STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2939-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN TOLIVER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY WAGNER PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

WILLIAM L. GANSNER
Assistant Attorney General
State Bar #1014627

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539 (Phone), (608) 266-9594 (Fax)
gansnerwl@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2939-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN TOLIVER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY WAGNER PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin agrees with plaintiff-appellant Stephen Toliver that oral argument and publication of the

court's opinion are not warranted. The parties' arguments are fully presented in their briefs, and the appeal can be decided on the basis of well-established authority.

SUPPLEMENTAL STATEMENT OF THE CASE

As an aid to the court's consideration of his present appeal, the State presents this complete chronology of the course of Toliver's case from his 1991 charging and 1992 conviction through the granting of federal habeas corpus relief from his conviction in 2012. Events after Toliver's return to the circuit court for new proceedings in 2013 are fairly described in Toliver's brief, at 5-9.

Original charge and conviction: On May 28, 1991, Stephen Toliver and his brother Oliver Toliver were charged in Milwaukee County Circuit Court as parties to the crime of the first-degree intentional homicide of Tina Rodgers on May 12, 1991 (1). The brothers' prosecutions were severed for separate trials (1:4; 6). On January 25, 1992, a jury found Oliver guilty of the charged crime (1:12). Another jury returned a guilty verdict against Stephen Toliver on January 31, 1992 (1:17; 14). On March 16, 1992, Stephen Toliver (hereafter, simply "Toliver") was sentenced to life in prison with parole eligibility in December of 2045 (16).

Direct appeal and conviction affirmed. Toliver filed a motion for postconviction relief on December 16, 1992 (29) and a supplemental motion on January 8, 1993 (34). The motions were heard between February 4 and 9, 1993 (61-65) and denied in an order of February 9, 1993 (37). This court affirmed Toliver's conviction and the postconviction order in an unpublished decision in Case No. 93-0510-CR on May 10, 1994 (70). The Wisconsin Supreme Court denied his petition for review on July 19, 1994 (71). Toliver represented himself on his postconviction motion and direct appeal.

Unsuccessful § 974.06 motion. On February 24, 1997, represented by counsel, Toliver filed a motion for collateral postconviction relief under Wis. Stat. § 974.06 (74).[1] The circuit court summarily denied the motion on procedural grounds in an order of February 28, 1997 (77), and this court summarily affirmed the order on June 8, 1998 (80). The Wisconsin Supreme Court denied Toliver's petition for review on August 21, 1998 (81).

Federal court reinstatement of right to state court direct appeal with counsel. In November of 1999, acting on a new federal habeas petition, the United States District Court for the Eastern District of Wisconsin ruled that Toliver was entitled to release from custody unless he were granted reinstatement of his right to a state court direct appeal with appointed counsel. *Wisconsin ex rel. Toliver v. McCaughtry*, 72 F.Supp. 2d 960 (E.D. Wis. 1999).

New postconviction motion and direct appeal. With his right to seek postconviction relief in the State courts reinstated, Toliver – with counsel's assistance – filed a new postconviction motion under Wis. Stat. § (Rule) 809.30 in June of 2000 asserting, among other claims, his trial counsel's ineffectiveness (85). The circuit court denied the motion in a lengthy decision and order on August 24, 2000 (89). Toliver appealed his judgment of conviction and the denial of his postconviction motion (92). This court affirmed the judgment and order in an unpublished decision issued September 18, 2001 (94). The Wisconsin Supreme Court denied review on December 17, 2001 (95).

---

[1] The motion referenced two additional postconviction efforts Toliver pursued after his direct appeal and before the § 974.06 motion: (1) an unsuccessful state habeas corpus petition in this court (74:2); and (2) an unsuccessful federal habeas corpus petition that was dismissed for failure to exhaust state court remedies (*id.*).

Federal court grant of habeas relief. Toliver then returned to federal court with a renewed petition for federal habeas corpus relief asserting several claims, including ineffectiveness of trial counsel. The district court initially denied Toliver's petition in a decision issued in January of 2006, *Toliver v. McCaughtry*, No. 02-C-1123, 2006 WL 273537 (E.D. Wis. 2006). On Toliver's appeal, the federal appellate court focused primarily on the ineffectiveness claim. The federal court of appeals reversed the district court decision, concluded that trial counsel's failure to call two potentially exculpatory witnesses was prejudicial, and remanded for an evidentiary hearing on deficient performance. *Toliver v. McCaughtry*, 539 F.3d 766 (7th Cir. 2008). On remand, the district court granted the habeas petition after concluding that counsel's performance was unreasonable and deficient. The State of Wisconsin then appealed. In August of 2012, in *Toliver v. Pollard*, 688 F.3d 853 (7th Cir. 2012), the federal appellate court upheld Toliver's claim of trial counsel's ineffectiveness and affirmed the district court's grant of habeas relief (98).

