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. 2014AP784-CR

Trial Case No. 2008CF002852 (Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON APRIL 13, 2010, FROM THE DECISION AND ORDER DENYING THE DEFENDANT'S POST-CONVICTION MOTION ENTERED ON AUGUST 6, 2012, HON. REBECCA F. DALLET, PRESIDING, AND FROM THE ORDER DENYING MOTION TO WITHDRAW PLEA FILED APRIL 1, 2014, HON. STEPHANIE ROTHSTEIN PRESIDING.

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ARGUMENT

I. THE STATE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT MATTHEW ENTERED HIS PLEA VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY.

The State begins its argument by asserting that the post-conviction court properly relied on Matthew's trial counsel's testimony to find that the State had met its burden. Relatedly, the State claims that our argument that the trial court impermissibly relied on trial counsel's assertions has no basis in law. The State misunderstands our argument.

Our Supreme Court has made clear that the record must show, independent of defense counsel's assertions, that a defendant understood the nature of the charges when he entered his plea. ***State v. Brown***, 293 Wis. 2d 594, 625, 716 N.W. 2d 906. As the Court of Appeals observed in its decision in the original appeal in this case, ***Bangert*** warns that [d]efense counsel may not speak for the defendant; the defendant must affirmatively state his own knowledge and understanding when he is capable of doing so, citing ***State v. Bangert***, 131 Wis. 2d at 270, 389 N.W. 2d at 24. (R. 125:20). It is clear that it is not enough for defense counsel to state that a defendant's plea was a knowing one.

At no time did we argue however that a post-conviction court cannot take into account the testimony of trial counsel regarding counsel's interactions with a defendant during preparation for a plea hearing. We do not disagree that the State is entitled to call defense counsel to the stand to question counsel regarding counsel's preparations for the plea hearing. Case law indicates that the State can also call the defendant to the stand, although it did not do so here. ***Bangert*** at 275. We do not dispute that counsel's testimony may be relied upon by a post-conviction court when making its decision; however, whether a court can rely on the testimony of counsel to find a defendant's plea to be a knowing one depends on the substance of that testimony. We did not, and do not, argue that the testimony of trial counsel could not shed light on the issue. In fact, we cited extensively from counsel's testimony in our brief. We detailed in our brief why we do not believe defense counsel's testimony at the post-conviction hearing established that Matthew entered a knowing and voluntary plea. We simply disagree with the State that counsel's testimony in this case established by clear and convincing evidence that Matthew's plea was a knowing and voluntary one.

For example, the State argues that Matthew "understood the length of his sentence, the monetary penalties and the medications he took." (State's Brief – P. 19). We had argued in our brief that Attorney Kohn's testimony did not shed any light on the confusion surrounding the length of Matthew's sentence, the amount of monetary penalties, and confusion over medications he had been taking. (Appellant's Brief – 25, 26, 29, 30). On those issues, the State admits that Attorney Kohn's testimony did not address any specific examples of misunderstandings. (State's Brief – P. 19).

Because Attorney Kohn's testimony does little to help the State, the State refers back to the plea colloquy stating "the plea colloquy itself defeats Lilek's claims." (State's Brief – P. 19). The State then examines the record at the time Matthew originally entered his plea, and cites statements that have already been addressed by the Court of Appeals in its remand decision.

For example, regarding the penalty scheme, the State argues that it was adequately addressed at the time of the plea hearing. (State's Brief – PP. 19, 20). This argument by the State is at odds with the Court of Appeals' remand opinion which specifically addressed the record in this area and determined that Matthew's responses exposed his

lack of understanding. In this court's original opinion this court stated: "And when the circuit court's question did not call for a "yes' or "no," Lilek's non-responsive comments exposed his apparent lack of understanding:

> When the circuit court attempted to tell Lilek about the potential length of sentence that could be imposed, he answered: "Yes, but I spent 20 months here also."
>
> When the circuit court asked Lilek about taking his medication, he gave several non-responsive answers:
>
> "CIRCUIT COURT: So when's the last time you took your medications?
>
> THE DEFENDANT: Last night I was notified to, but, and I saw a nurse today."
>
> "THE COURT: Okay. And what, do you remember what you take?
>
> THE DEFENDANT: I don't drink alcohol. I am not quite sure about that. I don't know how to describe that because I don't know."
>
> Lilek also seemed not to know that he was pleading "no contest" rather than "guilty."
>
> "THE COURT: All right. So Mr. Lilek, I understand that you are going to be entering two guilty pleas today. Do you understand that sir?
>
> THE DEFENDANT: Yes, Your Honor.
>
> MR. KOHN: Actually, Your Honor, they're going to be no contest.
>
> THE COURT: They're two no contest pleas, right Mr. Lilek?
>
> THE DEFENDANT: I said yes Your Honor."

