STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP450-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIUS C. BURTON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE KEVIN E. MARTENS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

Page

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues raised can be resolved by application of established legal principles to the particular facts.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED BURTON'S POST-CONVICTION MOTION ASSERTING INEFFECTIVE ASSISTANCE OF COUNSEL WITHOUT AN EVIDENTIARY HEARING.

In his postconviction motion, Burton moved to withdraw his guilty pleas to two counts of attempted first-degree intentional homicide while armed, alleging he

> received ineffective assistance of counsel at the time that he entered his pleas of guilty in this matter since it was obvious from the medical records and medical reports of the defendant that he was suffering from a lifelong mental disease or defect and, from the record of this matter, it appears counsel failed to pursue a defense of not guilty by reason of mental disease or defect and instead counseled the defendant to enter pleas of guilty to these crimes.

(31:1).[1]

In the argument section of his motion, Burton stated that a defendant is entitled to enter a guilty plea to the crimes charged and then have a jury trial to determine whether he should be held not responsible by reason of mental disease or defect (31:18). Burton's motion then stated: "In this case, there is nothing in the record to indicate that defense counsel had ever advised the defendant of the possibility of entering such a bifurcated plea" (31:19).

[1]The affirmative defense set forth in Wis. Stat. § 971.15 is labeled not responsible by reason of mental disease or defect in that statute, it is referred to as not guilty by reason of mental disease or defect in Wis. Stat. § 971.06 and it is referred to colloquially and in some case law as an insanity defense. There is no substantive difference between the terms. The State uses them interchangeably in this brief.

The trial court denied the claim that trial counsel rendered ineffective assistance of counsel by failing to pursue the insanity defense because the record of the guilty plea hearing unequivocally showed that after thorough consultation with counsel, Burton had made a knowing and voluntary choice to abandon the insanity defense and enter pleas of guilty to the charged offenses in exchange for the State's favorable sentence recommendation (36:2-4). The trial court denied this claim without an evidentiary hearing, and Burton does not challenge that ruling on appeal.[2]

The trial court did not specifically address the assertion that the record does not reflect that trial counsel advised Burton that even if he pled guilty to the crimes charged he could still go to trial on the issue of whether he should be held not responsible due to mental disease or defect. That assertion was made only in the body of the motion and was not labeled a claim for relief. This court may conclude that Burton did not raise the issue raised on appeal sufficiently in his motion to preserve it for appeal. Even if this court determines that Burton did sufficiently raise it, this court may affirm the denial of the motion without an evidentiary hearing if that decision is correct, even though the trial court did not consider it. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

Burton was not entitled to an evidentiary hearing or relief on his claim that trial counsel's failure to advise him that he had the right to plead guilty to the crimes charged and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect constituted ineffective assistance of counsel.

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[2]In his postconviction motion, Burton also claimed that defense counsel was ineffective for failing to advise him there was almost no chance the trial court would follow the sentence recommendation the State had agreed to make as part of the plea agreement. The trial court rejected this claim and Burton does not challenge that ruling on appeal.

Based on the contents of his postconviction motion, Burton was not entitled to an evidentiary hearing. A criminal defendant is not entitled to an evidentiary hearing on a postconviction motion simply because he requests one. *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, to require an evidentiary hearing, the motion must allege sufficient material facts that, if true, would warrant the requested relief. Whether a motion meets this standard is a question of law the appellate court reviews *de novo*. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 14. The defendant is not entitled to an evidentiary hearing if key allegations are merely conclusory or if the record conclusively demonstrates that the defendant is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 12, 15. Moreover, "[a]t a minimum, a motion, whether made pretrial or postconviction, must '[s]tate with particularity the [factual and legal] grounds for the motion,' Wis. Stat. § 971.30(2)(c) (2001-02), and must provide a 'good faith argument' that the relevant law entitles the movant to relief, Wis. Stat. § 802.05(1)(a) (2001-02)." *Allen*, 274 Wis. 2d 568, ¶ 10.

When a defendant claims that trial counsel "was ineffective by failing to take certain steps [he] must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *abrogated on other grounds*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. In order to obtain an evidentiary hearing on such a claim, the defendant's motion must allege specifically what actions counsel should have taken, it must allege specific material facts demonstrating what the result of such actions would have been and it must allege specific material facts demonstrating how those results would have altered the outcome of the proceeding. *See Allen*, 274 Wis. 2d 568, ¶¶ 18-24, 29-33.

An evidentiary hearing is required only when the postconviction motion alleges sufficient, specific, material facts that, if true, would entitle the defendant to relief.

Allen, 274 Wis. 2d 568, ¶ 14. An evidentiary hearing is not required if the defendant alleges only his opinion. To be entitled to an evidentiary hearing, the defendant must allege a factual basis for his opinion. *Allen*, 274 Wis. 2d 568, ¶ 21.

