STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2015AP001740-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JASON D. HENDERSON,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A PRESENTENCING MOTION FOR PLEA WITHDRAWAL AND AN ORDER DENYING A POSTCONVICTION MOTION WITHOUT A HEARING, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. Did the court properly deny Mr. Henderson's pre-sentencing motion to withdraw his plea?

Trial court answered: Yes.

II. Did the court properly deny Mr. Henderson's post-conviction motion without a hearing?

Trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. See Wis. Stat (Rule) 809.22(1)(b). Further, the case can be resolved by applying well-established legal principles to the facts of the case, and—as a matter to be decided by one judge—is not eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)2, 4.

STATEMENT OF THE CASE

Mr. Henderson was convicted of one count of misdemeanor battery with the habitual criminality repeater enhancer and one count of disorderly conduct with the habitual criminality repeater enhancer. The convictions were entered pursuant to a plea taken on March 3, 2014. Pursuant to plea negotiations, a second enhancer of domestic abuse repeater was dismissed from each count. This enhancer would have made each of the charges a felony. Mr. Henderson now appeals the Honorable Rebecca F. Dallet's denial of a plea withdrawal motion made by Mr. Henderson both before and after sentencing.

In November 2013, Mr. Henderson was charged with battery and disorderly conduct. (R2:1-3). Each count was charged with two separate enhancers: domestic abuse repeater pursuant to Wis. Stats. § 939.621(1)(b) and (2), and habitual criminality repeater pursuant to Wis. Stats. § 939.62(1)(b). *Id.* The domestic abuse repeater enhancer changed the status of each of these charges from a misdemeanor to a felony. *Id.* The applicability of each of these enhancers and the increased penalties is laid out in the complaint and calculates as a

maximum possible penalty of 4 years and 9 months on the battery and 4 years and 3 months on the disorderly conduct. *Id.*

On the day of trial, March 3, 2014, the victim, S.M. was present and the State was ready to proceed. (R33:7). Mr. Henderson, represented by Attorney Elizabeth Carlson, resolved the case with a plea. (R33:1-10). Pursuant to negotiations, the State agreed to dismiss the domestic abuse repeater on each count, making each charge a misdemeanor rather than a felony. (R33:2-3). Mr. Henderson was advised that the court could then impose up to two years on each count. (R33:3). Mr. Henderson acknowledged that was his understanding of the maximum possible penalty. *Id.*

On the day of sentencing, Mr. Henderson expressed a desire to withdraw his guilty pleas, and Attorney Carlson was allowed to withdraw as counsel. (R34:2-3). Attorney Michael Plaisted was then appointed to represent Mr. Henderson. (R35:2). Attorney Plaisted later filed a motion to withdraw Mr. Henderson's plea prior to sentencing. (R15:1-2). Mr. Henderson alleged in that motion that he was rushed into the plea, that he did not personally affirm the facts in the complaint, and that his plea was not knowingly, voluntarily and intelligently made. *Id.* The matter was set for a motion hearing on September 19, 2014. (R1:6).

At the September 19, 2014, motion hearing, Mr. Henderson testified that he spent approximately three to four hours with his attorney on the morning of trial before entering his guilty pleas. (R38:19). Mr. Henderson testified that he had prior experience in the criminal justice system and six prior convictions, but that none of them were felonies. (R38:22-25). Mr. Henderson agreed on the day of trial the State was ready to proceed, and that Mr. Henderson had to weigh his options. (R38:27). He testified that he did not want to lose his job, and that he and Attorney Carlson discussed the pros and cons of "getting it over with" rather than going to trial. *Id.* Mr. Henderson specifically mentioned how they discussed that going forward to trial would mean that it would still be a felony. *Id.* Mr. Henderson expressed that if he became a felon that he would lose his job and stated that a felony is a lot worse than a misdemeanor. (R38:28). Mr. Henderson explained again how he and Attorney Carlson spent hours talking about

the options and how they mainly focused on the felony part. (R38:29) Mr. Henderson stated they discussed getting the felony "wiped off" because that was exactly what he, Mr. Henderson, wanted. *Id.* No other witnesses were called as part of the motion hearing. (R28:36).

