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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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*. This Court has previously held 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*.

Mr. Toliver did not enter his pleas in a knowing, intelligent and voluntary manner and for that reason is entitled to withdraw his pleas as a matter of right. The Respondent argues the circuit court properly determined that Mr. Toliver failed to meet his burden for plea withdrawal. However, it is clear there were a number of "affirmative incorrect statements" made to Mr. Toliver regarding custody credit and the impact the credit had on his mandatory release date. According to the Court in *Brown*, "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. *Id*. As previously stated in Defendant-Appellant's brief p. 11-13, both parties addressed the amount of custody credit and the impact the credit had on Mr. Toliver's mandatory release date as part of not only the negotiations between the parties, but as to hearings before the court. When Mr. Toliver entered his pleas on January 25, 2013 he was informed he was entitled to 7,917 days custody credit and was expecting a mandatory release date of

sometime between April and July 2014. On June 27, 2013 when Mr. Toliver entered into a new plea agreement, he was informed he was entitled at that point to 7,793 days custody credit. *R173:3*. After receiving a number of letters from the Department of Corrections, the court issued a final order informing Mr. Toliver his new mandatory release date was at least an entire year after the date previously informed of by Attorney Knight and ADA Williams.

Mr. Toliver was misinformed by the parties as to the amount of credit he actually was entitled to. If Mr. Toliver was not allowed to withdraw his plea, he would suffer a manifest injustice because he was informed, by his attorney and the ADA prior to entering his plea that he was entitled to one amount of credit, but it turned out he was entitled to a completely separate amount of credit. This misinformation provided to Mr. Toliver impacted the outcome of his case because it moved his mandatory release date back at least an entire year.

The issue of credit was not simply a sentencing issue, but an issue considered by Mr. Toliver prior to making the decision to resolve this case with a plea. At the Postconviction hearing, Mr. Tolvier was asked by counsel "Prior to entering your plea, did you consider whether—did you consider the custody credit that you had in making your decision whether to go to trial or not to go to trial?" *R174:29*. Mr. Toliver replied "That was the only reason I took it." *Id.* at 30. When asked later in the hearing whether he would have accepted the pretrial offer and entered pleas if knew he was not entitled to the amount of credit he actually was entitled to, Mr. Toliver stated "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 has shown the issue of credit was not simply a sentencing issue, but an issue considered in making the decision to enter his pleas. Unfortunately, Mr. Toliver was provided incorrect information regarding the credit.

As the court indicated in *Brown*, a misunderstanding of a collateral consequence of a guilty plea is grounds for plea withdrawal if it is based on "affirmative incorrect statements." It is clear, based on the comments by the parties at the hearings held in this case that affirmative incorrect statements were made to Mr. Toliver as to his credit. For that reason, his pleas were not knowingly, voluntarily and intelligently entered into by Mr. Toliver.

In sum, Mr. Toliver asks this Court to grant an order allowing him to withdraw his pleas because he suffered a manifest injustice when he was misinformed regarding the amount of custody credit. Additionally, a number of affirmative incorrect statements were made to Mr. Toliver regarding the credit and the impact on his mandatory release date which prevented his pleas from being entered voluntarily, intelligently and knowingly and because the trial court erred in denying his Postconviction motion.

II. The Trial Court Erred in Denying Mr. Toliver's Post Conviction Motion Based on 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 *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).

On January 23, 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. Mr. Tolvier was sentenced by the court to 30 years prison with 7,917 days custody credit on Count #1 Felony Murder, and 5 years prison on Count #2 Hiding a Corpse. *R170:34*.

On June 26, 2013 Mr. Toliver appeared in court because the Department of Corrections had notified the court that the Hiding a Corpse charge plead to by Mr. Toliver on January 25, 2013 did not exist at the time the present offenses were committed on May 12, 1991. On June 27, 2013, Attorney Knight informed the court the parties had reached an agreement where the Count #1 Felony Murder charge previously plead to would not be vacated and that Mr. Toliver would be pleading to Count #2 as a charge of First Degree Reckless Endangerment. *R173:2*. Attorney Knight informed the court the parties would be stipulating and agreeing that the previous sentence imposed on Count #1 would be consecutive to Count #2, but would be concurrent to anything else. *Id*. at 3.

In 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 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*. Because of Wisconsin Statute 973.04, the sentences Mr. Tolvier received could not have been run concurrent as described in the plea agreement he entered into.

Mr. Toliver was lead to believe he was receiving some type of advantage because the agreement entered into on June 27, 2013 called for the sentence to run "concurrent" to any other sentence. As the court stated in *Dawson* "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."

