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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 14 AP 1019

In re: the findings of contempt:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEPHANIE M. PRZYTARSKI,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDERS ENTERED ON MAY 7, 2013 AND APRIL 17, 2014 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, BRANCH IV, THE HONORABLE MEL FLANAGAN PRESIDING.

Respectfully submitted,

STEPHANIE M. PRZYTARSKI,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases Cited

Statutes Cited

Other Authorities Cited

STATEMENT OF ISSUE

SHOULD MS. PRZYTARSKI HAVE BEEN PERMITTED TO PRESENT EVIDENCE REGARDING A STATUTORILY PROVIDED AFFIRMATIVE DEFENSE TO HER ORIGINAL CHARGE?

THE TRIAL COURT ANSWERED NO.

DID MS. PRZYTARSKI MAKE THE NECESSARY SHOWING IN HER POST-CONVICTION MOTION TO OBTAIN A MACHNER HEARING?

THE TRIAL COURT ANSWERED NO.

SHOULD MS. PRZYTARSKI BE PERMITTED TO WITHDRAW HER PLEA BECAUSE OF THE INEFFECTIVE ASSISTANCE OF HER TRIAL COUNSEL?

THE TRIAL COURT ANSWERED NO.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF FACTS AND CASE

This case stems from events that occurred around Christmas of 2012. R. 2. However, as one might expect with any case where the original charge is interfering with custody, the history between the parties is long and complicated. Mr. Ted Vallejos and Ms. Stephanie Przytarski have a daughter in common. Id. at 1. A family court order in Waukesha County case number 06PA390 permitted Mr. Vallejos to pick up his daughter for a holiday placement from noon on Christmas Day. Id. When his daughter was not at the predetermined meeting place, Mr. Vallejos contacted the police. Id. A charging conference was held in this matter on December 27, 2012 at the Milwaukee County District Attorney's Office. Id. at 2. Ms. Przytarski was arrested at the end of that conference. Id. The following day a criminal complaint was filed charging her with one count of interfering with custody. Id.

On December 29, 2012, Ms. Przytarski made her initial appearance. R. 31. At that time, she was released on bond. R. 3. One of the conditions of that bond was that she not have contact with her daughter. R. 4. Four days later, Ms. Przytarski filed a pro se motion to dismiss and vacate all orders. R. 5. Attached to that motion are several exhibits. R. 5. Exhibit C is a transcript of testimony from a hearing in the Waukesha County paternity case at which Dr. Charlene Kavanagh testified about diagnosing Ms. Przytarski's daughter with post-traumatic stress disorder (PTSD). Id. at 11-12. Dr. Kavanagh also opined that the child's PTSD

and other mental health concerns were caused in large part by visitations with Mr. Vallejos. Id. at 18. She explained that PTSD is associated with neurological damage. Id. at 16. At that same hearing, it was mentioned that Mr. Vallejos had been diagnosed with several personality disorders. Id at 14-15. In her motion, Ms. Przytarski explained that she declined to follow the court's order for a holiday placement because she wanted to protect her daughter from potential physical harm. Id. at 1-2.

On January 8, 2013, Ms. Przytarski appeared for a preliminary hearing before Judge Mel Flanagan. R. 32. Judge Flanagan did not address Ms. Przytarski's motion nor did she actually preside over the preliminary hearing. Id. Instead, she indicated that she did not have time to handle a preliminary hearing and informed Ms. Przytarski that she would find another judge who could cover that hearing. Id. at 4. Later that same morning, Ms. Przytarski appeared before Judge Mary Triggiano for her preliminary hearing. R. 33. Judge Triggiano discussed with the defendant the possibility of waiving time so that she might hire an attorney to assist her. Id. at 4-5. Ms. Przytarski decided to continue pro se. Id. at 5. Her cross examination of the officer was cut off at noon to accommodate a lunch break, but she was asked to come back at 1:30 p.m. to continue with her questioning. Id. at 18. That afternoon, Judge Triggiano cut off testimony again and decided to adjourn the hearing to another date to give Ms. Przytarski the opportunity to obtain an attorney. Id. at 17. The State rested subsequent to that discussion, even though it was in no position to do so given that Ms. Przytarski

was cut off in the middle of her cross examination. Id. at 19. Ms. Przytarski did not waive time limits requiring that the preliminary hearing be concluded within 20 days of her initial appearance. R. 34.

