STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2525-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TYDIS TRINARD ODOM,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying a Motion for Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan Presiding, and from an Order Denying a Supplemental Motion for Postconviction Relief, the Honorable Ellen R. Brostrom Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Odom Is Entitled to Plea Withdrawal Because the Circuit Court Misadvised Him About His Eligibility For the Substance Abuse and Challenge Incarceration Programs.

Odom's principal brief argued that the circuit court misadvised him about his eligibility for the Substance Abuse and Challenge Incarceration Programs, and as a result, his pleas were unknowing, unintelligent, and involuntary. In its response brief, the State asserts that this claim should be reviewed under an erroneous exercise of discretion standard. (State's Resp. Br. at 12-13).

However, whether a plea was knowingly, intelligently, and voluntarily entered is a question of constitutional fact. This court therefore applies is a two-step standard of review. First, this court accepts the circuit court's findings of evidentiary and historical fact unless they are clearly erroneous. Second, it reviews *de novo* the question of whether a plea was knowingly, intelligently, and voluntarily entered. ***State v. Taylor***, 2013 WI 34, ¶ 25, 347 Wis. 2d 30, 829 N.W.2d 482; ***State v. Cross***, 2010 WI 70, ¶ 14, 326 Wis. 2d 492, 786 N.W.2d 64; ***State v. Trochinski***, 2002 WI 56, ¶ 16, 253 Wis. 2d 38, 644 N.W.2d 891; ***State v. Brown***, 2004 WI App 179, ¶¶ 4-5, 276 Wis. 2d 559, 687 N.W.2d 543.

Regarding the merits of this claim, the State alleges that the circuit court did not mislead Odom about his eligibility for the Substance Abuse and Challenge Incarceration Programs "in any material respect." (State's Resp. Br. at 19). Although the State acknowledges that the circuit court failed to inform Odom that "he was ineligible as a matter of law," it nevertheless argues that the court correctly advised Odom about these programs because it told him his "eligibility would depend on 'all the factors' and, more importantly, correctly told Odom that eligibility would

depend on whether he had a substance abuse problem."[1] (State's Resp. Br. at 19-20).

The State's argument is puzzling, because the circuit court's assertion that it had the discretion to find Odom eligible for these programs was precisely what made its statement misleading. Again, all of Odom's convictions were for Chapter 940 offenses, which made him statutorily ineligible for both programs. Wis. Stat. § 973.01(3g), (3m). As a result, the circuit court did not have the discretion to find Odom eligible for these programs, as it claimed.

Furthermore, contrary to the State's assertion, this inaccurate information was "material." Because of the court's misadvice, Odom pled guilty/no contest with the mistaken belief about a collateral consequence of his pleas. He believed, through no fault of his own, that the possibility of early release through prison programming would be potentially open to him if he pled guilty or no contest. However, that possibility was barred as a matter of law by statute.

The State agrees that Odom's ineligibility for these programs was a collateral consequence of his pleas. (State's Resp. Br. at 18). Inaccurate legal information provided by a judge about a collateral consequence of a plea can render the plea unknowing and involuntary. *See* ***Brown***, 276 Wis. 2d 559, ¶¶ 8, 13-14; ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983); ***State v. Kohlhoff***, 2013 WI App 41, ¶ 6, 346 Wis. 2d 733, 828 N.W.2d 593 (unpublished opinion) (App. 149). Although a circuit court is not required to disclose a collateral consequence during a plea colloquy, a

[1] The State complains that Odom, in quoting the circuit court, "conveniently" left out the portion of the trial court's answer in which it stated that it needed to have a substance abuse problem. (State's Resp. Br. at 20 n. 5). The State overlooks the fact that Odom included this portion of the circuit court's answer in his statement of facts. (Odom's Initial Br. at 6).

manifest injustice may occur when a court affirmatively misinforms a defendant about a collateral consequence or acquiesces to a defendant's misunderstanding of that consequence. *See* ***Brown***, 276 Wis. 2d 559, ¶¶ 8, 13-14; ***Riekkoff***, 112 Wis. 2d at 128; ***Kohlhoff***, 346 Wis. 2d 733, ¶ 6 (App. 149).

