RECEIVED
10-03-2014
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2014AP001019-CR

In re: the findings of contempt:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEPHANIE M. PRZYTARSKI,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

John T. Chisholm
District Attorney
Milwaukee County

Matthew J. Torbenson
Assistant District Attorney
State Bar No. 1049925
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal Case No. 2014AP001019-CR

In re: the findings of contempt:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEPHANIE M. PRZYTARSKI,

Defendant-Appellant.

ON APPEAL FROM FINAL ORDERS ENTERED ON MAY 7, 2014, AND APRIL 17, 2014, IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1) Should the trial court have allowed Ms. Przytarski to present an affirmative defense to the charge of interference with child custody when Ms. Przytarski failed to provide a sufficient offer of proof?

   The trial court answered: No

2) Should the trial court have allowed Ms. Przytarski to present an affirmative defense to the charge of interference with child custody when Ms. Przytarski's evidence consisted solely of evidence of emotional harm to the child?

   The trial court answered: No

3) Was Ms. Przytarski entitled to a *Machner* hearing when Ms. Przytarski failed to meet the prejudice prong of the S*trickland* test?

   The trial court answered: No

4) Was Ms. Przytarski prejudiced by any alleged deficient performance by trial counsel?

   The trial court answered: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not necessary in this case. This case does not involve any novel legal issues, but rather calls upon the court to analyze specific facts and apply previously developed legal standards.

The State does not request oral argument as the legal issue involved can be adequately addressed through the written briefs.

STATEMENT OF THE CASE

From January 4, 2011, through October 28, 2011, Waukesha County Circuit Court Judge Michael O. Bohren presided over ten days of hearings on the issue of legal custody and placement of S.V-K., the child in common between Ted Vallejos and Stephanie Przytarski. (R15:3-4).

After conducting lengthy hearings on the issue of legal custody and placement of S.V-K., the Honorable Michael O.

Bohren entered an order on March 26, 2012, awarding Ted Vallejos expanded placement of S.V-K. (R15:5). Within Judge Bohren's order, the court noted that it was not surprising that S.V-K. was experiencing issues surrounding custody exchanges given Ms. Przytarski's efforts to thwart placement with Ted Vallejos. (R15:3).

On December 25, 2012, Ted Vallejos traveled from his home state of New Jersey to Wisconsin to exercise his custody and placement rights with his six-year-old daughter, S.V-K. (R2:1). Pursuant to the family court order issued by Judge Bohren on March 26, 2012, Ted Vallejos was to have placement of S.V-K. from noon on December 25, 2012, through 5:00 P.M. on December 31, 2012. (R2:1).

The family court order required Ted Vallejos and Ms. Przytarski to exchange physical custody of S.V-K. at the Waukesha County Sheriff's Department. (R2:1).

On December 25, 2012, the Ms. Przytarski failed to appear at the Waukesha County Sheriff's Department with S.V-K. (R2:1). Ms. Przytarski did not provide notice to Ted Vallejos that Ms. Przytarski was intent on disobeying the family court order. (R2:1).

On the morning of December 26, 2012, Ted Vallejos contacted the City of Milwaukee Police Department to report Ms. Przytarski's failure to comply with the terms of the family court order. (R2:1). City of Milwaukee Police Officers Marcie Adameak and David Class proceeded to Ms. Przytarski's residence to locate S.V-K. (R2:1). Upon arriving at the residence, Officer Class looked inside a window and observed S.V-K. within the residence. (R2:2).

As Officers Adameak and Class attempted to decipher if there was an adult inside the residence supervising S.V-K., Ms. Przytarski's father, Gary Kramschuster, arrived on scene and accused the officers of terrorizing S.V-K. (R2:2). Ms. Przytarski's husband, Benjamin Przytarski, was inside the residence and refused to open the door. (R2:2). As a result, the Milwaukee Police Department ordered the matter into the Milwaukee County District Attorney's Office for review on December 27, 2012. (R2:2).

