STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP375-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRUS LEE COOPER,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION TO WITHDRAW A GUILTY PLEA, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Constitutional Provisions

Statutes

Other Authorities

ISSUES PRESENTED[1]

1. Did the court of appeals properly hold that the circuit court did not erroneously exercise its discretion when it found that Defendant-Appellant-Petitioner Tyrus Lee Cooper did not meet his burden to show a fair and just reason to withdraw his plea?

The circuit court found Cooper's testimony incredible, and it based its decision on the facts of record. The court of appeals looked to the standard of review, recognized that the circuit court's findings were supported by the record, noted that Cooper had not tied any of his claims to any facts, and determined that it could not find that the circuit court erroneously exercised its discretion.

This Court should affirm the circuit court and court of appeals.

2. Could the circuit court, when considering Cooper's motion to withdraw his guilty plea in 2014, be "bound" by findings of fact and conclusions of law this Court would not make until two years later in an uncontested disciplinary case against Cooper's trial counsel?

Neither the circuit court nor the court of appeals were presented with this question. This Court asked the parties to address this question in its order granting review.

---

[1] In contravention of this Court's order granting the petition, Cooper has "raise[d] or argue[d] issues not set forth in the petition"; namely, an ineffective assistance of counsel claim. (Order Granting Petition 1.) *Compare* (Petition for Review 1) *with* (Cooper's Br. 14–16.) Additionally, Cooper conflates several distinct legal questions into one general heading about whether the circuit court "erred" by not allowing him to withdraw his plea. The State has therefore separated and reframed the issues.

This Court should hold that a fact-finding criminal court cannot be bound by attorney discipline findings that have not yet been made. If attorney discipline findings have been made, a fact-finding criminal court must acknowledge that fact and may consider the details of the attorney disciplinary opinion, but is not bound by those findings.

3. Even if this Court's disciplinary findings should factor into an assessment of Cooper's plea withdrawal claim, has he met the necessary showings to require the State to have to demonstrate substantial prejudice?

The court of appeals did not reach the question of the effect, if any, of this Court's attorney discipline decision; it reviewed the circuit court's credibility determination only. It did not address substantial prejudice to the State because it determined Cooper had not shown that the circuit court's credibility finding was clearly erroneous.

This Court should hold that Cooper has failed to show a fair and just reason for plea withdrawal. If this Court holds that Cooper proved that the circuit court's credibility finding was clearly erroneous, it should remand the case to allow the State to present evidence of substantial prejudice.

4. Has Cooper forfeited his claim that Hicks's advice to take the plea amounted to ineffective assistance of counsel?

Cooper never raised this claim in his petition for review to this Court. If this Court reaches ineffective assistance, though, it should affirm the court of appeals' holding that Cooper failed to allege facts that would show that Hicks's advice amounted to ineffective assistance.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case reviewed in this Court, oral argument and publication are appropriate.

INTRODUCTION

As he has done throughout this litigation, Cooper offers only conclusory allegations unconnected to any facts. He also rests his argument on the illogical proposition that the circuit court at his 2014 motion hearing should have been bound by this Court's findings following a 2016 disciplinary hearing against his attorney.

Cooper failed to meet his burden in the circuit court to prove that he was confused and misled about his guilty plea. He failed to meet his burden on appeal to prove that the circuit court's finding that he was not confused or misled was clearly erroneous. And he has failed to explain in this Court how or why his attorney's disciplinary case is relevant to the circuit court's findings, let alone how the circuit court could have been bound by findings that had not yet been made.

This Court should affirm the circuit court and court of appeals.

STATEMENT OF THE CASE

The Circuit Court Proceedings and Cooper's Entry of His Guilty Plea

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 on June 12, 2011, 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 from a tattoo on

Cooper's forearm. (R. 2:1–2.) She stated that Cooper was a friend of her boyfriend and previously had been in her house. (R. 2:1–2.) Cooper was on GPS monitoring at the time, and the GPS printout pinpointed Cooper at L.C.'s house during the crime. (R. 2:1–2.) Cooper admitted to police he was present during the crime, but claimed "he just watched four other guys commit the crime." (R. 2:2.)

On November 19, 2012, after Cooper's trial had been delayed for over one year, Cooper filed a motion with the court requesting that his original attorney withdraw from the case. (R. 12.) The court allowed her to withdraw. (R. 47:3.) On December 19, 2012, the State Public Defender appointed Attorney Michael Hicks as successor counsel. (R. 48:2.) After two status conferences, Cooper's trial was set for October 21, 2013. (*See* R. 48–51.)

On October 8, 2013, Cooper sent the court a *pro se* letter complaining that Hicks had not sent him a copy of the discovery, refused to subpoena a purported alibi witness, and did not meet with him to prepare for trial. (R. 14:1–2.)

The State offered Cooper a plea agreement, whereby Cooper would plead guilty to the charge in exchange for the State recommending a sentence of three years of initial confinement and three years of extended supervision. (R. 15:1–2.)

On October 21, 2013, Cooper accepted the State's plea offer and pled guilty to armed robbery as a party to the crime. (R. 15:1; 52:7.) He submitted a signed and completed plea questionnaire accurately detailing the charge, the maximum sentence, and the State's plea offer. (R. 15:1–2.)

The court[2] explained the charge, the maximum sentence, and each individual element of the offense to Cooper. (R. 52:3–7.) When asked if he understood each of those things, Cooper said that he did. (R. 52:3–7.)

The court then asked,

> Now, to the charge made against you of being a party to armed robbery by use of force, what plea have you entered to that charge made against you in the information?
>
> [COOPER]: Plead guilty.
>
> THE COURT: Are the facts contained in the underlying Criminal Complaint relative to this matter, are those facts true and correct?
>
> [COOPER]: Yes.
>
> THE COURT: Is anyone forcing you or making you enter this plea?
>
> [COOPER]: No.

(R. 52:7.)

The court found that Cooper was entering his plea "freely, knowingly, voluntarily . . . based on [Cooper's] own statements." (R. 52:12.)

The court then asked Cooper about his October 8 letter complaining about Hicks. (R. 52:12–13.) The court asked if Cooper had an opportunity to discuss the letter with Hicks, and Cooper said yes. (R. 52:13.) The court asked Cooper, "[w]hat do you want done as to the letter?" (R. 52:13.) Cooper said, "[d]isposed of." (R. 52:13.) The court asked what he meant, and asked "[d]o you want the Court to take any

---

[2] Judge Dennis Flynn presided over the plea hearing. (R. 52:1.)

action based on it?" (R. 52:13.) Cooper replied, "[n]o actions." (R. 52:13.) The court then asked Hicks if he wanted to address the letter further, and Hicks said, "No. I received the letter and confirmed with Mr. Cooper and we are ready to continue on." (R. 52:13–14.) The court therefore set sentencing for January 9, 2014. (R. 52:14.)

