STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP002611-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY C. ANDERSON,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and Order Denying Postconviction Relief Entered in the Shawano County Circuit Court, the Honorable James R. Habeck, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTE CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. Mr. Anderson Did Not Waive His Right to Be Present.

The state agrees that Anderson had a right to be present in the same courtroom as the presiding judge when he pled guilty and the court pronounced judgment. (State's brief: 2; Anderson's brief: 8-11). The state also agrees that this right is subject to waiver, which must be knowing, intelligent, and voluntary. (State's brief: 2; Anderson's brief: 11-12). The state also implicitly agrees with the corresponding principle that waiver is the intentional relinquishment of a known right and that a valid waiver requires the party asserting waiver to prove that the person against whom waiver is asserted had actual knowledge of the right being waived. (State's brief: 2; Anderson's brief: 11-12).

Nevertheless, the state argues that Anderson knowingly waived his right to be present for his plea hearing because "he knew that he *could* be present" or because he "had to have known that he had the option of being present." (State's brief: 2, 3) (emphasis in original). In other words, the state argues that so long as Anderson knew he was "allowed to be there" he knowingly, intelligently, and voluntarily waived his right to be present. (State's brief: 2-3).

This argument should be rejected for two main reasons. First, the record refutes the state's argument both in terms of the asserted clarity of the court's colloquy on this issue at the plea hearing and Anderson's supposed admission of "knowledge" at the postconviction hearing. (State's brief: 2-4; 37:3-4; App. 104-105; 39:4-11, 13-14; App. 117-124, 126-127). Second, this argument ignores clear and consistent

language from the United States Supreme Court, our state supreme court, and this court regarding what constitutes a valid waiver.

First, while the state asserts that the court's colloquy with Anderson "made absolutely clear that he had a choice whether to be personally present or to participate by telephone" (state's brief: 3), the record does not support that claim.

It is undisputed that the court never explicitly informed Anderson that he had a right to be present in the courtroom for his plea hearing. (State's brief: 3; Anderson's brief: 3). Rather, the record shows that the court ambiguously informed Anderson that he could be present in person for "different things." (37:3; App. 104). The court's colloquy with Anderson proceeded as follows:

> The Court: All right. And, Mr. Anderson, you know, you can be present in person for different things. For our procedure today, realizing the fact that we have a jury trial coming scheduled on November 5 to start, is it okay that we do this by phone today?
>
> Mr. Anderson: Yes.

(*Id.*).

The record is not at all clear that Anderson's plea hearing necessarily fell within the group of "different things" to which the court referred. An "absolutely clear" statement from the court would have explicitly placed Anderson's plea hearing within the group of "different things" to which the court referred.

Moreover, the court's subsequent explanation only further muddied the water:

> The Court: So you understand, when I spotted this yesterday, we pursued whether we could get you by *internet*, then that would have given you the ability to see us and vice versa. But they were already filled up and we could not get that, so this was the next best technology.
>
> Mr. Anderson: Okay.

(37:3-4; App. 104-105) (emphasis added). Rather than clearly inform Anderson of his right to be physically present for his plea hearing, the court informed Anderson that an attempt had been made to arrange for Anderson to appear by video for his plea hearing. The fact that Anderson did not inform the court that it was *not* "okay that we do this by phone today" does not constitute a knowing, intelligent, and voluntary waiver of Anderson's right to be present.

Additionally, the state relies on selected excerpts of Anderson's cross-examination testimony at the postconviction motion hearing to argue that "Anderson admitted he knew he could be present." (State's brief: 2). The record reveals no such admission. (39:8-11; App. 121-124).

The prosecutor's cross examination of Anderson began as follows:

> Ms. White: Mr. Anderson, do you remember during the time that you were entering your plea that the judge told you that you could be present in person for that plea?
>
> Mr. Anderson: I believe so. It's been a while.

> Ms. White: So he did tell you you could be present in the courtroom?
>
> Mr. Anderson: He said something about video conference, I remember that. But he said the video is down.

(39:8-9; App. 121-122). The prosecutor then read from the plea hearing transcript and asked Anderson if he remembered answering "yes" to the court's "different things" question. (39:9; App. 122). Anderson responded to the prosecutor's question by saying, "Yeah. I remember the different things." (*Id.*).

