STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2016AP375-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRUS LEE COOPER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEA ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD, PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it refused to allow Cooper to withdraw his plea on the basis that he subsequently learned his counsel's license had been suspended for 27 days during his 13-month representation of Cooper?

The circuit court determined that Cooper had not shown a fair and just reason for withdrawal.

This Court should affirm the circuit court and answer no.

2. Did Cooper receive ineffective assistance of counsel when his attorney advised him to take the plea?

The circuit court was not clearly presented with this question.

It is unclear if this question was adequately raised to preserve it for appeal, but if this Court does address the question, it should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves only the application of well-established law to the facts, which can be adequately addressed by the briefs.

INTRODUCTION

Although Cooper's former trial attorney has since had his license suspended for misconduct relating to Cooper's case, Cooper has not shown a fair and just reason to withdraw his plea. The plea hearing transcript shows that Cooper understood the charge, the elements of the offense, the possible range of sentences, and the recommendation the

State would make. Cooper admitted postconviction that he is satisfied with the plea deal, but he is upset that his former attorney did not tell him when the attorney's license was temporarily suspended, and did not communicate with him as much as the attorney should have.

Being upset with his attorney is understandable, but it is not a sufficient reason to withdraw the plea that Cooper intelligently, voluntarily, and knowingly entered, and has stated that he is satisfied with. He also cannot show that he received ineffective assistance of counsel, because he has not shown that absent counsel's conduct he would have rejected the plea; there was no prejudice to Cooper.

STATEMENT OF THE CASE

The State charged Cooper with one count of armed robbery with the use of force as a party to a crime after the victim, L.C., identified him as one of several men who broke into her home, struck her in the face with a gun, and stole her TV. (R. 2:1.) L.C. identified Cooper as the person who struck her with the gun by a tattoo on Cooper's forearm. (R. 2:1–2.) She stated that Cooper was a friend of her boyfriend and had been in her house before. (*Id.*) Cooper was on GPS monitoring at the time, and the GPS printout pinpointed Cooper at L.C.'s house at the time of the crime. (*Id.*) Cooper admitted to police he had been there, but claimed "he just watched four other guys commit the crime." (R. 2:2.)

After his initial counsel withdrew due a communication breakdown, the State Public Defender's Office appointed Attorney Michael Hicks to represent Cooper. (*See* R. 48:2.) After several scheduling hearings, Cooper's trial was set for October 21, 2013. (*See* R. 48–51.) On October 8, 2013, Cooper sent the court a letter complaining that Hicks had not sent him a copy of the discovery in his case and had not contacted witnesses Cooper thought were pertinent. (R. 14:1–2.)

Shortly after that, Cooper reached an agreement with the State to plead guilty to the charge in exchange for the State's recommending a sentence of three years' initial confinement and three years' extended supervision. (R. 15:1–2.) On October 21, 2013, Cooper pled guilty. (*Id.*) The court[1] explained charge, the maximum sentence, the elements of the offense, and the plea agreement to Cooper. (R. 52:3–7.) When asked if he understood each of those things, Cooper said that he did. (*Id.*) After ensuring Cooper understood his constitutional rights, the court accepted Cooper's plea. (R. 52:12.)

The court then asked Cooper about his October 8 letter complaining about Hicks, and Cooper said he wanted it disposed of with no action taken on it. (R. 52:13.) Sentencing was set for January 9, 2014. (R. 52:14.)

On December 21, 2013, Cooper wrote to the court stating that he wanted to withdraw his plea and requested new counsel. (R. 16:1.) Cooper had learned that Hicks' license was suspended during part of his representation and was under investigation by the Office of Lawyer Regulation, and claimed that there had been a breakdown in communication between them. (*Id.*) Hicks was suspended for 27 days between February 12, 2013, and March 11, 2013. *See In re Disciplinary Proceedings Against Hicks*, 2016 WI 31, ¶ 9, 368 Wis. 2d 108, 877 N.W.2d 848. Hicks withdrew and new counsel was appointed for Cooper, who then filed a motion to withdraw Cooper's plea. (R. 19:1–2.) The motion alleged that due to Hicks' conduct Cooper's plea was not knowingly and voluntarily entered. (*Id.*)

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[1] The Honorable Dennis Flynn presided over Cooper's plea hearing. (R. 52:1.)