Here, Odom's misunderstanding about the Substance Abuse and Challenge Incarceration Programs was not due to his own inaccurate interpretation of the law. It was directly the result of affirmative, inaccurate legal information provided by the circuit court. This rendered Odom's pleas unknowing and involuntary.

The State further argues that the trial court's misadvice about these early release programs "made no difference," because Odom never alleged that he had a substance abuse problem. According to the State, he was therefore "ineligible in any event." (State's Resp. Br. at 19). That is simply incorrect, however.

As an initial matter, the State confuses the terms "eligibility" and "suitability" for the Substance Abuse and Challenge Incarceration Programs. The circuit court determines a defendant's *eligibility* for these programs pursuant to Wis. Stat. § 973.01(3g), (3m). Those subsections contain no requirement that the court determine that a defendant has a substance abuse problem before finding him eligible to participate in the programs. *See id.* If a circuit court finds a defendant eligible for these programs, then the Department of Corrections (DOC) must decide whether (and when) an inmate is *suitable* to participate in them. *See* Wis. Stat. §§ 302.045, 302.05. It is true that the DOC must determine that an inmate "has a substance abuse problem" before it can find that inmate suitable for either program. Wis. Stat. §§ 302.045(2)(d), 302.05(1)(am). However, in this case, it is unknown whether the DOC would have concluded that Odom had a substance abuse problem had he been

eligible for these programs. Odom's alleged failure to raise this issue at sentencing is therefore not dispositive.

In any event, at sentencing, Odom's attorney explained that Odom did, in fact, have a substance abuse issue.[2] As his attorney explained, Odom, who was eighteen years old at the time of sentencing, had been exposed to a significant amount of drug abuse by his family while growing up. He had also used marijuana a lot as a teenager. (38:15-16). This information was sufficient to notify the circuit court that Odom may be suitable for the Substance Abuse Program and/or Challenge Incarceration Program. Contrary to the State's suggestion, Odom was not required to use any magic words or terms at sentencing, such as "substance abuse problem." (*See* State's Resp. Br. at 20 n.6). Nor was he required to present evidence that he had "been diagnosed with a substance abuse problem." (*See id.*) Consequently, Odom's mistaken belief that he was statutorily eligible for these programs, and that the circuit court could therefore find him eligible in the exercise of its discretion, was entirely reasonable.

The State also claims that "[t]he 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." (State's Resp. Br. at 21). This argument is specious. It overlooks the important fact that it was the trial court – not Odom's attorney – that gave Odom the materially inaccurate information about the early release programs. This court has recognized that a manifest injustice may occur when a circuit court affirmatively

[2] In addition, Odom did not "belatedly" suggest that he may have a substance abuse problem, as the State claims. (State's Resp. Br. at 20 n.6). To the contrary, Odom's attorney raised this issue at sentencing, and Odom pointed this out in both his original postconviction motion and his initial appellate brief. (28:6; 38:15-16; Odom's Initial Br. at 16 n.5).

misinforms a defendant about a collateral consequence of a plea. ***Kohlhoff***, 346 Wis. 2d 733, ¶ 6. Accordingly, Odom was not required to raise an ineffective assistance of counsel claim, as the State asserts. (State's Resp. Br. at 20-21). Rather, he properly asserted that his pleas were unknowing and involuntary because the trial court misadvised him about a collateral consequence of his pleas.

No showing of prejudice is required for such a claim either. In both ***Brown*** and ***Riekkoff***, the courts did not consider whether the defendants would have insisted on going to trial absent the misinformation. Instead, those cases held that the misinformation, and the defendants' resulting misunderstandings, undermined the knowing and voluntary nature of the pleas as a matter of law, thereby entitling the defendants to plea withdrawal. ***Brown***, 276 Wis. 2d 559, ¶¶ 13-14; ***Riekkoff***, 112 Wis. 2d at 128. Based on these cases, Odom is entitled to plea withdrawal as a matter of law, as well. In the alternative, he should at a minimum be entitled to a hearing on whether his pleas were actually knowing and voluntary. (*See* Odom's Initial Br. at 16-17).

