STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2525-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYDIS TRINARD ODOM,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM ORDERS DENYING POSTCONVICTION RELIEF AND SUPPLEMENTAL POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE TIMOTHY G. DUGAN AND ELLEN R. BROSTROM, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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# BRIEF OF PLAINTIFF-RESPONDENT

## ISSUE PRESENTED

Did the trial court properly exercise its discretion when it summarily denied Tydis Odom's postconviction motions to withdraw his guilty and no contest pleas for failure to sufficiently allege a "manifest injustice?"

The trial court (Judge Dugan on the initial motion and Judge Brostrom on the supplemental motion) denied relief without an evidentiary hearing. The court held that Odom's claimed misunderstanding about two collateral consequences of his plea: (a) his ineligibility for the Challenge Incarceration and Substance Abuse Programs in prison; and (b) the imposition of the mandatory DNA surcharge on each count at sentencing, were insufficient to prove a "manifest injustice" entitling Odom to withdraw his voluntary and intelligent guilty and no contest pleas.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of established principles of law to the unique facts presented. The briefs of the parties should adequately address the legal and factual issues.

## STATEMENT OF THE CASE

Odom appeals (56), from judgments of conviction (as amended) (18; 19; 23; 30), and from orders denying postconviction relief (29), and supplemental postconviction relief (54), entered in the Circuit Court for Milwaukee County, the Honorable Timothy G. Dugan, presiding at the plea and postconviction motion stage, and the Honorable Ellen R. Brostrom, presiding at the supplemental postconviction motion stage.

Odom was charged in a complaint (2) and, after bindover (34:17-18), in an information (6), with two counts of second-degree sexual assault, one count of forcible kidnapping and one count of substantial battery, all arising out of his brutalization of one A.F. March 11-12, 2014, in the City of Milwaukee (2:2; 34:3-10; 38:4-9; 52:1-2). If convicted, Odom faced maximum sentences of 123.5 years in prison and fines totaling $310,000 (6).

On the day set for trial, June 9, 2014, Odom accepted a plea offer from the State whereby he agreed to plead "no contest" to two counts of fourth-degree sexual assault and one count of false imprisonment, and "guilty" to one count of substantial battery.[1] His maximum penalty exposure was thereby reduced to eleven years in prison and fines totaling $40,000. The State also agreed not to pursue a new witness intimidation charge filed June 9 against Odom for making harassing telephone calls to the victim from jail (she failed to appear for the scheduled June 9 trial) (12; 37:3-5, 12-13; *see* 34:21; 38:4, 7-9; 52:2).

The trial court engaged Odom in a thorough colloquy to ascertain his understanding of the constitutional trial rights he would be giving up, the elements of the new charges, their maximum penalties, and the factual basis for the pleas – all in compliance with Wis. Stat. § 971.08 (37:5-27).

Odom asked during the colloquy whether he would be "eligible for boot camp or anything like that?" The court responded that he "could be eligible for boot camp and I believe for substance abuse. . . . [The] Court would have to look at all the factors. And I also have to have a substance abuse issue need to be addressed for both of those programs" (37:9).

Sentencing took place the next day, June 10, 2014 (38). The prosecutor, "pursuant to negotiations [left] the sentence to the sound discretion of the Court" (38:10). The prosecutor noted that one substantial benefit Odom gained by his pleas to fourth-degree sexual assault was that he would not be required to register as a sex offender for the rest of his life (38:11).

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[1] Although he entered both guilty and no contest pleas, the State will hereafter refer to Odom's pleas as "guilty" pleas for ease of reference only.

Defense counsel requested four years of probation along with the possibility of expungement of Odom's record upon successful completion of probation (38:11-12, 16-17). Defense counsel stated it was "very important that [Odom] get treatment or some cognitive thinking classes," or "batterer's intervention," while on probation (38:17). There was no request that Odom be made eligible for the Challenge Incarceration or Substance Abuse Programs if sent to prison. There was no mention at sentencing that Odom suffered from drug or alcohol issues that would have made him eligible for those programs if sent to prison.

In its sentencing remarks, the court pointed out that Odom initially faced serious charges but he "received a great benefit" in the form of significantly reduced maximum penalties when the State reduced the charges (38:30). The court rejected probation because it would "unduly depreciate the seriousness of the offense" in light of Odom's rehabilitative needs and past failures under supervision and in the community (38:33). The court sentenced Odom to initial confinement in prison followed by extended supervision, a condition of which was that he "participate in cognitive behavioral therapy programming" (38:35). The court also ordered that Odom "undergo alcohol and drug assessment" (38:35). Another condition was that Odom "participate in batterer's intervention programming, participate in sex offender treatment" (38:36). The court denied defense counsel's request that Odom's record be expunged upon the successful completion of probation because it did not order probation (38:39-40).

Pertinent to the issues on appeal, the court ordered that Odom provide the mandatory DNA sample and, "on all four counts impose[d] the mandatory DNA surcharge" totaling $900 (38:37). The court went on to "impose the applicable mandatory penalty assessment, surcharges, and costs on each count" totaling $486 (38:37). Finally, the court determined that Odom was "not eligible for the Challenge Incarceration Program nor the Substance Abuse Program" (38:39). The court imposed aggregate concurrent and

consecutive sentences on the four counts totaling five years and three months of initial confinement, followed by five years of extended supervision (38:38-39, 41).

