STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No.2015AP001546

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MIGUEL ANGEL LANGARICA,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA FROM THE CIRCUIT COURT FOR GREEN COUNTY, THE HONORABLE THOMAS J. VALE, PRESIDING

TRIAL COURT CASE NO. 2013CF000043

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral Argument. Plaintiff-Respondent anticipates that the issues presented in this case will be fully argued in the parties' briefs. Plaintiff-Respondent considers oral argument unwarranted.

Publication. Plaintiff-Respondent does not believe publication is warranted because this is a single judge appeal and therefore will not be published.

STATEMENT OF ISSUES IN PLACE OF THAT PRESENTED BY DEFENDANT-APPELLANT

I. DID THE TRIAL COURT ERR IN FINDING TRIAL COUNSEL WAS NOT DEFICIENT WHEN HE CORRECTLY ADVISED DEFENDANT THAT WISCONSIN LAW DID NOT REQUIRE SEX OFFENDER REGISTRATION AS A COLLATERAL COUNSEQUENCE OF THE PLEA AGREEMENT AND DID NOT ADVISE DEFENDANT OF ILLINOIS SEX OFFENDER REGISTRATION LAW?

ANSWERED BY THE TRIAL COURT: NO

II. SHOULD WISCONSIN LAW BE EXPANDED TO REQUIRE TRIAL COUNSEL IN CRIMINAL CASES TO AFFIRMATIVELY ADVISE DEFENDANTS OF POTENTIAL COLLATERAL CONSEQUENCES UNDER THE LAWS OF OTHER STATES IN WHICH THEY ARE NOT LICENSED TO PRACTICE?

NOT ANSWERED BY THE TRIAL COURT

STATEMENT OF CASE AND FACTS

The Defendant-Appellant has set out most of the facts and statement of the case correctly, yet ignored some important facts. First, the Defendant-Appellant's trial counsel is not licensed in the State of Illinois. R:41-15; App. 7. Second, Defendant-Appellant did not think that his trial attorney's letter concerning there being no requirement for sex offender registration in Wisconsin had anything to do with Illinois requirements. R:41-20; App. 12. Thirdly, trial counsel and Defendant-Appellant never talked about any sex offender registration consequences under Illinois Law, R41-15; App. 7; R41-20; App. 12. Indeed, they never talked about Illinois law at all. R41-17; App. 9.

ARGUMENT

I. DEFENDANT-APPELLANT DID NOT ESTABLISH MANIFEST INJUSTICE WILL OCCUR ABSENT PLEA WITHDRAWAL WHERE HIS TRIAL ATTORNEY DID NOT PROVIDE INCORRECT INFORMATION TO DEFENDANT-APPELLANT.

On appellate review, the issue of whether a plea was knowingly and intelligently entered presents a question of constitutional fact. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). The Court on questions of law decides without deference to the trial court. ***State v. Moore***, 167 Wis.2d 491, 495-496, 481

N.W.2d 633, 635 (1992).

Defendant-Appellant argues that statements made by his trial counsel led to him misunderstanding the consequences of his plea. However, none of his trial counsel's statements were inaccurate. A failure of trial counsel to give affirmative advise about a potential future collateral consequence has only been ruled "necessarily linked to the practice and expectation of the legal community." for the potential deportation of non-citizens under Federal Law. ***Padilla v. Kentucky***, 559 U.S. 356, 366 (2010)

To prevail on a claim of ineffective assistance of counsel, a defendant must show both (1) "That counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W. 2d 711 (1985) adopting the two prong test of Strickland). Generally, the deficiency in performance must be "unreasonable under prevailing professional norms," ***Strickland***, 466 U.S. at 688-689.

Incorrectly advising a defendant that convictions to certain charges will not lead to mandated sex offender registration when they would under Wisconsin Law could justify a plea withdrawal. See ***State v. Brown*** 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543.

Similarly, *incorrectly* advising a defendant he could enter a plea and still appeal an evidentiary ruling establishes manifest injustice. **State v. Riekkoff**, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983). Had his trial attorney made an affirmative but incorrect statement of the law that affected the Defendant-Appellant's decision to accept the plea bargain, Defendant-Appellant would have a basis to argue a manifest injustice justifying withdrawal of the plea. But here, defendant sat on his hands, did not pursue it with his trial counsel, nor take other steps himself to investigate.

A defendant who was correctly warned in his plea colloquy of the potential of deportation if he was not a citizen, who then later claimed to have made the incorrect assumption that he was a U.S. citizen and that he therefore incorrectly judged the likelihood of his deportation following conviction for second degree sexual assault, did not establish by clear and satisfactory evidence that plea withdrawal was necessary to prevent manifest injustice. ***State v. Rodriguez***, 221 Wis. 2d 487, 585 N.W. 2d 701 (Ct. App. 1998).

