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SUPREME COURT OF WISCONSIN **12-27-2012**

STATE OF WISCONSIN,
Plaintiff- Respondent

**CLERK OF SUPREME COURT
OF WISCONSIN**

vs.

Appeal No. 2011AP450- CR

JULIUS C. BURTON,
Defendant-Appellant

Case No. 2009CF002823

REPLY BRIEF OF DEFENDANT- APPELLANT- PETITIONER

APPEAL FROM THE COURT OF APPEALS, DISTRICT I,
FOLLOWING APPEAL FROM THE CIRCUIT COURT OF
MILWAUKEE COUNTY, THE HON. PATRICIA D. McMAHON,
PRESIDING, AND THE HON. KEVIN E. MARTENS, PRESIDING
IN POSTCONVICTION PROCEEDINGS

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INTRODUCTION

The issues raised in this case in the Appellant's Brief revolved around the fact that the defendant had been entitled to know that he had the right to plead guilty to the crimes with which he had been charged and still have the right to a jury trial to determine whether he should not be held responsible by reason of mental disease or defect.

The first argument dealt with the issue as to the role of defense counsel in advising the defendant of that possible choice in how to proceed in the matter, and whether it had been required that the court record note that defense counsel had told him about that choice.

The second argument dealt with the issue as to the role of the trial court in advising the defendant, on the record, of that possible choice, and the role of the trial court in obtaining a proper waiver of the defendant's right to a jury trial if he did not make that choice.

POINT I

AS LONG AS THE COURT IS SATISFIED THAT CERTAIN CONDITIONS HAVE BEEN MET, THE DEFENDANT IS ENTITLED TO ENTER A PLEA OF GUILTY TO THE CRIMES CHARGED, AND, THEREFORE, HE IS ENTITLED TO KNOW THAT HE MAY ENTER A PLEA OF GUILTY TO THE CRIMES CHARGED AND STILL HAVE A JURY TRIAL ON THE ISSUE AS TO WHETHER HE SHOULD NOT BE HELD RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT.

In the Respondent's Brief, POINT I, it was argued that a defendant does not have the right to plead guilty to the charges that have been filed against him in a criminal case and, therefore, the trial court is not required to advise the defendant that he had the right to plead guilty to the charges and still have a jury trial on the issue as to whether he was not responsible by reason of mental disease or defect.

In making that argument, the Respondent relied on *State v. Waldman*, 57 Wis.2d 234, 203 N.W.2d 691 (1973). In that case, which dealt with the issue of double jeopardy, the Court held that the trial court "has inherent power to refuse to accept a plea of guilty." *Id.* at 237. The problem with that argument is that that rule is only one small part of a much larger picture.

The general rule in regard to the right of a defendant to enter a guilty plea to the charges for which he has been charged was set forth by the United States Supreme Court in *Santobello v. New York*, 404 U.S.257, 92 S.Ct.495, 30 L. Ed.2d 427 (1971). In that case, the Court dealt with a plea bargain offer that had made to the defendant. The Court held that, "There is, of course, no absolute right to have a guilty plea accepted. 404 U.S. at 262.

The Court noted that before a guilty plea is accepted, the Court must satisfy itself that the plea is being made "voluntarily with understanding of the nature of the charge and the consequences of the plea." 404 U.S. at 261, f.1. Further, the Court held that, "The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the

plea.” 404 U.S.at 261. The Court held that, “A court may reject a plea in exercise of sound judicial discretion.” 404 U.S. at 262.

In further clarifying that rule, it was held in *United States v. Ritsema*, 89 Fed.3d 392, 398, f.5, that, “With respect to the court’s power to reject a plea, we have noted:

While a defendant has no absolute right to have a guilty plea accepted, a court must exercise sound discretion in determining whether or not to reject a plea. (Citing *Santobello v. New York*). Thus, a defendant is entitled to plead guilty unless the district court can articulate a sound reason for rejecting the plea. (Citation omitted,)

In §971.08(1) Wis. Stats., it states that, “Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted;

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged....

That statute establishes the conditions under which a court is to accept a plea of guilty. Once the court has made these inquiries and is satisfied that the defendant is entering his plea voluntarily and with an understanding of the nature of the charges and their potential punishment, as well as the fact that the defendant had, in fact, committed the crimes charged, the Court is to accept his plea of guilty, unless there is some other reason not to do so. The Court may not, in other words, arbitrarily refuse to accept the defendant’s plea of guilty.

This Court held that the reason for that rule is that one of the fundamental rights of a criminal defendant is to enter a plea of guilty. In *State v. Hereford*, 224 Wis. 2d 605, 614, 592 N.W.2d 247, this Court held that, “Fundamental rights of a defendant in a criminal trial include the decisions to plead guilty, to have a trial by jury, to appeal, to forego or obtain assistance of counsel, whether to testify, and to refrain from self-incrimination.”