Odom did not object at sentencing either to the imposition of the mandatory DNA surcharges or to the court's denial of eligibility for the Challenge Incarceration and Substance Abuse Programs. Nor did he object to any of the other mandatory financial obligations the court imposed at sentencing.[2]

On April 13, 2015, Odom filed a motion to withdraw his guilty pleas on the ground that "his pleas were not knowingly, intelligently, and voluntarily entered" because the court led him to believe at the plea hearing that he would be eligible for the Challenge Incarceration and Substance Abuse Programs in prison (28:1, 7). Wis. Stat. §§ 302.045, and 302.05. Odom pointed out in his motion that he was not statutorily eligible because his offenses of conviction were all under Wis. Stat. ch. 940. *See* Wis. Stat. §§ 302.045(2)(c), and 302.05(3)(a)1; §§ 973.01(3g) and (3m). Odom claimed that eligibility for participation in these programs "was crucial to him, because he wanted a chance" for early release to extended supervision (28:12). Odom alleged in his motion that he would have insisted on going to trial on all the original charges, plus the new intimidation of a witness charge, and risk 123.5 years in prison and $310,000 in fines, had he known he was not eligible to participate in these otherwise discretionary programs (28:12). Odom did not, however, claim in his motion that he suffered from substance abuse problems that would have made him eligible for these programs had his offenses of conviction not been under ch. 940.

[2] Odom's attorney also failed to correct the court at the plea hearing when the court provided this alleged misinformation in response to Odom's question about his eligibility for these programs (37:9).

The motion did not challenge trial counsel's effectiveness for failing either to correct the trial court at the plea hearing or to raise any issue at sentencing that it had misled Odom into thinking he was eligible for the prison substance abuse programs.

The trial court (Judge Dugan) denied the motion without an evidentiary hearing April 20, 2015 (29). It held that Odom's motion failed to sufficiently allege a "manifest injustice" because, with regard to the prison substance abuse programs, Odom knew all along "that none of these things were a certainty," and his "claimed reliance on a *possibility* is not sufficient to warrant plea withdrawal" (29:2) (emphasis in original). The court explained:

> The possibility of an early release program in this case — at most a discretionary determination made by the court with respect to prison programming — is not within the realm of similar collateral consequences as referenced above, such as being deported, being subjected to Chapter 980 commitment proceedings, being required to register as a sex offender, or being prohibited from possessing a firearm for the rest of one's life. A misunderstanding about an early release program does not constitute a negative legal collateral consequence occurring beyond the service of the sentence.

(29:3).

Odom did not in his initial postconviction motion claim that the sentencing court's imposition of the mandatory DNA surcharges rendered his pleas involuntary and unintelligent.

Odom filed a supplemental motion for postconviction relief four months later, August 12, 2015, this time claiming that "his pleas were not knowing and voluntary because the court failed to establish at the plea hearing that he understood, and he was in fact unaware, that he would be assessed a mandatory $900 DNA surcharge" (44:1).

Odom conceded that the effective date of the statutory change to mandatory DNA surcharges (January 1, 2014) was more than two months before he committed his offenses on March 11-12, 2014 (44:5-6). The law was firmly in place for over five months before he pled guilty on June 9, 2014. Odom also acknowledged that he knew before his pleas that under the old law the court could have imposed a discretionary $250 DNA surcharge (44:4-5).

There was no discussion in the supplemental motion about what trial counsel told Odom before the plea hearing or at sentencing with regard to the mandatory DNA surcharge. Although Odom claimed he was "unaware" of the surcharge, the supplemental motion did not explain why Odom's attorney failed to tell him about the DNA surcharge before the plea hearing and it did not allege that his attorney was ineffective for failing to do so

The trial court (Judge Brostrom now presiding) denied the supplemental motion without an evidentiary hearing in a Decision and Order issued November 17, 2015 (54). The court noted that the mandatory "DNA surcharge is not found within the penalty provisions of Sections 939.50 and 939.51, Stats. Nor is any other mandatory financial obligation." This is a financial obligation that must be imposed even when the court decides not to impose a fine or term of imprisonment (54:3). The court rejected Odom's claim that the DNA surcharge was "part of the punishment he faced" and, therefore, the court had to establish his understanding of that requirement on the record before accepting his guilty pleas (54:3-4). It "is a financial obligation which falls outside the range of penalties a court may impose under sections 939.50 and 939.51 Stats" (54:3).

The court held that Odom's reliance on *State v. Radaj,* 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, for the proposition that the DNA surcharge is "punishment," was misplaced because *Radaj* "applies only to defendants like Radaj who committed their crimes before the [mandatory] DNA surcharge statute took effect" (54:5). The court pointed

out that in a decision post-dating *Radaj,* the court of appeals held that the mandatory DNA surcharge statute was not intended to impose additional punishment for the offenses, but to offset the costs of expanding the State's DNA data bank (54:5-6). *See State v. Scruggs,* 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *petition for review granted March 7, 2016*. The court analogized the DNA surcharge to the mandatory but non-punitive victim-witness surcharge imposed under Wis. Stat. § 973.045 for each count of conviction even when there is no victim (54:6). There is no requirement that a defendant be informed of the victim-witness surcharge during the colloquy before his guilty plea is deemed voluntary and intelligent, and in compliance with Wis. Stat. § 971.08 (54:6). Because the mandatory DNA surcharge is not "punishment," it is but a collateral consequence of a guilty plea that does not impose a duty on the court to inform the defendant about that collateral consequence before his plea is deemed valid (54:6-7).

