STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016 AP 724 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WILLIAM J DRAKE II,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 5, THE HONORABLE NICHOLAS J. MCNAMARA, PRESIDING

Matthew D. Moeser
Deputy District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1034198

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State of Wisconsin does not request oral argument. This case is not eligible for publication pursuant to the Wisconsin Statutes.

ARGUMENT

I. Standard of Review.

Whether counsel was ineffective is a mixed question of fact and law. *See State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362 (1994). The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. *State v. McDowell,* 2004 WI 70, ¶ 31, 272 Wis.2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *See Flores,* 183 Wis.2d at 609, 516 N.W.2d 362.

II. Defendant-Appellant William Drake has failed to allege prejudice.

A defendant's claim of ineffective assistance of counsel has two components: (i) he must prove that his trial counsel's performance was deficient; and, (ii) he must prove that the deficient performance resulted in prejudice to his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A defendant cannot presume prejudice by pointing to decisions or errors of his trial counsel. Instead, the defendant must show that particular errors of his trial

counsel were unreasonable and that there was an actual adverse effect on his defense. *See id.* at 693. Stated another way a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Furthermore, courts strongly presume that trial counsel provided adequate assistance. *See State v. Balliette,* 2011 WI 79, ¶ 25, 336 Wis.2d 358, 805 N.W.2d 334. Courts are to give great deference to strategic choices made as part of a trial even if they are made with less than a thorough investigation of the facts. *See id*. at ¶ 26. "In sum, the law affords counsel the benefit of the doubt; there is a presumption that counsel is effective unless shown otherwise by the defendant." *Id*. at ¶ 27.

In the instant matter, Defendant-Appellant William Drake ("Drake") could only have prevailed on his claim of ineffective assistance of counsel if he had proven that "but for counsel's errors, he 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).

At a postconviction hearing held on July 15, 2015, Drake testified that if he had known that it would not have been eligible for work-release privileges pursuant to Wis. Stat. § 303.08 at the time of his plea:

> It would have made me wait, you know, for a better plea deal…. Or I could have waited a week because [Dane County Jail Classification Specialist Karianne Kundert] indicated in that letter I was only a week off from getting my Huber privileges. All I had to do is come off [administrative confinement] and they were currently reviewing….

(66:22-23).

At no point, did Drake testify that he would have gone to trial but for any error by his trial counsel, Antonette Laitsch ("Laitsch"), regarding his work-release eligibility. Nor did Drake allege that before in his written trial court postconviction arguments. (52:3).

Testimony from Dane County Jail Classification Specialist Karianne Kundert established that Drake was in administrative confinement (as of shortly after time of his sentencing) and therefore was not eligible for work-

release. (66:5-6). Drake would have had to have spent approximately 120 days in the Dane County Jail in general population before being reevaluated for work-release privileges. (66:6). Indeed, Kundert's letter to Judge McNamara, which contained the order revoking Drake's work-release privileges, indicated only that, "We are planning to move [Drake] to less restricted housing over the next few weeks." (37). Kundert explained that the Dane County Sheriff's Office would have had to evaluate the situation further if Judge McNamara had not signed an order revoking Drake's work-release privileges. (66:11).

Judge Nicholas J. McNamara, the trial judge, found that:

> Mr. Drake has failed to prove that he would have done anything different or that he was prejudice [sic] in any manner by his attorney's inability to predict the future of jail administration decisions outside of the courtroom and past the entry of the Judgment of Conviction.

(55:2).

Judge McNamara noted that Laitsch had not only obtained a plea agreement on pending charges but had also

obtained an agreement for another uncharged offense to be treated as a read-in offense, eliminating the possibility that Drake would face any additional penalty on that charge. (55:3). This was consistent with Drake's understanding of the benefit he received. (66:29-30).

The application of the *Strickland* prejudice standard to a plea withdrawal case requires proof that, if defense counsel had not performed deficiently, the defendant would not have pleaded guilty, but would have gone to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial") (footnote omitted).