Furthermore, even if a showing of prejudice were required, Odom would still be entitled to an evidentiary hearing. It is clear from the record that Odom wanted to take his case to trial before the State made its new plea offer on the day of trial. (36:5). Even after hearing the new offer, Odom was still hesitant. He spoke repeatedly with his attorney off the record. (37:5). He also asked the court explain in detail the differences between the maximum penalties under the new plea deal and the original charges. (37:5-8). He then asked the court about the possibility of expunction and his eligibility for early release programs. (37:8-9). Only after the court misinformed him about his eligibility for these programs did Odom decide to accept the new offer. (37:10-12).

Moreover, in his original postconviction motion, Odom specifically alleged that he would not have pled

guilty/no contest, and would have insisted on going to trial, had the trial court correctly advised him that he was statutorily ineligible for the Substance Abuse and Challenge Incarceration Programs. (28:10-12). In support of this claim, Odom made the following detailed allegations:

- He maintains that he is innocent of charges in the criminal complaint. Thus, prior to the new plea offer, he had wanted to take the case to trial

- He also believed he had a reasonable chance of prevailing at trial, because the only evidence against him on a number of key issues consisted of A.F.'s word against his. These included whether the sexual contact/intercourse was consensual, whether A.F. actually lost consciousness during the assault, and whether he forcibly transported A.F. without her consent.

- In deciding whether to accept the State's new plea offer, he considered that the plea deal would reduce the total maximum possible sentence he faced.

- However, he also considered that under the new plea deal, he would still face the possibility of a substantial amount of prison time.

- He therefore did not want to accept the State's offer unless he could be found eligible for the Substance Abuse and/or Challenge Incarceration Programs. He understood that if was eligible for (and successfully completed) one of these program, he would be able to earn early release.

(28:11-12).

Thus, eligibility for these programs was "crucial" to Odom. (28:12). And that is exactly why he asked the court about it at the plea hearing. (28:12). Accordingly, even if a showing of prejudice were required in this case (which it is

not), Odom would still be entitled to an evidentiary hearing since he has alleged facts that if true would entitle him to withdraw his plea. *See* ***State v. Love***, 2005 WI 116, ¶¶ 26, 42, 284 Wis. 2d 111, 700 N.W.2d 62.

II. Odom's Supplemental Postconviction Motion Alleged a *Prima Facie* Case For Plea Withdrawal Under ***Bangert***; the circuit court therefore erred in denying his motion without a hearing.

Odom's principal brief also argued that, pursuant to ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, the mandatory DNA surcharge in this case was a punishment. Therefore, pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the circuit court was required to inform Odom about the surcharge before accepting his pleas. (Odom's Initial Br. at 17-22).

The State argues that the mandatory DNA surcharge is not a punishment, because it was intended to serve a non-punitive purpose, i.e., funding "'the collection and analysis of DNA samples and the storage of DNA profiles.'" (State's Resp. Br. at 23 (quoting ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *petition for review granted March 7, 2016*)). According to the State, increasing the amount of funds available for this purpose by imposing a surcharge for each conviction "only enhance[s]" the statute's non-punitive purpose. (State's Resp. Br. at 23).

This argument is contrary to the ruling in ***Radaj***. There, this court held that, regardless of the legislature's intent, the new mandatory DNA surcharge is a punishment in cases with multiple convictions. ***Radaj***, 363 Wis. 2d 633, ¶¶ 22, 35-36. The ***Radaj*** court concluded that there was no non-punitive reason why the costs of DNA-analysis-related activities would increase with the number of convictions. ***Id.***, ¶¶ 29-30. As a result, in cases with multiple convictions, the court concluded that the surcharge is "excessive" and "not rationally connected" to its intended purpose. ***Id.***, ¶ 35.