## SUMMARY OF ARGUMENT

1. The trial court properly exercised its discretion in denying Odom's initial and supplemental motions without an evidentiary hearing because they failed to allege sufficient facts to support the conclusion that there was a "manifest injustice" entitling Odom to withdraw his guilty pleas.

2. Odom insisted in his initial motion that he would have gone to trial on the original charges, and risked 123.5 years in prison and $310,000 in fines, had the court told him he was not eligible for the Challenge Incarceration and Substance Abuse Programs in prison because his offenses were under Wis. Stat. ch. 940. Participation in these programs is not, however, guaranteed and Odom's ineligibility to participate in them was but a collateral consequence of his voluntary and intelligent plea. There was no guarantee, even if Odom was statutorily eligible, that:

(a) the trial court in its discretion would order at sentencing that he be made eligible; or, if it did, (b) that prison authorities in their discretion would thereafter place Odom in either program.

Missing from Odom's motion is any claim that his trial attorney was ineffective for not clarifying his eligibility for these programs before the plea hearing. Odom placed the blame entirely on the trial court. But even then, his motion fell short. The trial court did not mislead him in any material respect. While it did not state that Odom was ineligible *as a matter of law* because his crimes were under ch. 940, the court did advise Odom that his eligibility *as a matter of fact* would depend on the facts and, most important, on the prerequisite showing of a substance abuse problem. Missing from his motion, or from the record is any evidence that Odom suffered from a substance abuse problem.

3. Also missing from Odom's initial motion is any claim that his guilty pleas were involuntary and unintelligent because the trial court failed to advise him of the mandatory DNA surcharges during the plea colloquy. That was not important to Odom at sentencing because he did not object when the court imposed the DNA surcharge, and it was not important to Odom thereafter because he did not raise it as a ground for plea withdrawal in his initial postconviction motion. It only became important to Odom as an afterthought four months later when he raised this issue as a ground for plea withdrawal in his supplemental motion based on his overly-expansive reading of a decision this court issued after his first motion failed.

4. Odom insisted in his supplemental motion that he would have gone to trial had the court told him during the colloquy he would have to pay $900 in mandatory DNA surcharges. This was so even though Odom had no problem with the imposition of $486 in other mandatory court costs and fees, and he knew that even under the old law the court could have imposed a $250 DNA surcharge.

Odom failed to provide a sufficient factual basis to withdraw his pleas because the mandatory DNA surcharges were non-punitive collateral consequences that did not have to be discussed during the plea colloquy for Odom's pleas to be voluntary and intelligent. The trial court informed Odom of all the direct consequences of his pleas in full conformity with Wis. Stat. § 971.08.

The mandatory DNA surcharge statute was in effect for two months before Odom committed his crimes and more than five months before Odom pled guilty. Odom complains that he was "unaware" of the change from the old statute where the surcharge was only $250 and discretionary, but his supplemental motion failed to explain why his attorney did not advise him of the statutory change at any point before or at the plea hearing.

Odom again puts the onus entirely on the trial court, but the record conclusively shows that the trial court did nothing wrong. The court followed the law to the letter when it imposed the mandatory surcharge, and it was not required by Wis. Stat. § 971.08 to include any discussion of this collateral consequence in the plea colloquy. The trial court was required to explain the direct consequences of Odom's plea and it did. Odom's attorney was required to explain any pertinent collateral consequences to his client, but it is not revealed in Odom's supplemental motion whether counsel did so and, if not, why not.

5. In short, while both postconviction motions sounded in ineffective assistance of trial counsel, they did not allege it. They put the blame squarely on the trial court where it did not belong.

## ARGUMENT

**THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SUMMARILY DENYING ODOM'S INITIAL PLEA WITHDRAWAL MOTION BECAUSE IT FAILED TO SHOW THAT THE COURT MISLED HIM IN ANY MATERIAL RESPECT REGARDING ELIGIBILITY FOR THE PRISON SUBSTANCE ABUSE PROGRAMS, AND IT FAILED TO SHOW THAT ODOM HAD A SUBSTANCE ABUSE PROBLEM MAKING HIM ELIGIBLE FOR THOSE PROGRAMS. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SUMMARILY DENYING ODOM'S SUPPLEMENTAL MOTION BECAUSE THE DNA SURCHARGE WAS BUT A COLLATERAL CONSEQUENCE OF HIS VOLUNTARY AND INTELLIGENT PLEAS THAT DID NOT HAVE TO BE DISCUSSED WITH ODOM DURING THE PLEA COLLOQUY.**

### A. The applicable law and standard for review.

#### 1. The sufficiency of a postconviction motion to require an evidentiary hearing.

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

To be sufficient to warrant further evidentiary inquiry, the postconviction motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically allege within its four corners material facts answering the questions who, what, when,

where, why and how Odom would successfully prove at an evidentiary hearing that he is entitled to withdraw his pleas: "the five 'w's' and one 'h'" test. *Allen,* 274 Wis. 2d 568, ¶ 23. *See Balliette,* 336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is insufficient on its face, presents only conclusory allegations, or *even if facially sufficient* the record conclusively shows that Odom is not entitled to relief, the trial court may in the exercise of its sound discretion deny the motion without an evidentiary hearing, subject to deferential appellate review. *Balliette,* 336 Wis. 2d 358, ¶¶ 50, 56-59; *Allen,* 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley,* 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State,* 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). *See State v. Roberson,* 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111.

