STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW ALLEN LILEK,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Case No. 2012AP001855CR

Trial Case No. 2008CF002852 (Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON APRIL 13, 2010, AND FROM THE DECISION AND ORDER DENYING THE DEFENDANT'S POST-CONVICTION MOTION ENTERED ON AUGUST 6, 2012,
THE HONORABLE REBECCA F. DALLET, PRESIDING.

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ARGUMENT

I. THE DEFENDANT ADEQUATELY ALLEGED A PRIMA FACIE CASE UNDER *BANGERT*.

The State argues that the defendant has failed to meet his prima facie burden to warrant an evidentiary hearing. In its brief the State runs through various requirements for the acceptance of a plea, and identifies how the trial court "sufficiently explained" those requirements. We will comment on each in order.

A. Nature of the Charges

We do not believe that the record shows that the court took "great care in ascertaining the defendant's understanding of the nature of the charges..." as required by ***State v. Brown,*** 2006 WI 100, 293 Wis. 2d 594, 594 N.W.2d 759 (1999) ¶32.

The State describes the trial court as having engaged in an extended colloquy with Matthew to ascertain that he understood all of the elements of the offense. (State's Brief – P. 5). The State notes the court "went over" the elements of second degree sexual assault and cites to the record (R. 121:11). As pointed out in our brief, the answers Matthew gave at the cite relied on by State consisted of "yes, your honor", answers. Under the circumstances, that was not enough.

The State also argues "the court then delved into the specifics of sexual contact." (State's Brief – P. 6). The State then reproduces the very limited colloquy that the court had with the defendant regarding sexual contact. As shown in the State's brief at page six, the only open-ended question that was asked on that subject was asked of the prosecutor. The court asked the prosecutor what the facts were regarding the touching. That would have been an opportunity to ask Matthew about his understanding of the nature of the offense, rather than the prosecutor. Rather than doing so, the court summarized to Matthew what the State had indicated about the nature of the touching. Again, the State relies on Matthew's "yes your honor" answers to the court's questions.

At page seven of its brief the State then argues that the court established that Matthew understood all the elements of the offense of aggravated battery, citing to the "yes, your honor" answers given on page 12 and 13 of the sentencing transcript. The State argues that the colloquy was sufficient because it "directly tracked the statutory elements of the crime" citing ***State v. Brandt,*** 226 Wis. 2d, 610, 619, 594 N.W.2d 759 (1999).

We do not believe the "yes your honor" answers established Matthew's understanding under the facts of this

case and we believe ***Brandt*** supports our position. In ***Brandt*** our Supreme Court quoted ***Bangert*** as identifying various methods that a circuit court might use to ascertain that a defendant understood the essential elements of the crime. After listing various methods, the court indicated: "this list is not exhaustive... . A circuit court is given discretion to tailor the colloquy to its style and to the facts of the particular case provided that it demonstrates on the record that the defendant knowingly, voluntarily, and intelligently entered the plea." ***Brandt*** at 620. It is our contention that the court did not tailor the colloquy to the facts of this particular case.

The State then cites extensively to statements by counsel regarding Matthew's understanding of the elements. As we pointed out in our brief, a court cannot rely on statements of defense counsel. Furthermore, the statements relied on by the State clearly show that there was concern regarding Matthew's understanding. For example, the State quotes defense counsel as indicating Matthew's confusion regarding the battery charge because he never actually hit the victim. (State's Brief – P. 8.) The State also quotes defense counsel as indicating that he discussed Matthew's rights in terms of the televisions series "Matlock." We do not believe the State should rely on a T.V. show to

demonstrate a defendant's understanding of complicated legal concepts.

B. Waiver of Rights

The State then argues that the court adequately explained the rights Matthew was waiving. (State's Brief – P. 11). It again cites to yes and no answers given by him. We disagree that under the facts of this case those answers establish that he was not entitled to an evidentiary hearing.

The State also argues that any deficiency in the plea questionnaire was not important because it was not relied on by the court. We agree that the plea questionnaire does not indicate that Matthew understood the rights he was waiving.

