STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2014AP002939-CR
Circuit Court No. 1991CF911858A

STEPHEN TOLIVER,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

I. Did the trial court err when it denied Mr. Toliver's Post Conviction Motion arguing that Mr. Toliver did not enter his pleas knowingly, intelligently and voluntary?

The trial court held that Mr. Tolvier did not met his burden for plea withdrawal because he did not articulate any facts, either in his written submissions or

at the Postconviction hearing, to show that his release in April 2014 was crucial to his decision to enter his plea and that Mr. Toliver did not sufficiently demonstrate a manifest injustice for purposes of withdrawing his plea.

II. Did the trial court err when it denied Mr. Toliver's Post Conviction Motion arguing that the plea agreement was premised on a legal impossibility?

The trial court held that the misunderstanding about custody credit qualifies as a new factor and that the appropriate remedy is to modify Mr. Toliver's sentence to effectuate his release from custody.

III. Did the trial court err when it failed to vacate Mr. Toliver's entire plea when he entered a plea to a Non-Existent charge?

The trial court vacated the charge of Hiding a Corpse but did not vacate the count of Felony Murder.

IV. Did the trial court err when it denied Mr. Toliver's Post Conviction Motion arguing that trial counsel failed to provide effective representation?

The trial court held that Mr. Toliver failed to sufficiently demonstrate a manifest injustice for purposes of withdrawing his plea.

Position on Oral Argument and Publication

Oral argument is not required, publication is not requested.

Statement of the Case

On January 23, 2013, Mr. Toliver made an appearance in court after the Seventh Circuit reversed the original conviction from 1991 and sent this case back to the circuit court for a new trial. *R169:1*. On January 25, 2013 the parties entered into a plea agreement whereby the original count of first degree intentional homicide (PTAC) would be amended to one count of felony murder and one count of concealing a corpse. *R170:1*. At that hearing the prosecutor explained to the circuit court that the maximum penalty under the law at the time that the offenses were committed was 35 years and that the mandatory release was after the defendant served two-thirds of the sentence. *Id*. at 5. The prosecutor went on to tell the court that under his calculations Mr. Toliver's mandatory release "would come to about a year and half to two years from now. I think it is more than a year and half from now." *Id*. The prosecutor went on to tell the court that he would be recommending the maximum sentence because a "year and a half would be a good transition period" before Mr. Tolvier is released onto parole. *Id*. at 6. At that hearing, Defense Counsel Pat Knight, informed the court that he had calculated 7,917 days of custody credit applicable to the case. *Id*. at 10. There was a pretrial incarceration credit form that showed 7,917 days credit from the date of arrest of May 24, 1991 to date of sentencing January 25, 2013. *R103:1*. Mr. Toliver was sentenced by the court to 30 years prison with 7,917 days credit on the felony murder court and 5 years prison on the hiding a corpse count. *R170:34*.

On February 22, 2013 the circuit court issued an Order that vacated the original sentence in this case which was issued on March 16, 1992 and the court also modified the custody credit order. The circuit court changed the custody

credit order from 7,917 days to 297 days from the date of arrest of May 24, 1991 to the date of the original sentencing of March 16, 1992. The circuit court also directed the Department of Corrections to credit Mr. Toliver with confinement from March 16, 1992 pursuant to Wis. Stat. §973.04. *R109:1*. The circuit court was notified by the Department of Corrections through a letter dated April 3, 2013 that it had applied custody credit pursuant to s.973.04 from the dates of September 5, 1992 and not the date of March 16, 1992 as was previously ordered by the circuit court in its order dated February 21, 2013. *R111:1*. The Department of Corrections went on to explain that Mr. Toliver did not actually start serving his sentence on this case until September 5, 1992 because the original sentence was ordered to run consecutive to a sentence he was already serving and that sentence had a mandatory release date of September 5, 1992.

On May 3, 2013 the Department of Corrections notified the court through a letter the court of Hiding a Corpse was not a statute in existence when Mr. Toliver committed the original act back on May 12, 1991. *R112:1*. Mr. Toliver appeared in court on June 26, 2013 and informed the court, through his attorney, that the previous plea would have to be vacated and that the parties did not have an agreement resolving the case at that time. *R172:2*. At that hearing the prosecutor informed the court that the same offer that was previously made, just with a different charge, was being made to Mr. Toliver and that under that agreement Mr. Toliver "would have to be mandatorily released in ten months under our agreement." *Id*. at 4. The prosecutor went on to state that he was "offering him a deal where he would be mandatorily released in ten months." *Id*. at 5.

