STATE OF WISCONSIN
SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

Appeal No. 2016-AP-0375-CR

v.

Case No. 11-CF-2815

Tyrus Lee Cooper.

Defendant-Appellant-Petitioner,

DEFENDANT-APPELLANT-PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR REVIEW AND APPENDIX

APPEALED FROM: COURT OF APPEALS, District I, Wisconsin
Decision dated February 27, 2018

Submitted by:

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When Cooper's counsel engaged in serious professional misconduct, preventing Cooper from adequately understanding and participating in his own defense, did this constitute ineffective assistance of counsel and provide Cooper with a fair and just reason to withdraw his guilty plea prior to sentencing?

   The Trial Court Answered "no."
   The Court of Appeals Answered "no."

2. In deciding whether Cooper may withdraw his guilty plea, is the circuit court bound by the Supreme Court's findings and/or conclusions in *In re Disciplinary Proceedings Against Hicks*, 2016 WI 31, 368 Wis. 2d 108, 877 N.W.2d 848 (2016), including, but not limited to, language stating that the failure of Cooper's trial counsel to properly communicate with him prevented him from adequately understanding and participating in his own defense, *see i.d.*, ¶¶ 23-28, 39?

   The Trial Court Answered "no."
   The Court of Appeals Answered "no."

3. Did the circuit court erroneously exercise its discretion when it denied defendant's motion to withdraw his plea prior to sentencing without a sufficient evidentiary record to support a finding that withdrawal of the plea pre-sentencing would result in substantial prejudice to the State?

The Trial Court Answered "no."
The Court of Appeals Answered "no." The Court of Appeals did not expressly answer this question, but instead held that Cooper had not met the initial burden of showing he had a fair and just reason for withdrawal of the plea.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court should grant oral argument and publish its decision. This appeal raises important legal issues regarding whether a defendant, whose court appointed counsel commits professional misconduct, is suspended during the representation of defendant, and who is ultimately sanctioned for his mishandling of defendant's case, has a "fair and just reason" to support his pre-sentencing plea withdrawal motion under the applicable liberal *Canedy* standard.

STATEMENT OF THE CASE AND THE FACTS

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; P-App. 157-158). L.C. was beaten and robbed by a number of men. *Id.* A television was taken and L.C. suffered injuries as a result of the assault. *Id.*

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

Cooper was initially appointed defense counsel, but sought a change of counsel on November 12, 2012 citing an issue with communication with his first appointed attorney. (R. 12:1; R. 47:2-3). Cooper's counsel moved to withdraw on December 6, 2012 citing a serious breakdown in

communications. (R. 47:2-3). Cooper was then appointed new counsel, Attorney Michael Hicks ("Hicks"). (R. 48:2). Hicks acted as counsel for Cooper after his initial counsel withdrew, and up until Hicks' withdrawal in January 2014. (R. 53:2).

Trial in Cooper's case was reset from April 29, 2013 to October 21, 2013 after the trial court and Hicks both realized they had scheduling issues at a prior pretrial hearing. (R. 50:1-3; R. 51:1-2; P-App. 117-118). By letter dated October 8, 2013 (but not filed until October 18, 2013), Cooper wrote to the circuit court leveling a number of complaints about Hicks' performance as counsel in his case. (R. 14:1-2;P-App. 160-161). Cooper's complaints included his concern about his counsel's lack of adequate preparation for trial, which was to occur in less than 2 weeks. *Id.* Cooper was also concerned about Hicks' lack of communication and his failure to contact alibi witnesses. *Id.* Cooper specifically stated that he was not able to assist in his own defense, and had not received the benefit of effective assistance of counsel before trial. *Id.*

On October 21, 2013, the date the case was set for trial, Cooper pled guilty to armed robbery as a party to a crime. (R. 51:1; P-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. (R. 52:2; P-App. 118). The Court held an on the record the conversation with Cooper whereby Cooper was walked through the elements. (R. 52:4-12;

P-App. 120-128). 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. *Id.* Instead the Court broadly asked Cooper if the facts contained in the underlying Criminal Complaint were true and correct. *Id.*

