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 REPLY BRIEF

MILLER APPELLATE PRACTICE, LLC
Attorneys for the Defendant-Appellant
By Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

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

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ARGUMENT

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

The State makes, in essence, four arguments:

1. Adopting the rationale of the trial court, the State argues that trial counsel was not ineffective because the email evidence "had nothing to do with the charges in 12 CF 188," the trial scheduled for the No. 1 position on July 22, 2013 (State's Brief, p. 10);

2. Trial counsel was not deficient because Clarmont never told trial counsel what he should have done to "investigate" the IP address further (State's Brief, p. 12-13);

3. There was no prejudice because "Clarmont fails to show a nexus as to why the header information is so important." (State's Brief, p. 13);

4. Clarmont failed to show he would have insisted on going to trial after he learned about the plea offer (State's Brief, p. 14-17).

Each of these will be addressed in turn.

1. The trial position of the two cases is irrelevant because it has no bearing on Clarmont's state of mind at the time he entered the plea.

The State first argues:

> The court correctly found that Froelich's performance was not deficient because the email 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).

(State's Brief, p. 10). This issue was addressed at length in Clarmont's Brief-in-Chief and will not be repeated here. (See Brief-in-Chief, pp. 17-19).

Suffice it to say that nothing in the record remotely suggests that Clarmont, his trial counsel, or the prosecutor understood the cases would be tried separately. Both cases had been heard jointly and scheduled jointly, and were scheduled for trial on the same day.

More importantly, this argument fails to address Clarmont's state of mind at the time of the plea. Whether the bail jumping trial would have been rescheduled or not, Clarmont had to decide *that morning* (on July 22) whether to take the plea deal resolving *both* cases. For eight months, trial counsel had done nothing to find out where the IP address originated. Clarmont had to make the plea decision without knowing if he could get the proof he needed to connect the IP address to his wife's residence. Not only did the lack of proof directly impact his bail jumping case, he could not use it to attack his wife's credibility on the other charges. Clarmont was clearly prejudiced. He had no choice but to take the plea.

2. Trial counsel was deficient because he understood or should have understood that he needed to obtain a physical address for the IP address.

The State next claims trial counsel's performance was not deficient because he "received" the email's header from Clarmont" and then "sent a letter to the State on March 14, 2013, that contained the header information and explained Clarmont's position." (State's brief, p. 11). This argument makes no sense. Standing alone, the originating IP address did not prove anything. It needed to be connected to a physical address. Any competent counsel should have known that.

In a similar vein, the State argues that Froelich was not deficient because Clarmont never told him what to do with the header information:

> Clarmont doesn't state that Froelich was unprepared to address the issue of what address the email 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.

(State's Brief, p. 12-13).

The State's factual assertions are simply untrue. Clarmont specifically asked Froelich to investigate the source of the IP number that was on the header and determine whether it could be associated with a physical address. (47:53). While Froelich could not "recall" whether he had agreed to investigate the IP address, he didn't deny it either. (47:50). Froelich acknowledged, moreover, that in order to show that someone other than Clarmont had sent the email, he had to identify who had been assigned the originating IP address at the time the email was sent. (47:41). 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 further acknowledged that he had no reason not to prepare for trial prior to the pretrial.[1] (47:40). Froelich admitted he made no effort to obtain documentation on the IP address, however, and was not prepared to address the physical origin of the email. (47:40-41). Froelich agreed that had the Century-Link

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1 While there is an arguable dispute as to when Clarmont first learned of the plea offer—he claims he did not know of the offer until the morning of the July 22 pre-trial (47:54), whereas Froelich testified he sent Clarmont a letter with the offer sometime on or after the 17th (47:38-39)—there is no dispute Clarmont did not agree to the plea deal prior to the pre-trial hearing. Froelich, therefore, had no reason to forego trial preparation prior to the pre-trial on July 22. Froelich conceded, moreover, that by the time he received the plea offer, it would have been too late to subpoena information from Century-Link. (47:40).

documentation been available on July 22, 2013, it might have had an impact on whether or not Clarmont took the plea offer. (47:43).

In short, Clarmont told Froelich he believed his wife sent the email to herself, handed Froelich the originating IP address, and told him to find out where it originated. Competent counsel would have obtained the documents necessary to show the physical address of the IP address. Froelich's failure to do so was deficient performance.

3. Trial counsel's failure to obtain a physical address for the originating IP address prejudiced Clarmont.

The State argues that Clarmont failed to prove prejudice because it was *possible he* sent the email from Dodie's computer. There was no proof he had moved out of the Lena residence and even if he had, he could have returned surreptitiously. Clarmont never supplied an alibi or any proof as to where he was when the email was sent. (State's Brief, p. 13).

As a threshold matter, the State's argument is entirely speculative. It has no proof whatsoever Clarmont accessed the computer at Dodie's residence, or has ever returned to her residence in violation of the no contact order. Rather, Clarmont has repeatedly denied sending the email. (47:37-38; 24:17, 21). He testified he did not have access to Dodie's computer, that he never returned to the residence without law enforcement accompanying him, and that he was under a no contact order which restricted him from being on the premises. (47:60). In fact, it was never disputed that Dodie had sole possession of the Lena residence at the time the email was sent. (1:4; 24:21; 47:60).

The State argues the trial court viewed the IP evidence as "qualified." Further, that even with the IP evidence, the case "still came down to Dodie Clarmont's word versus Shaun Clarmont's word." The State's argument has no basis in the record or reality.

