WISCONSIN COURT OF APPEALS
DISTRICT I

State of Wisconsin,

Plaintiff-Respondent,

v.

Tyrus Lee Cooper.

Defendant-Appellant,

Appeal No. 2016-AP-0375-CR

Case No. 11-CF-2815

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

REPLY BRIEF OF DEFENDANT-APPELLANT TYRUS LEE COOPER

GIERKE FRANK NOORLANDER LLC
David E. Frank
State Bar No. 1056505
1011 N. Mayfair Rd. Suite 304
Wauwatosa, WI 53226
Phone: 414.395.4600
Fax: 414.921.4108

ATTORNEYS FOR DEFENDANT-APPELLANT TYRUS LEE COOPER

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

The State argues that appellant Tyrus Lee Cooper ("Cooper") hasn't alleged sufficient—or specific—facts to show a "fair and just reason" for withdrawal of his plea. *See State v. Canedy*, 161 Wis.2d 656, 580-82 (Wis. 1991). Specifically, the State alleges that Cooper failed to show any "misleading advice" by his unlicensed attorney. Br. at 6-7. That argument misconstrues the applicable legal standard, as Cooper had no obligation to show that he got "misleading advice." He need only show that he had a "fair and just reason" for withdrawal of his plea, where "fair and just" includes: "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 purpose in permitting plea withdrawals before sentencing under this liberal standard...ensures that a defendant is not denied a trial by jury unless he clearly waives it." *State v. Shimek*, 230 Wis.2d 730, 736, 601 N.W.2d 865, 867 (Wis. Ct. App. 1999.) Further Cooper did assert he was misled by Hicks at his withdrawal hearing, and believed the charges would be amended. (57:7-8; A-App.142:16-143:23).

The Wisconsin Supreme Court has set forth in detail the "adequate reason" for Cooper's change of heart. Had the Trial Court considered all the facts and applied the proper standard, Cooper would

have had his constitutionally protected day in court, which is all he is asking this court to grant him.

A. Attorney Hick's Inadequate Representation, and Suspension, Provides Sufficient Grounds to Find That Cooper's Plea Withdrawal Was "Fair and Just."

The Supreme Court has provided a clear record of why Cooper was justified in seeking withdrawal of his plea. In April of 2016 that Court suspended Hicks' license to practice law for three year for misconduct related to his representation of Cooper and others. *Office of Lawyer Regulation v. Hicks* (*In re* Hicks), 2016 WI 31. In so doing, the Court found that the following facts related to Attorney Hick's deficiencies in representing Cooper supported the suspension:

- By failing between the date on which he received [T.C.'s] letter in January 2013 and February 12, 2013, between March 11, 2013 and August 16, 2013, and between August 18, 2013 and **October 20, 2013**, to communicate with [T.C.] regarding the issues raised in [T.C.'s] January 2013 letter and to otherwise consult with [T.C.] regarding trial strategy and preparation, thereby ***preventing [T.C.] from adequately understanding and participating in his own defense***, [Attorney] Hicks violated SCR 20:1.4(a)(2). (Emphasis added.)

- By failing to timely provide [T.C.] with a complete copy of the discovery materials, despite [T.C.'s] requests, [Attorney] Hicks violated SCR 20:1.4(a)(4).

- By failing to provide a written notice to [T.C.] of his February 12, 2013 suspension, [Attorney] Hicks violated SCR 22.26(1)(a) and (b).

- By failing to provide written notice to the court and opposing counsel in [T.C.'s pending criminal case] that his license to practice law had been suspended on February 12, 2013, Attorney] Hicks violated SCR 22.26(1)(c).

Office of Lawyer Regulation v. Hicks (In re Hicks), 2016 WI 31 at ¶ 28.

The highest court in this state found that Hicks' representation of Cooper, in the case in which he sought to withdraw his plea, was so deficient that it warranted suspending the attorney's license for three years. *Id.* at ¶ 49. The Court actually stated that Hicks' conduct was so egregious that it prevented Cooper from "adequately understanding and participating in his own defense." *Id.* at ¶ 28. Moreover, the Supreme Court held that Attorney Hicks' failure to communicate with Cooper ran up to October 20, 2013. Cooper entered the plea he sought to withdraw one day later on October 21, 2013. *Id.* In other words, the Supreme Court said that Cooper was without counsel that allowed him to understand and participate in his defense up to the day he entered a guilty plea on felony charges. *Id.*

In addition to the substantively inadequate representation Cooper received, he learned that while he was considering pleading to felony charges, his attorney wasn't an attorney at all. *Id.* His license had been suspended. *Id.* Certainly the type of conduct that would make someone in his position question whether he'd gotten sound advice. A concern that the Supreme Court agreed with.