On June 27, 2013 Mr. Toliver, through his attorney, informed the court that he parties had reached an agreement to resolve the case. The agreement was stated that the felony murder charge that was previously plead to would not be vacated, but that in place of the Hiding a Corpse charge, Mr. Toliver would be pleading to First Degree Reckless Endangerment and that the State would be recommending the maximum sentence of 5 years imprisonment consecutive to count #1, which was the Felony Murder charge, and concurrent to anything else. *R173:2*. Defense Counsel, Attorney Knight, stated to the court that the parties were stipulating and agreeing that the previous sentence imposed in Count #1 is consecutive to Count #2 but that it would be concurrent to anything else, and that the parties had agreed that Mr. Toliver was entitled to custody credit of 297 days and that "then by operation of credit required under Section 973.04, he is also granted credit for incarceration served on the original sentence from March 16, 1992 to today's date, June 27, 2013, that total will be 7.793 days." *Id*. at 3. Attorney Knight went on to state that the total sentence credit under both of the statutes would be 8,070 days credit and that it was his understanding that the parties were in agreement regarding the number of days. *Id*. at 4. The prosecutor then replied by stating "that's a correct statement of the agreement, judge." *Id*. A Pretrial Incarceration form was signed by Attorney Knight, Mr. Toliver and ADA Williams with 8,070 days of custody credit regarding this case. *R118:1*. During his sentencing argument, ADA Williams stated that the agreement was "premised on" the parties understanding that the 1991 law allows Mr. Toliver's mandatory release after serving two-thirds of his sentence. *R173:8*. ADA Williams went on to state that "and I believe if the court gave him a consecutive sentence, Mr. Knight has calculated that Mr. Toliver would be mandatorily released in about ten months."

Id. Attorney Knight went on to state that for the benefit of the Department of Corrections that is was "absolutely necessary that the official judgment of conviction clearly direct the credit involved," and that it also be necessary to point out that the counts are concurrent to one another. *Id*. at 9. ADA Williams went on to state that "I would agree with that. So madam clerk would say that these sentences run concurrent with anything else." *Id*. at 10. The court went on to sentence Mr. Toliver to the new charge in Count #2 to 5 years imprisonment consecutive to Count #1 and concurrent to anything else and ordered 8,070 days custody credit. *Id*.

On August 29, 2013 the Department of Corrections informed the circuit court through a letter that the Department was in disagreement with the amount of credit previously granted to Mr. Tolvier because of the fact that he did not start serving his sentence until September 5, 1992. *R121:1*. The circuit court responded to the letter through a written Order dated September 11, 2013. The circuit court explained that while it was not obligated to grant credit from the original sentencing date of March 16, 1992, the Department of Corrections was required by statute to credit Mr. Toliver with confinement from that date. *R122:1*. The court vacated the 8,070 days credit at that time. *Id*.

On December 13, 2013 the Department of Corrections wrote an additional letter to the circuit court explaining how the Department applied Mr. Toliver's credit in this case after reviewing the latest Order from the court. *R138:1*. In this letter the Department indicated that credit was given to Mr. Toliver not from the March 16, 1992 date ordered previously by the court, but granted Mr. Toliver credit from September 5, 1992 citing the language outlined in Wis. Stat. §973.04, saying that the department "lacked statutory authority" to apply credit from March 16, 1992 to September 5, 1992. *Id*.

The Department calculated that the mandatory release date for Mr. Toliver was July 28, 2015.

On December 20, 2013, the Court issued another Order Amending the Judgment of Conviction lowering the amount of presentence credit from 297 days to 67 days pursuant to *State v. Gavigan*. The court in this Order agreed with the Department of Corrections and ordered that Mr. Toliver's entitlement to custody credit under s.973.04 commenced on September 5, 1992. As a result of this Order, Mr. Tolvier was informed by the Department of Corrections that his new mandatory release date was March 18, 2016.

