STATE OF WISCONSIN

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

DISTRICT III

Case No. 2014AP1043-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN M. CLARMONT,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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On appeal from the Circuit Court
of Oconto County, Hon. Jay N. Conley,
Circuit Judge, presiding.

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ISSUE FOR REVIEW

1. Has the defendant shown a reasonable probability he would have rejected the plea offer and insisted on going to trial had trial counsel obtained evidence proving a defense to the charge?

> The Trial Court Answered: The trial court did not specifically address this question but denied the defendant's motion to withdraw his plea.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE[1]

Shaun and Dodie Clarmont were in the middle of an acrimonious divorce and custody battle when Dodie reported there were marijuana plants in her basement that belonged to her estranged husband, Shaun Clarmont ("Clarmont"). (24:19, 21). She also accused Clarmont of kicking her in the leg four days earlier. As a result, Clarmont was charged with one felony count of manufacturing THC, and four misdemeanors: possession of drug paraphernalia, battery; disorderly conduct; and bail jumping.[2] (See Complaint, Oconto County Case No. 12 CF 188; A:22-27). Clarmont was arrested and on October 17, 2012, was released on bond. As a condition of bond, Clarmont was prohibited from having any contact with Dodie.

On October 19, 2012, Dodie reported to the Oconto County Sheriff's Department that Clarmont had sent her an email dated October 18, 2012, contrary to the provisions of his bond in 12 CF 188. A sheriff's deputy viewed the email on Dodie's computer and had her forward it to his county

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1 The Statement of the Case and the Statement of Facts are combined.

2 Contrary to Wis. Stats. § 961.41(1)(h)2; 961.573(1); 961.19(1); 947.01(1); and 946.49(1)(a), respectively. See Oconto County Case No. 12CF188. The bail jumping charge was dropped when the underlying Outagamie County disorderly conduct charge--also from an allegation made by Dodie--was reduced to a forfeiture. (24:19, 22).

email account. On October 30, 2012, Clarmont was charged with felony bail jumping--the sole charge in this case.

Clarmont had already moved out of the marital home[3] and was living at his own residence when these accusations were made. (24:21). He was, however, still using the same AT&T email account he had when he was living with Dodie. (47:53). He found the October 18, 2012, email to Dodie in the "sent" file of his email account. (47:19). A review of the routing header showed the originating IP address was not consistent with Clarmont's IP address. (32; 34; A:19, 20).[4]

Clarmont told Froelich he believed that Dodie had accessed his email account from their home computer and sent the email to herself in order to falsely accuse him of violating his bond. (47:38). The computer located at Dodie's residence was the same computer Clarmont had been using before he moved out, and it was set up to auto-fill the username and password for his email account. (47:53). He provided a copy of the header to Froelich in November of 2012, and specifically asked him to investigate the source of the originating IP number to determine whether it could be associated with Dodie's physical address. (47:37, 53; 32 (A:19)).

Clarmont told Froelich he did not send the email. (24:22; 47:37). Froelich was also aware of Clarmont's theory that Dodie had sent the email to herself by accessing Clarmont's email account. (24:22; 47:37, 38). In fact, Froelich had sent a letter to the prosecutor in March of 2013, explaining Clarmont's position. (47:46). Froelich did

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3 There was also an order in effect that restricted Clarmont from any physical presence on Dodie's Lena property. (47:60).

4 Clarmont had a static IP address: 24.106.27.198. (34; A:20).

not specifically "recall" receiving the header from Clarmont, but had no reason to disagree when he was told a copy of the header had been found in his file. (47:37). Likewise, Froelich could not "recall today" whether he agreed to investigate the IP address or not, but did not deny it either. (47:50).

Clarmont wanted a jury trial. (24:22; 47:37, 40). Froelich acknowledged he had no reason to not prepare for trial. (47:40). Froelich also understood that in order to show someone other than Clarmont may have sent the email, he had to identify who had been assigned the originating IP address on the header at the time the email was sent. (47:41). Froelich admitted he made no effort to obtain documentation on the IP address and that by July 19 or 20, 2013, it would have been too late for him to do so. (47:40, 41). He also acknowledged that without the IP documentation, Clarmont's defense that Dodie sent the email to herself would have been reduced to a credibility contest between Clarmont and Dodie. (47:41). Froelich also agreed that had the Century-Link documentation been available on July 22, 2013, it might have had an impact on whether or not Clarmont took the plea offer. (47:43).