Post-Habeas Return to Milwaukee County Circuit Court. The granting of habeas relief to Toliver was conditional, requiring that Toliver be released from custody unless the State commenced proceedings to provide him a new trial. Those proceedings commenced on January 23, 2013, when Toliver returned to the circuit court for a bail hearing (169). Subsequent events in the circuit court are described in Toliver's brief, at 5-9.

ARGUMENT

I. TOLIVER FAILED TO PROVE THAT HIS GUILTY PLEAS SHOULD BE WITHDRAWN ON THE GROUNDS THAT THE NEGOTIATED PLEAS TO REDUCED CHARGES WERE NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED.

Toliver spent the better part of two decades challenging his 1992 conviction and life sentence for first-degree intentional homicide. He ultimately succeeded. That conviction and sentence were vacated and in January and June of 2013, respectively, he entered negotiated guilty pleas to reduced charges of felony murder (170:19) and first-degree reckless endangerment (173:8), for which consecutive thirty-year and five-year sentences were ordered (170:34; 173:10). There followed several months of wrangling with the Department of Corrections over the amount of pretrial incarceration credit he should receive under Wis. Stat. § 973.155 and how much time he had served under the vacated life sentence should be credited against the new felony murder sentence under Wis. Stat. § 973.04.[2] And finally, on December 1, 2014, Toliver secured an even more favorable sentencing result. While the circuit court denied Toliver's motion to withdraw his guilty pleas, the court modified the five-year sentence imposed in June of 2013, reducing it to a two-year term consecutive to the felony murder sentence (162:6; A-Ap. 112; 166).

The intended purpose of this sentence modification was "to effectuate [Toliver's] immediate release [on mandatory release supervision]" (162:6; A-Ap. 112). It produced that result: records of the Wisconsin Department of Corrections show that

[2] The back-and-forth with the Department of Corrections is recounted in Toliver's brief at 6-9.

Toliver was released from prison on mandatory release supervision on December 3, 2014 (R-Ap. 101).[3]

The circuit court modified Toliver's sentence to that effect as a remedy for what both sides acknowledged had been a mistaken understanding of what Toliver's mandatory release would be under the negotiated guilty plea and sentencing in January and June of 2013 (174:5, 8). The circuit court viewed this modification of sentence – and not withdrawal of Toliver's guilty pleas – as the appropriate remedy for the parties' misunderstanding (162:5-6; A-Ap. 111-112). The circuit court's decision was correct.

A defendant who seeks to withdraw his guilty plea after sentencing bears the heavy burden of proving by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw the plea. *State v. Brown*, 2006 WI 100, ¶¶ 18-19, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To prevail, the defendant must prove there was a serious flaw in the fundamental integrity of the plea; not just disappointment in a lengthier than expected sentence. *State v. Roou*, 2007 WI App 193, ¶ 15, 305 Wis. 2d 164, 738 N.W.2d 173. This stiff burden of proof is imposed on the defendant, to protect the state's strong interest in preserving the finality of criminal convictions once

[3] If he had been willing, Toliver might have been released even earlier. At the hearing on Toliver's postconviction motion on October 31, 2014, the State had proposed reducing the reckless endangering sentence right then in order to effect Toliver's release from prison within a day (174:7). In fact, the prosecutor stated that this proposal had been made to Toliver a few months earlier but Toliver had rejected it in favor of pursuing his plea withdrawal motion (174:7-8). Indeed, in a brief the State filed in the circuit court on August 21, 2014, the State had proposed modifying Toliver's sentence in a manner that would have resulted in his release "in the summer of 2014" (153:1).

the plea has been accepted and sentence has been imposed. *See State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999).