Furthermore, the state ignores Anderson's clear testimony on direct and redirect examination:

> Ms. Marion: So were you - - were you aware that you had a right to be present in the courtroom when you entered your plea?
>
> Mr. Anderson: Well I didn't really know what was going on. I was confused because I never really had that happen.
>
> Ms. Marion: Okay. So you never knew that you had a right to require them to bring you in - - to be in the courtroom with everyone?
>
> Mr. Anderson: No.
>
> …
>
> Ms. Marion: So when the judge asked you that you knew you could be present in person for different things, what did that mean to you?
>
> Mr. Anderson: Sentencing, anything, different thing - - it was just - - I was thinking he was referring to video court.

> Ms. Marion: And did you know that you had a right by statute and a constitutional right to demand to be present in court?
>
> Mr. Anderson: No.

(39:7, 13-14; App. 120, 126-127).

Accordingly, even if a knowing, intelligent, and voluntary waiver in this case required only that Anderson "knew that he could at least request to be present" (State's brief: 2-3), the record demonstrates that Anderson made no such admission, was confused by the ambiguous colloquy he had with the court, and assumed that he "c[ould] be present for *different* things." (37:3; App. 104; 39:13-14; App. 126-127) (emphasis added).

Second, a valid waiver of a constitutional right in this case requires more than mere knowledge by Anderson that he *could have* interrupted the hearing and demanded to be physically present.

Anderson set forth the relevant legal principles related to waiver in his initial brief, (Anderson's brief: 11-12), which, as argued above, the state has not explicitly disagreed with. Our state supreme court has made it very clear that waiver of important rights, including the right at issue in this case, requires a showing of the "intentional relinquishment of a known right." ***State v. Soto***, 2012 WI 93, ¶40, 343 Wis. 2d 43, 817 N.W.2d 848. The intentional relinquishment of a known right "must be done with actual knowledge of the right being waived." ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶36, 325 Wis. 2d 135, 785 N.W.2d 302. The burden is on the party asserting waiver to meet this standard. ***Id***.

In its response, the state argues that Anderson "had to have known that he had the option of being present" because

the court asked Anderson if it would be okay to do the hearing by phone. (State's brief: 3). There is a substantial difference between Anderson's acquiescence to proceed by phone, and a knowing, intelligent, and voluntary waiver.

Mere acquiescence is insufficient to establish waiver. ***State v. Jaramillo***, 2009 WI App 39, ¶14, 316 Wis. 2d 538, 765 N.W.2d 855 ("courts indulge in every reasonable presumption against waiver of fundamental constitutional rights and … do not assume acquiescence in the loss of fundamental rights.") (citing ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938)). In ***Jamarillo***, the court rejected the state's argument that the defendant waived his right not to testify by acquiescence when he took the witness stand in his own defense. ***Id***.[1]

Further, in ***Soto***, our supreme court explained that "mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forgo the right." 343 Wis. 2d 43, ¶37. Because the principle of waiver, rather than forfeiture, applies to the right at issue in this case, the state cannot rely on Anderson's acquiescence to meet its burden to establish a valid waiver.

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[1] Anderson asserted in his postconviction motion, at his postconviction hearing, and in his initial brief that he had a statutory and due process right to be present in the same courtroom as the presiding judge when he entered his plea and the court pronounced judgment. (Anderson's brief: 8-9). The state acknowledges the clear establishment of this right. (State's brief: 2). The state does not argue that Anderson's right to be present was not constitutionally protected. (State's brief: 2). Accordingly, Anderson's clear assertion of a due process right, along with a statutory right, to be present should be deemed conceded. *See* ***State v. Hurley***, 2015 WI 35, ¶61 n.20, 361 Wis. 2d 529, 861 N.W.2d 529 (citing ***Charolais Breeding Ranches, Ltd. v. FPD Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979)).

II. It Is Not Clear That the Harmless Error Rule Applies to the Violation of a Defendant's Right to Be Present at His Plea Hearing.

The state claims that "[a]ny error in denying a defendant his right to be personally present is subject to the harmless error rule." (State's brief: 4). However, the cases to which the state cites deal exclusively with a defendant's right to be present when a court interacts with a jury. In fact, one of the cases cited by the state, ***State v. Peterson***, 220 Wis. 2d 474, 488-89, 584 N.W.2d 144, 150 (Ct. App. 1998), explains only that ***State v. Koopmans***, 210 Wis. 2d 670, 563 N.W.2d 528 (1997), did not *bar* the application of the harmless error test for *all* violations of Wis. Stat. § 971.04. The ***Peterson*** court went on to distinguish between the significance of the sentencing proceeding at issue in ***Koopmans*** from the specific jury interaction issue in ***Peterson***.

