STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EUGENE B. SANTIAGO,

Defendant-Appellant.

APPEAL FROM A CORRECTED JUDGMENT OF CONVICTION AFTER REVOCATION OF PROBATION, AN ORDER DENYING POSTCONVICTION RELIEF AND AN ORDER DENYING A MOTION TO CORRECT OR AMEND THE JUDGMENT OF CONVICTION, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL WILK AND THE HONORABLE STEPHEN A. SIMINEK, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication, as the issues presented can be resolved based on well settled law and the briefs of the parties.

SUPPLEMENTAL STATEMENT OF THE CASE

Criminal charges, no-contest pleas and sentencing. Twenty years ago, the State charged Eugene Santiago with first-degree sexual assault of a juvenile under the age of sixteen and threat to injure, both as a repeat offender. (1, A-App. 107; 15.) The State amended the complaint to specify that the offenses, which were reported by the then-five-year-old victim in September 1995, occurred between July 1992 and November 1992. (9, A-App. 108.) The Information specified that the maximum imprisonment for the first-degree sexual assault count was "not to exceed 50 years" and for the threat to injure count was "not to exceed 16 years." (15.)

On May 17, 1996, Santiago signed a plea questionnaire and waiver of rights. (16, A-App. 109-10.) At the plea hearing on that same date, Santiago pled no contest and the circuit court found him guilty of both counts. (17, A-App. 111.)

After a sentencing hearing (72), the circuit court entered two judgments of conviction dated July 3, 1996, both indicating that the crimes were committed between July 1992 and November 1992. (21; 22, A-App. 112.) On count one for first-degree sexual assault of a child, the court withheld sentence and set 30 years of probation. (21.) On count two, threat to injure, the court imposed a sentence of fifteen years in state prison. (22, A-App. 112.) Santiago received and

signed an "Information on Postconviction Relief" form, but did not file a postconviction motion or a direct appeal. (24.)

Probation and parole revocation and sentencing after revocation. Thirteen years later, in 2009, the Department of Corrections (DOC) revoked Santiago's probation and parole on both counts. In a letter to the circuit court requesting a sentencing after revocation hearing, the DOC succinctly summarized the events leading up to Santiago's revocation:

> On 07/03/96 Eugene Santiago was convicted of 1st Degree Sexual Assault of a Child. The sentence was withheld and he was placed on probation for a period of 30 years. Mr. Santiago was also convicted of Threats to Injure and sentenced to 15 years WSP. He was released from prison on 3/14/06. His parole supervision was revoked on 3/13/08. He was again released from prison on 7/1/08.
>
> On 6/24/09 the parole and probation cases were found revoked by Administrative Law Judge Andrew Riedmaier. Attorney Denise Hertz-McGrath appealed the decision to Hearings and Appeals Administrator David H. Schwarz. ALJ Riedmaier's decision was sustained.

(37:1.)

In a June 24, 2009, revocation decision, ALJ Riedmaier ordered Santiago to "be reincarcerated for 3 years, 6 months and 2 days with custody credit from June 8, 2006 to February 14, 2007, from October 31, 2008 to November 3, 2008, from December 27 to 29, 2008 and from February 6, 2009 to present" on the threat to injure count and further ordered that he return to the circuit court for sentencing on count one for first degree sexual assault of a child. (37:7.)

At the sentencing after revocation hearing, the circuit court found that when Santiago was originally sentenced on both the first-degree sexual assault of a child for committing

sodomy on his three-year-old stepson and for making threats to that child, he was "given an opportunity" for rehabilitation because the court sentenced him to 15 years in prison on the threat to injure count "and the first-degree sexual assault of a child was held open basically on probation for [an] extended period of time." (73:30-31.) The court therefore found that Santiago had been given an opportunity to rehabilitate himself, but he was not "able to take advantage of it." (73:32.) The court further noted that now after revocation of his probation, Santiago's "own attorney indicated [he] needed prison" and that the State sought "the full measure of the sentencing available, 40 to 50 years." (73:33.)

