STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON D. HENDERSON,

Defendant-Appellant. **Brief Cover**

Case No. 15-AP-1740

ON APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY,

THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF JASON D. HENDERSON, DEFENDANT-APPELLANT

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CERTIFICATION OF DELIVERY

I certify that this reply brief was mailed to the Clerk of the Wisconsin Court of Appeals via the U.S. Mail Service on November 16, 2015. I further certify that conforming copies of the brief and appendix were forwarded to the Milwaukee County District Attorney's Office via the US. Mail.

Dated: November 16, 2015.

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ISSUES

I. Did the court err by failing to grant Mr. Henderson's requests to withdraw his guilty plea?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case. Not recommended for publication.

FACTS

1. STATEMENT OF THE CASE

Mr. Henderson was convicted of one count of battery as a repeater and one count of disorderly conduct as a repeater following a plea taken by the Honorable Jeffery Wagner on March 3, 2014.[1] As part of the plea negotiations a domestic abuse repeater enhancer was dismissed from each count. This is an appeal from the judgment of conviction and the final order signed by the Honorable Rebecca F. Dallet denying Mr. Henderson's trial and post-conviction motions asking to withdraw his pleas.

2. STATEMENT OF THE FACTS

Mr. Henderson was charged with two counts: battery and disorderly conduct in a criminal complaint in late 2013. (R.2; A.101-103). In each count, Mr. Henderson was charged as a domestic abuse repeater (§939.621(1)(b) and (2)) and a

[1] Judge Jeffrey A. Wagner conducted the plea hearing for the assigned judge (Judge Dallet) due to calendar congestion.[1]

habitual criminal repeater (§939.62(1)(b)). (R.2; A.101-103). The enhancers on the battery would lead to total exposure of 4 years and 9 months. (R.2; A.101-103). This number is arrived at by applying the enhancers in order as instructed by §973.01(2)(c)2 (9 months, plus 2 years for the DV enhancer, plus another 2 for the repeater). Using the same process the maximum on the DC count is 4 years and 3 months. (R.2; A.101-103).

At the initial appearance Mr. Henderson was represented by an attorney Greg Renden.[2] (R.30; A.134). During the initial appearance that attorney stated that the maximum penalty was 4 years on each count.[3] (R.30; A.135). Neither the court commissioner nor the DA corrected this misstatement of the maximum penalties. Mr. Henderson was never informed, until appellate counsel told him, that he faced a total of 9 years maximum if convicted on both counts and he was sentenced consecutively. (R.25; A.128).

On the day of trial, Mr. Henderson resolved the case with a plea. (R.33; A.145-154). Mr. Henderson was represented by attorney Elizabeth Carlson (court appointed) at the plea

[2] Appellate counsel would typically not mention the names of the trial attorney, but Mr. Henderson had three different attorney at the trial stage so he names the individual attorney to avoid confusion.
[3] It should be noted counsel objected to the sufficiency of the criminal complaint because of the confusing structure of the penalty enhancers.

hearing. (R.33; A.146). In exchange for guilty pleas to both counts the State agreed to dismiss the domestic abuse repeater enhancer. (R.13; A.105) This dropped the maximum on each count to 2 years. (R.33; A.147). The plea questionnaire incorrectly states that the 2 year maximum consisted of a maximum of 1 year IC and 1 year ES on each count. (R.13; A.104). The actual bifurcated sentence on each count is 18 months of initial confinement and 6 months of extended supervision.[4] At the plea hearing, the trial court (after some confusion) correctly stated the maximum of 2 years on each count during the plea colloquy. (R.33; A.147). Mr. Henderson acknowledged the maximum of 2 years on each count as stated by the court. (R.33; A.147). Neither the trial court nor the State[5] corrected the error in the bifurcation calculation on the plea questionnaire. Mr. Henderson was not asked if he committed these crimes at the plea hearing. (R.33; A.145-154).

Mr. Henderson was never properly informed of the maximum IC and ES terms he was facing, until he appealed, in this case. (R.25; A.128). Mr. Henderson was unaware that his plea

[4] Appellate counsel incorrectly figured the bifurcated maximums in the post-conviction motions.

