WISCONSIN COURT OF APPEALS
DISTRICT I

State of Wisconsin,

Plaintiff-Respondent,

Appeal No. 2016-AP-0375-CR

v.

Case No. 11-CF-2815

Tyrus Lee Cooper.

Defendant-Appellant,

APPEAL FROM THE CIRCUIT FOR MILWAUKEE COUNTY,
CASE NO. 2011-CF-2815,
HONORABLE DONALD M. JOSEPH, PRESIDING

AMENDED BRIEF OF DEFENDANT-APPELLANT TYRUS LEE COOPER

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STATEMENT OF ISSUES

1. When a defendant's counsel has engaged in serious professional misconduct leading up to the trial date affecting defendant's meaningful participation in his own defense, did the circuit court erroneously exercise its discretion when it denied defendant's motion to withdraw his plea prior to sentencing?

   Answered by the Trial Court: No.

2. Did the circuit court erroneously exercise its discretion when it denied defendant's motion to withdraw his plea prior to sentencing without an evidentiary record to support substantial prejudice to the State?

   Answered by the Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant asserts having oral argument in this case may aid resolution of the issues. Publication may enhance understanding of this area of the law.

STATEMENT OF THE CASE

The case arose out of an incident on June 12, 2011, at 1909 West Greenfield, Ave. in the City of Milwaukee, the home of L.C. (Pursuant to Wis. Stat Rule 809.86(4) the victim is hereinafter referred to as "L.C.") (2:1-2; A-App. 100-101). L.C. was beaten and robbed by a number of men. *Id.* A television was taken and she suffered injuries as a result of the assault. *Id.*

The Criminal Complaint alleges that L.C. identified a tattoo on the forearm of one of the assailants which said "FAM" or FAM 1." *Id.* Detectives from the Milwaukee Police Department searched records kept by the MPD and found two individuals matching the description. *Id.* They alleged in the Criminal Complaint that Appellant Tyrus Lee Cooper ("Cooper" or "Appellant") was one of two people who had such a tattoo. *Id.* They showed L.C. photos of both tattoos, and L.C. identified the one that allegedly belonged to Cooper. *Id.* She was asked if she knew Cooper, and she indicated he was a friend of her boyfriend and had been at the house on a prior occasion. *Id.* Cooper was charged with armed robbery as a party to a crime on June 17, 2011. *Id.*

Cooper sought a change of counsel on November 12, 2012 citing an issue with communication with his attorney. (12:1). Cooper's Counsel moved to withdraw on December 6, 2012 citing a

serious breakdown in communications. (47:3). Cooper was then appointed new counsel, Attorney Michael Hicks ("Hicks"). (48:2) Hicks acted as counsel for Cooper after his initial counsel withdrew, and up until Hicks' withdrawal in January 2014. (53:2). Trial was set for October 21, 2013. (52:1-2; A-App. 120-121). On October 8, 2013, Cooper wrote to the circuit court leveling a number of complaints about Attorney Hicks' performance as counsel in his case. (14:1-2; A-App. 103-104). Cooper's complaints included his concern about his counsel's preparation for trial, which was to occur in less than 2 weeks. *Id.* He was also concerned about the lack of communication and Hicks' failure to contact alibi witnesses. *Id.* Cooper specifically stated that he was not able to assist in his own defense, and was had not received the benefit of effective assistance of counsel before trial. *Id.*

On October 21, 2013, the date set for trial, Cooper pled guilty to armed robbery as a party to a crime. (51:1; A-App. 103-107). Cooper and the State agreed the State would recommend 3 years of initial confinement and 3 years of extended supervision as a condition of plea deal. (51:2; A-App. 122). The Court held an on the record the conversation with Cooper whereby Cooper was walked through the elements. (51:1; A-App. 120-135). Cooper was told that the State would need to prove all the elements of each claim, but the

Court never went through each element and asked if that element were actually true. A-App. 52:1-15. Instead the Court broadly asked Cooper if the facts contained in the underlying Criminal Complaint are true and correct. *Id.* at 52:7.

The Court briefly address the October 8, 2013 letter, and asked what Cooper wanted to do about it. (52:13-14; A-App. 132-137). Cooper responded "disposed of" and then indicated that he wanted the Court to take no action. *Id.* The Court made no further inquiry into the basis for the claims in the letter, or how those issues were resolved. *Id.*

Sentencing was set for January 9, 2014, but on December 21, 2013 Cooper wrote to the circuit court stating that he wanted to withdraw his guilty plea. (16; A-App.108). In the letter he stated that he learned that while Hicks was advising him about his case, he was suspended from the practice of law. *Id.* Hicks was, in fact, suspended for a significant portion of the representation, and never informed Cooper of that fact. *Id. See also Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31, ¶¶ 23-28. Cooper stated that Hicks misled him into taking the plea deal, and that Hicks said Cooper was destined to lose at trial. *Id.* Hicks moved to withdraw, and new counsel was appointed for Cooper. On April 1, 2014 Cooper filed a motion to withdraw guilty plea prior to sentencing. (19; A-App. 111).

