STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No.16-AP-2209-CR

DARRICK L. BENNETT,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID BOROWSKI AND JOSEPH M. DONALD, RESPECTIVELY PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State's Facts

The state's account of the facts is, though generally accurate, exaggerates and misleads at points.

The allegations of the criminal complaint are cited as fact. (At 2-3.) They are not beyond dispute. Though Bennett

agreed that the complaint could supply a factual basis for the plea, he did not stipulate to its entire accuracy, much less its fairness or impartiality. To serve as a factual basis, allegations must be merely supported by "strong evidence"; they need not be certain nor agreed. *See State v. Chabonian*, 55 Wis.2d 723, 730, 201 N.W.2d 25 (1972).

Use of the complaint is unnecessary: Bennett raises no factual basis claim. Bennett's statements to the presentence investigator establish the essence of his course of conduct.

In the criminal complaint Bennett reportedly explained in narrative of the fight that he was "gripping" C's neck. (R1:2.) It later states, without context, that he "admitted" that he "squeezed [her neck] hard" (R1:3.) The state conflates these statements: "Bennett grabbed her by the neck and squeezed hard." (Brief at 3.) The state makes it seem like Bennett told police that he intentionally strangled C.S. But whatever he might have said that police took as an admission, Bennett denies that he tried to injure her this way.

The state recounts Bennett saying that he did not seek help because he knew he was in trouble. (Brief at 3.) The criminal complaint however, qualifies this to "at the time they were fighting." (R1:3.) Bennett has asserted that his reasons for not seeking help were based mainly on other factors: he thought she was faking a seizure and not deathly injured. He also had a competing concern for his children, and took them away from the scene. And his use of drugs left him impaired.

The State's account of facts becomes argumentative, asserting that Bennett's postconviction claims were "conclusory" as to the allegation that Bennett could have

relied on an negative defense (Pl. Brf, at 14) or that the prosecutor presented a version of the crime that was inaccurate (Id. at 14 n.5.) The motion further elaborates these allegations.

Likewise, the state soft-pedals the court's statements that C. looked into Bennett's eyes and begged for mercy, and suffered a death of extreme agony. In the State's distorted account, these were idle musings by the court "that the court could imagine" such things. That is wrong, The court said these things "had to" have happened, it was "sure." The court engaged speculative fancy, inisted these follies were true, basing the sentence on them, rather than on reliable evidence. *See State v. Mosley*, 201 Wis. 2d 36, 44 (Ct. App. 1996).

The State's Brief (at 15) apparently referring to paragraph 57, characterizes Bennett as arguing that some "abuse" of C. was "justified," which is oxymoronic. "Abuse" is never justified. What Bennett argued, which is legally unassailable, is that he had a legal privilege to deflect C.'s physical interference with his person, even if it caused injury.

The State also claims that Bennett acknowledges having "brutally" attacked C. (Pl. Brf. at 28.) His only assertion on this was relative: the attack was far *less* brutal then the court described. (Def. Brf. at 28.) Bennett himself is a human being, not a brute.

Finally, the State's Brief's relates, sometimes repetitiously, the facts of Bennett's wrongful conduct and its tragic effects at the expense of legal analysis appears. This seems an appeal to emotion, and arguably one that seeks to overbear the reasoned application of the law. Bennett

acknowledges that arguments supported by strong emotion are legitimate, and the ideal in law is more nuanced than simply seeking that judges always be dispassionate. *See generally* Terry A. Moroney, "The Persistent Cultural Script of Judicial Dispassion," 99 CAL. L. REV. 629 (2011). One respected view is that emotions represents a sometimes essential aid to cognition, but also poses risks of "short-circuit[ing]" or "blind[ing]" rational faculties. Richard A. Posner, FRONTIERS OF LEGAL THEORY 226, 228, 230-31, 245 (2001).

Without wading too deep into these waters, Bennett simply urges the court to handle the incendiary emotional matter of this case delicately. The issue Bennett poses is not whether he should escape judgment for domestic battery, which he agrees should not be tolerated. It is whether he was given his right to an informed plea, whether he has presented overlooked facts that are highly relevant to his sentence, and whether he made a sufficient presentation to obtain the first step toward discovering information that could better inform his sentence. These are all questions that require even judgment upon appropriate legal standards. A victory for Bennett here is not an attack on the rights of women. Even if he attains all he asks for, he will not be set free for a long long time, and that is so even if a jury agrees with him as to his principal defense.

II. Legal Responses

A. Intelligent and Voluntary Plea.

Part I.A of the State's brief makes one vital omission:

plea withdrawal can be based on a manifest injustice other than ineffective assistance. The state disregards Defendant's entire argument that regardless of whether counsel was ineffective, Bennett stated a claim that his plea was, based on factors beyond the record, not an intelligent and voluntary plea. Because the state does not even bother to argue this point, the court should treat any state responsive argument as waived and grant remand on that basis.

B. Court's Silence and Non-exercise of Discretion

It is disingenuous to argue that the court "rephrased" Bennett's argument by trading causation for *mens rea*. (Pl. Brf, at 20) To rephrase is to express something in alternative way, not to express something entirely different.

