STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP000724 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. DRAKE II,

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov
Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

ARGUMENT

I. Trial Counsel's Performance was Deficient.

The State alleges that Mr. Drake has failed to satisfactorily prove that trial counsel's performance was constitutionally deficient. (State's Br. at 7). However, a close review of the record discloses that trial counsel did in fact perform deficiently.

Trial counsel's participation in this matter appears minimal, at least from the available record. Trial counsel was appointed by the State Public Defender on August 26, 2014. (5:1). She filed her notice of appearance two days earlier. (6:1). Aside from the boilerplate motions accompanying her notice of appearance, no substantive pleadings were filed in the matter.

Despite being appointed in August of 2014, trial counsel did not personally appear at the next hearing, conducted on October 13, 2014. (59:1). She also did not personally appear at the hearing conducted on December 8, 2014. (60:1). She also did not attend the hearing on January 22, 2015. (61:1).

On November 5, 2014, trial counsel informed the Court that the matter was in a trial posture. (18:1). On February 3, 2015, the parties again requested that the matter be forwarded to a trial branch. (29:1). Soon after, however, the matter was scheduled for a plea hearing. (62:1).

The plea agreement was certainly less than ideal, as it required Mr. Drake to plead to both offenses, without amendment. (62:2). While the plea offer also included a read-

in offense that lessened some hypothetical criminal liability,[1] the weakness of this alleged concession has already been fully explored in the opening brief. (See Opening Brief at 9-10).

Primarily, Mr. Drake was motivated to get out of jail in order to attend work and school. (62:22). He was unable to post bail in order to do so. Trial counsel was therefore informed by Mr. Drake that his acceptance of the plea depended on his ability to obtain Huber release. (62:35). Trial counsel unambiguously responded to this concern by telling Mr. Drake, prior to the plea, that "the judge would order Huber." (62:32). Undersigned counsel was asked this follow-up question at the postconviction motion hearing:

> Q: Did you tell him there was any reason to be concerned that he wouldn't get Huber?
>
> A: No.

(62:32-33).

The Court interjected and asked undersigned counsel to clarify the witness's answer. The following exchange occurred:

> Q: You testified that you had a conversation with Mr. Drake about Huber eligibility?
>
> A: Yes.
>
> Q: And precisely you indicated that the judge would approve him for Huber?
>
> A: I advised him that the judge would allow him to have Huber at the time that he was sentenced.

---

[1] In undersigned counsel's opening brief, the read-in was wrongly stated as a burglary. The read-in was for a retail theft. (62:2).

> Q: Did you tell Mr. Drake anything else about Huber eligibility that you can recall?
>
> A: No.

(62:33).

On cross-examination, trial counsel stated that defendants are "always eligible" for Huber. (62:35). Trial counsel was asked specifically whether she explained the difference between the judge's initial decision to grant Huber and the practical possibility of actually obtaining Huber release. (62:35). The following exchange illustrates her understanding of the issue as well as her "usual" advice:

> Q: So when you're explaining potential ramifications to your clients, do you distinguish between Huber eligibility and Huber as a thing that will definitely come to reality in their life?
>
> A: I always tell my clients that they are, that the judge will find them eligible for Huber. I don't believe anybody ever asks that it can be taken away, I don't think anybody ever has. I don't recall any discussion with a client saying you'll get Huber from the judge and then it will depend on the jail as to whether or not your Huber will ever be revoked or it will be denied.

(62:35).

In light of the testimony, it is Mr. Drake's position that the State's recitation of the facts, specifically trial counsel's actions, does not fully account for the scope and nature of her error(s). (See State's Br. at 8). Partially, this may owe to the fact that a failure to investigate claim and a failure to advise claim have been collapsed into the same responsive argument. (See State's Br. at 8). In any case, the record is clear that trial

counsel was asked a general question by her legally uneducated client that was essential to Mr. Drake's understanding of the plea's value. (62:35).

In response, she failed to give legally accurate advice—by promising that work-release was a guarantee—and did not clarify that the judge's approval was only a formal first step. (62:35). Despite clear signals that work-release was not practically available for Mr. Drake—his prior record, his history of nonappearances, his mental health struggles, his incarceration in a secure unit of the jail—trial counsel did not bother to investigate whether her advice was even practically accurate. (62:33). In short, she promised an outcome that was never realistically on the table.

