STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2015AP2344-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY L. WAND,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF A POSTCONVICTION MOTION BY THE CIRCUIT COURT FOR LAFAYETTE COUNTY, THE HONORABLE THOMAS J. VALE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

WAND SET FORTH SUFFICIENTLY SPECIFIC CLAIMS TO DESERVE A HEARING ON THE POSTCONVICTION MOTION.

The State's response brief argues that the trial court was right to deny Wand's postconviction motion without a

hearing because the motion offered only conclusory allegations without the factual specificity necessary to entitle Wand to a hearing. (State's brief, 10-14). Wand's motion alleging ineffective assistance of counsel for failure to hire and use experts was properly denied, the State said, because Wand and his brother, Armin, jointly hired John Agosti as an arson investigator and Wand also hired psychologist William Merrick to evaluate whether Wand was capable of understanding and voluntarily waiving his rights under *Miranda*. (*Id*., at 15, 18).

Wand's postconviction motion also raised the issue of whether trial counsel had been ineffective for not arguing attorney coercion as grounds for plea withdrawal before sentencing. In response to this issue, the State agreed with the trial court's heavy reliance on the plea colloquy with Wand and his attorney (*Id*., at 23-26). The State also claimed that Wand failed to offer sufficient evidence on how his attorneys pressured or misled him into pleading guilty. (*Id.*, at 28).

Finally, in response to Wand's claim that his attorneys operated under a conflict of interest in arguing the plea withdrawal motion, the Stated suggested that Wand offered a mere hypothetical, that no such conflict existed, and, even if it did, Wand failed to show how he was adversely affected. (*Id.*, at 29).

A. The failure to hire and use experts.

In responding to this issue, the State emphasized that the detectives read Wand his *Miranda* rights and that a defense expert, Dr. William Merrick, found that Wand was competent to understand these rights. Previously, a pretrial report from Dr. Schoenecker established Wand's competency to stand trial. (State's brief, 18-19).

The State misperceives the issue: it is not whether Wand understood the *Miranda* warnings; rather, it is an issue of coercive interrogative tactics likely to produce an involuntary confession. While *Miranda* claims arise under the Fifth Amendment to the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment and Article 1, Section 8, of the Wisconsin Constitution prohibit the use of involuntary confessions obtained through coercion. *State v. Jerrell C. J.*, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110. Both the characteristics of the defendant and the nature of the interrogation are balanced in determining whether the defendant's statements were voluntary. *State v. Hoppe*, 2003 WI 43, ¶39-40, 261 Wis. 2d 294, 661 N.W.2d 407.

To be coercive, the police interrogation techniques need not be outrageous; even subtle pressure can be coercive if it overcomes the defendant's ability to resist. *Id.*, ¶46. *Hoppe* held that a defendant's statements are voluntary "if they are the product of a free and unconstrained will, reflecting a deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by the representatives of the State exceeded the defendant's ability to resist." *Id.*, ¶36.

Dr. Lawrence White's report, submitted in support of the postconviction motion, highlights the ways in which Wand's confession was involuntary and bore the indicia of a false confession. (Wand's brief-in-chief, 29-32; 156:2). Dr. White stated that false confessions are more common than one might think: they have occurred in approximately 25 percent of all DNA exonerations and, according to police sources, 5 percent of innocent suspects falsely incriminate themselves. Wand's age (18 years at the time), the interrogation's length (10 hours over 4 days), and the

"emotionally intense, accusatory questioning by investigators who shouted at him, bullied him, and called him a liar" were among the factors that cast doubt on the reliability and voluntariness of Wand's confession. (156:5). The investigators also confronted Wand with fabricated evidence, minimized the crime to imply that he would receive lenient treatment, suggested that he had lost his memory of events—to which Wand started to modify his answers with conditional language suggesting that he might bear responsibility for the crimes. (156:5-6).

By feeding Wand information, discounting his protestations of innocence, and ignoring discrepancies his account and known facts, the investigators demonstrated confirmation bias and tunnel vision; and, in the end, nothing Wand said provided the investigators with independent confirmation about details from the crime. These behaviors and facts bear the hallmark of a false confession. Given Dr. White's opinion, Wand's supposed confession lacks probative value and should have been suppressed.