This specificity requirement promotes "the policy favoring finality, the pleading and proof burdens that have shifted to the defendant in most situations after conviction, and the need to minimize time-consuming postconviction hearings unless there is a clearly articulated justification for them." *Balliette,* 336 Wis. 2d 358, ¶ 58.

### 2. The "manifest injustice" standard governing motions to withdraw guilty pleas after sentencing.

The decision whether to grant or deny a motion to withdraw a guilty or no contest plea is addressed to the sound discretion of the trial court. This court will not disturb that decision unless discretion was erroneously exercised. *State v. Lopez,* 2014 WI 11, ¶ 60, 353 Wis. 2d 1, 843 N.W.2d 390; *State v. Jenkins,* 2007 WI 96, ¶¶ 6, 29-30, 303 Wis. 2d 157, 736 N.W.2d 24; *State v. Canedy,* 161 Wis. 2d 565, 579, 469 N.W.2d 163 (1991). *Also see State v. Black*, 2001 WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363; *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998); *State v. Kosina*, 226 Wis. 2d 482,

485, 595 N.W.2d 464 (Ct. App. 1999); *State v. Damaske*, 212 Wis. 2d 169, 192, 567 N.W.2d 905 (Ct. App. 1997).

After sentencing, Odom would have to prove by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw his guilty plea. *State v. Dillard,* 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44; *State v. Taylor,* 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482; *State v. Brown,* 2006 WI 100, ¶¶ 18-19, 293 Wis. 2d 594, 716 N.W.2d 906; *Bentley,* 201 Wis. 2d at 311; *State v. Roou,* 2007 WI App 193, ¶ 15, 305 Wis. 2d 164, 738 N.W.2d 173. Odom had to provide some reason other than his belated desire to go to trial or his misgivings about the decision to plead guilty. *Jenkins,* 303 Wis. 2d 157, ¶¶ 32, 74.

Odom had to allege and prove that there was a serious flaw in the fundamental integrity of his plea, not just disappointment in the sentence. *Roou,* 305 Wis. 2d 164, ¶ 15. This stiff burden of proof is placed on Odom, and deference is owed to the trial court's discretionary determination that he failed to prove a "manifest injustice" to protect the State's strong interest in the finality of criminal convictions once the plea has been accepted and sentence has been imposed. *Id. See Lopez,* 353 Wis. 2d 1, ¶ 60; *State v. Cain,* 2012 WI 68, ¶¶ 25-26, 342 Wis. 2d 1, 816 N.W.2d 177; *State v. Higgs,* 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999). Odom had to convince the trial court there was "some adequate reason for [his] change of heart" other than the belated desire to have a trial. *Libke v. State,* 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

The trial court's findings of fact and credibility determinations are to be reviewed deferentially and may not be disturbed by this court unless they are clearly erroneous. Wis. Stat. § 805.17(2). *See Jenkins,* 303 Wis. 2d 157, ¶ 33; *Canedy*, 161 Wis. 2d at 585-86; *State v. Harvey*, 139 Wis. 2d 353, 376, 379, 382, 407 N.W.2d 235 (1987).

### 3. The requirements of Wis. Stat. § 971.08 and *State v. Bangert.*

To satisfy the constitution, a guilty or no contest plea must be knowingly, voluntarily, and intelligently entered. *State v. Brandt*, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999). This means that the defendant must understand the nature of the crime to which he is pleading and the constitutional rights he is relinquishing by virtue of his plea. *Id.*

In *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the supreme court set forth certain mandatory procedures to be followed by trial courts when accepting a guilty or no contest plea to ensure that the record reflects the voluntary and intelligent nature of the plea. *Id.* at 260-62, 266-72. *See* Wis. Stat. § 971.08. These mandatory procedures help the trial court ascertain whether the defendant understands the elements of the offenses to which he is about to plead, whether he understands the constitutional trial rights he will waive by pleading guilty, whether any threats or promises were made to coerce the plea, and whether he understands the direct consequences of his plea. *Bangert,* 131 Wis. 2d at 260-66. The court must also inquire into the factual basis for the plea to ensure that the facts supporting the charges actually constitute the offenses to which the defendant is about to plead. Wis. Stat. § 971.08(1)(b).

The court in *Bangert* also set up a postconviction framework for ascertaining whether a plea was constitutionally defective whenever a defendant claims he lacked sufficient understanding of the nature of the charge, the penalties, or the constitutional rights being waived. The defendant establishes a prima facie defective plea when he proves that there was a defective colloquy and couples that proof with an allegation that as a result of the defect, he did not in fact understand the essential elements of the charges, the penalties or his relevant constitutional rights. Only upon successfully making this prima facie showing and

allegation of a constitutionally defective plea would the burden then shift to the State to prove by clear and convincing evidence that the plea was voluntarily and intelligently entered despite the defective colloquy. *Bangert*, 131 Wis. 2d at 274-75. *See also Jenkins,* 303 Wis. 2d 157, ¶¶ 53-59; *State v. Bollig*, 2000 WI 6, ¶¶ 48-49, 232 Wis. 2d 561, 605 N.W.2d 199; *Brandt*, 226 Wis. 2d at 618 n.5; *State v. Garcia*, 192 Wis. 2d 845, 864-66, 532 N.W.2d 111 (1995); *State v. James*, 176 Wis. 2d 230, 236-37, 500 N.W.2d 345 (Ct. App. 1993).

### 4. For his plea to comply with Wis. Stat. § 971.08 and *Bangert,* the court need only advise the defendant of the direct consequences of his plea.

