STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JASON D. HENDERSON,

Defendant-Appellant. **Reply Cover**

Case No. 15-AP-1740 CR

ON APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY,

THE HONORABLE REBECCA F. DALLET, PRESIDING

REPLY OF JASON D. HENDERSON, DEFENDANT-APPELLANT

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CERTIFICATION OF DELIVERY

I certify that this reply was mailed to the Clerk of the Wisconsin Court of Appeals via the U.S. Mail Service on January 3, 2016. I further certify that conforming copies of the reply were forwarded to the Milwaukee County District Attorney's Office via the US. Mail.

Dated: January 3, 2016.

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State Bar 1045756

ARGUMENT

The state, in their brief, advances three arguments to support the convictions and sentences of Mr. Henderson. First, they assert that the circuit court properly denied Mr. Henderson's motion to withdraw his plea filed prior to sentencing. *State's Brief*, p.7-9. Next, they assert that the plea colloquy conducted by the court did not require a post-conviction motion hearing to withdraw his plea. *State's Brief*, p.10. Third, the State argues that there is no manifest injustice to justify a post-conviction plea withdrawal hearing. *State's Brief*, p.11-13. The State concludes that the circuit court's rulings should be

upheld. Mr. Henderson concedes that arguments raised by the state are accurate arguments; however, that is only because it ignores certain facts. The state ignores that Mr. Henderson was told the wrong penalty information by his trial counsel prior to entering the plea. In addition, the state ignores that fact that trial counsel failed to argue this issue when asking to withdraw the pleas of Mr. Henderson. Mr. Henderson argues that because his trial counsels were ineffective his pleas should be withdrawn.

I. Mr. Henderson's trial counsels were ineffective.

A. Attorney Carlson was ineffective for failing to correctly inform Mr. Henderson of the potential penalties he faced as a result of conviction.

Ms. Carlson did not know the potential bifurcated sentences Mr. Henderson faced as a result of his pleas. This fact is evidenced by the incorrect information provided on the plea questionnaire. (R.13; A.104). This error is a result of attorney Carlson's misunderstanding of the effect Wisconsin's repeater enhancers have on the length of a bifurcated misdemeanor sentence. The Wisconsin Supreme Court has held that failure to investigate repeater enhancers is objectively unreasonable. *State v. Dillard*, 2014 WI 123, ¶92, 358 Wis. 2d 543, 572, 859 N.W.2d 44 (Wis.

2014). Therefore, on its face attorney Carlson's performance was objectively unreasonable.

The state attempted to distinguish *Dillard* from Mr. Henderson's case. They argued, at the time of this case, that the application of the repeater enhancer was an unsettled area of law. *State's brief*, p.13. This assertion is only partially accurate.

Mr. Henderson concedes that the *Lasanske* case was filed just days prior to the plea in this case, February 26, 2014, and March 3, 2014 respectively. That being said, Ms. Carlson still provided Mr. Henderson incorrect information about the potential consequences of entering a plea. She told him he faced 1 years IC and 1 years ES on each count. (R.13; A.104). Clearly, Mr. Henderson was not correctly informed of the potential penalties he faced by his counsel prior to his plea. Thus, his plea was not entered into knowingly and intelligently. This is a violation of Mr. Henderson's due process rights and should have served as a basis to withdraw his pleas prior to sentencing. *State v. Cross*, 326 Wis. 2d 492, ¶16, 786 N.W.2d 64 (Wis. 2010). Unfortunately, Mr. Henderson's trial counsel did not raise this issue when filing a motion to withdraw his pleas prior to sentencing. Thus, this argument was never made to the

trial court until Mr. Henderson raised the issue in his post-conviction motion.

According to the ruling in *Dillard*, the failure to correctly inform a client of the effect of a penalty enhancer on the sentence is ineffective assistance of counsel. In addition, Mr. Henderson informed the court in his post-conviction motion that he would not have taken the deal if he had known the actual amount of time he was facing.