Clarmont found out about the State's plea offer the morning of trial.[5] (47:40, 54). The State had offered to dismiss and read-in all the charges in 12 CF 188, and reduce the felony bail jumping in this case to a misdemeanor. The State would also recommend "VIP" probation without any jail time. (12). Clarmont told Froelich he didn't want a plea deal. He wanted to take the case to trial. (47:54).

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5 Froelich claims he sent a letter to Clarmont on July 17, 2013 outlining the terms of the State's plea offer. (47:39). Clarmont testified, however, that he first learned of the plea deal offer on July 22, 2013. (47:54). Given that the letter would have arrived only two or three days before the July 22, 2013, plea hearing, this dispute is not material.

According to Clarmont, Froelich responded, first of all, that he did not want to take the case to trial because of the lack of "financing." (47:54). Clarmont then asked Froelich if he had obtained the IP information Clarmont had requested and Froelich answered "no." (47:54). Clarmont asked how they could go to trial if they didn't have the evidence to show he was telling the truth? Froelich responded he should just "keep [his] mouth shut and take the plea. It was a sweet deal." (47:55, 59). Clarmont was scared and didn't know what to do. At that point, he didn't know if it was even possible to get the IP information. (47:55). Ultimately, Clarmont made the only logical choice he could have made under the circumstances, and that was to accept the plea deal. Without the IP information, he had no choice other than to follow his attorney's advice. (47:59, 60).

Clarmont entered a plea to an amended charge of misdemeanor bail jumping. All the charges contained in 12 CF 188 were dismissed and read-in. The circuit court imposed and stayed a 90-day jail sentence and placed Clarmont on probation for a year. (24:30, 32). The court also imposed a weekend in jail as a condition of probation. (24:32, 33). Clarmont served his jail time in August of 2013. (24:33-34).

Clarmont obtained postconviction counsel and served a subpoena on the internet service provider for Dodie's residence. The subpoena asked the service provider to identify the IP address it had assigned to the internet connection at 4997 State Hwy 22, Lena, Wisconsin at the time the email was sent. (47:9). Century-Link generated a report which showed that IP address 174.124.141.61 had been in use at 4997 State Hwy 22, Lena, WI 54139 from 20:20:19 CDT on October 10, 2012, until 18:10:41 CDT on October 19, 2012. (31:3; 47:10). It was undisputed that Dodie had sole possession of the Lena residence located at 4997 State Highway 22 on October 18, 2012, at 11:19 p.m.

CDT. (1:4; 24:21; 47:60).

On November 18, 2013, Clarmont filed a postconviction motion seeking to withdraw his plea to the misdemeanor bail jumping charge. (27:1-11). He also filed a motion for postconviction discovery seeking an electronic copy of the email he had allegedly sent to Dodie. (28:1-2). A hearing was held on February 10, 2014. At that hearing, Clarmont presented testimony from John Duffy, a computer expert who identified the originating IP address from the email header as174.124.141.61; and Nick Barton, the Century-Link records custodian whose report showed that I.P. address 174.124.141.61 had been assigned to 4997 State Highway 22, Lena, Wisconsin, during the relevant period. (31:3 (A:16); 47:10, 19). Clarmont and his attorney, Christopher Froelich, also testified. (47:33-61).

The State agreed to comply with Clarmont's motion for post-conviction discovery. (47:7). The header on the State's copy of the email confirmed the originating IP address was also174.124.141.61--the same IP address Clarmont had obtained from the email in his "sent" file. (36:3 (A:28)).

The trial court rendered an oral decision on April 24, 2014. (43:3-22 (A:1-12)), The trial court acknowledged the IP address was "powerful evidence" in Clarmont's favor and that it would have been "extremely helpful" to Clarmont on the bail jumping charge. (43:11, 13 (A:1, 3)). The court even went so far as to suggest the D.A.'s office review the matter for possible charges against Dodie. (43:13 (A:3)). Froelich "more or less acknowledged that he should have followed up" on identifying the IP address from the email header. (43:17 (A:7)). Froelich's representation was "arguably deficient,…." (43:20 (A:10)). Had 12 CF 201 been the only charge before the court, "then I think what Mr. Miller says makes a lot of sense, because having your

attorney tell you, if that's the only case and that's scheduled for trial and you are looking down the barrel of a trial tomorrow and your attorney tells you no, I didn't get the evidence that I wanted, I think that's a big deal, and I think that could constitute ineffective assistance of counsel." (43:19; (A:9)).