Cooper's Motion to Withdraw His Plea

Two months later, on December 21, 2013, Cooper wrote a *pro se* letter to the court, stating that he wanted to withdraw his guilty plea and requesting new counsel. (R. 16:1.) Cooper said he wanted to withdraw his plea because he learned that Hicks failed to inform him that Hicks's license to practice law was suspended for roughly one month early in his representation of Cooper. (R. 16.) Hicks's license to practice 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 (hereinafter *In re Hicks III*). Cooper further alleged that Hicks misled him by telling him he was "destined to [lose] [his] case" at trial and the plea was in his best interest. (R. 16.) Hicks withdrew on January 9, 2014, and new counsel, Attorney Odalo Ohiku, was appointed. (R. 17.)

Ohiku filed a motion to withdraw Cooper's guilty plea. (R. 19.) As grounds, he claimed that "when he entered his plea on October 21, 2013, the issues raised in his [October 8] letter had not been resolved or rectified," and also pointed to Cooper's unawareness that Hicks's law license "had been suspended (for a portion of time)." (R. 19:1.) These issues, Cooper claimed, "caused him to enter his plea in haste" and that his guilty plea "was not knowingly and voluntarily entered." (R. 19:1.)

On June 27, 2014, the court[3] held a hearing on Cooper's motion to withdraw his guilty plea. (R. 57:1.)[4]

The circuit court informed the parties that it reviewed the entire record and noted that the plea court asked Cooper if he wanted to address the concerns in his October 8 letter, and Cooper said no. (R. 57:3–4.)

In response, defense counsel said he understood; he asserted, "[f]irst of all, 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 [the State] made." (R. 57:4–5.) He said that the only thing Cooper "grapple[d] with" was that he was unaware of Hicks's 27-day license suspension. (R. 57:5.)

Counsel then claimed Cooper "would say that he entered a plea on October 21st because he felt like his attorney wasn't prepared." (R. 57:6.) The Court asked what prevented Cooper from saying "look, judge, I'm not willing to accept any plea negotiations, I want a trial?" (R. 57:7.)

Cooper himself responded, claiming that he thought the charges were being amended to something other than armed robbery. (R. 57:7.) He reiterated that Hicks never told him about the license suspension. (R. 57:8.)

The court reviewed the plea hearing transcript and pointed out that the plea court directly explained that Cooper would plead guilty to armed robbery as a party to a crime, each separate element of that crime, and the

---

[3] Judge M. Joseph Donald presided over the motion hearing.

[4] For clarity, the State will refer to the court that accepted Cooper's guilty plea as the plea court, and the court that presided over his plea withdrawal motion as the circuit court.

maximum penalty. Further, Cooper told the court he understood each of those things. (R. 57:9–13.) The court asked Cooper how he did not know those things when the plea court told him, and why he said he understood, but Cooper had no response. (R. 57:9–11.)

The court denied Cooper's motion. (R. 57:18–21.) It found that the State's offer to recommend three years of initial confinement and three years of extended supervision was "a very reasonable recommendation for armed robbery." (R. 57:19.) The court suspected that Hicks "prevailed upon Mr. Cooper that looking it over it was a good deal, [they] should take it." (R. 57:19.)

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, in terms of the time lapse between not having discussions with him and also not disclosing to him whether or not he was suspended or revoked." (R. 57:19.)

The court said, though, "the issue I find is that when I look at the plea hearing . . . it is clear that Mr. Cooper understood what rights he was giving up, he understood what the maximum penalties were, he understood the negotiations." (R. 57:20.) The court also found that "in fact, he even understood that the court even had a copy of his letter and specifically asked him if there [was] anything [he wanted] done with this letter and his response was no actions." (R. 57:20.)

The court said it believed that Cooper "wanted to take advantage of the State's offer," not that he was rushed or misunderstood the plea, "and that is why he [entered the plea]." (R. 57:20.) Accordingly, the court found that Cooper had not shown a fair and just reason to withdraw his guilty plea. (R. 57:20–21.)

The court also found that given the age of the case, it would have found substantial prejudice to the State. (R. 57:21.)

The court sentenced Cooper to five years of initial confinement and five years of extended supervision on July 17, 2014. (R. 58:1, 28.)

Hicks's Disciplinary Proceedings

Nearly two years after Cooper's plea withdrawal motion—on April 29, 2016—this Court suspended Hicks's license to practice law for one year due to 19 counts of misconduct, stemming from his actions in Cooper's and three other clients' cases. *In re Hicks III*, 368 Wis. 2d 108, ¶¶ 6–49.

In those proceedings, Hicks pled no contest to the misconduct alleged in a complaint filed against him by the Office of Lawyer Regulation (OLR), and "agreed that the referee could use the facts stated in the complaint as a basis to determine violations of the Rules of Professional Conduct for Attorneys." *In re Hicks III*, 368 Wis. 2d 108, ¶ 7. Hicks did not appeal from the referee's report. *Id.* ¶ 2.

Accordingly, "[g]iven Attorney Hicks' no contest plea," this Court accepted "the referee's factual findings as taken from the OLR's complaint," including a statement that by failing to communicate with Cooper and consult with him "regarding trial strategy and preparation," Hicks "prevent[ed] [Cooper] from adequately understanding and participating in his own defense." *In re Hicks III*, 368 Wis. 2d 108, ¶¶ 28, 39.

This Court "agree[d] with the referee that those factual findings [were] sufficient to support a legal conclusion that Attorney Hicks engaged in the professional misconduct set forth" in the referee's report. *In re Hicks III*, 368 Wis. 2d 108, ¶ 39. This Court therefore found, as relevant here, that Hicks's failure to promptly 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. *Id*. ¶¶ 28, 39.

Cooper's Appeal

After numerous delays, on February 23, 2016, Cooper filed a notice of appeal from the circuit court's 2014 denial of his motion to withdraw his guilty plea. After another 15-months' worth of delays, Cooper filed his appellant's brief on May 5, 2017. In the meantime, this Court issued its opinion in *In re Hicks III*. *In re Hicks III*, 368 Wis. 2d 108 (opinion issued April 29, 2016). On appeal, Cooper pointed to *In re Hicks III* as stand-alone evidence that he showed a fair and just reason to withdraw his plea and that he received ineffective assistance of counsel.

The court of appeals affirmed the court's order denying his motion for plea withdrawal. *State v. Cooper*, 2016AP375-CR, 2018 WL 1100986 (Wis. Ct. App. Feb. 27, 2018) (unpublished). It found that the record showed that the circuit court "fully assessed Cooper's claim," and "[a]fter thorough consideration of the record and the evidence presented during the post-plea proceedings, the circuit court disbelieved the reasons that Cooper offered to support his claim[s]." *Cooper*, 2018 WL 1100986, ¶ 19.

The court of appeals noted that "[a]lthough another court might have reached a different conclusion . . . our role is to determine whether discretion was exercised, not whether it might have been exercised differently." *Id.* "Because the circuit court properly exercised [its] discretion in concluding that Cooper failed to offer fair and just reasons for plea withdrawal," the court upheld the circuit court's decision. *Id.* ¶ 19.

