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 REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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

Submitted by:

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I. The Trial Court and Court of Appeals Erred In Refusing To Find That Cooper's Pre-Sentencing Motion To Withdraw His Plea Met The Fair And Just Reason Standard.

A. Applicable Legal Standards and Standard of Review.

The State attempts to reframe the issues in order to avoid the impact this Court's rulings in *Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31 (2016).[1] The State argues that Cooper's claim that the trial court and court of appeals should be bound by *In re Hicks III* ignores the applicable standard of review (Resp. Br. at 27), which the State asserts is an abuse of discretion standard. (Id. at 11, 27.) The State wants to treat the question of whether the trial court and court of appeals erred in refusing to accept Cooper's pre-sentencing motion to withdraw his plea as distinct and unrelated to the issue of whether his attorney Hicks' misconduct had any impact and/or constituted ineffective assistance of counsel. (Resp. Br. at 34.) In fact, the State rather incredibly asserts that Cooper failed to raise the ineffective assistance issue in his Petition for Review and should, therefore, be barred from even addressing it. (*Id.*) The State misconstrues both the issues presented and the applicable standards of review.

Cooper acknowledged in his opening brief, that whether the trial court erred in not allowing Cooper to withdraw his guilty plea prior to sentencing is subject to review under an erroneous exercise of discretion standard. (Cooper's Br. at 9,

[1] The State refers to *Office of Lawyer Regulation v. Hicks (In re Hicks)*, 2016 WI 31 (2016) as *In re Hicks III*. (Resp. Br. At 6.) For this purpose of clarity, Cooper adopts this reference hereinafter.

citing *State v. Kivioja*, 225 Wis. 2d 271, 284 (1999)). Cooper further acknowledged that under the erroneous exercise of discretion standard, 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." *Id.* (citing *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)). To the extent that Cooper points to his attorney's misconduct as a reason for his plea withdrawal this constitutes a "fair and just reason," even if this Court were to find that it does not rise to the level of ineffective assistance of counsel (which Cooper asserts it does).

But, this does not end the inquiry as to the applicable legal standards and standard of review. Contrary to the State's assertion, the question of whether Hicks' misconduct amounted to ineffective assistance of counsel and as such provided a fair and just reason for withdrawal of Cooper's plea is properly before this Court.

Cooper's Petition for Review explicitly raised the ineffective assistance of counsel issue as follows:

> When a defendant's counsel has engaged in serious professional misconduct leading up to the trial date affecting defendant's meaningful participation in his own defense, does that provide a sufficient reason to withdraw a guilty plea prior to sentencing?

(Pet. for Rev. at 1) Further, Cooper's also included the following argument:

> This Court Should Clarify the 'Liberal Application' Standard Set Forth in *Canedy* to Include Instances Where the Defendant in Unrepresented Due to His Counsel's Bad Acts.

(*Id.* at 7.)

Thus, Cooper presented the ineffective assistance issue by arguing in his Petition for Review that his attorney's misconduct left him "unrepresented" and this met the *Canady* fair and just reason standard for Cooper to withdraw his plea pre-sentencing. *State v. Canedy*, 161 Wis. 2d 565, 580-82 (Wis. 1991) (referring to the "fair and just reason" standard for pre-sentencing plea withdrawal motions). The State's suggestion that Cooper did not raise the ineffective assistance of counsel issue in his Petition for Review lacks merit. Cooper's Petition for Review did not simply assert his attorney was ineffective – he argued his attorney's misconduct left him effectively unrepresented or without counsel (i.e. he argued ineffective assistance of counsel).[2]

Cooper's ineffective assistance argument complicates the standard of review analysis (and refutes the State's position that it is simply an abuse of discretion question), because it presents this Court with a mixed question of fact and law. (Cooper's Br. At 9-10., citing *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)). Again, in determining the ineffective assistance of counsel issue, 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

[2] This is not the first time the State has attempted to dodge having to address the ineffective assistance argument. The State similarly argued (unsuccessfully) to the Court of Appeals that Cooper failed to preserve the argument before the trial court. (P-App. 109 fn. 4.)

review independently" or *de novo*. *Id*; *see also Trawitzki*, 244 Wis. 2d 523, ¶ 19. *State v. Hunt*, 2014 WI 102, ¶ 22 (2014).