The court denied Mr. Henderson's motion in an oral ruling on October 29, 2014. (R39:1-15). The court first found that Mr. Henderson's plea was knowingly, voluntarily and intelligently made and that there were no defects in the plea colloquy itself. (R39:8). The court then found that Mr. Henderson had not presented any manifest injustice or any fair and just reason that would allow for plea withdrawal. (R39:8-11). The court made this ruling based on a number of factors, including the time Mr. Henderson spent discussing the case with his attorney, the evidence that he weighed his options and was motivated by his desire to avoid a felony, and that he was not subject to any undue pressure, other than that expected on a trial date when the victim is present and the State is ready to proceed. *Id.*

The court clarified that it was not finding a fair and just reason to allow Mr. Henderson to withdraw his plea, but even if there was such a finding, the court reasoned that there would be substantial prejudice to the State in allowing a plea withdrawal. (R39:10). The court explained this prejudice in a discussion about the dynamics of domestic violence cases and the difficulty of maintaining cooperative victims. (R39:10-13). The plea was taken on a trial day when the victim was present and the State was ready to proceed, and the court found that the passage of time since the State was in that position would cause substantial prejudice to the State's case. *Id.*

After this motion to withdraw his plea was denied, Mr. Henderson was sentenced to two years of probation with nine months imposed and stayed on the battery and three months imposed and stayed on the disorderly conduct. (R21:1-3). Mr. Henderson then filed a post-conviction motion to withdraw his pleas. (R25:1-10). This motion alleged ineffective assistance of counsel based upon the misinformation Mr. Henderson received about the maximum initial confinement time he was exposed to with his guilty pleas. *Id.* The court denied Mr.

Henderson's post-conviction motion without an evidentiary hearing in a written decision. (R26:1-4).

STANDARD OF REVIEW

I. Legal Standard Relating To Motions To Withdraw Guilty Pleas, Brought Before Sentencing.

The decision to grant or deny a motion to withdraw a plea is within the discretion of the court. *State v. Lopez*, 2014 WI 11, ¶60, 353 Wis. 2d 1, 31, 843 N.W.2d 390, 405. In general "a circuit court should 'freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.' " (internal citations omitted) *Id.*, 353 Wis. 2d at 4, ¶ *2*, 843 N.W.2d at 392. The court's discretionary finding is reviewed under the erroneous exercise of discretion standard. *Id.*, 353 Wis.2d at 31, ¶60. To sustain a discretionary act, this court need only find that the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.*, quoting *Loy v. Bunderson*, 107 Wis. 2d 400, 414-415, 320 N.W.2d 175 (1982).

II. Legal Standard Relating To When The Court Must Grant A Hearing On A Post-Conviction Motion.

A defendant seeking post-conviction relief is not automatically entitled to a hearing. The requirements to be met before a hearing is required varies, depending on the type of claim which is brought.

Where a defendant alleges, post-conviction, that the he should be permitted to withdraw his plea because the trial court failed in its mandatory duties attendant to the plea process, the court must grant a hearing if the motion (1) makes "a prima facie showing that the plea was accepted without the trial court's conformance with Wis. Stat. § 971.08 or other mandatory procedures, and (2) alleges that in fact the defendant did not know or understand the information that should have

been provided at the plea colloquy. *State v. Howell*, 2007 WI 75, ¶ 27, 301 Wis. 2d 350, 367, 734 N.W.2d 48 (internal citations omitted).

Under the *Bangert* standard, the appellate court reviews whether a postconviction plea withdrawal motion entitles a defendant to an evidentiary hearing independently of the circuit court, but benefiting from the lower court's analysis. *Howell*, 301 Wis. 2d at 369, ¶ 30. The reviewing court first determines as a matter of law whether a defendant's motion has pointed to deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing; it then determines as a matter of law whether a defendant has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing. *Id.*

Where a defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm, the trial court's decision to hold a hearing is governed by the *Nelson/Bentley* line of cases. (*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). *Howell*, 301 Wis.2d at 374, ¶ 74

Before the court is required to grant a defendant such a hearing, the defendant must allege in his moving papers sufficient material facts that, if true, would entitle him to relief. If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309-10; *Nelson*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98.

ARGUMENT

I. The Circuit Court Properly Denied Mr. Henderson Plea Withdrawal Prior To Sentencing.

The circuit court did hold an evidentiary hearing in response to Henderson's presentencing motion to withdraw his pleas. After that hearing, the court found that there was not a manifest injustice or a fair and just reason to justify plea withdrawal. Those findings by the court were based upon relevant facts, appropriate law, and rational decision making, and as such the findings are not erroneous. *Lopez*, 353 Wis. 2d at 31, ¶60. The court's appropriate use of discretion in making these findings should be upheld.