The defendant must allege facts that, if true, would meet the legal standard for establishing ineffective assistance of counsel. A criminal defendant alleging ineffective assistance of trial counsel must prove that his trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838. To prove prejudice, a postconviction motion to withdraw a guilty plea based on ineffective assistance of counsel must allege sufficient facts that, if true, would show there is a reasonable probability that but for counsel's alleged errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

In order to meet this pleading requirement, "[a] defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." *Bentley*, 201 Wis. 2d at 313. The defendant must allege "facts that allow the reviewing court to meaningfully assess his or her claim" of prejudice. *Bentley*, 201 Wis. 2d at 314. This means the motion must allege a specific explanation of why the defendant would not have pled guilty and would have gone to trial if trial counsel had not given him misinformation. *Bentley*, 201 Wis. 2d at 313-17.

In the first place, Burton failed to sufficiently allege even the most basic facts that, if true, would entitle him to relief. His postconviction motion did not allege that, in fact, trial counsel never told Burton that he had the option to plead guilty to the charged offenses and have a jury trial

on the affirmative defense of not responsible by reason of mental disease or defect.

Burton's postconviction motion alleged only that the record did not show that trial counsel had informed Burton of this option. Contrary to the motion's apparent assumption, the fact that the record does not reveal all of the information trial counsel provided to Burton in regard to his plea choices does not mean that trial counsel did not advise Burton that the statute gave him the option of pleading guilty to the charged offenses and going to trial on his insanity plea. A criminal record ordinarily does not and should not spell out all of the information that trial counsel provided to the defendant. At a guilty plea hearing the defendant and trial counsel may choose to provide the trial court with some information about their discussions which help demonstrate the defendant's guilty plea is knowing, intelligent and voluntary. There is no expectation, however, that the plea hearing record would contain a detailed recital of all of the information counsel provided to the defendant, nor would it be appropriate for the record to contain such detail. The fact that the record does not contain exactly what information trial counsel provided to the defendant about all of his plea choices does not fairly give rise to the inference that trial counsel failed to provide any specific piece of information to the defendant.

Burton's postconviction motion was fatally defective because Burton never alleged that, in fact, trial counsel failed to advise him that he could plead guilty to the charged offenses and go to trial on his insanity defense. Burton's motion also did not allege that, in fact, Burton did not know that he had the option to plead guilty to the charged offenses and go to trial on his insanity defense. Accordingly, the motion failed to allege the most essential, basic facts necessary to make a sufficient allegation of deficient performance to obtain an evidentiary hearing or relief.

Furthermore, Burton's motion failed to allege sufficient facts to prove prejudice because he failed to allege sufficient, material facts that, if true, would show there is a reasonable probability that if counsel had advised Burton that he could plead guilty to the charged offenses and go to trial on the insanity defense, Burton would not have pled guilty. His motion made only the conclusory assertions:

> In this case, counsel's performance in advising the defendant to abandon his affirmative defense of not guilty by reason of mental disease or defect when there does not appear on the record any reason for doing so constituted deficient performance. Further, if the defendant had been made to understand that the jury could certainly have accepted Dr. Lytton's expert opinions in this matter and, therefore, that the jury could have found him not guilty by reason of mental disease or defect, and if he had been advised that he could have had the jury consider that affirmative defense even if he had pled guilty to having committed the crimes charged, there is a reasonable probability that he would not have pled guilty to the crimes. For that reason, defense counsel's deficient performance prejudiced the defendant in regard to his pleas of guilty, and constituted ineffectiveness of counsel.

(31:20-21.)

The motion did not contain objective, factual allegations setting forth a specific explanation of why Burton would not have pled guilty if he had been advised he had the option to plead guilty to the charged offenses and still have a jury trial on the defense of insanity. Burton was not entitled to an evidentiary hearing or relief because his motion did not sufficiently allege prejudice. *See Bentley*, 201 Wis. 2d at 313-17.

Furthermore, the record conclusively establishes that Burton is not entitled to relief on his ineffective assistance of counsel claim.

The crimes occurred on June 9, 2009, and a criminal complaint was filed on June 11, 2009 (2). The factual portion of the criminal complaint, which formed part of the factual basis for the guilty pleas, described how Officer Harris responded to a dispatch that two officers had been shot. At the scene he discovered both officers on the ground, bleeding (2:2). A citizen witness (Mr. Thompson) told the police that he observed the two