Other Wisconsin cases, post-*Bentley*, have also reaffirmed the requirement that a defendant prove he would have gone to trial to meet the crucial requirement for showing prejudice. A defendant must assert more than conclusory allegations of prejudice; he must explain why he would have gone to trial. *See State v. Thornton*, 2002 WI App 294, ¶ 27, 259 Wis. 2d 157, 656 N.W.2d 45. "To show prejudice, a defendant must do more than merely allege that he would have pleaded differently but for the alleged

deficient performance. He must support that allegation with 'objective factual assertions.'" *State v. Hampton*, 2004 WI 107, ¶ 60, 274 Wis.2d 379, 683 N.W.2d 14.

As the record in this case reflects, Drake has never alleged he would have gone to trial but for Laitsch's errors. Drake, on appeal, claims that he has established prejudice by arguing that he would "not have accepted the agreement to plead to all charges and merely argue sentence" through what he describes as a "hasty and ultimately improvident choice regarding a dubious plea offer" made on the "basis of insufficient information." Drake's brief, p. 14. This statement, even if taken as true, is insufficient to entitle Drake to relief.

To the extent Drake now argues, on appeal, that he was "stuck in a depressingly common trap in which many indigent defendants find themselves," Drake's brief, p. 9 , because he could not post cash bail, that the benefit of the uncharged read-in is overstated, *see id.*, pp.9-10, or that the plea offer he accepted "was actually quite weak," *id.*, p.10, Drake continues to ignore the clear requirements to establish what he terms "constitutionally cognizable prejudice." *Id*.

Drake also ignores that, as Judge McNamara noted at the time of Drake's plea and sentencing, Drake had "a number of nonappearances in this case." (13; 21; 26; 62:17). This certainly justified the use of cash bail pursuant to Wis. Stat. § 969.01(4). Although Drake may have been motivated to get out of the Dane County Jail, Drake's three missed court appearances and three bench warrants were the reason why Drake was in the Dane County Jail at the time of his sentencing.

III. Drake has failed to prove deficient performance.

A defendant does not sufficiently allege deficient performance by demonstrating that his trial counsel was imperfect or less than ideal; he is only entitled under the Constitution to "reasonably effective assistance" by "a reasonably competent attorney." *Balliette,* 2011 WI 79, ¶ 22,. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 688.

Drake does not dispute the authority of the Dane County Sheriff to refuse to allow him to exercise work-

release privileges pursuant to Wis. Stat. § 303.08(10). Laitsch testified that she regularly informed clients that they would be eligible for work-release privileges but that she did not recall anyone asking about whether it could be taken away. (66:35). Laitsch's understood that the Dane County Sheriff's Office would make the decision on whether work-release should be denied and then write to the sentencing judge. Laitsch did recall Drake saying he would plead if he got work-release privileges and that she told him the judge would grant work-release privileges at the time of sentencing, (66:35-36), but she also testified that she was aware that a judge did not have to grant work-release privileges. (66:38). Laitsch testified that she had not confirmed with the Dane County Sheriff's Office that Drake was administratively eligible for work-release status.

Drake conceded that Laitsch told him that "everybody in Dane County gets Huber privileges unless otherwise," and explained that "otherwise" meant, "That there's a reason to revoke 'em or not grant 'em, severity of the crime, whatever." (66:24). Drake indicated that he did not believe that his administrative confinement status would prevent him from getting work-release privileges, "Because

I've seen in the past people who was on administrative confinement who there was Huber privileges and them have to grant them." (66:25)

Any errors by Laitsch were not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Could Laitsch have contacted the Dane County Sheriff's Office and determined the likelihood of that office seeking to deny Drake work-release? Certainly. But Laitsch's failure to investigate the impact of Drake's status in administrative confinement did not sink to the level of constitutionally deficient performance. At the time of his plea, Drake was held on cash bail, (27; 28), and in administrative confinement. (66:23-24). It is likely that Laitsch would have been told by the Dane County Sheriff's Office that Drake would not be reevaluated for work-release until after he has spent 120 days in the jail after getting out of administrative confinement. Even if Laitsch had learned that information however, it is not clear what Drake is suggesting would have been a constitutionally adequate performance by Laitsch. Since Drake has not argued he would have chosen to remain in jail and go to trial on the two counts in this case and the

third uncharged count, presumably he is suggesting that Laitsch should have advised him to remain in jail, potentially in administrative confinement, wait 120 days after he was placed into general population, get reevaluated for Huber eligibility, and then plead.