The court held a hearing on Cooper's motion on June 27, 2014. (R. 57:1.) There, the court[2] pointed out that the court had directly explained the charge, the elements, and the maximum sentence to him, and that Cooper told the court he understood. (R. 57:9–13.) The court found that the State had offered Cooper "a very reasonable recommendation for armed robbery" and suspected that Hicks "prevailed upon Mr. Cooper that looking it over it was a good deal, we should take it." (R. 57:19.) The court found that in light of the plea colloquy, Cooper's responses at the plea hearing, and Cooper's responses at the motion hearing, it was clear that Cooper understood his rights, the charges, the maximum penalties, and the negotiations. (R. 57:18–20.) It also found that Cooper knew that the court was willing to take action on his October 8 letter, but Cooper said he did not want the court to do so. (R. 57:20.) The court "suspect[ed] that after Mr. Cooper had some time to think about it he was a little frustrated and upset with his attorney, Mr. Hicks," (R. 57:19) but found that was not a fair and just reason to withdraw the plea that Cooper had knowingly, voluntarily, and intelligently entered (R. 57:20–21).

The court also found that given the age of the case and the amount of time that had gone by, the court would have found substantial prejudice to the State even if Cooper had shown a compelling reason. (R. 57:21.) It refused to allow Cooper to withdraw his plea. (*Id.*) Cooper was subsequently sentenced to ten years in prison. (R. 58:1.)

On April 29, 2016, the Wisconsin Supreme Court suspended Hicks' license to practice law for a year due to 19 counts of misconduct stemming from his actions in Cooper's and three other clients' cases. *In re Hicks*, 368 Wis. 2d 108,

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[2] The Honorable M. Joseph Donald presided over Cooper's postconviction motion hearing. (R. 57:1.)

¶¶ 6–49. Specifically, the court found that Hicks' failure to communicate and consult with Cooper, to provide Cooper with a copy of the discovery materials, to inform Cooper and opposing counsel of his February 12, 2013, license suspension, and to respond to the grievance Cooper filed against him violated the rules of professional conduct regarding communication with clients, activities after license suspension, and cooperation with grievance investigations. *Id*. ¶¶ 28, 39.

Cooper appeals the circuit court's denial of his motion to withdraw his plea before sentencing.

STANDARD OF REVIEW

Granting or denying plea withdrawal "is left to the sound discretion of the circuit court." *State v. Bollig*, 2000 WI 6, ¶ 28, 232 Wis. 2d 561, 605 N.W.2d 199. This Court "must affirm the circuit court's decision as long as it was demonstrably 'made and based upon the facts of record and in reliance on the appropriate and applicable law.'" *State v. Jenkins*, 2007 WI 96, ¶ 6, 303 Wis. 2d 157, 736 N.W.2d 24 (quoting *State v. Canedy*, 161 Wis. 2d 565, 579, 469 N.W.2d 163 (1991)).

ARGUMENT

I. Cooper's conclusory allegations that his attorney's license suspension affected his decision to plead guilty are insufficient to entitle him to relief.

A. Legal principles on pre-sentencing plea withdrawal.

When a defendant seeks to withdraw a plea before sentencing, the defendant must show a credible "fair and just reason" for withdrawing the plea. *Canedy*, 161 Wis. 2d at 567. A fair and just reason is some adequate reason for the

defendant's change of heart "other than the desire to have a trial or belated misgivings about the plea." *Jenkins*, 303 Wis. 2d 157, ¶ 32 (citations omitted). "Fair and just" has not been precisely defined, but courts have considered withdrawal to be fair and just based on a 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 trial counsel. *State v. Shimek*, 230 Wis. 2d 730, 739–40, 601 N.W.2d 865 (Ct. App. 1999) (collecting cases). The defendant has the burden to prove a fair and just reason by a preponderance of the evidence. *Id.* If the defendant does so, the burden shifts to the State to show that it would be substantially prejudiced if the defendant were allowed to withdraw the plea. *Bollig*, 232 Wis. 2d 561, ¶ 34.

