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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2014AP001246-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Jeromy Miller,

Defendant-Appellant.

On appeal from a judgment and order denying a postconviction motion of the Milwaukee County Circuit Court, The Honorable Carl Ashley, and the Honorable Stephanie Rothstein, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

I. Whether the circuit court erred in denying Miller's postconviction motion to withdraw his guilty plea, without conducting an evidentiary hearing, where the motion alleged that that the court's plea colloquy was defective, and that defense counsel was ineffective, because both misinformed Miller that, despite the guilty plea, he would still be able to appeal the denial of a pretrial "motion to dismiss" the complaint.

Answered by the circuit court: No. The circuit judge reasoned that even if the judge and defense counsel misinformed Miller concerning his appeal rights, there is no prejudice because if Miller had gone to trial he would have been convicted.

Summary of the Argument

Miller filed a postconviction motion seeking to withdraw his guilty plea. In the motion, Miller alleged that his guilty plea was not knowingly and intelligently entered because, at the plea hearing, the circuit judge misinformed Miller about his right to appeal the denial of pretrial motion to dismiss. Additionally, Miller alleged that his trial attorney was ineffective because the lawyer gave him the same advice. Finally, Miller alleged that if he had known that his guilty plea waived the right to appeal the denial of the pretrial motion, he would not have pleaded guilty.

The circuit court denied Miller's postconviction motion without conducting a hearing. The circuit judge implicitly recognized that the plea colloquy was defective, and that defense counsel's representation was deficient; but the judge found no prejudice on either count because, had Miller gone to trial, he would have been convicted.

The circuit court's ruling is erroneous because whether Miller would have been convicted at trial is not the proper measure of prejudice. Rather, the question is whether Miller would have pleaded guilty had he been properly informed by the court and by his lawyer. Moreover, there is utterly no basis in the record for the circuit court's claim that Miller would have been convicted had he gone to trial. No evidence was

presented, and this conclusion is apparently based solely on the judge's reading of the allegations of the criminal complaint.

Statement of the Case[1]

On March 7, 2008, the defendant-appellant, Jeromy Miller ("Miller"), was charged with first degree sexual assault of a child, and the complaint alleged that intercourse occurred (penis to mouth). (R:2) Specifically, the complaint alleged that, based solely on Miller's statement to police, sometime between June 1, 2006 and March 31, 2007 Miller was in his bedroom at his stepfather's house. While there, he was watching a pornographic video and masturbating. Miller's six month-old daughter was in the bedroom with him at the time because he was exercising a period of temporary placement with the child. According to Miller's statement to police, while watching the video and masturbating, he briefly put the tip of his erect penis in the baby's mouth. *Id.*

Miller waived his preliminary hearing, and then entered a not guilty plea.

Miller filed a pretrial motion suppress his statement, and a motion to dismiss the complaint (R:17; App. D). The motion sought dismissal of the complaint on the grounds that Miller's confession to the police was wholly uncorroborated.

[1] This case involves a guilty plea and, therefore, the brief will not set forth a separate statement of the facts. The facts as alleged in the complaint, as necessary for a clear understanding the issue, will be set forth as needed.

The circuit judge held a hearing on the motion to dismiss. No evidence was presented.[2] At the conclusion of the hearing, the judge denied the motion on the grounds that Miller's statement was sufficiently corroborated by the allegation in the criminal complaint that at the time in question, the baby's mother found a pornographic video in the Playstation in Miller's bedroom and threw it out[3]. (R:70-6)

Thereafter, the parties reached a plea agreement. The state amended the the information to allege that Miller had sexual contact, rather than sexual intercourse, with the child. (R:72-11). The state agreed to recommend that the court impose a bifurcated sentence of three years initial confinement and three years extended supervision, imposed and stayed, and to place Miller on probation for five years. (R:72-3) Miller then entered a no contest plea to the amended charge. (R:72-13)

Significantly, during the plea hearing, the judge told Miller, "Now, you have had some motion hearings and those issues are preserved. So if you appeal, the Court will look at those issues." (R:72-9)

The case then proceeded to sentencing. The circuit court imposed five years of initial confinement, and five years of extended supervision, stayed the sentence, and placed

[2] No evidence was presented on the motion to dismiss. The court did conduct an evidentiary hearing on the motion to suppress Miller's statement.

[3] In fact, the complaint does not allege that the mother threw the video out.

Miller on probation for five years. (R:72-37)

Miller filed a notice of intent to pursue postconviction relief (R:35), and he was appointed postconviction/appellate counsel. However, no appeal or postconviction motion was filed.

