STATE OF WISCONSIN

COURT OF APPEALS

Appeal No. 2015AP000953 CR

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HENRY J. BLOEDORN,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY, PRESIDING, DENYING DEFENDANT-APPELLANT'S MOTION TO WITHDRAW DEFENDANT'S ALFORD PLEA DUE TO INEFFECTIVE COUNSEL

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is not believed to be necessary in this case. The issues are matters of law which can be resolved by the briefs of the parties without the aid of oral argument and publication is not requested.

STATEMENT OF THE ISSUES

Whether the trial court erred in refusing to permit the defendant to withdraw his Alford plea as a result of counsel's ineffective assistance.

Answer in the trial court: No.

STATEMENT OF THE CASE

On September 3, 2013, the defendant was charged in a criminal complaint with the following offenses: Count 1: repeated sexual assault of a child; Count 2: incest; and Count 3: child enticement. (R.1, App. A).

On February 12, 2014 the defendant entered a guilty plea to Count 1 and on motion of the State, Counts 2 and 3 were dismissed and read in. Court orders a presentence investigation be completed and the defendant was remanded

to the custody of the Ozaukee County Sheriff's Department.

On March 4, 2014 the defendant wrote directly to the court regarding his doubts about his legal representation and stated in his letter "not once has anyone shown me evidence." (R.25, App. B).

On March 6, 2014, the defendant again wrote directly to the court regarding his doubts about his legal representation and states "I still can't believe my lawyer Ken Kratz isn't doing more." (R.27, App. C).

On April 7, 2014, at the court hearing, the court read into the record the letters mentioned in the two previous paragraphs, and adjourned the case to April 8, 2014.

On April 8, 2014, at the court hearing, Attorney Ken Kratz requested sentencing be continued for approximately one month and the court adjourned sentencing for defendant to consider if he wishes to withdraw his plea; court schedules jury trial for May 6, 2014 and jury status hearing for May 2, 2014.

On April 10, 2014, the State of Wisconsin filed their Witness List, and on May 1, 2014, filed their proposed jury instructions. Attorney Kratz never filed any witness list

or jury instructions.

On May 2, 2014, defendant entered an Alford Plea to Count 1; ordered Counts 2 and 3 dismissed and read in and adjourned sentencing to May 6, 2014.

On May 6, 2014 after counsel statements, the Court sentenced defendant as follows: "And so I'm going to sentence you to 25 years, with 20 years of initial confinement and 5 years of extended supervision." (R.71, page 43, App. D).

On October 21, 2014, defendant filed Defendant's Motion to Withdraw Alford Plea and on October 30, 2014, defendant filed his Defendant's Amended Motion to Withdraw Alford Plea. On March 12, 2015 Defendant's Amended Motion to Withdraw Alford Plea was heard and on April 22, 2015 the Court signed it's Order denying Defendant's Motion to Withdraw Defendant's Alford Plea. (R.68, App. E). Defendant's Notice of Appeal was filed on May 8, 2015. (R.69)

STATEMENT OF THE FACTS

On August 30, 2013, a child forensic examiner employed by the Child Protection Center of Children's Hospital interviewed the alleged minor victim in this case, hereinafter referred to as NTK, who stated that between the dates when NTK was 11 years of age and 14 years of age, he was molested by his grandfather, who he identified as the Defendant. NTK also informed the forensic examiner that the defendant had images of NTK and defendant engaged in sexual relations. That defendant was subsequently arrested and the Ozaukee County District Attorney's office filed its criminal complaint on September 3, 2013.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE DEFENDANT TO WITHDRAW HIS ALFORD PLEA AS A RESULT OF COUNSEL'S INEFFECTIVE ASSISTANCE.