A status conference was held in this case on February 1, 2013. R. 39. Prior to that hearing, Ms. Przytarski hired attorney Christopher Carson to represent her. He filed a motion to modify bond on January 18, 2013. R. 6. In that motion, he argued that the no-contact order preventing Ms. Przytarski from seeing her daughter should be lifted. Id. In part, he argued that the child was in danger and risked additional harm if left in her father's custody. Id. That motion was the primary topic of discussion at the status conference. R. 39. That hearing was often contentious, and it was clear that Judge Flanagan was frustrated with the tone of Attorney Carson's motion. Id. She characterized it as hyperbolic, accusatory, and inappropriate. Id at 6 and 8. Attorney Carson made an oral motion for recusal after the Court denied the motion to modify bond. Id. at 38. That motion was also denied. Id. Attorney Carson later filed a written motion for recusal on February 19, 2013. R. 7.

The continuation of the preliminary hearing occurred on February 28, 2013, well beyond the statutory time limit for the hearing to be completed. R. 35. Attorney Carson did not raise that issue or request a dismissal for lack of jurisdiction. Id. He also does not assert Ms. Przytarski's right to continue her cross-examination of the state's only witness. Id. The majority of this hearing was actually spent discussing Attorney Carson's written motion for recusal, which was

denied, and the State's motion in limine to preclude Ms. Przytarski from raising an affirmative defense under Wisconsin Statutes section 948.31(4). Id.

In the State's motion in limine, it correctly argued that the affirmative defense provided by Wisconsin Statutes section 948.31(4)(a) does not include protecting a child from emotional harm. R. 8 at 1. On March 14, 2013, Attorney Carson filed a memorandum in opposition to the state's motion in limine. R. 10. In it, Attorney Carson clarified that the defense argument was that the child in this case engaged in self-harm as a result of placements she has had with Mr. Vallejos. R. 10 at 1. He argued that the statute providing for an affirmative defense does not specifically state that the physical harm must be at the hands of one of the parents involved in a custody dispute. Id.

The state's motion in limine and the defense's response to it were argued further at a pretrial conference on April 10, 2013. R. 36.[1] At that hearing, Attorney Carson explained that "the child engages in self harm immediately after her placements with the -- or visits with the father and immediately before." Id. at 11. Repeated head banging was among the behaviors observed. Id. He indicated that the defense intended to offer the testimony of one or two psychologists to show there was more than a casual nexus between the child's self-harming behaviors and her contact with Mr. Vallejos. The State also argued that Ms. Przytarski was collaterally estopped from raising this type of affirmative defense in her criminal

[1] It should be noted that in the interim, Attorney Carson filed a motion to reconsider the denial of his previous motions for recusal and bond modification. R. 11. Judge Flanagan issued a written order denying his request to lift the no-contact order between Ms. Przytarski and her daughter. R. 12. That order does not address the recusal issue. Id.

case because some of the same facts served as the basis for litigation in past family court actions. Id. at 13.

Judge Flanagan tentatively granted the State's motion to preclude affirmative defense evidence. Id. at 24. She indicated that the daughter hitting her head sounded like emotional harm, and that the cause of that harm was unknown. Id. at 22. Without a clearer connection between the girl's self-harming behaviors and Mr. Vallejos, the court questioned the relevance of any testimony about it. However, she did indicate that she would review supplemental reports that Attorney Carson referenced during his argument. Id. at 24. On April 16, 2013, Attorney Carson made a supplemental filing in opposition to the State's motion in limine. R. 13. In it, he made an offer of proof as to who will testify about Ms. Przytarski's child's self-harming behaviors and how this will support the conclusion that there is a connection between these behaviors and the daughter's visits with Mr. Vallejos. Id. at 2.

On May 2, 2013, just a short time prior to the scheduled trial dates, Judge Flanagan issued a written order regarding the admissibility of evidence pertaining to the Przytarski's affirmative defense. R. 15. In her findings of fact, Judge Flanagan incorrectly stated that "the affirmative defense offered by the defendant is based on her fear that the minor child may suffer emotional harm due to visits with her father." Id. at 4. She concludes that the threat of emotional harm is not a defense under Wisconsin Statutes section 948.31. Id. at 5. She also held that the proffered testimony regarding the affirmative defense was irrelevant or of such

limited probative value that the risk of prejudice or confusion of the issues weighs against its admission. Id. at 6. Finally, the Court concluded that testimony regarding the affirmative defense should be precluded because of the doctrine of collateral estoppel because some of these issues were previously discussed in family court proceedings. Id. at 6-7.

