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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP000967 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GITAN MBUGUA,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Janet Protasiewicz Presiding, and an Order Denying Postconviction Relief, the Honorable Michael J. Hanrahan Presiding

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REPLY BRIEF OF THE DEFENDANT-APPELLANT

Nicole M. Masnica
Assistant State Public Defender
State Bar No. 1079819

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

Attorney for Defendant-Appellant

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ARGUMENT

I. Mr. Mbugua received ineffective assistance of counsel during the plea bargaining process when he was given inaccurate information regarding his exposure to sex offender registration and the maximum exposure he faced, and therefore, he should be allowed to withdraw his plea and take advantage of the original plea offered by the State.

In its reply brief, the State assumes for the sake of argument that "Attorney Ward inaccurately advised Mbugua that a conviction for false imprisonment exposed him to potential sex offender registration." (State's Brief, 13, fn. 5). For that reason, its response focuses on the prejudice prong of the ineffective assistance of counsel test. The State takes the position that Mr. Mbugua failed to establish prejudice as a result of Attorney Ward's deficiencies in three ways: (1) Mr. Mbugua did not show that he would have accepted the original plea offer had he been properly advised; (2) Mr. Mbugua did not show that he was subject to a more severe conviction or sentence as a result of counsel's incorrect advice; and (3) Mr. Mbugua did not show that the court would have accepted a guilty plea to the original charges. (State's Br., 14-20).

Regarding Attorney Ricci's representation, the State first contends that Mr. Mbugua did not establish that the original offer was available at the time he ultimately resolved the matter, and second, that he was not prejudiced by any error because we do not know that he would have received a lesser-sentence under the original offer.

A. Mr. Mbugua's postconviction motion properly alleged that he would have accepted the original plea offer.

1. This Court should employ the "waiver rule" and prohibit the State from arguing that Mr. Mbugua's assertions that he would have accepted the original plea offer were conclusory.

The State's response brief submitted to this Court asserts for the first time in postconviction litigation that Mr. Mbugua made a conclusory assertion when he alleged that he would have accepted the more favorable plea offer had he not been incorrectly told by trial counsel that doing so would result in him being placed on the sex offender. (State's Response Br., 14-15). Mr. Mbugua contends that the State has forfeited the right to make this argument. *See* ***State v. Huebner***, 2000 WI 59, ¶¶ 10-12, 235 Wis. 2d 486, 611 N.W.2d 727.

The Supreme Court of Wisconsin created the "waiver rule"[1] to prohibit parties from adopting positions on appeal that were not fully litigated in the trial court. The "waiver rule" is an "essential principle of the orderly administration of justice" and "promotes both efficiency and fairness."

[1] While the legal principle is called the "waiver rule," it involves the "forfeiture" of a legal right following failure to preserve an issue for appeal, rather than a knowing "waiver" of a constitutional right. *See* ***Huebner***, 2000 WI 59, ¶ 11, fn. 2, citing ***United States v. Olano***, 507 U.S. 725, 733 and ***Freytag v. Commissioner of Internal Revenue***, 501 U.S. 868, 894-95, fn. 2.

Huebner, 2000 WI 59, ¶ 11, citing ***Freytag v. Commissioner of Internal Revenue***, 501 U.S. 868, 894-95.

In its response brief at the trial level, the State did not allege that Mr. Mbugua's pleadings included only conclusory assertions regarding his interest in accepting the original plea agreement. In its brief to the postconviction court, the State argued: (1) that trial counsel was not deficient by providing the inaccurate advice, (2) that Mr. Mbugua's assertion that he would have accepted the original plea offer was not supported by the record, and (3) that even if counsel did make an error, there was no prejudice as the ultimate sentence was within the bounds of what was available under the original plea agreement. (23:8-9, 14). The State never argued that Mr. Mbugua's pleadings were insufficient to warrant a hearing under the ***Bentley*** standard. (23), *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).