The circuit court found that although Santiago had already served prison time on his original and revocation sentences on the threat to injure count, Santiago needed "to be reincarcerated for a substantial period of time" on revocation of his probation on the first-degree sexual assault of a child count. (73:33.) Specifically, the court found that the need to protect the community must take precedence over rehabilitation of Santiago. It described his crime as:

> so deviant and so violent and so criminal that – that you have to be viewed as a danger to the community for committing that. The fact that you have had the inability to keep from violating conditions of treatment, sexual offender treatment so that you have been denied access to those programs while on probation suggests that it's going to be difficult for you to ultimately gain the benefits of treatment if you continually do things that prevent that.
>
> I think in this case that the Court needs to balance the needs of the community with your . . . treatment opportunities. The Court in this case believes that punishment needs to be a substantial component of the sentencing and an opportunity for rehabilitation should be a desire, but you've already

> had opportunities [for] rehabilitation and you've not been able to take advantage of them, so the rehabilitation opportunities certainly must take a secondary role to protecting the community and providing punishment in this regard.

(73:34-35.) The circuit court sentenced Santiago after revocation of his probation to 16 years in State prison on his conviction for first-degree sexual assault of a child, concurrent to his sentence on count 2. (73:35-36.) On September 9, 2010, the circuit court entered the judgment of conviction after revocation of probation. (60:4, A-App. 113.)

Postconviction motion, corrected judgment of conviction and appeal. Approximately six years later, on February 22, 2016, the DOC sent a letter to the circuit court requesting clarification of the September 9, 2010, judgment of conviction after revocation. The DOC pointed out that the judgment of conviction indicated that Santiago was convicted of first-degree sexual assault of a child under Wis. Stat. § 948.02(1)(c), which "did not exist when the offense occurred." (60:1, A-App. 101.) The DOC letter noted that the amended criminal complaint charged Santiago with this offense under Wis. Stat. § 948.02(1): "'a Class B felony punishable by imprisonment no[t] to exceed 55 years.'" (60:1, A-App. 101.)

Subsequently, Santiago filed a pro se postconviction motion pursuant to Wis. Stat. § 974.06. (63.) In the motion, Santiago claimed that he was denied "his constitutional right to due process of law" during his plea proceedings when he "was misinformed as to the maximum penalty he was facing on Count 1 and the minimum penalty on Count 2," and that his trial counsel was ineffective for not correctly informing him of the penalties. (63:1.) Santiago argued that although he committed the crimes of sexual assault of a child and threat to injure in 1992, he was charged under the

version of the statute in effect in 1996. (63:2-3.) Santiago asserted that during the plea proceedings, the court and his counsel told him that he was facing a possible 55 years on count one and 16 years on count two, for a total of 71 years, when he was actually exposed to 35 years on count one and to 19 years on count two, for a total of 54 years. (63:3-5.) Santiago asserted that if he had "been fully aware of the Fifty-Four (54) maximum penalty in this instant matter, he would have elected a trial as he has several issues with this case," and that "it was the Seventy-One (71) year exposure coupled with the familial strife that trumped the risks and/or benefits of a trial in the first place," and that therefore his plea was "induced." (63:5.)

Santiago further alleged that the plea colloquy was defective and that his trial counsel was ineffective "for his failure to research and investigate charges and potential penalties" that resulted in a "manifest injustice." (63:6-7.) Santiago asserted that he was entitled to an evidentiary hearing on his motion to withdraw his plea and to a dismissal of the complaint and immediate release from custody. (63:7-8.)

At a hearing on Santiago's postconviction motion, the circuit court indicated that it had "to make a determination as to whether or not he is even entitled to [an evidentiary] hearing or whether or not there could be a summary denial of the motion because this is – it really takes the place of a habeas corpus and it's not the appropriate mechanism if he could have appealed outright or had the matter addressed earlier[.]" (74:2-3, R-App. 106-107.) Santiago acknowledged that he had not filed a direct appeal or a previous postconviction motion in this case. (74:4, R-App. 108.)

The circuit court confirmed with Santiago that his argument in this postconviction motion was that he had

"accepted a plea agreement here and it turns out that your exposure was not as great as you were originally led to believe" and that "you're saying if my exposure was the lesser amount, I would have taken it to trial." (74:7, R- App. 111.) Santiago admitted that "a plea withdrawal at this point would present a problem for the State and a trial 20 years later would be a complicated mess." (74:11, R- App. 115.) Santiago acknowledged that he "will be released in 2019," but proposed a resolution that would allow him to be released immediately. (74:11-12, R-App. 115-116.)