The court of appeals also rejected Cooper's claim that *In re Hicks III* proved he received ineffective assistance, because Cooper could not prove prejudice. *Cooper*, 2018 WL 1100986, ¶ 25.

Cooper petitioned for review, which this Court granted on January 3, 2019.

ARGUMENT

I. The Court of Appeals properly found that the circuit court did not erroneously exercise its discretion in denying Cooper's motion to withdraw his guilty plea.

A. Standard of review

"A circuit court's discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard." *State v. Jenkins*, 2007 WI 96, ¶ 30, 303 Wis. 2d 157, 736 N.W.2d 24.

When reviewing a circuit court's decision to deny a motion to withdraw a plea before sentencing, this Court applies "a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact." *Jenkins*, 303 Wis. 2d 157, ¶ 33. This standard "also applies to credibility determinations." *Id.*

"When there are no issues of fact or credibility in play, the question whether the defendant has offered a fair and just reason becomes a question of law" reviewed de novo. *Jenkins*, 303 Wis. 2d 157, ¶ 34. For example, "a defendant's genuine misunderstanding of the consequences of a plea is a fair and just reason to withdraw his plea." *Id.* However, "whether such a misunderstanding actually exists is a question of fact, and the circuit court's determination

depends heavily on whether the court finds the defendant's testimony or other evidence credible and persuasive." *Id.*

In other words, whether a *type* of claim constitutes a fair and just reason to withdraw a plea, if proven, is a question of law reviewed de novo. *Jenkins*, 303 Wis. 2d 157, ¶ 34. Whether the reason given by the defendant actually exists is a question of fact that this Court will not disturb unless the circuit court's findings were clearly erroneous. *Id.* ¶¶ 33–34.

A circuit court's factual findings are clearly erroneous only if they are not supported by the record. *Schreiber v. Physicians Ins. Co. of Wis.*, 223 Wis. 2d 417, 426, 588 N.W.2d 26 (1999).

B. Relevant law

A fair and just reason to withdraw a plea 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 (citation omitted). "Fair and just" has not been precisely defined, but courts have considered 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, to be fair and just reasons to withdraw a plea before sentencing. *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. *Jenkins*, 303 Wis. 2d 157, ¶ 34. However, "[i]f '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.* (citation omitted).

If the defendant proves to the circuit court's satisfaction that he has a fair and just reason to withdraw the plea, "the defendant must rebut evidence of substantial prejudice to the State." *Jenkins*, 303 Wis. 2d 157, ¶ 43.

"If the defendant does not overcome these obstacles in the view of the circuit court . . . the defendant's burden to reverse the circuit court on appeal becomes relatively high." *Jenkins*, 303 Wis. 2d 157, ¶ 44. "This is so because, on appeal, the defendant has two additional and substantial obstacles." *Id.*

"The first obstacle is the applicable standard of review." *Jenkins*, 303 Wis. 2d 157, ¶ 44. "The second obstacle is the extensive plea colloquy required of circuit courts." *Jenkins*, 303 Wis. 2d 157, ¶ 44. "The effect of more elaborate and comprehensive plea colloquies is to ensure that pleas are knowing, intelligent, and voluntary. The corresponding impact, however, is to make it more difficult for defendants to withdraw their pleas." *Jenkins*, 303 Wis. 2d 157, ¶ 60.

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.

But again, even if the defendant provides an explanation, "[i]f '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.'" *Jenkins*, 303 Wis. 2d 157, ¶ 34 (citation omitted).

C. The circuit court did not find Cooper credible in light of the record, and Cooper therefore did not show a fair and just reason to withdraw his guilty plea.

The circuit court's findings are not clearly erroneous given the record, and consequently "there is no fair and just reason to allow withdrawal of [Cooper's] plea." *Jenkins*, 303 Wis. 2d 157, ¶ 34.

Cooper testified that he was "misled by Hicks" into believing that the charges were being amended. (R. 57:7.) He said he "never knew the charges were still set at armed robbery, use of force, party to a crime, and [he] was still facing forty years or anything as such." (R. 57:7.) He also claimed that once he learned that Hicks's license had been suspended and confronted him about it, Hicks "was willing to step down" because "he knew that he was out of order." (R. 57:7–8.)

The circuit court did not find Cooper's testimony credible in light of the record. (R. 57:20.) Furthermore, the circuit court found that Cooper was aware that the plea court was willing to act on his complaints about Hicks set forth in his October 8 letter, but Cooper did not want the court to do so because he was satisfied with the plea agreement. (R. 57:20.) The court found that the real reason Cooper wanted to withdraw his plea was because he became angry with Hicks after he learned about the OLR investigation. (R. 57:19–20.)

The circuit court noted that during the plea colloquy, the plea court thoroughly explained the charge to which Cooper pled, including the maximum potential sentence and each element of the charge. (R. 57:9.) The circuit court asked Cooper, "[h]ow can you say you did not know or how can you say that you expected the charge was being reduced when the court just told you what the charge was?" (R. 57:9.)

Cooper said he thought the court was just reading the original charges, and did not know that he was still facing forty years until after pleading guilty. (R. 57:10.) The circuit court said,

> And I understand you're telling me that you didn't know, but as Judge Flynn is asking you and telling you what it is, you're saying that you do know, understand?
>
> [COOPER]: Yes.
>
> THE COURT: Which one is it? Are you saying that you didn't know what Judge Flynn was talking about, or are you saying you didn't know it and it was only afterward that you thought that somehow it was being reduced to something else?
>
> [COOPER]: (No response.)
>
> THE COURT: Mr. Cooper, do you understand the question?
>
> [COOPER]: Well, before I thought - - [b]efore he even asked me this question, I thought the charges were being amended because my lawyer came back to the bull pen where I was just there and brought me the plea deal and I told him, yeah, I was willing to accept it. So when I came out here and Judge Flynn talked to me and he said, you know, was I willing to accept a plea and the grounds that he didn't' have to go over the plea and this is what I was facing, forty years as party to a crime of armed robbery, then, you know - - I mean, I'm thinking he still reading the charges in as they were, not the plea deal that was set forth.

(R. 57:10–11.)

The circuit court then read through the plea transcript, noting that the plea court had read each individual element to Cooper and asked him if he understood each one. (R. 57:10–13.) Cooper said that he did, to every element. (R. 57:10–13.) Given Cooper's unequivocal

statements, the court found "it hard to believe that somehow [he was] now saying, wait a minute, that wasn't discussed between [Cooper] and Mr. Hicks when, in fact, [Cooper] told the court, yes, I understand it." (R. 57:13.)

Furthermore, Cooper's allegations that he thought he was pleading to an amended charge and that he "never did an armed robbery" (R. 16), were belied by the following exchange:

> THE COURT: Now, to the charge made against you of being a party to armed robbery by use of force, what plea have you entered to that charge made against you in the information?
>
> [COOPER]: Plead guilty.