> uniformed officers confronting the man with the bike and that the man had gotten off the bike. . . . Mr. Thompson stated that after the officers had stopped Mr. Burton, Mr. Burton continued to struggle with the officers and attempted to break away from the officers. Mr. Thompson stated that Mr. Burton began throwing his elbows back and forth saying, "Stop." Mr. Thompson stated that Mr. Burton was yelling loudly. Mr. Thompson stated that the officers were trying to control Mr. Burton's [sic] and that the officers had nothing in their hands and that their guns were holstered at that time. Mr. Thompson stated that he then heard four to six gunshots. He heard one gunshot and then a short pause and then four to six gunshots in rapid fire. He immediately turned and looked back at the officers and ducked down. He then began walking slowly southbound to W. Walker Street and he observed the defendant, Julius Burton, walking southbound carrying a large dark colored semi-automatic pistol in his right hand. Mr. Thompson stated that he then watched Mr. Burton walk southbound and observed him look back over his right shoulder numerous times back toward the officers. Mr. Thompson stated he then observed Mr. Burton turn southwest bound across Walker Street and Mr. Burton continued to look over his shoulder. Mr. Thompson then went to check on the condition of the officers and observed that both officers appeared to have been shot in the head and were bleeding profusely. Mr. Thompson observed that both officers' guns were still in their holsters.

(2:2-3.)

The complaint further alleged that:

> [Officer] Graham Kunisch had suffered a gunshot wound to his left hand, a gunshot would to his left

> shoulder, and a gunshot wound to his jaw. The gunshot wound to his jaw was as an entry wound to the upper portion of his neck, through his jaw, through his nasal cavity, through his left eye and out the top of Officer Kunisch's head. The gunshot caused severe head trauma and that Officer Kunisch lost his left eye.
>
> . . . Officer Norberg received a gunshot wound to his right shoulder and a gunshot wound to his left jaw that entered his cheek and exited out his right jaw and that Officer Norberg is in good condition.

(2:3.)

The complaint further stated that Burton was found shortly thereafter, hiding in the unlocked basement of a nearby home. The police found Burton's loaded .40 caliber semiautomatic handgun with a bullet in the chamber in the basement and a search of Burton's person uncovered a magazine with bullets. After being given his rights at the police department, Burton told the police

> that he did fire towards the officers and that he was riding his bike down 2nd and Walker when this happened. The defendant indicated that he became scared of the officers and fired over the shoulder at the officers.
>
> Complainant alleges that he has observed a videotape from the scene which captures the shooting of Officer Norberg and Officer Kunisch and that complainant observes in that videotape that the defendant turned and fired directly at the officers and that he pointed the gun at the head of Officer Kunisch and fired directly at Officer Kunisch's head from approximately two feet away.

(2:4.)

Burton underwent a competency evaluation and, without objection, on July 23, 2009, the trial court found him competent to proceed (41:2-3). The competency evaluation is contained as an exhibit to Burton's

postconviction motion (33:39-50).[3] On July 23, 2009, a preliminary hearing was held at which facts consistent with the criminal complaint were adduced and Burton was bound over (42). The information was filed at the conclusion of the preliminary hearing and Burton entered a plea of not guilty (42:47). On August 27, 2009, Burton added a plea of not guilty by reason of insanity and asked the court to appoint an expert and the court appointed Dr. Smail as the court's expert (43:2, 4). At a hearing on October 14, 2009, after the parties and court had received Smail's report, the defense informed the court that it was maintaining the previously entered pleas and that the report by the expert retained by the defense would be available soon (44:3). Smail's report is contained as an exhibit to Burton's postconviction motion (33:51-61). Trial was then scheduled for February 22, 2010 (44:4). On November 20, 2009, Burton filed a motion to suppress his police statement (10). At a hearing held on January 8, 2010, the prosecutor acknowledged receipt of the defense expert's report, and a hearing on the suppression motion was scheduled for February 12, 2009 (45:5, 11). The defense expert report (Dr. Diane Lytton) is contained as an exhibit to Burton's postconviction motion (33:62-91).

On January 21, 2010, the State confirmed in writing a plea offer in which Burton would plead guilty to the two charged offenses of attempted first-degree intentional homicide while armed with a dangerous weapon. The State would make a global sentence recommendation of 50 years actual prison confinement time and no specific recommendation on extended supervision time. The victims would be free to make their own sentencing recommendations. The State would be free to argue aggravating and mitigating circumstances. The defense

[3]None of the expert reports are in the record, except as exhibits to Burton's postconviction motion. Burton has also provided the reports as part of his voluminous appendix in this court. Although the reports should have been included in the record sent to this court, there is no dispute that the reports provided by Burton are accurate copies of the reports filed by the experts. Therefore, the State does not object to this court considering them.

would be free to argue sentencing, and the defendant would agree to make reasonable restitution (14).

Burton accepted the plea offer and a guilty plea hearing was held January 21, 2010 (46). The agreement was confirmed on the record, the State filed the written offer with the court, defense counsel stated he had gone over it with Burton and Burton confirmed his understanding of the plea agreement (46:3-4).