The State rejected Santiago's proposal and argued that, while there was a "typographical error in the judgment of conviction" as pointed out by the DOC, Santiago was not entitled to be released as a result because he had "accepted a plea bargain," he had not "cooperate[d] with the conditions of probation," and his sentence after revocation of his probation and parole was based on his failure to "agree to one single condition of his probation." (74:13, R- App.117.)

Before ruling, the circuit court recited the facts that the original conviction "goes back 20 years," that "[t]he sentencing after revocation goes back about 10 years," and that Santiago "received an initial sentence of 15 years on one count and then when he got out he was on 30 years probation and that probation was revoked and I believe he got an additional 16 years by Judge Wilk. That 16 years is almost run out." (74:14-15, R- App. 118-119.) Based on those facts, the circuit court found that "[i]t would be very difficult for the Court to determine at this point whether or not what Mr. Santiago alleges actually did take place" because

> he is telling the court what was in his mind and there's no way to verify or dispute what is in his mind as to what he would have done 20 years ago on the advice of counsel. It's only if the defendant alleges facts that, if true, would entitle the

> defendant to relief which would trigger this Court's obligation to hold an evidentiary hearing and that hearing would entail the same test as a motion to withdraw a guilty plea.

(74:15-16, R- App. 119-120.)

The circuit court determined that it was appropriate to summarily dismiss Santiago's motion and to order that the incorrect reference to Wis. Stats. § 948.02(1)(c) in the judgment of conviction after revocation be "remedied by simply filing an amended judgment of conviction listing the correct statutory citation." (74:16.) Therefore, the circuit court denied Santiago's postconviction motion and instructed the clerk to file an amended judgment of conviction correcting the error. (74:17, R-App. 103, 70:1, A-App. 102.)

The circuit court clerk filed the corrected judgment of conviction after revocation, correcting the citation to the statute governing the crime of first-degree sexual assault to Wis. Stat. § 948.02(1). (64, R-App. 103-104.) Santiago then filed a motion to correct or amend the judgment of conviction, now asserting that the judgment of conviction after revocation indicated that the date the offense of first-degree sexual assault of a child was committed was May 17, 1996, which was actually the date he was convicted of the offense. (67, A-App. 105-106.) The circuit court entered an order denying the motion. (70:3, A-App. 103.) Santiago appeals. (71.)

ARGUMENT

I. The circuit court properly denied Santiago's postconviction motion without a hearing because Santiago may not challenge his 1996 no-contest plea after revocation of his probation and sentencing after revocation.

On appeal, Santiago alleges the that original criminal complaint was "fatally defective" and seeks plea withdrawal based on his allegations of a "manifest injustice" related to his 1996 convictions for first degree sexual assault of a child count and threat to injure (Santiago's Br. 5-22.) Santiago challenges the validity of his no-contest pleas to both counts. (16, 17, 21, 22.) Santiago alleges that during the plea process, he was misinformed about the potential penalties and that his trial counsel was ineffective for not properly informing him. (Santiago's Br. 8-19.)

However, Santiago has fully served his 15-year sentence on the threat to injure count and is currently serving the 16-year post-revocation sentence on the first-degree sexual assault count. (R-App. 101-102.) Santiago can only challenge the post-revocation judgment of conviction and sentence (64, R-App. 103-104.) He may not challenge his original no-contest pleas and judgments of conviction.

A. Relevant law.

When a defendant is sentenced after revocation of probation, he may appeal the judgment of conviction after revocation. But a "challenge to a post-revocation sentence does *not* bring the original judgment of conviction before the court." *State v. Scaccio*, 2000 WI App 265, ¶ 10, 240 Wis. 2d 95, 622 N.W.2d 449 (emphasis added.); *see also State ex rel. Marth v. Smith*, 224 Wis. 2d 578, 582 n.5, 592 N.W.2d 307 (Ct. App. 1999); *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). In other words, when the time for

appeal from the original judgment of conviction in a criminal case imposing probation has run, the subsequent imposition of a post-revocation sentence and the entry of a new judgment of conviction reflecting that sentence do not resurrect the defendant's right to appeal the validity of the original judgment of conviction. *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994); *Tobey*, 200 Wis. 2d at 784 (defendant's issues in motion for postconviction relief should have been addressed after conviction and sentencing, but instead defendant "chose to begin serving his probation without objecting to the events surrounding his . . . conviction[.]" Therefore, "he cannot now raise these issues because he is dissatisfied with the outcome of his sentencing after probation revocation.").