On January 29, 2014, Mr. Toliver filed a Pro-se notice of intent to pursue Postconviction relief. *R145:1*. On June 13, 2014 appellate counsel filed a Postconviction Motion for Plea Withdrawal with the Milwaukee County Circuit Court. *R148:1*. On July 28, 2014 the State filed a response to Mr. Toliver's Postconviction motion. *R151:1*. On July 30, 2014 appellate counsel filed a reply motion to the State's response. *R152:1*. On August 21, 2014 ADA Williams filed a motion regarding the State's position as to the remedy available to Mr. Tolvier regarding his sentence. *R153:1*. On September 29, 2014 appellate counsel filed a response to ADA Williams motion regarding the State's position as to Mr. Toliver's sentence. *R156:1*. On October 31, 2014 a hearing was held before the circuit court for both parties to argue the Postconviction motions. On December 1, 2014, the court issued an Order denying Mr. Toliver's Postconviction motion for plea withdrawal and the court modified the June 27, 2013 sentence Mr. Toliver received on Count #2 to 2 years imprisonment consecutive to Count #1 to effectuate an immediate release of Mr. Toliver. *R162:6*.

Argument

I. The Trial Court Erred in Denying Mr. **Toliver's** Post Conviction Motion Based on The Grounds That Mr. Toliver Did Not Enter His Pleas Knowingly, Intelligently and Voluntarily

In order to withdraw one's plea after sentencing, the defendant must establish by clear and convincing evidence that failure to allow a withdrawal would result in a "manifest injustice." *State v. Trochinski*, 253 Wis.2d 38, 644 N.W.2d 891, 898 (2002). "A defendant may demonstrate a manifest injustice by showing that the guilty plea was not made knowingly, intelligently and voluntarily." *State v. Hoppe*, 317 Wis.2d 161, 765 N.W.2d 794 (2009). "When a guilty plea is not knowingly, intelligent and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process'." *Id*. The Court of Appeals of Wisconsin has previously held that a defendant's misunderstanding of a collateral consequence of a guilty plea is grounds for plea withdrawal if it is based on "affirmative incorrect statements." *State v. Brown*, 276 Wis.2d 559 (Ct. App. 2004). The defendant's "misunderstanding of the consequences of his pleas undermines the knowing and voluntary nature of his pleas." *Id*. Additionally, the Wisconsin Court of Appeals has previously held that in some circumstances, "a particular consequence is deemed 'collateral' because it rests in the hands of another government agency or different tribunal. *State v. Kosina*, 226 Wis.2d 482, 486, 595 N.W.2d 464 (Ct. App. 1999).

The primary issue presented during this case was the amount of custody credit Mr. Toliver was entitled to at the time of sentencing. Additionally, the impact the custody

credit had on Mr. Toliver's mandatory release date was also as important as outlined by the parties. Mr. Toliver's mandatory release date, which was completely contingent on how much confinement credit he was granted by the Department of Corrections, is a collateral consequence of his plea.

It is clear that Attorney Knight and ADA Williams's numerous statements regarding Mr. Toliver's expected mandatory release date if he were to receive a maximum sentence on the two amended charges were "affirmative incorrect statements." On January 25, 2013 Mr. Toliver entered pleas to an amended Count #1 of Felony Murder and Count #2 of Concealing a Corpse. It is clear that at the time Mr. Tolvier was sentenced on January 25, 2013 that both the State and the Defense made a number of comments regarding Mr. Toliver's custody credit. At that hearing, ADA Williams in his sentencing remarks explained that "I think we both agree that after two-thirds Mr. Toliver would be mandatory released. And in my calculations that would come to about a year and a half to two years from now. I think it is more than a year and a half from now." *R170:5*. ADA Williams went on to explain to the court that "I think that just to release Mr. Toliver now after being—after serving 21, almost 22 years in prison would not serve anyone. I think there has to be a transition period with the prison. I think that year and a half would be a good transition period, and at that point Mr. Toliver would be released and out on patrol." *Id.* at 6. In addition, a Pretrial Incarceration form was submitted by Attorney Knight submitting custody credit for all 7,917 days from Mr. Toliver's original date of arrest of May 24, 1991 to the date of sentencing of January 25, 2013. At that hearing, the court ordered that Mr. Tolvier be entitled to the 7,917 days of credit. Based on the statements made on the record by the parties, Mr. Toliver, at that time, was expecting a

mandatory release date of sometime between April and July of 2014.