Had the postconviction court been presented with this argument in the State's brief at the postconviction stage, it could have addressed the question in its decision, minimizing future litigation. For these reasons, Mr. Mbugua asks the court to apply the "waiver rule" and to not address this claim.

2. Mr. Mbugua properly alleged that he would have accepted the plea to the original offer but for counsel's error, and any quarrel with his pleadings to that effect are issues of credibility that must be decided at an evidentiary hearing.

The State's response alleges that Mr. Mbugua has not established that he was prejudiced by counsel's failures because his assertions were "conclusory." (State's Response Br., 14-15). Mr. Mbugua, however, asserted in the pleadings at the postconviction stage that he would testify at an

evidentiary hearing that he would have been willing to enter a plea to false imprisonment under the original plea offer had he not been misinformed about the collateral consequences of that plea deal. (18:6, 10-11). Mr. Mbugua also provided reasons and context as to why he was so adamantly opposed to entering a guilty plea to the charge in the first place – trial counsel incorrectly told him that a conviction for false imprisonment could result in him being placed on the sex offender registry. (18:6, 8-9).

Furthermore, Mr. Mbugua contends that the State's challenge to Mr. Mbugua's assertion that he would have accepted the original plea offer to the false imprisonment charge had he been properly advised about the collateral consequences is really a question of credibility and one that must be decided at an evidentiary hearing.

Credibility determinations are generally resolved by live testimony. ***State v. Love***, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62, citing ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596, 604, 486 N.W.2d 539 (Ct. App. 1992). In this case, Mr. Mbugua has alleged sufficient facts that if true, would support his position that he would have entered a plea to the original charge. It is the duty of the court to review the evidence, coupled with the live testimony of Mr. Mbugua and both of the trial attorneys, to determine whether it is likely Mr. Mbugua would have accepted the original plea.

B. Mr. Mbugua has established that he was subjected to a more severe conviction than what he would have had under the original plea offer.

The State's response brief attempts to draw similarities between the instant case and ***State v. Harris***, 119 Wis. 2d 612, 618, 350 N.W.2d 633 (1984). The State argues that

because Wisconsin courts have held that the "repeater" sentencing enhancer is not a crime in and of itself and is not "applicable" in the context of a sentencing hearing unless the trial court uses the additional time to enhance the sentence, Mr. Mbugua has not been prejudiced. (State's Response Br., 16). *See* ***Harris***, 119 Wis. 2d at 619. In making this conclusion, the State attempts to bend the holding of ***Lafler v. Cooper*** in a way that would undoubtedly create absurd results. 566 U.S. 156 (2012).

The ***Lafler*** court concluded that prejudice occurs when the "conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment[2] and sentence that in fact were imposed." 566 U.S. at 164. The State asks this Court to interpret the U.S. Supreme Court's use of the word "conviction" narrowly and apply the holding of ***Harris***, which is not analogous and deals primarily with a postconviction request for a new sentencing hearing due to the trial court's misunderstanding of how to apply a repeater enhancer. ***Harris,*** 119 Wis. 2d at 620-21.

Mr. Mbugua's opening brief provided an example of how strict interpretation of the term "conviction" would create an absurd result. (Opening Brief, 22-23). Under the State's version of the prejudice standard, prejudice would

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[2] In this quote from ***Lafler***, the U.S. Supreme Court uses the terms "conviction" and "judgment" interchangeably, further supporting Mr. Mbugua's argument that the ***Lafler*** court did not intend for such a strict construction of the term "conviction" as proposed by the State. When considering the term "judgment," which arguably includes all enhancers and terms of a criminal punishment, it is undeniable that Mr. Mbugua's resulting "judgment" was more serious due to the penalty enhancer than what was originally proposed in the first offer made by the State.

exist when an individual is convicted of a Class A misdemeanor rather than a Class B misdemeanor due to ineffective assistance of trial counsel in the plea negotiation process when the individual was sentenced to ninety days jail. In this situation, the State would agree that prejudice has occurred.