Faced with the prospect of not being able to present a defense just days prior her trial, Ms. Przytarski decided to enter a plea to a reduced misdemeanor count of contempt of court. R. 37 at 13. She made the decision to enter a guilty plea only after consulting with Attorney Carson. R. 47 at 1. During that discussion, Attorney Carson assured her that she would be able to appeal the Court's decision to preclude testimony regarding an affirmative defense. Id. Attorney Carson was well aware of her strong desire to appeal that decision. Id. Following a bifurcated sentencing hearing that spanned two days, the Court imposed, but stayed, a one-year jail sentence and placed Ms. Przytarski on two years of probation. R. 38 at 36. Attorney Carson did not object to this unlawfully long period of probation. R. 38.

Ms. Przytarski filed a timely notice of intent to pursue post-conviction relief. R. 23. She then learned from appellate counsel that a direct appeal on the affirmative defense issue was not permitted because she had entered a plea. R. 47 at 2. She indicated that she would have never entered a plea if she had know that would have precluded her from appealing this issue. Id. She eventually filed a motion to withdraw her plea based upon ineffective assistance of counsel. R. 46.

The Circuit Court issued a written order denying Ms. Przytarski's post-conviction motion without a hearing. R. 48. The Court noted that Ms. Przytarski had waived the right to present defenses as part of the plea colloquy. Id. at 2. The Court reasoned that because, in its view, the proffered testimony was about emotional harm, Ms. Przytarski was not prejudiced by her inability to appeal. Id. at 4. The Court never contemplated the possibility that a higher court might view self-harm, including repeatedly hitting one's head against surfaces, as physical harm. Id. The Court did recognize, however, that the sentence imposed was illegal and reduced the term of probation to one year. Id. Upon receiving the written order denying her motion, Ms. Przytarski filed a notice of appeal. R. 50.

ARGUMENT

I. Ms. Przytarski should have been permitted to present evidence regarding a statutorily provided affirmative defense.

Ms. Przytarski was originally charged with one count of interference with custody, contrary to Wisconsin Statutes section 948.31(1)(b). Those charged with such an offense are afforded the right to several affirmative defenses. Wis. Stat. § 948.31(4)(a). One of those affirmative defenses says that a parent or person authorized by the parent may interfere with a custody order if that is done to protect the "child in a situation in which the parent or authorized person reasonably believe that there is a threat of physical harm." Wis. Stat. § 948.31(4)(a)1. If a defendant raises this affirmative defense, he or she has the burden of proving the defense by the preponderance of the evidence. Wis. Stat. § 948.31(4)(b).

In this case, there is a repeated mischaracterization of the evidence that Ms. Przytarski wanted to offer regarding an affirmative defense by both the State and Circuit Court. Both the prosecutor and Judge Flanagan continually acted as though it was a forgone conclusion that the harm to Ms. Przytarski's daughter was just emotional. Indeed, in her finding of facts regarding the State's motion to exclude testimony regarding the affirmative defense, this is how Judge Flanagan refers to it. This is simply not accurate. While Ms. Przytarski's daughter did show signs of emotional harm following her visits with Mr. Vallejos, the harm was clearly not limited to emotions. Hitting one's head repeatedly against a surface will most

certainly cause physical harm. It is also clear that is what the evidence would have shown. Wisconsin Statutes section 948.31(4)(a)1 does not say a parent cannot interfere with a custody order if he or she is doing so because of a threat of physical *and* emotional harm. Indeed, it stands to reason that the threats a child might face would often include a combination of physical and emotional dangers.

This section also does not require that a parent seek to protect a child from physical harm at the hands of the other parent or guardian. The clear and plain meaning of the law is that a parent may interfere with a custody order when there is a threat of physical harm, regardless of who is causing that harm. For example, if a child was being abused (physically or sexually) by a stepparent or stepsibling, Wisconsin Statutes section 948.31(4)(a)1 would privilege another parent who chose to interfere with an otherwise valid custody order to prevent such abuse. There is no reason to conclude that this does not extend to cases involving self harm, even if the cause of that physical self harm is emotional distress.

