STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2012 AP 55

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRES ROMERO-GEORGANA,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT OF BROWN COUNTY, THE HONORABLE KENDALL M. KELLEY, PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

The State acknowledges in its brief what is obvious from the record: that Romero-Georgana has a winning WIS. STAT. § 971.08 claim for plea withdrawal. (State's Response Brief at 7 n.2.) Since the State makes no argument that Romero-Georgana is not entitled to relief under § 971.08(2) or that his allegations regarding that claim are inadequate, Romero-Georgana has met the prejudice prong of his ineffective assistance of postconviction counsel claim by

showing he is entitled to relief on his underlying claim for plea withdrawal.[1] *See* ***State v. Balliette***, 2011 WI 79, ¶70, 336 Wis. 2d 358, 805 N.W.2d 334 (explaining that the defendant's duty when alleging that postconviction counsel's conduct was prejudicial was "to allege facts which, if true, would entitle him to a new trial [his requested relief].").

Thus, the only question before this Court is whether Romero-Georgana adequately alleged that his postconviction counsel performed deficiently when she failed to bring the

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[1] The State's brief misstates the standard for prejudice in this case. It claims that Romero-Georgana must show that "'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty to and would have insisted on going to trial.'" (State's Response Brief at 9 (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)). The standard outlined in ***Hill*** applies to cases where the defendant is asking for plea withdrawal based on allegations of ineffective assistance of trial counsel. The second case the State cites for this standard, ***Missouri v. Frye***, actually explains that the ***Hill*** standard applies to "cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial." ***Missouri v. Frye***, 132 S.Ct. 1399, 1409 (2012). Romero-Georgana is no longer pursuing a claim that his plea was the product of ineffective assistance of trial counsel.

It would be nonsensical to apply the ***Hill*** standard to this case, where the basis for plea withdrawal is WIS. STAT. § 971.08(2). The legislature made a policy decision that the failure to give § 971.08(1)(c) warnings is per se prejudicial and requires plea withdrawal if the defendant wishes and is likely to be deported as a result of the plea. *See* § 971.08(2). If Romero-Georgana had included the § 971.08(2) claim as part of his first postconviction motion, he would not have needed to prove that had he known about the deportation consequences of his plea he would not have entered a no contest plea, and he should not have to prove that now. *See* ***State v. Douangmala***, 2002 WI 62, ¶¶41-42, 253 Wis. 2d 173, 646 N.W.2d 1. Instead, consistent with ***Strickland***, Romero-Georgana needs to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In the case of claims of ineffective assistance of postconviction counsel for failing to pursue a particular claim for relief, this amounts to a showing that if counsel had pursued the claim, the defendant likely would have prevailed. *See* ***State v. Balliette***, 2011 WI 79, ¶70, 336 Wis. 2d 358, 805 N.W.2d 334.

WIS. STAT. § 971.08(2) claim instead of or in addition to the resentencing claim she brought. That question, in turn, hinges on whether the decision not to pursue the claim was the product of a reasonable strategic decision to pursue only a resentencing hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶67. In other words, the court needs to know why postconviction counsel failed to raise a winning claim for plea withdrawal. That question cannot be answered in Romero-Georgana's motion; it can only be answered at a ***Machner*** hearing where postconviction counsel testifies.

I. Romero-Georgana's motion adequately alleged that his postconviction counsel performed deficiently by failing to raise WIS. STAT. § 971.08(2) plea withdrawal in his original postconviction motion.

As required by ***Balliette***, Romero-Georgana's motion alleges sufficient facts to put the State and the court on notice as to the reasons he believes his postconviction counsel's performance was deficient, as well as how he intends to prove it. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶65, 68. His counsel performed deficiently by failing to pursue a strong claim for plea withdrawal, a remedy he desired and continues to desire. He intends to prove that by calling his attorney to testify at a ***Machner*** hearing, as is required for claims of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). So, the issue to be litigated at a hearing is narrow and clearly defined by Romero-Georgana's motion. Given the clarity of the issue, a hearing in this case would not be a "fishing expedition." *See* ***Balliette***, 336 Wis. 2d 358, ¶68.