The trial court did not view the possibility of Clarmont sending the email from Dodie's computer as very likely. While it acknowledged the evidence was not "mathematically 100 percent determinative one way or another," it was, nonetheless, "powerful evidence" that would have been "extremely helpful" on the bail jumping charge. (43:11, 13). The court even went so far as to suggest the D.A.'s office review the matter for possible charges against Dodie. (43:13). There's simply no denying the IP evidence was highly persuasive proof that Dodie had created false evidence, lied to the police, and was prepared to perjure herself at trial.

4. The evidence shows Clarmont would have insisted on going to trial had trial counsel obtained the IP information connecting his wife to the email.

The State argues Clarmont failed to prove he would have insisted on going to trial had Froelich obtained the IP information. (State's Brief, p. 8, 13-17). Rather: "[a]ll indications from the record…are that Clarmont decided not to try the case(s) [] after he received the State's offer." (State's Brief, p. 16, 17). Those "indications" include: 1) 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)" (State's Brief, p. 8); 2) "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)" (State's Brief, p. 14); and 3) "Clarmont's testimony at the motion hearing on February

10, 2014, concerning why he entered the plea directly contradicts what Clarmont told the court at the sentencing hearing on July 22, 2013." (State's Brief, p. 15). Each of these will be addressed in turn.

Froelich's testimony concerning what Clarmont told him is, first of all, qualified. He said he didn't "believe" Clarmont specifically told him *he would have* insisted on going to trial *had* Froelich produced the IP information. (47:47). The more relevant question, however, is why would the State expect Clarmont to make such a statement to Froelich and why would the absence of such a statement matter? The fact is, it doesn't matter. Clarmont had made himself clear. He told Froelich he did not want a plea deal: "…I want to take this to trial. That's why we're here." (47:54). When he learned Froelich did not have the IP evidence, Clarmont asked him: "How can we go into trial if you don't have my evidence there to show what I'm stating is the truth?" (47:54-55). What Clarmont had to deal with moments before he entered his plea was the reality that his lawyer had failed to prepare a defense. The absence of such a hypothetical observation—"oh, by the way, I would have insisted on going to trial *had* you produced the IP evidence"—is only relevant if one can assume such a statement would always be made under similar circumstances. Such an assumption has no basis in fact. Moreover, the lack of such a statement does not change Clarmont's clearly expressed desire to try the cases.

The State next makes the assertion that Froelich "*denied* ever having had a conversation with Clarmont regarding Clarmont wanting to try the case *on the date* Clarmont entered his plea." (emphasis added) (State's Brief, p. 14). In support of this assertion, the State cites 47:47. *Id*. The problem is that Froelich does not deny any such conversation on p. 47 or anywhere else in the record for that matter. The State appears to have made this up. In fact, the

State later argues that "Froelich's testimony regarding Clarmont's intent to try the case *is, at best, inconclusive* and certainly not clear." (emphasis added) (State's Brief, p. 15). In short, Froelich never denied Clarmont wanted to try the case. Froelich specifically agreed he had no reason not to prepare for trial. (47:40).

Finally, the State contends that Clarmont's postconviction testimony "directly contradicts" what he told the court at the sentencing hearing.[2] (State's Brief, p. 15; citing 24:22). Again, the State's assertion takes considerable license with the facts of record. Clarmont did say different things on each of those occasions, but they were not mutually exclusive. At the sentencing hearing, Clarmont said that he wanted to "move on," that he had a business to run, and that his son was his priority. (24:24). At the time of sentencing, Clarmont did not have the IP information, did not know whether it even existed, did not know whether he could obtain it, and did not know what, precisely, it would prove. More importantly, the State fails to articulate how this so-called contradiction has any relevance to whether Clarmont would have insisted on going to trial *had* Froelich produced the IP information.

Finally, the State insists that "appellate counsel" only addressed "whether Clarmont insisted on going to trial *prior* to the offer being made" but did not address "Clarmont's position *after* the State proffered its July 17, 2013 offer." (Emphasis original). (State's brief, p. 16). Again, this is simply untrue. There is no dispute Clarmont found out Froelich had failed to obtain the IP evidence *after* they

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2 The State also contends that *Froelich's* statement at sentencing contradicts Clarmont's postconviction testimony. What *Froelich* said does not "directly" contradict Clarmont's postconviction testimony, assuming it matters. (See 24:22-24). In fact, Froelich specifically denied Clarmont had anything to do with the marijuana at Dodie's residence or sending the email. (24:21-22).

discussed the plea offer, but before the plea was made. (47:54). The emphasis on Clarmont's desire to try the case before July 22 was to underscore that Froelich had every reason to obtain the IP evidence. Nothing contradicts Clarmont's testimony that it was the lack of IP evidence, not the plea deal, which ultimately caused him to enter his plea.

The bottom line is that Clarmont would not have brought this post-conviction motion if he did not want to try both cases,[3] and there is no reason his position would have been any different on July 22. Circumstances were no different when he filed his postconviction motion on November 18, 2013, than they were on July 22, 2013, *but for the IP evidence*. Clarmont knew about the evidentiary problems with the marijuana case when he entered his plea, and this is clearly not a case of sentencing remorse as Clarmont's two days in jail and one year of probation have already been served. Nothing else has changed. The evidence against him is the same; the risk of conviction on multiple charges is the same; and the additional potential sentencing consequences are the same. If Clarmont is prepared to risk conviction on additional charges now by filing a motion to withdraw his plea, why would he not have been ready and willing to take the same risks on July 22? The State fails to suggest even a single reason, and the fact is, there are none.

CONCLUSION

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

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3 As part of a global plea deal, the State would have the option of reinstating all charges. *State v. Pohlhammer*, 78 Wis.2d 516, 522, 254 N.W.2d 478.

Respectfully submitted this 9th day of December, 2014.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

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MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

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MILLER APPELLATE PRACTICE, LLC

By_____

Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780