In Sum, Mr. Toliver 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 any other sentence and was lead to believe he was entitled to a certain amount of custody credit when he was not.

III. The Trial Court Erred in Failing to Vacate Mr. Toliver's Entire Plea on Grounds That Mr. Toliver Plead to 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 May 3, 2013, the Department of Corrections drafted a letter to the court explaining that Count #2, Hiding a Corpse, which Mr. Toliver entered a plea to, was not a statute at the time of the alleged offense on May 12, 1991. *R112:1*. For that reason, Mr. Toliver appeared in court on June 26, 2013 and informed the court the plea previously entered had to be vacated. R172:2. It was at this point that both the pleas entered to Count #1 and Count #2 should have been vacated. However, that is not what occurred. The parties informed the court on June 27, 2013 an agreement was reached in which Mr. Toliver's plea previously entered to Count #1 would remain, and he would now enter a plea to an amended Count #2 of First Degree Reckless Endangerment. *R173:2*.

The Respondent argues the circumstances in the present case are significantly different than those in *Briggs*. However, this argument is wrong because the facts of this case closely match those in Briggs. In *Briggs*, the court agreed with *Briggs* that attempted felony murder is not a crime and that his conviction on the non-existent crime must be vacated. *State v. Briggs*, 218 Wis.2d 61,65-69,579 N.W.2d 783 (Ct. App. 1998) Briggs wanted to vacate the attempted felony murder conviction alone, while leaving the armed burglary conviction intact. However, this court held that Brigg's appeal brought the entirety of the judgment before this court and that the appropriate remedy was to vacate the conviction on both counts and to reinstate the original information. *Id*. at 71-74. This is exactly what should have occurred in the present case but did not. On January 25, 2013 Mr. Toliver entered a plea to an amended Count #1 of Felony Murder and Count #2 Concealing a Corpse and was sentenced on those two charges. However, it was error to allow Mr. Toliver to enter a plea to a charge Hiding a Corpse because

this charge was not a stature at the time of the alleged offense of May 12, 1991. Much like Briggs entering a plea to a charge of attempted felony murder, which was not a crime, the charge of Hiding a Corpse plead to by Mr. Toliver was not a crime at the time of the alleged offense.

The Respondent argues the parties entered into a joint agreement which corrected the issue as to Count #2. However, 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). Additionally, the court in *Briggs* held that 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." *Briggs*, 579 N.W.2d 783.

For all of these reasons, it was error for the court not to vacate Mr. Toliver's pleas to both charges on January 23, 2013. 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 Grounds That Trial Counsel Failed to Provide 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*. 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. 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.

Attorney Knight was ineffective for failing to correctly determine and calculate the custody credit Mr. Toliver was entitled and the impact the credit had on his mandatory release date. Calculating custody credit is part of the responsibilities of trial counsel at the time of plea and sentencing. Particularly, trial counsel is called upon to determine the amount of custody credit a defendant has and which cases the credit applies to. In this case Attorney Knight did determine an amount of credit Mr. Toliver was entitled to, however, he did so incorrectly. More importantly, Attorney Knight incorrectly advised Mr. Toliver as to the amount of credit prior to Mr. Toliver making the decision to resolve the case with a plea.

At the Postconviction hearing, Mr. Toliver testified that prior to entering his pleas in June 2013, he spoke with Attorney Knight regarding the amount of jail credit he was entitled to. *R174:29*. Mr. Toliver was asked at the Postconviction 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?" and Mr. Toliver stated "That was the only reason I took it." *Id*. When asked if he would have entered the pleas if he knew that he was not entitled to the amount of credit that he believed he was, he stated "No" and then stated "No, I wouldn't have accepted it because I wasn't going to accept I on June 25. I demanded a trial." *Id.*

It is clear that Attorney Knight's error in calculating Mr. Toliver's custody credit amounted to deficient performance. Not only was his performance deficient, the error did prejudice Mr. Toliver because he was misinformed by Attorney Knight as to the impact his credit had on his mandatory release date. Mr. Toliver showed at the Postconviction hearing that if he would have been properly informed by Attorney Knight he would not have entered plea in this case. For that reason the outcome of this case would have been different. For all of these reasons, the circuit court erred in denying Mr. Toliver's Postconviction motion.

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 his 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 23rd day of June, 2015.

Respectfully submitted,

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

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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 2,718 words.

Respectfully submitted,

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Certification of Electronic Brief

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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