The state argues that Mr. Henderson did not mention the amount of time he was facing as a factor in his decision to enter a plea when he testified at the motion to withdraw pleas conducted on September 19, 2014. This argument is a red herring. Mr. Henderson testified that he went over the plea questionnaire with attorney Carlson for only 3-4 minutes prior to entering his pleas. (R.38; A.189). He also stated he did not read the forms. (R.38; A.184). Thus, Mr. Henderson argues it is reasonable to believe he was unaware that he was told incorrect information by attorney Carlson prior to entering his plea when he testified.[1] Attorney Plaisted missed this issue too because he did not present it to the court at any time during the proceedings. Thus,

[1] This position is consistent with appellate counsel's interaction with Mr. Henderson as expressed in the post-conviction motion.

it is unreasonable for Mr. Henderson to raise this issue *sua sponte* when two attorneys, the state, and two trial judges missed the issue as well. Thus, the failure of Mr. Henderson to mention the length of sentence at the motion hearing conducted on September 19, 2014, has no bearing on the credibility of Mr. Henderson's claim now. It is undisputed that Mr. Henderson was given incorrect information prior to entering his plea by his attorney. Therefore, his pleas should be withdrawn.

B. Attorney Plaisted was ineffective for failing to argue Attorney Carlson was ineffective.

The state appears to include Mr. Plaisted's failure to recognize the enhancer issue in their attempt to distinguish the instant case from *Dillard*. That broad based attempt is not appropriate in this case. The state argues that because *Lasanske* was filed just shortly before the plea hearing in this case, trial counsel could not be expected to know this obscure area of law. This argument is appealing at first blush; however, a closer examination of the record debunks this line of reasoning.

The motion to withdraw Mr. Henderson's plea was not filed until May 30, 2014. (R.15; A.107-108). The hearing on the matter was not held until September 19, 2014, nearly 7 months after the *Lasanske* decision was published. (R.38;

A.155). In addition, the oral ruling on Mr. Henderson's motion was not made until October 29, 2014, eight months after the *Lasanske* decision was released. (R.39; A.197). Therefore, the argument that this issue was obscure does not have merit in relation to attorney Plaisted.

The lack of merit is illustrated by the attention *Lasanske* received following its publishing. For example, the *Lasanske* decision was highlighted in the May 2014 edition of *Wisconsin Lawyer*. As stated above, the motion filed by Attorney Plaisted was not filed until May 30, 2014. Thus by May 30, 2014, the case had been featured in the "Court of Appeals Digest" in *Wisconsin Lawyer* both in print and on the web.[2] Mr. Henderson argues that by the time his motion was filed this was a well-publicized area of law, not some obscure backwater issue.

If one gives the benefit of the doubt to the state's argument for distinguishing this case from *Dillard*, at most Attorney Carlson is excused. Attorney Plaisted should have known the information. He filed his motion 3 months after the decision was published. Prior to filing his motion the case had been featured in *Wisconsin Lawyer*. Every attorney

[2] Professors Daniel Blinka and Thomas Hammer, "Court Appeals Digest", Wisconsin Lawyer, May 2014 and See http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=87&issue=5&articleid=11551.

in Wisconsin receives this publication. Yet, Mr. Plaisted did not amend the motion to include a discussion about the misinformation attorney Carlson provided to Mr. Henderson prior to his plea hearing. Moreover, attorney Plaisted, did not include this information in his argument at the motion hearing. In fact, despite the fact that Ms. Carlson was available for the motion hearing, Mr. Plaisted elected to not call her as a witness. (R. 38. A. 190). Finally, Mr. Plaisted did not include this argument in the brief he requested additional time to file after the motion hearing. [3] (R.38; A.191). Therefore, Mr. Plaisted did not raise this issue at any time prior to the oral ruling despite the fact the Lasanske case had been published approximately 8 months prior to the ruling. All of these examples illustrate the fact that attorney Plaisted was not aware of the issue. Thus, his lack of study on the issue is exactly the situation raised in *Dillard*. This factual issue warranted a post-conviction motion hearing.