The Court briefly addressed Cooper's October 8, 2013 letter, and asked what Cooper wanted to do about it. (R. 52:13-14; P-App. 129-131). Cooper responded that it was "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 by letter dated December 21, 2013 (but not filed until January 2, 2014) Cooper again wrote to the circuit court this time stating that he wanted to withdraw his guilty plea. (R. 16; P-App. 165). In the January 9, 2014 letter, Cooper stated that he learned that while Hicks was advising him about his case, Hicks had been suspended from the practice of law. *Id.* Cooper's statement was factually correct; Hicks had been suspended while he was representing Cooper, but did not inform Cooper of that fact. *Id. See also Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31, ¶¶ 23-28. Cooper's January 9, 2014 letter told the circuit court that Hicks had misled him into taking the plea deal,

and that Hicks said Cooper was destined to lose at trial. *Id.* Hicks withdrew and new counsel was appointed for Cooper. (R. 17).

On April 1, 2014, with the assistance of his new counsel, Cooper filed a motion to withdraw his guilty plea, prior to sentencing. (R. 19; P-App. 168). The grounds for the motion to withdraw were that the issues raised in October 8, 2013 letter had not been resolved or rectified. *Id.* Further, Cooper asserted that Hicks had been suspended from the practice of law during his representation of Cooper and never disclosed that fact to him. *Id.* Cooper further asserted that his plea was not knowingly or voluntarily entered into, was entered in haste, and without the benefit of effective assistance of counsel, pointing specifically to the fact that Hicks had not met with him to discuss the case or provided him copies of discovery materials. *Id.*

Hicks' misconduct as to his representation of Cooper (as referenced by Cooper in his motion to withdraw his plea) is also documented in Hicks' OLR disciplinary case, *In re Hicks*, 2016 WI 31, ¶¶ 23-28. Specifically, in *Hicks*, the Supreme Court outlined Hicks' misconduct as it related to Cooper as follows:

- Failing over the course of the representation to communicate with Cooper regarding issues raised in Cooper's January 2013 letter and to otherwise consult with Cooper regarding trial strategy and preparation ***"thereby preventing [T.C.] [Cooper] from adequately understanding and participating in his own defense"***;

- Failing to timely provide Cooper with a complete copy of the discovery materials, despite Cooper's requests;

- Failing to provide a written notice to Cooper of Hicks' February 12, 2013 suspension;

- Failing to provide written notice to the court and opposing counsel in Cooper's pending criminal case that Hicks' license to practice law had been suspended on February 12, 2013; and

- Failing to timely file a response to Cooper's grievance.

Id. (emphasis supplied).

On June 27, 2014, the circuit court held a hearing on Cooper's pre-sentencing motion to withdraw his plea. (R. 57:1-24; P-App. 133-156). At the hearing, Cooper outlined Hicks' misconduct, including his failure to communicate with Cooper and his failure to disclose to him concerning that Hicks' license to practice law had been suspended during his representation of Cooper. (R. 57:7-8; P-App. 139-140). The trial court heard the testimony and statements from counsel and Cooper, but denied Cooper's motion to withdraw his plea. (R. 57:21; P-App. 153). The State presented no evidence of prejudice. (R. 57:15-16, 18, 21-24; P-App. 147-148, 153-156). The only factor identified by the circuit court as a purported basis for the prejudice factor was the age of the case; the court did not appear to take into account the fact that only 2 months had elapsed between when Cooper entered his plea and asked to withdraw it. (R. 16:1; 52:1-16; 57:15-16, 18-24; P-App. 117-132, 150-155, 165).

On July 17, 2014 Cooper was sentenced to 5 years of initial confinement, and 5 years of extended supervision. (R. 30:1-2; P-App.

115-116). This was a higher sentence than the plea deal he had struck with the State. (*Compare* R. 52:1-2; P-App. 120-121).