The basis for that Motion was that the issues raised in October 8, 2013 letter had not been resolved or rectified. *Id.* Further Cooper asserted that Atty. Hicks had been suspended from the practice of law during the representation and never disclosed it to him. *Id.* He further asserted that his plea was not knowingly or voluntarily entered allowing for its withdrawal for ineffective assistance of counsel. *Id.* Hicks' misconduct related to Cooper is also documented in *In re Hicks*, 2016 WI 31, ¶¶ 23-28. In *Hicks*, the Supreme Court outlined all of Hicks' misconduct as it related to Cooper, specifically his suspension while representing Cooper, failure to allow Cooper to participate in his defense, and failure to communicate with Cooper. *Id.*

On June 27, 2014 the Court held a hearing on Cooper's Motion. (57:1-24; A-App. 136-159). At the hearing Cooper outlined Atty. Hicks' misconduct, including failure to communicate with Cooper and misleading him concerning Hicks' license to practice law. (57:7-8; A-App. 142-143). The Court heard the testimony and statements from counsel and Cooper, but denied Cooper's Motion. (57:21; A-App. 156). The State presented no evidence of prejudice. (57:15-16, 18, 21-24; A-App. 150-151, 153, 156). The circuit court only identified the age of the case as a basis for prejudice, despite the fact that only 2 months elapsed between when Cooper entered his plea and asked

to withdraw it. (16:1; 52:1-16; 57:15-16, 18, 21-24; A-App. 108, 120-135, 150-151, 153, 156).

On July 17, 2014 Cooper was sentenced to 5 years of initial confinement, and 5 years of extended supervision. (30:1-2; A-App. 113-117). This was a higher sentence than the plea deal he had struck with the State. *See* (52:1-2; A-App. 120-121). Cooper timely filed his Notice of Appeal on February 18, 2016 initiating this action. (33:1-2; A-App. 118-119).

STANDARD OF REVIEW

Whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. *State v. Trawitzki*, 2001 WI 77, ¶ 19. The circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634 (Wis. 1985). Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law that [a reviewing court] review[s] de novo. *Trawitzki*, 244 Wis. 2d 523, ¶ 19. *State v. Hunt*, 2014 WI 102, ¶ 22.

Whether a court erred in not allowing the withdrawal of a defendant's guilty plea is subject to review under the erroneous exercise of discretion standard. *State v. Kivioja*, 225 Wis. 2d 271, 284 (Wis. 1999), All that "this court need find to sustain a

discretionary act is that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, (Wis. 1982); *see Kivioja*, 225 Wis. 2d at 284 (citing *State v. Salentine*, 206 Wis. 2d 419, 429-30, (Wis. Ct. App. 1996)).

ARGUMENT

I. The Trial Court Erred in Not Allowing the Withdrawal of Cooper's Guilty Plea

Cooper provided the circuit court a fair and just reason for withdrawing his guilty plea—namely the misconduct of his attorney. We know the Supreme Court agreed that Hicks' actions were improper and sanctionable, however the circuit court disagreed. Because Cooper satisfied his burden, the circuit court should have required a showing from the State to show substantial prejudice form the withdrawal of the plea. It did not. There is no evidence in the record to show that the State met its burden to show substantial prejudice. This constitutes reversible error.

A. Cooper Satisfied his Burden to Show a Fair and Just Reason for Withdrawal

Prior to sentencing, a plea may be withdrawn for any "fair and just reason." *State v. Canedy*, 161 Wis. 2d 565, 580-82 (Wis. 1991). Presentation of such a reason shifts the burden to the state to show

that it would be substantially prejudiced by plea withdrawal. *State v. Bollig*, 2000 WI 6, ¶ 34. A fair and just reason means "the mere showing of some adequate reason for the defendant's change of heart," *Libke v. State*, 60 Wis. 2d 121, 128, (Wis. 1973). The court should "take a liberal, rather than a rigid, view of the reasons given." *Bollig*, 232 Wis. 2d 561, ¶ 29. This is a "liberal rule" under which withdrawals are "freely allow[ed]." *State v. Jenkins,* 2007 WI 96, ¶¶ 2, 29.

"Fair and just reason" has not been precisely defined, Wisconsin courts have recognized a variety of fair and just reasons for plea withdrawal prior to sentencing, such as: genuine misunderstanding of the plea's consequences; haste and confusion in entering the plea; coercion on the part of trial counsel; ***and confusion resulting from misleading advice from the defendant's attorney***. *State v. Shimek*, 230 Wis. 2d 730, 739, (Ct. App. 1999) (emphasis added). This is what we have here. Hicks' conduct cannot be ignored, and was clearly improper. Cooper has claimed he was confused as to the charge he was pleading to, and what his sentence range would be. (57:10-13; A-App. 145-148).