A. Applicable case law

"[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

In *McMann v. Richardson*, 397 U.S. 759, 7768-71 (1970), the court observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on whether a court would retrospectively consider his advice right or wrong "but on whether that advise was within the range of competence demanded of attorneys in criminal cases." *See also Tollett v. Henderson*, 411 U.S. 258, 266-69 (1973); *United States v. Agurs*, 427 U.S. 97, 102 n.5 (1976). In the instant case, Defendant-Appellant Henry J. Bloedorn (hereinafter referred to as "H. Bloedorn") questions his counsel's competence. H. Bloedorn believes Attorney Ken Kratz (hereinafter referred to as "Kratz"), did not only inadequately represent him, no proper communication regarding his alternatives were properly explained to him, any strategy he may have had right from the beginning was never fully discussed and agreed to between them.

A defendant may withdraw a guilty plea after sentencing upon a showing of "manifest injustice" by clear and convincing evidence. *State v. Rock*, 92 Wis.2d 554, 558-59, 285 N.W.2d 739 (1979). *Rock* recognized that the "manifest injustice" requirement is met if the defendant was denied

the effective assistance of counsel. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that such performance prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel's conduct fell below an objective standard of reasonableness. *Id.* At 687-88. To establish prejudice, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* At 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Prejudice in the context of an ineffective assistance of counsel claim "should be assessed based on the cumulative effect of counsel's deficiencies." *State v. Thiel,* 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.

The Sixth Amendment demands effective assistance of counsel during the pretrial and plea bargaining process. *Missouri v. Frye,* 132 S.Ct. 1399, 1407 (2012). When a defendant enters his plea upon the advice of counsel, the "deficient performance" requirement of *Strickland* is

satisfied if he shows that the advice he relied on in entering his guilty plea was not within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart,* 474 U.S. 52, 56 (1985). To satisfy the prejudice requirement of *Strickland* in the context of a case that resulted in a plea, the defendant must show that there is a reasonable probability that, but for counsel's unreasonable advice, he would not have pled guilty and would have insisted on going to trial. *Hill* 474 U.S. at 59.

Although historically the core purpose of the right to counsel was to assure assistance at trial, over time the Court has recognized that this assistance would be less meaningful if it were limited to the formal trial itself. *United States v. Ash*, 413 U.S. 300, 309-10 (1973). As a result, the Supreme Court has consistently held that the right to effective counsel attaches during all critical stages of the prosecution. *Rothgery v. Gillespie County,* 128 S.Ct 2578 (2008); *Powell v. Alabama*, 287 U.S. 45, 57, (1932). In particular, the Court in *Powell v. Alabama* concluded that pretrial arrangements could be "perhaps the most critical period of the proceedings." *Powell*, 287 U.S.

at 57.

Since plea-bargaining is an "essential component" *Santobello v. New York*, 404 U.S. 257, 260 (1971) of the criminal process, a defendant's counsel has a duty to provide effective assistance during this stage. *Strickland* 466 U.S. at 688. This ensures that the defendant retains the ultimate authority to make certain fundamental decisions, such as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *Jeffrey Welton Nunes v. G.A. Mueller,* 350 F.3d at 1053, quoting *Jones v. Barnes*, 463 U.S. 745, 751,(1983). When a defendant is denied effective assistance of counsel during plea bargaining, the right asserted is not the right to a plea bargain, or even the right to a fair trial, but rather the right to be properly informed before deciding his or her own fate. *Id.* ("Here the right that [the defendant] claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate – a right also clearly found in Supreme Court law.")

B. Defense counsel failed to communicate or advise the Defendant regarding evidence, strategy or possible prison sentences.

Communication with H. Bloedorn was so limited that to say Kratz "represented" H. Bloedorn in the instant case would be completely overstating their relationship.

During the *Machner* hearing Kratz described his various meetings with H. Bloedorn and the fact that H. Bloedorn's wife, Laura A. Bloedorn (hereinafter referred to as "L. Bloedorn"), was with H. Bloedorn during many of those meetings. Specifically, Kratz describes a meeting he had with both H. Bloedorn and L. Bloedorn on October 14, 2013 as follows:

"Q All right. Then on October 14, was that a meeting with Mr. Bloedorn and his wife?

A It was. October 14th was a very, very extensive long meeting where we developed our initial defense strategy…"

(R. 88, Page 57, App. F).