For his pleas to be voluntary and intelligent, the trial court was only constitutionally required to advise Odom of the direct consequences of his pleas. It was not constitutionally required to also advise him of any collateral consequences of his pleas. *See Bollig*, 232 Wis. 2d 561, ¶ 16; *Kosina*, 226 Wis. 2d at 485.

> A direct consequence of a plea has a definite, immediate, and largely automatic effect on the range of a defendant's punishment. *State v. James*, 176 Wis. 2d 230, 238, 500 N.W.2d 345, 348 (Ct. App. 1993). A collateral consequence, in contrast, does not automatically flow from the plea. *State v. Myers*, 199 Wis. 2d 391, 394, 544 N.W.2d 609, 610 (Ct. App. 1996). In some cases, a particular consequence is deemed "collateral" because it rests in the hands of another government agency or different tribunal. *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988). It can also be collateral because it depends upon a future proceeding. *Myers*, 199 Wis. 2d at 394, 544 N.W.2d at 610-11.

*Kosina*, 226 Wis. 2d at 486.

Failure to inform Odom of a collateral consequence is neither a constitutional violation nor does it amount to clear and convincing proof of a manifest injustice. *Id.* at 485.

The Wisconsin Supreme Court has held that requiring a convicted sex offender to register does not constitute "punishment" and, accordingly, is only a collateral consequence of a guilty plea. The defendant has no due process right to be informed of that consequence before entering his plea. *Bollig*, 232 Wis. 2d 561, ¶ 27. *See Kosina,* 226 Wis. 2d at 485, 489. As this court has stated: "Sex offender registration merely centralizes information already in the public domain." *State v. Nelson,* 2005 WI App 113, ¶ 15, 282 Wis. 2d 502, 701 N.W.2d 32. A guilty plea is voluntary and intelligent even when the court fails to advise the defendant of the possibility of a ch. 980 commitment as a sexually violent person upon completion of his sentence because it is an uncertain collateral consequence at the time of the plea. *State v. Myers,* 199 Wis. 2d 391, 394-95, 544 N.W.2d 609 (Ct. App. 1996).

In *State v. Sutton,* 2006 WI App 118, ¶¶ 13-15, 294 Wis. 2d 330, 718 N.W.2d 146, this court held that the length of initial confinement on a bifurcated sentence is a collateral consequences of a guilty plea because the overall range of punishment does not change. In *State v. Byrge*, 225 Wis. 2d 702, 714-17, 594 N.W.2d 388 (Ct. App. 1999), this court held that a defendant is not entitled to be advised about parole eligibility as part of the plea colloquy because parole eligibility is a collateral consequence. *See also Kosina*, 226 Wis. 2d at 486-89 (federal statutes prohibiting those convicted of misdemeanor crimes of domestic violence from possessing firearms or ammunition created only collateral consequences of a guilty plea); *Warren*, 219 Wis. 2d at 637-39 (probation revocation for the defendant's failure to admit guilt during sex offender treatment was only a collateral consequence that did not affect the voluntary and intelligent nature of the defendant's *Alford* plea); *James*, 176 Wis. 2d at 243-44 (sentence to prison after revocation of probation is a collateral consequence because it is dependent upon the defendant's future behavior and his decision to violate the

conditions of probation); *State v. Santos*, 136 Wis. 2d 528, 531-33, 401 N.W.2d 856 (Ct. App. 1987) (deportation is a collateral consequence of a guilty plea).

### 5. Applicability of the harmless error doctrine to guilty pleas.

The harmless error rule applies not only to appellate review of convictions obtained after trials, but also to review of convictions after a guilty or no contest plea. *See State v. Armstrong*, 223 Wis. 2d 331, 367-71, 588 N.W.2d 606, *on reconsideration*, 225 Wis. 2d 121, 121-22, 591 N.W.2d 604 (1999).

The test is whether there is a reasonable probability Odom would not have pled guilty and would have insisted on going to trial had he been properly informed of the collateral consequences before he pled guilty. *Armstrong*, 223 Wis. 2d at 370-71; *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. *See also State v. Rockette*, 2005 WI App 205, ¶ 31, 287 Wis. 2d 257, 704 N.W.2d 382; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (on an ineffective assistance challenge to a guilty or no contest plea, the defendant must prove there is a reasonable probability he would not have pled and would have insisted on going to trial but for counsel's deficient performance).

The court considers several factors including: the strength of the State's case, the comparative weakness of the defense's case, the defendant's incentive for pleading guilty, and the thoroughness of the plea colloquy. *Rockette*, 287 Wis. 2d 257, ¶¶ 27-31; *Semrau*, 233 Wis. 2d 508, ¶ 22. *See State v. Martin,* 2012 WI 96, ¶ 46, 343 Wis. 2d 278, 816 N.W.2d 270.

### B. Eligibility for participation in prison substance abuse treatment programs is a collateral consequence of a guilty plea.

Odom complains that the trial court misled him about his eligibility to participate in the prison substance abuse programs provided at Wis. Stat. §§ 302.045, and 302.05. He was not eligible because the offenses to which he pled guilty were under Wis. Stat. ch. 940. *See* Wis. Stat. §§ 302.045(2)(c), and 302.05(3)(a)1. Odom concedes, however, that his ineligibility was only a collateral consequence of his guilty pleas. Odom's brief at 13-14. The above authority conclusively shows that Odom's ineligibility for these programs was but a collateral consequence of his guilty pleas that the trial court was not required to discuss with him during the plea colloquy.