On December 27, 2012, Ms. Przytarski met with Milwaukee County Assistant District Attorney Jennifer Hanson. (R2:2). Ms. Przytarski was advised of the *Miranda* warnings and voluntarily agreed to provide a statement to Assistant District Attorney Hanson. (R2:2). After hearing Ms. Przytarski's version of events, Assistant District Attorney Hanson asked Ms. Przytarski to cooperate with the family court order and turn S.V-K. over to Ted Vallejos. (R2:2). Ms. Przytarski refused to abide by the terms of the family court order. (R2:2). As a result, Ms. Przytarski was taken into police custody and charged with Interference with Child Custody, contrary to Wisconsin State Statute § 948.31(1)(b). (R2:1-2).

On December 29, 2012, Ms. Przytarski made her initial appearance in Milwaukee County case 2012CF6183. (R31:3-14). During the initial appearance Ms. Przytarski was ordered to have no contact with Ted Vallejos or S.V-K. (R31:9-10).

On January 2, 2013, Ms. Przytarski filed a *pro se* motion to dismiss the criminal charges in Milwaukee County case 2012CF6183. (R5:1-21). Ms. Przytarski's motion asserted that Ms. Przytarski withheld S.V-K. from Ted Vallejos to protect S.V-K. from physical harm. (R5:1-2). Ms. Przytarski's motion failed to allege any threat of physical harm to S.V-K. that was directly correlated to conduct by Ted Vallejos. (R5:1-21).

On January 8, 2013, Milwaukee County case 2012CF6183 was scheduled for a preliminary hearing. (R32:2). The matter was spun from the assigned judge, the Honorable Mel Flanagan, to the Honorable Mary Triggiano, due to Judge Flanagan starting a trial. (R32:1-5; R33:1-20). Prior to the commencement of the preliminary hearing, the Honorable Mary Triggiano urged Ms. Przytarski to hire counsel. (R33:3-5). Ms. Przytarski chose to continue *pro se.* (R33:5).

The State called a single witness during the preliminary hearing, City of Milwaukee Police Officer Marcie Adameak. (R33:8-15). After the State rested, Ms. Przytarski attempted to challenge the validity of the underlying family court order by asserting the order was under appeal. (R33:15-17).

In response Judge Triggiano explained to Ms. Przytarski that an appeal did not stay the underlying family court order.

(R33:17-18;R34:5). Ms. Przytarski proceeded to question Officer Adameak. (R34:8). Almost every question Ms. Przytarski asked was objected to by the State. (R34:8-10). Every objection of the State was sustained by the trial court. (R34:8-10).

As a result, the trial court urged Ms. Przytarski to explore hiring counsel. (R34:11-12,17). With the agreement of Ms. Przytarski, the trial court found cause to adjourn the preliminary hearing until February 1, 2013, to provide Ms. Przytarski with sufficient time to find counsel. (R34:17-22).

On February 1, 2013, Ms. Przytarski appeared with Attorney Christopher Carson. (R39:5-51). Attorney Carson filed a motion to modify the no contact order between Ms. Przytarski and S.V-K.(R6:1-3). After hearing argument on Attorney Carson's motion, the Honorable Mel Flanagan denied Ms. Przytarski's request to modify the no contact order.(R39:5-35).

Assistant District Attorney Abbey Marzick informed the trial court that procedurally the preliminary hearing had not been completed. (R39:36). Since Judge Flanagan did not preside over the preliminary hearing on January 8, 2013, Judge Flanagan attempted to review transcripts of the testimony from that date. (R39:40-41).

Upon reviewing the transcripts, Judge Flanagan noted that the transcript containing most of the testimony from Officer Marcie Adameak was not prepared. (R39:41). Consequently, Judge Flanagan ordered a transcript of the proceedings from the morning of January 8, 2013, and adjourned the matter to February 28, 2013, to conclude the preliminary hearing. (R39:41-51). Attorney Carson agreed that a review of the transcripts was necessary to complete the preliminary hearing. (R39:40).