The Supreme Court has shown a fair, just and adequate reason for Cooper to be allowed to withdraw his plea. His legal representation was so deficient as to warrant suspension of his attorney's license. Upon learning of the suspension—but before sentencing—Cooper sought to withdraw his

plea because of concerns related to the advice he'd received. (16; A-App.108). That's an adequate reason, and allowing withdrawal would have been "fair and just." Failure to allow withdrawal under these circumstances is an erroneous exercise of discretion.

B. The Showing of a "Fair and Just Reason" Means an Adequate Reason, and it Should be Liberally Applied

The showing of a fair and just reason contemplates the "mere showing of some adequate reason for the defendant's change of heart." *State v. Shimek*, 230 Wis. 2d 730, 739, (Wis. Ct. App. 1999). A court must apply this test liberally. *Id.* The trial court's discretionary ruling will be sustained if the trial court reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts. Id.

"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, (Wis. 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.

II. The State Has Failed to Show it Would Be Prejudiced By Cooper Exercising His Constitutionally Protected Right to Trial

Once a defendant shows a fair and just reason for withdrawal of his pre-sentencing plea it "becomes the state's burden to prove that allowing the defendant to withdraw her plea would result in substantial prejudice to the State." *State v. Lopez*, 2014 WI 11 ¶ 54. For the reasons set forth above—and in his original brief—Cooper has shown a fair and just reason for withdrawal of his plea. The State failed to even argue prejudice to the Trial Court, and the Trial Court failed to make sufficient record of prejudice to the State. Similarly, the State has not argued prejudice in its brief to this Court. Presumably, the State concedes that it would not have been prejudiced by allowing Cooper to withdraw his plea and proceed to trial.

Indeed, it's difficult to see how the State could have been prejudiced by allowing the case to go to trial. Cooper's trial was October 21, 2013, which was also the day he entered his plea. (51:1; A-App. 103-107). On December 21 he told the court he wanted to withdraw his guilty plea. (16; A-App.108). The State was ready to go trial in October, and has offered no evidence to suggest that changed in two months. It's position in prosecuting Cooper would have been unchanged if he had been allowed his

right to trial. In other words, it suffered no prejudice.

III. Cooper Received Ineffective Assistance of Counsel

A. Cooper Preserved an Ineffective Assistance of Counsel Argument at The Trial Court

The State concedes the Trial Court addressed whether Cooper was prejudiced by Attorney Hick's representation, potentially preserving ineffective assistance of counsel for this Court to review. (Br. at 10) Nonetheless, the State argues that Cooper: "Arguably has forfeited any claims of ineffective assistance of counsel," for failing to raise the argument with the Trial Court. *Id*.

Cooper agrees that the Trial Court addressed ineffective assistance of counsel, thereby preserving the issue for appeal. (57:17-21; A-App.152-156). To preserve an issue for appeal, a party must object to the error in the Trial Court. *State v. Johnson*, 2004 WI 94, ¶ 25. Cooper did raise the ineffective nature of Hick's representation with the Trial Court, and specifically asked the judge to allow him to withdraw his please because of it. On December 21, 2103 Cooper sent the Trial Court a letter asking to be allowed to withdraw his plea, and specifically stating that one of the reasons he wanted to withdraw it was because of ineffective assistance of counsel. (16; A-App. 108.) Moreover, Cooper filed a motion to withdraw his plea in which he asserted that Hick's had failed to communicate with him, had failed to tell Cooper or the Court that his license had been suspended, and that as a result his plea was not entered knowingly and voluntarily. (19: A-App. 108) It was based on this motion that the Trial

Court entered the order from which this appeal was taken. (57; A-App 136-159). Ineffective Assistance of counsel was square before – and addressed by - the Trial Court.

Nonetheless, in the event this court disagrees, it can and should examine the issue. Appellate courts have discretion to address arguments raised for the first time on appeal. *Townsend v. Massey (In Re Willa L.)*, 2011 WI App 160, ¶ 23. "The forfeiture rule is one of administration, and appellate courts have the authority to ignore forfeiture when a case presents an important or recurring issue." *Id.*

This case does address an important and recurring issue. In fact, it arguably addresses some of the most important issues faced by our courts; the constitutional right to trial and effective counsel before depriving citizens of liberty. *State v. Lehman*, 108 Wis. 2d 291, 316 (Wis. 1982) (Calling the right to jury trial "fundamental" and stating that it must be "preserved inviolate.") Even if this Court finds ineffective assistance of counsel wasn't preserved at the Trial Court, it should address the issue now in order to protect the fundamental rights at issue.

B. The Record Supports Cooper's Ineffective Assistance of Counsel Claim

The State cites the elements for an ineffective assistance claim, and concedes that the first element is met by Attorney Hick's deficient work for Cooper. A defendant who asserts ineffective assistance of counsel must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S.