Years later, after Miller's probation was revoked and he was imprisoned, he filed a petition for habeas corpus alleging that his appointed attorney had abandoned him.

On August 27, 2013, the court of appeals granted Miller's petition (2012AP2470-W) and reinstated his postconviction/appellate rights under § 809.30, Stats.

Thereafter, on February 28, 2014 (R:52; App. C), Miller filed a postconviction motion seeking to withdraw his guilty plea on the grounds that the plea was not intelligently entered because, during the plea colloquy, the judge told Miller that he could appeal the denial of his pretrial motions, which, by implication, includes his motion to dismiss on the grounds that the confession was not corroborated. *Id.* Under the law, of course, only motions to suppress evidence may be raised on appeal after a guilty plea. Miller further alleged in the motion that had he known he could not appeal the motion to dismiss he would not have pleaded guilty, and he would have instead gone to trial. Additionally, the motion alleged that Miller received ineffective assistance of trial counsel because his attorney raised the "corroboration" issue as a pretrial motion

when, in fact, it should have been raised as a trial issue; and, further, that counsel advised Miller at the plea hearing that he would be able to appeal the corroboration issue despite his guilty plea. *Id.*

Without conducting a hearing, the circuit court denied Miller's motion by memorandum decision. (R:60) According to the decision, even if the judge and defense counsel misled Miller during the plea and the plea colloquy, the error is harmless because, had Miller gone to trial, *he would have been convicted*. (R:60-4, 5; App. b)[4] The words of the circuit judge are worth reading. She wrote:

> Consequently, *even if* his attorney (or the court) gave him erroneous advice about the ability to appeal the merits of the motion to dismiss the complaint, he has not shown that he was prejudiced by the error because if he had gone to trial, *there is not a reasonable probability that he would have been acquitted.*

(emphasis provided; R:60-5)

Miller timely filed a notice of appeal.

[4] Interestingly, the circuit judge does not explain how she could possibly know whether Miller would have been convicted had he gone to trial. No evidence was ever presented concerning Miller's guilt or innocence. Thus, it appears that the circuit judge reached this bold conclusion based wholly on the allegations of the criminal complaint.

Argument

I. The allegations of Miller's postconviction motion are sufficient to allege that his guilty plea was not knowingly and intelligently entered because both the judge and defense counsel misinformed him about the right to appeal a pretrial motion to dismiss the complaint and, therefore, the circuit court must conduct an evidentiary hearing.

Miller filed a postconviction motion seeking to withdraw his guilty plea. In the motion, Miller alleged that his guilty plea was not knowingly and intelligently entered because, at the plea hearing, the circuit judge misinformed Miller about his right to appeal the denial of pretrial motion to dismiss. Additionally, Miller alleged that his trial attorney was ineffective because the lawyer gave him the same advice. Finally, Miller alleged that if he had known that his guilty plea waived the right to appeal the denial of the pretrial motion, he would not have pleaded guilty.

The circuit court denied Miller's postconviction motion without conducting a hearing. The circuit judge implicitly recognized that the plea colloquy was defective, and that defense counsel's representation was deficient; but the judge found no prejudice on either count because, had Miller gone to trial, he would have been convicted.

The circuit court's ruling is erroneous because whether Miller would have been convicted at trial is not the proper

measure of prejudice. Rather, the question is whether Miller would have pleaded guilty had he been properly informed by the court and by his lawyer. Moreover, there is utterly no basis in the record for the circuit court's claim that Miller would have been convicted had he gone to trial. No evidence was presented, and this conclusion was apparently based solely on the judge's reading of the allegations of the criminal complaint.

A. Standard of Appellate Review

The standard of appellate review for a claim that the circuit court improperly denied the defendant a hearing on a postconviction motion was set forth in *State v. Allen,* 2004 WI 106, P9, 274 Wis. 2d 568, 682 N.W.2d 433, as follows:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [*State v.] Bentley,* 201 Wis. 2d 309-10, 548 N.W.2d 50. [682 N.W.2d 433 (1996)] If the motion raises such facts, the circuit court must hold an evidentiary hearing. Id. at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson,* 54 Wis. 2d at 498. S*ee Bentley*, 201 Wis. 2d at 318-19 (quoting the same). We review a circuit court's

> discretionary decisions under the deferential erroneous exercise of discretion standard. *In re the Commitment of Franklin*, 2004 WI 38, P6, 270 Wis. 2d 271, 677 N.W.2d 276; Bentley, 201 Wis. 2d at 311.