Despite Romero-Georgana's motion putting the court and the State on notice as to what he intends to prove and how he intends to prove it, the State argues that the motion is

insufficient. Other than broad statements that Romero-Georgana's allegations were "conclusory," the State only mentions one allegation it believes Romero-Georgana should have made but did not: it points out that Romero-Georgana did not specifically allege that he expressed his desire to withdraw his plea to his attorney or that she overrode him. (State's Response Brief at 13.)

It would only make sense for Romero-Georgana to have expressed a preference for plea withdrawal if it was an option he had known about and understood. Thus, the State's argument presumes that Romero-Georgana's attorney explained WIS. STAT. § 971.08 plea withdrawal as a realistic option and discussed it with him. However, nothing in his motion or the record suggests that she did.

Romero-Georgana's motion, read in its entirety, indicates that his attorney did not discuss the possibility of plea withdrawal with him. His motion states that he was not warned about the deportation consequences of his plea by either his trial attorney or the court before his plea. (92:7-8.) It also states that had he understood the possible deportation consequences of his plea, he would not have entered a plea of no contest. (92:7.) The logical conclusion from those allegations is that if postconviction counsel had discussed the option of plea withdrawal with him, shortly after his conviction, he would have chosen to pursue it over a resentencing claim that would have no potential to impact his deportation status. Thus, it is clear from the pleadings that postconviction counsel's failure to pursue plea withdrawal was based on either a failure to discover the issue and discuss it with her client or a failure to act on his wishes.

If Romero-Georgana's postconviction counsel did not advise him as to the possibility of plea withdrawal, the State's argument imposes a requirement that he affirmatively allege

the absence of particular discussions with his attorney. Such a requirement is an unrealistic and overly burdensome expectation for defendants filing WIS. STAT. § 974.06 motions alleging ineffective assistance of postconviction counsel, many of whom—like Romero-Georgana—file *pro se* because they are no longer entitled to appointed counsel.[2] It amounts to a requirement that defendants anticipate and head off any possible evidence a hearing might turn up to show that they might not be entitled to relief.

II. Interpreting WIS. STAT. § 974.06 pleading requirements to deny a *Machner* hearing in this case has significantly delayed finality.

This Court has repeatedly reasoned that defendants must meet a heavy pleading burden in order to receive a hearing on a WIS. STAT. § 974.06 motion because of the need for finality of convictions. *See, e.g.*, ***State v. Starks***, 2013 WI 69, ¶60, 349 Wis. 2d 274, 833 N.W.2d 146 (citing ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994)); ***Balliette***, 336 Wis. 2d 358, ¶53. The overly rigid application of § 974.06 pleading standards argued by the State in this case undermines the finality those standards were designed to support.

Denying Romero-Georgana a hearing has proven to be a greater waste of time and resources than granting one would have been, especially if one believes that Romero-Georgana might have lost the hearing based on his postconviction counsel's testimony. If Romero-Georgana had been granted a

[2] Indeed, as Romero-Georgana pointed out in his First Brief at 17, this Court has traditionally construed filings by *pro se* prisoners "liberally to do substantial justice" in part because "'the confinement of the prisoner…make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting…grievances to a court.'" ***Amek bin-Rilla v. Israel***¸ 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983) (citation omitted).

hearing and postconviction counsel had testified that she did discuss plea withdrawal with him and that they made a strategic decision together to pursue resentencing instead, that hearing would have been over long ago and in all likelihood neither the court of appeals or this Court would have seen the case or spent much time on it.

If, on the other hand, Romero-Georgana had been given a hearing and, as his motion strongly suggests, postconviction counsel testified that she did not discuss the possibility of plea withdrawal with Romero-Georgana, his motion likely would have been granted. Given the State's acknowledgment that he "might well have prevailed" on his plea withdrawal claim if it had been filed as part of his original postconviction motion, it seems unlikely that there would have been a hard-fought appeal from the State. (State's Response Brief at 7 n.2.)