Burton was sworn and the court conducted a thorough plea colloquy with him (46:4-23). The court had before it the written plea questionnaire and waiver of rights form that Burton and his attorney had signed on January 14, 2010 (15). The attached addendum to the form stated: "I understand that by pleading I am giving up defenses such as alibi, intoxication, self-defense, insanity" and the word insanity was underlined by hand (15:3). Burton confirmed on the record that he had gone over the entire form with counsel, he understood everything in it and he had signed it (46:8).[4]

The trial court advised Burton that it was not bound by the plea agreement sentencing recommendation, and it could impose any sentence up to the maximum of 90 years of initial confinement and 40 years of extended supervision (46:6-7). The trial court advised Burton of the constitutional rights he was waiving by pleading guilty and Burton confirmed his understanding of those rights (46:11-12).

The trial court also conducted the following colloquy with Burton regarding his decision to withdraw his insanity defense:

> THE COURT: You are also giving up the right to raise certain defenses; such as alibi or intoxication or self-defense or insanity. Correct?

[4]In his brief, Burton mistakenly states he signed the form at the plea hearing. Burton's brief at 12.

MR. BURTON: Yes.

THE COURT: You talked with your attorney about entering, in fact I believe you did enter a plea of not guilty by reason of mental disease or defect. Correct?

MR. BURTON: Yes.

THE COURT: You are withdrawing that plea at this time. Correct?

MR. BURTON: Yes.

THE COURT: And you are also giving up the right, as I mentioned we have a motion hearing challenging the statements that you gave to detectives on that day and you are giving up the right to pursue that motion. Correct?

MR. BURTON: Yes.

THE COURT: You are giving up the right to pursue other motions you might have filed. Correct?

MR. BURTON: Yes.

THE COURT: Are you entering your plea because you are guilty of these offenses?

MR. BURTON: Yes.

THE COURT: And is anyone forcing you to do this?

MR. BURTON: No.

THE COURT: Is there anything you haven't understood so far?

MR. BURTON: No.

THE COURT: And you have been working with your attorney, your attorneys on this case and are you satisfied with their representation of you?

MR. BURTON: Yes.

THE COURT: They have worked very hard to make sure you understood everything that was happening. Correct?

MR. BURTON: Yes.

THE COURT: You signed the forms on the 14th and today is the 21st of January. So you have had almost, you have had a week to think about entering your decision. Correct?

MR. BURTON: Yes.

THE COURT: And you still want to go ahead with your decision to enter these pleas?

MR. BURTON: Yes.

(46:13-15.)

The trial court asked defense counsel if he was satisfied Burton understood the nature of the charges, the effect of his guilty pleas and that he was making his pleas freely and voluntarily, and the following extensive discussion occurred: defense counsel responded as follows:

THE COURT: And counsel, are you satisfied that your client understands the nature of the charges, the effects of his plea and is making his plea freely and voluntarily?

MR. LaVOY: Yes. The Sheriff's Department provided both myself and Mr. Kim quite a bit of access to Mr. Burton. We have met with him a number of times about defenses, the trial issues, N.G.I. issues, motions. I believe that he's making this decision of his own free will.

We have explained to Mr. Burton we retained experts and the experts are prepared to testify, if necessary. But he's informed us he wishes to accept responsibility by entering the pleas, so I believe that he is doing this of his own free will.

THE COURT: Mr. Burton, did your attorney describe what your conversation, general summary of your conversation is with your attorney?

MR. BURTON: Yes.

THE COURT: So, you talked about this with your attorneys for the time they represented you since the very beginning of this case. Correct?

MR. BURTON: Yes.

THE COURT: And they came and talked with you and talked about your various options in this case. Correct?

MR. BURTON: Yes.

THE COURT: Counsel, are you satisfied that your client understands how the facts in this case meet the elements?

MR. LaVOY: Yes.

THE COURT: Am I correct in assuming you used the jury instructions that you provided in—as part of framework of that explanation?

MR. LaVOY: Right. In fact I read the jury instructions to him word for word and answered any questions he had about it.

THE COURT: And did you also read the criminal complaint?

MR. LaVOY: I did. I read the criminal complaint for him word [f]or word, multiple times.

THE COURT: And did you review the statement he made?

MR. LaVOY: Yes.

THE COURT: And—

MR. WILLIAMS: Judge, there is a doctor that found Mr. Burton, would render that opinion that Mr. Burton was not guilty by reason of mental disease or defect. I'm assuming that Mr. Burton read that report,

knows that report is available and that he has two competent lawyers that would present that if the matter did go [to] trial.

There also is at least one doctor that finds Mr. Burton was not, was, did understand what he was doing at the time and would contradict that opinion. But Mr. Burton is aware that there is an opinion from a doctor that he would, that he was not guilty by mental disease or defects at the time and he is waiving that right to present that defense.

THE COURT: Counsel, have you had that discussion with your client?

MR. LaVOY: Yes. The doctor that the State's referring to is Dr. Lytton. That is the doctor we retained. I have reviewed that report word for word with Mr. Burton. He is aware of her opinion and he is aware that she would be prepared to testify, if necessary, at trial. But he indicated to me that he wishes to again, accept responsibility and forgo that issue.