(R. 52:7.) Cooper also filled out, signed, and filed a plea questionnaire that detailed the charge, the maximum sentence, and the State's recommendation. (R. 15.)

The record thus supports the circuit court's finding that Cooper understood the maximum sentence and charge to which he pled guilty.

The record also supports the circuit court's determination that Cooper only wished to withdraw his plea based on belated frustration with Hicks, which had nothing to do with Cooper's entry of his plea. The circuit court asked Attorney Ohiku if he had anything to add after Cooper's testimony, and he pointed to Cooper's October 8 letter, reminding the court that "two weeks prior to his entering his plea . . . [Cooper] contacted the court, letting the court know he hadn't received all of the information from Attorney Hicks." (R. 57:14.)

But at the outset of the motion hearing, the circuit court discussed the fact that the plea court asked Cooper about his October 8 letter. (R. 57:3–4.) The plea court asked Cooper if he discussed the letter with Hicks, and Cooper said

yes. (R. 57:3.) The circuit court noted that the plea court then asked Cooper, "what do you want done as to the letter, and the defendant responds disposed of. . . . and then the court says do you want the court to take any action based on it, and the defendant's response is no actions." (R. 57:3–4.)

The circuit court therefore said it did not believe Cooper's assertion that the complaints he raised in his October 8 letter had any bearing on his entry of his plea. (R. 57:20.) Rather, the court found that, "after Mr. Cooper had some time to think about it he was a little frustrated and upset with his attorney, Mr. Hicks," but at the plea hearing, Cooper "understood that the court even had a copy of his letter and specifically asked him if there [was] anything [he] want[ed] done with this letter and his response was no actions." (R. 57:19–20.)

And, in fact, the circuit court's assessment is further supported by Cooper's own claims at the motion hearing. After the circuit court asked why Cooper's October 8 letter should have any weight when Cooper told the plea court he wanted no action taken on it, defense counsel told the court:

> I will get right to the point. As I understand it, Mr. Cooper --
>
> First of all, 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 [the State] made. He really doesn't grapple with that. What 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.) In short, Cooper admitted that he did not actually have concerns about the plea or the advice he received. (R. 57:4–5.) He was simply angry with Hicks for failing to tell him about Hicks's license suspension. (R. 57:4–5.)

Cooper discusses none of the circuit court's factual findings about his comprehension of his guilty plea. (*See* Cooper's Br. 12–18.) 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," or explain why the circuit court had to do so. *Jenkins*, 303 Wis. 2d 157, ¶ 62; (Cooper's Br. 10–18.) Apart from noting that counsel has been disciplined and repeating his nebulous claims that he was "misled him about the nature of the charge and the deal with the prosecution," Cooper's entire argument consists of bolding a single line of text from *Shimek* recognizing that misleading advice from counsel may be a fair and just reason, and proclaiming "[t]his is what we have here." (Cooper's Br. 12–13.)

Cooper neither points to anything in the record before the circuit court that would show that the circuit court's finding—that he was not confused—was clearly erroneous, nor provides any material facts that would support his arguments. *See State v. Allen*, 2004 WI 106, ¶¶ 21–24, 274 Wis. 2d 568, 682 N.W.2d 433. He does not explain how or why he was confused after filling out the plea questionnaire, or after the plea court explained the charge and maximum penalty to him, or why he told the plea court that he understood, or why the circuit court should have nevertheless found his motion hearing testimony credible. (*See* Cooper's Br. 12–13.) Nor does he explain why Hicks's one-month suspension that occurred seven months before the plea would have caused him to be confused. (Cooper's Br. 12–16.)

The circuit court's findings—that Cooper only wished to withdraw his plea because of his belated anger with his attorney's failure to disclose his suspension—are supported

by the record. They therefore cannot be clearly erroneous. *Schreiber*, 223 Wis. 2d at 426.

D. Cooper's belated frustration is not a fair and just reason to withdraw his guilty plea.

The circuit court correctly held that Cooper's being upset with his former attorney alone is not a fair and just reason to withdraw Cooper's fully-understood and admittedly-satisfactory plea, especially given his stated desire to reenter the same plea. (R. 57:4–5.)

All of the "fair and just" reasons this Court recognizes require the defendant to show, at the very least, that he might have opted for a trial had the plea process occurred differently. *See Shimek*, 230 Wis. 2d at 739 (fair and just reasons include *genuine misunderstanding* of the plea's consequences, haste *and confusion* in entering the plea, *coercion*, and *confusion resulting from* misleading advice from counsel). This is required because "[t]he purpose of permitting plea withdrawals before sentencing under this liberal standard is to facilitate the efficient administration of justice by reducing the number of appeals contesting the knowing and voluntariness of a plea; it also ensures that a defendant is not denied a trial by jury unless he clearly waives it." *Id*.

Allowing a defendant to withdraw his plea and attempt to reenter the same plea for the sole purpose of doing so with a different attorney thwarts, rather than facilitates, "the efficient administration of justice," and is not necessary to preserve the defendant's right to a jury trial. *Shimek*, 230 Wis. 2d at 739.

Cooper did not even have a "change of heart." *Jenkins*, 303 Wis. 2d 157, ¶ 31. He has not claimed that he wants a trial. (R. 57:4–5.) He admitted he would seek to enter another plea if allowed to withdraw this one. (R. 57:4–5.) He

admitted he is happy with the recommendation he received from the State. (R. 57:4–5.) His sentence, five years of initial confinement and five years of extended supervision, is lenient for armed robbery.

Instead, he only claimed he would have wanted a different attorney had he learned of Hicks's suspension. (R. 57:4–5.) But Cooper simply wishing a different attorney negotiated the same plea agreement is not a fair and just reason to withdraw it. *Cf. Shimek*, 230 Wis. 2d at 741.

In sum, the record shows that the circuit court "reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts." *State v. Kivioja*, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1991). Though another court could have reached a different decision, the circuit court's findings are supported by the record, and therefore cannot be clearly erroneous. *State v. Canedy*, 161 Wis. 2d 565, 585–86, 469 N.W.2d 163 (1991). The circuit court did not erroneously exercise its discretion. Consequently, this Court must affirm the circuit court's decision. *Kivioja*, 225 Wis. 2d at 284.

II. The circuit court was not bound at the 2014 plea withdrawal hearing by this Court's subsequent 2016 findings in *In Re Hicks III*, and the court of appeals was bound to review the circuit court's 2014 decision for an erroneous exercise of discretion.

Cooper claims that in applying the fair and just reason 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 *In re Hicks III*. (Cooper's Br. 10–11.) To support this claim, he argues that lower courts cannot disregard statements of this Court as dictum. (Cooper's Br. 11.) He further claims that "both the trial court and the court of appeals erred and abused their

discretion in fail[ing] to properly consider and adopt the factual findings and legal conclusions of this Court" in *In re Hicks III*. (Cooper's Br. 11.)

He is wrong on all accounts, for multiple reasons.

