STATE OF WISCONSIN

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

DISTRICT III

Appeal No. 2014AP1043-CR
(Oconto County Circuit Court Case No. 2012CF201)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN CLARMONT,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
APPELLANT'S MOTION TO WITHDRAW PLEA ENTERED IN OCONTO
COUNTY CIRCUIT COURT, THE HONORABLE JAY N. CONLEY PRESIDING

Brief of the Plaintiff-Respondent
State of Wisconsin

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Brief of the Plaintiff-Respondent
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ISSUE PRESENTED

1. Was there an erroneous exercise of discretion by the trial court when it denied Clarmont's motion to withdraw his plea?

   Not addressed in court.

2. Did trial counsel render ineffective assistance of counsel?

   The trial court answered "No".

3. If trial counsel did render ineffective assistance of counsel has Clarmont made a sufficient showing that but for the ineffective assistance of counsel there was a reasonable probability that he would have insisted on going to trial on the case(s)?

The trial court answered “No”.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent believes that publication of this case is not necessary.

Respondent believes that oral argument is not necessary in this case.

STATEMENT OF THE CASE AND FACTS

Appellant claims he was denied effective assistance of counsel because trial counsel failed to investigate the originating IP address of an e-mail sent to his wife, Dodie Clarmont, in violation of the terms of the bond set in Oconto County Case No.12 CF 188.

The crux of Clarmont’s testimony at the motion hearing on February 10, 2014 is that he had no choice but to enter his plea because trial counsel, Christopher Froelich, was not prepared for trial because: 1) Froelich had not investigated the origins of the e-mail 2) Clarmont claims he was not advised of a plea agreement proffered to his

attorney until shortly before entering into court and he had to make a last minute decision whether to proceed to trial or not.

The Court did not address the issues raised by the State or Clarmont at the hearing held on Clarmont's Motion to Withdraw Plea. Rather, the Court indicated that Froelich was not ineffective because the case that the e-mail evidence was relevant to, case no. 12 CF 201, was in a subordinate trial position to the case involving the possession with intent deliver, domestic violence charges and bail jumping case, Oconto County Case No. 12 CF 188. (43:17-20). The trial court did find that Clarmont's plea was voluntary. (43:21-22).

FACTS

Clarmont claims that he could not have sent the offending e-mail because he was not living at the home at the time. Clarmont claims that he did not return to the residence after a bond was entered prohibiting contact with Dodie Clarmont or her residence. (47:60, 6-14).

Clarmont testified he was told to keep his mouth shut and say yes to the judge and take the deal by trial counsel. (47:57, 9-12). He took the deal because he was scared and felt he had no other choice. (47:54, 21). He indicated he was unfamiliar with the legal process. (47:58-

59). Froelich represented Clarmont in a criminal matter in Outagamie County that had been resolved in January 2013. (24:22, 12-17). Clarmont had a divorce case pending where he was represented by another attorney, (24:21, 5-12) ,and the two Oconto County files, one of which is the subject of this appeal.

Clarmont's trial counsel, Christopher Froelich, testified that he and Clarmont went over the plea offer prior to court on July 22, 2013. (47:47, 19). Froelich testified he believed that Clarmont was not coerced or forced to enter into his plea. (47:45, 23). Clarmont never told Froelich that had he had the IP address information that he would have demanded to go to trial. (47:47, 9-15). The Court found that Froelich's testimony was very credible. (43:16, 18-23).

During the sentencing hearing Froelich maintained that Clarmont did not send the e-mail to Dodie Clarmont. (24:22, 18-25). Clarmont's statement at sentencing consisted of the following:

> Just that I want to move on. I have no issues as far as animosity towards her or anything else. I don't have any issues as far as being angry. I just want to get back on with our lives. It's time to move forward and get back -- structured in for my son. You know, my son's the priority in all of this and that's where the focus needs to be. I have a business that I've been running for many years. I've actually had it for longer than what Chris has stated. I was partnership in the past before that and it's important also for the livelihood of my son, and I -- and I just want to get back with my life.

(24:24, 13-25).

Froelich indicated that he mailed the plea offer to Clarmont on July 17, 2013. (47:38, 1-3). Clarmont denies receiving the offer or knowing anything about an offer until the morning of July 22, 2013. (47:9, 9-13).

The State argued that Clarmont's testimony was self-serving and incredible. (43:7, 11-17). The court made no findings as to whether Clarmont's testimony was credible or not.