Again during the Machner hearing Kratz describes another meeting, very briefly, that happened on October 30, 2013 as follows:

"A Actually the discussion about his agreement to what he said in the interview being accurate was made to me on October 30th. That was my next meeting with Mr. Bloedorn. That was a meeting that was almost specifically directed towards the evidence and directed towards whether I was going to file a Fifth or Sixth Amendment challenge to Mr. Bloedorn's statements.

Q And that's – okay. So the next time you met with him was October 30th?

A Yes."

(R. 88, Page 60, App. G).

L. Bloedorn also testified at the *Machner* hearing and she described the office meetings she attended with her husband in a very different manner. Throughout her testimony L. Bloedorn refers to the shortness of the meetings and her frustration with the same. (R. 88, Pages 85-90, App. H). Particularly, L. Bloedorn was asked about her second meeting with H. Bloedorn and Kratz where H. Bloedorn's retainer was paid (R. 88, Page 85, Lines 7-14, App. H) wherein L. Bloedorn states the meeting was only five minutes at the most.

L. Bloedorn continues to describe a meeting on October 30th where she dropped H. Bloedorn off so that he could have a private meeting with Kratz. She states that she dropped him off, went to McDonalds and was surprised that her husband called such a short time later to have her come back and pick him up as the meeting was over. She states (R.88, Page 86, Lines 3-7, App. H) that the meeting was no more than fifteen minutes, twenty minutes, at the most. L. Bloedorn continues to testify (R.88, Page 87, App. H) that she always answered the phone at her home as H. Bloedorn refused to, and that H. Bloedorn never spoke with Kratz on the phone and all meetings were arranged through L. Bloedorn. She continues to further testify (R.88, Page 87, App. H) that the meetings she arranged, and that she attended with H. Bloedorn before February 12, 2014, were never more than ten minutes, at the most. L. Bloedorn ends her testimony with a final statement reiterating again her frustration with the short meetings:

"Q And what was the longest meeting you had during any of the times you talked to him?

A Like I said, five minutes at the most. He doesn't -- he didn't talk. I mean this is why I said he never

counseled anybody or us or anything. He was very tight-lipped or what do you call that? But I mean I just – I couldn't believe it personally. I was expecting always him to come forth, and he never did." (R.88, Page 90, Lines 15-23, App. H).

In regard to discussing any length of time for prison that H. Bloedorn was facing or that Kratz believed would be the end result if negotiated rather than trial, L. Bloedorn stated as follows:

"Q Did he ever tell you that he was going to recommend 15 years in and 15 years out –

A Never.

Q -- as a condition of probation?

A Never.

THE WITNESS: I only heard three, Your Honor. That's all he always said, Mr. Kratz, only three. All the way up to the end.

THE COURT: Okay."

(R.88, Page 90, Lines 6-14, App. H).

H. Bloedorn personally, in frustration over his lack of proper counsel, wrote directly to Judge Malloy on two occasions. In his letter dated March 2, 2014, (R.25, App. B) H. Bloedorn states at the end of his letter: "Not once has anyone shown me evidence." Again, in his letter two days later dated March 4, 2014 (R.27, App. C) H. Bloedorn states in the second paragraph: "I still can't believe my lawyer Ken Kratz isn't doing more. I have never been told or shown any evidence. Isn't that a part of case that the evidence comes out. Who is withholding my evidence."

As all of the meetings were short, according to L. Bloedorn's personal testimony, H. Bloedorn was right to feel that his attorney never properly communicated with him in regard to strategy, evidence or possible sentencing ramifications if he plead to the case. Without said proper communication, how could H. Bloedorn assist in his own defense?

C. Defense counsel allowed a presentence investigation to continue as Defendant was withdrawing his plea and considering trial.

On February 12, 2014, H. Bloedorn entered a guilty plea to Count 1 of the Criminal Complaint following the advice of his counsel. On February 13, 2014, the court ordered a pre-sentence investigation. A pre-sentence investigation generally consists of an interview with the defendant, a review of his or her criminal record, and a review of the specific facts of the crime, as well as interviews with the defendant and his significant others and, on occasion, may also include statements from the victim(s). The pre-sentence investigation report is extremely important for the defendant in a case as it makes a recommendation to the court about the type and severity of the sentence.