A defendant's "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). The presumption of truthfulness of a plea statement will not be overcome unless the defendant explains "why it is fair and just to disregard the solemn answers the defendant gave in the colloquy." *Jenkins*, 303 Wis. 2d 157, ¶ 62. "If 'the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" *Id.* ¶ 34 (citation omitted).

B. Cooper has not shown that the circuit court erroneously exercised its discretion because he has not alleged any facts showing he received misleading advice from counsel or misunderstood the charge.

The circuit court properly exercised its discretion when it denied Cooper's motion because he alleged no credible facts showing a fair and just reason to withdraw his plea. Cooper's anger with Hicks is understandable, but Cooper's

unsupported argument that Hicks' "improper conduct" somehow equates to misleading advice that "confused" Cooper is nonspecific, conclusory, and does nothing to refute the circuit court's finding that Cooper understood and voluntarily entered his plea.

The circuit court did not find credible Cooper's claim that he did not understand the charge or sentence and was misled into the plea. (R. 57:20.) It based this determination on the court's thorough plea colloquy with Cooper, and Cooper's unequivocal statements that he understood everything and wanted no action taken on his October 8 letter. (R. 57:18–20.) The court found that Cooper understood the plea and wanted to take advantage of the State's lenient sentencing recommendation, but later became frustrated with how he had been treated by Hicks. (R. 57:19–21.)

The court's assessment of Cooper's comprehension of the plea was demonstrably based upon the facts of record. *Jenkins*, 303 Wis. 2d 157, ¶ 6. It was also made in reliance on the applicable law: the circuit court applied the "fair and just reason" standard. *Id.* Ergo, the record shows that the circuit court's determination was "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *State v. Lopez*, 2014 WI 11, ¶ 6, 353 Wis. 2d 1, 843 N.W.2d 390 (quoting *Canedy*, 161 Wis. 2d at 580). Consequently, this Court must affirm the circuit court's decision. *Id.*

Cooper takes issue with none of the court's factual findings about his comprehension of the plea. (*See* Cooper's Br. 9–10.) Cooper does not even mention the answers he gave at the plea hearing, let alone explain "why it is fair and just to disregard the solemn answers the defendant gave in the colloquy." *Jenkins*, 303 Wis. 2d 157, ¶ 62. Apart from noting that counsel has been disciplined, Cooper's argument that he

has shown a fair and just reason to withdraw his plea consists only of bolding a single line of text from *State v. Shimek* that misleading advice from counsel may be a fair and just reason, stating "[t]his is what we have here," and then summarily proclaiming that he has met his burden. (Cooper's Br. 9–10.)

Cooper points to no facts in the record to support that claim. *See State v. Allen*, 2004 WI 106, ¶¶ 21–24, 274 Wis. 2d 568, 682 N.W.2d 433. He says that he was "confused about the charge he was pleading to and what the sentence range would be," but he does not explain how or why he was confused after the circuit court explained those things to him, or why he told the court that he understood. (*See* Cooper's Br. 9.) Cooper does not even identify what was supposedly "misleading" about Hicks' advice. Instead he simply says that Hicks' "conduct" was improper and "cannot be ignored." (*Id.*) Hicks' improper conduct has not been "ignored"; Cooper was given an evidentiary hearing to address his motion to withdraw his plea on this basis, where he failed to show that his plea was not intelligently, knowingly, and voluntarily entered.