"When probation is revoked, there can be no challenge to the underlying conviction; appellate review is limited to the sentencing after revocation." *In re the Commitment of Bush*, 2004 WI App 193, 276 Wis. 2d 806, 812, 688 N.W.2d 752, *see Drake*, 184 Wis. 2d at 399. A defendant cannot wait until he is dissatisfied by the outcome of sentencing after probation revocation to object to an underlying conviction. *See Scaccio*, 240 Wis. 2d 95, ¶¶ 4-12; *Tobey*, 200 Wis. 2d at 784; *Drake*, 184 Wis. 2d at 398-99.

B. Santiago may not challenge the original judgments of conviction by seeking plea withdrawal after revocation of his parole and probation.

Santiago filed his motion for postconviction relief pursuant to Wis. Stat. § 974.06. In it, he challenged the underlying criminal complaint and no contest pleas resulting in the original judgments of conviction. But he cannot do that. Although Santiago received and signed a written notice of his right to purse postconviction relief after the original judgments of conviction (24), Santiago never filed a notice of

intent to pursue postconviction relief, a postconviction motion or direct appeal of his original convictions. Instead, he began serving his 15-year sentence for the threat to injure conviction. Then, after he was released, he violated the conditions of his parole and probation. The DOC revoked both his parole and his 30-year probation, and Santiago got a revocation sentence of 16 years in prison. (37; 73.)

Santiago cannot now obtain relief through a postconviction motion asserting that he should be able to withdraw his no-contest pleas to both counts in the criminal complaint (63:8), given that he has fully served his sentence on the threat-to-injure conviction, and he got a revocation sentence on his sexual assault of a child conviction. Therefore, because Santiago is barred from challenging his original convictions, this Court should affirm the circuit court's order denying Santiago's postconviction motion without a hearing.

II. The circuit court properly denied Santiago's postconviction motion without a hearing because he has not shown a manifest injustice.

Even if Santiago could resurrect his challenge to the underlying no-contest pleas and judgments of conviction through a Wis. Stat. § 974.06 motion, his challenge fails. On appeal, Santiago argues that the criminal complaint and information were "defective" because the State improperly charged him with first-degree sexual assault of a child under the version of Wis. Stat. § 948.02(1) that was in effect at the time of his conviction in 1996, not the version that was in effect in 1992 at the time he committed the crime. Santiago also argues that he was improperly charged with respect to the penalty enhancers on the threat to injure count. (Santiago's Br. 7-8.)

As a result, Santiago argues that he suffered "prejudice" by not having notice of the potential penalty he faced during the plea proceedings. He claims that if he had known the penalties he faced, he would not have pled no contest and would have insisted on a trial. (Santiago's Br. 8-16.) Santiago further alleges that his trial counsel was ineffective for not informing him of the penalties he faced and that this resulted in a "manifest injustice" entitling him to withdraw his plea. (Santiago's Br. 17-22.) For the reasons set forth below, Santiago has failed to show a manifest injustice entitling him to withdraw his 1996 no-contest plea and therefore, the circuit court properly denied his motion without a hearing.

A. Relevant law and standard of review.

A defendant who seeks to withdraw a plea after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836); *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).) "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which rendered it unknowing, involuntary, and unintelligently entered." S*tate v. Denk*, 2008 WI 130, ¶ 71, 315 Wis. 2d 5, 758 N.W.2d 775. A manifest injustice also occurs if the plea is "'entered without knowledge of the charge or that the sentence *actually imposed* could be imposed.'" *State v. James*, 176 Wis. 2d 230, 237, 500 N.W.2d 345 (Ct. App. 1993) (quoted source omitted) (emphasis added).