B. The Circuit Court And Court Of Appeals Are Bound By The Findings And Conclusions Of *In re Hicks III* In Determining Whether Cooper's Satisfied His Burden To Show A Fair And Just Reason For Withdrawal Of His Plea And Under *In re Hicks III* The Circuit Court And Court Of Appeals' Decisions Must Be Reversed.

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*. 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). If Cooper presents such a reason, it shifts the burden to the State to show that it would be substantially prejudiced by plea withdrawal. *State v. Bollig*, 2000 WI 6, ¶ 34. The court should "take a liberal, rather than a rigid, view of the reasons given." *Bollig*, 232 Wis. 2d 561, ¶ 29. This is a "liberal rule" under which withdrawals are "freely allow[ed]." *State v. Jenkins,* 2007 WI 96, ¶¶ 2, 29.

"Fair and just reason" has not been precisely defined, but 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).

The State largely acknowledges these are the principles this Court should apply to determine whether the trial court and court of appeals erred in refusing Cooper's pre-sentencing motion to withdraw his plea. (Resp. Br. at 12-13.) But, the

State argues that the circuit court and court of appeal's findings are not clearly erroneous in light of the fact that the circuit court simply found that Cooper's stated grounds for the plea withdrawal were not credible. (Resp. Br. at 14-18.) In reaching this conclusion, the State asserts that the findings and holdings of this Court in *In re Hicks III* have no bearing. The State is incorrect on all counts.

First, this Court's findings and/or conclusions in *In Re Hicks III* are controlling authority. Cooper argued that 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). (Cooper Br. at 11.)

The State argues that these cases do not apply because only prior discussions of law are precedential and the Court in *In re Hicks III* simply recited facts that were determined by the referee. (Resp. Br. at 24.)[3] But this argument is unsupported by the express language of this Court's decision in *In re Hicks III*, where the Court makes it clear that it was making legal findings "on the basis of these facts [as recited in that decision]":

> On the basis of these facts, the referee concluded that there was a sufficient basis to support five counts of misconduct: [Count Thirteen] By failing between the date on which he received [T.C.'s] letter in January 2013 and February 12, 2013, between March 11, 2013 and August 16, 2013, and between August 18, 2013 and October 20, 2013, to communicate with [T.C.] regarding the issues raised in [T.C.'s] January 2013 letter and to otherwise

[3] The State also makes strawman arguments about claim preclusion and issue preclusion, though Cooper did not assert either of these doctrines applied. (Resp. Br. at 24-26.)

> consult with [T.C.] regarding trial strategy and preparation, thereby preventing [T.C.] from adequately understanding and participating in his own defense, [Attorney] Hicks violated SCR 20:1.4(a)(2). . . .

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

The State also asserts that Cooper's argument that Court's factual findings and legal conclusions in *In re Hicks III* control the circuit court by pointing out that the circuit court's decision pre-dated this Court's *In re Hicks III* findings and asserting that the referee in *In re Hicks III* and the circuit court were finding "different facts." (Resp. Br. at 21-23.) Perhaps Cooper's initial brief was in artful in using the phrase "were bound" to describe both the circuit court and court of appeals. More accurately, both circuit court and the court of appeals' decisions are controlled by *In re Hicks III*. But, there are not alternative facts here - the facts are the facts – meaning the facts reviewed and determined by the referee are the same facts adopted by this Court in *In re Hicks III* as the basis for its legal conclusions and are the same facts Cooper raised as grounds for his plea withdrawal.

Again, 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); *Compare 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 (and also

as discussed below provide a basis for his ineffective assistance claim).