On February 28, 2013, the trial court gave Attorney Christopher Carson the opportunity to present evidence prior to the conclusion of the preliminary hearing. (R35:6). For strategic reasons Attorney Carson chose not to present evidence. (R35:6). The trial court reviewed the transcripts from the testimony taken on January 8, 2013, and on motion of the

State, bound Ms. Przytarski over for trial before the circuit court. (R35:6-9).

The State filed a motion to prohibit Ms. Przytarski from asserting an affirmative defense at trial, relying in large part on *State v. McCoy,* 143 Wis. 2d 274, 421 N.W.2d 107 (1988). (R8:1-7). Ms. Przytarski requested time to respond to the State's motion. (R35:15). On agreement of the parties, the trial court set the matter for a final pretrial and jury trial. (R35:16-17).

On March 14, 2013, Ms. Przytarski filed a response motion to the State's motion to prohibit an affirmative defense. (R10:1-3). Within Appellant's response, Ms. Przytarski contended, without specificity, that S.V-K. engaged in acts of self-harm surrounding times of physical placement with Ted Vallejos. (R10:1-3).

Each act of alleged self-harm occurred in Ms. Przytarski's care.(R10:3). Significantly, Ms. Przytarski's motion contained no evidence to connect the alleged acts of self-harm to conduct by Ted Vallejos. (R10:1-3).

During the final pretrial hearing held on April 10, 2013, the trial court expressed concern with the lack of any causal nexus between S.V-K.'s alleged acts of self-harm and any conduct by Ted Vallejos. (R36:11, 20-23). Nevertheless, the trial court provided Ms. Przytarski with an opportunity to supplement the defense brief with additional documentation. (R36:26-33).

In response, Ms. Przytarski provided the trial court with numerous materials, all of which substantially predated the events of December 26, 2012:

(1) A three page letter authored by Dr. Charlene Kavanagh and dated July, 2007;

(2) A psychological evaluation of Ted Vallejos by Dr. Kavanagh, dated January 2, 2011;

(3) A five page letter from Dr. Marc Ackerman to the family court Guardian Ad Litem, Attorney Laura Schwefel, dated December 8, 2007;

(4) A compact disc containing video evidence of prior custody transfers involving S.V-K. (R15:2).

After reviewing the motions and submissions of both parties, the trial court issued a seven page decision outlining the trial court's reasoning and decision to prohibit Ms. Przytarski from asserting an affirmative defense at trial under Wisconsin State Statute § 948.31(4). (R15:1-7).

In reaching its decision, the trial court noted that the family court order of March 26, 2012, recognized that it was not surprising that S.V-K. experienced issues surrounding placement exchanges given Ms. Przytarski's persistent narrow view of the circumstances and Ms. Przytarski's repeated actions to thwart placement of S.V-K. with the father. (R15:3).

The trial court further recognized that every shred of psychological evidence Ms. Przytarski submitted to correlate S.V-K.'s purported acts of self-harm to placement with Ted Vallejos was dated and irrelevant given that none of the evaluations even addressed S.V-K's purported self-harming behavior or its genesis. (R15:4-7).

The trial court concluded that Ms. Przytarski's affirmative defense was based on Ms. Przytarski's fear that S.V-K. would suffer emotional harm as a result of placement with Ted Vallejos, and emotional harm is not a defense to interference with child custody under Wisconsin law. (R15:5).

As a result of the trial court's ruling, on May 6, 2013, Ms. Przytarski chose to waive her right to a jury trial. (R37:5-13). Ms. Przytarski entered a plea to an amended charge of criminal contempt of court, contrary to Wisconsin State Statutes §§ 785.03(1)(b) and 785.04(2)(a). (R37:5-13). During the plea colloquy, the trial court ensured that Ms. Przytarski understood that Ms. Przytarski was giving up the right to present a defense. (R37:9). Ms. Przytarski also signed the plea questionnaire form and addendum acknowledging that Ms. Przytarski knew by pleading guilty, Ms. Przytarski was giving up the right to present a defense. (R18:3).