[5] To be fair, it is likely the State was unaware of this error on the plea questionnaire at the time of the plea; however, the State did use the plea questionnaire to cross examine Mr. Henderson at the motion to withdraw pleas hearing.

form was incorrect until informed by appellate counsel. (R.25; A.128). Mr. Henderson would not have entered the plea if he had been informed of the correct maximum bifurcated penalties. (R.25; A.128).

The day after the plea Mr. Henderson contacted Attorney Carlson and informed her that he wanted to withdraw his plea. (R.38; A.175). The court allowed Ms. Carlson to withdraw as counsel of record from the case and the Public Defender Office appointed attorney Michael Plaisted for Mr. Henderson. (R.25; A.121).

Mr. Plaisted filed a motion to withdraw Mr. Henderson's guilty pleas prior to sentencing. (R.15; A.107-108). The basis of the motion was multifaceted. (R.15; A.107-108). First, Mr. Henderson argued the trial court failed to establish the voluntariness of Mr. Henderson's plea and did not ask if Mr. Henderson if he committed these crimes. (R.15; A.107-108). In addition, Mr. Henderson asserted that he was "rushed" into making this decision.[6] (R.15; A.107-108). He asserted in the motion that he was innocent and did not affirm the facts in the criminal complaint. (R.15; A.107-108). The

[6]Mr. Henderson did not raise the issue of the incorrect maximums in his motion to the trial court.

State filed a written response to the motion urging the court to deny the motion to withdraw the pleas. (R.16. A.109-115).

A motion hearing on the issue was conducted on the plea withdrawal issue. (R.37; A.155-196). Mr. Henderson was the only witness to testify as Ms. Carlson did not remember the case. (R.37; A.172-190). At the hearing, Mr. Henderson admitted he discussed the decision to plea and the plea questionnaire with his attorney. (R.37; A.185). He also testified he did not want to plea to something he did not do. (R.37; A.175). He entered his plea to avoid the felony and "get it over with". (R.37; A.181). The court denied the motion and Mr. Henderson was eventually sentenced. Mr. Henderson was sentenced to 9 months on the battery and 3 months on the DC. This sentence was imposed and stayed for 2 years of probation. (R.21; A.116-118).

Mr. Henderson filed a post-conviction motion requesting to withdraw his pleas. (R.25; A.119-128). He alleged ineffective assistance of counsel in his motion. (R.25; A.119-128). The trial court denied this motion without an evidentiary hearing in a written decision. (R.26; A.129-132).

ARGUMENT

I. The court erred by failing to grant Mr. Henderson's motions to withdraw his pleas?

A. Standard of Review

The determination to grant or deny a motion to withdraw a plea is left to the discretion of the court. *State v. Lopez*, 2014 WI 11, ¶60, 353 Wis. 2d 1, 843 N.W.2d 390 (Wis. 2014) (quoting *State v. Rhodes*, 2008 WI App 32, ¶7, 307, Wis. 2d 350, 746 N.W.2d 599 (Ct. App. 2008). As a determination of a motion to withdraw pleas is a discretionary decision, it is reviewed using an erroneous exercise of discretion analysis. *Lopez* at ¶60. To justify the decision, the circuit court need only to have examined the relevant facts, applied the appropriate law, and come to a rational decision. *Lopez* at ¶60 (quoting *Loy v. Bunderson*, 107 Wis. 2d 400, 414-415, 320 N.W.2d 175 (Wis. 1982)).

B. Tests to determine if plea withdrawal is warranted.

There are two separate tests courts use to determine if a plea should be withdrawn. The timing of the defendant's request to withdraw his plea determines which test to use. If the motion is made prior to sentencing the

defendant, to be successful, must show that a "fair and just" reason to withdraw the plea exists. *State v. Cain*, 2012 WI 68, ¶24, 342 Wis.2d 1, 816 N.W.2d 177 (Wis. 2012)(citing *State v. Jenkins,* 2007 WI 96, ¶ 2, 303 Wis.2d 157, 736 N.W.2d 24). If the defendant establishes a fair and just reason for plea withdrawal, then the State must demonstrate that there would be substantial prejudice to the State if the plea is withdrawn. *Cain* at ¶24.