Compare this to the instant case in which trial counsel's incorrect legal advice resulted in Mr. Mbugua pleading to a Class H penalty with a four-year initial confinement sentencing enhancer as opposed to a Class H felony with no enhancer. In the instant case, where Mr. Mbugua faced four additional years in prison, the State argues that there was no prejudice because the repeater enhancer is technically not a "conviction." This interpretation of the ***Lafler*** holding cannot be what the U.S. Supreme Court intended and this Court should decline to adopt the State's position.

C. Mr. Mbugua's postconviction motion sufficiently alleged that the court would have accepted his guilty plea.

1. This Court should employ the "waiver rule" and prohibit the State from adopting a new argument for the first time on appeal.

The State's response brief in this Court asserts for the first time that Mr. Mbugua did not establish that the court would have accepted a guilty plea to the original charges. (State's Response Br., 17-20). Mr. Mbugua contends that the State has forfeited this claim. *See* ***State v. Huebner***, 2000 WI 59, ¶¶ 10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Had the Court been presented with this argument in the State's brief at the postconviction stage, the circuit court could have

appropriately addressed the question. For these reasons, Mr. Mbugua asks the court to apply the "waiver rule" and deem this argument forfeited.

2. The record demonstrates that the trial court would have accepted a plea under the original agreement and contrary to the State's assertions, there is no reason to conclude otherwise.

a. Mr. Mbugua has made the initial showing required by ***Lafler*** to establish that the trial court would have accepted a plea to the original offer.

As stated in his earlier briefs, there is no reason to believe the court would not have accepted the plea. The State quarrels with this assertion, arguing there was not a factual basis to which Mr. Mbugua stipulated to that supported the charge of false imprisonment. In this case, however, there was a factual basis for the charge of false imprisonment in the complaint and as Mr. Mbugua was not pleading to the false imprisonment, there is no reason that an admission regarding that charge would appear on the record.

Further, Counsel's statements regarding the lack of physical restraint are not dispositive on whether Mr. Mbugua committed the act. False imprisonment does not require any physical restraint. WI JI-Criminal 1275. While it is necessary that for one to be convicted of false imprisonment, the individual must have "confined" or "restrained" another without the victim's permission, the definition of "confined" or "restrained" provided in the jury instruction makes it clear that a physical act is not required for a conviction. In fact, the

instruction clearly states that "one may be confined or restrained by…words" alone. WI JI-Criminal 1275.

The State also relies on defense counsel's remarks at sentencing that C.S. had the opportunity to leave the residence. The jury instruction states that while one is not confined or restrained if the individual "could have avoided it by taking reasonable action," "[a] reasonable opportunity to escape does not change confinement or restraint that has occurred." WI JI-Criminal 1275. Here, that C.S. was eventually able to seek assistance on her own does not establish that false imprisonment did not occur when Mr. Mbugua refused to get her medical attention or let her leave the residence at the outset of the incident. Therefore, the State's position that there would have been no factual basis to accept a plea to false imprisonment is without merit.

Additionally, while the court was making its findings at sentencing, specifically noted that it believed C.S. requested medical attention and Mr. Mbugua did not allow her to do so. The sentencing court stated, "We have her asking you to take her to the hospital and you wouldn't do it." (39:25). The sentencing court, therefore, accepted the facts as true that would have formed the basis for the false imprisonment charge.

D. Mr. Mbugua sufficiently alleged that the original plea offer was available at the time he ultimately entered a plea.

At issue on this question is a type-written note from the assistant district attorney handling the matter. (18:16). Mr. Mbugua asserts that the language of the note, coupled with the fact that there was not any other plea offer extended, establishes that the original plea offer was still on the table. The State "agrees that the note [outlining the final plea offer]

appears to be an offer to 'make some adjustments' to the original plea offer," but argues that this "does not mean that the withdrawn offer remained available" to Mr. Mbugua. (State's Response Br., 23). The State continues, addressing Mr. Mbugua's claim that in the postconviction stage, the State did not take the position that the original offer was unavailable at the time the plea was entered. Again, instead of asserting that the original offer was unavailable, the State attempts to argue that Mr. Mbugua has shifted the burden. (State's Response Br., 23).