The circuit court then went on to state, however, that it could not view the bail jumping charge in isolation. Trial counsel represented Clarmont on two files, the final resolution being that Clarmont entered a plea to "one of the least significant of all the charges." (43:15 (A:5)).

> So the first thing I want to suggest is that's a pretty high climb right there, to find Mr. Froelich ineffective when he has six charges, two felonies, two files, and his client ends up with one entire file being dismissed, and then the only remaining charge reduced from a felony to a misdemeanor with a recommendation of VIP probation and no jail. It's kind of hard to, on its face, find ineffective assistance of counsel there.

(43:16 (A:6)).

In addition, Clarmont failed to show he was prejudiced. While both files were scheduled for jury trials on July 22, 2013, case no. 12 CF 188 was in the number 2 position while this case, 12 CF 201, was in the number 3 position. (43:17-18 (A:7-8)). Had there been no plea bargain, the State would have gone ahead with the domestic violence related charges in 12 CF 188 and 12 CF 201 would have been rescheduled. (43:18 (A:8))[6]. Clarmont would not have been prejudiced: "Mr. Froelich then would have had all day to obtain the header information before the next scheduled trial, because those cases were never consolidated by this Court, those cases were two separate files. They

6 The State acknowledged it could not have gone forward on the marijuana charges. (24:19).

were set number two and number three, meaning …they were not heard together, so we were not going to trial and he was not looking down the gun barrel of having to go to trial on the bail jumping without his evidence." (43:19-21 (A:9-11)).

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO OBTAIN HIGHLY EXCULPATORY EVIDENCE ENTITLES CLARMONT TO WITHDRAW HIS PLEA.

1. Legal Standards for plea withdrawal

To withdraw a plea after sentencing, a defendant bears the burden of proving a manifest injustice. *State v. Booth*, 142 Wis.2d 232, 235, 418 N.W.2d 20 (Ct.App.1987); *State v. Schill*, 93 Wis.2d 361, 383, 286 N.W.2d 836 (1980). Ineffective assistance of counsel has been recognized as a manifest injustice requiring a guilty plea to be withdrawn. *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50 (1996).

Wisconsin uses a two-prong test to determine ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991).

The first half of the test considers whether trial counsel's performance was deficient. *Id*. Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 688, 690 (1984). Counsel's performance cannot be based on an "irrational trial tactic" or "caprice rather than judgment." *State v. Domke*, 2011 WI 95, ¶ 49, 337 Wis.2d 268, 805 N.W.2d 364.

If counsel's performance is found to be deficient, the second half of the test considers whether the defendant was prejudiced. In the context of a plea withdraw, a defendant satisfies the prejudice prong when he shows "there is a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). See also *People v. Martinez*, 304 P.3d 529, 567 (Cal., 2013) (A court deciding whether to grant plea withdraw "considers what the defendant would have done, not what the result of the defendant's decision would have been.") A defendant's state of mind is measured at the time he entered his plea. *State v. Van Camp*, 213 Wis.2d 131, 149, 569 N.W.2d 577 (1997). Whether to permit plea withdrawal is within the circuit court's discretion. *Booth*, at 237.

Whether counsel rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶ 14, 247 Wis.2d 466, 634 N.W.2d 325. The circuit court's findings of fact will be upheld unless they are clearly erroneous. However, whether the defendant's proof is sufficient to establish ineffective assistance of counsel is a question of law reviewed without deference to the circuit court's conclusions. *Id*.

