STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2016AP000724 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WILLIAM J. DRAKE II,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING THE MOTION FOR POSTCONVICTION RELIEF ENTERED BY THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE NICHOLAS MCNAMARA PRESIDING.

Respectfully submitted,
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ISSUES PRESENTED FOR REVIEW

1. Was trial counsel ineffective for failing to adequately advise Mr. Drake regarding the possibility of Huber release?

   The trial court answered no.

2. In addition, and in the alternative, was trial counsel ineffective for failing to research whether Mr. Drake was actually eligible for Huber release?

   The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Drake does not request oral argument and the case is statutorily ineligible for publication.

STATEMENT OF THE CASE

This case was initiated via the filing of a criminal complaint in the Circuit Court for Dane County. (2:1-2). Mr. Drake was charged with two misdemeanor offenses. (2:1-2). Eventually, Mr. Drake pleaded guilty to both counts and was sentenced to a term of incarceration in the Dane County Jail. (35:1-2).

Undersigned counsel was appointed on appeal. (56:1). A timely motion for postconviction relief followed. (44:1-10). On July 15, 2015, the Circuit Court conducted an evidentiary

hearing. (66:1). The Court requested supplemental briefing and, in a written order, eventually denied the defense motion. (55:1-4). This appeal followed. (57:1-2).

STATEMENT OF FACTS

On the date of the plea hearing, Mr. Drake was housed within a secure unit of the Dane County Jail. (66:33; 66:9). He was incarcerated as a result of his inability to post a $1,000 cash bail. (61:4). As a result of his correctional history, he was therefore being held in solitary confinement 23 hours a day. (66:9). Prior this term of presentence incarceration, Mr. Drake was working and had enrolled in a post-secondary course of study. (66:22). At the prior bail hearing, Mr. Drake expressed concern that his inability to post bail was causing him to miss out on school. (61:5).

While Mr. Drake was represented at all times by the State Public Defender, the plea and sentence constitutes the only on the record appearance for counsel of record, Toni Laitsch. (62:1). On that date, Mr. Drake agreed to plead guilty to both crimes as they were charged in the criminal complaint, without amendment. (62:2). An unrelated and uncharged burglary was read-in. (62:2). The parties had no agreement as to sentencing. (62:2). The State, while seeking incarceration, did not agree to any cap with respect to the argued sentencing. (62:2). By the terms of the agreement. Mr. Drake faced up to a year in the Dane County jail. (62:4). The State would ultimately ask for close to that maximum. (62:10).

Prior to the plea hearing, trial counsel for Mr. Drake informed her client that if a jail sentence were imposed, "the judge would order Huber." (66:32). Trial counsel testified that

she gave no further advice on this point. (66:33). She also did not verify whether Mr. Drake would be actually eligible for Huber release. (66:33).

Trial counsel testified at the postconviction hearing that it was her belief that her clients are "always" eligible for Huber release. (66:35). She further testified that she "always" told her clients that "the judge *will* find them eligible for Huber." (66:35) (emphasis added). However, trial counsel also testified that the she was aware that the Court actually has discretion whether or not Huber privileges would be granted. (66:38). She was also aware that the trial court branch in question sometimes exercised that discretion to deny Huber privileges to certain offenders. (66:38). Trial counsel understood that while a judge may make a defendant eligible for Huber release, the actual decision (at least in practice) is made by the jail. (66:35). She testified that she never explained this final distinction to her clients. (66:35).

Trial counsel testified that Mr. Drake placed great importance on the possibility of work release, apparently informing her "if he would get Huber then he would do this plea." (66:36). Mr. Drake testified that it was his understanding at the time of the plea that any jail sentence "would be served with Huber privileges granted." (66:21). He based that belief in part on the advice of counsel. (66:22). He specifically informed trial counsel, in context of an apparent discussion as to whether he would accept the plea, "I'll plead out right now just as long as I get Huber privileges, that way I can go to work and school [...]." (66:22). Mr. Drake was at time employed at "Cappriottis [sic] Subs" and was enrolled in a graphic design program at MATC. (66:22). If Mr. Drake had known that Huber—which was a necessary prerequisite for continuing

with work and school—was not a realistic possibility, he would not have taken the deal. (66:23).