IV. Drake's claim is moot.

"'An issue is moot when its resolution will have no practical effect on the underlying controversy.'" *McFarland State Bank v. Sherry*, 2012 WI App 4, ¶ 9, 338 Wis. 2d 462, 809 N.W.2d 58 (quoting *State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶ 19, 252 Wis. 2d 404, 643 N.W.2d 515). "Conversely, a case is not moot when 'a decision in [a litigant]'s favor . . . would afford him some relief that he has not already achieved.'" *Id.* (alterations in *McFarland*) (quoting *Treat*, 252 Wis. 2d 404, ¶ 19). Thus, a claim is moot when the only requested relief would have no practical effect if granted by the court. *See State ex rel. Clarke v. Carballo*, 83 Wis. 2d 349, 357-58, 265 N.W.2d 285 (1978) (dismissing a claim as moot because the only requested relief would have no practical effect if granted); *City of Racine v. J-T Enterprises of Am., Inc.*, 64 Wis. 2d 691, 700-01, 221 N.W.2d 869 (1974) (same); *see*

also Tellurian U.C.A.N., Inc. v. Goodrich, 178 Wis. 2d 205, 214, 504 N.W.2d 342 (Ct. App. 1993) (holding that Tellurian's appeal is not moot because, "[w]hile Tellurian's request for injunctive relief is moot, its claims for damages and attorney's fees are alive").

This Court "will not generally consider a moot issue." *Tellurian U.C.A.N.*, 178 Wis. 2d at 213-14 (citing *J-T Enterprises*, 64 Wis. 2d at 700). "Moot cases will be decided on the merits only in the most exceptional or compelling circumstances." *J-T Enterprises*, 64 Wis. 2d at 702. These circumstances include issues of great public importance or that arise frequently enough to warrant a definitive decision to guide the circuit courts. *See State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 12, 278 Wis.2d 24, 692 N.W.2d 219.

Although this Court reviews *de novo* whether an issue is moot, the circuit court in this case did not rule on the issue of mootness. *See McFarland*, 338 Wis. 2d 462, ¶ 9 (internal citation omitted) ("As a general matter, the question of whether a case is moot is a question of law for our *de novo* review, although of course on this issue we are not reviewing a decision of the circuit court.").

Drake's only requested relief is to withdraw his pleas to criminal charges based on his claim that due to the ineffective assistance of counsel he served the sentences on those charges (sentences that are now completed) without work-release privileges. This relief, if granted, would have no practical effect. Because Drake's requested relief would have no practical effect, his appeal is moot. *See McFarland*, 338 Wis. 2d 462, ¶ 9. Although the issue of mootness was not presented to the circuit court, this Court may affirm on the grounds that Gils' appeal is moot.[1] *See State v. Jensen*, 2011 WI App 3, ¶ 75, 331 Wis. 2d 440, 794 N.W.2d 482 (citation omitted) ("If the [circuit court's] decision is correct, it should be sustained, and we may do so on a theory or on reasoning not presented to the circuit court.").

[1] Although the issue of mootness was not raised before the circuit court, the State as respondent may raise this issue before this Court. *See State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860 (citing *State v. Holt*, 128 Wis. 2d 110, 124-26, 382 N.W.2d 679 (Ct. App. 1985)).

CONCLUSION

Upon the record in this matter, and for the reasons stated above, the State of Wisconsin respectfully requests that this Court affirm Drake's convictions.

Matthew D. Moeser
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1034198

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 8th day of September, 2016.

_____

Matthew D. Moeser
Deputy District Attorney
Dane County, Wisconsin