On June 26, 2013 Mr. Toliver found himself back in court because the Department of Corrections had notified the court that the Hiding a Corpse charge that Mr. Tolvier previously plead to back on January 25, 2013 did not exist at the time the present offenses were committed on May 12, 1991. At the June 26, 2013 hearing Attorney Knight informed the court that the previous plea would have to be vacated. ADA Williams informed the court that the State was making the same offer to Mr. Toliver, just with a different charge, and that Mr. Toliver "would have to be mandatorily released in ten months under out agreement." *R172:4*.

On June 27, 2013 Attorney Knight informed the court that the parties had reached an agreement where the Count #1 Felony Murder charge previously plead to would not be vacated and that Mr. Tolvier would be pleading to Count #2 as a charge of First Degree Reckless Endangerment. *R173:2*. Attorney Knight indicated to the court the parties were stipulating and agreeing that the previous sentence imposed in Count #1 is consecutive to Count #2 but concurrent to anything else and that all parties have agreed that Mr. Tolvier was entitled to credit of 297 days and "then by operation of credit required under Section 973.04, he is also granted credit for incarceration served on the original sentence from March 16, 1992 to today's date, June 27, 2013, that total will be 7,793 days. *Id*. at 3. A pretrial incarceration credit form was signed by Attorney Knight, Mr. Toliver and ADA Williams calculating 8,070 total days. *R118:1*.

The Department of Corrections, on a number of times, made it clear, through letters to the circuit court that Mr. Toliver's release date rested in the Department's hands and not in the hands of the circuit court and for that reason the issue of custody credit was a collateral consequence of Mr. Toliver's guilty plea. The Department repeatedly ignored

Judgments of Conviction and written Orders from the circuit court indicating that Mr. Toliver was entitled to custody credit from March 16, 1992. Ultimately, the court agreed with the Department and Mr. Toliver was credited with custody credit from September 5, 1992 to the present. As a result of the final Order from the court, the Department of Corrections informed Mr. Toliver that his new mandatory release date was March 18, 2016. This final release date was at least an entire year after Mr. Tolvier was promised by his own attorney, by ADA Williams and by the circuit court at the time he was sentenced on this case on June 27, 2013.

Because of the misinformation that Mr. Toliver received from Attorney Knight and by ADA Williams about the custody credit he was entitled to, particularly the application of s.973.04 and the impact on his mandatory release date, Mr. Toliver entered his guilty pleas with an incorrect understanding of the consequences of his pleas, namely the effect a maximum sentence would have on his expected release date. For this reason, Mr. Toliver had a misunderstanding of what his maximum sentence in fact was and for that reason could not freely, knowingly and voluntarily enter his pleas. This is a "manifest injustice' and should permit Mr. Tolvier to withdraw his pleas because the custody credit was a collateral consequence of his guilty pleas and his pleas were based on affirmative incorrect statements. The issue of custody credit was not simply an issue the parties addressed as part of their sentencing arguments. It is clear from the record that the parties, in their negotiations which lead to Mr. Toliver entering a plea on June 27, 2013, that the amount of custody credit that Mr. Toliver was entitled to was considered by the parties in their negotiations and were part of the plea itself. The record shows that the plea agreement entered into by the parties was based on Mr. Toliver's custody credit.

In sum, Mr. Toliver asks this Court to grant an order allowing him to withdraw his pleas because he was misinformed regarding the amount of custody credit he was entitled to and that the issue of custody credit was the driving force of the parties in the plea agreement they reached on June 27, 2013 and the impact that credit had on his mandatory release date and because the trial court erred in denying the Postconviction motion.