Following the brief argued sentencing, the trial court rejected probation and instead imposed a lengthy jail sentence. (62:14-15). The Court exercised its discretion in making Mr. Drake eligible for Huber release. (55:1). However, the matter was reopened less than a week later, when the Dane County Sheriff's department wrote a letter requesting that Mr. Drake's Huber privileges be revoked. (37:1). Due to their internal policies, Mr. Drake was not capable of being transitioned to Huber housing at that time. (37:1). The Court signed an order revoking Huber without a further hearing. (37:1).

Ms. Karianne Kundert, a classification specialist at the Dane County Jail and the author of the letter requesting revocation, testified at the postconviction hearing. (66:1). She testified that all of the facts and circumstances related to her decision to request revocation were in place prior to the plea and sentence. (66:8). In her words, Mr. Drake's file was actually "more or less flagged" regarding his likely ineligibility for Huber release. (66:8).

SUMMARY OF ARGUMENT

Mr. Drake should be entitled to withdraw his guilty pleas due to a manifest injustice: ineffective assistance of trial counsel. Trial counsel gave demonstrably incorrect advice regarding the possibility of Huber release. Despite promising Mr. Drake that he would "get Huber," trial counsel never verified whether this was a practical possibility, despite numerous warning signs that Mr. Drake was likely to be ineligible for Huber release. These errors prejudiced Mr.

Drake, as they caused him to take a deal he would not have otherwise accepted.

STANDARD OF REVIEW

An ineffective assistance of counsel claim presents a mixed question of fact and law. While this Court must defer to the lower court's findings of fact, it must independently assess "whether those historical facts demonstrate that defense counsel's performance met the constitutional standard for ineffective assistance of counsel [...]." *State v. Dillard*, 2014 WI 123, ¶86, 358 Wis.2d 543, 859 N.W.2d 44.

ARGUMENT

I. Trial counsel was ineffective for failing to adequately advise Mr. Drake regarding the possibility of Huber release.

A. Legal standard.

"A defendant is entitled to withdraw a plea of guilty upon a showing of "manifest injustice" by clear and convincing evidence." *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50 (1996) (*quoting State v. Rock*, 92 Wis.2d 554, 558-59, 285 N.W.2d 739 (1979)). "[T]he "manifest injustice" test is met if the defendant was denied the effective assistance of counsel" as guaranteed by the state and federal constitutions. *Id.* (citations omitted); *see also Dillard*, 2014 WI 123, ¶84.

In order to prevail, "a defendant must show that counsel's performance was both deficient and prejudicial." *Id.* (citations omitted). The first prong, deficient performance,

requires a showing that counsel's errors were unreasonable. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). As to the second prong, prejudice, the defendant must make "objective factual assertions" showing why he would have pleaded differently absent trial counsel's error. *Bentley*, 201 Wis.2d at 313.

B. Trial counsel's performance was deficient.

In this case, trial counsel provided inaccurate advice about Huber eligibility and how Mr. Drake's sentence would actually be served. This is deficient performance. While trial counsel was apparently aware of the relevant law regarding Huber release and how that law was applied in Dane County, she failed to accurately communicate this information to Mr. Drake before he made what the Supreme Court of Wisconsin has dubbed "the most important decision to be made in a criminal case"—whether to plead out at a given procedural juncture. *Dillard*, 2014 WI 123, ¶90.

In this case, trial counsel was in possession of three pieces of important information that were never communicated to her client, notwithstanding their significance to Mr. Drake's decision to accept or reject the plea.