Without further quibbles over the facts, as they are clearly developed in the record, it suffices for this reply to note that the State has made several concessions that should be acknowledged here. First, that trial counsel "regularly informed clients that they would be eligible for work-release privileges." (State's Br. at 8). This is inaccurate advice, as Mr. Drake has already pointed out in his opening brief. Second, the State has conceded that trial counsel understood the interrelationship between the Sheriff's office and the Court with respect to the Huber decision. (State's Br. at 8). Third, they agree that Mr. Drake's plea was conditioned on getting Huber release. (State's Br. at 8). Fourth, they agree that he was told he would be granted work-release privileges. (State's Br. at 8). Fifth, they agree trial counsel was aware that the grant of Huber was not a guarantee at the time of sentencing. (State's Br. at 8). Finally, they acknowledge that

trial counsel failed to research Mr. Drake's actual eligibility. (State's Br. at 8).[2]

Of course, the real dispute centers not on what trial counsel did or did not do but on the constitutional significance of those actions. The State has averred that trial counsel's errors do not rise to a constitutionally cognizable level. (State's Br. at 9). To some extent, the State seeks to excuse counsel's errors with speculative inferences about what might have happened had trial counsel refrained from committing the errors in question. (State's Br. at 9). Defendants cannot establish prejudicial effect by virtue of pure speculation. *See* ***State v. Koller***, 2001 WI App 253, ¶15, 248 Wis.2d 259, 635 N.W.2d 838. The State should not be permitted to evade an otherwise compelling attack under the deficient performance prong with more of the same.

As was pointed out in the opening brief, trial counsel's errors were significant and meaningful. Trial counsel failed to adequately counsel Mr. Drake about how his sentence would actually be served and whether he was practically or legally eligible for work-release. While these issues may not be significant in all cases, they certainly were in this case. Trial counsel acknowledged that the plea entirely hinged on whether or not Mr. Drake would receive work-release. To assert that failure to either actually investigate the question or

[2] The State also points to Mr. Drake's testimony that he was told by trial counsel he would get Huber unless "otherwise," otherwise meaning that the privileges were revoked or the offense was serious. (State's Br. at 8). This is still an incomplete explanation by trial counsel. At the same time, Mr. Drake's testimony contradicts the express testimony of trial counsel on direct, cross, and court-directed examination on this point. Reliance on a single allegedly inconsistent statement during hostile cross-examination, while not inappropriate, should not be dispositive to the claim.

to provide accurate information is not owed to the client, misses the mark entirely. The attorney is required to adequately advise their client of the "advantages and disadvantages" of a plea agreement. *See* ***Libretti v. United States***, 516 U.S. 29, 51 (1995). In this case, the main advantage to Mr. Drake—given the asserted weakness of the deal—was the possibility of early release. This was Mr. Drake's primary focus in the conversation with trial counsel about whether he should take the plea or not. (62:35). On this essential issue, trial counsel failed to adequately assist Mr. Drake.

Accordingly, for all of the reasons outlined in the initial brief, this Court should find that the first prong—deficient performance—has been satisfactorily proven.

II. Trial Counsel's Actions Prejudiced Mr. Drake.

The State alleges that Mr. Drake has failed to prove that he was prejudiced by trial counsel's failings. (State's Br. at 1). However, the State reads the case law too narrowly and, in so doing, mischaracterizes the legal test for prejudice in this context.

In ***Hill v. Lockhart***, the United States Supreme Court formulated a prejudice standard to be used in the plea context. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). That standard focused on "the outcome of the plea process." ***Id***. Conceptualizing only two possible outcomes—a plea or a trial—the Court held that a defendant convicted by virtue of an ostensibly faulty plea must show "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." ***Id***.

The standard was developed and clarified in subsequent Supreme Court cases. For starters, the Court has now acknowledged that a defendant's right to effective representation is broad-ranging and offers a defendant protection throughout the plea-bargaining process. *See* ***Lafler v. Cooper***, 132 S.Ct. 1376, 1384 (2012); ***Missouri v. Frye***, 132 S.Ct. 1399, 1404 (2012). This broader assessment of trial counsel's role in the pretrial process has resulted in an arguable broadening of the prejudice prong in the plea context. While not overruling Hill, the restrictive language of that case has been softened.

