STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1865 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIO DOUGLAS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order
Denying a Postconviction Motion,
Entered in Milwaukee County Circuit Court,
the Honorable David Borowski, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

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

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

In this case, the State concedes that "everyone" erroneously believed that Mr. Douglas could have been convicted of two counts resulting in a maximum term of imprisonment of 100 years. (State's Br. at 2). Nonetheless, the State argues that Mr. Douglas is not entitled to any relief.

Contrary to the State's argument, the misunderstanding of all of the parties as to the number of counts and the maximum penalty Mr. Douglas was facing if he went to trial permeates the entire criminal proceeding and renders both his plea and sentencing invalid. Accurate knowledge of the total counts a defendant can be convicted of and the total maximum penalty is critical information for all of the parties. How can a defendant make an informed decision to enter a plea or go to trial without this information? How can a defense attorney adequately and properly advise his client? How can a defense attorney and the State effectively negotiate when neither side knows the correct number of counts or maximum penalty? And, how can a circuit court effectively sentence a defendant and evaluate the case when it doesn't have accurate information regarding the number of counts a defendant could have been convicted of, how much time a defendant was facing, or the benefit of recommendations or discussions based on accurate knowledge?

As discussed below, Mr. Douglas asserts that he is entitled to an evidentiary hearing to determine whether plea withdrawal is justified, a new sentencing hearing, or sentence modification. In addition, Mr. Douglas requests that this Court order the circuit court to modify the no contact order to allow Mr. Douglas contact with his biological children.

I. Mr. Douglas Is Entitled to an Evidentiary Hearing and Plea Withdrawal Because the Circuit Court and Trial Counsel Incorrectly Advised Him that He Could Be Convicted of Two Counts with a Maximum Prison Term of 100 Years If He Went to Trial.

A. Mr. Douglas's plea was not entered knowingly, intelligently, and voluntarily.

In ***State v. Dillard***, 2014 WI 123, ¶ 60, 358 Wis. 2d 543, 859 N.W.2d 44, the Wisconsin Supreme Court stated that a plea is not voluntary unless the defendant is "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel . . ."

In this case, Mr. Douglas's plea was not made with full knowledge of the information relevant to a decision to proceed to trial or enter a plea. The record unequivocally reflects that both the circuit court and trial counsel incorrectly advised Mr. Douglas that he could be convicted of two counts of sexual assault of a child resulting in a total maximum prison term of 100 years. As a result of this advice, Mr. Douglas was prevented from making a reasoned decision whether to proceed to trial or enter a plea. He was not aware of the direct consequences of his plea or the actual value of the commitments made by the prosecutor in the plea offer.

The State cannot show that the misinformation from the circuit court and trial counsel did not impact Mr. Douglas's decision to enter a plea instead of going to trial. *See generally*, ***Dillard***, 2014 WI 123, ¶ 60 (stating that "case law does not require that the decision to plead . . . be based exclusively on the misinformation that the defendant received.").

The State argues that a 100-year sentence is not different than a 60-year sentence because both amount to "a de facto sentence of life in prison." (State's Br. at 7-8). However, contrary to the State's argument, a 100-year sentence is substantially different than a 60-year sentence. It is a matter of an entire 40 years. Further, the State ignores the difference in the initial confinement or initial release time. The maximum amount of initial confinement time of a 100-year sentence would be 65 years (25 years of initial confinement on count one and 40 years of initial confinement on count two). In comparison, the maximum amount of initial confinement time of a 60-year sentence would be 40 years. See Wis. Stat. § 973.01(2)(b). Thus, if the maximum amount of initial confinement time was imposed in each of the scenarios, this would make a difference between initially being released from prison at age 93 versus age 68.

The State also argues that, unlike in ***Dillard,*** "the charge of first-degree sexual assault of a child was neither a factual or legal impossibility." (State's Br. at 8). This misses the point. While it is true that Mr. Douglas could have been convicted of first-degree sexual assault of a child *or* second-degree sexual assault of a child, the problem is that he was affirmatively misadvised that he could be convicted of *both* counts. Thus, offering to drop one of the charges was an illusory benefit and renders Mr. Douglas's plea invalid.

In addition, the State argues that Mr. Douglas "got exactly the same benefit he would have received if he had been properly charged with only one crime." (State's Br. at

9). What would have happened or could have happened is speculation.[1]

B. Harmless error.

The State argues that any error would have been harmless. (State's Br. 9-10).

First, it is not clear whether the harmless error doctrine applies when a defendant has been given affirmative misinformation. The harmless error doctrine is not mentioned in other cases analyzing whether affirmative misinformation requires plea withdrawal. *See, e.g.,* ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983); ***State v. Woods***, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992).

The State cites ***State v. Cross***, 2010 WI 70, ¶ 36, 326 Wis. 2d 492, 786 N.W.2d 64, for the proposition that "a defendant's failure to know and understand the precise maximum penalty can be harmless error." (State's at 9). However, in ***State v. Taylor***, 2013 WI 34, ¶ 41 n. 11, 347 Wis. 2d 30, 829 N.W.2d 482, the Wisconsin Supreme Court clarified in a footnote that "[n]or did ***Cross*** undertake the harmless error analysis. The only time ***Cross*** mentioned harmless error was in the context of discussing federal rules that support the proposition that not every plea colloquy error should result in withdrawal . . ."