Wand's trial lawyers raised the issue as a *Miranda* violation, made clear by Attorney Michel's letter to Wand, dated June 6, 2013, in which he told Wand that, even if his statements to the police were suppressed, they still could be used against him if he were to testify differently at trial (App. 134). Statements obtained in violation of *Miranda* but otherwise voluntary are admissible for impeachment purposes. *See Harris v. New York*, 401 U.S. 222, 225-26 (1971); *State v. Schultz*, 152 Wis. 2d 408, 417-18, 448 N.W.2d 424 (1989). Dr. Merrick's report, accompanying the suppression motion, only addressed Wand's ability to understand the *Miranda* warnings.[1] Trial counsel therefore

[1] The suppression motion dated June 7, 2013, along with Dr. Merrick's report, was not part of the court file sent to appellate counsel upon his appointment, nor do they appear in the docket entries. However, they were attached to the State's

retained an expert and filed a motion on the wrong issue, a mistake of constitutional magnitude that deserves a finding of ineffective assistance of counsel.

The failure to suppress Wand's statement led directly to his guilty plea. He recognized the importance of suppressing his statements. As the U.S. Supreme Court recognized in *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Wand's postconviction motion stated that he would testify that he thought the suppression motion would be heard on June 12, 2013, and felt hopeless when it did not happen. The result was that he pled guilty on June 12 (150:5).

Moreover, at the hearing to withdraw the guilty plea on August 22, 2013, Wand said that "we have false statements by me ... and there was really no way to get this to go through except for the suppression" (121:16-17). This comment shows that the failure to suppress Wand's confession led to his guilty plea; therein lays the prejudice from trial counsel's deficient performance.

While the State observes that Wand "never claimed in his colloquies with the court that his confession was coerced; he only claimed that it was false," the fact remains that Wand, untutored as he is, still had the sense that something was wrong with the police tactics used against him—and he also knew his confession was false. He told Dr. Shoenecker that the police secured the confession by "badgering" him (117:18-19) (State's brief, p. 20).

The State takes a disingenuous approach to the problem of a coerced confession by making light of Wand's

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brief in opposition to the postconviction motion and are included (presumably) as Document 161 of the record on appeal.

description of the police interrogation as "badgering": "Wand told Dr. Shoenecker before trial that, rather than exercise his rights, he decided to 'lie' to the police so they would stop 'badgering' him ... Wand's conscious decision to lie rather than remain silent show his attempt to take control of the interview rather than his helpless acquiescence to the interrogation in the face of unrelenting police pressure." (State's brief, p. 20-21). Did Wand "lie" about being involved in the crime as part of a clever strategy to "control" the interview or did he succumb to police pressure and tell the police what they wanted to hear? The latter is the more believable.

The State suggests that the coercive factors identified by Dr. White were not different than those present in *State v. Moore*, 2015 WI 54, ¶57-65, 363 Wis. 2d 376, 864 N.W.2d 827. (State's brief, at 20). But, unlike here, the *Moore* decision found it significant that the defendant had "a significant amount of prior police interaction" and proved capable of concocting and modifying a story "on the fly." *Id.*, ¶60.

The State also takes issue with Dr. White's statement: "I cannot offer a professional opinion as to the truthfulness of the statements made by Jeremy Wand in response to the investigators' questions." (State's brief, p. 21). Dr. White, not being at the scene of the fire, could only focus on the nature of the police interrogation and the confession's reliability, not the ultimate question of whether it might be true despite all the indicia of a false confession.

Turning to the report from arson investigator R. Paul Bieber, filed with the postconviction motion, the State responded that trial counsel could not have been ineffective because the defense had retained John Agosti to investigate the fire. (State's brief, p. 15-16). While the contents of Agosti's report, whether favorable or unfavorable to the

defense, remain unknown, the important point is that Bieber found that the fire might not have been arson and that its origin could not be determined. Bieber's opinion provides an alternative to the State's position that Wand's confession is "strongly corroborated" by deputy fire marshal's findings. (State's brief, p. 21).[2] In a sleight of hand, the State argues that Dr. White's opinion would have scant probative value because the fire marshal's findings corroborate Wand's confession even as the State also says that Bieber's report is irrelevant. (*See* State's brief, p. 18). Bieber's report enhances the probability that Wand's confession is false.

Surely, with a suppressed confession and the fire's origin suddenly uncertain, Wand would not have pled guilty. The expert reports established a sufficient factual basis, both in terms of deficient performance and prejudice, to gain Wand a hearing on the postconviction motion.