668, 687 (1984). The State argues, however, that Cooper cannot show prejudice by a "reasonable probability." *State v. Bentley*, 201 Wis. 2d 303, 312 (Wis. 1996). "To prove constitutional prejudice, the defendant 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 the confidence in the outcome." *State v. Girley*, 2016 WI App 34, ¶ 18 (citing *State v. Love,* 2005 WI 116, ¶ 30). The record in this case shows a reasonable probability of a different outcome had Cooper been allowed to withdraw his plea. He would have gotten his day in court.

On December 21, 2013 Cooper sent a letter to the Trial Court in which he asked to withdraw his guilty plea. (16; A-App.108) In it he cited the following basis for his request:

- Ineffective assistance of counsel;
- His Counsel being suspended;
- Not being provided with documents related to his defense;
- Irreconcilable differences and breakdown in communication with his counsel.
- His lawyer lying to him.

Id.

In addition Cooper told the Court that Attorney Hicks told him he could take the plea and go home, and that he would lose at trial. *Id.* He denied having committed the crime he was accused of, and told the Court that he needed to go home and support his family. *Id.* Cooper is not a sophisticated litigant, but he did his best to communicate his deep concerns about the sufficiency of Attorney Hicks' work, and his desire to

have his case tried to a jury. It's reasonable to read his request to withdraw his plea, his insistence he had not committed the crime, and his plea to return to his family as a request to be heard at trial.

The State alleges that Cooper's "conclusory allegations" do not entitle him to relief. (Br. at 13.) But the Wisconsin Supreme Court has held that "a specific explanation of why the defendant would have gone to trial" is sufficient to support a finding he would have gone to trial. *State v. Bentley*, 201 Wis. 2d 303, 313 (Wis. 1996) (citing *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989)). That's what Cooper did in his letter. He laid out for the Court, in the best way he could, his deep concerns about the adequacy of his counsel, that based on those concerns he wanted to withdraw his plea, and that he wanted to argue his innocence. In other words, that he wanted a trial. His specific explanation of his reasons is sufficient to support a finding of prejudice.

CONCLUSION

It's a cliché to call something a "perfect storm," but that's what this case presents. In 2013 Cooper knew just enough to recognize that something wasn't right with his lawyer. He worried that his lawyer had lied to him, he knew his lawyer had been suspended, he didn't understand the deal his lawyer told him to take, and he asked to withdraw his plea. The Trial Court heard his arguments, but didn't have a full appreciation of just how bad Attorney Hicks' representation had been. When the Office of Lawyer Regulation dug in to the matter it was even worse than imagined. The Supreme Court found Attorney Hicks' representation of Cooper so

deficient it warranted suspending Hicks' license, and prevented Cooper "from adequately understanding and participating in his own defense" up to the day he entered his plea. It's in the spotlight of that revelation that this Court must decide if Cooper should be allowed his constitutional right to adequate counsel and a jury trial. For all the reasons previously argued, we respectfully submit he should, and ask that this Court allow him to withdraw his plea.

Dated this 19th day of July 2017

GIERKE FRANK NOORLANDER LLC

/s/David E. Frank
David E. Frank
State Bar No. 1056505
1011 N. Mayfair Rd. Suite 304
Wauwatosa, WI 53226
Phone: 414.395.4600
Fax: 414.921.4108
ATTORNEYS FOR DEFENDANT-APPELLANT TYRUS COOPER

CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a reply brief produced using a proportional serif font. The length of this brief is 2,438 words.

Dated this 19th day of July 2017

GIERKE FRANK NOORLANDER LLC

/s/David E. Frank
David E. Frank
State Bar No. 1056505
1011 N. Mayfair Rd. Suite 304
Wauwatosa, WI 53226
Phone: 414.395.4600
Fax: 414.921.4108
ATTORNEYS FOR DEFENDANT-APPELLANT TYRUS COOPER

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.

Dated this 19th day of July 2017

GIERKE FRANK NOORLANDER LLC

/s/David E. Frank
David E. Frank
State Bar No. 1056505
1011 N. Mayfair Rd. Suite 304
Wauwatosa, WI 53226
Phone: 414.395.4600
Fax: 414.921.4108
ATTORNEYS FOR DEFENDANT-APPELLANT TYRUS COOPER

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

I hereby certify that on this 19th day of July 2017, I personally caused the foregoing reply brief to be delivered via a third party commercial carrier for overnight service to the Clerk's office. I further certify that I caused copies to be served on counsel of record listed below by first class mail postage prepaid.

Lisa E.F. Kumfer
Wisconsin Department of Justice
17 W. Main St.
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Milwaukee County District Attorney's Office
821 W. State St.
Milwaukee, WI 53233

Dated this 19th day of July 2017

GIERKE FRANK NOORLANDER LLC

/s/David E. Frank
David E. Frank
State Bar No. 1056505
1011 N. Mayfair Rd. Suite 304
Wauwatosa, WI 53226
Phone: 414.395.4600
Fax: 414.921.4108
ATTORNEYS FOR DEFENDANT-APPELLANT TYRUS COOPER