Cooper timely filed his Notice of Appeal on February 18, 2016. (R. 33:1-2; P-App. 118-119). On February 27, 2018, the Wisconsin Court of Appeals issued its decision affirming the circuit court's decision. (P-App. 100-111). This Court subsequently granted Cooper's Petition for Review on December 12, 2018.

STANDARD OF REVIEW

Whether the trial court erred in not allowing Cooper to withdraw his guilty plea prior to sentencing is subject to review under the erroneous exercise of discretion standard. *State v. Kivioja*, 225 Wis. 2d 271, 284 (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, (1982); *see Kivioja*, 225 Wis. 2d at 284 (citing *State v. Salentine*, 206 Wis. 2d 419, 429-30, (Ct. App. 1996)).

The question of whether Hicks' misconducted amounted to ineffective assistance of counsel and thus formed the basis for a fair and just reason for Cooper to withdraw his plea pre-sentencing presents a mixed question of fact and law. *State v. Wood*, 2010 WI 17, ¶ 16, 323 Wis. 2d 321, 339 (2010) ("A claim for ineffective assistance of counsel is a mixed question of fact and

law.") (citing *State v. Doss*, 2008 WI 93, ¶ 23, 312 Wis. 2d 570 (2008)); *State v. Trawitzki*, 2001 WI 77, ¶ 19 (2001). This Court will defer to the circuit court's factual findings unless they are clearly erroneous. *Wood*, 2010 WI 17, ¶ 16; *see also State v. Pitsch*, 124 Wis. 2d 628, 634 (1985). "The conclusions as to whether an attorney's performance was deficient or prejudicial, however, are questions of law that we review independently" or *de novo*. *Id*; *see also Trawitzki*, 244 Wis. 2d 523, ¶ 19. *State v. Hunt*, 2014 WI 102, ¶ 22 (2014).

ARGUMENT

I. The Trial Court and Court of Appeals Erred In Refusing To Accept Cooper's Pre-Sentencing Motion To Withdraw His Plea.

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. Moreover, in applying this standard the trial court and the court of appeals were required to take into account and be bound by this Court's

prior factual findings and legal conclusions in *Hicks*.

It is a well-established principle of Wisconsin law that "when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision. *Chase v. American Cartage Co.*, 176 Wis. 235, 238 (1922); *see also State v. Taylor, 205 Wis. 2d 664, 670 (Ct. App. 1996)*. In addressing this doctrine, this Court cautioned that "[i]f the court of appeals could dismiss a statement in a prior case from this court as dictum, the limitation . . . against overruling, modifying, or withdrawing language would be seriously undermined. We therefore conclude that to uphold the principles of predictability, certainty, and finality, the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 350 (2010).

Here, both the trial court and the court of appeals erred and abused their discretion in failed to properly consider and apply the factual findings and legal conclusions of this Court in *Hicks*. Namely, this Court not only agreed that Hicks' actions were improper and sanctionable, but this Court specifically held that Hicks' misconduct towards Cooper had the effect of "preventing [T.C.] [Cooper] from adequately understanding and participating in his own defense" *Hicks*, 2016 WI ¶ 28. Examining the

relevant facts and applying the legal conclusions from *Hicks* supports a conclusion that Cooper satisfied his burden to show that Hicks' misconduct amounted to ineffective assistance and that he met his burden to establish a fair and just reason to withdraw his plea. As such, the circuit court and court of appeals also erred in failing to require the State to show it would suffer substantial prejudice from Cooper's withdrawal of his plea. This also constitutes reversible error.

A. The Circuit Court And Court Of Appeals Were Bound By The Findings And Conclusions Of This Court In Hicks' In Determining Whether Cooper Satisfied His Burden To Show A Fair And Just Reason For Withdrawal Of His Plea.

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, (Ct. App. 1999). A court must apply this test liberally. *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, (Ct. App. 1999) (emphasis added). This is what we have here.