A. No Credible Fair And Just Reason For Plea Withdrawal Has Been Presented By Mr. Henderson.

Mr. Henderson is unable to meet the standard for plea withdrawal, showing that there was a credible fair and just reason to withdraw his plea prior to sentencing. The Wisconsin Court of Appeals has articulated this requirement stating, "A defendant seeking to withdraw his plea before sentencing must present a fair and just reason which the trial court finds credible *and* rebut evidence offered by the State that the State will be substantially prejudiced by the plea withdrawal" (emphasis in original). *State v. Rhodes*, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 355, 746 N.W.2d 599, 600, quoting *State v. Jenkins*, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24.

The trial courts in both *Rhodes* and *Jenkins* found that there was not a credible fair and just reason given for plea withdrawal and the higher courts upheld that finding as within the court's discretion. *Rhodes* involved a defendant seeking plea withdrawal prior to sentencing on the claim that he was innocent, coerced into pleading guilty on the day of trial by counsel, and made a hasty decision. *Rhodes*, 307 Wis. 2d at 357, ¶12. The trial court in *Rhodes* did not find these claims to be credible and denied a motion to withdraw his plea presentencing. *Id.*, 307 Wis. 2d at 356-358, ¶10-13. The Court of Appeals held that the trial court appropriately exercised its discretion in denying the motion.

The original claims made by Mr. Henderson in the presentencing motion to withdraw his pleas are very similar to those raised by *Rhodes*. Trial counsel summarized Mr. Henderson's claims as essentially two things: that he was innocent of the charges to which he pled and that he was rushed into his decision to plead guilty on the trial date. (R39:4). The trial court, in looking at these claims, found that they did not give rise to a manifest injustice or to a fair and just reason to allow Mr. Henderson to withdraw his plea. (R39:8-11). The court's findings were clearly based upon relevant facts and appropriate law and should not be disturbed. *See Lopez*, 353 Wis. 2d at 31, ¶60. The credibility determination made by the trial court as to Mr. Henderson's claims was based upon the evidence that Mr. Henderson did have time to discuss his options with his attorney, that he did weigh the pros and cons of accepting the State's offer, and specifically understood that he would be facing a felony if he went to trial and lost. (R39:8-11).

Mr. Henderson now claims that Attorney Plaisted should have also raised the misinformation about the bifurcated sentence given at the time of the plea and that this should have been considered as to his motion for a plea withdrawal. To prevail on this claim, Mr. Henderson would have to establish that Attorney Plaisted was ineffective as to this alleged failure.

Attorney Plaisted did not perform deficiently in failing to raise this issue in Mr. Henderson's first motion to withdraw his plea. As established below, the misinformation, under the law, does not rise to the level of making a plea unknowingly, involuntarily, or unintelligently made. *See State v. Sutton*, 2006 WI App 118, ¶1, 294 Wis. 2d 330, 333, 718 N.W.2d 146, 148. Mr. Henderson was also not prejudiced by any possible deficiency as he would have been unable to establish any credible claim that the correct bifurcation information would have caused Mr. Henderson to proceed to trial. The information that Attorney Plaisted relied on in making his motion to the court was elicited by Mr. Henderson's testimony at the Sept. 19, 2014 motion hearing. (R39:4). That testimony very clearly established that Mr. Henderson's main concern at the time he pled guilty was avoiding a felony conviction. (R38:28-29). This is the same testimony that the trial court relied on in finding that Mr. Henderson knowingly weighed his

options and made an intelligent plea. (R39:10). To now claim that, given the proper bifurcation structure, Mr. Henderson would have taken two felony charges to trial rather than accept the plea to misdemeanors, the court would have to discount all of Mr. Henderson's previous testimony to the contrary. This claim hardly raises a credible fair and just reason to withdraw a plea.