The state fails to explain why its subsequent argument means "there is no need for reversal." (Id.) Even if it were true that Bennett had inadequately pled his claim (which is not true), the court would still have been obligated to exercise discretion whether to grant a hearing, and that was not done.

C. Bennett's Right to an Informed Plea Decision

1. Advice and Probable Outcome. Bennett's argument doesn't depend on his being able to "successfully challenge" the state's proof, as the state claims. (Id.) His right to an informed plea has nothing to do with a guarantee or even likelihood of victory, just a colorable defense and a prayer would be enough.

Bennett does not argue that he should have been counseled "to go to trial." (Id.) His argument is that he should have been presented with an informed choice which included

the *option* of presenting a defense, even if this attorney believed it unlikely to succeed.

State v. Felton teaches that a criminal defendant's "lawyer should advise the accused with complete candor concerning *all aspects of the case*" *Id.*, 110 Wis. 2d 485, 506, 329 N.W.2d 161 (1983) (emphasis added). This would include potential defenses. The state selectively quotes *Felton* limiting its scope to an "assessment of the probable outcome." Full disclosure would have been to tell Bennett that he had a defense that most likely fail, and advise against. Instead, the choice was presented as a nullity: you plead, or go forward with no defense at all.

The state says that Bennett was concerned about causation and that advising him against a defense of non-causation was not deficient. (Pl. Brf. at 21.) Obviously. But since when is a defense lawyer's duty to only pursue defenses that are promoted by the client? Going to *Felton* again, the duty of the attorney is to independently investigate all potential defenses because the client "is not educated in or familiar with controlling law." *Id.* The Constitutional guarantee of effective counsel is not simply for those defenses which an accused identifies for himself. It includes the spotting of legal issues.

If Bennett had argued that a trial would have reduced his sentencing exposure that would obviously have been false. (Pl. Brf. at 21.) But this is one more parader in the State's pageant of straw men: he made no such argument.

The state recites its case against Bennett (Id. at 22) and seems at first to be second-guessing what a jury would do, but

it ends on the assessment that there was a "very real probability" of a guilty verdict. Okay. The state also adverts to Bennett's concession that it might not be prudent to go to trial. (Id. at 23.) Mmm-hmm. But the state appears to miss the point. It was Bennett's choice to make. He had the right to choose prudently or imprudently, based on the knowledge that he had a legal defense, even if it "very…probab[ly]" would not succeed.

2. Lesser Included Instruction. The Defense argument does not depend on an "assumption" that he would be able to argue for a lesser included offense. He could rely on such an instruction being given because the lesser charge reflects a reasonable view of the evidence. *State v. Head*, 2002 WI 99, ¶ 44, 255 Wis.2d 194, 648 N.W.2d 413.

Here that view is obvious, and Bennett has stated it. The jury could conclude that yes, Bennett committed a battery, and yes, it led to death, but no, it was not intended, no it was not the natural and probable result, and no it was not subjectively or objectively likely. It was instead something of a fluke, a terrible product of chance that made the outcome of a already serious crime much worse than it would have been.

3. Amended Information. The benefits of the plea agreement do shift slightly when it is acknowledged that the charge had been amended to intentional homicide (Pl. Brf. at 21), but not so as to affect Defendant's argument. Either way, the trial offered him a chance at a much lesser sentence, while the plea exposed him to a *de facto* life sentence.

It is unclear what the state is thinking when it argues that the amended information would undermine a *mens*

innocens defense (Id.), since the elevated charge requires proof of an even more culpable mental state, If Bennett's causing death was not reckless then *a fortiori* it was not intentional.

D. Sentence Modification

1. Pleading Burden. The State asserts that when a postconviction motion seeks sentence modification, there is a heightened pleading standard that requires clear and convincing proof of a new factor be submitted along with the motion. (Brf. at 25.) There is no argument advanced why this should be so, merely a confident declaration and a citation to *State v. Franklin*, 148 Wis.2d 1, 434 N.W.2d 609 (1989). *Franklin* does not support the state's position, but goes against it.

Franklin was not about the standard to obtain a hearing, and does not even reference a request for a hearing. The issue was the "existence of a new factor", *id.*, 148 Wis.2d at 8, and specifically "the burden of proof necessary to set aside a final judgment and reach the stage where relevant sentencing information may be considered", *id.* at 10.

The state appears to misapprehend what is meant by "stage" here. The two stages are analytical steps, not procedural steps of pleading and hearing. The first is demonstration that there is a new factor and the second is its discretionary consideration toward a change in sentence. Per *Franklin* at 8: If a defendant has demonstrated the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence….

> In this case we must determine whether Franklin has demonstrated the existence of a new factor allowing the circuit court to consider sentence modification.

The court was clear about what it was doing. The court based its decision to apply a "clear and convincing" standard explicitly because "this case is analogous to that of post-conviction motions." It makes no sense that there would be an analogy modification final proof and postconviction motion pleading.

