STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2015AP475CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN KENNEDY

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON MAY 16, 2014 AND SENTENCE IMPOSED ON MAY 12, 2014 AND ORDER DENYING KENNEDY'S MOTION FOR POSTCONVICTION RELIEF, ENTERED ON FEBRUARY 17, 2015, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court Cases

Wisconsin Cases

Wisconsin Statutes

ISSUES PRESENTED

Did the trial court err by finding that Kennedy is not entitled to withdraw his plea due to Bangert?

Answer by Circuit Court: No

Did the trial court err by finding that Kennedy is not entitled to withdraw his plea due to Nelson-Bentley?

Answer by Circuit Court: No

ARGUMENT

I. KENNEDY IS ENTITLED TO WITHDRAW HIS PLEA DUE TO THE FACT THAT HIS PLEA WAS NOT KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY ENTERED UNDER BANGERT

Whether to permit withdrawal of a guilty plea is a discretionary decision for the trial court. ***State ex rel. Warren v. Schwarz,*** 219 Wis.2d 616, 636, 579 N.W.2d 698, 708 (1998). The trial court's decision will be overturned only if the court erroneously exercised its discretion. ***Id***. A defendant seeking to withdraw his plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct "a manifest injustice." ***Warren*** 219 Wis.2d at 635. A manifest injustice can occur when a plea is not voluntarily, knowingly, or intelligently entered. ***Warren,*** 219 Wis.2d at 635-636. Under Wis. Stat. §971.08(1)(a), the court is required to "determine that a plea is made voluntarily and with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. §971.08(1)(a). Upon entering a plea of guilty or no contest, the court must satisfy itself by addressing the defendant personally on the record that his plea was entered knowingly and willingly. ***State v. Bangert,*** 131 Wis.2d 246, 389 N.W.2d 12 (1986). During the course of a plea hearing the court

must address the defendant personally and establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea, and notify the defendant of the direct consequences of his plea. ***State v. Brown,*** 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906. A direct consequence is a consequence that has a "definite, immediate and largely automatic effect on the range of defendant's punishment." ***State v. Bollig,*** 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.

Kennedy alleges that his plea was not knowing, intelligent or voluntary because he was not informed that the disorderly conduct charge was related to domestic abuse or the domestic abuse assessment. Although Kennedy was informed in the complaint that he was charged with misdemeanor battery, domestic abuse assessments, his charge was amended to disorderly conduct with no mention of domestic abuse assessments. (15AP475:2). An amended criminal complaint was not filed by the State. Instead the amendment was on the record. (15AP475:23:2; App. 117). The amendment on the record did not state anything regarding the domestic abuse assessment. The State alleges that the only amendment ever discussed during the course of the plea colloquy was an amendment of the charged offense, not the domestic abuse modifier nor the imposition of the assessment. Kennedy's plea is not knowingly, or intelligently made then due to the fact that there was no way of him knowing that the only amendment was to the charge because the court never addressed this.

Throughout the entire plea colloquy no mention was made that the amendment to the charge was only based on disorderly conduct and Kennedy would have no way of knowing this. (15AP475:23; App. 116-126). In fact the court went over the penalties which did change from the battery and made sure that Kennedy understood the new penalties. (15AP475:23:7-8;App. 122-123). Therefore, Kennedy did not have ample notice that the crime to which he plead was one of domestic abuse and his plea was not knowingly, voluntarily or intelligently made.

II. KENNEDY SHOULD BE ALLOWED TO WITHDRAW HIS PLEA DUE TO THE FACT THAT HIS PLEA WAS NOT KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY ENTERED UNDER NELSON/BENTLEY

A defendant seeking to withdraw his plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct "a manifest injustice." ***State ex rel. Warren v. Schwarz,*** 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998). A manifest injustice can occur when a plea is not voluntarily, knowingly, or intelligently entered. ***Warren,*** 219 Wis.2d at 635-636. A defendant is entitled to a hearing to address a plea withdrawal if sufficient facts are alleged that would entitle the Defendant to the relief sought. ***Nelson v. State,*** 54 Wis.2d 489, 195 N.W.2d 629(1972); ***State v. Bentley,*** 201 Wis. 2d 303, 548 N.W.2d 50(1996).

A manifest injustice can occur when a plea is not voluntarily, knowingly, or intelligently entered. ***Warren,*** 219 Wis.2d at 635-636. Ineffective assistance of counsel may constitute a manifest injustice. ***State v. Berggren,*** 2009 WI App 82 ¶10, 320 Wis.2d 209, 769 N.W.2d 110.

To establish ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington,*** 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the Federal Constitution. ***See State v. Sanchez,*** 201 Wis.2d 219, 235-36, 548 N.W.2d 69 (1996). Performance is deficient if it falls outside the range of professionally competent representation, measured by the objective standard of what a reasonably prudent attorney would do under the circumstances. ***State v. Pitsch,*** 124Wis.2d 628, 636-37, 369 N.W.2d 711 (1985). Prejudice is demonstrated where, but for counsel's deficient performance, there was a reasonable probability that

but for counsel's errors, he would have insisted on going to trial. ***Hill v. Lockhart,*** 474 U.S. 52 (1985).

Kennedy alleges that his trial counsel never informed him of the fact that the disorderly conduct charge had a domestic abuse modifier or a domestic abuse assessment. Kennedy thought that he was pleading to a disorderly conduct only. Trial Counsel's performance was deficient because he did not inform his client of all of the consequences of his plea based on the amendment of the plea. A reasonably prudent attorney would inform their client that the amendment of disorderly conduct still has a domestic abuse modifier, that there would be a domestic abuse assessment, and that he still would not be able to possess a firearm. A reasonably prudent attorney would inform their client of what the amendment to disorderly conduct would change or not change about the complaint and his client's plea.

There is a reasonable probability that if Kennedy was informed of the modifier and assessment ahead of time, he would not have plead to the charge and would have insisted on a trial due to the fact that his security license and hunting license would be revoked based on the domestic abuse modifier and his inability to carry a firearm.

CONCLUSION

For, the reasons stated above Kennedy asks this Court to allow Kennedy to withdraw his plea or remand the case to the circuit court for a hearing to address plea withdrawal.

Respectfully submitted this
11th day of July, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **1,093** words.

Respectfully submitted this
11 th day of July, 2015.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief report 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: July 11, 2015

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