Odom's eligibility for participation in these programs was highly uncertain even if his offenses were not under ch. 940 because it was doubly discretionary. Odom's eligibility for participation was subject to the discretion of the trial court, which "shall, as part of the exercise of its sentencing discretion" declare whether he is eligible or ineligible for participating in these programs during the period of initial confinement. Wis. Stat. §§ 973.01(3m) and (3g). *See* Wis. Stat. §§ 302.045(2)(cm), and 302.05(3)(a)2. Even if declared eligible by the trial court at sentencing, Odom's eligibility for participation down the road would be further subject to the discretion of prison authorities who could independently declare him ineligible for a variety of reasons. Wis. Stat. §§ 302.045(2)(a)-(e), and 302.05(3)(a). This, then, represents the quintessential uncertain collateral consequence of a plea.[3]

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[3] This uncertainty is reflected at page 10 of Odom's brief, where he argues that the trial court led him to believe, "that the *possibility* of early release through prison programming would be *potentially* open to him if he pled guilty" (emphasis added). A mistaken belief about a possibility of a potentiality is not a "manifest injustice," a trial court could reasonably determine.

Odom was also not eligible for these programs as a matter of law unless (under the Challenge Incarceration Program) he "has a substance abuse problem," Wis. Stat. § 302.045(2)(d), and unless (under the Wisconsin Substance Abuse Program) he should be included in it "for the treatment of substance abuse." Wis. Stat. § 302.05(1)(am). The Earned Release Program (ERP), of which § 302.05(3) is a part, was created by 2003 Wisconsin Act 33 (July, 2003), and is administered by the Department of Corrections. *State v. Johnson,* 2007 WI App 41, ¶¶ 6-7, 299 Wis. 2d 785, 730 N.W.2d 661; *State v. Owens,* 2006 WI App 75, ¶ 5, 291 Wis. 2d 229, 713 N.W.2d 187.[4] *See State v. Lynch,* 2006 WI App 231, ¶ 18, 297 Wis. 2d 51, 724 N.W.2d 656 ("one purpose of the earned release program is undoubtedly to encourage inmates to participate in treatment for substance abuse"). *Also see Lynch,* 297 Wis. 2d 51, ¶ 18 n.6 ("Lynch does not contend that, if he cannot participate in the earned release program, he is denied all treatment for substance abuse.").

Odom did not in his motion and does not now allege that he had or has "a substance abuse problem" that would make him eligible for these programs. Absent that prerequisite to eligibility, the trial court's allegedly misleading statement about Odom's eligibility as a ch. 940 offender made no difference because he would have been ineligible in any event for lack of "a substance abuse problem."

Odom complains that the trial court misled him when he asked about eligibility for "boot camp" and similar programs during the plea colloquy (37:9). The court did not mislead him in any material respect. It is true that the court did not tell Odom he was ineligible as a matter of law

[4] Wisconsin Stat. § 302.05 was amended by 2011 Wisconsin Act 38 (July 2011), so that it now *only* applies to inmates who successfully complete substance abuse treatment.

because his offenses were under ch. 940. *See* Wis. Stat. §§ 302.045(2)(c), and 302.05(3)(a)1. The court did, however, tell him that eligibility would depend on "all the factors" and, more important, correctly told Odom that eligibility would depend on whether he had a substance abuse problem: "And I also have to have a substance abuse issue need to be addressed for both of those programs" (37:9).[5] Odom had no further questions and he did not object when the trial court exercised its discretion under Wis. Stat. § 973.01(3g) and (3)(m), to declare him ineligible as a *matter of fact* due no doubt to the aggravated nature of his offenses and the lack of any demonstrated substance abuse issues, rather than declare him ineligible as a *matter of law* because his offenses were under ch. 940.

Odom knew when he pled guilty that the trial court might not declare him eligible for these programs and, even if it did, prison authorities might not allow him to participate in these programs years down the road. Odom also should have known from what the trial court told him that a substance abuse problem is a prerequisite for admission into these programs. Odom did not in his motion allege that he had a treatable substance abuse problem that would have made him eligible for these programs but for the fact that his offenses were under ch. 940.[6]

It was incumbent on Odom's attorney to discuss any pertinent collateral consequences with him before the plea. Odom's motion, however, alleged nothing with respect to his

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[5] Odom conveniently left this all-important sentence out when quoting the trial court's answer at page 14 of his brief.

[6] Odom belatedly suggests that he may have a substance abuse problem because he smoked marijuana as a teenager and some of his relatives abused drugs. Odom's brief at 16 n.5. Odom and his attorney did not, however, argue at sentencing that he had a substance abuse problem sufficient to make him eligible for these programs, and he did not mention a substance abuse problem as a basis for program eligibility in his plea withdrawal motion. There is no evidence in the record that Odom has ever been diagnosed with a substance abuse problem.

counsel's performance. More to the point, the motion did not allege that trial counsel did anything wrong in advising him about the direct and collateral consequences of his plea. Absent any claim that counsel performed deficiently in this regard, the law presumes that counsel performed competently in advising Odom of these collateral consequences. *Strickland v. Washington,* 466 U.S. 668, 690 (1984); *Balliette,* 336 Wis. 2d 358, ¶¶ 25-27.