Toliver claims that his guilty pleas were not voluntarily, knowingly, or intelligently entered because of the parties' misunderstanding of his mandatory release date under the sentences imposed in January and June of 2013. He had the burden of proving his claim, *Virsnieks v. Smith*, 521 F.3d 707, 714-15 (7th Cir. 2008). And the circuit court properly determined he had not discharged that burden:

> As the court has indicated, the defendant bears the burden of demonstrating a manifest injustice by clear and convincing evidence. In this instance, the defendant's testimony is that he accepted the State's plea offer because he believed he would be getting released in April 2014. While the defendant testified that he had intended on going to trial as late as June 25, 2013, he stated that ultimately he decided to accept the plea offer with the encouragement of his attorney and his family. . . .
>
> The court is not persuaded that the defendant has met his burden for plea withdrawal because he has not articulated any facts, either in his written submissions or at the hearing, to show that his release in April 2014 was crucial to his decision to enter his plea. . . . It is not sufficient for purposes of plea withdrawal for the defendant to assert that he thought he was going to be released in April 2014 without showing *why* being released at that time was crucial to his decision to accept the State's plea offer. Under the circumstances, the court agrees with the State that the defendant's claim is conclusory and therefore the court finds that he has not sufficiently demonstrated a manifest injustice for purposes of withdrawing his plea . . . .

(162:5-6; A-Ap. 111-112.) And while claiming that his misunderstanding of his mandatory release date was critical to his plea decision, Toliver cites no Wisconsin case in which a misunderstanding of the computation of a mandatory release

date has been regarded as undermining the knowing, voluntary, and intelligent nature of a plea decision and thereby creating a "manifest injustice" justifying withdrawal of a negotiated guilty plea.

Moreover, he has not challenged the circuit court's application of the decision in *State v. Armstrong*, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860, that a "new factor" modification of sentence was an appropriate remedy where the parties were mistaken in their erroneous belief on the amount of sentence credit to which a defendant was entitled. A similar shared misunderstanding by the parties was presented here. Rather than undermining the knowing and voluntary nature of Toliver's guilty pleas, that misunderstanding was most appropriately regarded here as a basis for modifying Toliver's sentence to more nearly achieve the actual period of incarceration the parties had contemplated when they had reached their negotiated plea agreement. That result was reasonable and fair, and this court should affirm the circuit court's decision.

II. TOLIVER HAS FAILED TO SHOW THAT HIS PLEA AGREEMENTS WERE PREMISED ON A LEGAL IMPOSSIBILITY.

When Toliver entered his guilty plea to the charge of first-degree reckless endangerment on June 27, 2013, the parties agreed that the sentence on that count would run consecutive to his felony murder sentence but concurrent with any other sentence (173:3). The parties also agreed that the felony murder sentence that was previously imposed was also made concurrent to any other sentence (173:3-4). Toliver contends that running either sentence concurrent to any other previously-imposed sentence was a legal impossibility. But his argument does not clearly explain what previous sentence existed and constituted "any other sentence" to which the

felony murder and reckless endangerment sentences could concurrently run. Nor does he clearly explain why it was impossible for his felony murder and reckless endangerment sentences to run concurrently with any such previous sentence.

Moreover, he does not explain why the concurrent sentence provision of the sentences imposed on the reduced charges in January and June of 2013 had any impact at all on the knowing, intelligent, and voluntary character of his guilty pleas.

His legal impossibility argument, as a result, is not sufficiently developed to warrant this court's consideration. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

III. THE TRIAL COURT DID NOT ERR WHEN IT VACATED HIS GUILTY PLEA TO CONCEALING A CORPSE WITHOUT VACATING HIS PLEA TO FELONY MURDER.

In January of 2013, following the granting of federal habeas relief from his first-degree intentional homicide conviction and sentence, Toliver negotiated an agreement with the State by which he entered guilty pleas to reduced charges of felony murder and concealing a corpse (101; 170:5, 11-19). Consecutive sentences of thirty and five years, respectively, were imposed (170:34-35). The Department of Corrections subsequently advised the court in a letter of May 3, 2013, that the crime of hiding a corpse was not created in Wis. Stat. § 940.11 until May of 1992, a year after Toliver's charged criminal conduct (112).