A defendant who waives constitutional rights by entering a plea to a criminal charge must enter the plea "'with sufficient awareness of the relevant circumstances

and likely consequences' that could follow" and with knowledge of the "direct consequences" of the plea. *James*, 176 Wis. 2d at 237 (citing *Brady v. United States*, 397 U.S. 742, 748 (1970).) No manifest injustice occurs, however, when a defendant is not apprised of a collateral consequence of a plea. *State v. Madison*, 120 Wis. 2d 150, 159, 353 N.W.2d 835 (Ct. App. 1984). Direct consequences of a plea have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998) (quoting *James*, 176 Wis. 2d at 238). Collateral consequences, in contrast, do not automatically flow from the plea, but rather will depend upon a future proceeding or may be contingent on a defendant's future behavior. *State v. Myers*, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996); *James*, 176 Wis. 2d at 243-44.

Ineffective assistance of counsel may amount to a manifest injustice permitting plea withdrawal. *See State v. Hampton*, 2004 WI 107, ¶ 60, 274 Wis. 2d 379, 683 N.W.2d 14. When alleging counsel's ineffectiveness, a defendant must show that his counsel's performance was deficient and that prejudice resulted from the deficiency. *Id.*; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance requires a showing that the identified acts or omissions of counsel fell below the objective standard of reasonableness under prevailing professional norms viewed at the time of counsel's conduct. *State v. Hubert*, 181 Wis. 2d 333, 339, 510 N.W.2d 799 (Ct. App. 1993).

Prejudice occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. In the context of deficiencies related to guilty

pleas, the defendant must show that he would have pled differently but for counsel's deficient performance. *Hampton*, 274 Wis. 2d 379, ¶ 60.

In order to review a claim of ineffective assistance of counsel, the circuit court must have held a hearing to preserve the trial counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804-05, 285 N.W.2d 905 (Ct. App. 1979). The defendant is not automatically entitled to a hearing on his ineffective assistance of counsel claim; he or she must allege facts that, if true, show that the defendant is entitled to relief. *Bentley*, 201 Wis. 2d at 309. If the defendant's motion fails to allege such facts, the defendant is not entitled to a hearing, although the court may choose to hold one in its discretion. *Id*. at 310.

The appellate court reviews the denial of an ineffective assistance claim as a mixed question of fact and law. The reviewing court must accept the circuit court's factual findings unless they are clearly erroneous. The reviewing court then determines independently as a question of law whether, under the facts as found by the circuit court, the trial attorney's performance was deficient and prejudicial. *State v. Kimbrough*, 2001 WI App 138, ¶ 27, 246 Wis. 2d 648, 630 N.W.2d 762.

B. Santiago's speculative allegations that he would not have agreed to the no-contest plea fail to show a manifest injustice because the potential prison time he would face if his probation was revoked was a collateral consequence of his plea.

Santiago argues that he is entitled to withdraw his 1996 no-contest pleas to the charges of first-degree sexual assault of a child and threat to injure because the State allegedly charged him based on the statute in effect in 1996,

not the 1992 statute. (Santiago's Br. 2.) Santiago asserts that "the substantial increase of twenty-five (25) years Santiago thought he was facing was substantial enough to induce a plea" and that if he had known the maximum penalty he would not have pled no-contest and would have insisted on going to trial. (Santiago's Br. 16.)

However, Santiago's allegations that he would not have pled no-contest if he had known the maximum penalty he faced if he went to trial and was convicted are not facts that, if true, would entitle him to relief. *Bentley*, 201 Wis. 2d at 309-10. This is because, as a result of the negotiated no-contest plea where the State agreed to recommend probation on the first-degree sexual assault of a child count, the maximum penalty on that charge became a collateral consequence of Santiago's pleas because it was completely contingent on his future behavior: whether he would comply with conditions of parole and probation. Therefore, Santiago has not shown that not knowing the maximum penalty was a manifest injustice entitling him to withdraw his plea.