He's also aware of the other opinions that have been presented by the other doctors referenced by the State. So, it is my opinion that his position is that he wishes to resolve the case with a plea today.

THE COURT: So, the not guilty by reason of mental disease or defect plea would be withdrawn at this time too?

MR. LaVOY: That is correct.

THE COURT: Mr. Burton, you heard what the State said and your counsel said. Do you disagree with anything that they have said so far?

MR. BURTON: No.

THE COURT: And they have had, your attorneys had that conversation with you. Correct?

MR. BURTON: Yes.

THE COURT: And you have gone through, there is a lot of information here. So, they have spent a lot of time with you, haven't they?

MR. BURTON: Yes.

THE COURT: And you specifically talked about your right to raise that particular defense of mental disease or defect. Correct?

MR. BURTON: Yes.

(46:15-18.)

With the consent of both counsel and Burton, the trial court used the criminal complaint, along with the preliminary hearing and videotape from an outside camera on a business that had coincidentally recorded the crimes, as the factual basis for the pleas to two counts of attempted first-degree intentional homicide while armed with a dangerous weapon (46:19-20). Defendant confirmed that he was giving up his right to challenge the admissibility of his police statement, even though he had some reasons for his challenge, the State indicated it likely would not use the statement at trial, defense counsel confirmed the State had previously so informed him and he had discussed that with Burton, and Burton confirmed to the court that he was standing by his statement to the police (46:21-22). The trial court accepted Burton's pleas, adjudged him guilty of the charged crimes, ordered a presentence investigation and set a date for sentencing (46:23-24).

This record does not support an inference that trial counsel failed to advise Burton that he could plead guilty to the charged offenses and have a jury trial on his insanity plea. Nor does this record support a claim that there is a reasonable probability that had he been so advised, Burton would not have pled guilty. The plea hearing record makes it abundantly clear that Burton knew and understood that by entering his guilty pleas pursuant to the plea agreement, he was giving up his right to present his insanity defense, and he made this choice because he wanted the State's favorable sentence recommendation. Although the statute may provide a criminal defendant the option to plead guilty to the

charged offenses and go to jury trial on the insanity plea, in order to do so in this case, Burton would have had to reject the State's plea offer. The State made the plea agreement because the two police officer victims of the crime and their families wanted to avoid a trial (47:9-11). The State obviously would not have agreed to make a favorable sentence recommendation if defendant went to jury trial on the insanity plea and lost, because that would not achieve the goal of avoiding a trial.

There is no reasonable probability to believe that Burton would have given up the plea agreement, which yielded him a very favorable sentence recommendation from the State, in order to plead guilty with no sentence recommendation, and take his chances that he could convince a jury to find him not responsible by reason of mental disease.[5] Burton relies on the fact that at a jury trial on mental responsibility, he could have presented his history of mental health problems and the opinion of his retained expert (Lytton). He ignores the fact that it would not have been enough for him to simply present his evidence. The State would have presented the contrary expert opinion reached by the independent, court-appointed expert (Smail), and it could have presented the opinion evidence from the competency evaluator, which was consistent with Smail's opinion and inconsistent with Lytton's opinion on relevant points. In order to succeed in obtaining a jury verdict of not responsible by reason of mental disease or defect, Burton would have had to convince the jury to a reasonable degree by the greater weight of the credible evidence that at the time he committed the crimes he suffered a mental disease or defect (which does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct) and that as a result of that mental disease or defect, he lacked the substantial capacity to either appreciate the

[5]The question is whether there is a reasonable probability Burton would have made a different choice at the time he entered his guilty pleas, based on the facts that existed at that time. The fact that the trial court subsequently imposed a greater sentence than that recommended by the State does not inform this question.

wrongfulness of his conduct or to conform his conduct to the requirements of law. Wis. Stat. § 971.15.

There is no reasonable probability that Burton would have forfeited the benefit of the plea agreement for the State's favorable sentence recommendation, pled guilty to the charged offenses without the benefit of any plea agreement, and gone to trial on the affirmative defense alone. Although he could have presented a favorable expert opinion, that opinion was not persuasive.