On the other hand, when a defendant asks a court to withdraw his plea after sentencing he carries a heavy burden to demonstrate by clear and convincing evidence that the court needs to correct a manifest injustice. *State v. Thomas,* 232 Wis.2d 714, ¶ 16, 605 N.W.2d 836 (quoting *State v. Washington,* 176 Wis.2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993)). To demonstrate a "manifest injustice" the defendant must show that there is serious flaw in the integrity of the plea. *Cain* at ¶25 (citing *State v. Nawrocke*, 193 Wis.2d 373, 379, 534 N.W.2d 624 (Wis. App. 1995)).

C. Ineffective assistance of counsel is a manifest injustice.

The Wisconsin Supreme Court has ruled that for a

defendant to be entitled to withdraw a guilty plea after sentencing he must show by clear and convincing evidence that a "manifest injustice" occurred. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996) (citing *State v. Rock*, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979)). The Court in *Bentley* recognized that ineffective assistance of counsel was a "manifest injustice". *Bentley* at 310 (citing *Rock*, at 558-59; and *State v. Reppin*, 35 Wis. 2d 377, 385-86, 151 N.W.2d 9 (1967)). In the instant case, all of Mr. Henderson's trial counsel were ineffective for failing to inform him of the proper maximum penalties he faced. Specifically, Attorney Carlson provided him the wrong bifurcated maximums on the plea questionnaire. Mr. Plaisted failed to point out this error in the motion he filed on Mr. Henderson's behalf. Mr. Henderson argues this is ineffective assistance of counsel and is a manifest injustice. Therefore, Mr. Henderson's guilty pleas should be withdrawn.

1. Two prong test for ineffective counsel claim.

To prevail on an ineffective assistance of counsel theory the defense must show that: 1) the trial attorney performed deficiently; and 2) the deficient performance caused prejudice to the defendant's case. *Strickland v.*

Washington, 466 U.S. 668, 687 (1984), *State v. Franklin*, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289 (Wis. 2001).

Failure to inform Mr. Henderson of the actual penalties he faced by entering a plea was deficient performance. To prove deficient performance Mr. Henderson must show that his trial counsel's acts or omissions were objectively unreasonable. *State v. Luedtke*, 2013 WI App 30, ¶12, 346 Wis.2d 280, 827 N.W.2d 929 (Ct. App. 2013). In this case, Mr. Henderson was incorrectly informed of the maximum bifurcated penalties he faced if he accepted the plea agreement. Mr. Henderson argues that the failure to tell him the actual maximums he was facing upon conviction is objectively unreasonable.

Mr. Henderson was represented by three different attorneys at the trial level: Greg Renden, Elizabeth Carlson, and Michael Plaisted. None of these attorneys correctly informed Mr. Henderson of the maximums he was facing.

At the initial appearance hearing, Attorney Renden acknowledged that the repeaters created "a confusing structure" regarding the maximum penalties. (R.30; A.135). Counsel then went on to state, incorrectly, that the

maximum prison term with the repeaters on each count was four years. (R.30; A.135). Mr. Henderson was actually facing a total was 4 years and 9 months on count 1 (battery). This maximum penalty is calculated by adding the 9 months on the battery, plus two years for the domestic violence repeat offender and another 2 years because of the habitual repeater. Using the same technique, Mr. Henderson was actually facing 4 years and 90 days on the DC charge with both the enhancers. Defense counsel's incorrect assessment at the initial appearance was not corrected by the court or the district attorney. More importantly, Mr. Henderson was misinformed about the bifurcated maximums he was facing when he entered his plea.

As part of the plea agreement the State agreed to dismiss the domestic abuse repeat offender on each count. This dismissal reduced the maximum on each count to 2 years and changed the charges from felonies to a misdemeanors. Attorney Carlson incorrectly informed Mr. Henderson that he was facing 1 year of IC and 1 year of ES on each count on the plea questionnaire. That being said, the trial court appropriately informed Mr. Henderson of the total maximums he faced on each count (2 years), but did not correct the error regarding the bifurcation of those two years

contained on the plea questionnaire. Mr. Plaisted did not address the error on the plea questionnaire in his motion to withdraw the pleas prior to sentencing.