The trial court cannot be faulted if Odom's attorney failed to clarify for him whether he would be eligible to participate in these substance abuse programs before he pled guilty. *Compare State v. Brown,* 2004 WI App 179, ¶¶ 8, 13-14, 276 Wis. 2d 559, 687 N.W.2d 543 (defendant allowed to withdraw guilty plea because he was misinformed by his attorney and the prosecutor, with the acquiescence of the trial court, that he would not have to register as a sex offender and would not be subject to commitment under ch. 980 if he pled guilty to charges that everyone believed would enable him to avoid those collateral consequences).

In short, the trial court accurately told Odom that a substance abuse problem was a prerequisite to participation in these programs and, regardless, eligibility was not a certainty. With that knowledge, and ably assisted by presumably competent counsel, Odom entered a voluntary and intelligent plea absent any evidence at sentencing or in his motion that he had a treatable substance abuse problem. The record conclusively shows that the trial court properly exercised its discretion in summarily denying plea withdrawal because the motion failed to allege facts sufficient to show that Odom could prove a "manifest injustice" by clear and convincing evidence at an evidentiary hearing.

If the trial court inadvertently misled Odom, the error was harmless because it is not reasonably probable that he would have insisted on going to trial had the court told him he was not eligible for these programs. *Armstrong*, 223 Wis. 2d at 370-71; *Semrau*, 233 Wis. 2d 508, ¶ 22. The

plea colloquy was thorough. Odom's attorney would still no doubt have advised him to plead guilty because the plea agreement reduced his prison exposure from 123.5 years to eleven years. His incentive to accept the plea agreement remained powerful while eligibility for participation in these programs would still be subject to the discretion of the trial court and, later, prison authorities. The State's case, on the original charges and the added witness intimidation charge, was strong. Odom seemingly had no defense other than to argue that sex with the victim was consensual, even though it occurred after he severely beat and kidnapped her. Odom then intimidated her from his jail cell. In all reasonable probability, had the court told Odom he was not eligible for these programs, Odom's decision to plead guilty would not have changed because his incentives for doing so and his attorney's advice would not have changed.

### C. Odom's plea satisfied Wis. Stat. § 971.08 and *Bangert* because the mandatory DNA surcharge was a non-punitive collateral consequence of Odom's plea that did not have to be discussed during the plea colloquy.

Odom argued in his supplemental plea withdrawal motion that he must be allowed to withdraw his plea as a matter of law because the trial court did not tell him during the plea colloquy that it would impose a mandatory DNA surcharge for each of his four offenses. Odom maintains that the trial court was required to explain the surcharge to him during the colloquy to make his plea valid under Wis. Stat. § 971.08 and *Bangert*. This lack of information was, however, of no concern to Odom at sentencing or when he filed his first plea withdrawal motion.

The trial court was not required to discuss the mandatory DNA surcharges during the plea colloquy because § 971.08, as interpreted in *Bangert,* required the court to advise Odom of any of the *direct* consequences of his

pleas. The court did so (37:5-27). It advised Odom of the elements and the range of punishment for the offenses to which he pled guilty, "and no additional dissection of the potential punishment is required." *Sutton,* 294 Wis. 2d 330, ¶ 15. The mandatory DNA surcharge was a collateral consequence of Odom's guilty pleas because it was imposed by the legislature for legitimate, non-punitive reasons. *Scruggs,* 365 Wis. 2d 568, ¶¶ 10-14. *See State v. Dugan,* 193 Wis. 2d 610, 618-24, 534 N.W.2d 897 (Ct. App. 1995) (restitution is not "potential punishment" for purposes of Wis. Stat. § 971.08).

In enacting the mandatory DNA surcharge statute, "the legislature was motivated by a desire to expand the State's DNA data bank and to offset the cost of that expansion, rather than a punitive intent." *Scruggs,* 365 Wis. 2d 568, ¶ 10. The surcharges "fund the collection and analysis of DNA samples and the storage of DNA profiles." *Id.* ¶ 12. As with restitution, "[i]f the legislature had truly intended [mandatory DNA surcharges] to constitute 'potential punishment' for purposes of the plea colloquy statute, § 971.08, Stats., it would have formally included such among the 'Penalties' in the sections of the criminal code devoted to that specific topic." *Dugan,* 193 Wis. 2d, at 621. *See also Radaj,* 363 Wis. 2d 633, ¶¶ 17-18.

The statute's salutary and non-punitive purposes are only enhanced by imposing a surcharge for each offense (a maximum of $200 for each misdemeanor and $250 for each felony) because it increases the pool of funds available to further enhance the State's ability to collect, store and analyze DNA samples. Odom fails to explain how increasing the amount of funds available for these all-important law enforcement purposes is "punishment."

The mandatory $900 DNA surcharge imposed on Odom was no more a "punishment" than the $40,000 in restitution the defendant in *Dugan* was ordered to pay even though he was not advised by the court at his plea hearing

that restitution *in any amount* could be imposed. 193 Wis. 2d at 616. *See also Bolling*, 232 Wis. 2d 561, ¶¶ 26, 27 (sex offender registration requirement may have a "punitive effect" but is not "punishment" and so, is only a collateral consequence of a guilty plea).