On May 7, 2013, the court placed Ms. Przytarski on probation with a number of specific conditions, including a mental health evaluation. (R38:24-45; R20:1-2).

On March 31, 2014, Ms. Przytarski filed a motion for post-conviction relief, asserting that Ms. Przytarski should be allowed to withdraw her guilty plea based on ineffective assistance of trial counsel. (R46).

On April 17, 2014, the Honorable Mel Flanagan issued a written order denying Ms. Przytarski's request for post-conviction relief without a *Machner* hearing. (R48). Ms. Przytarski now appeals.

ARGUMENT

I. THE TRIAL COURT PROPERLY PROHIBITED MS. PRZYTARSKI FROM ASSERTING AN AFFIRMATIVE DEFENSE AT TRIAL WHEN THERE WAS NO SUPPORT FOR THE AFFIRMATIVE DEFENSE IN FACT OR LAW

A. STANDARD OF REVIEW

A trial court's decision to prohibit a defendant from asserting an affirmative defense at trial is a question of law that requires *de novo* review. *State v. Nollie*, 249 Wis. 2d 538, 638 N.W.2d 280 (2002).

B. MS. PRZYTARSKI FAILED TO MAKE A SUFFICIENT OFFER OF PROOF FOR THE TRIAL COURT TO ALLOW MS. PRZYTARSKI TO PRESENT AN AFFIRMATIVE DEFENSE AT TRIAL

A defendant is not entitled to present an affirmative defense when there is no evidence to support that defense. *State v. Dundon*, 226 Wis. 2d 654, 674-675, 594 N.W.2d 780 (1999). A defendant pursuing an affirmative defense at trial will often have to provide the circuit court with an offer of proof

demonstrating that evidence exists to support the proffered affirmative defense. *Dundon*, 226 Wis. 2d at 674.

When it is clear that a defendant's offer of proof fails to demonstrate that an affirmative defense is applicable, the trial court can exclude evidence relating to the affirmative defense. *Id.*

In this case, Ms. Przytarski has attempted to invoke the statutory privilege to withhold S.V-K. from the father based on broad allegations that S.V-K. engaged in acts of self-harm surrounding past custody exchange dates. Ms. Przytarski's offer of proof failed to provide any casual nexus between any alleged conduct or behavior by Ted Vallejos and S.V-K.'s acts of self-harm.

To be clear, Ms. Przytarski has not alleged any behavior on the part of Ted Vallejos that jeopardized the health, safety, or welfare of S.V-K., other than Ted Vallejos exercising his custody and placement rights with S.V-K. Every act of alleged self-harm occurred while S.V-K. was in Ms. Przytarski's care.

Moreover, Ms. Przytarski failed to provide a shred of evidence connecting S.V-K.'s alleged acts of self-harm to conduct by Ted Vallejos. Ms. Przytarski relied on dated evaluations conducted for the family court that never assessed the genesis of S.V-K.'s alleged self-harming behavior.

Here, historical context is critical. This is a case in which the underlying family court has found that Ms. Przytarski is responsible for the issues that S.V-K. experienced surrounding custody exchanges given Ms. Przytarski's repeated history of thwarting placement with the father.(R15:3).

Given the contentious history between Ms. Przytarski and Ted Vallejos over the issue of legal custody and placement of S.V-K., the question posed to the court is whether Ms. Przytarski is entitled to an affirmative defense when the alleged acts of self-harm occur in Ms. Przytarski's care and the family court has found Ms. Przytarski responsible for creating S.V-K.'s issues surrounding custody and placement exchanges.

Under Wisconsin State Statute § 948.31(4)(a)1., a parent may take action to:

> protect his or her child in a situation in which the parent reasonably believes that there is a threat of physical harm…. to the child.