A. The circuit court could not be bound by findings that had not been made.

No "prior factual findings and legal conclusions" existed for the circuit court to take into account at the motion hearing. The circuit court held the hearing on Cooper's plea withdrawal motion on June 27, 2014. (R. 57:1.) This Court's opinion in *In re Hicks III* was filed on April 29, 2016—nearly two years after the motion hearing. (R. 57:1.)

Cooper fails to explain how the circuit court could have been "bound by" findings that had not occurred. (Cooper's Br. 10–12.) The circuit court granted a hearing on Cooper's motion, made factual findings based on the record before it, applied the correct law, and, in its discretion, denied Cooper's motion because it did not believe his assertions. That is exactly what the circuit court was required to do. *Jenkins*, 303 Wis. 2d 157, ¶ 30.

B. The referee in *In re Hicks III* and the circuit court at Cooper's plea withdrawal hearing were finding different facts; therefore, there is no conflict between their findings.

The referee in *In re Hicks III*—as any referee does in any OLR proceeding—made factual findings about *what Hicks did*, and it based those findings on OLR's complaint. *In re Hicks III*, 368 Wis. 2d 108, ¶¶ 1–2. Because Hicks pled no contest to the complaint, there was no hearing. *Id.*

Nothing in this Court's opinion in *In re Hicks III* indicates why or how the referee reached the conclusion that

Cooper was "prevent[ed] . . . from adequately understanding" his own defense. *In re Hicks III*, 368 Wis. 2d 108, ¶ 28. What Cooper understood was not at issue in *In re Hicks III*, and determining whether Cooper adequately understood his case was not necessary to support the referee's conclusion that Hicks's conduct violated SCR 20.1.4(a)(2).

Cooper never testified in the OLR proceeding. *In re Hicks III*, 368 Wis. 2d 108, ¶ 28. And even if he had, the proceeding would have been directed toward determining whether Hicks communicated with Cooper and provided him with documents, not what Cooper knew when he entered his plea or the credibility of his reason for wanting to withdraw it.

The circuit court, though, actually made factual findings about *what Cooper knew about his charge at the time he pled guilty and the plea itself*. It did so based on live testimony from Cooper and the whole criminal record up to that point. Therefore it, unlike the referee, had the opportunity to make observations about Cooper "that are critical to the resolution of the factual issue presented" in Cooper's criminal case, such as Cooper's demeanor and "the nuances in the attorney's questions and [Cooper's] answers." *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989).

And the circuit court specifically recognized that it had been presented with no evidence to determine what Hicks did or did not do, and accordingly it made no findings on that issue. (R. 57:20.) In short, the referee in *In re Hicks III* and the circuit court at Cooper's plea withdrawal hearing were making findings on fundamentally different facts: the referee was finding facts about what Hicks did during his representation of Cooper, whereas the circuit court was finding facts about what Cooper understood at the time he pled guilty and why he wanted to withdraw his plea. The

circuit court's fact findings depended on the credibility of Cooper's testimony.

For this reason, this Court has made clear that "[w]here there is conflict in a witness' testimony it is the province of the trier of fact . . . to determine the weight and credibility to be given [the witness's] testimony." *Owens*, 148 Wis. 2d at 930. The OLR referee was not the factfinder in the criminal case; it was tasked with finding facts about Attorney Hicks's conduct, not with what Cooper understood about his plea. It did not have the opportunity to assess Cooper's credibility about his reasons to withdraw his plea. Because "[o]nly the trial court was exposed to those nuances . . . only the trial court was in a position to resolve the factual issues presented" by Cooper's plea withdrawal motion. *Id.*

It would make no sense to hold that this Court's adoption of the referee's report in *In Re Hicks III* trumps the credibility findings of the circuit court for purposes of Cooper's plea withdrawal motion simply because the referee wrote Cooper's untested and nonspecific allegation that he was "prevented" from "understanding" his case into its report. The circuit court, not this Court or the referee, had Cooper's live testimony and the entire criminal record in front of it.

No matter what the referee found in the OLR proceeding, this Court should defer to the circuit court's findings to assess the lower court's rejection of Cooper's plea withdrawal motion, because the circuit court was the only factfinder tasked with making findings about what *Cooper knew and believed*, and the only factfinder in the position to assess Cooper's credibility. Moreover, it was the only factfinder in the position to assess how Cooper's knowledge and beliefs related to his decision to enter his plea, and his motivations to seek to withdraw it.

C. There is no legal doctrine that would permit OLR proceedings to preclude fact-finding in a criminal case.

Cooper's claim that the court of appeals was bound by this Court's OLR determinations because the court of appeals "may not dismiss a statement of this Court as dictum"—is misplaced. (Cooper's Br. 11.)

First, the "dictum" doctrine concerns this Court's declarations on what the law is, not what the facts were. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 41–45, 50–59, 324 Wis. 2d 325, 782 N.W.2d 682. Indeed, this principle developed because it is this Court's purpose alone "to oversee and implement the statewide development of the law . . . that is, determining on common-law principles what the law should be in view of the statutory and decisional law of the state." *State v. Schumacher*, 144 Wis. 2d 388, 405, 424 N.W.2d 672 (1988).

Therefore, the rule that the court of appeals cannot overrule or modify this Court's opinions, or disregard statements of this Court as dictum, is required to ensure that the four branches of the court of appeals "speak with a unified voice" and apply the law the same way across the state. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997); *Zarder*, 324 Wis. 2d 325, ¶¶ 50–59. But only prior discussions of the law are precedential; a reviewing court's summarization of the facts does not set "precedent." There are other doctrines that may preclude a party from contesting a fact in a given case, but this rule is not one of them.

The doctrines which may prevent a fact at issue from being litigated are the doctrines of claim preclusion and issue preclusion (formerly known as *res judicata* and

collateral estoppel, respectively[5]). Those doctrines, however, do not apply here.

"The doctrine of [claim preclusion] states that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983). Claim preclusion operates even if the plaintiff "is prepared in the second action: (1) to present evidence or grounds or theories of the case not presented in the first action; or (2) to seek remedies or forms of relief not demanded in the first action." *Id.* at 312.

Cooper's plea withdrawal hearing was not a subsequent action to *In re Hicks III*. Regardless, claim preclusion would not apply. Under claim preclusion, "in order for the first action to bar the current action, there must be an identity of parties and an identity of causes of actions or claims in the two cases." *DePratt*, 113 Wis. 2d at 311. Neither of those conditions are met here. Neither the State nor Cooper was a party to the OLR proceeding. OLR was the "complainant" in that proceeding; Cooper was merely a "grievant." SCR 22.001(6); SCR 22.11(4). And Cooper's claim that he did not understand the charge to which he pled is not identical to OLR's claim that Hicks violated the rules of professional conduct.

"Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." *Northern States Power Co. v. Bugher*, 189

---

[5] *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

Wis. 2d 541, 550, 525 N.W.2d 723 (1995). "Unlike claim preclusion, an identity of parties is not required in issue preclusion." *Id.* at 550–51.