II. The Trial Court Erred in Denying Mr. **Toliver's Post Conviction Motion** Based on the Grounds That the Plea Agreement Was Premised on a Legal Impossibility

"When a guilty plea is not knowing, intelligent and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process." *State v. Hoppe*, 317 Wis.2d 161, 765 N.W.2d 794 (2009). The Court in *State v. Woods* found that the defendant's plea not knowing and voluntary because he made the decision to plead guilty based on inaccurate information provided to him by the attorneys and the court. *Woods*, 173 Wis.2d 129, 496 N.W.2d 144 (Ct. App. 1992). Additionally, the Court in *Dawson* held that "a plea agreement that leads a defendant to believe that a material advantage or right has been preserved when, in fact, it cannot legally be obtained produces a plea that is 'as a matter of law…neither knowing nor voluntary." *State v. Dawson*, 276 Wis.2d 418, 688 N.W.2d 12 (Ct. App. 2004), citing *State v. Riekoff*, 112 Wis.2d 119, 128, 332 N.W.2d 744 (1983).

In the present case, Mr. Toliver was lead to believe that he gained a material advantage of having his sentence run concurrent to his 1991 sentence. Mr. Toliver was lead to believe this based on the fact that the word "concurrent" was

used in the actual agreement and because of the calculation of custody credit by his attorney. The plea agreement entered into was that the parties would argue to run his sentence concurrent to any other sentence. *R117:2*. However, because of Wis. Stat. 973.04, there was no way to run the sentence concurrent the way that the parties had intended because of what occurred in the past and what was demanded by s. 973.04 regarding the custody credit Mr. Toliver was entitled to be credited with. Pursuant to a letter dated August 29, 2013 from the Department of Corrections, Mr. Toliver was charged with committing these crimes on May 12, 1991 and was sentenced on March 16, 1992 to a consecutive sentence. Because of the consecutive nature of the sentence Mr. Toliver received he did not start serving his sentence on this case until September 5, 1992, which was the mandatory release date on Case F-910277. *R121:1*.

Mr. Toliver was also informed that he was entitled to a certain amount of custody credit. The custody credit that was calculated by his attorney and agreed to by ADA Williams, and ultimately the court, was later determined by the Department of Corrections to be an inaccurate amount of credit and for that reason Mr. Toliver was not credited with the amount of time he was lead to believe he was entitled to at the time of entering a plea. For these reasons, Mr. Toliver's pleas were neither knowing nor voluntary and must be withdrawn.

In sum, Mr. Tolvier asks this Court to grant an Order allowing his pleas to be withdrawn because Mr. Toliver did not enter the pleas knowing and voluntary because he was lead to believe he was receiving a material benefit of his sentence running concurrent to his 1991 sentence and was lead to believe he has an amount of custody credit that was later determine he did not have.

III. The Trial Court Erred in Failing to Vacate Mr. Toliver's Entire Plea on Grounds That Mr. Toliver Plead to a Non-Existent Crime

It has been previously held that "the waiver doctrine does not permit conviction for a nonexistent crime", even when a defendant has specifically requested that the jury be instructed on the non-offense. *State v. Cvorovic*, 158 Wis.2d 630, 631, 462 N.W.2d 897 (Ct. App. 1990) "Criminal subject matter jurisdiction, conferred by law, is the power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment." (*Id.* at 634, citing *Mack v. State*, 93 Wis.2d 287, 294 (1983)) "Subject matter jurisdiction cannot be conferred on the court by consent, and an objection to it cannot be waived." (*Id.*) Wisconsin law clearly has established that a judgment "resulting from a complaint or information which charges no offense recognized in law is void ab initio." *State v. Briggs*, 579 N.W.2d 783 (Ct. App. 1998);*See* also *Howard v. State*, 139 Wis. 529, 534 (1909)

On January 23, 2013, Mr. Toliver appeared in court after the Seventh Circuit reversed the original conviction from 1991 and sent this case back to the circuit court for a new trial. *R169:2.* Two days later, on January 25, 2013, the parties entered into a plea agreement whereby the original count of First Degree Intentional Homicide, As a Party to a Crime, would be amended to one count of Felony Murder and one count of Concealing a Corpse. *R170:5*. On May 3, 2013, the Department of Corrections drafted a letter to the court explaining that the count of Hiding a Corpse was not a statute at the time that Mr. Toliver committed the act back on May 12, 1991. *R112:1*. On June 26, 2013, Mr. Toliver appeared back in court. At that hearing, defense counsel informed the

court that the previously entered plea would have to be vacated. *R172:2*. On June 27, 2013, Mr. Tolvier once again appeared in court. Mr. Toliver's attorney informed the court that the parties had reached an agreement whereby the one count of Felony Murder, previously pleads to, would not be vacated, but that in place of Hiding a Corpse, Mr. Tolvier would be pleading to First Degree Reckless Endangerment. *R173:2*.