Mr. Henderson argues that it is objectively unreasonable that trial counsel did not inform him of the correct potential penalties he faced from his charges both initially and as part of his plea deal. The Wisconsin Supreme Court has stated that trial counsel must "either reasonably investigate the law of and facts or make a reasonable strategic decision that makes any further investigation unnecessary". *State v. Dillard*, 2014 WI 123, ¶92 (Wis. 2014)(quoting *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364 (Wis. 2011). In *Dillard*, the defendant pled no contest to a charge of armed robbery when he was told by the State, his attorney, and the court that he faced a mandatory life sentence if he was convicted of a persistent offender. Mr. Dillard was incorrectly charged as a persistent repeater. The Supreme Court ruled that the failure of trial counsel to investigate and understand the enhancer statutes was deficient performance with no strategic justification. *Dillard* at ¶ 93. The court also determined that this deficient performance prejudiced MR. Dillard. Specifically, the Court determined that Mr.

Dillard adequately established that his decision to plead no contest was a direct result of the error in the potential penalty described to him by his attorney. Dillard at ¶104.

Similarly, in this case, it is apparent that Attorney Carlson did not research the law to determine the maximum penalties in this case. This fact is established by the incorrect information stated on the plea questionnaire. It is unknown if Attorney Plaisted was aware of this mistake on the plea questionnaire; however, by failing to raise the issue it is assumed that Mr. Plaisted acquiesced in Ms. Carlson's assessment of the maximum bifurcated sentences. It is apparent that both attorneys failed to properly inform Mr. Henderson of the maximum bifurcated sentence he faces as a result of his plea. Therefore, for failing to investigate the law on the repeater enhancers the performance of his trial counsel was deficient.

Mr. Henderson was prejudiced by trial counsel's ineffective performance. Mr. Henderson informed appellate counsel that he would not have entered the plea if he had been given the correct initial confinement punishment he

was facing upon conviction after the plea.[7] (R.25. A.128). Mr. Henderson further explained that if he had been told he was facing over three years of initial prison confinement he would not have entered the plea because that exposed him to too much time. This is consistent with Mr. Henderson's position stated on the record in the case.

At sentencing, trial counsel made it clear that Mr. Henderson did not commit the battery. Trial counsel told the court prior to sentencing, "… he just has always contended that he did not commit the battery against this victim, as he understands it." (R.40; A.218). Mr. Henderson believed he could beat the battery case at trial, even with the testimony of Ms. McParland. He testified that he did not harm anyone when he testified at the motion hearing. Thus, it is reasonable to infer that Mr. Henderson believed he beat, at least, the battery count at trial. This result would expose Mr. Henderson to the penalty for the DC case (4 years).[8] Thus, by accepting the plea, Mr. Henderson was exposing himself to the same amount of time he believed he

[7] It should be noted that appellate counsel miscalculated the maximums by about a month, but it does not change the fact Mr. Henderson would not have pled guilty if he knew he was facing more than 2 years of initial confinement.

[8] Appellate counsel assumes that trial counsel informed Mr. Henderson he was facing four years on each count based on his conversation with Mr. Henderson and the initial appearance transcript. Even though the correct maximum is 4 years, 3 months.

would have faced after trial. It is unclear what trial counsel informed Mr. Henderson would face penalty wise if he was convicted at trial, but given the repeated errors by successive counsel in the record it can be assumed the information was incorrect. On the other hand, Mr. Henderson indicated that had he been given the correct initial confinement time (not the 2 years he was told by trial counsel) he would have not entered a plea. His assertion that he would not have taken the plea if given the correct penalty information is credible because it is consistent with his view of the case that he could beat at least part of the case at trial.

Failing to accurately tell Mr. Henderson the bifurcated maximums he was facing, is deficient performance. Thus, the first prong of the Strickland test has been satisfied. Mr. Henderson was prejudiced by this error because it contributed to his decision to enter a plea. He would not had pled had he been told the correct maximums because of the weakness in the State's case. Like the defendant in *Dillard*, Mr. Henderson gave up a potentially winning case due to the incorrect information he was provided. As in Dillard, this establishes the prejudice and the second prong of the Strickland test.

Therefore, as Mr. Henderson has established deficient performance and prejudice he has proved ineffective assistance of counsel. Thus, he has established the manifest injustice needed to withdraw his plea. The court denied Mr. Henderson's motion which is an erroneous exercise of discretion.