Essentially, Cooper argues that because Hicks "was non-communicative and suspended" for part of the representation, the court should have taken Cooper's claim that he received misleading advice and misunderstood his plea at face value and shifted the burden to the State to show substantial prejudice. (*See* Cooper's Br. 9–10.) But Cooper stating that he was misled and confused does not make it so. Though the fair and just standard is lenient, the courts are not required to accept a defendant's statement that is disproven by the existing record regardless of the leniency of the standard. *Cf. State v. Taylor*, 2013 WI 34, ¶¶ 82–83, 347 Wis. 2d 30, 829 N.W.2d 482 (Prosser, J., concurring). And Cooper's claims are disproven by the existing record.

There was nothing improper or misleading about the advice Hicks gave to Cooper to take the plea deal. The victim

definitively identified Cooper's tattoo and said he was the one who had hit her in the face with the gun. (R. 2:1–2.) Cooper was on GPS monitoring at the time and his GPS device showed he was at L.C.'s house at the time of the crime. (R. 2:2.) He admitted to police that he was there when the crime took place but claimed "he just watched four other guys commit the crime." (*Id.*) The State agreed to recommend six years imprisonment when Cooper was exposed to 40. The evidence against Cooper was overwhelming, and as the circuit court noted, "that is a very reasonable recommendation for armed robbery." (R. 57:19.) Hicks' assessment that Cooper was "destined to lose at trial"[3] and his advice to take a plea deal were not misleading; both were well within the bounds of objectively reasonable professional assistance. Cooper's claim that he misunderstood the charge and sentence is equally unconvincing in light of the plea colloquy.

And in fact, Cooper admitted at the motion hearing that he does not have any issues with the plea. Instead he is simply angry with Hicks:

> if the Court were to allow Mr. Cooper to withdraw his plea, he still might decide to enter a plea, because he does like -- he's satisfied, I guess, with the recommendation that Mr. Cotter made . . . [w]hat he grapples with is . . . [that] he didn't know Attorney Hicks' license was suspended at the time of his representation of Mr. Cooper.

(R. 57:4–5.) Being upset with his former attorney is not a "fair and just reason" to withdraw Cooper's fully-understood and admittedly-satisfactory plea.

Thus, this Court need not address Cooper's claim that the court erred in finding substantial prejudice. (*See* Cooper's Br. 10–11.) The State did not need to argue that it would be

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[3] *See* Cooper's Br. 5.

substantially prejudiced by the withdrawal nor did the court need to make a comprehensive record on substantial prejudice, because Cooper did not make the threshold showing of a fair and just reason to withdraw that would shift the burden to the State. *Bollig*, 232 Wis. 2d 561, ¶ 34.

II. Cooper did not receive ineffective assistance of counsel because he has not alleged any facts showing he was prejudiced by Hicks' conduct.

A. Cooper does not appear to have raised ineffective assistance in the trial court.

Neither Cooper's motion nor the circuit court at the motion hearing mentions "ineffective assistance" or discusses *Strickland v. Washington*, 466 U.S. 668 (1984) and the prongs of the ineffective assistance test. Cooper's pro se December 21 letter to the court argues that counsel was ineffective, though, and both his counseled motion and the circuit court discussed the effect of Attorney Hicks' misconduct as the exclusive issue raised by the motion. (*See* R. 19:1–2; 57:1–24.) Arguably, Cooper has forfeited any claim of ineffective assistance of counsel. Failure to raise an issue in the trial court generally constitutes forfeiture, and this Court need not address forfeited arguments. *See In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155 (collecting cases) (explaining that the fundamental forfeiture inquiry is "whether particular arguments have been preserved, not . . . whether general issues were raised before the circuit court").

However, because the court appears to have decided the motion on the basis that Cooper was not prejudiced by Attorney Hicks' actions, (*see* R. 57:18–21), the State will address Cooper's ineffective assistance of counsel claim in the event that this Court determines that Cooper adequately raised ineffective assistance below, and opts to review it.