When Mr. Tolvier entered his pleas on January 25, 2013 to an amended count of Felony Murder and one count of Concealing a Corpse, he unknowingly entered a plea to a crime that did not exist. This error was not recognized until May 3, 2013 when the Department of Corrections sent a letter to the circuit court requesting clarification of the Judgment of Conviction. Then, on June 26, 2013, when Mr. Toliver appeared before the circuit court, defense counsel informed the court that the previous plea would have to be vacated.

Mr. Toliver then appeared before the court the following day, where defense counsel informed the court the parties reached an agreement whereby the Felony Murder charge previously plead to by Mr. Tolvier would not be vacated and that Mr. Tolvier would be pleading to a count of First Degree Reckless Endangerment instead of the Hiding a corpse charge. It was at this hearing, that the circuit court erred in not vacating the entire plea previously entered by Mr. Toliver.

When Mr. Toliver originally entered his plea, the plea agreement called for him to plead to a charge (Hiding a Corpse) that was non-existent at the time of the charged offense. For that reason, the entire agreement was void and improper. The Court in *Briggs*, held that "Because the circuit court had no subject matter jurisdiction over a non-existent crime, even though the charge was filed as part of an

amended information pursuant to a plea agreement, Brigg's conviction for attempted felony murder must be vacated…" *State v. Briggs*, 579 N.W.2d 783 (Ct. App. 1998) In the present case, the circuit court did not have subject matter jurisdiction over the non-existent crime of Hiding a Corpse when Mr. Toliver entered his plea to this charge on January 25, 2013. The court then erred on June 27, 2013 when the court did not vacate the entire plea, but only vacated the Hiding a Corpse count.

The error occurred, even though Mr. Toliver's attorney informed the court at that hearing that the parties had reached an agreement that whereby the count of Felony Murder, previously plead to, would not be vacated. The court in *Mack* stated that "Subject matter jurisdiction cannot be conferred on the court by consent, and an objection to it cannot be waived." *Mack v. State*, 93 Wis.2d 287, 294, 286 N.W.2d 563, 566 (1983) For that reason, even if Mr. Tolvier wanted to and did in fact enter into an agreement with the State on June 27, 2014 to enter a plea to the previously charge of Felony Murder, it was error by the court for failing to vacate the previous plea for that charge, and require Mr. Toliver to enter a new plea to the charge. The original amendment of the count of Felony Murder was part of a plea agreement that included a non-existent charge. For that reason, the entire agreement needed to be vacated. However, the court did not vacate the entire plea, just the count regarding the Hiding a Corpse, and this was error.

In sum, Mr. Toliver asks this Court to order that the pleas in this matter be vacated because the trial court erred when the court failed to vacate the previously entered plea because of the non-existence of one of the charges plead to by Mr. Toliver.

IV. The Trial Court Erred in Denying Mr. **Toliver's** Post Conviction Motion Based on the Grounds That Trial Counsel Failed to Provided Effective Representation to Mr. Toliver

The United States Supreme Court established a two-prong test for ineffective assistance of counsel. *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient and that counsel's errors were prejudicial. *Id.* Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. *State v. Johnson*, 153 Wis.2d 121, 449 N.W.2d 845 (1990). Deficient performance requires "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct at 2064. It must be shown that "counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Strickland*, 466 U.S. at 688) The "reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Strickland at 385.*

The prejudice standard as set forth in Strickland states that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. The two-part *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 472 U.S. 52 (1985). In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. *Lafler v. Cooper*, 132 S.Ct.

1376 (2012); see *Missouri v. Frye*, 132 S.Ct. 1399, 1388-1389 (2012).

Mr. Toliver's attorney was deficient because he incorrectly calculated his credit which leads to incorrectly advising his client on his mandatory release date, and in effect incorrectly advising Mr. Toliver of the maximum sentence. Attorney Knight did not research the history of the case and how Mr. Toliver's case may be impacted by s.973.04 and the separate sentence that Mr. Toliver received in the current sentence which lead to him starting his sentence on this case on September 5, 1992. Attorney Knight did not clarify with the Department of Corrections regarding Mr. Toliver's sentence credit prior to allowing Mr. Toliver to enter into pleas and be sentenced in this case.