Burton's retained expert (Lytton) opined in her written report:

> In my opinion, at the time of the alleged offenses, Mr. Burton clearly experienced several layers of fearfulness, some that could be termed normal, although perhaps exaggerated due to his deficit intelligence. Those normal and reality-based fears included that he was fearful of the gang members' on-going threats to kill him, which included an actual "pretend" shooting of Mr. Burton by one of the threatening gang members. He was fearful of police, in general, due to what he viewed in movies. Those were normal fears. Of course, being approached from behind and taken off his bike, at the time of the event, would also certainly cause a fear reaction. However, superimposed upon his normal and reality-based fears was his extreme and increasing delusional paranoia, that resulted from active symptoms of a true psychotic disorder, at the time of the event. It is difficult for non-affected persons who do not suffer from schizophrenia symptoms, to fully understand psychotically-driven paranoia, and how it affects a person and their behaviors. Family members described some of Mr. Burton's increasingly bizarre behaviors as he attempted to deal with his paranoia, such as barricading himself in his home, and purchasing a gun. Although he said that he purchased the gun due to the gang members' threats, my opinion is that he was also driven to buy the weapon due to his psychotic paranoia. His fiancée noted that they moved to another side of the city, where Mr. Burton did not know anyone. The gang members did not apparently reside on that side of the city, as Mr. Burton confirmed. However, his paranoia increased to eventually encompass almost everyone,

> including even his brother, and his sister, who is his closest sibling.
>
> Mr. Burton acknowledges that, at the time of the alleged offenses, he knew it was illegal to shoot police officers. However, in my opinion, due to the very substantial and significant effects of the schizoaffective disorder on his perceptions of reality and the events around him, he was unable to control his actions. He firmly believed that he would be killed by the officers, and lacked control of his behaviors. The fact that he later attempted to hide, and change his clothing, does not alter the fact that he was suffering from persecutory delusional beliefs that others would kill him, at the time the event was alleged to have occurred. He did understand that what he had allegedly done was illegal, and he deeply regrets his actions. However, at the time of the alleged events, he could not control his behaviors due to his extreme paranoia.

(33:90.) Lytton's report did not make any attempt to explain how Burton's paranoia caused him to be substantially unable to conform his conduct to the requirements of the law, even though he knew the two men he shot in the face at close range were police officers, he knew it was wrong to shoot them, and he evidenced his knowledge that it was wrong by running away and hiding. Burton never claimed that when he shot the officers he heard a voice telling him to shoot them or that at the moment of the shooting he was having any visual or auditory hallucination. Lytton rejected the notion that Burton was malingering or exaggerating his mental health problems (33:82-84).

In contrast to defense expert Lytton, the court appointed expert opined in his written report:

> Mr. Burton is an 18-year-old individual with an early childhood onset of severe emotional and behavioral disturbance documented from incidents at home and at school. At times, he has been described as "violent," "out of control," apt to "fly into rages," "aggressive and dangerous." These emotional and behavioral disturbances compromised his functioning at school such that he was placed in special education classes for the emotionally disturbed and his academically acquired skills lag behind grade placement. Diagnostic

conditions of Attention Deficit/Hyperactivity Disorder and Borderline Intellectual Functioning also contributed to his overall poor school performance.

. . . .

There is not much objective evidence in his record to substantiate a diagnosis that may reflect psychosis. His observed behavior has not been clinically bizarre or been shown to have the pervasive disorganization of, for example, Schizophrenia. The only evidence to support any of the diagnoses that may reflect psychosis has been his self reported claim for auditory, visual or tactile hallucinations. The record is very thin with respect to any objective observations of him by trained clinical staff suggesting that what they observed was consistent with individuals who in fact experience hallucinations of any sort. . . . In regards to Mr. Burton's repeated assertions that he experiences auditory, visual or tactile hallucinations, there are non-psychotic reasons why someone may make that claim. It would appear just as likely that a scared or frightened psychologically unsophisticated individual may speak in those terms.

. . . His acquisition of the gun that he had apparently was motivated out of a sense that he needed to protect himself from conflicts that he had with neighbors. These and other behaviors seem to reflect chosen conduct that lies outside of pro-social attitudes and values.

. . . [O]n June 4, 2009 . . . Mr. Burton reported that the medication he was taking was having a positive effect in reducing his frustration and anger. He was described as being "calm." That observation is but five days before the alleged incidents of attempted first degree intentional homicide. . . . [H]e had contact with the Milwaukee County Mental Health Complex on April 25, 2009 at which time he reported homicidal ideation, auditory, visual and tactile hallucinations. The disposition then was not to admit him for inpatient care, however, in part because the objective evidence of that hallucinatory phenomenon seemed quite vague. Instead, he was given a major tranquilizing drug and referred to the outpatient program just mentioned.