C. Range of Punishment

The State argues that the court adequately explained the range of punishment for both crimes. In support, the State discusses an exchange between Matthew and the court, cited in our brief, wherein Matthew was confused as to the fine he was facing. The State argues that the court corrected Matthew's misunderstanding, and that "it does not matter what Lilek was told or understood prior to the plea. The salient inquiry is what Lilek understood at the time of his plea." (State's Brief- P. 14). Ironically, the State,

throughout its brief and immediately following that statement, relies on counsel's discussions with Matthew before the plea hearing. We agree that what this borderline retarded defendant was told prior to the hearing cannot be relied on to demonstrate his understanding. It was his understanding at the time of his plea that was crucial. The court could have easily established his understanding by asking him what the penalties were.

D. Nature of Plea Agreement

On page 15 of its brief the State argues that the court adequately explained the nature of the plea agreement and personally informed Matthew that it was not bound by it. The State then reproduces the questions and answers on that point. Again, those questions consisted entirely of yes and no questions. We believe the court should have done more. The court could have easily asked Matthew what his understanding of the plea agreement was.

E. Plea Consequences

In the fifth section of the State's brief it argues that the court adequately explained the likely consequences of Matthew's plea to him. In doing so the State makes much of the fact that the Matthew is a citizen, and not subject to deportation. We did not argue that the plea was inadequate because of the risk of being deported. We

merely cited that portion of the plea colloquy as an example of his lack of understanding. This issue arose because the State, in its brief to the trial court, cited Matthew's responses in this area as evidence of his understanding. (R.88,9)

The State is arguing it was sufficient in this case to ask yes and no questions, just as might be asked in any other case of any other defendant, to establish that this very disabled defendant understood what he was doing when he entered his plea. We think more should have been done. Many courts, when taking a plea, ask defendants to explain what they did, explain the rights they are giving up, and ask them to verify the plea agreement. Here, at no time was Matthew asked, for example, what are you charged with, what is the plea agreement, what's your understanding of the penalties you face, or what is a jury trial? We suspect that had he been asked any of the above questions, his lack of understanding would have been clear. Given his well documented disabilities, he should be entitled to an evidentiary hearing on his motion.

II. THE DEFENDANT ADEQUATELY ALLEGED A PRIMA FACIE CASE UNDER *BENTLEY.*

Matthew requested plea withdrawal under the ***Bangert*** and ***Bentley*** line of cases. See ***State v. Bentley,*** 201 Wis.

2d 303, 548 N.W.2d 50, (1996). The State claims that Matthew's allegations in his motion were insufficient to warrant a hearing under ***Bentley***.

We agree with the State that the key inquiry is what Matthew understood at the time his plea was entered. (State's Brief – P. 20). Because of that, we specifically alleged in the post-conviction motion that, at the time he entered his plea, he did not understand the constitutional rights he was waiving, the nature of the plea agreement he entered into, the elements of the offense pled to, and the likely consequences of his plea. We also detailed in the motion his numerous disabilities and indicated that post conviction interviews indicated that he did not understand the elements of the offenses, the rights he had given up, and that he believed he had a trial.

This is not a case like ***State v. Farrell,*** 226 Wis. 2d 447, 595 N.W.2d 64 (Ct. App. 1999), which was cited by the State in its brief. In that case it was conceded that the defendant had given no indication prior to his plea that he was suffering from any type of mental shortcomings. In ***Farrell*** the defendant conceded that it was only after he entered his pleas that any indication arose that he might not have been competent at the time he entered his pleas. That is clearly not the case here.

III. THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION AT SENTENCING

We disagree with the State that the record supports the sentence imposed.

What we find most troubling is the argument that Matthew's disabilities were not mitigating factors. Not only does the State seemingly argue that the court did not need to consider his disabilities at the time of sentencing, it seems to argue that the trial court was justified in viewing his disabilities as aggravating factors. The State argues: "Here the circuit court appropriately exercised its discretion when it did not give Lilek's disabilities the overriding and mitigating significance he would have preferred, and instead considered that factor less important than others, or even aggravating." (State's Brief - P. 31). The State also argues that "... positive attributes which seem to be mitigating, may, in fact, be considered aggravating in the court's discretion, because they can signify the defendant's conduct as especially egregious in light of his otherwise laudable or positive character." The State then quotes the Bible as stating "to whom much is given, much is expected." (State's Brief – P. 30).