The circuit court erred when it determined Clarmont was not prejudiced by his trial counsel's failure to obtain the IP evidence, for the following alternative reasons: 1) the circuit court applied the wrong prejudice standard in that it did not decide whether there was a reasonable probability that, *had* Froelich obtained the IP evidence, Clarmont would not have entered a plea and would have insisted on going to trial; 2) Clarmont has shown there is a reasonable probability he would have insisted on going to trial had Froelich obtained the IP evidence; and, 3) alternatively, the trial court's finding that Clarmont was not prejudiced

because Froelich could have obtained the IP evidence at a later date should be rejected because: a) it's speculative; and, b) it fails to consider Clarmont's state of mind at the time of the plea. Each of these will be addressed in turn.

2. The circuit court applied the wrong legal standard.

The circuit court described the IP evidence as "powerful evidence" in Clarmont's favor that would have been "extremely helpful" on the bail jumping charge. (43:11, 13). Froelich's representation was "arguably deficient" in that he "more or less acknowledged that he should have followed up" on identifying the source of the IP address from the email header. (43:17, 20). Had 12 CF 201 been the only charge before the court, "I think that could constitute ineffective assistance of counsel." (43:19).

The circuit court found a lack of prejudice, however, for two reasons. First, it would be hard to find Froelich ineffective when he negotiated a plea deal where five charges were dismissed and the one charge Clarmont pled to, bail jumping, was reduced to a misdemeanor. (43:16). Second, Clarmont was not prejudiced because the trial in this case, with its single bail jumping charge, would have been rescheduled and therefore Froelich would have had plenty of time to obtain the IP documentation in his defense. Neither of these reasons address the relevant legal question, however, as neither decide whether there is a reasonable probability Clarmont would not have pleaded guilty and instead would have insisted on going to trial *had* Froelich obtained the IP documentation. *Hill*, 474 U.S. at 59; see also *Martinez*, 304 P.3d at 567 (A court deciding whether to allow plea withdraw "considers what the defendant would have done, not what the result of the defendant's decision would have been.").

3. Clarmont has shown a reasonable probability he would have insisted on going to trial had trial counsel obtained the IP evidence.

Clarmont testified he would *not* have entered a no contest plea had Froelich obtained the IP documentation from Century-Link showing the email originated from Dodie's residence. (47:60). This "powerful evidence," as the circuit court described it, was a near absolute defense to the bail jumping charge. In addition, it would have been admissible to undermine Dodie's credibility in 12 CF 188 even if the cases had been tried separately. See *Redmond v. Kingston*, 240 F.3d 590, 592 (7th Cir. 2001) (specific conduct used to show motive or bias material and admissible in Wisconsin); *State v. Missouri*, 2006 WI App 74, ¶ 15, 22, 291 Wis.2d 466, 714 N.W.2d 595 ("[t]he bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely."); *State v. Williamson*, 84 Wis.2d 370, 383-84, 267 N.W.2d 337 (1978) ("other-acts" character evidence can be admitted to show "proof of motive ...[or] intent" under Wis. Stat. §904.04(2)").

The plea deal looked far better on paper than it actually was. The felony was already off the table as both the State and the circuit court acknowledged the marijuana growing charge could not have been prosecuted. (24:19; 43:18)[7]. The remaining charges--all misdemeanors--hinged

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7 The prosecutor described 12 CF 188 as a "comedy of errors" he inherited from his predecessor. (24:18). The misdemeanor bail jumping charge was removed because it was based on a civil citation. The marijuana charge could not be prosecuted because "the suspected controlled substance was never sent to the crime lab or if it was, we never got it back. So I would have proof problems on that." The prosecutor also acknowledged that "in the middle of all this, we have a nasty contested divorce." (24:19).

on Dodie's credibility. Dodie reported the disorderly conduct and battery charges *four days* after they allegedly occurred. Not surprisingly, the complaint fails to mention any witnesses or physical evidence. (A:22-27). In addition, the paraphernalia Dodie *said* belonged to Clarmont was in her exclusive possession when she made the accusation.

The risk calculus that comes with a plea withdraw lies primarily with the defendant. See *United States v. Taylor*, 139 F.3d 924, 933 (DC cir. 1998) (Defendant was entitled to hearing on whether he should be allowed to withdraw "global" plea when he was not informed of a possible defense to one of the charges. Only the defendant can properly assess the risk of rejecting a global plea offer.) The defendant alone knows where his priorities lie, what his risk tolerance is, and which consequences he can live with and which he can't. A non-citizen defendant may reasonably decide, for example, that preserving his right to remain in the United States is far more important to him than any jail sentence. *Commonwealth v. DeJesus*, 468 Mass. 174, 184 (2014).