Odom's claimed unawareness of this non-punitive collateral consequence, in effect as it was for two months before his crimes and five months before his plea hearing, was no fault of the trial court. Odom apparently believed that the old law still applied; the court could (in its discretion) order him to pay a $250 DNA surcharge (44:4-5). Odom's brief at 18-19.[7] Any blame for his unawareness of the change lies exclusively at Odom's (and his attorney's) feet. *See State v. Plank,* 2005 WI App 109, ¶ 17, 282 Wis. 2d 522, 699 N.W.2d 235. But, again, Odom does not claim that his attorney did anything wrong. *Compare Brown,* 276 Wis. 2d 559, ¶¶ 8, 13 (defendant was misled by defense counsel and the prosecutor, with the acquiescence of the judge, into believing that he would not have to register as a sex offender and would not be subject to ch. 980 commitment proceedings if he pled guilty to charges the attorneys believed would serve that very purpose).

Unlike the defendant in *Radaj,* 363 Wis. 2d 633, whose crime was committed under the old statute that capped the DNA surcharge at $250 and made its imposition at sentencing discretionary, Odom committed his crimes, pled guilty and was sentenced under the current statute that made the surcharges mandatory for each count. In the *Radaj* case, where the crime was committed under the old law, the new law had a retroactive "punitive effect" as applied to that

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[7] Yet, Odom appears to claim that he was also unaware of the old law that made the surcharge discretionary. Odom's brief at 20. Odom does not explain why that was so. It was his attorney's job to advise Odom of the DNA surcharge, discretionary or mandatory. The court would have had no obligation to advise him under the old law because, by Odom's own admission, the discretionary $250 surcharge was not punishment. Odom's brief at 18-19.

particular defendant because of the significant increase in the surcharge (from $250 to $1,000) between the date of his crime and the date of his plea. *Id.* ¶¶ 3-5, 12. Here, the surcharge did not increase between the dates of Odom's offenses and guilty pleas. Odom's punishment for his crimes was not made more burdensome after his crimes as it was for the defendant in *Radaj*. *See Scruggs,* 365 Wis. 2d 568, ¶ 7.

It is revealing that Odom does not argue the trial court violated Wis. Stat. § 971.08 and *Bangert* when it failed to discuss with him during the plea colloquy the mandatory court costs, fees and victim-witness surcharges totaling $486 that he was also ordered to pay at sentencing. Apparently, Odom does not consider these surcharges to be "punishment." Like those other mandatory court costs, fees and victim-witness surcharges, the mandatory DNA surcharges were non-punitive collateral consequences of Odom's pleas that the trial court did not have to mention during the colloquy before his plea could be deemed voluntarily and intelligently entered.

It is also revealing that Odom was willing to plead guilty despite being told during the colloquy that he could be sent to prison for up to eleven years and fined up to $40,000, but insists he would not have pled guilty if the court also told him it would impose a mandatory $900 DNA surcharge. So, had the court sent Odom to prison for eleven years of initial confinement, and imposed a $40,000 fine to boot, the plea would have been voluntary and intelligent according to Odom. But, had the court also advised him it would impose a $900 DNA surcharge, Odom "may have weighed differently his decision to plead guilty or no contest." *See Sutton,* 294 Wis. 2d 330, ¶ 10.

Odom insists he is willing to risk a trial on the original charges, up to 123.5 years in prison and $310,000 in fines (plus the other mandatory court costs and fees), just to avoid the $900 surcharge. This is so even though those same mandatory DNA surcharges would still be imposed at

sentencing after a jury trial and guilty verdicts on the original charges. That is, simply put, impossible to believe.[8]

Once again, any error was harmless because it is not reasonably probable that Odom would have rejected the plea agreement if the court told him at the plea hearing he would have to pay a $900 DNA surcharge. Odom did not find any of the other costs, fees and surcharges objectionable. Odom did not object to the surcharge at sentencing or even in his first plea withdrawal motion. The plea colloquy was thorough. Counsel's advice to accept the plea offer would not have changed. The powerful incentives for Odom to accept the plea agreement would not change. The State's case would remain strong while Odom's defense would remain weak.

## CONCLUSION

The trial court properly exercised its discretion in denying Odom's initial and supplemental plea withdrawal motions without a needless evidentiary hearing because the record conclusively shows the following: Odom's ineligibility for participation in the prison Challenge Incarceration and Substance Abuse Programs was but a collateral consequence of his guilty pleas because eligibility for those programs was at best uncertain and doubly discretionary; the trial court properly advised Odom that he would not be eligible unless he had a substance abuse problem; Odom did not at sentencing or in his motion allege that he had a substance abuse problem making him eligible had his offenses not been under ch. 940; and the mandatory DNA surcharges were only non-punitive collateral consequences of Odom's plea

[8] Impossible to believe, that is, unless the real reason Odom seeks plea withdrawal is to have a trial in hopes the victim will again not appear. That, however, has nothing to do with his eligibility for prison substance abuse programs or DNA surcharges. This is simply Odom's belated desire to have the trial that he knowingly and voluntarily waived. Odom's belated desire to have a trial on the original charges in hopes the victim will not appear is not a "manifest injustice" by any stretch of the imagination.

that had no conceivable impact on the voluntary and intelligent nature of his plea. The record conclusively shows that the plea colloquy satisfied the constitution and Wis. Stat. § 971.08. The record also conclusively shows that any error was harmless. Odom's motions failed to sufficiently allege a "manifest injustice" entitling him to withdraw his pleas.

Therefore, the State of Wisconsin requests that the judgment of conviction and the orders denying Odom's postconviction motions to withdraw his guilty pleas be AFFIRMED.

Dated at Madison, Wisconsin this 8th day of April, 2016.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,952 words.

Dated this 8th day of April, 2016.

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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 8th day of April, 2016.

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