The Circuit Court was very concerned with finding a nexus between the self-harm and the child's visits with Mr. Vallejos. In a situation such as this, it is a challenge to show the precise cause of self-harming behaviors. However, Ms. Przytarski was prepared to offer testimony to show that her daughter's behaviors coincided with visits with Mr. Vallejos and didn't occur at other times. She was also prepared to offer testimony from mental health professionals to try to establish such a nexus. Is it possible that she could have failed to convince a jury that she acted out concern for her daughter and because of a reasonable belief that

her daughter was in danger of physical harm? Yes, that is possible. However, this was a question for a jury, and the Circuit Court should not have substituted its own judgment for that of the jury. The statute establishes several clearly delineated affirmative defenses. Ms. Prytarski made a sufficient proffer regarding how she intended to prove her affirmative defense. The burden would have been hers. The Circuit Court should have afforded her the opportunity to meet that burden.

One of the arguments made by the Circuit Court against the affirmative defense evidence was relevance. However, when a showing had been made that an affirmative defense is a possibility, which was certainly the case here, testimony relating to that defense would clearly be relevant since it would tend to make the existence of a consequential fact (i.e. whether or not Ms. Przytarski's actions were privileged because of the statutorily-sanctioned affirmative defense) more probable. *See* Wis. Stat. § 904.01. Even relevant evidence can still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03. In this case, the entire trial would have boiled down to whether or not the affirmative defense applies. The presentation of the evidence proffered by Ms. Przytarski clearly does not prejudice her. It could be argued that it might prejudice Mr. Vallejos, but prejudice to him is of little concern since he is not on trial, nor a direct party to this case. This evidence would not have confused nor mislead the jury. Again, the argument would not have been that Ms. Przytarski did not

interfere with custody arrangements. She clearly did. The only question would have been was she permitted to do so because of the her belief that her daughter faced possible physical harm. This is a straightforward question. It might be possible that lengthy testimony about past relationship difficulties or dated psychological evaluations would have confused the issue or caused an undue delay. However, the solution for the Circuit Court would be to limit the evidence offered regarding the affirmative defense, not to exclude it entirely.

Perhaps the most bizarre argument made by the State is that Ms. Przytarski was precluded from offering an affirmative defense because of the doctrine of issue preclusion, formerly known as collateral estoppel. The idea being that because much of the testimony had been previously offered in the family law case regarding the paternity of Ms. Przytarski's daughter, she should not be able to rely on it in this case. It was repeatedly asserted that she was trying to relitigate issues from the family law case. The issues in the family law case were: 1) the paternity of the child, which had been established; and 2) the custody and support arrangements for the child. No decision in this case would in anyway impact past decisions on those two issues. Nor would Ms. Przytarski have wanted to do so; the family court has given her primary placement of her daughter.

The doctrine of issue preclusion holds that once a court has decided an issue of fact or law necessary to its judgment, that decision *may* preclude relitigation of that issue in another case involving at least one of the same parties. Allen v. McCurry, 449 U.S. 90, 94 (1980); Aldrich v. LIRC, 2012 WI 53, ¶ 88,

341 Wis. 2d 36, 814 N.W.2d 433. The applicability of issue preclusion "is a mixed question of law and fact in which legal issues predominate." Aldrich, 2012 WI 53, ¶ 91. "The first step in the analysis of issue preclusion is to 'determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment.'" Id., ¶ 97. The second step in the analysis calls for the court to decide whether, given the particular circumstances of the second case, the application of issue preclusion would be consistent with fundamental fairness. Id., ¶ 98.[2]

In this case, given the differing nature of the cases and what was at stake for Ms. Przytarski (a criminal conviction and possible prison time), fundamental fairness would not have permitted the Circuit Court to apply issue preclusion in her criminal case. That said, the Circuit Court should not have even reached the question of fundamental fairness. That is because while some of the testimony that would have been offered by Ms. Przytarski was previously offered in the family court case, that has no bearing on the factual or legal findings in this case. The family court never determined if Mr. Vallejos was causing his daughter to engage

[2] In assessing fundamental fairness, the court may consider five factors: 1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law; 2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law; 3) Do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issue; 4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and 5) Are matters of public policy and individual circumstances involved that would render the application of issue preclusion to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? Aldrich, 2012 WI 53, ¶ 110.

in self harm. It never decided if Ms. Przytarski believed that was the case. It never examined whether such a belief was reasonable. Finally, it never looked at the question of whether such a belief could justify noncompliance with custody orders. None of the key factual or legal decisions necessary in this case had been previously decided. Issue preclusion does not prevent testimony from overlapping in multiple legally distinct cases. If a woman is raped by her husband and then sues for divorce, testimony regarding the sexual assault can and should be used in both the divorce proceedings and criminal case against the husband. Issue preclusion is meant to prevent the relitigation of the exact same dispute in different cases. That is not what was being attempted here, and this doctrine does not deserve a place in the discussion over whether or not to permit testimony regarding the affirmative defense allowed by Wisconsin Statutes section 948.31(4)(a)1.