B. A Plea Withdrawal Would Have Resulted In Substantial Prejudice To The State.

Even if Mr. Henderson could somehow establish a credible fair and just reason to withdraw his plea, he has still failed to rebut the State's evidence of substantial prejudice. As stated above from *Rhodes*, 307 Wis.2d at 355, ¶7, a defendant is required to show both a credible fair and just reason to withdraw a plea, and rebut evidence of substantial prejudice. The trial court in Mr. Henderson's case found both that there was not a fair and just reason to withdraw his plea, but also that in the alternative there would be substantial prejudice to the State if the plea was withdrawn. (R39:11-13). The court made a record that this was a case of domestic violence that was old, in that it had been pending for almost a year. *Id.* The court discussed the dynamics of domestic violence cases and the reluctance of victims to appear and to cooperate with prosecution. *Id.* These dynamics, in light of the facts that the victim in Mr. Henderson's case, S.M., did appear for trial on the day of Mr. Henderson's plea but had since petitioned the court for a no violent contact order, led the court to find the State had established substantial prejudice. *Id.*

The trial court's findings in regards to substantial prejudice are similar to the findings in *Lopez*, 353 Wis. 2d. In *Lopez*, the trial court found there was substantial prejudice based on the passage of time which made an audiovisual recorded interview of the victim no longer admissible under Wis. Stats. § 908.08. Ms. Lopez argued that the State should be required to make some showing that the victim was unavailable or had faulty memory to establish substantial prejudice. *Id.*, 353 Wis. 2d at 33, ¶64. The *Lopez* trial court did not require any such findings and found the State had met its burden of showing substantial prejudice without actual evidence of the victim's current mental state or ability to recall

the events. The *Lopez* court relied in large part on *State v. Bollig*, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199. *Bollig* also involved a defendant trying to withdraw his plea presentencing. The *Bollig* trial court found that the State would be substantially prejudiced given the passage of time and the effect it would have on the victim and the victim's ability to recall events. The higher courts in both *Lopez* and *Bollig* upheld the trial courts' determinations of substantial prejudice as a proper use of discretion.

The trial court in Mr. Henderson's case similarly used appropriate discretion in finding that even if Mr. Henderson could show a fair and just reason to withdraw his plea, that there would be substantial prejudice to the State. Mr. Henderson has offered nothing to rebut that finding in his appeal. Therefore, Mr. Henderson cannot succeed on a motion for plea withdrawal based on a fair and just reason.

II. There Was No Deficiency In The Plea Colloquy Which Would Require A Hearing On Mr. Henderson's Post-Conviction Motion To Withdraw His Plea.

The circuit court made findings that Mr. Henderson's plea was knowing, intelligent and voluntary and that there was no fair and just reason to withdraw that plea. The court reiterated this position, finding no basis for a plea withdrawal post-sentencing, even given the misinformation about the proper bifurcation of the charge to which the defendant pled.

The court that took Mr. Henderson's plea did meet the basic requirements under Wis. Stats. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The court did personally address Mr. Henderson as to the voluntariness of his pleas. (R33:3-6). The court specifically asked Mr. Henderson about the nature of the charges and the maximum possible penalty. (R33:3-5). The court used the criminal complaint as a factual basis for the plea. (R33:6).

Mr. Henderson alleges that because Mr. Henderson was misinformed by counsel about the possible maximum initial confinement time, under truth in sentencing bifurcation, that his

plea was not knowingly, voluntarily, and intelligently made. However, in the plea colloquy, Mr. Henderson was properly notified of the maximum possible penalty, which is sufficient to establish a knowing, voluntary and intelligent plea. When the trial court ruled on this exact issue it correctly cited *Sutton*, 294 Wis. 2d which stands for the premise that informing a defendant of the maximum term of imprisonment is all that is required in a proper plea colloquy. (R26:3). The court in *Sutton* held that the knowing, voluntary and intelligent plea requirement in Wis. Stats. § 971.08(1)(a) and in *Bangert*, 131 Wis. 2d is met without proper notification of what the bifurcated sentence would be under Wisconsin's truth-in-sentencing law (TIS). *Sutton*, 294 Wis. 2d at 333-334, ¶1. The court reasoned that the total possible imprisonment was the direct consequence of the plea and that the potential bifurcation of that sentence was more analogous to a collateral consequence. *Id.*, 294 Wis. 2d at 339, ¶11.

Mr. Henderson was correctly informed of the maximum possible penalty given his plea. (R33:3). This is all that is required under the law. Therefore, Mr. Henderson's plea was knowingly, voluntarily and intelligently made and a post-conviction hearing is not warranted.