Issue preclusion could not apply here, either. Though issue preclusion does not require identity of parties, it does require one of the parties in the subsequent action to have been a party to the previous action. *See Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation*, 402 U.S. 313, 320–30 (1971); *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 688–69, 495 N.W.2d 327 (1993). As explained, neither the State nor Cooper were a party to the OLR proceeding. And again, Cooper's plea withdrawal hearing was not subsequent to *In re Hicks III*. The referee's findings could not "preclude" the circuit court from finding anything.[6]

---

[6] Though not necessary to decide the issue here, as neither the State nor Cooper were a party to the OLR proceeding and the circuit court's motion findings preceded the OLR determinations, if at issue, the State would argue that for the reasons set forth in *Standefer v. United States*, 447 U.S. 10 (1999), nonmutual issue preclusion may never apply against the State in a criminal case. *Id*. at 21–26.

The Supreme Court of the United States and the Wisconsin Court of Appeals have recognized that the government's position as a litigant is significantly different from that of a private litigant. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984); *Gould v. Dep't of Health and Social Servs.*, 216 Wis. 2d 356, 367–68, 576 N.W.2d 292 (Ct. App. 1998). Because of these profound differences, both courts have held that the policy bases that generally support application of issue preclusion do not apply to the government. The Supreme Court has held that nonmutual issue preclusion may never apply against the government in criminal cases. *Standefer*, 447 U.S. at 23–25.

D. Cooper's claim that the court of appeals should have been bound by *In re Hicks III* ignores the standard of review.

"[T]he applicable standard of review" of a circuit court's denial of a motion to withdraw a plea before sentencing "requires the reviewing court to affirm the circuit court's decision unless it is clearly erroneous." *Jenkins*, 303 Wis. 2d 157, ¶ 44. This requires the reviewing court to uphold "the circuit court's factual and credibility determinations if there is support for them in the record." *Id.* ¶ 46.

Cooper's appeal challenged the circuit court's findings, not the referee's findings in *In re Hicks III*. Therefore, the court of appeals was required to review the circuit court's finding to determine whether it was clearly erroneous. In other words, the *only* thing the court of appeals could do in this case was determine whether the record supported the circuit court's factual findings. If so, it was bound to uphold the circuit court's decision. *Jenkins*, 303 Wis. 2d 157, ¶ 6.

The court of appeals could not jettison the standard of review, nor remand with the requirement that the circuit court now believe Cooper's testimony, simply because this Court sanctioned Hicks.

Additionally, *In re Hicks III* and Cooper's criminal case were two separate proceedings being reviewed by two different appellate courts—and in *both proceedings*, the reviewing courts were required to uphold the findings of those respective factfinders unless their findings were clearly erroneous. *See In re Hicks III*, 368 Wis. 2d 108, ¶ 38; SCR 22.17(3); *Jenkins*, 303 Wis. 2d 157, ¶ 44. Thus, even if the OLR referee and the circuit court had made opposing findings on the same fact—though, as explained, they did not—that would not necessarily mean that either finding

was clearly erroneous, provided there was some support in the record for each factfinder's finding.

And this Court, like the court of appeals, has only appellate jurisdiction in criminal cases like this one. Wis. Const. art. VI § 3(2). Fact-finding, and particularly ascribing the "weight and credibility to be given to testimony," are "uniquely within the province of the trial court." *Noble v. Noble*, 2005 WI App 227, ¶¶ 15–16, 287 Wis. 2d 699, 706 N.W.2d 166.

Accordingly, in criminal cases, "[w]hen reviewing fact finding, appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court could have reached but did not." *Noble*, 287 Wis. 2d 699, ¶ 15.

This Court has stated in no uncertain terms that whether a defendant actually misunderstood his plea is a matter for the circuit court that heard the defendant's testimony. *Canedy*, 161 Wis. 2d at 586. In *Canedy*, like here, the circuit court did not believe that the defendant misunderstood the consequences of his plea. *Id.* at 585. And "[w]hile [this Court] recognize[d] that another judge or another court may not have reached the same conclusion," this Court explained that "it is not [its] function to take on the role of the trier of fact." *Id.* at 586.

Allowing this Court's adoption of the referee's facts in a separate OLR proceeding two years later to trump the circuit court's findings of fact that were based on the record in the criminal case would usurp the well-established function of the circuit court as trier of fact in criminal cases.

E. Where relevant and in existence at the time of a criminal motion hearing, a circuit court should consider this Court's OLR findings, but it should not be bound by them.

This all is not to say, though, that a circuit court must ignore this Court's imposition of discipline on an attorney for his actions in a defendant's criminal case. In the appropriate case, the fact that this Court sanctioned an attorney for his conduct may be highly persuasive to the circuit court when considering the defendant's claims. But as explained, the referee in an OLR case finds different facts than a circuit court in a criminal matter. The referee's facts might help inform the circuit court's analysis of a claim in a criminal case, but the referee's findings in a wholly separate action geared toward answering a different question should not preclude the circuit court from making the necessary findings to answer the questions before it.

This Court should therefore hold that facts contained in OLR opinions do not require the circuit courts to accept a defendant's assertions in a criminal case, apart from requiring the court to acknowledge that an attorney was disciplined.

III. Even if this Court concludes that its OLR findings should factor into an assessment of Cooper's plea withdrawal claim, his claim still fails.

A. Cooper has failed to show that the OLR findings would undermine the circuit court's fact-findings in denying his motion.

In order to meet his burden on appeal to show that he is entitled to plea withdrawal, Cooper must show that the

circuit court's findings are not supported by the record. *Schreiber,* 223 Wis. 2d at 426.

As explained, the circuit court in 2014 did not "ignore" this Court's opinion in *In re Hicks III*, as Cooper claims. (Cooper's Br. 13.) *In re Hicks III* did not even exist at the time of the plea withdrawal motion hearing and would not exist for another two years. Cooper has made no attempt to show that the circuit court's findings were not supported by the record *that the circuit court actually had before it*, and therefore he has failed to meet his burden. But even if this Court considers the record from the OLR proceedings, Cooper has still failed to meet his burden.

Cooper has never attempted to explain how or why the 2016 *In Re Hicks III* decision factors into the analysis of the circuit court's 2014 decision concerning the believability of his alleged misunderstanding of the plea agreement. In his brief, Cooper generally claims that because the OLR proceedings held that Hicks's failures prevented Cooper from "adequately understanding and participating in his own defense," that must in turn make credible his plea withdrawal claim that Hicks misled him about specific terms of the plea agreement. (Cooper's Br. 13 (quoting *In Re Hicks III*, 368 Wis. 2d 108, ¶ 28).) However, he has never supplied any material, factual link between this Court's disciplinary opinion that would explain why the disciplinary opinion *must* mean the circuit court's credibility finding was clearly erroneous, despite the abundance of evidence in the criminal record supporting the circuit court's findings.