---

[1] When noting that O.L.G. alleged the use of force supporting the greater offense of first-degree sexual assault (at 10), the State does not acknowledge trial counsel's sentencing statements that he had spoken to O.L.G's uncle who said that "[O.L.G. related a different story, that, yes, it was an act of sexual intercourse, but due to not wanting to get in trouble herself, she created this story about being forced . . ." (56:10; Def. Initial Br. App. 146).

Second, even if the harmless error doctrine applies, the State has failed to meet its burden to prove beyond a reasonable doubt that the error did not contribute to the conviction.[2] The error in this case is that trial counsel and the circuit court affirmatively misinformed Mr. Douglas. As a result, Mr. Douglas's plea was entered in ignorance. Mr. Douglas did not know the number of counts or the correct maximum he faced if he went to trial. Additionally, Mr. Douglas did not know the value of the commitments offered by the prosecutor. Thus, the misinformation regarding the number of counts Mr. Douglas could be convicted of and the maximum sentence he faced if he went to trial undermines the plea. The State cannot show beyond a reasonable doubt that the misinformation did not affect or contribute to Mr. Douglas's decision to enter a plea instead of going to trial. As discussed above, a 100-year sentence is substantially different than a 60-year sentence.

---

[2] As stated above, it is unclear whether the harmless error doctrine applies when a defendant has been given affirmative misinformation. Assuming that it does, Mr. Douglas analyzes harmless error using the standard set forth by the State that "[a]n error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the conviction." (State's Br. at 9 (citing to a discussion of whether a hearsay statement violated a defendant's right to confrontation in ***State v. Weed***, 2003 WI 85, ¶¶ 29-30, 263 Wis. 2d 434, 666 N.W.2d 485)). Under that standard, it is the State's burden to prove that the error did not contribute to the conviction. *See generally*, ***State v. Thoms***, 228 Wis. 2d 868, 873-74, 599 N.W.2d 84 (Ct. App. 1999).

II. Mr. Douglas Is Entitled to an Evidentiary Hearing and Plea Withdrawal Because He Received Ineffective Assistance of Counsel.

The State does not address whether trial counsel's performance was deficient. As a result, Mr. Douglas requests that this argument be deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

The State argues that Mr. Douglas was not prejudiced because of the risk he faced if he were to go to trial. (State's Br. at 11-12). The State cites ***U.S. v. Payton***, 380 F. App'x. 509, 512-13 (6th Cir. 2010). However, ***Payton*** analyzed the defendant's decision under "plain error," not ineffective assistance of counsel. *See* ***id.*** at 512, 513.

Moreover, other federal cases support that a defendant's misunderstanding of the maximum possible exposure entitle the defendant to relief. *See, e.g,* ***Hammond v. U.S.***, 528 F.2d 15 (4th Cir. 1975) (on collateral attack, remanding for a hearing on the voluntariness of plea when the court clerk and court appointed attorney misadvised defendant that his total exposure was 90 years or 95 years if he went to trial when in fact the most the defendant could have received was 55 years); ***U.S. v. Rumery***, 698 F.2d 764 (5th Cir. 1983) (on appeal of denial of motion to withdraw plea, vacating the plea and holding that defendant was denied effective assistance of counsel when his maximum exposure was five years, but the court appointed attorney advised him of a maximum possible exposure of thirty years); *see also*, ***U.S. v. Stubbs***, 279 F.3d 402, 411 (6th Cir. 2002) (stating "'[w]hen considering a plea agreement, a defendant might well weigh the terms of the agreement against the maximum

sentence he could receive if he went to trial. When the maximum possible sentence exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject.'" (quoting ***Pitts v. U.S.***, 763 F.2d 197, 201 (6th Cir. 1985) (per curiam))), *abrogation on other grounds recognized by* ***U.S. v. Helton***, 349 F.2d 295, 299 (6th Cir. 2003).

Therefore, Mr. Douglas requests an evidentiary hearing to determine whether he is entitled to plea withdrawal.

III. The Circuit Court Sentenced Mr. Douglas Based on Inaccurate Information and He Is Entitled to a New Sentencing Hearing.

As set forth in Mr. Douglas's initial brief (at 25-26), the pretrial transcript reflects that the circuit court incorrectly believed that Mr. Douglas could be convicted of both counts of sexual assault of a child resulting in a maximum prison sentence of 100 years. There is no indication on the record that the court realized at the time of sentencing that was inaccurate. Moreover, the circuit court's inaccurate belief was further denoted during sentencing when it stated that ". . . *if he goes to trial on these two counts*, Count 2 is a 25-year initial confinement as part of the bifurcated sentence." (56:19-20; Douglas Initial Br. App. 155-56) (emphasis added).