The State asserts that it would make no sense to accept the referee's report (which was adopted by this Court) in place of the findings of the circuit court. (Resp. Br. at 23.) But, actually, what would make no sense would be to on one hand uphold the circuit court's finding that Hicks' misconduct had no impact or effect on Cooper's understanding, but on the other hand have this Court sanction Hicks based on a contrary finding that Hicks' misconduct prevented Cooper from adequately understanding and participating in his own defense. *Hicks*, 2016 WI ¶ 28 (holding that Hicks' conduct prevented Cooper from "adequately understanding and participating in his own defense.").[4] Essentially, this Court's findings and conclusions in *In re Hicks III* must mean that the circuit court and court of appeals findings of fact and conclusions of law were erroneous and thus an abuse of discretion. Cooper demonstrated a fair and just reason for his motion to withdraw his plea and the circuit court and court of appeals decisions to the contrary should be reversed.

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

As discussed above, this Court's findings and conclusions in *In re Hicks III* are binding on the trial court and the court of appeals. Namely, this Court not only

[4] Cooper also pointed out that this Court found that Attorney Hicks' representation of Cooper, in the case in which he sought to withdraw his plea, was so deficient that it justified Hicks' license being suspended. *Id.* at ¶ 49.The State tries to quibble with how much Hicks' misconduct impacted Cooper or how much with regard to Cooper vs with regard to his other clients it mattered in this Courts' decision to suspend Hicks. (Resp. Br. at fn. 7.) But there can be no doubt that this Court found it warranted Hicks' suspension.

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 *In re Hicks III* 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. This Court found in *In re Hicks III* that Cooper's court appointed counsel Hicks 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. The State incorrectly argues that Cooper cannot establish that Hicks' performance was deficient. (Resp. Br. at 37-39.) The State mischaracterizes the evidence as being limited to the fact that Hicks was suspended during his representation of Cooper. The only way for the State to deny that Hicks' performance was deficient is to once again ignore this Court's findings and conclusions in *In re Hicks III*, which list Hicks' deficiencies as including failing to communicate with Cooper, failing consult regarding trial strategy, failing to inform Cooper of his suspension, preventing Cooper from understanding and participating in his own defense. *Id.*

Cooper's argument that Hicks' ineffective assistance constitutes a fair and just reason for Cooper's pre-sentencing plea withdrawal motion is not only not a new argument, it's one that has been expressly recognized as grounds for plea withdrawal in the related context of post-sentencing motions. In fact, the issue of

ineffective assistance of counsel is one of the specific grounds that satisfies the heightened "manifest injustice" standard applicable to post-sentencing motions to withdraw a plea. *State v. Cain*, 2012 WI ¶ 25, 342 Wis. 2d at 15, (recognizing that "[w]hen a defendant moves to withdraw a plea *after* sentencing, the defendant 'carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice' and listing "ineffective assistance of counsel" as one of the six circumstances constituting manifest injustice); *contrast with Id.* ¶ 24 ("[w]hen a defendant moves to withdraw a plea before sentencing, 'a circuit court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.'" (citing *State v. Jenkins*, 2007 WI 96, ¶2, 303 Wis. 2d 157 (Wis. 2007) (quoting *State v. Bollig*, 2000 WI 6, ¶28, 232 Wis. 2d 561 (Wis. 2000)).

Which begs the question, if ineffective assistance of counsel is sufficient to meet the heightened "manifest injustice" standard applied to post-sentencing plea withdrawal motions, should it not be a more than sufficient basis to meet the "fair and just reason" standard that applies to Cooper's pre-sentencing motion?

Again, 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 such as Cooper 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).

The State also incorrectly asserts that Cooper cannot show prejudice, despite the fact that it cannot deny Cooper was deprived of adequate 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. This Court agreed that Hicks' performance was deficient warranting serious disciplinary action. *Id.* Again, the question of prejudice was effectively answered because this Court when it concluded that Cooper was prevented from adequately understanding and participating in his own defense. *Hicks*, 2016 WI ¶ 28.

II. The State Cannot Meet The Burden 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 of the plea. (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 argue prejudice in the motion hearing on the withdrawal of Cooper's plea (R. 57:15-16; P-App. 147-148). And here again the State fails to offer any argument as to how allowing the plea withdrawal would prejudice the State. As such, the State cannot meet the shifting burden 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 8th day of April, 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 3245 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

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

I hereby certify that on this 8th day of February, 2019, I personally caused the foregoing Defendants-Appellant-Petitioner's Reply 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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