In this case, the risk calculus was both reasonable and rational. Clarmont stood a good chance of convincing a jury that none of the remaining charges in 12 CF 188 were true. Dodie already had a motive to lie due to the on-going divorce and custody battle. The IP evidence, moreover, would have provided proof positive that Dodie created false evidence, lied to the police, and was willing to commit perjury. The worst that would have happened at trial would have been three relatively minor misdemeanor convictions rather than one. Clarmont may have actually been better off at sentencing with three misdemeanor convictions since neither the bail jumping nor the felony marijuana charge would have been read-in. The fact that the prosecutor made a deal this "sweet" is evidence enough of the State's lack of confidence in the accusations.

Froelich's failure to obtain the IP evidence was deficient and prejudicial. It's absence radically changed Clarmont's risk calculus as the evidence would have provided a solid defense to the bail jumping charge and a persuasive means to attack Dodie's credibility. The circuit court erred when it refused to allow Clarmont to withdraw his bail jumping plea.

4. Alternatively, the circuit court's reliance on the bail jumping trial being "bumped" to a later date is speculative and fails to consider Clarmont's state of mind at the time he entered the plea.

The circuit court's holding is based on the assumption that had Clarmont rejected the plea deal, the State would have tried 12 CF 188 on July 22 and 12 CF 201 would have been "bumped" to a later date. This would have given Froelich the time he needed to obtain the IP evidence for the bail jumping charge. This assumption is speculative and thus erroneous. It was just as likely that the new prosecutor would have decided his predecessor's case did not warrant the effort of a trial. The felony (marijuana) charge was gone. The disorderly conduct and battery charges were reported four days late, lacked witnesses or corroborating physical evidence, and were dependent on the say so of a witness going through a "nasty" divorce with the defendant. In fact, the prosecutor could have reasonably decided to dismiss 12 CF 188 altogether and try the bail jumping felony instead since that, on the surface at least, appeared to be a slam dunk.

Likewise, there is no reason to believe these cases would not have been consolidated for trial had the plea been rejected. Both files were treated as one case. Court appearances were joint once the bail jumping charge was

issued. Both cases were scheduled for trial on the same day. The complainant, defendant, witnesses, lawyers, and timeframe were the same in both cases. At the very least Clarmont would have wanted the cases consolidated in order to maximize the impact of his defense, and there is no reason to believe such a request would have been denied.

In any event, there is no evidence that either Clarmont or Froelich understood these cases would be tried separately or that the bail jumping case would be "bumped" to a later date. As the circuit court itself acknowledged, neither side had made any mention of this. (43:17 (A:7)). Froelich was certainly not contemplating a rescheduled trial when he testified that it was too late for him to get the IP documentation as of the plea date. (47:40-41). Clarmont's testimony was also consistent with his belief that both cases were going to be tried together on July 22. (47:54-55). If Clarmont entered his plea under the reasonable assumption the charges would be tried together, then it doesn't matter whether it was true or not. *Van Camp*, 213 Wis.2d at 149 (defendant's state of mind measured at the time he entered his plea).

The bottom line, however, is that it doesn't matter whether the bail jumping case was going to be tried later or whether Clarmont knew it. Without the IP evidence, Clarmont was forced to accept or reject the plea offer without knowing whether he had a defense to the bail jumping charge or the means to challenge Dodie's credibility. He had no idea whether the IP documentation could even be obtained at that point. Clarmont had no rational choice other than to take the deal. On the other hand, had he known he had a solid defense to the bail jumping charge as well as a means to attack Dodie's credibility, he would have had every reason to try the case. Froelich's failure to obtain the IP evidence had a material impact on Clarmont's plea decision and for that reason,

Clarmont should be allowed to withdraw his plea.

CONCLUSION

This Court should remand the case with directions that Clarmont be allowed to withdraw his plea.

Respectfully submitted this 22nd day of August, 2014.

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

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This brief contains 5089 words.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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Dated this 22nd day of August, 2014.

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CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on August 22, 2014. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this August 22, 2014.

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APPENDIX OF DEFENDANT-APPELLANT

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