For the above reasons, Mr. Henderson argues it is ineffective for Mr. Plaisted not to present the issue of the misinformation provided to Mr. Henderson to the court. This failure prejudiced Mr. Henderson because the trial

[3] Attorney Plaisted did not submit additional briefing to the court.

court denied his motion. This motion was denied because trial counsel failed to present this germane issue and argument. Mr. Henderson argues that had trial counsel shown the manifest injustice of the ineffective representation by attorney Carlson the motion would have been granted. Instead, Mr. Plaisted elected not to raise the issue which is ineffective representation which prejudiced Mr. Henderson.

II. The "substantial prejudice" to the State is through no fault of Mr. Henderson.

The state argues that "Mr. Henderson has offered nothing to rebut" the finding that the state would be substantially prejudiced if his pleas were withdrawn. *State brief*, p. 10. The court in making their determination of prejudice considered the age of the case and the fact the witness asked for the no contact order be amended to a no violent contact order. (R.39; A. 208). Neither of these issues is within the control of Mr. Henderson.

Mr. Henderson pled guilty on March 3, 2014. He acknowledges that the alleged victim was in the courthouse and asked for the no contact order be changed to a no violent contact order. (R.33; A.151). Mr. Henderson informed attorney Carlson the day after he pled that he wished to withdraw his plea. (R.38; A.175-176). Ms. Carlson

did not file a written motion to withdraw. Instead she asked to withdraw on the record on March 31, 2014. (R.34). Mr. Henderson went to the SPD that day and qualified for SPD presentation. (R.34:4). Mr. Plaisted was subsequently appointed as Mr. Henderson's new attorney.[4] Mr. Plaisted filed Mr. Henderson's motion to withdraw his pleas on May 30, 2014. (R.15; A.107).

For various reasons this motion was not heard by the court until September 19, 2014.[5] The oral ruling on the motion was not made until October 29, 2014. That decision was made nearly eight months after Mr. Henderson first requested that his pleas be withdrawn. The scheduling issues were not the fault of Mr. Henderson. Moreover, at the oral ruling, the state did not inform the court that they had no contact with the alleged victim. Instead, the state hypothesized that because there was a request that the no contact order be changed to a no violent contact order in March that there may have been a "shifting of opinion" in the alleged victim to show up for trial. (R.39; A.208). The state offered no indication that their contact

[4] Mr. Henderson assumes he was appointed prior to the status conference Mr. Plaisted appeared at on April 9, 2014. (R.14).

[5] Mr. Plaisted asked for an adjournment on May 20, 2014, in order to be given time to file a motion; the matter was adjourned on July 15, 2014, because attorney Carlson was not subpoenaed for the hearing; and the matter was adjourned on August 29, 2014, because the court was in trial.

with the victim had been severed despite being directly given that opportunity by the court. (R.39; A.207).

In conclusion, Mr. Henderson concedes that there was delay in the case; however, it was through no personal fault of Mr. Henderson. Therefore, that delay should not be used against him in determining if there is prejudice to the state or not. More importantly, the state did not indicate to the court, despite being asked, that the victim was no longer cooperating with the state. For these reasons, Mr. Henderson argues that the "facts" relied upon by the trial court have no bearing on whether there is prejudice to the state.

CONCLUSION

For the above stated reasons and those previously outlined in his brief, Mr. Henderson asserts that he entered his plea without the requisite knowledge and intelligence required. Thus, his plea was given in violation of his due process rights. In addition, both his trial counsel were ineffective. Attorney Carlson was ineffective for telling him the wrong information about the penalties he faced as a result of his pleas. Attorney Plaisted was ineffective for failing to point this misinformation out to the trial court when he asked to

withdraw Mr. Henderson's pleas. Therefore, Mr. Henderson argues his pleas should have been withdrawn by the trial court.

January 3, 2016.

_____
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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 reply brief is 11 pages.

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

January 3, 2016.

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