We believe that the State is agreeing, by virtue of its argument, that the court viewed Matthew's disabilities as aggravating factors justifying the confinement imposed. We believe the court erroneously exercised its discretion when it viewed Matthew's disabilities in that fashion. We find it particularly inappropriate to analogize Matthew's situation to the Biblical tenet referenced above. Is Matthew the person to whom much was given? Are blindness, mental illness, and mental retardation gifts? As much as the state would like to downplay Matthew's disabilities, we believe the primary factors to be considered at sentencing, including the gravity of the offense, the character of the offender and the need to protect the public, should have been considered in light of his mitigating disabilities.

A. Protective Placement

The State misunderstands our argument regarding protective placement. We did not argue that Matthew's disabilities rendered him unable to appreciate the wrongfulness of his conduct or check his behavior, and that therefore he should have been protectively placed. It was the trial court that stated, as a rationale for its prison sentence that Matthew was unable to appreciate the wrongfulness of his conduct and was unable to check his behavior. We pointed out those findings were consistent

with an NGI plea, and if true are generally viewed by the law as exculpatory, calling for commitment for treatment rather than punishment. In fact, Dr. Smail found that although Matthew met the criteria for a mental disease or defect, Matthew could conform his conduct to the requirements of the law, therefore an NGI plea was not appropriate (R. 45).

The thrust of our argument regarding protective placement was that the court approached the sentencing with a made up mind. Our complaint with the court's approach to protective placement is that it rejected placement out of hand, without any justification for doing so.

We believe the court erred by refusing to even consider the possible parameters of a protective placement, either in conjunction with a probationary sentence, or as Matthew's likely living situation following release from prison.

The court also did not see any need for information regarding placement of Matthew. We believe the court should have welcomed such information. As noted in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 555, 678 N.W.2d 197, ¶34, "[n]ow judges have an enhanced need for more complete information upfront, at the time of sentencing."

It is plain that the defense attempted to proceed with the protective placement expeditiously. The record reflects that the defense wrote the placement court, advising the placement court of Matthew's sentencing date and requesting that the court address placement prior to that date. The State, in response, wrote the placement court indicating that it did not feel placement needed to be addressed prior to sentencing (R. 56). Under the circumstances the court should have let the placement process run its course, or at least evaluated Matthew's placement options as presented by Attorney Pledl at sentencing, rather than rejecting it out of hand as a sentencing consideration.

Regarding placement of Matthew at Mendota or Winnebago, we recognize that Matthew was not found NGI. We pointed out that because he was not found NGI, he could not be placed at Mendota or Winnebago by the Department of Corrections under his prison sentence, even though in its decision the trial court ruled that he could be placed there, and even though, at sentencing, the State indicated he could be placed there. We do not think we have a disagreement with the State on this point. We think the court should have considered the limited placement options for Matthew in the prison system when fashioning his sentence.

IV. THE DEFENDANT DID NOT WAIVE HIS TIME LIMIT CLAIM AND SHOULD PREVAIL ON THE MERITS.

The State argues that Matthew waived his contention that the mandatory time limits were violated. We argued in our brief that these are strict time limits. Such time limits cannot be waived. See ***Department of Social Servs. v. Matthew S.,*** 2005 WI 84, 282 Wis.2d 150, 698 N.W.2d 631. In any event, the State has agreed to address the merits.

The State's arguments on the merits suffer from a basic misunderstanding of our argument, and a basic misunderstanding of the facts of this case. Our argument is that court-appointed evaluations must be done within the time limits set out in the statutes. We recognized in our brief that the parties were free to hire their own experts without being constrained by the time limits imposed on the court for court-appointed experts. The State argues around the requirements of the statutes by misidentifying the status of the experts. The State consistently refers to the court-appointed experts as either "Lilek's" or the "State's" experts. That is simply incorrect.

The State identifies Dr. Knutson as "Lilek's expert". He was not. He was court appointed. He was employed by the Wisconsin Forensic Unit. The State identifies Dr. Jurek as the "State's expert". He was not. He was court appointed,

at the State's request. The State argues that the statutes allow parties to hire their own experts. We agree. But the State did not hire its own expert, although at one point the defense did. The defense hired Dr. Leslie Taylor.

Rather than hire its own expert, the State asked the court to appoint an expert after the time period for doing so had expired. The State should have hired its own expert and the case could have proceeded expeditiously, consistent with the court's calendar.

Dated: August _____, 2013.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 13 pages long including this page.

Dated: August _____, 2013.

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John J. Grau

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

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 § 809.19(12)(f).

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

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

GRAU LAW OFFICE

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