ARGUMENT

1. THERE WAS NO ERRONEOUS EXERCISE OF DISCRETION WHEN THE TRIAL COURT DENIED CLARMONT'S MOTION TO WITHDRAW HIS PLEA.

A circuit court's decision to permit the withdrawal of a plea is ordinarily a matter of the circuit court's discretion. The standard of review is the erroneous exercise of discretion standard. *State v. Thomas*, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836 (citing *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, ¶32, 579 N.W.2d 698 (1998)); see *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). In accepting a plea, the circuit court must make findings of fact. A reviewing court does not disturb a circuit court's findings of fact, except in situations where those findings are contrary to the

great weight and clear preponderance of the evidence. *State v. Bangert*, 131 Wis. 2d 246, 283-84, 389 N.W.2d 12 (1986) (citing *State v.Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984)). Therefore, a reviewing court: "…must ensure that the circuit court's determination was made upon the facts of record and in reliance on the appropriate and applicable law." *Schwarz*, 219 Wis. 2d 615, (citing *Bangert*, 131 Wis. 2d at 289); see *State v. Hunt*, 2003 WI 81, ¶52, 263 Wis. 2d 1, 666 N.W.2d 771 (citing *State v. Shillcutt*, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983) (noting that appellate courts "will uphold a discretionary decision if there are facts in the record which would support the trial court's decision".)

Here there are sufficient facts to uphold the trial court's decision. The essential fact the court relied on, although neither party argued this, is that the case involving the e-mail header was in a subordinate position to 12 CF 188, the marijuana grow case, bail jumping case, battery and disorderly conduct case. The court correctly found that Froelich's performance was not deficient because the e-mail header had nothing to do with the charges in case no. 12 CF 188 that were scheduled for trial in the No. 1 position. (43:17,18).

2. FROELICH DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL.

The State will not reiterate the law in regard to ineffective assistance of counsel. The State has reviewed the case law in Appellant's brief and agrees with the criteria this Court must use when deciding ineffective assistance of counsel issues.

Froelich's performance was not deficient. Froelich testified that he received the information regarding the e-mail from Clarmont and sent a letter to the State on March 14, 2013, that contained the header information and explained Clarmont's position. (47:37, 21). (Neither the State nor appellate counsel asked for the letter to be admitted as evidence).

When a defendant moves to withdraw a plea after sentencing, the defendant "…carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice." *State v. Washington*, 176 Wis. 2d 205, 213, 500N.W.2d 331 (Ct. App. 1993)); see *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Here, the burden is on Clarmont to prove that plea withdrawal is warranted because "...the state's interest in finality of convictions requires a high

standard of proof to disturb that plea." *Washington*, 176 Wis. 2d at 213) (internal quotation marks omitted); *State v. Black*, 2001 WI 31, 242 Wis. 2d 126, 624 N.W.2d 363. Therefore, in order to disturb the finality of an accepted plea, the defendant must show "a serious flaw in the fundamental integrity of the plea." Id. (citing *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534).

When a defendant claims that trial counsel "…was ineffective by failing to take certain steps [he] must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) abrogated on other grounds, 2000 WI 101, 237 Wis.2d 197, 14 N.W.2d 477.

Clarmont has not met this “high standard of proof” at the trial court level nor has he shown with sufficient specificity how Froelich’s alleged deficient representation altered the outcome of the proceeding.

Clarmont posits that Froelich was ineffective because he did not obtain the header information. Froelich did… he shared it with the State.

Clarmont doesn’t state that Froelich was unprepared to address the issue of what address the e-mail originated from at trial. He simply states that Froelich didn’t

"investigate it." (47:53,18) He does not say what Froelich should have done to further investigate the matter. He did not ask Froelich if he had anyone subpoenaed that could testify as to what IP address the e-mail originated from and, more importantly, from what physical address the e-mail originated from.

Moreover, Clarmont fails to show a nexus as to why the header information is so important. Judge Conley first refers to the IP address evidence as "powerful" then qualifies his statement. (43:11, 14). Judge Conley correctly inferred that Clarmont could have sent the e-mail, that he would not have been the first person to return to his home after a divorce was pending. (43:11, 24). Judge Conley further found that the e-mail header is not 100% conclusive. (43:13,15). Clarmont never claims that he told Froelich he was somewhere else on the date and time the e-mail was sent and could not have sent the e-mail. Clarmont simply says he could not have sent the e-mail because he moved out prior to the e-mail being sent. Clarmont admits he drafted the e-mail. (1:5). Nowhere in the record, other than Froelich's sentencing statement to the court, is it referenced when Clarmont actually *did* move out of the address where the e-mail was sent from. (24:21, 17).