In *James*, this Court held that a manifest injustice allowing plea withdrawal occurs if the defendant enters a plea "without knowledge . . . that the sentence actually imposed could be imposed.'" *James*, 176 Wis. 2d at 237. This Court decided "that in accepting a negotiated plea for probation, the trial court should but is not required to advise the defendant of the potential maximum term to which he or she would be subjected in the event probation is revoked." *James*, 176 Wis. 2d at 232-33. Where the court imposes probation and it is subsequently revoked, the sentence imposed after revocation is a collateral consequence to the no-contest plea because the sentencing was contingent upon the defendant's behavior in electing not to abide by the conditions of his probation. *James*, 176 Wis. 2d at 243-44.

Here, the sentence actually imposed on the first-degree sexual assault of a child count was 30 years of probation, which was revoked because of Santiago's failure to comply with the conditions of his parole and probation. (21; 37.) Santiago argues on appeal that he is entitled to withdraw his plea because he was not properly informed about the "range of punishments" he could have received if convicted of first-degree sexual assault of a child and threats to injure and therefore, that his plea was entered involuntarily. (Santiago's Br. 13.) What he fails to understand, however, is that he is only subject to the prison sentence he is currently serving for first-degree sexual assault of a child because he violated the terms of his probation. His current prison sentence depended on his future behavior and the decisions of administrative agencies in determining whether he violated his parole and should be reconfined and whether his probation should be revoked and he should be sentenced after revocation of probation. Therefore, Santiago's alleged failure to understand the range of punishment he could have received if he was convicted was a collateral, not a direct, consequence of his plea, and even if he was misinformed about the maximum penalty, he has not suffered a manifest injustice.

Like in *James*, here the parties agreed to recommend probation. The transcript of the original sentencing hearing, held on July 3, 1996, indicates that "[t]he plea was the State would drop the weapons enhancer on the first degree sexual assault, agree to recommend probation on the first degree sexual assault charge instead of the – instead of any prison time, and on the threat to injure would have a free hand." (72:2.) The State recommended 16 years on the threat to injure count and recommended 40 years of probation on the first-degree sexual assault of a child count. (72:4.) Defense counsel recommended a total of five to ten years in prison. (72:11.) The circuit court imposed 15 years in prison on the

threat to injure count, followed by a withheld sentence and 30 years of probation on the first-degree sexual assault of a child count. (72:17-18.) As a result, the amount of prison time Santiago could face should he violate his probation became collateral to his plea.

As in *James*, in this case this Court should similarly conclude that because Santiago's parole and probation violation was a matter within his control, the maximum punishment he could have received was not a direct consequence of his no-contest pleas. The effects of Santiago's revocation and his subsequent prison sentence after revocation were entirely collateral to his plea because they depended on future administrative proceedings and Santiago's behavior. *Myers*, 199 Wis. 2d at 394; *James*, 176 Wis. 2d at 243-44. Therefore, the alleged failure to accurately inform Santiago of the maximum amount of prison time he could face is not a manifest injustice that would allow him to withdraw his plea. This Court should affirm the circuit court's denial of Santiago's motion to withdraw his plea without a hearing.

C. Santiago's allegations are insufficient to show his trial counsel performed deficiently or that he was prejudiced and therefore he was not entitled to a hearing on his motion seeking plea withdrawal.

On appeal, Santiago argues that his trial counsel was ineffective because he "failed to conduct the most basic elementary research or he'd discovered the discrepancies in the criminal complaint(s) and information," and that he was prejudiced because he was "misled by defense counsel as to the maximum penalty he truly faced before his plea, during his plea and at sentencing. Further, Santiago was misled as to the potential possibilities as it related to parole and parole eligibility in assessing plea offer(s)." (Santiago's Br. 18.)

Santiago asserts that the only way to remedy this prejudice is plea withdrawal and that he has established a "manifest injustice" by clear and convincing evidence even without an evidentiary hearing. (Santiago's Br. 22.)

In order for this Court to review a claim of ineffective assistance of counsel, the circuit court must have held a hearing to preserve counsel's testimony. *Machner*, 92 Wis. 2d at 804. And, in order for the defendant to be entitled to a hearing, he must allege facts that, if true, would entitle him to relief. *Bentley*, 201 Wis. 2d at 309-10. Here, Santiago's allegations of deficient performance and prejudice by his trial counsel are entirely insufficient to require a remand for a hearing on his claims.