In this case Ted Vallejos presented no threat of physical harm to S.V-K. Sadly, what has created a situation leading to emotional harm to S.V-K. is the inability of both parents to work together for the betterment of S.V-K. As the Wisconsin Supreme Court so eloquently noted in *State v. McCoy,* 143 Wis. 2d 274, 295, 421 N.W.2d 107 (1988):

> Children unfortunately are often the pawns in the domestic struggles between their parents. One parent may try in various ways to turn a child away from the other parent by ridicule or lies, hoping to deprive the mate, whom they now see as their enemy, of one of life's great treasures, the love and respect of one's own child. Of greater hurt is to be deprived of even the physical presence and company of one's child by the concealment of that child. In either of these situations the child is often bruised and torn mentally and emotionally by the struggle between the natural objects of the child's own affections, their mother and father.

If the court overturns the sound decision of the trial court and allows Ms. Przytarski to present an affirmative defense at trial when all of the alleged acts of the self-harm occur within Ms. Przytarski's care and Ms. Przytarski has failed to provide any causal nexus between the alleged acts of self-harm and conduct by Ted Vallejos, then the flood gates are opened to any parent in a legal custody dispute to create the very harm the parent would later rely on to deprive the other parent of custody and placement with the child. This is the very situation the Wisconsin Supreme Court cautioned against in *McCoy.*

Ms. Przytarski failed to provide the trial court with a sufficient offer of proof demonstrating a reasonable belief that placement with Ted Vallejos presented a threat of physical harm to S.V-K. The trial court was therefore well within its right to deny Ms. Przytarski from presenting an affirmative defense at trial based on *Dundon.*

C. THE TRIAL COURT PROPERLY PREVENTED MS. PRZYTARSKI FROM ASSERTING AN AFFIRMATIVE DEFENSE AT TRIAL WHEN THE ALLEGED HARM TO THE CHILD WAS EMOTIONAL HARM

In *McCoy,* the Wisconsin Supreme Court considered and rejected the argument that the term physical harm encompassed emotional harm. *State v. McCoy*, 143 Wis. 2d 274, 287-288, 294, 421 N.W.2d 107 (1988). In that case, the defendant was convicted at trial of concealing two of his children from the mother. *McCoy,* 143 Wis. 2d at 279-280. On appeal, the defendant asserted that the jury instruction employed by the trial court outlining the affirmative defense to interference with child custody was too narrow because the instruction did not allow a parent to interfere with the custodial rights of another parent in order to prevent emotional harm to a child. *Id.* at 294.

In reaching its decision rejecting the defendant's assertion, the Wisconsin Supreme Court recognized that emotional harm to a child all too often is the result when one parent works to demean the other parent before the child's eyes. *Id.* at 295.

In this case, the State does not dispute that S.V-K. suffered from post-traumatic stress disorder as a result of the inability of the parents to put S.V-K. first. However, the assertion that S.V-K.'s post-traumatic stress disorder manifest into self-harming conduct while in Ms. Przytarski's care does not alter the nature of the harm, nor render the harm solely attributable to the father.

Any alleged self-harming behavior exhibited by S.V-K. was a manifestation of the emotional harm S.V-K. endured as a result of a contentious and ongoing custody dispute. This harm, emotional harm, was precisely the harm the Wisconsin Supreme Court recognized and rejected as cause for one parent to interfere with the custodial rights of another parent.

Ms. Przytarski cannot identify a reasonable threat of physical harm posed by Ted Vallejos to S.V-K. Instead, Ms. Przytarski has attempted to couch S.V-K.'s diagnosed emotional harm as physical harm. The court should follow the

sound logic of the Wisconsin Supreme Court and reject Ms. Przytarski's attempt to recast S.V-K.'s emotional harm into physical harm.

II. MS. PRZYTARSKI WAS NOT ENTITLED TO A *MACHNER* HEARING WHEN THE TRIAL COURT CORRECTLY DETERMINED THAT MS. PRZYTARSKI COULD NOT MEET THE PREJUDICE PRONG OF THE *STRICKLAND* TEST

A criminal defendant has a constitutional right to counsel, which includes the right to effective assistance of counsel. *State v. Trawitzki*, 244 Wis. 2d 523, 547-548, 628 N.W.2d 801 (2001). A defendant who asserts a claim of ineffective assistance of counsel must prove: (a) that trial counsel's performance was deficient; and (b) that the deficient performance of trial counsel prejudiced the defendant. *State v. Johnson*, 153 Wis. 2d 121, 126-127, 449 N.W.2d 845 (1990).