Further, despite the length of time Lilek's lawyer said that he and his intern spent with Lilek explaining things, Lilek told the circuit court that he believed that the maximum fine the court could impose "was $5,000." (R. 125:18, 19).

As the above indicates to the extent that the State and the post-conviction court are relying on the original plea hearing transcript to establish Matthew's knowing and voluntary plea, neither the State nor the post-conviction court is persuasive.

Ultimately, the State argues that Matthew "had the requisite understanding at the time he entered his plea." The State argues that Attorney Kohn's undisputed testimony shows that Matthew was able to retain information and that Matthew understood the relevant concepts at the time his plea was entered. (State's Brief – P. 21). We disagree. The record does not establish by clear and convincing evidence that Matthew understood relevant concepts at the time the plea was entered. Attorney Kohn's testimony shows no such thing. At pages 27 and 28 of our brief we reproduced Attorney Kohn's testimony on that very point. It bears repeating. He stated:

> Well, I wish I would have said, and this may be based on the issues that have since

> arisen, that I believe that it is knowing and voluntary based on my interaction with him on the days that I explained this to him. Whether he retained that and whether the questions that the Court asked him, I guess, are why we're here today, why the decision of the Court of Appeals sent this back. And I don't know exactly what Matt was thinking that day because I wasn't the person doing the questioning.
>
> But when I was the person doing the questioning, I believe that was on a very basic level, which is what the doctors said that was all that was necessary, I believe that he understood.

(R. 132:48)

Attorney Kohn's testimony did not establish that Matthew had the requisite understanding at the time he entered his plea.

The State further argues that ***State v. Cross,*** 2010 WI 70, 326 Wis.2d 492, 786 N.W.2d 64, and ***State v. Cain,*** 2012 WI 68, 342 Wis.2d 1, 816 N.W.2d 177, support the denial of Matthew's request to withdraw his plea. The State's reliance on ***Cross*** and ***Cain*** is misplaced.

In ***Cross*** the defendant sought to withdraw his plea because he was told an incorrect maximum potential sentence. The court held there was not a ***Bangert*** violation. ***Cross*** at ¶ 4. That is not the case here.

In ***Cain*** the defendant pled to a charge requiring possession of more than four marijuana plants. The

defendant, at the time of his plea, denied that he had more than four plants, but entered his plea anyway. The Supreme Court indicated that Cain's claim was properly understood as a failure to personally ratify a plea, not that his plea was unknowing. ***Cain*** at ¶¶ 27, 28. ***Cain*** also is not on point.

II. 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" (State's Brief - P. 32). The State also argues "... factors which seem mitigating, may, in fact, be considered aggravating in

the court's discretion, because they can signify the defendant's conduct is especially egregious in light of his otherwise laudable or positive character." (State's Brief – P. 32).

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. 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.

The State misunderstands our argument regarding protective placement. We are not arguing 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. (State's brief at 32,33). It was the trial court that stated Matthew was unable to appreciate the wrongfulness of his conduct and was therefore 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. We pointed out that, contrary to what the court indicated, 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). Our point is that the court did not use a logical rationale in fashioning its sentence.

The thrust of our argument regarding protective placement is 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.

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 seemed to assume that Matthew needed to be imprisoned for twenty years because there was nothing else to be done with him. Certainly, exploration of the possibility of a protective placement would be helpful to a court in determining whether a probationary sentence was appropriate. It would also be helpful if a court felt that

probation was inappropriate. For example, the possibility or likelihood that Matthew could be placed in a secured all male group home could have assisted the court in determining the appropriate term of initial confinement and appropriate term of extended supervision.

We believe the court should have welcomed such information regarding placement options for Matthew. 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.

The State further argues that a protective placement was an impossibility because Matthew would need to be found incompetent. The State ignores the fact that the record shows that Matthew was found incompetent when he was 18 years old. His mother has been his guardian since that time. In any event, that determination is part of the protective placement process, which process was cut short by Matthew's sentence.

III. 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: _____, 2015.

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.

Dated: _____, 2015.

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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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