First and foremost, trial counsel was aware that the first step toward Huber release—judicial approval—was not automatic. Rather, trial counsel was fully aware that the Court had discretion to grant *or* deny Huber release privileges. (66:38). This is a matter of black-letter law. WIS. STAT. § 303.08(1), the Huber statute, makes clear that prisoners in county jails "may" be released for work or other purposes but offers no guarantee to prospective prisoners. Absent the

Court's express order, a defendant is presumptively denied Huber privileges. WIS. STAT. § 303.08(2). Similarly, when a court imposes a probation sentence—as requested here by the defense—it also has the option of ordering conditional jail with or without Huber. *See* WIS. STAT. § 973.09(4). When made at the time of sentencing, the Huber release decision is treated as part of the overall sentence and is therefore accorded broad deference by reviewing courts. *See State v. Ogden*, 199 Wis.2d 566, 571, 544 N.W.2d 574 (1996).

Second, trial counsel knew that the branch in question did not act as a mere rubber stamp with respect to Huber eligibility determinations. Rather, trial counsel was aware that the Court in question often used its discretion to deny Huber to certain types of offenders. (66:38). For example, the Court often denied Huber, at least in part, to upper-level operating while intoxicated ("OWI") offenders. (66:39). Mr. Drake, while not convicted of an OWI, did have substance abuse issues and a prior escape charge. (62:9).

Third, and most importantly, trial counsel was also aware that the initial judicial order was often a mere formality. (66:35) At least in Dane County, the practically binding decision was actually made independently by jail staff. (66:35).

Trial counsel did not explain that the Court had discretion whether or not to approve Huber. (66:33). There is no indication that trial counsel ever explained the possibility that the Court could utilize that discretion to deny Huber based on Mr. Drake's specific background. Trial counsel also did not explain to Mr. Drake that, even if the Court approved Huber, this could be summarily reversed at the request of the jail staff. (66:35); *See* WIS. STAT. § 303.08(2) (stating that Huber

privileges may be withdrawn with our without notice to the defendant).

Rather, trial counsel gave Mr. Drake the erroneous impression that Huber release would be automatic. The advice is plainly deficient. The misadvice in question applies directly to a discretionary sentencing decision the court was required to make. It also applies directly to how the sentence in question was actually served. This is therefore not a case of "collateral" misadvice. *See State v. LaMere*, 2016 WI 41, ¶35-36 (errors related to collateral consequences, absent exception created for deportation, will not ordinarily result in a valid ineffectiveness claim).

Trial counsel had a duty to give accurate information to her client, especially when she knew or should have known the missing information's significance with respect to the decision to plead guilty. The information in question is not obscure or complex; rather, the information not conveyed is either a matter of black letter law or easily accessed practical knowledge. Trial counsel failed to adequately counsel Mr. Drake and, in so doing, her performance fell below an objective standard of reasonableness. This is deficient performance.

C. Prejudice.

Mr. Drake's straightforward testimony was that he would not have pleaded guilty if he had known the correct information about Huber release. (66:23). This was corroborated by trial counsel. (66:35). At the time he entered the plea, Mr. Drake was incarcerated without the potential of immediate release, short of posting $1,000 cash. (61:4).

At an earlier appearance, the stand-in public defender candidly told the Court that $150 would "stretch" Mr. Drake's financial resources. (59:4). Mr. Drake could not afford to get out of jail at the time his plea. Without release, he could not work and earn money. His investment in school was also at risk. Simply put, Mr. Drake was stuck in a depressingly common trap in which many indigent defendants find themselves. In order to find a way out, Mr. Drake made the obvious decision: to quickly accept a guilty plea which, even if it resulted in the worst-case scenario coming true—a lengthy jail sentence—would still enable him to be released for work and school. Trial counsel's remarks at sentencing regarding Mr. Drake's work and school show that she was aware, or should have been aware, of these pressures. (62:12).

Thus, the main benefit of the perceived deal was the imminent possibility of work release. A plea not only got Mr. Drake out from under his problem caused by an inability to post cash bail, it also gave him a perceived guarantee that he would be able to salvage his two most important life projects, his employment and his schooling. A poor person with poor choices, Mr. Drake analyzed the situation as best he could. Unfortunately, that analysis suffered as a result of poor advice from trial counsel. Had he received correct information, it is highly likely his choosing would have been very different.