Not only did Attorney Knight's failure to properly calculate Mr. Toliver's custody credit prior to sentencing on June 27, 2013, but this failure prejudice the outcome of this case. In order to determine whether Attorney Knight's error was prejudicial to Mr. Toliver, he must prove by a reasonable probability that but for the error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

On October 31, 2014 Mr. Toliver testified during the Postconviction Motion Hearing in Milwaukee County Circuit Court. At that hearing Mr. Toliver testified that prior to entering his pleas in June 2013, he spoke with Attorney Knight regarding that amount of jail credit he was entitled to. *R174:29*. Mr. Toliver was asked by appellate counsel at that hearing "did you consider the custody credit that you had in making your decision whether to go to trial or not to go to trial?" *Id.* at 30. In response, Mr. Tolvier stated "That was the only reason I took it." *Id.* Appellate counsel also asked Mr. Toliver "If you would have know prior to entering your plea that you were not entitled to the custody credit that you believed you were, would you have accepted the state's offer?" and Mr. Toliver responded "No." and went on to state

that "No, I wouldn't have accepted it because I wasn't going to accept it on June 25. I demanded a trial." *Id.*

Mr. Toliver showed through his testimony that he would not have entered pleas in this matter had it not been for his conversation with Attorney Knight regarding the amount of custody credit he was entitled to and the affect his credit had on his release date. In fact, when the parties appeared before the court on June 26, 2013, Attorney Knight informed the court that based on a letter dated May 3, 2013 from the Department of Corrections, that Mr. Toliver's pleas had to be vacated and that at that point the parties had not reached an agreement to resolve the case with a plea. *R172:2*. It was not until the hearing held on June 27, 2013 whereby Mr. Tolvier entered pleas in this matter. However, that plea was based upon the statements from Attorney Knight regarding the amount of custody credit Mr. Toliver was entitled to. At that hearing on June 27, 2013, Attorney Knight informed the court the parties had reached an agreement and that Mr. Tolvier was entitled to pretrial credit of 297 days and "then by operation of credit required under Section 973.04, he is also granted credit for incarceration served on the original sentence from March 16, 1992 to today's date, June 27, that total will be 7,793 days." *R173:3*. It was at that hearing that a pretrial incarceration credit form was submitted to the court for 8,070 total days and was signed by Mr. Toliver, Attorney Knight and ADA Williams.

All of this information shows that the issue of custody credit and the impact that it had on Mr. Tolvier's mandatory release date was not only discussed prior to entering a plea on June 27, but was the driving force behind Mr. Toliver's decision to enter a plea. In fact, Mr. Toliver testified at the Postconviction hearing as such. The record clearly shows that custody credit was considered by all the parties in this case and was a part of the negotiations. The custody credit that Mr. Toliver was entitled to was not simply a sentencing issue, but

the record shows was a driving force in the negotiations to resolve the case. For that reason, Mr. Toliver was denied the effective assistance of counsel prior to entering his plea because he was misinformed by Attorney Knight as to the correct amount of credit and the impact the actual amount would have on his sentence.

In sum, Mr. Toliver asks this Court to order that the pleas in this matter be withdrawn and vacated because Mr. Toliver was denied the effective assistance of counsel and that the trial court erred in denying Mr. Toliver's Postconviction motion.

Conclusion

This Court therefore should reverse the decision of the trial court denying the defendant's Post Conviction motion for plea withdrawal.

Dated at Milwaukee, Wisconsin this 27th day of February, 2015.

Respectfully submitted,

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APPENDIX

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STATE OF WISCONSIN

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

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2014AP002939-CR

STEPHEN TOLIVER,

Defendant-Appellant.

Certification of Form & Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 6,731 words.

Respectfully submitted,

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STATE OF WISCONSIN

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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, 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 issue raised, including oral or written rulings or decisions showing the trial 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.

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Signed:_____,
MATT LAST
Attorney for Defendant-Appellant

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Pursuant to Rule 809.19(12)(f), I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed:_____,
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