But, as explained, *see* Section II.B., *supra*, the referee's uncontested findings in *In re Hicks III* do not address what Cooper misunderstood or why. Further, they were made: (1) two years after the circuit court's findings at the motion hearing; (2) pursuant to a stipulation from Hicks; (3) on a cold paper record with no testimony from Cooper; and (4)

based entirely on the grievance Cooper himself must have filed with OLR. *In re Hicks III*, 368 Wis. 2d 108, ¶¶ 1–2, 38–39.

What Cooper knew or understood about his plea was never tested in the OLR proceeding—and never would have been tested in the OLR proceeding—because the OLR proceeding was designed to determine what Hicks did, not the validity of Cooper's plea withdrawal motion. The referee's findings say nothing about whether Cooper adequately understood the charge to which he pled.

Cooper essentially argues that because this Court subsequently accepted Hicks's no contest plea to the charge that he "was non-communicative and suspended" for part of Cooper's representation, that post-hoc determination retroactively proves that the circuit court was required to take Cooper's previous plea withdrawal claim at face value in its entirety.[7] (*See* Cooper's Br. 13.)

---

[7] Cooper's claim that Hicks was suspended for a "significant portion of [Cooper's] representation" is false, as is his allegation that "[t]his Court . . . found that Attorney Hicks' representation of Cooper . . . was so deficient that it warranted suspending the attorney's license for three years." (Cooper's Br. 13.)

First, Hicks represented Cooper for 396 days, from December 9, 2012, to January 9, 2014. (R. 48:2; 17.) Hicks's license was suspended for 27 days, from February 12, 2013, to March 11, 2013, during that time. *In re Disciplinary Proceedings Against Hicks*, 2016 WI 31, ¶ 9, 368 Wis. 2d 108, 877 N.W.2d 848. No events in Cooper's case occurred during or even close to that period other than an April status conference. (R. 49:3–4; 50:4–5; 51:2.) Under no conceivable construction of "significant" could Hicks's suspension for 27 irrelevant days out of 396, long before any scheduled event in Cooper's case, be considered a "significant portion of [the] representation." (Cooper's Br. 13.)

But Cooper simply claiming that he was misled and confused does not make it true. Nor does this Court's finding that Hicks's failure to adequately communicate with Cooper violated the rules of professional conduct make true that Hicks misled Cooper as to the terms of his plea agreement.

Neither Cooper's bald allegation nor this Court's finding in *In re Hicks III* supply any *facts* that would explain how Cooper was misled or what he misunderstood about the plea. Cooper's motion hearing was his opportunity to prove that he did not understand the particular things he claimed he did not understand, and he failed to meet his burden; the uncontested facts about what Hicks did to warrant discipline do not supply the missing facts about what Cooper understood.

And based on the record before it, the circuit court did not believe Cooper was either misled or confused about his particular asserted complaints when he entered his plea. The fair and just standard is lenient, but the circuit court is not required to accept a defendant's incredible statements, regardless of the leniency of the standard. *Canedy*, 161

Second, this Court did not suspend Hicks's license for three years solely because of Hicks's representation of Cooper. (Cooper's Br. 13.) Four clients filed grievances against Hicks in *In Re Hicks III*, resulting in 19 counts of misconduct. *In Re Hicks III*, 368 Wis. 2d 108, ¶¶ 10–31. Cooper's claim resulted in only 5 of out of 19 counts of misconduct.

And for that misconduct in all four clients' cases, this Court imposed a *one*-year suspension of Hicks's license. *In re Hicks III*, 368 Wis. 2d 108, ¶ 49. However, in a previous proceeding, this Court already suspended Hicks's license for two years. *Id.* ¶ 44. This Court ordered the one-year suspension to run consecutively to the two-year suspension Hicks previously received in *In re Hicks II*. *Id*. ¶ 49.

Wis. 2d at 585–86; *cf. State v. Taylor*, 2013 WI 34, ¶¶ 82–83, 347 Wis. 2d 30, 829 N.W.2d 482 (Prosser, J., concurring).

The only proper question here, then, is whether the circuit court's finding—that Cooper's real reason for seeking plea withdrawal was his belated anger with Hicks—is clearly erroneous based on the *criminal case record* in 2014. And because the circuit court's determination that Cooper's claim was unconvincing and that Cooper was merely angry with Hicks is supported by the plea questionnaire form, the plea hearing transcript, the motion hearing testimony, and the court's credibility determination, its finding was not clearly erroneous.

B. Should this Court conclude he has shown a fair and just reason, this Court should remand for a determination of whether the State would suffer substantial prejudice.

This Court need not address Cooper's claim that the court erred in finding substantial prejudice to the State. (*See* Cooper's Br. 10–11.) Cooper has not made the threshold showing that the circuit court's finding that he did not have a fair and just reason to withdraw his plea was clearly erroneous.

Should this Court disagree, the State does not dispute that the circuit court did not have enough evidence before it to make that finding. *State v. Nelson*, 2005 WI App 113, ¶¶ 17–22, 282 Wis. 2d 502, 701 N.W.2d 32. The circuit court did not give the State the opportunity to prove substantial prejudice because it was unnecessary. (R. 57:17–22.)

That, however, does not mean that Cooper "must be allowed to withdraw his guilty plea as a result," as Cooper claims. (Cooper's Br. 17.) The appropriate remedy would be to remand this case to the circuit court to give the State the

opportunity to provide evidence showing substantial prejudice.

IV. Cooper forfeited his ineffective assistance of counsel claim by failing to include it in his petition for review, but even so, he cannot show that he received ineffective assistance of counsel.

A. Cooper did not raise this claim in his petition for review, and his raising it now violates Wis. Stat. § (Rule) 809.62(6).

"[T]he parties cannot raise or argue issues not set forth in the petition [for review] unless ordered otherwise by the supreme court." Wis. Stat. § (Rule) 809.62(6); *State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991) ("the issues before the court are the issues presented in the petition for review"). This Court has repeatedly stated that if an issue is not included in a petition for review, response, or cross-petition, "the issue is not before" it. *Betchkal v. Willis*, 127 Wis. 2d 177, 183 n.4, 378 N.W.2d 684 (1985); *See, e.g., Weber*, 164 Wis. 2d at 791 n.3 (Abrahamson, J., dissenting on denial of motion for reconsideration) (collecting cases).

Cooper's petition for review raised two issues: (1) whether disciplinary proceedings against a defendant's attorney are, by themselves, enough to meet the "fair and just reason" standard for pre-sentencing plea withdrawal; and (2) whether the circuit court improperly found that the State would have been substantially prejudiced if it allowed Cooper to withdraw his plea. (Petition for Review 7–9.)

Cooper's petition did not raise an ineffective assistance of counsel claim. This Court did not order that the parties address ineffective assistance of counsel. (Order Granting Petition.) And yet, Cooper devotes a substantial portion of

his argument to whether Hicks rendered ineffective assistance. (Cooper's Br. 9–10, 14–16.)