At a hearing on June 27, 2013, Toliver's counsel stated to the court that Toliver's plea and sentence to the corpse charge was "null and void" (173:2) and should be vacated while the

plea and sentence to felony murder would remain intact (173:2-3). The parties then advised the court that they had reached an agreement by which Toliver would plead guilty to a new charge of first-degree reckless endangerment in place of the corpse charge and that the State would recommend a five-year sentence on the new charge, consecutive to the previous thirty-year felony murder sentence (173:3-4). Toliver personally acknowledged that the parties' agreement left the felony murder charge, plea, and sentence intact and that only the corpse charge, plea, and sentence were being vacated (173:4). Toliver then entered his plea of guilty to the new reckless endangerment charge (173:5-8), for which the court then imposed a five-year sentence consecutive to the previous and unvacated thirty-year felony murder sentence (173:10-11). The court's vacating of the corpse charge, plea, and sentence – while leaving the felony murder plea and sentence intact – was plainly done at the agreement of the parties and with Toliver's explicit understanding and approval.

Contrary to his representations and actions when he entered his revised plea agreement on June 27, 2013, Toliver now argues that the court erred in vacating only the corpse plea, charge, and sentence, and should have vacated the entirety of the previous plea agreement and disposition, including his plea and sentence on the felony murder. His argument should be summarily rejected.

Toliver's reliance upon *State v. Briggs*, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), is misplaced (Toliver's brief at 16, 18). Briggs was convicted on his negotiated no-contest pleas to two charges in an amended information – attempted felony murder and burglary while armed. 218 Wis. 2d at 63-64. The circuit court denied his postconviction motion seeking to vacate the attempted felony murder charge on the ground that there is no such crime in Wisconsin. *Id.* at 64. This court agreed with Briggs that attempted felony murder is not a crime, *id.* at 65-68,

and that his conviction on the non-existent crime must be vacated. *Id.* at 68-69. Briggs wanted to vacate the attempted felony murder conviction alone, while leaving the armed burglary conviction intact, but this court held that his appeal had brought the entirety of the judgment before the court and that the appropriate remedy was to vacate Briggs' conviction on both counts and to reinstate the original information. *Id.* at 71-74.

The circumstances here are significantly different. This appeal does not bring a conviction on a non-existent crime before the court. Instead, it presents an appeal from Toliver's plea-based convictions on two valid crimes, felony murder and reckless endangerment. Toliver's plea and conviction on an invalid charge of hiding a corpse – invalid because it was not a crime at the time of Toliver's charged conduct – was vacated at the parties' joint request in the circuit court. It was then replaced, also at the parties' agreement, by a valid charge to which Toliver entered his negotiated guilty plea. This court's correction of an invalid charge and conviction is not necessary; the corrective remedy was already applied by the circuit court in the manner jointly agreed upon by the parties.

IV. TOLIVER DID NOT DISCHARGE HIS BURDEN OF ESTABLISHING THAT HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was *both* deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must overcome a strong presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove prejudicial performance in the context of representation in negotiation and entry of guilty pleas, the defendant must show that but for

counsel's errors, there is a reasonable probability that the defendant would have pleaded not guilty and gone to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1986).

Toliver argues that his counsel was ineffective in failing to correctly determine or calculate his mandatory release date before he entered his negotiated guilty pleas to felony murder and reckless endangerment. Even if his attorney performed deficiently in failing to correctly calculate his mandatory release date under his new sentences – a "failing" he shared with the prosecutor and the court – that performance was not prejudicial. When the circuit court rejected Toliver's argument that his guilty pleas were not voluntarily, intelligently, and knowingly entered, the court found that Toliver had not demonstrated – in his allegations or his testimony at the hearing on his postconviction motion – "that his release in April 2014 was crucial to his decision to enter his plea" (162:5; A-Ap. 111). Instead, as the court found, after intending to go to trial as late as June 25, 2013, Toliver "stated that ultimately he decided to accept the plea offer [on June 27, 2013] with the encouragement of his attorney and his family" (*id.*). Thus, the circuit court was "not persuaded" by Toliver that there was a reasonable probability he would have pleaded not guilty and gone to trial but for his counsel's asserted failure to correctly calculate his mandatory release date.

CONCLUSION

The State of Wisconsin respectfully requests that this court affirm Toliver's judgment of conviction and sentence and the circuit court order denying his postconviction motion for withdrawal of his guilty pleas.

Dated at Madison, Wisconsin, this 16th day of June, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

WILLIAM L. GANSNER
Assistant Attorney General
State Bar #1014627

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
gansnerwl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3128 words.

_____

William L. Gansner
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (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 16th day of June, 2015.

_____

William L. Gansner
Assistant Attorney General