II. Ms. Przytarski's made the necessary showing in her post-conviction motion to obtain a Machner Hearing.

The Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution guarantee criminal defendants the right to counsel. An inherent aspect of this right is one's ability to represented by an effective and competent attorney. State v. Trawitzki, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801. In order for a claim of ineffective assistance of counsel to prevail, a defendant must prove that his or her trial counsel's performance was deficient and that the deficiency was prejudicial. Strickland v. Washington, 466

U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." Id. at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The question of whether or not prejudice can be shown is case specific. In some guilty plea cases, the inquiry into whether or not the defendant was prejudiced will closely resemble the analysis that would have occurred if the case had gone to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). However, in cases where the alleged ineffectiveness turns on misinformation provided by trail counsel that induced a defendant to enter a guilty plea, prejudice can be demonstrated by just showing that, but for counsel's errors, the defendant would have insisted on a trial. Id. at 58-59. Ms. Przytarski clearly made that showing with her post-conviction motion and supporting affidavit. She was provided with clearly incorrect information about her ability to appeal. By providing this type of misinformation, Attorney Carson failed to meet the most basic professional standards. Criminal defendants expect accurate information from their attorneys regarding the impact of a guilty plea; this is a reasonable expectation. She also showed that she was prejudiced by her trial counsel's deficient performance because she would not have entered a plea had she known doing so waived most

of her direct appeal rights, particularly the right to appeal the Circuit Court's decision to preclude her from asserting an affirmative defense.

To prevail on a claim of ineffective assistance of counsel, Ms. Przytarski need only show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id. Ms. Przytarski does not need to prove that the outcome would have been different by a "preponderance of the evidence" or by a "more likely than not" standard. Id. at 693-94. Undermining confidence in the outcome is enough. Ms. Przytarski showed that the outcome would have been different by merely showing that she would have demanded a trial, instead of entering a plea.

Even if it were necessary to show the outcome of a trial would have been different, it is wrong for the Circuit Court to limit this analysis to the likely outcome of the trial without Ms. Przytarski being able to assert an affirmative defense. It is clear that Judge Flanagan does not believe the affirmative defense should have been allowed, but Ms. Przytarski's argument centers on that being incorrect and that her trial attorney's failings prevented her from getting meaningful review of the Circuit Court's decision about the affirmative defense. The proper analysis would actually be whether there is a reasonable probability that the outcome of the case would have been different if Ms. Przytarski had been able to present the proffered affirmative defense at trial. There is certainly a

reasonable chance that it would have been. While it is difficult to predict hypothetical trial outcomes, a Circuit Court should avoid letting its own preconceived opinions about the case influence its view. As the United States Supreme Court explained in Strickland, these predictions should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." 466 U.S. at 695.

When a defendant pursues post-conviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony at a post-conviction hearing. *See* State v. Machner, 92 Wis. 2d 797, 804, 285 N.W.2d 905. Nonetheless, a defendant is not automatically entitled to a Machner hearing upon filing a post-conviction motion that alleges ineffective assistance of counsel. State v. Curtis, 218 Wis. 2d 550, 555, n. 3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. State v. Allen, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Ms. Przytarski's motion did allege facts that, if true, would entitle her to relief. She would not have entered a plea if she had not been misinformed about her appellate rights. That alone, is enough to justify the relief sought. Furthermore, if she were able to appeal and the appellate court were to permit her to assert an affirmative defense at trial, the outcome could be radically different, namely an acquittal. At a bare minimum, Ms. Przytarski should have been granted the ability make a record on her post-conviction motion at a Machner hearing.

III. Ms. Przytarski should be permitted to withdraw her plea in this matter because of the ineffective assistance of her trial counsel.