Similarly, defendant's self-generated mistaken belief that his parole eligibility date on a prior armed robbery sentence will not be affected by two new additional concurrent terms, this belief not engendered

by the court, the prosecutor, or his attorney, did not establish a manifest injustice. ***State v. Birts***, 68 Wis. 2d 389, 228 N.W. 2d 351 (1975).

Wisconsin's sex offender registration law requirements are not punishment, and a defendant has no due process right to be advised of them at the plea by the trial court. ***State v. Bollig***, 2000 WI 6, ¶ 27. 232 Wis. 2d 561, 577, 605 N.W.2d 199.

Similarly, trial courts need not warn of other collateral consequences during plea colloquies, such as potential ineligibility for Federal Health Care Programs, ***State v. Merten,*** 2003 WI App 171, 266 Wis.2d 588, 668 N.W.2d 750, and that conviction may be a predicate offense for later chapter 980 action, ***State v. Myers,*** 199 Wis.2d 391, 544 N.W.2d 609 (1996).

Thus, Defendant-Appellant has failed to establish under current law a manifest injustice as a basis for allowing withdrawal of his plea.

II. THE DEFENDANT-APPELLANT IS ATTEMPTING TO CAUSE THIS COURT TO ECEED ITS ATHORITY AND DECLARE NEW LAW.

It would have perhaps been better if trial counsel for the Defendant-Appellant had told him he needed to check with an Illinois Licensed attorney about the Illinois Sex Offender Registration law requirements, or

otherwise discussed with Defendant-Appellant as to whether he planned to live in Wisconsin during the term of his probation, or to have his probation transferred to Illinois, but Defendant-Appellant is not entitled to the best lawyer, only an adequate one. ***State v. Hanson***, 2000 WI App 10, ¶ 20, 232 Wis.2d 291, 299, 606 N.W.2d 278, and also cited there: ***State v. Williquette***, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct.App.1993), aff'd, 190 Wis.2d 677, 526 N.W.2d 144 (1995). Trial counsel must have provided reasonably effective assistance by a reasonably competent attorney. ***State v. Burton***, 2013 WI 61, at ¶ 29, 349 Wis.2d 1, at 29, 832 N.W.2d 611; ***State v. Balliette***, 2011 WI 79, at ¶ 22 336 Wis.2d 358, at 371, 805 N.W.2d 334, cert. denied, ____ U.S. ____, 132 S.Ct. 825 (2011)

But while the standard of reasonable competency requires attorneys, when they decide to advise of collateral consequences, to get it right, (***State v. Brown***, id.; ***State v. Riekkoff***, id.) the standard for a reasonably competent attorney has never *required* advising of potential collateral consequences with the exception of advice under Federal Law of the potential of deportation. ***Padilla v. Kentucky***, *Id.*

Further, the standard has never placed an affirmative duty on Wisconsin attorneys to advise on

another state's law where the attorneys are not licensed. If trial attorneys must warn about sex offender registry issues, then why not of potential federal firearm charges as a consequence conviction in violent domestic abuse cases, or of the potential of refusal of admission into Canada or other countries after a conviction for operating under the influence?

By seeking to place that burden on defense attorneys, counsel for Defendant-Appellant tries, under the guise of correcting an error of law, to have this court step into the place of the Supreme Court and declare new law. That is not this court's function. ***Larson v. City of Tomah***, 193 Wis. 2d 225, 230, 532 N.W. 2d 726 (1995); ***Vollmer v. Luety***, 156 Wis. 2d 1, 14, 456 N.W.2d 797, 803 (1990).

CONCLUSION

Defendant-Appellant has not established manifest injustice, where all of trial counsel's advice to him was correct, and Defendant-Appellant's sole ground of contention is trial counsel having provided no information concerning potential Sex Offender Registration in Illinois. Defendant-Appellant did not believe the trial counsel's letter concerning sex offender registration requirements in Wisconsin had

anything to do with Illinois law, and he failed to inquire further himself. To place an affirmative duty on trial counsel would be an impermissible expansion of Wisconsin Law, which this Court, unlike the Supreme Court is not authorized to do, and which in any event would be bad public policy opening the door to trial counsel having to advise on numerous other collateral consequences. The trial court therefore correctly denied the defendant-appellant's motion to withdraw his plea and the court's order denying such motion should be affirmed.

Dated at Monroe, Wisconsin, December 11, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM, LENGTH AND E-FILING

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for brief and appendix produced with a mono spaced font 10 characters per inch, double spaced, 1.5 inch margin on left, 1 inch on all other sides. The length of this brief is 8 pages.

I certify that I have submitted an electronic copy of this brief excluding appendix if any which complies with the requirements of s. 809.19(12). I further certify that This electronic brief is identical in content with the paper copies of this brief filed with the court and service on all opposing parties.

Dated this 11th day of December, 2015

_____
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