A court may deny a defendant's post-conviction motion without a *Machner* hearing if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Curtis*, 218 Wis. 2d 550, 555, 582 N.W.2d 409 (Ct. App. 1998).

A. STANDARD OF REVIEW

A finding of prejudice requires the court to conclude that but for trial counsel's deficient performance there is a reasonable probability that the outcome at trial would have been different. *State v. Williams*, 296 Wis. 2d 834, 848, 723 N.W.2d 719 (Ct. App. 2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

B. MS. PRZYTARSKI WAS NOT PREJUDICED BY THE PERFORMANCE OF TRIAL COUNSEL

Ms. Przytarski asserts that her decision to plead guilty to an amended charge in this matter was based on incorrect legal

advice from trial counsel that Ms. Przytarski would still be able to appeal the trial court's decision prohibiting Ms. Przytarski from asserting an affirmative defense at trial.

As the trial court noted in its decision, Ms. Przytarski acknowledged both within her plea colloquy and within the plea questionnaire waiver form, that by pleading guilty Ms. Przytarski was giving up her right to a jury trial and the right to present a defense. (R48: 2; R37:9, R18:3).

Even if one presumes that trial counsel provided Ms. Przytarski with incorrect legal advice, it does not change the fact that Ms. Przytarski was not entitled to present an affirmative defense at trial based on emotional harm to S.V-K. Without the ability to present an affirmative defense at trial, Ms. Przytarski had no defense to the charged crime.

Additionally, even if Ms. Przytarski was entitled to present an affirmative defense based on emotional harm, the trial court concluded that Ms. Przytarski's offer of proof was insufficient to establish a causal connection between the emotional harm to S.V-K. and placement of S.V-K. with Ted Vallejos. (R15:5-6; R36:11, 20-23).

Thus, Ms. Przytarski cannot establish a reasonable probability that, but for trial counsel's performance, the outcome would have been different. Ms. Przytarski has no ability to present an affirmative defense under Wisconsin law. Had the matter proceeded to trial without the ability for Ms. Przytarski to present an affirmative defense, Ms. Przytarski would in all likelihood stand convicted of a felony offense.

Ms. Przytarski asks the court to consider the motion to withdraw a plea in a vacuum, without assessing Ms. Przytarski's likelihood of success on the merits of her appeal. However, Ms. Przytarski's insufficient offer of proof combined with the fact that Wisconsin law prohibits a parent from arguing emotional harm as a defense to a parent withholding a child in violation of a family court order demonstrates that Ms. Przytarski is not likely to prevail on the merits of her appeal.

III. MS. PRZYTARSKI CANNOT ESTABLISH A MANIFEST INJUSTICE IN THIS CASE

A. STANDARD OF REVIEW

A defendant who seeks to withdraw a guilty plea after sentencing must establish by clear and convincing evidence that the trial court should permit the defendant to withdraw her plea to correct a "manifest injustice." *State v. Booth*, 142 Wis. 2d 232, 235, 237, 418 N.W.2d 20, 21, 22 (Ct. App. 1987). The "manifest injustice" test is met if a defendant was denied the effective assistance of counsel. *State v. Rock*, 92 Wis. 2d 554, 558-559, 285 N.W.2d 739 (1979).

B. MS. PRZYTARSKI WAS NOT PREJUDICED BY TRIAL COUNSEL'S ALLEGED ERRONEOUS ADVICE

Even if one presumes for arguments sake that trial counsel provided erroneous advice to Ms. Przytarski regarding Ms. Przytarski's ability to appeal the trial court's ruling prohibiting an affirmative defense post entry of a guilty plea, Ms. Przytarski cannot demonstrate prejudice in this case.