After sentencing, a defendant who seeks to withdraw a guilty or no contest plea has the burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. State v. McCallum, 208 Wis.2d 463, 473, 561 N.W.2d 707 (1997); State v. Hoppe, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794. A defendant may demonstrate manifest injustice by showing that the no contest or guilty plea was not made knowingly, intelligently, and voluntarily or that the defendant was denied the effective assistance of counsel. Hoppe, ¶ 60; State v. Wesley, 2009 WI App 118, ¶22, 321 Wis. 2d 151, 772 N.W.2d 232. As discussed above, when a defendant alleges ineffective assistance as a basis to withdraw a plea, the defendant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. Strickland , 466 U.S. at 694; Wesley, 209 WI App 188, ¶23. Applying the ineffective assistance standard in the plea withdrawal context, a defendant may establish a manifest injustice by showing that counsel's conduct or advice was objectively unreasonable and that, but for counsel's error, the defendant would not have entered the plea. Hill v. Lockhart, 474 U.S. at 59; State v. Bentley, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).

Ms. Przytarski's guilty plea was not knowingly, intelligently, and voluntarily made. Instead, her decision to enter a plea in this matter was based upon incorrect information provided to her by trial counsel regarding her ability to

appeal the court's decision regarding an affirmative defense. Namely, she was told that she would be able to appeal the Court's decision preventing her from raising an affirmative defense at trial. This is simply not true, and a plea conditioned on such incorrect information cannot possible be knowingly and intelligently made. Interestingly, the Circuit Court spends almost a page of its order denying the post-conviction motion discussing how, as part of the plea, Ms. Przytarski indicated she was waiving any possible defenses. This waiver is largely meaningless. At that point, the Circuit Court had already prohibited her from offering her only defense, what remaining defense did she have to waive? Also, these words, which are a standard part of most plea colloquies, cannot be imbued with the importance ascribed to them by Judge Flanagan. They do not mean that a person is giving up any right to appeal. Indeed, it is very common for a defendant who has had a motion to suppress denied to enter a plea and then appeal. This is permissible under Wisconsin Statutes section 971.31(10). In this case, the motion to exclude evidence was brought by the State, not the defense, and it was granted, not denied. However, the practical effect is not so dissimilar, i.e. the Court ruled against a defendant on a pretrial motion that was largely dispositive.

A defendant's right to effective assistance of counsel extends beyond that small proportion of individuals who have trials. McMann v. Richardson, 397 U.S. 759, 771 (1970). In recognition of the importance of plea negotiations and decision to enter a guilty plea in a criminal case, the United States Supreme Court has explicitly stated that criminal defendants are entitled effective assistance of

competent counsel prior to deciding whether to enter a guilty or no contest plea. Id. Counsel's failure to provide the defendant with the information needed to make an intelligent and knowing decision regarding the acceptance of a plea agreement has been found to be prejudicially deficient performance. State v. Ludwig, 124 Wis. 2d 600, 610-11, 369 N.W.2d 722 (1985). Ineffective assistance of counsel occurs when the law or counsel's duty is clear and reasonable counsel should have known to raise the issue at hand. State v. McMahon, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994).

As discussed at length above, the legislature provided affirmative defenses to the original charge of interference with child custody. Wis. Stat. § 948.31(4)(a). The State moved this Court for an order prohibiting Ms. Przytarski from offering evidence in support of her contention that she did not comply with the custody order because there was a threat of physical harm to her daughter. The State's motion to preclude such evidence was granted. This substantially undermined Ms. Przytarski's chances of success at trial. Prior to that point, Ms. Przytarski had given no indication that she wanted anything except a trial. Following this devastating ruling and in consultation with her trial counsel, she made the decision to enter a plea to the reduced charge of contempt of court. In discussing the decision to enter or plea, Attorney Carson was aware of Ms. Przytarski's desire to appeal the Court's decision to grant the State's motion regarding the affirmative defense. He assured her that she could enter a plea and then pursue an appeal

challenging that ruling. Indeed, her decision to enter a plea was based on this advice.

