STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP2611-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY C. ANDERSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER ENTERED IN THE CIRCUIT COURT FOR SHAWANO COUNTY, THE HONORABLE JAMES R. HABECK, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

## ARGUMENT

### I. Anderson waived his right to be personally present in the courtroom when he entered his plea.

It has previously been established that a criminal defendant has a right to be personally present in the same courtroom as the presiding judge when he pleads guilty, his plea is accepted by the court, and the court pronounces judgment. *State v. Soto*, 2012 WI 93, ¶ 34, 343 Wis. 2d 43, 817 N.W.2d 848. It has also been established that this right may be waived. *Soto*, 343 Wis. 2d 43, ¶¶ 43-44. As with other rights, the waiver of a defendant's right to be personally present must be knowing, intelligent and voluntary. *Soto*, 343 Wis. 2d 43, ¶ 45.

The defendant-appellant, Ricky C. Anderson, claims that his waiver of his right to be personally present in court was not knowing because he did not know that he had a right to be present at the guilty plea proceeding. The record shows otherwise.

At the hearing on Anderson's postconviction motion, he testified that he did not know he had a constitutional or statutory *right* to be present in the courtroom when he entered his plea. (39:7, 14.) But Anderson admitted he knew that he *could* be present. (39:8, 10-11.)

Anderson fails to explain why the difference between knowing he had a right to be present and knowing he could be present might be significant. What difference could it possibly make whether Anderson was aware of the legal rules that allowed him to be present in court as long as he knew that he was allowed to be there.

Even if Anderson might not have known that he could demand to be present, he knew that he could at least request to

be present. And he had every reason to believe that such a request would be honored.

The fact that the court told Anderson he could be present for different things, and then asked him if it would be "okay that we do this by phone today," (37:3) made absolutely clear that he had a choice whether to be personally present or to participate by telephone.

There would have been no reason for the court to ask if it was okay to do this by phone if Anderson had no choice, and the proceedings were going to be conducted by phone regardless of his answer. If that was the case the court would have just proceeded by phone without telling or asking Anderson anything.

Anderson had to have known that he had the option of being present, and that he could reply that it was not okay to take his plea by phone that day because he wanted to be present. *See Soto*, 343 Wis. 2d 43, ¶¶ 46-49.

Anderson argues that he could only hear but not see what was happening in the courtroom, while those in the courtroom could only hear but not see him. (Appellant's Br. 17.) But he fails to explain why this might have made his waiver unknowing.

Surely, a person who is in jail talking on the telephone knows he cannot see the people he is talking to in the courtroom and that they cannot see him. And there does not appear to be any reason why a person must be able to see the people in the courtroom to know that he could be personally present with them if he wanted to be there.

Anderson talked to his attorney by phone immediately before the plea hearing. (37:4; 39:6.) The court offered to let

Anderson talk with his attorney privately during the hearing, (37:13) but Anderson stated two different times that he did not need to talk to his attorney any more. (37:13, 20.) Thus, Anderson's waiver of his right to be personally present in the courtroom could not have been influenced by any inability to communicate with counsel.

Anderson's choice to participate in the plea proceedings by telephone was plainly knowing. He does not claim that his choice was not intelligent or voluntary.

## II. Any error in initially taking Anderson's plea by telephone was harmless beyond any doubt.

Any error in denying a defendant his right to be personally present is subject to the harmless error rule. *State v. Cox*, 2007 WI App 38, ¶ 19, 300 Wis. 2d 236, 730 N.W.2d 452; *State v. Koller*, 2001 WI App 253, ¶ 62, 248 Wis. 2d 259, 635 N.W.2d 838, *modified on other grounds, State v. Schaefer*, 2003 WI App 164, ¶ 52, 266 Wis. 2d 719, 668 N.W.2d 760; *State v. Peterson*, 220 Wis. 2d 474, 488, 584 N.W.2d 144 (Ct. App. 1998).

Anderson's attempt to argue that there is a structural error, not subject to being harmless, when a defendant talks to his attorney on the telephone is unpersuasive.

As Anderson admits, the two federal appeals court cases he cites were both reversed by the United States Supreme Court. And the Supreme Court case he cites, while declining to provide a clear answer to the question on paper, wrote the answer on the wall.

In *Wright v. Van Patten*, 552 U.S. 120 (2008), the Court reaffirmed that a defendant who claims ineffective assistance of counsel in connection with a guilty plea must ordinarily prove

prejudice. *Van Patten*, 552 U.S. at 124. A defendant may be absolved of this requirement only when there is a complete absence of counsel, i.e., when counsel is either totally absent or is prevented from assisting the accused during a critical state of the case. *Van Patten*, 552 U.S. at 124-25.

Noting that its precedents do not clearly hold that counsel's participation by phone should be treated as a complete denial of counsel on a par with total absence, the Court said,

> Even if we agree . . . that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or "prevented [counsel] from assisting the accused," so as to entail application of [the presumed prejudice rule of [*United States v.*] *Cronic* [466 U.S. 648 (1984)]. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance than in inquiry into its effects would not be worth the time.

*Van Patten*, 552 U.S. at 125.

Here, where Anderson was able to communicate fully with his attorney by telephone before entering his plea, (37:4; 39:6) where he twice stated that he did not need to communicate further with his attorney when he was offered the opportunity to do so during the plea hearing, (37:13, 20) and where there has been no claim that counsel's performance was ineffective, there is no basis for suggesting that there was a complete denial of counsel which could not be harmless error.

An error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the

conviction of the defendant. *State v. Weed*, 2003 WI 85, ¶¶ 29-30, 263 Wis. 2d 434, 666 N.W.2d 485; *State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189. There is no contribution when the defendant would have been found guilty if the error had not occurred. *Weed*, 263 Wis. 2d 434, ¶¶ 29, 32; *Harvey*, 254 Wis. 2d 442, ¶¶ 46, 49.

In the context of a guilty plea, the question is whether the defendant would have pleaded guilty even if the error had not occurred. *See State v. Rockette*, 2005 WI App 205, ¶¶ 25-31, 287 Wis. 2d 257, 704 N.W.2d 382.

Assuming for the sake of argument that it was error to take Anderson's guilty plea by telephone, there is no need to speculate whether Anderson would have pleaded guilty if he had appeared personally in court at the plea proceeding. The record shows that he would have entered his plea in person because he subsequently reaffirmed his plea in person.

Both Anderson and his attorney appeared together in person in court at the sentencing. (38:1.)

Anderson's attorney told the court that he had now completed the paperwork relating to the guilty plea, and filed with the court a copy of the plea questionnaire which was signed by Anderson the same day. (15:2; 38:3-4.)

The plea questionnaire states that Anderson had decided to plead guilty, and was asking the court to accept his plea and find him guilty. (15:2.) Anderson's attorney stated that Anderson reaffirmed that he wanted to plead guilty. (38:4.)

Since Anderson reaffirmed when he was personally present in court at the sentencing that he wanted to plead guilty, there is no question that he would have pleaded guilty if he had been personally present in court at the plea hearing.

There is no claim that there was any defect in the plea hearing other than the fact that Anderson was not personally present in court. The record of the plea hearing shows that the court conducted an exceptionally thorough colloquy with Anderson, and obtained Anderson's assurances that he was aware of all the things that were necessary to make his plea proper. (37:5-13.)

Any error in initially taking Anderson's guilty plea by telephone was harmless beyond any doubt.

## CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: May 4, 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) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,561 words.

Dated this 4th day of May, 2016.

_____

Thomas J. Balistreri
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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 4th day of May, 2016.

_____

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