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 Reply Brief

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Argument

I. The state appears to misunderstand the relief that Miller demanded in his postconviction motion: Miller is not seeking an appeal of his motion challenging the complaint, he is seeking withdrawal of his guilty plea

Beginning at page 16 of its brief, the state makes an effort to persuade the court that if Miller had, in fact, appealed the denial of his pretrial motion to dismiss the complaint, he would have been unsuccessful. The state correctly points out that the motion may have been untimely, the corroboration rule probably does not apply to the sufficiency of a criminal complaint, and a validly-entered guilty plea waives all challenges to the sufficiency of the complaint.

All of this is beside the point, though.

Under the present state of the record, if Miller were permitted to appeal the denial of his motion on the complaint, he would lose. In his postconviction motion, though, Miller does not seek to have his appeal rights reinstated. Rather, he seeks to withdraw his guilty plea.

Once the guilty plea is withdrawn, and Miller is correctly informed that he cannot continue to litigate the corroboration issue following a guilty plea, Miller will then proceed to trial. The corroboration rule certainly applies at trial. It is likely that

Miller would be found not guilty and, if not, the corroboration issue will then be properly preserved for an appeal.

It is essential to understand that where a guilty plea is not knowingly entered, the remedy is plea withdrawal. Similarly, the remedy for ineffective assistance of counsel at a plea hearing is withdrawal of the plea. *State v. Bentley*, 201 Wis. 2d 303, 312 (Wis. 1996).

Thus, the measure of prejudice is not whether Miller would have been found guilty if he had proceeded to trial, as the circuit judge seemed to believe. Likewise, the measure of prejudice is not whether Miller's appeal would have been successful, as the state seems to belief.

A guilty plea not knowingly entered is, itself, prejudicial.

II. The state admits that there is an issue of fact as to whether trial counsel misinformed Miller concerning his appeal rights

In support of his claim of ineffective assistance of counsel at the plea hearing Miller alleged that his lawyer-- just like the judge-- informed him that he could appeal the corroboration issue despite his guilty plea.

In its brief, the state responds:

> The record, however, refutes that declaration: on the day of his change of plea, Miller signed an explicit waiver of any further challenge to the sufficiency of the criminal complaint (30:3), and he

> told the circuit court during the change-of-plea hearing that he had gone over the plea questionnaire and addendum with his lawyer, that his lawyer had answered all of his questions, and that he did not have any questions for either the court or his lawyer (72:6).

(Respondent's brief p. 24).

This argument is meritless because, in evaluating whether the allegations of a postconviction motion are sufficient to warrant a hearing, the court must assume the allegations to be true. *See, State v. Love*, 2005 WI 116 (Wis. 2005).

In making this argument, the state asks the court to make a credibility determination.[1] That is, that the allegation in Miller's motion (that his lawyer told him he could still appeal) is not credible because Miller signed the guilty plea form that included an acknowledgment that he was waiving his right to appeal. The appellate court is not permitted to make such a credibility determination on appeal.

[1] In fact, the state's entire argument is based on this flawed assertion. Here is the state's summary conclusion: "To withdraw his no-contest plea, Miller had to allege facts that, if proved, would establish by clear and convincing evidence that a manifest injustice would occur if he could not withdraw his plea. *But if the record conclusively refuted those alleged facts, the circuit court could properly deny the motion without holding an evidentiary hearing*. As shown in the preceding sections of this brief, the record trumps Miller's allegations. " (Respondent's brief p. 26)

III. The fact that the information on the plea questionnaire conflicts with what the judge told Miller during the plea colloquy only emphasizes that the plea was not knowingly entered.

Finally, the state takes one last stab at convincing the court that Miller's plea was knowingly entered. The state argues:

> The circuit court erred, but not in any way that harmed or actually misled Miller. Just moments earlier, Miller had acknowledged his understanding of the plea questionnaire and addendum. The addendum contained his unqualified waiver of his right to challenge the sufficiency of the criminal complaint. He thus knew, regardless of the court's statement, that he had pled away any right to challenge the complaint's sufficiency.

(Respondent's brief p. 26).

Not surprisingly, how Miller was supposed to know whether the plea questionnaire or the judge was correct is left unexplained.

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

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Jeffrey W. Jensen