– Particularly since there is an overlap between the two motions. Franklin filed a stand-alone sentence modification motion over 12 years after conviction. *Id.* at 5-6. In contrast, Bennett is utilizing sections 947.02 and 809.30 to make what is called a "postconviction motion for sentence modification." *State v. Walker*, 2006 WI 82, ¶ 30, 292 Wis. 2d 326, 716 N.W.2d 498.

There is ample authority that the pleading standard for "postconviction motion[s]" (of any type) requires *alleging* facts that if true would allow the defendant to move forward toward relief – not to prove facts by means of a motion. This standard ha been cited even where the only relief sought is sentence modification. *See, e.g., State v. Gentry*, No. 2009AP1703-CR (Wis. App. Apr. 1, 2010). Various cases have held it appropriate to deny a hearing on a postconviction motion for sentence modification when a defendant fails to "allege" or "raise" facts that constitute a new factor. *State v. Krueger*, 119 Wis.2d 327. 335, 351 N.W.2d 738 (Ct. App. 1984); *State v. Washington*, 176 Wis.2d 205, 216-17, 500 N.W.2d 331 (Ct. App. 1993).

This is common sense. Pleadings typically *allege*, and

postconviction motions have been analogized to pleadings. *State v. Sutton,* 2012 WI 23, ¶20, 339 Wis.2d 27, 810 N.W.2d 210.

. There are cases where in order to better keep the gate to a hearing, some *prima facie* showing is required before advancing to a hearing. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). But the state's theory appears to be that only when the defense has already *fully* met the burden that would be faced at a hearing is he or she entitled to that hearing. In other words, the defendant only gets to present witnesses and physical evidence when such mainstays of proof are not actually needed .

2. No New Facts. The state's claim that the modification claims involve no new facts (Pl. Brf. at 25) is dumbfounding. First, Bennett challenges the length of the physical confrontation, which the court indicated lasted between 20 minutes and two hours. The state relies on reports that Bennett was "arguing" for two to three hours with C. – not beating her. The law distinguishes speech from battery. It also relies on the criminal complaint, in which Bennett describes a course of fighting in which he struck C. three times, choked her, and grabbed her by the ponytail, acts that would require at most a couple minutes.

The state says the court was not embroidering by imagining that C. begged for an end to the beating, again citing the criminal complaint, which mentions no such begging, only that she approached Bennett in a pleading manner. The court had Bennett coldly looking C. "right in the

eyes" as he struck her. Again, the state cited the complaint which only stated that Bennett could see C,'s face.

The state says the crime scene photographs ate not a new factor. But the court overlooked the information in the autopsy report, which contradicted some of its statements, such as there being cuts or gashes on C.'s face.

C.'s purported prolonged "agony" was entirely speculative. The state points to various evidence that would *not* support the court's inference. (She looked horrible, her condition worsened, at one point she appeared to be hurting.) Bennett asserted that a significant share of hæmatomas do not involve a headache, that C. would have diminishing consciousness of pain, and that she was under the influence of an analgesic, all points that the court did not consider.

The contents of the coroner's report, the effects of head injuries and analgesics, whether someone looked directly into another's eyes or begged, the length of time that an event occurs, are all facts, not characterizations or opinions. Likewise whether C. had living parents. The court did not just make an isolated hyperbolic remark. It had a whole scenario built up in its mind that did not reflect reality.

3. Optional Factors. The state does note that some of the facts offered by Defendant relate to optional sentencing considerations. (Pl. Brf. at 26.) It fails to explain why this is relevant. Facts about Bennett's life, such as the good he has done in the community, cannot be considered by a court if they are not known. Here, the court placed a lot of emphasis on Bennett's character, regarding him as pure monster. The proffered facts would appear to be highly important because

they undermine this assessment. The fact that the court may opt not to give them any weight does not preclude them from being new factors, since the court is free not to give a new factor any weight.

E. Postconviction Discovery

The state seems not to understand postconviction discovery. If granted, the court would direct that the records defendant seeks be delivered to the court for *in camera* review. Only relevant evidence would be passed on to the defendant. There would be no opportunity for a "fishing expedition."

Bennett has been clear regarding his need for postconviction discovery. It is not to malign C. The record already shows that she was a deeply troubled, drug addicted felon who repeatedly lied to the authorities and savagely treated her vulnerable mother. Those are just the facts. To the extent that C.'s character is relevant, anything further would have to be extreme not to be cumulative.

The information Bennett sought would have undermined the basis for the sentence, because it may have undermined facts that the court relied upon, such as C.'s credibility, and her life expectancy.

The fact that the court is not required to give weight to what the discovery discloses is again not a controlling factor. The court relied on an unsound legal argument to deny postconviction discovery, rather than a sound exercise of discretion.

CONCLUSION

Wherefore, this Court should order relief specified in Bennett's Brief-in-Chief.

Dated at Milwaukee, Wisconsin, February 19, 2018.

Respectfully Submitted
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CERTIFICATION OF FORM AND 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 300 dots per inch, 13 point body text, 12 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is **2965** words.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 19th day of February, 2018, I caused ten copies of the Brief and Appendix of Respondent-Appellant to be mailed by first class mail, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O.Box 1688, Madison, Wisconsin 53701-1688.

_____
GARY GRASS

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

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GARY GRASS