See, also, State v. Love, 2005 WI 116, P27 (Wis. 2005).

Thus, the question on this appeal is whether Miller's motion alleged sufficient facts which, if true, would entitle him to withdraw his guilty plea under the law.

B. The legal standard for post-sentencing plea withdrawal.

In, *State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232, 233-234 (Wis. 1996), the court stated, "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice."

> A defendant seeking to withdraw a guilty plea after sentencing must show that refusal would cause "manifest injustice." *State v. Brown,* 2006 WI 100, ¶ 18, 293 Wis.2d 594, 716 N.W.2d 906. A defendant can make a prima facie showing of manifest injustice if the trial court failed to follow the procedures designed to ensure a defendant's plea is knowing, intelligent, and voluntary (i.e., the procedures outlined in Wis. Stat. § 971.08 and case law), and the defendant swears that he actually did not know or understand the plea's consequences. Such a showing shifts the burden to the State to establish that despite the defects in those procedures, the defendant's plea was knowing, intelligent, and voluntary. *See Brown,* 293 Wis.2d 594, ¶¶ 36–37, 716 N.W.2d 906 (discussing *Bangert* motions).

> If, on the other hand, no defects in the plea-taking procedures are evident in the record itself, the defendant's motion to withdraw the plea must allege other facts, such as ineffective assistance of counsel, that, if proven, would demonstrate that the defendant did not understand his plea or its consequences. *Brown,* 293 Wis.2d 594, ¶ 42, 716 N.W.2d 906 (discussing *Bentley* motions; *see State v. Bentley,* 201 Wis.2d 303, 548 N.W.2d 50 (1996)).

State v. Lichty, 2012 WI App 126, 344 Wis. 2d 733, 740-41, 823 N.W.2d 830, 834 review denied, 2013 WI 80, 839 N.W.2d 616.

C. Miller's motion properly alleges that his plea was not knowingly and intelligently entered because the judge misinformed him as to whether his right to appeal the denial of his motion to dismiss was properly reserved

Miller alleged in his motion that the trial judge informed him at the plea hearing that, despite his guilty plea, he could still appeal the denial of his motion to dismiss the complaint. This is not true. *See* Sec. 971.31(10), Stats. Under the statute, only "An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint." Thus, Miller's guilty plea waived his right to

appeal the denial of his pretrial motion to dismiss the complaint.[5]

In a factual scenario almost identical to the one presented here, the Supreme Court reversed a trial court order denying the defendant's motion to withdraw his plea. The court wrote:

> Riekkoff pleaded guilty believing that he was entitled to an appellate review of the reserved issue. Both the prosecutor and the trial judge acquiesced in this view and permitted Riekkoff to believe that, despite his plea, appellate review could be had of the evidentiary order. Because Riekkoff thought he could, with the acquiescence of the trial court and the prosecutor, stipulate to the right of appellate review, it is clear that Riekkoff was under a misapprehension with respect to the effect of his plea. He thought he had preserved his right of review, when as a matter of law he could not. Under these circumstances, as a matter of law his plea was neither knowing nor voluntary. While that plea waived his appellate rights in respect to the antecedent evidentiary motion, we conclude that if Riekkoff desires to move to withdraw his plea he may do so

State v. Riekkoff, 112 Wis. 2d 119, 128, 332 N.W.2d 744, 749 (1983).

[5] Miller's postconviction motion also argued that an issue concerning whether an uncorroborated statement by the defendant may serve as the basis for a criminal conviction should not brought as a pretrial motion challenging the sufficiency of the complaint. Rather, the issue is a question of the sufficiency of the evidence presented at trial. This is an additional reason for Miller to withdraw his guilty plea. The so-called *corpus delicti* issue was probably not properly raised in the trial court.

D. The motion properly alleges that Miller's trial counsel's performance was deficient because he improperly advised Miller that he preserved his right to appeal the denial of his motion to dismiss.

Miller's motion alleged that his trial counsel was ineffective in that counsel, too, assured Miller that he could appeal the denial of his motion to dismiss the complaint. Miller further alleged that, if he had known that a guilty plea waived his right to appeal that order, he would not have pleaded guilty.

Challenges to guilty pleas alleging ineffective assistance of counsel require application of the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under that test, the defendant must prove: (1) deficient performance, and (2) prejudice. *Id.* at 687; *see State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Again, as was mentioned in the preceding section, Miller's guilty plea waived the right to appeal the denial of his motion to dismiss. Assuming the allegations of Miller's postconviction motion to be true, then, defense counsel's advice to the contrary was clearly deficient.