This examination yields the following diagnoses applying to Mr. Burton at the time of the alleged offenses: Mood Disorder NOS by history, Borderline Intelligence and Personality Disorder NOS with

> antisocial features. I do not believe that there is any evidence to reasonably sustain a diagnosis that would reflect a psychosis of any sort for Mr. Burton when he had the altercation with the police officers. These opinions are offered to a reasonable degree of professional certainty.
>
> It is also my opinion that the evidence ultimately fails to indicate that Mr. Burton, at the time of the offense, was substantially unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. The evidence indicates that he was a non-psychotic individual who had a history of explosive temper. He was not in the course of decompensation but in fact had been deemed to be doing quite well by his therapist only several days prior to this incident. The record is silent with respect to any inference that hallucinations or delusions compromised his functioning. When confronted by police he became scared, least they find the gun that he was carrying, and in some fashion sanction him for it. It was out of his sense of fear as to what the police may do that he took the gun from his waistband and fired over his shoulder at close range toward the police officers who were attempting to arrest him. The fact that Mr. Burton then turned around and fired several more shots at very close range at the officers was a reflection of his fear driven behavior. There is no indication that this behavior was out of his control but merely a response to his fear.
>
> Subsequent to the shooting, Mr. Burton fled the scene, discarded his outer garment as a manner of avoiding detection, and hid in a nearby basement. He apparently locked the door behind him and put on a garment to obscure his identity. He called relatives to say what he had done and that he had made a "mistake." All of that behavior indicates that Mr. Burton knew at the time of the alleged offense that what he had done was wrong.
>
> For the above stated reasons, I believe that there is no evidence to support a special plea. This opinion is also offered to a reasonable degree of professional certainty.

(33:59-61.)

The competency evaluator opined:

> Mr. Burton presents a complicated clinical picture. His childhood history is significant for violent, aggressive outbursts, difficulties in attention and concentration, and social maladjustment. He reports a history of perceptual disturbances in the form of visual, auditory, and tactile hallucinations, and suicidal ideation and attempts, as well as nonsuicidal self-injury. Approaching adulthood, he has adjusted very poorly to the demands of independent living and social/occupational functioning. In the past three months, he has been assigned several diagnoses suggestive of a serious psychiatric disorder. The childhood course suggests a neurodevelopmental disorder of childhood progressing toward a serious mental disorder of perception and mood in adulthood. In the context of this evolving clinical presentation, there is substantial clinical evidence to support the conclusion that Mr. Burton is also malingering. In Mr. Burton's case, the evidence supports my opinion that, as opposed to the deliberate fabrication of symptoms, he is exaggerating the subjective severity of his symptoms in an effort to impress upon authorities the extent of his distress, in part reflecting his apprehension in anticipation of the serious consequences he may be facing, and in part reflecting a probable effort to support a special plea. However, his tendency to exaggerate does not automatically negate the presence of an actual psychiatric disorder.

(33:48.)

The jury might well have found the competency evaluator's opinion on malingering and Smail's opinion that at the time of the crime, Burton did not have a mental disease or defect that caused him to lack substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law more credible than Lytton's contrary opinions. The jury might well have doubted Lytton's credibility because she was retained by the defense, she put significant weight on Burton's self reports, and Burton admitted that he lied to the court-appointed expert when he said he had no memory of the crime.

For all of these reasons, Burton's motion failed to allege specific, objective, material facts that, if true, would prove trial counsel's performance was deficient or prejudicial. The motion never alleged that, in fact, trial counsel failed to tell Burton he had the option to plead guilty to the charged offenses (without benefit of the plea agreement, thereby forfeiting the State's favorable sentence recommendation) and have a jury trial on mental responsibility. The motion never alleged that Burton did not know he had this option. The motion never alleged objective material facts demonstrating a reasonable probability that if Burton had known this option, he would not have pled guilty pursuant to the plea agreement and withdrawn his insanity defense. Burton's motion was insufficient to require an evidentiary hearing or relief, and the trial court properly denied it.

II. BURTON IS NOT ENTITLED TO WITHDRAW HIS GUILTY PLEAS BECAUSE THE TRIAL COURT DID NOT ADVISE HIM HE HAD A STATUTORY OPTION TO PLEAD GUILTY TO THE CHARGED CRIMES AND STILL HAVE A JURY TRIAL ON HIS INSANITY PLEA.

Burton asserts that the trial court was required to inform him during the plea colloquy that he had a right to plead guilty to the crimes charged and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect. Burton is wrong. The trial court had no such obligation and its failure to so advise Burton does not render his guilty pleas unknowing, unintelligent and involuntary.

What Burton labels a due process right to enter a plea of guilty to the crimes charged and still have a jury trial on the affirmative defense of lack of mental responsibility due to mental disease or defect is merely a statutory right. Wisconsin Stat. § 971.06 provides:

> **971.06 Pleas. (1)** A defendant charged with a criminal offense may plead as follows:
>
> (a) Guilty.
>
> (b) Not guilty.
>
> (c) No contest, subject to the approval of the court.
>
> (d) Not guilty by reason of mental disease or defect. This plea may be joined with a plea of not guilty. If it is not so joined, this plea admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged in the indictment, information or complaint.

Burton had only a statutory right to pursue an insanity defense, whether coupled with a guilty plea or a not guilty plea. He had no constitutional right to pursue an insanity defense. *State v. Francis*, 2005 WI App 161, ¶¶ 19-21, 285 Wis. 2d 451, 701 N.W.2d 632.