Thus, a requirement that there be a reasonable probability of a different outcome, in the plea context, now means that "a defendant must show the outcome of the plea process would have been different with competent advice." ***Lafler***, 132 S.Ct. at 1384. One way the outcome could be different is that the defendant may have chosen to reject a plea and go to trial. ***Id***. However, other permutations exist. A defendant who went to trial may also assert that they would have taken an offer as a means of proving prejudice. ***Id***. A defendant who pleaded guilty can also establish prejudice when they can prove that they would have actually taken an earlier, better offer if not for ineffective assistance of counsel. ***Frye***, 132 S.Ct. at 1409.

This emphasis on the choosing—and the panoply of alternatives at play in a system that is dominated by, and increasingly structured in favor of, plea bargaining, *see* ***Id***. at 1407—leads to a rejection of the State's unduly narrow prejudice argument. Mr. Drake need not show that he would have made the ultimate choice to go to trial—although this can be implied from statements that suggest he would have waited the process out, come what may—only that he would

have made a different choice when faced with the State's offer here.[3]

This is actually consistent with the Wisconsin Supreme Court's approach in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50. In that case, the defendant did not make the explicit invocation the State seemingly requires here—that he would have gone to trial absent faulty advice. ***Id***. at 316. (See State's Br. at 5). That assertion's absence, however, was not fatal to Bentley's case. ***Id***. Rather, the Court agreed that the "motion essentially alleges that had counsel correctly informed him about his minimum parole eligibility date, he would have pled differently." ***Id***. This was legally sufficient. ***Id***.

The fatal flaw, however, was a lack of specificity that would allow the lower court "to meaningfully assess Bentley's claim that he was prejudiced by the misinformation." ***Id***. at 317. The Court faulted Bentley for not explaining why the faulty advice "affected his decision to plead guilty." ***Id***. Moreover, Bentley failed to allege "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty." ***Id***.

The State's insistence that Mr. Drake needed to unambiguously assert that he would have taken the case to trial is therefore misplaced. (State's Br. at 2). Mr. Drake has unambiguously asserted that if he had known that the benefit he sought—work release—was not available, he would not have accepted the plea.

---

[3] Semantically speaking, Mr. Drake has impliedly asserted he would have chosen a trial by asserting he would not have accepted the only realistic alternative—the plea at issue—given that the case had already been placed in a trial posture by trial counsel.

Mr. Drake has supported that allegation with specific assertions. He has shown why the erroneous advice, unsupported by investigation, mattered to his decision. He has also pointed out many atmospheric, corroborative facts and circumstances. For example, Mr. Drake has described the nature of his confinement when he took the plea. (Opening Br. at 12-13). He has accurately detailed the impossibility of release on bail at the time of the plea hearing. (Opening Br. at 9). He has shown that release in some form or another was necessary to avoid losing out on his work and school. (Opening Br. at 9). He has elicited the testimony of his trial counsel, who corroborated Mr. Drake's testimony. (62:35).

He has shown the weakness of the plea bargain. (Opening Br. at 10). Even more suggestively, the case was in trial posture at least once. Due to his repeated absences from court, there had been scant opportunities for negotiation. The rapid decision to accept a plea—following his inability to obtain release on bail—proves that the outcome of this case would likely have been different if he had been informed that acceptance of the plea would not result in the liberty he sought.

Mr. Drake has therefore satisfied the requirements for proving constitutionally cognizable prejudice.

III. Mr. Drake's Appeal is Not Moot.

Mr. Drake seeks to withdraw his plea, alleging that this plea was procured without the effective assistance of counsel. While the State is correct that his sentence has already been served, the conviction is still in effect. There is no case law on point that would sanction the bizarre outcome the State seeks, which would prohibit a defendant from attacking a conviction obtained in the absence of a constitutional protection, the right to effective assistance of counsel. Mr.

Drake believes the issue requires little further analysis but wishes to make clear that he does not concede by failing to address the argument in his reply.

CONCLUSION

For all of the reasons stated herein, Mr. Drake respectfully requests that the Court grant the requested relief and allow him to withdraw his pleas.

Dated this 15th day of September, 2016.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,329 words.

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 on or after 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 15th day of September, 2016.

Signed:

Christopher P. August
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov
Attorney for Defendant-Appellant