Instead, it serves "as an additional criminal fine." ***Id.***, ¶ 25. Its primary effect is punishment.

The DNA surcharge in this case is therefore not analogous to restitution, as the State suggests. (State's Resp. Br. at 23-24). Restitution has a primary purpose that is non-punitive. It is therefore a collateral consequence of a plea. *See* ***State v. Dugan***, 193 Wis. 2d 610, 620-22, 534 N.W.2d 987. In contrast, in cases with multiple convictions, the primary effect of the per-conviction DNA surcharge is punishment. It is therefore a direct consequence of a plea.

The State also claims that Odom previously alleged that he would not have pled guilty had the circuit court advised him about the mandatory DNA surcharge at the plea hearing. It further argues that this is "impossible to believe." (State's Resp. Br. at 25-26). However, Odom has never alleged that he would not have pled guilty had he been informed of the DNA surcharge.[3] Nor is such an allegation even a requirement of a ***Bangert*** claim. Unlike an ineffective assistance of counsel claim under the ***Nelson***/***Bentley***[4] framework, a ***Bangert*** claim does not require a defendant to allege (or prove) prejudice. *See* ***Bangert***, 131 Wis. 2d at 274. The harmless error doctrine also does not apply to the ***Bangert*** framework. ***Taylor***, 347 Wis. 2d 30, ¶¶ 40-41.

Finally, the State argues that because other court costs, fees, and surcharges are non-punitive, the DNA surcharge should not be considered punitive either. (State's Resp. Br. at 25). However, the issue of whether other costs, fees, or

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[3] The State also incorrectly alleges that, at the time of the plea hearing, Odom believed that the old DNA surcharge statute still applied. (State's Resp. Br. at 24). In his supplemental postconviction motion, Odom specifically stated that "he did not know that the court was required to, or that it even could, impose any DNA surcharge at all." (44:6).

[4] *See* ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

surcharges are punitive is not before the court in this case. This court therefore should not address that issue here.

Moreover, even if other court costs, fees, and surcharges are non-punitive, that is not determinative of whether the DNA surcharge is punitive. In ***Radaj***, this court held that there is no non-punitive reason why the amount of the DNA surcharge should increase with the number of convictions. ***Radaj***, 363 Wis. 2d 633, ¶¶ 29-30. By contrast, there are legitimate non-punitive reasons why the amounts of other costs and surcharges would increase with the number of convictions. For example, with respect to the clerk's fee of $163 under Wis. Stat. § 814.60(1), the amount of administrative work the clerk's office is required to perform in a given case likely increases on average with the number of charges/convictions, as more charges/convictions likely equal more filings and paperwork to process. In addition, with respect to the victim-witness surcharge under Wis. Stat. § 973.045(1), the amount of harm inflicted on a victim in a given case likely increases on average with the number of offenses/convictions. It therefore makes sense that the amount of that surcharge would increase with the number of convictions.

Again, however, there is no non-punitive reason why the amount of the DNA surcharge should increase with the number of convictions. ***Radaj***, 363 Wis. 2d 633, ¶¶ 29-30 The DNA surcharge is therefore a punitive, direct consequence of a plea in cases involving multiple convictions. Accordingly, the circuit court in this case was required to establish that Odom understood he faced a $900 DNA surcharge, in addition to the maximum potential terms of imprisonment and fines he faced. Because the court failed to do so, and because Odom was otherwise unaware of the DNA surcharge, Odom is entitled to a ***Bangert*** hearing on this issue.

CONCLUSION

For the foregoing reasons, Tydis Odom respectfully requests that this court reverse the judgment and orders of circuit court, order that his pleas be deemed withdrawn as a matter of law, and remand the case to the circuit court for further proceedings consistent with this court's opinion. Should this court determine that Odom is not entitled to plea withdrawal as a matter of law, then Odom requests that the court remand the case to the circuit court with instructions to hold a hearing on both of his claims for plea withdrawal under ***Bangert***.

Dated this 20th day of May 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,891 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 20th day of May 2016.

Signed:

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