E. Neither the misinformation given by the the trial judge at the plea hearing, nor trial counsel's deficient performance were harmless, and the the circuit judge's "finding" that the errors were harmless is not based upon any evidence in the record.

The circuit judge denied Miller's postconviction motion because the judge "found" that neither the judge's misinformation nor trial counsel's deficient performance was prejudicial. That is, according to the circuit judge, had Miller gone to trial he would have been convicted anyway.

This, of course, is not the proper measure of prejudice for either of Miller's claims.

With regard to the claim that the judge misinformed his him, the measure of prejudice is whether the state can prove that Miller's plea was, nevertheless, intelligently entered. In this case, it would require proof that Miller actually knew that his guilty plea waived his right to appeal.

With regard to the claim of ineffective assistance of counsel, the proper measure of prejudice is whether Miller credibly alleged that, but for counsel's error, he would not have pleaded guilty. The postconviction motion alleges that Miller would not have pleaded guilty had he known that in doing so he waived his right to appeal.

More disturbing, though, is the fact that in this case, without conducting an evidentiary hearing, the circuit judge

purported to make a "finding" that Miller would have been convicted had he gone to trial. There was no evidence presented in this record concerning the merits of the case. Thus, the circuit judge's "finding" appears to be based upon the judge's reading of the *allegations* of the criminal complaint.

i. The burden shifted to the State to prove that Miller's plea was knowingly and voluntarily entered, and the state presented no evidence; but, nevertheless, Miller's motion was denied.

When the defendant properly alleges that his plea was not knowingly and intelligently entered because the judge's plea colloquy was defective, the burden then shifts to the state to prove that the defendant's plea was nevertheless knowing and intelligent.[6] *See, Lichty, supra*

Here, in her memorandum decision, the circuit judge implicitly recognized that the court misinformed Miller, but then went on to find the error was harmless because he would have been convicted had he gone to trial.

Firstly, this is not the correct measure of prejudice. Rather, where misinformation is given during the plea colloquy, the burden then shifts to the state to prove that, despite the misinformation from the judge, the plea was nevertheless intelligently entered. Here, the standard would have required the state to present evidence that, despite the judge's

[6] The circuit court's memorandum decision, without citing authority, suggests that it is Miller's burden to show that he would have been acquitted if he had gone to trial.

misinformation, Miller actually knew that by entering a guilty plea he was waiving his right to appeal. No such evidence was presented, or even alleged by the state in its response to Miller's postconviction motion.

Additionally, there was no evidence presented as to Miller's guilt and, therefore, there is no way in logic that the judge could have properly determined that if Miller had gone to trial he would have been convicted.

ii Trial counsel's error was prejudicial because Miller alleged that, but for counsel's error, he would not have pleaded guilty.

In the context of a plea withdrawal, to satisfy the prejudice prong of an ineffective assistance of counsel claim, a defendant must demonstrate that there is a reasonable probability that, *but for counsel's alleged errors, he or she would not have pled guilty, and would have insisted on going to trial*. *State v. Bentley*, 201 Wis. 2d 303, 312 (Wis. 1996).

Here, Miller alleged that had he known that he could not appeal the denial of his pretrial motion he would not have pleaded guilty. Nonetheless, in her memorandum decision denying Miller's postconviction motion, the circuit judge found that Miller was not prejudiced by counsel's deficient performance because had Miller gone to trial, he would have

been convicted anyway.

Again, this is not the proper measure of prejudice. The question is whether Miller's postconviction motion properly alleged that he would not have pleaded guilty had he known that in doing so he would waive his right to appeal. And, once again, in the absence of any evidence in the record, one wonders how the judge could possibly know that Miller would be convicted if he went to trial.

Conclusion

For the foregoing reasons, it is respectfully requested that the court reverse the order the circuit court denying Miller's motion to withdraw his plea, and to remand the matter with orders to conduct an evidentiary hearing into the allegations of the motions.

Dated at Milwaukee, Wisconsin, this _____ day of August, 2014.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4063 words.

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Dated this _____ day of August, 2014:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2014AP001246-CR

State of Wisconsin,

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v.

Jeromy Miller,

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Defendant-Appellant's Appendix

A. Record on Appeal

B. Memorandum decision of the circuit court denying Miller's postconviction motion. (R:60)

C. Miller's postconviction motion (R;52)

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, at a minimum: (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 circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit

court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of August, 2014.

_____

Jeffrey W. Jensen