Ms. Przytarski asserts that had she known that a guilty plea would have prohibited an appeal of the trial court's ruling, Ms. Przytarski never would have entered a plea.

In an analogous case, *State v. Bentley*, 201 Wis. 2d 303, 306-307, 548 N.W.2d 50 (1996), the defendant filed a motion for post-conviction relief contending that trial counsel erroneously advised the defendant of an incorrect minimum parole eligibility date. The defendant's motion for post-conviction relief asserted that had the defendant been properly informed of the correct minimum parole eligibility date, the defendant would not have entered guilty pleas. *Bentley*, 201 Wis. 2d at 316.

In *Bentley*, the Wisconsin Supreme Court held that "[a] 'bare-bones allegation' that a defendant would have pled differently 'is no more than a conclusory allegation' and … not sufficient to require the trial court to direct that an evidentiary hearing be conducted." *Bentley*, 201 Wis. 2d at 316 (*quoting*

Smith v. State, 60 Wis. 2d 373, 380, 210 N.W.2d 678 (1973)). In that case, the Wisconsin Supreme Court noted that the defendant failed to provide any factually specific circumstances as to why the defendant placed a special emphasis on the parole eligibility date when making the decision to enter guilty pleas. *Id.* at 317.

Like the facts in *Bentley*, in this case Ms. Przytarski makes a bare-bones assertion that had Ms. Przytarski known that entering a guilty plea foreclosed Ms. Przytarski's right to appeal the trial court's ruling on the ability to present an affirmative defense, Ms. Przytarski never would have entered a plea.

However, a review of the plea and sentencing transcripts demonstrates that Ms. Przytarski made the strategic decision to enter a guilty plea hoping the trial court would change its position on the no contact order between Ms. Przytarski and S.V-K. (R37:7,14-21).

Ms. Przytarski further acknowledged within the plea colloquy that by entering a plea, Ms. Przytarski was giving up her right to pursue a defense to the charged conduct. (R:37:9).

Moreover, Ms. Przytarski's signature on the plea questionnaire form demonstrates Ms. Przytarski's acknowledgement that by pleading guilty, Ms. Przytarski was giving up any defense to the charged conduct.

Finally, Ms. Przytarski, through trial counsel, acknowledged that absent the ability to present an affirmative defense, Ms. Przytarski had no defense to the charged conduct at trial. (R36:30).

Here, once again, Ms. Przytarski seeks the court to examine the issue of prejudice with blinders on towards Ms. Przytarski's likelihood of success on the merits of Ms. Przytarski's purported affirmative defense. The fact is that Ms. Przytarski was not entitled to an affirmative defense at trial because Ms. Przytarski did not provide a sufficient offer of proof for the affirmative defense and failed to establish a threat of physical harm to S.V-K. that was directly attributable to Ted Vallejos. Ms. Przytarski's motion should therefore be denied.

CONCLUSION

The court should deny Ms. Przytarski's appeal in this matter and uphold the sound decisions of the trial court. Ms. Przytarski failed to provide the trial court with a sufficient offer of proof allowing Ms. Przytarski to present an affirmative defense at trial.

Additionally, Ms. Przytarski is not entitled to an affirmative defense under Wisconsin law when the alleged harm to S.V-K. was emotional harm.

Finally, Ms. Przytarski was not prejudiced by trial counsel's representation since Ms. Przytarski was not entitled to present an affirmative defense at trial. For all of these reasons, Ms. Przytarski's appeal should be denied by the Court.

Dated this _____ day of October, 2014.

Respectfully submitted,

JOHN T. CHISHOLM
District Attorney
Milwaukee County

_____
Matthew J. Torbenson
Assistant District Attorney
State Bar No. 1049925

CERTIFICATION

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 word count of this brief is 4,322.

_____ _____

Date Matthew J. Torbenson
Assistant District Attorney
State Bar No. 1049925

CERTIFICATE OF 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 s. 809.19 (12). I further certify that:

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

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

_____ _____

Date Matthew J. Torbenson
Assistant District Attorney
State Bar No. 1049925

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.