The trial court had no obligation to inform Burton of all of the plea options provided in § 971.06. Wisconsin Stat. § 971.08 does not provide that during the plea colloquy the trial court must inform the defendant of the options in § 971.06. In *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the Wisconsin Supreme Court imposed certain court-mandated obligations that trial courts must perform during a plea colloquy, but the supreme court did not mandate that trial courts must inform criminal defendants of the statutory plea options set forth in § 971.06. Burton cites no legal authority whatsoever in support of his bald assertion that the trial court was required to inform him during the guilty plea colloquy of the option to plead guilty to the charged crimes and have a jury trial on the affirmative defense of lack of mental responsibility. Indeed, it could be perceived as an interference in the plea bargaining process and an interference in the confidential consultations between trial counsel and the defendant for a trial court to tell a defendant who has chosen to accept a plea agreement, plead guilty and abandon his insanity defense, that he has another option which is to reject the plea

agreement, plead guilty to the charged offenses and have a jury trial on his insanity defense.

Immediately following the preliminary hearing, Burton entered a plea of not guilty (42:47). He subsequently entered a plea of not guilty by reason of mental disease or defect in addition to his previously entered plea of not guilty (43:2). He subsequently entered pleas of guilty to the charged crimes and withdrew his lack of mental responsibility plea pursuant to a plea agreement in which the State agreed to make a favorable sentencing recommendation (46:2-5). During the plea colloquy, the trial court confirmed with both Burton and defense counsel that by entering his guilty pleas Burton was also withdrawing his lack of mental responsibility plea (46:13-18).

It was appropriate and commendable for the trial court to specifically address the withdrawal of the insanity defense during the plea colloquy, but the trial court was not required to do so. In *Francis*, 285 Wis. 2d 451, ¶ 1, this court stated:

> Francis initially entered joined pleas of not guilty and not guilty by reason of mental disease or defect, i.e., insanity. She later accepted a plea bargain in which she pled guilty to several counts and no contest to another. Francis offers a host of reasons why we should permit her to withdraw these subsequent pleas, but the only argument we deem to be of any arguable merit is her contention that the circuit court erred when it accepted her pleas of guilty and no contest without conducting a personal colloquy to ensure that she waived her NGI plea knowingly, voluntarily, and intelligently. We reject this argument. Courts engage in personal colloquies in order to protect defendants against violations of their fundamental constitutional rights. Neither the federal constitution nor our state constitution confers a right to an insanity defense or plea. The court therefore had no obligation to personally address Francis with respect to the withdrawal of her NGI plea.

The court held that as a matter of law trial courts are not required to engage defendants in a personal colloquy

before allowing them to abandon an insanity plea. *Francis*, 285 Wis. 2d 451, ¶ 14. The court explained that a personal colloquy is required only when the right involved is a fundamental constitutional right and there is no federal or Wisconsin constitutional right to an insanity plea, the plea is purely statutory. *Francis*, 285 Wis. 2d 451, ¶¶ 15-22. Furthermore, the court recognized that this holding was bolstered by the fact that a criminal defendant need not personally withdraw his insanity plea. Trial counsel can withdraw a defendant's insanity plea unless the defendant affirmatively objects. *Francis*, 285 Wis. 2d 451, ¶¶ 23-24. Indeed, the court recognized that it can be said that a validly entered guilty plea automatically and implicitly waives the insanity defense, just as it automatically waives any other affirmative defense and the right to present evidence on any issue. *Francis*, 285 Wis. 2d 451, ¶¶ 25-26.

Francis holds that a trial court has no constitutional or court-mandated obligation to conduct a personal colloquy with a defendant who wishes to enter a guilty plea after having previously entered pleas of not guilty and not guilty by reason of insanity before allowing the defendant to thereby abandon the insanity defense. *Francis*, 285 Wis. 2d 451, ¶¶ 1, 15-26. Because the trial court has no constitutional or court-mandated obligation to conduct a personal colloquy with a defendant at a guilty plea hearing before allowing the defendant to thereby abandon the plea of not guilty by reason of mental disease at all, the trial court obviously also has no constitutional or court-mandated obligation to advise the defendant that he has a statutory option to reject the plea agreement, plead guilty to the charged offenses without benefit of a plea agreement, and go to jury trial on the insanity defense.

For all of these reasons, Burton's assertion that he is entitled to withdraw his guilty pleas because the trial court did not advise him of the statutory option to plead guilty to the charged offenses and have a jury trial on the lack of mental responsibility defense is wholly without legal

merit. The trial court properly denied his postconviction claim and this court must affirm.

CONCLUSION

Based on the record and the legal theories and authorities cited herein, the State asks this court to affirm the judgment of conviction, sentences and order denying postconviction relief entered in the circuit court below.

Dated this 2nd day of August, 2011.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 8,170 words.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of August, 2011.

_____

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Assistant Attorney General