This is an attempt to distract from the real issue – that the State would have permitted Mr. Mbugua to accept the original offer and that the offer was altered at defense counsel's request so that Mr. Mbugua would not be required to enter a plea to the false imprisonment charge. If this was not the case, the State would simply say so in its briefs and assert that the assistant district attorney who drafted the note would testify to that effect at an evidentiary motion if necessary. The State, however, did not do so.

Furthermore, the note in this case provides more physical evidence supporting Mr. Mbugua's position than that which would exist in many cases. Practically speaking, many plea negotiations take place without any written documentation memorializing the discussions. Negotiations occur on the telephone and very often, in the halls of the courthouse. Few cases will have the type of written physical evidence that the State argues should be required to establish that an offer was still available.

To argue that Mr. Mbugua hasn't met his burden places too high a burden on a defendant who has been harmed by counsel's deficient performance. Here, the State concedes that the note in question in fact references the original plea

offer, and yet it still argues this is not enough to warrant an evidentiary hearing on the matter. If this Court adopts the State's reasoning on this issue, it would be difficult to imagine a defendant who could overcome such a substantial burden and make a successful showing that prejudice has occurred in this context.

E. Mr. Mbugua was prejudiced by entering a plea to a series of charges that exposed him to four additional years of imprisonment and the State's position again imposes too great a burden on defendants-appellants.

The State asserts that even if Attorney Ricci was ineffective in his discussion of the plea offers with Mr. Mbugua, he has not established that prejudice occurred as a result. (State's Response Br., 24). The State argues that because the sentencing court didn't utilize those additional four-years made available by the repeater enhancer at issue, any assertion of prejudice is just speculation. (State's Response Br., 24). Under the State's theory, a defendant-appellant could never establish prejudice when the repeater is at issue unless the court specifically chose to utilize the additional time made available by the repeater enhancer.

Moreover, because of administrative policy of the Milwaukee County Circuit Court, the postconviction motion was not decided by the same court that sentenced Mr. Mbugua, though the sentencing judge is still a member of the judicial bench. (25, 39). Instead, we are left with a postconviction decision that simply states in response to Mr. Mbugua's assertion that it is reasonable to conclude the sentence would have been different:

> This kind of speculation may be the fodder for academic discussion, but it does not present a valid legal basis for

> granting the defendant a "do over" so that he can put his theory to the test.

(25:8). Had the matter been assigned to the court that actually ordered the sentence, there would be no need to speculate about the result.

Finally, a defendant is not required to establish that the result of the proceedings would have been different. "The ***Strickland*** test is not an outcome determinative test. In the decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceedings fundamentally unfair.'" ***Smith***, 207 Wis. 2d at 276, citing ***Strickland v. Washington***, 466 U.S. 668, 694-94 (1984) and ***Lockhart v. Fretwell***, 506 U.S. 364, 373 (1993). Here, the proceedings were fundamentally unfair to Mr. Mbugua as he made decisions that impacted him negatively due to counsel's deficient advice.

As the court opined in ***Smith***, prejudice is so often difficult to measure when there has been an error by trial counsel, and for that reason, there are many circumstances in which the court presumes prejudice. 207 Wis. 2d at 278-81. This should be one of those circumstances.

CONCLUSION

For the reasons stated above, Mr. Mbugua asks this court to vacate the judgment conviction in this matter and order that the State extend the original pretrial offer.

Dated this 11th day of December, 2017.

Respectfully submitted,

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@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 2,988 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 11th day of December, 2017.

Signed:

Nicole M. Masnica
Assistant State Public Defender
State Bar No. 1079819

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

Attorney for Defendant-Appellant