On March 2 and 4 H. Bloedorn wrote to the Court (R.25 and 27, App. B and C) and on March 19, 2014 Kratz and the District Attorney's Office were forwarded copies of the ex-parte communication. At that moment, Kratz was fully aware that his client had made known not only to the Court, but to Kratz and the District Attorney's Office that he was uncertain and wavering in his decision to plead and was confused and uninformed regarding his case and, certainly,

any sentence he may be receiving. In H. Bloedorn's letter of March 4 he states "So far I still have not met with the P.S.I person." (R.27, App. C). Although Kratz indicates that he discussed the P.S.I. process throughout his representation (R.88, Pages 15 through 19, App. I), he never indicates any concern regarding H. Bloedorn's continuing to move forward with the P.S.I. after the receipt of the letters from H. Bloedorn indicating his confusion and reluctance with regard to his plea.

In L. Bloedorn's testimony at the *Machner* hearing, regarding the pre-sentence investigation report, she states:

"Q Did you have occasion to look at the PSI, the presentence investigation?

A Never. Never saw it.

Q Were you ever told what was in it?

A No, basically. I never saw it. Never.

Q What was your understanding as to the length of time your husband was facing in jail?

A I was – I think I was told Mrs. – Yolanda, she was very

nice. She said something like eight or nine years. That's what I was told, nine basically.

Q What about Mr. Kratz? Did you get any –

A No. He always said –"

(R.88, Pages 88 and 89, App. J).

Kratz, as evidenced above, allowed H. Bloedorn to complete a presentence investigation without proper guidance during the time period where H. Bloedorn indicated in his letters he was uncertain as to the evidence against him and the nature of his guilty plea. Kratz further compounded the multiple problems in this case by not requesting a supplemental presentence after H. Bloedorn entered an Alford plea. It is clear that the Judge, in sentencing, considered H. Bloedorn's failure to show proper remorse and take responsibility for his actions. It appears from a review of the entire case that H. Bloedorn never wished to plead guilty and wished to have a jury trial. It further appears that Kratz convinced H. Bloedorn that an Alford plea was not an admission of guilt and thus tainted the entire process.

D. Defense counsel, after advising Defendant he was facing jail time and probation or up to three years in prison, failed to properly argue a reasonable prison sentence.

The presentence investigation report recommended nine years in prison and infers that the recommendation is based on H. Bloedorn not showing the remorse or responsibility for his actions the author would have preferred to see. (R.28). Although, as stated on page 15 of this brief, L. Bloedorn, when speaking with the presentence author was informed that nine years would be the recommendation, there is no evidence that Kratz ever thoroughly explained to H. Bloedorn what he was facing when he entered the court room on May 6, 2014.

Kratz stated various times in his testimony at the *Machner* hearing, that he discussed a strategy with his client. Most particularly in answering questions by Attorney Lieuallen as below:

"Q What did you tell him that you believed was likely that would happen in this court?

A I told him that this was a prison case; that if he was going to enter his plea, that our strategy, really from September when he hired me, was to convince the Court that

the necessity of sending Mr. Bloedorn to prison was not there in this case. I told Mr. Bloedorn really throughout, that since I've gone through my notes I've seen throughout my notes that an argument to the Court was going to be this is a prison case; however, we were -- "we" meaning the defense was going to ask for an imposed and stayed prison sentence with probation and up to a year in the county jail." (R.88, Page 13, App. K).

However, L. Bloedorn contends that never did Kratz say to her that the sentence H. Bloedorn was honestly facing was 9 years if the recommendation from the PSI was taken up to 40 years if the Court decided to sentence him to the maximum. Although the complaint states the maximum for Count 1, from the beginning according to L. Bloedorn's testimony, Kratz never expressed to either her or her husband in the numerous meetings she attended that H. Bloedorn would ever receive more than three years in prison. H. Bloedorn further expresses his confusion and lack of understanding in his letters to the Court.