D. Mr. Henderson should have been allowed to withdraw his plea prior to sentencing.

In the instant case, Mr. Henderson moved the court prior to sentencing to withdraw his guilty pleas. Mr. Henderson argued to the trial court that his plea was not entered into knowingly, intelligently and voluntarily. Specifically, he argued that Judge Wagner failed to comply with the requirements of §971.08 of Wis. Stats. Mr. Henderson asserted he was not asked if he had committed the crimes of battery and disorderly conduct; he did not personally affirm the facts in the criminal complaint. In addition, although not noted in his motion, he was not informed of his right to remain silent, the right to cross examine witnesses, and the right to require witnesses to testify.

Mr. Henderson, in his motion, did not address the incorrect penalties given to him by his prior attorney. Mr.

Henderson argued in his post-conviction motion that trial counsel was ineffective for failing to argue his plea should be withdrawn because he was misinformed about the maximum penalties by his attorney. Mr. Henderson reasserts that argument here.

1. A plea must be made knowingly, voluntarily and intelligently.

The due process requirements of the 14th Amendment of the US Constitution require that all pleas be made knowingly, voluntarily and intelligently. *State v. Cross,* 326 Wis.2d 492, ¶ 16, 786 N.W.2d 64 (Wis. 2010) (citing *State v. Brown,* 2006 WI 100, ¶ 25, 293 Wis.2d 594, 716 N.W.2d 906).

2. Mr. Henderson was not correctly informed of the potential punishments upon conviction.

Mr. Henderson did not enter his plea knowingly, voluntarily and intelligently. The Wisconsin Supreme Court has held that misinformation about the potential penalties a defendant faces undermines the defendant's capacity to knowingly, voluntarily and intelligently enter a plea. *State v. Dillard*, 2014 WI 123, ¶69 (Wis. 2014). In this case, Mr. Henderson was incorrectly informed of the maximum initial confinement and extended supervision terms he was facing if he went to trial or if he accepted the plea.

The plea questionnaire illustrates the misinformation provided to Mr. Henderson. The questionnaire incorrectly states that the maximums he faced upon conviction was 1 year of IC (initial confinement) and 1 year of ES (extended supervision) on each count. In reality, Mr. Henderson was facing 18 months IC and 6 months ES. See *State v. Lasanske*, 2014 WI App 26, ¶12, 353 Wis. 2d 280, 844 N.W.2d 417 (Ct. App. 2014). Therefore, the plea questionnaire incorrectly informed Mr. Henderson of the potential punishment he could receive upon conviction. The trial court did not correct the mistake on the plea form.

In this case, Mr. Henderson did not enter his plea knowingly, voluntarily and intelligently. He was not given the appropriate bifurcated maximums by Attorney Carlson. This misinformation was not corrected by the court or the state prior to Mr. Henderson entering his pleas. As discussed above this is ineffective assistance of counsel. The failure to raise this argument is ineffective because there is no strategic reason not to raise the argument. The fact that Mr. Henderson was ineffectively represented is a fair and just reason to withdraw his plea.[9] The failure to raise this argument prejudiced Mr. Henderson because it is

[9] If ineffective assistance of counsel satisfies the higher "manifest injustice" hurdle, Mr. Henderson argues it should logically satisfy the lower hurdle of "fair and just" reason to withdraw his plea.

a meritorious argument and the motion filed by Attorney Plaisted was denied by the trial court. Again, but for the ineffective performance of Attorney Plaisted Mr. Henderson's pleas should have been withdrawn prior to sentencing.

CONCLUSION

For the above reasons Mr. Henderson requests that he be allowed to withdraw his guilty pleas to count 1 and count 2. Mr. Henderson asserts that he was misinformed, both prior to the plea and during the plea, about the penalties he faced in this case. This is ineffective assistance of counsel. Therefore, his pleas were not entered knowingly, intelligently, and voluntarily and should be withdrawn.

November 16, 2015.

_____
Attorney Gregg H. Novack
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for brief procedure using the following font: Monospaced font: 12 point font; double-spaced; 1.5-inch margin on the left side and 1-inch margins on the other three sides. The length of this brief is 19 pages.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief as per §809.19(12).

November 16, 2015.

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