III. There Is No Manifest Injustice Which Would Justify A Plea Withdrawal Motion Hearing Post-Sentencing.

In arguing for a plea withdrawal after sentencing, a defendant has the heavy burden of establishing by clear and convincing evidence that the court should permit the defendant to withdraw the plea to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis.2d 714, 605 N.W.2d 836. Mr. Henderson argues ineffective assistance of counsel as the basis for a post-conviction hearing on the issue of a plea withdrawal. Mr. Henderson, however, has failed to effectively prove ineffective assistance of counsel to justify such a hearing.

A. Trial Counsel Did Not Perform Deficiently.

Mr. Henderson correctly cites the rule necessary to establish ineffective assistance of counsel, that a defendant

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).

To prevail on establishing deficient performance, a defendant must show that acts or omissions of trial counsel were objectively unreasonable. *State v. Luedtke*, 2013 WI App 30, ¶12, 346 Wis. 2d 280, 827 N.W.2d 929. The duty of trial counsel is further defined as requiring that counsel "either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary." *State v. Dillard*, 2014 WI 123, ¶92, 358 Wis. 2d 543, 572, 859 N.W.2d 44, 57, (quoting *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364).

Mr. Henderson relies extensively on *State v. Dillard* to establish that both prongs of the *Strickland* test have been met. As to showing deficient performance, *Dillard* is clearly distinguishable from the current case. *Dillard* involved misinformation provided by trial counsel and the court as to the applicability of the persistent repeater enhancer. *Id.*, 358 Wis.2d at 565, ¶69. The appellate court in *Dillard* found that trial counsel's failure to investigate and understand the applicability of this enhancer to this particular defendant was deficient performance. *Id.*, 358 Wis. 2d at 572, ¶93. In making that finding, the court in *Dillard* specifically stated that the "persistent repeater enhancer statute is not obscure or unsettled law as applied to the facts of the present case" and trial counsel had no explanation for a failure to investigate that statute. *Id.*

In contrast, Mr. Henderson does not argue that he was misinformed about the applicability of either repeater enhancer he was charged with (habitual criminality or domestic abuse repeater).[1] Rather, he argues that he was misinformed about the maximum initial confinement time he was facing with his plea to both charges with the habitual criminality repeater. The correct bifurcation of a misdemeanor enhanced with the habitual criminality statute was obscure and unsettled law around the time of the defendant's plea. In fact, the case which

[1] Mr. Henderson has never contested that both repeater enhancers charged in the original complaint and information are applicable given Mr. Henderson's prior criminal record.

Mr. Henderson relies on for determining the correct maximum bifurcation, *State v. Lasanske*, 2014 WI App 26, ¶12, 353 Wis. 2d 280, 844 N.W.2d 417, was filed on February 26, 2014. The court in *Lasanske* began its opinion stating:

> This appeal concerns the vexing problem of how our trial courts may structure bifurcated sentences when the base penalty for a misdemeanor does not require bifurcation but an applicable penalty enhancer does. Several unpublished one-judge opinions have tackled the issue. However, the analyses have been anything but uniform. We made this a three-judge decision in order to have some established law on the subject.

Id., 353 Wis.2d at 281, ¶1.

The *Lasanske* opinion itself clearly shows that this was an area of unsettled and obscure law. Mr. Henderson was charged and had his initial appearance in November 2013, before the *Lasanske* opinion was filed. (R.2:1-3). Mr. Henderson entered his guilty plea on March 3, 2014, only five days (three business days) after the *Lasanske* opinion was filed.

Clearly, the timeline of this case and the *Lasanske* opinion show that trial counsel for Mr. Henderson was in a very different position in her ability to investigate and understand the law than was the trial attorney in *Dillard*. Without a meaningful ability to investigate the correct bifurcation of the applicable enhancer, Mr. Henderson cannot show his trial counsel performed deficiently. Moreover, the decision to enter into the plea agreement on the day of trial, rather than take two felonies to trial, was clearly strategic and negated the obligation to investigate the issue of bifurcation on the repeater enhancer.