B. Legal principles on ineffective assistance.

It is well-settled that the right to counsel contained in the United States Constitution[4] and the Wisconsin Constitution[5] includes the right to the effective assistance of counsel. *Strickland*, 466 U.S. at 686. A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687. "The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688).

To prove deficient performance, Cooper "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

To prove prejudice, Cooper "must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. Cooper "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. In the plea withdrawal context, to show constitutional prejudice a defendant must allege "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

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[4] U.S. Const. amends. VI, XIV.

[5] Wis. Const. art. I, § 7.

State v. Bentley, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

C. Cooper has not shown a substantial likelihood that he would have insisted on going to trial but for Hicks' conduct.

It is undisputed that Hicks did not inform Cooper that his license was suspended for 27 days in early 2013 when he represented Cooper. *See In re Hicks*, 368 Wis. 2d 108, ¶ 9. It is also undisputed that Hicks has had his license suspended for a year by the Wisconsin Supreme Court for misconduct, including for failing to adequately communicate with Cooper. *Id.* ¶ 46. But simply because Hicks was sanctioned for misconduct does not mean that Cooper automatically received ineffective assistance of counsel. In order to show ineffective assistance, a defendant must prove both prongs of *Strickland*. The State will assume that conduct that warrants license suspension falls below an objective standard of reasonable professional assistance. However, Cooper has failed to meet his burden because he again relies only on conclusory statements and cannot show prejudice. (*See* Cooper's Br. 13–14.)

Cooper makes only the speculative and conclusory allegation that "it is reasonable to believe" that "concerns" in the letter Cooper disavowed at the plea hearing, along with unidentified "pressure" from Hicks, "forced him to accept a plea deal he did not want." (*See* Cooper's Br. 14.) Cooper points to no facts to support any portion of that assertion other than referring to Cooper's October 8 letter. He does not discuss why the circuit court should overlook the fact that Cooper told the court he did not want any action taken on the letter at the plea hearing. He also says nothing about why, when facing a potential 40 year sentence for armed robbery with GPS evidence that placed him directly at the crime scene, he would have insisted on going to trial had he known

Hicks' license had been suspended for 27 days several months before his trial date.

"[C]onclusory allegations do not entitle a defendant to relief." *State v. Maloney*, 2006 WI 15, ¶ 38, 288 Wis. 2d 551, 709 N.W.2d 436. This Court need not consider Cooper's inadequately developed arguments. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). However, even taking Cooper's statement as adequate, he has failed to meet his burden: "[i]t is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted). "Stated differently, relief may be granted only where . . . there is a 'substantial, not just conceivable, likelihood of a different result.'" *State v. Starks*, 2013 WI 69, ¶ 55, 349 Wis. 2d 274, 833 N.W.2d 146 (citation omitted). Cooper's claim that Hicks' conduct may have had some conceivable effect on his decision to plead guilty does not show a substantial likelihood of a different result.

And indeed, Cooper cannot make this showing. As mentioned, Cooper admitted at the motion hearing that he was satisfied with the deal he received and might still decide to enter a plea if the court allowed him to withdraw. (R. 57:5.) At the plea hearing, he specifically told the court that he wanted to take the State's plea offer and did not want the court to take any action regarding his "concerns" he brought up in the October 8 letter. He is seeking to withdraw only because he is upset that Hicks did not tell him about his license suspension. (*Id.*) Apart from the fact that this precludes him from showing prejudice, allowing Cooper to withdraw his plea, which he admits he is happy with, and enter another one simply because he's upset with his former attorney would be a waste of judicial resources and an abuse of the court system.

Cooper has every right to be upset that Hicks did not inform him that his license was suspended and did not better communicate with him. However, that does not mean Cooper received ineffective assistance. The record shows that Cooper was not prejudiced by Hicks' actions and Cooper does not have a fair and just reason to withdraw his plea.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 2nd day of June, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3830 words.

_____
LISA E.F. KUMFER
Assistant Attorney General

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 2nd day of June, 2017.

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LISA E.F. KUMFER
Assistant Attorney General