Cooper asserted he was confused as to the charge he was pleading to

and what his sentence range would be. (R. 57:10-13; P-App. 142-145). Cooper also asserted that Hicks misled him about the nature of the charge and the deal with the prosecution. (R. 57:7; P-App. 139). Cooper also complained that his attorney was non-communicative and suspended during a significant portion of his representation. (R. 57:10-13; P-App. 142-145). Hicks also misled Cooper about the nature of the charge and the deal with the prosecution. (R. 57:7; P-App. 139). *See also Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31, ¶¶ 23-28. With these facts, Cooper gave a clear, cogent and understandable reason that met the burden of a "fair and just reason" for his withdrawal of his plea.

In response, the circuit court and court of appeals found nothing in the record to show that disclosure of the license suspension or any of Hicks' other misdeeds mattered to Cooper. (P-App. 106-108.) In doing so, however, the circuit court and court of appeals ignored the fact that this Court had already found that Hicks' misconduct *did* indeed matter to Cooper and *did* indeed interfere with Cooper's ability to understand and participate in his defense. *Hicks*, 2016 WI ¶ 28 (holding that Hicks' conduct prevented Cooper from "adequately understanding and participating in his own defense.") This Court also found that Attorney 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.

Cooper has shown a fair, just and adequate reason for his motion to withdraw his plea.

B. The Circuit Court And Court Of Appeals Were Bound By The Findings And Conclusions Of This Court In Hicks' In Determining Whether Hicks' Misconduct Constituted Ineffective Assistance That This Satisfied Cooper's Burden To Show A Fair And Just Reason For Withdrawal Of His Plea.

As discussed above, Cooper's court appointed counsel was suspended during a portion of the representation, did not communicate with Cooper regarding his defense, and as a result Hicks was prevented from adequately understanding and participating in his own defense. Hicks' misconduct meets the definition of ineffective assistance.

1. 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.

2. Cooper's Counsel Was Ineffective and Prejudiced Cooper.

Cooper was deprived of counsel during the period of time Hicks

represented him, as set forth in *Hicks*, 2016 WI 31, ¶¶ 23-28. Thus, 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*. The court of appeals did not even address the question of whether Hicks' conduct was deficient. Perhaps because it plainly was.

As a result, the only question is whether Cooper was prejudiced by the Hicks' deficiency. Cooper argued he was prejudiced by Hicks' lack of preparation, communication and the fact that Hicks was suspended during his representation of Cooper. (R. 14:1-2; P-App. 104-104). *Id.* But, more importantly, we need not look further for the answer as to whether there was prejudice, because this Court concluded that Cooper was prevented from adequately understanding and participating in his own defense. *Hicks*, 2016 WI ¶ 28.

II. The Circuit Court And Court Of Appeals Erred In Failing To Address The State's Lack Of Showing Of Prejudice.

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. (R. 57:18, 21; P-App. 150, 153). The circuit court admitted that it had no information about the availability of witnesses just that the case had been

pending since 2011. (R. 57:18; P-App. 150). In fact, the circuit court found substantial prejudice without any factual information to basis it on. (R. 57:18, 21; P-App. 150, 153). The State failed to even argue prejudice in the motion hearing on the withdrawal of Cooper's plea. (R. 57:15-16; P-App. 147-148). 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 appears the circuit court and court of appeals believed that the original filing date of the Criminal Complaint would be determinative of whether the State would suffer substantial prejudice. (R. 57:18, 21; P-App. 150, 153). 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; P-App. 165). 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. Because the State failed to meet the shifting burden to show prejudice the trial court and court of appeals erred in failing to address this prong and Cooper must be allowed to withdraw his guilty plea as a result.

CONCLUSION

The circuit court's judgment of conviction of Tyrus Cooper should be overturned because Hicks' misconduct amounted to ineffective assistance of counsel and gave Mr. Cooper 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 further proceedings and a trial on the merits.

Dated this 25th day of February, 2019

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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 4821 words.

Dated this 25th day of February, 2019

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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.

Dated this 25th day of February, 2019

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

I hereby certify that on this 25th day of February, 2019, I personally caused the foregoing Defendants-Appellant-Petitioner's Brief in Support of Petition for Review and Appendix to be delivered via a third party commercial carrier (FedEx/Express) for delivery to the Clerk's office within three calendar days. 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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