B. There Was No Prejudice To Mr. Henderson.

Even if Mr. Henderson were able to show deficient performance, he cannot meet the second prong of the *Strickland* test showing actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Proving prejudice in the context of a plea withdrawal requires a defendant to demonstrate that "under the totality of the circumstances there is a reasonable probability the defendant would not have

pled…and would have gone to trial but for counsel's deficient performance." *State v. Clarmont*, 2015 WI App 52, ¶15, 364 Wis. 2d 407, 866 N.W.2d 407, quoting *Dillard*, 358 Wis. 2d at 573, ¶99. The court goes on, however, to state that "a defendant must make more than a bare allegation that he would have pleaded differently and gone to trial." *Clarmont*, 364 Wis.2d at ¶16 quoting *Dillard*, 358 Wis.2d at 573, ¶99.

Mr. Henderson again relies on *Dillard* to assert that he was prejudiced by the misinformation he received. The court in *Dillard* emphasized the persuasiveness of the record in that case, stating:

> The defendant detailed why his plea of no contest was a direct consequence of the misinformation he received about the penalty he faced. The defendant's testimony is supported by trial counsel's testimony and the record....The defendant explained that he perceived the State's case as having a weak spot...and that he would have gone to trial absent his overwhelming desire to avoid a mandatory sentence of life in prison.

Dillard, 358 Wis.2d at 574, ¶100-101.

Mr. Henderson, like Mr. Dillard, had the opportunity to testify at a motion hearing, establishing his reasons for taking the plea negotiations. In that hearing, Mr. Henderson made clear that his main concern was avoiding a felony conviction, not reducing his total exposure for a sentence. (R.38:28-29). Mr. Henderson explained that he had a job and that if he became a felon that he would lose it. *Id.* Mr. Henderson emphasized that none of his prior convictions were felonies and that "a felony is a lot more worser than a misdemeanor case." *Id.* Mr. Henderson explained that he and his attorney (Ms. Carlson) discussed the case and the felony charges. (R.38:29). Mr. Henderson stated that he wanted the felony "wiped off" and that he was afraid to lose his job. *Id.* Nothing in the testimony of Mr. Henderson indicates that he was at all concerned about the time he was facing with his plea, rather he was concerned with avoiding a felony.

Given the lack of support in the record for Mr. Henderson's assertion that he would not have pled but for the misinformation he received at the time of the plea, this case is

much more factually similar to *Clarmont* than *Dillard*. *Clarmont* involved a defendant moving to withdraw his plea alleging ineffective assistance of counsel. Mr. Clarmont's claim was that his attorney failed to investigate the charge of bail jumping by determining the IP address used to send the email violation of the no contact order. The defendant later learned that the IP address established the email came from the victim's home. The court in *Clarmont* agreed that this information was persuasive as a trial defense, but the defendant still needed to establish that having that information at the time of his plea would have changed the decision to plead.

The *Clarmont* court spends a significant amount of time distinguishing the factual basis provided by that defendant from the thorough record provided in *Dillard*. Ultimately, the *Clarmont* court determined that the record did not "sufficiently establish Claremont's claim of prejudice." *Clarmont*, 364 Wis.2d at ¶18. Specifically, the court cites the lack of support by any trial counsel testimony or written communications, which were present in *Dillard*. *Id.* Ultimately, the court determined Clarmont's contention that he was prejudiced was nothing more than "a bare allegation that he would have pleaded differently and gone to trial." *Id.*, 364 Wis.2d at ¶26.

Mr. Henderson, similarly, offers nothing more than a bare allegation that the misinformation he received would have changed his decision to plead guilty. This allegation is not supported in the record and is in fact refuted by the evidence that the defendant's main concern was avoiding a felony conviction.

CONCLUSION

For the above reasons the State requests that Mr. Henderson's motion to withdraw his pleas be denied. The trial court did not abuse its discretion in previously finding the pleas were voluntarily, knowingly and intelligently made, that there was no fair and just reason to withdraw the pleas, and that the State would be substantially prejudiced if the pleas were withdrawn. Mr. Henderson cannot establish ineffective assistance of counsel, given that his trial attorney's representation was not deficient and there was no prejudice to

Mr. Henderson. Therefore, the circuit court's rulings should be upheld and Mr. Henderson's motion should be denied.

Dated this _____ day of December, 2015.

Respectfully submitted,

JOHN T. CHISHOLM
District Attorney
Milwaukee County

_____
Molly Marie Schmidt
Assistant District Attorney
State Bar No. 1086868

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4,951.

_____ _____

Date Molly Marie Schmidt
Assistant District Attorney
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 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.

_____ _____

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