B. Attorney coercion of guilty plea and conflict of interest.

In responding to this issue, the State relies on the plea colloquy and guilty plea questionnaire. (State's brief, pp. 23-26). This reliance overlooks the fact that trial counsel argued the plea withdrawal motion before sentencing and only needed to satisfy the more lenient fair-and-just standard for plea withdrawal. *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). Before sentencing, the presumption of innocence still exists and only some fair and just reason for plea withdrawal is necessary, not a "serious flaw in the fundamental integrity of the plea as required for a post-sentence plea withdrawal. *See State v. Thomas*, 2000 WI 13,

[2] The State also claims that Wand's confession is corroborated by Armin Wand's confession, S.W.'s eyewitness account, and a neighbor's eyewitness account. Armin Wand's appeal , of which the voluntariness of his confession is a major part, is currently pending before this court. As for the eyewitness accounts, S.W. provided inconsistent statements and no neighbor positively identified Jeremy Wand.

¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Wand claims that, but for pressure from his attorneys, he would not have succumbed to the plea colloquy and related procedures.

To satisfy the post-sentence manifest injustice standard, Wand raised facts from outside the plea colloquy: his attorney's ineffectiveness. Ineffective assistance of counsel is one of the circumstances that satisfies the manifest injustice standard. *State v. Reppin*, 35 Wis. 2d 377, 385-86, 151 N.W.2d 9 (1967). If trial counsel would have effectively argued the presentence plea withdrawal motion by using Wand's real reasons for plea withdrawal, *i.e.*, attorney pressure, it is substantially probable that the motion would have succeeded under the more liberal standard. At this juncture, trial counsel's failure to do so meets the test for manifest injustice.

In criticizing Wand's argument that he felt compelled to plead guilty due to pressure from his attorneys, the State responds that "...Wand waited until the day he was sentenced, July 19, to tell Attorney Medina that he wanted to withdraw his plea. Even then, the only reason Wand gave Medina was S.W.'s inconsistent statement in the presentence report (121:8-9). Moreover, Wand knew whether his confession was false long before he decided to plead guilty. Nothing changed." (State's brief, p. 25).

The above quote misconstrues Wand's argument on so many levels. First of all, the State assumes that Wand had a prior opportunity to communicate with trial counsel before he met with the PSI writer. Or that Attorney Medina's date of filing the motion is the same as the day he heard from Wand, who cannot control the time his attorney prepares and files a motion. The State also assumes that Wand told his attorney about the S.W.'s inconsistent statement and nothing else, even though he told the PSI writer much more. And that Attorney Medina did not read the PSI report and discover

Wand's allegation of pressure from his attorneys. As for Wand knowing his confession was false, he also knew, on June 12, that his attorneys were not going to litigate the motion to suppress it.

The State also argues that Wand's wish to have his attorneys continue their representation "undermines his claim that they were laboring under an actual conflict of interest that would have adversely affected their representation of him." (State's brief, p. 25, fn. 8). But this argument attributes to Wand the knowledge of conflict of interest, its significance and ramifications, and that he knew he could get another attorney appointed for him. When the trial asked Wand if he would feel comfortable continuing with trial counsel, Wand put the cart before the ox, saying "I think he's one of the best attorneys for the situation since I hear he's a better trial lawyer ... I just hear he has a great trial record ... as long as I can talk to him and figure out what signs were misunderstood ..." (120:14). Clearly, Wand was already looking past any hearing on the plea withdrawal motion, not realizing that it could not prevail so easily with conflicted representation.

Wand's statement at the August 22 hearing that his attorney advised him to plead guilty because it was "best choice that I could get" does not undermine Wand's claim of innocence (121:16). (State's brief, p. 25). Rather, it supports Wand's view that he was trapped into pleading guilty by attorneys who did not discuss a defense with him and did not show up to argue the anticipated suppression motion on June 12. Wand thereupon gave up and decided to "get with the program" in an effort, as he stated in the first scheduled sentencing hearing on July 19, to "make people happy" (120:10).

As described in Wand's brief-in-chief, he should have been given the opportunity to argue the presentence with

counsel who would have probed the issue of attorney pressure. In short, Wand's postconviction motion raised sufficient factual allegations to gain a hearing: his attorneys incessantly talked of pleading guilty, never discussed a defense, failed to litigate the suppression motion he was counting on, and never believed his assertions of innocence.

CONCLUSION

For the reasons set forth here and in his brief-in-chief, Mr. Wand respectfully urges this court to remand this case for a hearing on the issues raised herein.

Dated: May 5, 2016

Respectfully submitted,

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CERTIFICATION OF LENGTH AND FORM

I certify that this brief conforms to the rules for a brief produced using a proportional serif font. The length of this brief is 2,383 words.

Dated: May 5, 2016

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and form 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.

Dated: May 5, 2016

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