Cooper has given a clear, cogent and understandable reason that necessitates the need for withdrawal of his plea. His attorney was non-communicative and suspended during a significant portion

of his representation. (57:10-13; A-App. 145-148); *see also Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31, ¶¶ 23-28. Cooper has satisfied his burden for the first part of the test.

B. The Circuit Court Had No Factual Basis to Determine the State Would be Substantially Prejudiced

The circuit court gave very little time or attention to the State's burden of showing that it would be substantially prejudiced by the withdrawal. (57:18, 21; A-App. 153, 156). Here the circuit court admitted that it had no information about the availability of witnesses just that the case had been pending since 2011. (57:18; A-App. 153). In fact, the circuit court found substantial prejudice without any factual information to basis it on. (57:18, 21; A-App. 153, 156).

The State failed to even argue prejudice in the motion hearing on the withdrawal of Cooper's plea. (57:15-16; A-App. 150-151). It certainly produced no evidence whatsoever on the issue. *Id.* The circuit court took at face value the fact that the case had been pending since 2011 as a basis for the prejudice to the State. *Id.* However, it acknowledged in the same breath that it had no information as to why that would be the case. *Id.* It should be noted, the State did not identify at all how the age of the case in anyway affected the State's ability to prosecute the action.

It seems the circuit court believed that the original filing date of the Criminal Complaint would be determinative of whether the State would suffer substantial prejudice. (57:18, 21; A-App. 153, 156). Of course, this makes no sense, because presumably the State was set to proceed to trial on October 21, 2013. Cooper indicated his desire to withdraw the plea 60 days later. (16; A-App. 108). There is nothing that was presented to the circuit court that would give it a basis to find that the State would be substantially prejudiced by this delay. The State failed to meet the shifting burden and Cooper must be allowed to withdraw his guilty plea as a result.

II. Cooper Received Ineffective Assistance of Counsel During the Plea Stage and Should be allowed to Withdraw His Plea.

There can be no serious debate that the system failed Cooper. His court appointed counsel, Atty. Hicks was suspended for a portion of the representation, and did not communicate with Cooper regarding his defense. Hicks was unprepared to try the case as Cooper wanted, and convinced Cooper to take a plea deal he did not want. The Supreme Court sanctioned Hicks for his conduct, and rightly so. Now this Court must overturn the circuit court's erroneous decision to not allow Cooper to withdraw his guilty plea prior to sentencing.

A. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the United States Supreme Court first set forth the standard to determine ineffective assistance of counsel. *Strickland* requires a two-prong test that requires a defendant first show "that counsel's performance was deficient"; and, second, show that "the deficient performance prejudiced the defense." *Id.* at 687. Deficient performance requires showing "that counsel's representation fell below an objective standard of reasonableness." *State v. Johnson*, 133 Wis. 2d 207, 217, (Wis. 1986) (quoting *Strickland* at 688). In analyzing this issue, a court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland* at 690; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

Under Strickland, the presumption exists that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland* at 690. A defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman* at 384 (citing *Strickland* at 688-89).

"Reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting Strickland at 694). If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362, 39-94 (2000). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Cooper meets both prongs of the *Strickland* test, and in order for justice to be served, this Court should vacate the judgment of conviction and allow Cooper to withdraw his plea and go forward with a trial on the merits.

B. Cooper's Counsel Was Ineffective Prejudicing Cooper

Cooper was deprived of counsel during the period of time Atty. Hicks represented him as set forth in *Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31, ¶¶ 23-28. Cooper satisfies the first prong of *Strickland,* and met his burden by showing that Hicks' performance was deficient. Cooper's counsel was suspended from the practice of law during the representation, failed to communicate with Cooper and was unprepared for trial. The Supreme Court agreed Hicks' performance was deficient warranting serious

disciplinary action. *Id.*

As a result, the only question is whether this deficiency prejudiced Cooper. We know this deficiency prejudiced Cooper because Cooper was worried about the lack of preparation Hicks's had put into his defense. (14:1-2; A-App. 104-104). Cooper's October 8, 2013 letter tells us exactly what was going through his mind leading up to trial. *Id.* It is reasonable to believe that these concerns, and Hicks' pressure, forced him to accept a plea deal he did not want.

CONCLUSION

The circuit court's judgment of conviction of Tyrus Cooper should be overturned because he had ineffective assistance of counsel, and because he had a fair and just reason to withdraw his guilty plea pre-sentencing. Mr. Cooper respectfully requests this Court allow him to withdraw his guilty plea, and remand this case for a trial on the merits.

Dated this 5th day of May, 2017

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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 using a proportional serif font. The length of this brief is 3,465 words.

Dated this 5th day of May, 2017

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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 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 parties.

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CERTIFICATE OF FILING IN ACCORDANCE WITH WIS. STAT § 809.80(3)(b)

I hereby certify that on this 5th day of May, 2017, I personally caused the foregoing Amended Appellant's Brief and Appendix to be filed with the Clerk's office by hand. I further certify that I caused copies to be served on counsel of record listed below by first class mail postage prepaid.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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