The State argues that the circuit court did not rely on inaccurate information because, if Mr. Douglas had gone to trial, he could have been convicted of the greater offense which included a minimum of 25 years of initial confinement. (State's Br. at 13-14). It is true that if Mr. Douglas went to trial he could potentially be convicted of the greater offense. However, nothing in the circuit court's statement "if he goes

to trial on these two counts" reflects that it actually knew that Mr. Douglas could only be convicted of one of the counts. The court did not state, for example, that Mr. Douglas could have been found guilty at trial of the greater count *or* guilty of the lesser count.

The State also indicates that "[t]he court may have misspoken about a trial on two counts." (State's Br. at 14). It is unlikely that this was the case. The postconviction decision made no such claim that it "misspoke."

In addition, contrary to the State's argument (at 15-16), Mr. Douglas was deprived of effective assistance of counsel. Mr. Douglas disagrees with the State's argument that "there was nothing objectionable about the court's statement." As discussed above, the circuit court's statement about "going to trial on two counts" reflects its inaccurate belief that Mr. Douglas could have been convicted of both counts resulting in a maximum possible sentence of 100 years. Additionally, trial counsel's failure to object was prejudicial because the circuit court did not have accurate information. Contrary to the State's suggestion (at 15), Mr. Douglas did not have to show that his sentence would have been different. Rather, Mr. Douglas simply needs to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Thiel***, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305 (citations omitted). And, here, the fact that the circuit court did not have accurate information undermines the confidence in the sentence imposed in this case.

IV. This Court Should Remand for Sentence Modification.

The State argues that the circuit court's "recent recognition that Douglas could not have been convicted of both the greater offense of first-degree sexual assault of a child and the lesser included offense of second-degree sexual assault of a child does not qualify as a new factor because the court did not consider as a factor in sentencing Douglas its then-erroneous belief that Douglas could have been convicted of both offenses." (State's Br. at 17).

As discussed above, Mr. Douglas disagrees that the circuit court did not consider its erroneous belief that he could have been convicted of both offenses at the time of sentencing. (*See* Part III).

In addition, contrary to the State's argument, the number of counts a defendant could have been convicted of and the maximum amount of time a defendant was facing on the case is highly relevant because it goes towards the primary sentencing factors—the seriousness or gravity of the offense and the need to protect the public. For example, conduct that could have resulted in a 60-year maximum sentence is certainly more serious than conduct that could have resulted in a 6-year maximum sentence. Likewise, a person who committed an act that could have resulted in a 60-year maximum sentence likely poses more danger than a person who committed an act with a lesser maximum sentence.[3]

---

[3] The State notes that ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984), does not support that the number of counts charged and the resulting maximum aggregate sentence directly relate to the seriousness of the offense and the protection of the public. To be clear, Mr. Douglas cited ***Harris*** for the proposition that the primary sentencing factors are the gravity of the offense, the character of the offender, and (continued)

V. The Circuit Court's Blanket Order Prohibiting Mr. Douglas From Having Contact With Any Children Under the Age of Sixteen Is Overly Broad and Violates Mr. Douglas's Constitutional Right to Parent.

The State does not appear to contest that the circuit court's blanket order prohibiting Mr. Douglas from having contact with any children under the age of sixteen is overly broad. As a result, Mr. Douglas requests that this argument be deemed conceded. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d 97, 108-09 (unrefuted arguments are deemed conceded).

The State asserts that Mr. Douglas has not made a showing that the DOC has placed any restrictions on visits by his children to the prison or that any such restrictions might have been influenced by the court's order. (State's Br. at 18-19). However, this does not change the fact that the order is overbroad and an unconstitutional violation of the right to parent. And, if this Court determines that such a showing is necessary, Mr. Douglas respectfully requests a remand to present additional evidence on this point.

---

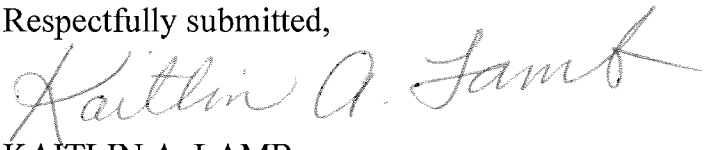
the need for protection of the public. Mr. Douglas did not, and does not, mean to suggest that ***Harris*** holds that the number of counts and maximum aggregate sentence directly relates to the seriousness of the offense and the protection of the public.

CONCLUSION

For the reasons state above, Mr. Douglas is entitled to postconviction relief.

Dated this 26th day of June, 2017.

Respectfully submitted,



KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

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

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,794 words.

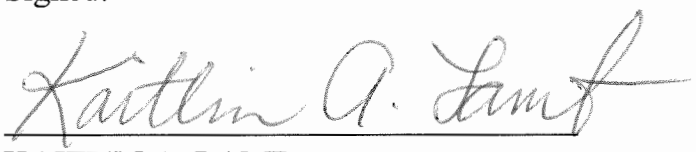
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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 26th day of June, 2017.

Signed:



KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

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

Attorney for Defendant-Appellant