For all of these reasons, the argument of the Respondent that the trial court was not required to advise the defendant that he had the right to plead guilty to the charge and still have a jury trial to determine the affirmative defense of not responsible by reason of mental disease or defect because he did not have the right to plead guilty must fail.

If the defendant offers to plead guilty and the Court finds that the plea is being voluntarily made, with an understanding of the nature of the charges and possible penalties, and if the Court finds that the facts establish that the defendant had actually committed the crimes charged, the Court must accept his plea of guilty, unless it can articulate a reason not to do so.

In this case, as set forth in the Statement of the Case- Factual in the Appellant's Brief, the Court found that the defendant had entered his pleas of guilty to the charges voluntarily and that he understood the nature of the charges. The Court also found that he understood the possible sentences he could receive. Finally, the Court set forth on the record the facts which it found established that the defendant had committed the crimes charged. Under these circumstances, without anything more, the Court was required to accept his pleas of guilty and it did so.

However, the Court then failed to advise the defendant that even doing so, the defendant still had the right to a jury trial in order to submit his evidence to the jury to establish that he should not be held responsible by reason of mental disease or defect. It would then be the jury's determination as to whether he had established that affirmative defense and was entitled to such a verdict. The failure of the Court to so advise the defendant constituted a denial of due process of law.

POINT II

THE CIRCUIT COURT ERRED IN REFUSING TO ORDER A MACHNER HEARING IN THIS CASE TO DETERMINE WHETHER DEFENSE COUNSEL HAD ADVISED THE DEFENDANT OF HIS RIGHT TO PLEAD GUILTY TO THE CHARGES AND STILL HAVE A JURY TRIAL TO DETERMINE WHETHER HE WAS NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT.

In their second argument, the Respondent argued, in POINT II, that the defendant had not submitted sufficient facts in the Postconviction Motion to establish that he was entitled to an evidentiary *Machner* hearing in this matter. It also argued that the defendant had not established that he would have been prejudiced by his counsel's failure to advise the defendant of his right to have a jury trial even if he had pled guilty to the charges.

These arguments are dealt with in POINT I of the Appellant's Brief. Basically, it was argued that there had been nothing in the record to indicate that defense counsel had ever advised the defendant of his right to such a jury trial. Counsel had then requested, in the Postconviction Motion, that the Circuit Court order a *Machner* hearing in order to have the two defense attorneys testify as to whether the defendant had ever been told of that right. It is a Catch-22 argument to say that the motion had not given that information to the Court when, in fact, the motion was requesting that the Court order a hearing to obtain that very information for the record.

The Respondent further argued that since the statute allowing the defendant to submit an affirmative defense of not responsible by reason of mental disease or defect is a statutory right, rather than a constitutional right. As a result, the Respondent argued, the Court need not have a colloquy with the defendant when he waived that affirmative defense.

As set forth in detail in the Appellant's Brief, POINT II, it is not just the abandonment of the affirmative defense that the Court is required to discuss with the defendant. Instead, it is the

defendant's waiver of a jury trial to determine that affirmative defense that the Court is also required to discuss with the defendant. Even if the right to enter a plea of not responsible by reason of mental disease or defect is given by a statute, once the right is given, with the corresponding right to have a jury trial to determine that affirmative defense, the Court must determine whether the waiver of the right to that jury trial had been voluntarily made. The Court cannot do so without a colloquy with the defendant on the record, advising him of that right and then obtaining a voluntary waiver of it.

Further, the Respondent argued in POINT II that if the defendant is entitled to relief, he is only entitled to an evidentiary hearing. Following that hearing, the Respondent argued, the defendant would only be entitled to a jury trial on the issue of his affirmative defense, not on the issue of whether he was guilty of the crimes charged.

The defendant requested the Circuit Court to order a *Machner* hearing in this matter in order to have the two attorneys testify as to whether they had advised the defendant of his right to a jury trial even if he pled guilty to the charges. However, even if the *Machner* hearing was held and it was determined that they had not so advised the defendant, the defendant would still be entitled to have his pleas of guilty withdrawn because the trial court had failed, at the time of the taking of his guilty pleas, to discuss his right to a jury trial on the issue of his affirmative defense *and* to obtain a proper waiver of that right on the record.

CONCLUSION

The defendant respectfully requests that the Decision of the Court of Appeals, District I, affirming the Decision and Order of the Circuit Court of Milwaukee County, be reversed and that the defendant's pleas of guilty be vacated, or, in the alternative, that an evidentiary *Machner* hearing be held to determine whether the defendant's waiver of his right to a jury trial to determine whether he should be found not responsible by reason of mental disease or defect had been constitutionally obtained.

Submitted: December 20, 2012

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this Reply Brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The brief contains 1,965 words.

Dated: December 20, 2012

Esther Cohen Lee
Attorney for Defendant- Appellant

CERTIFICATION AS TO COMPLIANCE WITH 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 §809.19(12) Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated: December 20, 2012

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