There is no support for the claim that the harmless error rule applies to *all* violations of the defendant's right to be present or the violation of the specific right at issue in this case. As alluded to above, ***Koopmans*** is an example of our supreme court *not* applying harmless error to a violation of a defendant's right to be present at sentencing under Wis. Stat. § 971.04. 210 Wis. 2d 670. As such, it is not clear that harmless error applies to the violation of a defendant's right to be in the same courtroom as the judge at his plea hearing.

While the ***Soto*** court distinguished ***Koopmans*** on the issue of whether the statutory right to be present under Wis. Stat. § 971.04 was subject to waiver, ***Soto*** did not address the application of the harmless error rule to the violation of a defendant's right to be present at a plea hearing. 343 Wis. 2d 43, ¶¶41-44.

Moreover, even if the harmless error rule could apply to the violation of Anderson's right to be present at his plea hearing, the state has failed to meet its burden. The state argues that the record demonstrates that Anderson would have pled guilty had he been present in court for his original plea hearing based on the fact that he subsequently reaffirmed his plea at sentencing. (38:5-6). What the state fails to acknowledge is Anderson's uncontroverted testimony at the postconviction hearing, first that he asked his lawyer about withdrawing his plea *three* times prior to sentencing, (39:7-13; App. 120-126), and second that he was not informed of any legal basis to withdraw his plea prior to sentencing (*Id.*). Hence, Anderson's position regarding his plea at sentencing must be viewed in proper context: that he repeatedly asked his attorney about withdrawing his plea prior to sentencing, was not informed of any legal basis to do so, and simply "thought it was too late" to withdraw his plea. (*Id.*).

The record shows that had Anderson been informed of the violation of the right to be present, he would not have reaffirmed his plea at sentencing. (39:11; App. 124). As a result, the state has not met its burden to prove that the violation of Anderson's right to be present at his plea hearing was harmless beyond a reasonable doubt.

Furthermore, it should be noted that Anderson received a sentence *less* than what the state recommended at sentencing as part of the plea agreement. (38:16, 39). Thus, this is not simply a case where a defendant has regrets about his plea based on the sentence he received. The fact that Anderson continues to wish to withdraw his plea, as he did prior to sentencing, weighs against a conclusion that the error in this case was harmless.

III. The Violation of Anderson's Right to Effective Assistance of Counsel Under ***Cronic*** Is Structural Error.

Anderson raised two distinct legal bases to support his plea withdraw claim. (Anderson's brief: 7, 18-23). The first claim was the denial of the right to be present. Second, Anderson argued that he was denied his right to counsel at his plea hearing, based on the fact that he was physically separated and unable to effectively communicate with counsel during his plea hearing, which is structural error under ***United States v. Cronic***, 466 U.S. 648, 659-60 (1984).

In addition to the arguments already made in his initial brief (Anderson's brief: 18-23), Anderson notes that the state makes no discernable distinction between Anderson's separate claims for plea withdrawal and simply claims that "any error" related to Anderson's plea by prison telephone while his counsel was in the courtroom is subject to harmless error. (State's brief: 4-7).

However, under ***Cronic***, structural error applies in circumstances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." 466 U.S. at 659-60. While the state attempts to dismiss Anderson's reliance on the federal court decisions involving federal habeas petitioner Joseph Van Patten (State's brief: 4-7), the state overstates the significance of the final outcome of ***Wright v. Van Patten***, 552 U.S.120 (2008) (*per curiam*). Van Patten's federal habeas claim failed because of the heightened standard of review imposed by AEDPA[2] and what

[2] The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1219; 28 U.S.C.§ 2254.

the Court called a lack of "clearly established law" regarding the full scope of the defendant's right to the physical presence of counsel by his side. ***Wright***, 552 U.S. at 126. In that same case, however, even the state admitted that "[p]erhaps under similar facts in a direct appeal, the Seventh Circuit could have properly reached the same result it reached here." [3] As argued in his initial brief, (Anderson's brief: 19-23), the reasoning in ***Wright*** supports Anderson's claim that he was denied the effective assistance of counsel at his plea hearing and that this error is structural and not subject to harmless error.

[3] As noted in Anderson's initial brief, Van Patten's case, like Anderson's, also arose from Shawano County. (Anderson's brief: 19).

CONCLUSION

For the reasons set forth above, Anderson respectfully requests that the court reverse the circuit court's order denying his motion to withdraw his guilty plea and vacate his judgment of conviction.

Dated this 23rd 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 2,576 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 23rd day of May, 2016.

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