The information provided to Ms. Przytarski about the possibility of a direct appeal regarding the affirmative defense was incorrect. A guilty plea, like the one entered in this case, forfeits the right to raise anything on appeal, except for non-jurisdictional defects or defenses. State v. Kelty, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886. Attorney Carson's failure to provide accurate information regarding the impact of a plea on future appellate prospects was clearly deficient performance. Indeed, under the standard enunciated by McMahon, it could be argued that it would have been ineffective assistance for Attorney Carson to merely neglect to warn Ms. Przytarski about how a plea would impact her ability to appeal the decision regarding her affirmative defense. However, Attorney Carson's error in this case was actually far more egregious. He did not just fail to discuss the impact of the plea on something that he knew was important to Ms. Przytarski, he actually misinformed her of a plea's impact. Criminal defendants expect to be counseled correctly on the impact of a plea, and Attorney Carson fell below the minimal performance standards expected of lawyers. While attorneys are not expected to provide detailed advice regarding the impact of an plea on appellate relief to each and every client, it is expected that they would not misinform a client about this issue when they are aware of the importance of an appeal to that client.

There is no doubt that Ms. Przytarski was prejudiced by Attorney Carson's failure to provide correct information about her ability to appeal the Circuit Court's decision regarding the affirmative defense. To show prejudice, a defendant need only demonstrate to the court that the outcome is suspect, not that the final result would have necessarily been different. Strickland, 466 U.S. at 693-94. As the United States Supreme Court held in Hill v. Lockhart, Ms. Przytarski can meet this burden by merely showing that she would have insisted upon having a trial if she had been properly advised of the limitations on appellate rights by Attorney Carson. She did that, but that standard was ignored by the Circuit Court when it denied her post-conviction motion. Instead, Judge Flanagan focused on how Ms. Przytarski would have been unlikely to prevail at trial, although the Court glosses over the fact that Ms. Przytarski would have almost assuredly lost at trial because of the Court's own ruling on the proffered affirmative defense.

Furthermore, if the Circuit Court were reversed on appeal and Ms. Przytarski was permitted to offer evidence that she believed there was a threat of physical harm to her daughter, she would have a realistic chance of prevailing at trial. It is not a certainty, but it never could be, and certainty is not what is demanded by the law. Instead, there need only be a reasonable probability that the result would be different. An affirmative defense provides that possibility. That is all that is needed for Ms. Przytarski's motion to be granted. In cases where ineffective assistance of counsel occurred during the pretrial stage, including the time period in which a plea is considered, the appropriate remedy is to grant a

defendant a new opportunity for trial. State v. Lentowski, 212 Wis. 2d 849, 857, 569 N.W.2d 758 (Ct. App. 1997).

Even without a finding of ineffective assistance of trail counsel, Ms. Przytarski should still be permitted to withdraw her plea to correct a manifest injustice. Bentley, 548 N.W.2d at 54 and State v. Nawrocke, 193 Wis. 2d 373, 378-79, 534 N.W.2d 624 (Ct. App. 1995). The manifest injustice test is rooted in constitutional concepts and requires a showing of a serious flaw in the fundamental integrity of the plea. Nawrocke, 193 Wis. 2d at 379. Ms. Przytarski has the burden of showing a manifest injustice by clear and convincing evidence. Id. She may do so by showing that she did not knowingly, intelligently, and voluntarily enter her plea. State v. Tochinski, 2002 WI 56, ¶ 15, 253 Wis. 2d 38, 644 N.W.2d 891. The decision whether to enter into a plea agreement or go to trial is exclusively reserved for the defendant and cannot be considered a strategic decision left to counsel. State v. Felton, 110 Wis. 2d 485, 514, 329 N.W.2d 161 (1982).

In this case, Ms. Przytarski decision to enter a plea was predicated on her mistaken belief that she could still appeal the Circuit Court's decision regarding her affirmative defense. A plea that is based on a fundamental misunderstanding of how such a plea would impact a defendant and her future chances for further litigation cannot possibly be viewed as knowingly and intelligently made. The only reason that Ms. Przytarski entered a plea was because she had an incorrect understanding of what that plea would mean. If she had understood that entering a

guilty plea would waive a direct appeal on the affirmative defense issue, she would not have entered a plea. It is necessary to permit the withdrawal of her plea simply so that she can have the opportunity to make a decision regarding her plea that is fully informed.

CONCLUSION

For all of the reasons stated in this brief, the judgment of the trial court should be reversed. Ms Przytarski respectfully asks this action be remanded to circuit court where she should be permitted to withdraw her plea, granted a trial, and allowed to present evidence to support her affirmative defense.

Dated this 7th day of July, 2014.

Respectfully Submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,917 words.

I also certify I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this 7th day of July, 2014.

Signed,

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