This Court has refused to address ineffective assistance of counsel claims omitted from petitions for review but nevertheless briefed by the petitioner, like Cooper's claim. *See, e.g.*, *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659; *State v. Smith*, 2016 WI 23, ¶¶ 40–41, 367 Wis. 2d 483, 878 N.W.2d 135.

Cooper forfeited this claim by failing to include it in his petition for review. Accordingly, this Court should decline to address it. However, Cooper could not prevail on such a claim in any event.

B. Cooper could not prevail even if an ineffective assistance claim were properly before this court.

Simply because Hicks was sanctioned for misconduct does not mean Cooper automatically received ineffective assistance of counsel. Cooper has failed to connect any of the sanctioned conduct to Hicks's advice about the case and why Cooper should plead guilty. He has therefore failed to plead any facts that, if true, show that Hicks performed deficiently when advising Cooper about the plea.[8] Further, Cooper

[8] The circuit court did not hold a *Machner* hearing in this case because Cooper's plea withdrawal motion neither claimed ineffective assistance, nor requested a *Machner* hearing. (R. 19.) Hicks, therefore, never had the opportunity to explain his rationale for advising Cooper to accept the plea agreement. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). All of the facts the State references about that rationale come solely from Cooper's *pro se* letter to the court requesting new counsel. (R. 16.)

cannot possibly show prejudice when he admitted at the motion hearing that he is happy with his guilty plea and would enter another one, if offered.

1. Standard of review

Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id.* "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id.*

2. Relevant law

A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The defendant has the burden of proof on both components" of the *Strickland*

The court of appeals addressed ineffective assistance because Cooper's *pro se* letter to the court asking for new counsel stated that Cooper believed Hicks had rendered constitutionally ineffective assistance; the State questioned whether the issue was properly preserved for review. *State v. Cooper*, 2016AP375-CR, 2018 WL 1100986, ¶ 20 n.4 (Wis. Ct. App. Feb. 27, 2018) (unpublished). The court of appeals determined that Cooper failed to plead adequate facts that would establish ineffective assistance. *Id.* ¶¶ 21–25.

Should this Court address this question and determine that Cooper pled adequate facts that could establish ineffective assistance of counsel, the only remedy available to Cooper would be to remand for a *Machner* hearing. *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89.

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.

To prove prejudice, 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." *Strickland*, 466 U.S. at 694. "It 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).

In the context of a motion to withdraw a plea based on ineffective assistance of counsel, to show prejudice, Cooper must "allege facts to show 'that there is a reasonable probability that, but for [Hicks's] errors, [Cooper] would not have pleaded guilty and would have insisted on going to trial.'" *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

3. Cooper fails to establish deficient performance.

Cooper has failed to connect any facts about the misconduct for which Hicks was sanctioned or Hicks's 27-day license suspension to Hicks's *advice about the plea*. (Cooper's Br. 16.) Cooper makes only the circular claim that he was "deprived of counsel during the period of time Hicks represented him, as set forth in [*In re Hicks III*]. Thus, Cooper satisfies the first prong of *Strickland*, and met his burden by showing that Hicks' performance was deficient." (Cooper's Br. 15–16.)

That is the definition of a conclusory allegation. *Allen*, 274 Wis. 2d 568, ¶ 21. Cooper points to no facts to support any portion of that assertion other than making a broad reference to Hicks's license suspension and *In re Hicks III*. (Cooper's Br. 16.) He again ignores that Hicks's license was suspended for a tiny fraction of his representation months before Cooper entered his plea, fails to explain how or why the suspension had any bearing on Cooper's entry of his plea, and ignores that Cooper told the plea court he did not want to take action on his October 8 letter complaints—the same complaints addressed in *In re Hicks III*—at the plea hearing.

Nor does Cooper attempt to explain what could possibly be deficient about advising Cooper to accept a plea agreement where the State offered to recommend less than one-fifth of the potential maximum sentence despite overwhelming evidence of Cooper's guilt. The victim definitively identified Cooper's tattoo and said he hit her in the face with the gun. (R. 2:1–2.) Cooper's GPS monitoring device showed he was at the victim's house when it occurred. (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." (R. 2:2.) The State agreed to recommend 6 years of imprisonment when Cooper faced 40 years. 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's assessment that Cooper was "destined to [lose]" at trial, (*see* R. 16), and any advice that the plea was in his best interest would not have been deficient; this advice would be well within the bounds of objectively reasonable professional assistance.

4. Cooper has not even argued that he would have insisted on going to trial but for Hicks's conduct.

In order to show ineffective assistance, a defendant must prove both prongs of *Strickland*. Cooper cannot show prejudice. (*See* Cooper's Br. 16–17.)

Cooper had to "allege facts to show 'that there is a reasonable probability that, but for [Hicks's] errors, [Cooper] would not have pleaded guilty and *would have insisted on going to trial*.'" *Bentley*, 201 Wis. 2d at 312 (citation omitted) (emphasis added). Cooper has never alleged that had he known that Hicks's license was temporarily suspended, or had Hicks communicated with him more effectively, he would have insisted on going to trial.

Indeed, Cooper admitted at the motion hearing that he was satisfied with the plea agreement and might still enter a plea if the court allowed him to withdraw this one. (R. 57:5.) Cooper's averment that he would like to reenter the same plea defeats any claim of prejudice. (R. 57:4–5); *Bentley*, 201 Wis. 2d at 312.

Cooper again relies solely on this Court's adoption of the referee's statement in *In re Hicks III*—that he was "prevented from adequately understanding and participating in his own defense"—to claim this Court already found prejudice. (Cooper's Br. 16 (quoting *In re Hicks III*, 368 Wis. 2d 108, ¶ 28).)

Even if this Court could properly determine *Strickland* prejudice from a wholly separate proceeding without considering the record in the criminal case, and where no *Machner* hearing had yet occurred, the statement Cooper relies on from *In re Hicks III* fails to meet Cooper's burden. Like his deficient performance claim, Cooper's prejudice claim is the kind of conclusory statement this Court has

repeatedly found insufficient to warrant relief. It neither contains material facts nor connects Hicks's misconduct to anything Cooper subsequently did. *Allen*, 274 Wis. 2d 568, ¶ 23.

"[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'" to prove prejudice under *Strickland*. *Domke*, 337 Wis. 2d 268, ¶ 54 (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 implied claim that Hicks's conduct may have had some conceivable effect on the proceedings, or even on his decision to plead guilty, does not show a substantial likelihood that but for Hicks's conduct Cooper would have insisted on going to trial.

CONCLUSION

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, the record shows that the circuit court properly exercised its discretion when it denied Cooper's motion to withdraw his plea. This Court should affirm the decision of the circuit court and court of appeals.

Dated this 19th day of March, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

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 with a proportional serif font. The length of this brief is 10,913 words.

Dated this 19th day of March, 2019.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 19th day of March, 2019.

_____
LISA E.F. KUMFER
Assistant Attorney General