Kratz, although as stated above, said he informed H. Bloedorn he would be asking for an imposed and stayed

prison sentence with probation, kept his client under the belief that the actual sentence would be no more than three years, and more likely, a year in the county jail with probation.

This author, after reviewing all of the file and information available to him, believes on May 6, 2014, Kratz, knowing that the presentence report recommended 9 years with extended supervision thereafter, decided without thorough and explicit explanation and consultation with his client, to recommend to the court a sentence of 15 years in prison, plus an additional 10 year extended supervision. (R.71, page 31, App. L).

It is absolutely incredible that Kratz, with a 9 year recommendation from the presentence investigation, would recommend more rather than the same or less. Kratz continually puts himself in the place of the prosecution, which agreed to remain silent and proffers to the Court a ridiculous sentence rather than recommending 9 years or less to be imposed and stayed which is what any reasonable lawyer under the circumstances would have done.

After putting forth the 25 year recommendation, Kratz

then states he would like the court to stay that recommendation and place H. Bloedorn on probation for 10 years and 1 year in county jail. Why, when you have a recommendation for 9 years from the P.S.I. report would you ask the Court to sentence your client to 15 years in prison and 10 years extended supervision? The Court was happy to indulge Kratz's recommendation and sentenced H. Bloedorn to 20 years initial confinement and 5 years extended supervision.

CONCLUSION

The Wisconsin Supreme Court, in *State v. Harper,* 57 Wis.2d 543, 205 N.W.2d 1 (1973) enunciated the standard for claims of ineffective assistance of counsel: "Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent law, skilled and versed in criminal law, would give to clients who had privately retained his services." *Id.* At 557, 205 N.W.2d at 9. It is the belief of the

Defendant-Appellant, Henry Bloedorn, that Attorney Ken Kratz's failure to inspect all of the evidence with Henry Bloedorn in a thorough manner led to the lack of information resulting in the possible exclusion of evidence.

Pleas-prejudice exists when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial," see *Hill v. Lockhart,* 474 U.S. 52, 59 (1985); *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50 (1996). Attorney Kratz should have immediately gone through each of the choices Henry Bloedorn faced in regard to his case and thoroughly explores all of the evidence with his client. At the very least, Kratz should have given his client copies of all of the evidence for his review. Kratz failed to even minimally provide such evidence to his client and failed to file even one motion. Kratz further failed to help his client make a fully informed choice on whether to move forward with a plea or trial.

Beginning with the first meeting that Attorney Kratz had with his client, wherein his main objective was his

fee, to the very end with his testimony at the *Machner* hearing, Attorney Kratz's main interest was Attorney Kratz. Attorney Kratz's overall actions and attitudes in this case were the height of irresponsibility and showed his lack of concern for his client; not only by his failure to communicate appropriately and intelligently with his client on a regular basis for more than 10 or 15 minutes, but by arguing an excessive prison term to be imposed and stayed which was ultimately very closely adopted by the court.

Attorney Kratz's utter disregard for his client's well-being and confidentiality continued right to the end. Attorney Kratz refused to communicate or cooperate in any way with your brief's author prior to the *Machner* hearing. Not until Attorney Kratz was subpoenaed did he even contact the undersigned and, after being subpoenaed, instead of sharing only what was reasonably required to establish effective assistance of counsel, Attorney Kratz, at the last minute, forwarded his entire file, including privileged confidential therapy notes and letters from his client to Attorney Kratz, to the District Attorney's Office for Ozaukee County and the undersigned.

Defense counsel's performance as a defense attorney was unprofessional to say the least and under *State v. Johnson* fulfills the need to show "that 'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson,* 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986) (quoting *Strickland,* 466 U.S. at 688).

Dated at Saukville, Wisconsin this 20th day of August, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. 809.19 (8)(b) and (c) for a brief and appendix produced with a monospaced Courier New font. The length of the brief is 27 pages.

_____ _____

Date: August 20, 2015 Perry P. Lieuallen