In support of his argument that his trial counsel was ineffective and that he was prejudiced, Santiago argues that he would not have pled no contest but for counsel's performance and that he "would've insisted on trial," had he been properly advised by his trial counsel of the maximum punishment that he was facing. (Santiago's Br. 16.) However, as set forth in Part B. above, the maximum sentence was a collateral consequence of his no contest plea, because it would not come into play unless and until Santiago violated his probation. Therefore, Santiago was not prejudiced by the alleged failure of his trial counsel to advise him properly of the amount of time he faced in prison. *See James*, 176 Wis. 2d at 243-44.

Further, Santiago's statements that he would have insisted on a going to trial and that the alleged "increase of twenty-five (25) years Santiago thought he was facing was substantial enough to induce a plea" (Santiago's Br. 16) are entirely conclusory and insufficient to support his claim that his counsel was ineffective and that he was prejudiced. *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682

N.W.2d 433. Not only are his allegations of prejudice wholly conclusory, they are also disingenuous. Santiago was facing at least 54 years in prison on the first-degree sexual assault of a child and threat to injure charges. He received only 15 years on the threat to injure and a withheld sentence and 30 years probation on the first-degree sexual assault of a child conviction. Santiago's assertion that his counsel performed deficiently for not correctly informing him of a collateral consequence of his plea—his potential prison time for the first-degree sexual assault of a child conviction if he violated his probation—amounts to an argument that he intended to violate his probation. This does not provide a basis for Santiago to be allowed to withdraw his plea or for this Court to remand for a hearing on his claims that his counsel performed deficiently.

Santiago's lack of knowledge of a collateral consequence of his plea—his maximum prison time when he received probation—is not a basis for plea withdrawal and does not provide a basis to allege ineffective assistance of trial counsel. Just as the circuit court was not required to inform Santiago of a collateral consequence of his plea, nor was his trial counsel, because whether Santiago would be sentenced after revocation of his probation was entirely up to him. If Santiago had not violated his probation, he would have only been subject to prison time for the threat to injure conviction, which he has fully served. Santiago's future behavior and violation of the terms of his probation resulted in his having to serve more prison time after revocation of his probation on the first-degree sexual assault of a child conviction. Santiago's allegations that his trial counsel performed ineffectively and that he suffered a manifest injustice are entirely conclusory and therefore, they are insufficient to entitle him to a hearing.

III. The circuit court properly denied Santiago's motion to correct or amend the judgment of conviction after revocation of his probation.

On appeal, Santiago argues that his Motion to Correct or Amend the Judgment of Conviction after revocation of his probation should have been granted because, although the original judgment of conviction reflects the proper date of the offense—"between July, 1992 and November, 1992"—the corrected judgment of conviction after revocation contains an inaccurate date of May 17, 1996, that "subjects Santiago to the provision of Presumptive Mandatory Release (PMR)." Santiago's Br. 23. He asserts that the DOC "is under the impression Santiago's offense was committed 'on or after July 21, 1994 through December 31, 1999' (i.e. May 17, 1996) and can thus further incarcerate Santiago beyond his mandatory release subjecting him to the provisions of PMR." In support, Santiago notes that "DOC penned in markings on the Judgment of Conviction dated September 9, 2010." (Santiago's Br. 24; 60:4, A-App. 113.)

But the DOC has already requested clarification of the September 10, 2010 judgment of conviction in its February 22, 2016 letter to the circuit court. (60:1, A-App. 101). In response, the circuit court entered a corrected judgment of conviction after revocation of probation, dated May 25, 2016, and corrected the statute governing the offense of first-degree sexual assault of a child to reflect the one that was in effect in 1992, Wis. Stat. § 948.02(1). (64, R-App. 103-104.) Subsequently, Santiago filed a motion for a further correction of the judgment of conviction after revocation of probation: specifically, the "date committed" section that indicates May 17, 1996, rather than between July 1992 and November 1992. (67.) The circuit court denied his motion to correct the judgment of conviction, finding that "Wisconsin Statutes allow the dates listed in the

documents." (69, A-App. 104; 70:3, A-App. 103.) The circuit correctly found that it is not statutorily required to amend the judgment of conviction and further, the record as a whole accurately reflects the date Santiago committed the crime of first-degree sexual assault of a child.