Instead, without a hearing, this case has now made its way through briefing in the court of appeals, a per curiam opinion by that court, a petition for review in this Court, the appointment of counsel, and now briefing, oral argument, and a decision in this Court. It has been two and a half years since Romero-Georgana filed his *pro se* motion, and we are in the Wisconsin Supreme Court, still arguing about whether he should get a hearing. That is not finality, nor is it an efficient use of court time and resources.

III. Romero-Georgana has not conceded that he was required to allege that the WIS. STAT. § 971.08(2) plea withdrawal issue was "clearly stronger" than the resentencing issue raised by his postconviction counsel.

Romero-Georgana disagrees with the State's assertion that he is conceding that he was required to allege that his

argument was clearly stronger than the one pursued by his postconviction counsel. (State's Response Brief at 13.) Romero-Georgana acknowledges that this pleading requirement was added in ***Starks***, which was decided after he filed his motion and after the court of appeals' decision in this case. *See* ***Starks***, 349 Wis. 2d 274, ¶60. Even though ***Starks*** had not yet been decided, the court of appeals relied on similar reasoning from prior cases to emphasize that Romero-Georgana did "not establish that raising the deportation issue would have been stronger than the issue actually presented." *See* ***State v. Romero-Georgana***, No. 12AP55, unpublished slip op., ¶6 (Ct. App. March 19, 2013) (citing ***Smith v. Robbins***, 528 U.S. 259, 288 (2000)). So, even without ***Starks***, the court of appeals used the "clearly stronger" test to decide against Romero-Georgana.

Because of the ***Starks*** decision and the court of appeals' reliance on ***Robbins***, Romero-Georgana explained in his First Brief that (1) his claim for plea withdrawal was at least as strong as his claim for resentencing because both were very likely to succeed and (2) both the court of appeals' reliance on ***Robbins*** and the pleading requirements laid out by ***Starks*** are misplaced in cases where the choice of issues is actually a choice between different forms of relief with wildly different consequences. (Romero-Georgana's First Brief at 25.) Romero-Georgana stands by that argument and the professional rules and case law he cited in support of his reasoning that the decision between remedies was his to make. (Romero-Georgana's First Brief at 21-26.)

Put another way, it makes no sense to deny a hearing based on the presumption that a decision to pursue a particular issue was strategically made by the attorney when the decision is not the attorney's to make. The relevant inquiry regarding postconviction counsel's choice of issues in this case is not whether the decision was the product of

reasonable attorney strategy; it is whether the decision was strategically made after properly consulting her client.

IV. Romero-Georgana maintains that a *Machner* hearing is the only way to gather the evidence necessary to grant or deny his motion.

Finally, Romero-Georgana strongly disagrees with the State's assertion that explaining the necessity of a ***Machner*** hearing to prove that he is entitled to relief amounts to an acknowledgment that his motion is inadequate. (State's Response Brief at 14.) Although the burden is on defendants filing WIS. STAT. § 974.06 motions to allege sufficient facts to show they are entitled to relief, they are not required to *prove* that they are entitled to relief. ***Balliette***, 336 Wis. 2d 358, ¶61. That is the purpose of a hearing. ***Id.*** In this case, a ***Machner*** hearing would allow the parties and the court to evaluate what everyone knows is the issue here—the basis for postconviction counsel's failure to pursue a strong argument for plea withdrawal. Without that hearing, the postconviction court should not have made a decision to grant or deny Romero-Georgana's motion.

CONCLUSION

For the above reasons, Romero-Georgana is entitled to a ***Machner*** hearing on his claim that his postconviction counsel was ineffective for failing to raise the issue of plea withdrawal under WIS. STAT. § 971.08(2).

Respectfully submitted this ____ day of March, 2014.

_____ _____

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,242 words.

_____

Sara Kelton Brelie

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the ame nded paper copy of the brief.

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Sara Kelton Brelie