The matter could be resolved at this point in Mr. Drake's favor. However, the trial court's erroneous assessment of the plea deal deserves brief comment. The trial court places great weight on the fact that an uncharged offense was read-in, therefore preventing ostensible future prosecution with respect to that other misdemeanor offense. (62:3). However, there is no evidence that this read-in ever reached the level of a referral

or that there was ever any serious possibility of a charge resulting. Arguably, the read-in actually harmed Mr. Drake at sentencing, as it allowed the State to bring in more negative facts about Mr. Drake in support of their incarceration recommendation. (62:8).

Absent this slight, largely theoretical concession, the offer on the table was actually quite weak. In essence, Mr. Drake was in no better position than if he had taken the case to trial and lost. He was still convicted of both original charges, without amendment. The plea did nothing to reduce his sentencing exposure and no cap was offered by the State.

Absent the illusory promise of release, Mr. Drake would not have pleaded guilty. This is constitutionally cognizable prejudice.

D. Summary.

The record as developed in the lower court supports Mr. Drake's contention that ineffective assistance of counsel resulted. Trial counsel failed to accurately advise Mr. Drake and this led to the entry of his guilty plea. This manifest injustice therefore requires reversal of the lower court's ruling regarding the motion to withdraw the guilty plea.

II. In addition, and in the alternative, trial counsel was ineffective for failing to research whether Mr. Drake was actually eligible for Huber release.

A. Legal standard

Failure to conduct an adequate investigation into both the relevant facts and law at play, without a reasonable strategic justification, is deficient performance. *Dillard*, 2014 WI 123 ¶92. When that lack of investigation results in an entry of a plea of guilty that would not otherwise have occurred, the defendant has been prejudiced by that deficiency. *Id.* This is constitutionally cognizable ineffectiveness under the state and federal constitutions. *Id.* That is precisely what occurred here.

B. Deficient performance

Shortly after his plea, the Dane County Sheriff's Office petitioned for revocation of Mr. Drake's Huber privileges in a letter dated February 17, 2015. (37:1). That letter informed the Court that Huber was not a realistic possibility for Mr. Drake given his placement in administrative confinement, his mental health issues, and past behavioral history. (37:1). In order to be placed in Huber housing, Mr. Drake would need to first transition out of administrative confinement and then spend *at least* 120 days in general population. (37:1).

Based on an interview with that letter's author, Ms. Karianne Kundert, undersigned counsel has averred that Huber release was clearly not a realistic option for Mr. Drake at the time of his plea. (44:4). Ms. Kundert's sworn testimony supports those averments. (66:3-20). Ms. Kundert confirmed that although the Court signs the initial order approving Huber release, the jail makes the practical decision whether or not a defendant is actually eligible. (66:4). She testified that in this case, Mr. Drake's file would have been "flagged" and that as a result, Huber was not a guarantee prior to the final hearing. (66:8-9). Post-sentencing, Ms. Kundert's analysis confirmed that Huber would not be practically available to Mr. Drake.

(66:9). There was no procedure in place for directly giving Mr. Drake this information prior to his plea. (66:14).

However, Mr. Drake's professional advocate—someone who has presumably worked with jail staff in a professional context in the past—could have obtained this information easily and efficiently. Because all of the information bearing on the decision—Mr. Drake's housing status, his mental health issues, his prior behavioral issues—was historical, trial counsel could have obtained this information either from a review of the jail records, or more practically, from a simple phone call with Classification Specialist Kundert.[1]

Several weeks elapsed between the status conference and the plea and sentence. (61:1; 62:1) Trial counsel therefore had ample opportunity to make that phone call. Given the special emphasis Mr. Drake placed on the possibility of Huber release, it was incumbent on trial counsel to ascertain whether the promise she gave Mr. Drake—that he would get Huber no matter what—would be actualized. As she very well knew, the judge may say yes, but the jail staff holds the effective veto power. (66:38).

Moreover, the possibility that Mr. Drake may not have been eligible for Huber release should have been apparent to trial counsel at the time she gave her ultimately inaccurate guarantee. During the time she represented Mr. Drake, he was incarcerated in administrative confinement, which is similar to the segregation unit utilized in the Wisconsin State Prison

[1] It is worth noting that all of the information in the postconviction motion was obtained as a result of a single phone call between undersigned counsel and Ms. Kundert, who willingly volunteered her analysis and conclusions.