A. Relevant law and standard of review.

The statute governing judgments of conviction, Wisconsin Statute § 972.13, provides:

> (1) A judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest.
>
> (2) Except in cases where ch. 975 is applicable, upon a judgment of conviction the court shall proceed under ch. 973. The court may adjourn the case from time to time for the purpose of pronouncing sentence.
>
> (3) A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence, and a finding as to the specific number of days for which sentence credit is to be granted under s. 973.155. If the defendant is acquitted, judgment shall be entered accordingly.
>
> (4) Judgments shall be in writing and signed by the judge or clerk.
>
> (5) A copy of the judgment shall constitute authority for the sheriff to execute the sentence.

In both statutory construction and sentencing pronouncements the test for ambiguity in sentencing pronouncements is whether the language at issue can be understood by "reasonably well-informed persons in two or more different ways." *State v. Oglesby*, 2006 WI App 95, ¶ 19, 292 Wis. 2d 716, 715 N.W.2d 727. Whether the sentence portion of a written judgment of conviction should

be corrected presents a question of law. *State v. Prihoda*, 2000 WI 1223, ¶ 8, 239 Wis. 2d 244, 618 N.W.2d 857. This Court reviews questions of law de novo. *State v. Ploeckelman*, 2007 WI App 31, ¶ 8, 299 Wis. 2d 251, 729 N.W.2d 784. In determining whether the sentencing court's intent was carried out in its sentence, this Court must "examine the entire record to discern the court's intent." *State v. Grube*, 2011 WI App 143, ¶ 18, 337 Wis. 2d 557, 806 N.W.2d 269; s*ee Oglesby*, 292 Wis.2d 716, ¶ 25.

B. The circuit court is not required to amend the judgment of conviction after revocation because the record shows that it intended to sentence Santiago for the first-degree sexual assault of a child crime he committed between July 1992 and November 1992.

Santiago seeks a correction of the "Date Committed" section of the May 25, 2016, judgment of conviction after revocation of his probation. As described above, the circuit court already responded to DOC's concerns about the judgment of conviction by correcting it to accurately reflect that the statute Santiago was charged with violating when he committed first-degree sexual assault of a child, was the one in effect in 1992, Wis. Stat. § 948.02(1). Santiago's statement on appeal that the DOC is "under the impression that Santiago's offense was committed 'on or after July 21, 1994 through December 31, 1999'" (Santiago's Br. 24) is pure speculation. The concern DOC raised in its February 22, 2016 letter about the judgment of conviction after revocation has been addressed by the May 25, 2016, corrected judgment of conviction after revocation of probation. (60, A-App. 101; 62, R-App. 103-104.) The judgment of conviction complies with Wis. Stat. § 972.13 and the circuit court is not required to make a further correction.

Additionally, based on the entire record, the date that Santiago committed the crime is readily apparent and therefore, a corrected judgment of conviction after revocation of probation is not required. At the sentencing-after-revocation hearing, the circuit court stated that Santiago committed the heinous crimes in this case "between July 1992 and November 1992," although he was not sentenced for them until 1996. (73:32, 34.) Therefore, the sentencing court's intent was to sentence Santiago after revocation of his probation for the crimes committed in 1992. Although the corrected judgment of conviction after revocation states that the crime of first-degree sexual assault of a child was committed on May 17, 1996, which is the date Santiago pled no-contest (62, R-App. 103-104), the sentencing court knew that the crime was committed in 1992. Therefore, the court was not required to correct the judgment of conviction.

The circuit court already entered a corrected judgment of conviction to clarify that the charging statute was Wis. Stats. § 948.02(1), which was in effect when the Santiago committed the first-degree sexual assault of a three year old child in 1992. (64, R-App. 103-104.) Santiago's speculative statement that the DOC "is under the impression Santiago's crime was committed" in 1996 is insufficient to warrant a further correction of the judgment of conviction

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's order denying the postconviction motion and the motion to correct the record without a hearing, and affirm the judgment of conviction after revocation.

Dated this 16th day of November, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,714 words.

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ANNE C. MURPHY
Assistant Attorney General

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 16th day of November, 2016.

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ANNE C. MURPHY
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Eugene B. Santiago
Case No. 2016AP1267-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, 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.

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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Dated this 16th day of November, 2016.

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