Without information of where Clarmont was and possibly with whom he was with when the e-mail was sent, Clarmont was in no better a position than he would have been had Froelich "investigated" the matter to Clarmont's satisfaction. The case still came down to Dodie Clarmont's word versus Shaun Clarmont's word.

3. EVEN IF THE COURT FINDS FROELICH INEFFECTIVE, CLARMONT CANNOT MEET HIS BURDEN OF PROOF THAT BUT FOR FROELICH'S DEFICENT PERFORMANCE, THERE WAS A REASONABLE PROBABLITY HE WOULD HAVE INSISTED THE CASE(S) GO TO TRIAL.

Even if the court finds Froelich's performance deficient, Clarmont cannot show that he would have insisted on going to trial. There is no clear evidence that Clarmont intended to do so. The only evidence offered by Clarmont for this proposition is his testimony at the February 10, 2014 motion hearing when he testified that he told Froelich that had he had the information he would have insisted on trying the case. (47:54-55, 47:60, 18-23). Clarmont's view of the record is rather myopic. This court should consider the entire record, not just the record from the February 10, 2014 motion hearing. *State v.* Cain, 2012 WI 68, 342 Wis.2d 1, 816 N.W.2d 177.

Froelich denied ever having had a conversation with Clarmont regarding Clarmont wanting to try the case on the date Clarmont entered his plea. (47:47, 9-15). Again, the

trial court specifically found Froelich credible. (43:16, 18-23). Clarmont's testimony at the February 10, 2014 hearing contradicts what Froelich told the trial court as to why Clarmont entered his plea. (24:22). Clarmont's testimony at the motion hearing on February 10, 2014 directly contradicts what Clarmont told the court at the sentencing hearing on July 22, 2013. Clarmont simply reiterates what Froelich told the Judge about why he entered a plea then adds that his main concern was his son and his business. (24:24, 13-25).

Froelich's testimony regarding Clarmont's intent to try the case is, at best, inconclusive and certainly not clear. The following is the exchange between Froelich and Appellate counsel:

> Q When did he -- prior to that offer being made, Shaun being made aware of that offer, what was his position on trial?
>
> A He had indicated that he wanted -- he was considering going to trial in these cases.
>
> Q So that's really what he said to you that he was considering it or did he tell you he wanted to go to trial?
>
> A I know we had talked on a number of occasions about both of these files. It was my understanding that he was -- what he had said about going to trial, I can't remember the exact words.

(47:39-40).

It is unclear from this exchange exactly when Clarmont had decided he did or did not want to take the case to trial. Appellate counsel specifically addresses whether Clarmont insisted on going to trial *prior* to the offer being made. He did not address Clarmont's position *after* the State proffered its July 17, 2013 offer.

Clarmont and Froelich met on a number of occasions and discussed both files. If the State's offer induced Clarmont not to go to trial, then Clarmont's plea is certainly valid. The court must look at the Clarmont's state of mind at the time the plea was taken. *State v. Van Camp*, 213 Wis.2d 131, 149, 569 N.W.2d 577 (1997).

Froelich testified that he sent the State's July 17, 2013, offer to Clarmont on the same day he received it, July 17, 2013. Froelich testified he believed Clarmont would have gotten the offer on the 18th or 19th of July, which was 3 to 4 days before the July 22, 2013 hearing(47:38, 1-3); leaving Clarmont enough time to consider his options.

Clarmont did not contradict Froelich's assessment of the speed at which the U.S. Postal Service delivers mail, rather, he denies receiving the letter at all. (47:9, 9-13). All indications from the record before this Court are that Clarmont decided not to try the case(s) until after he

received the State's offer. If Clarmont was of the mind to go to trial prior to July 18-22, 2013, it matters not. It is Clarmont's burden to show that that there was a reasonable probability he would have gone to trial had Froelich not rendered ineffective assistance of counsel. He has not met that burden.

CONCLUSION

For the reasons stated above, the Respondent, The State of Wisconsin, respectfully requests that the ruling of the trial court denying Clarmont's Motion to Withdraw his plea be affirmed.

Dated this _____ day of November, 2014.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Wis. Stats., for a brief produced with monospaced font. The length of this brief is 13 pages.

_____
Edward D. Burke, Jr.
District Attorney

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 Rule 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.

Dated this _____ day of November, 2014.

_____
Edward D. Burke, Jr.
District Attorney