System. (66:9). He was a "safety and security risk." (66:11). This fact alone should have set alarm bells ringing before false hopes about daytime release were encouraged.

However, this is not all. Trial counsel would also have had access to Mr. Drake's criminal record, which would disclose the existence of a prior escape charge. (62:9). She would have also been aware, or should have been aware, of prior drug charges and a conviction for battery by prisoner. (62:9). All of these facts and circumstances would have made it readily apparent that either the Court or the jail authorities may have had serious doubts about allowing release from the jail if a confinement sentence did result. In such a circumstance, it is reasonable to expect that she would conduct the cursory research at issue here and ensure that Mr. Drake's special confinement status and other issues would not disqualify him from the Huber release he was seeking. If trial counsel would have made that single phone call, it is likely that the "red flag" given to Mr. Drake by jail staff would have been uncovered and communicated to Mr. Drake in time to affect his plea decision.

Her failure to so investigate is deficient performance. *See Dillard*, 2014 WI 123 ¶92. There is no evidence that trial counsel's failure to so-investigate was the result of strategic choosing. Rather, counsel for Mr. Drake simply opted out of double-checking an already dubious piece of advice (following the arguments in the prior section) for no apparent reason. This is unreasonable performance.

C. Prejudice

This failure to investigate prejudiced Mr. Drake, as it encouraged him to make a hasty and ultimately improvident choice regarding a dubious plea offer on the basis of insufficient information. *See Section I, C, above.* Had Mr. Drake been told that a speedy plea would not necessarily release him from custody, the record is clear that he would not have accepted the agreement to plead to all charges and merely argue sentence.

D. Summary

Trial counsel could have easily confirmed whether or not Mr. Drake stood a good chance of actually getting Huber, or whether she was encouraging false hope based on deficient information. She failed to take reasonable steps to obtain information vital to Mr. Drake's plea decision. This is deficient and prejudicial. Accordingly, this Court should reverse the holding of the lower court denying the motion to withdraw Mr. Drake's guilty plea.

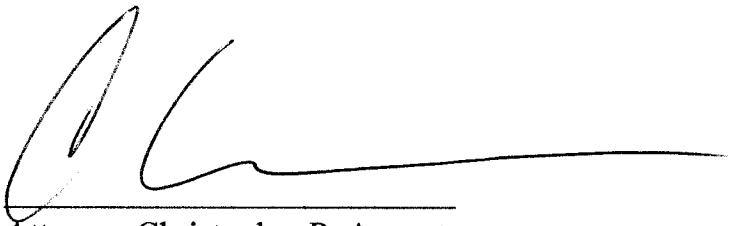
CONCLUSION

Mr. Drake deserved to have accurate information before entering a plea of guilty. However, trial counsel withheld vital information while also failing to research the Huber issue. Both claimed errors satisfy the two-pronged test. Accordingly, this court should reverse the holding of the lower court.

Dated this 8th day of June 2016.

Respectfully submitted,

Mr. William J. Drake II
Defendant-Appellant



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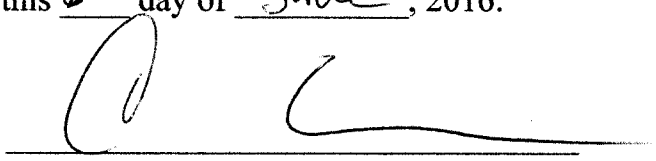
CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in WIS. STAT. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,524 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to WIS. STAT. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

I further certify that I have complied with WIS. STAT. § 809.86 requiring the usage of pseudonyms for crime victims.

Dated this 8th day of June, 2016.



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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 8th day of June, 2016.

Christopher P. August
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CERTIFICATION OF SERVICE

I hereby certify that on this 8th day of June, 2016, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 8th day of June, 2016.

Christopher P. August
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APPENDIX OF DEFENDANT-APPELLANT

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