STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2017AP001416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Order Denying Postconviction Relief, Entered in the Circuit Court for Fond du Lac County, the Honorable Robert J. Wirtz, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. This Court should reach the merits on all Hinkle's arguments.

While it is true that trial counsel did not object to counts 5-18 being in adult court and therefore this Court is not *required* to reach that direct challenge to the adult court's competency determination pursuant to § 938.183, the court still has discretion to reach the merits. The court of appeals has been willing to review issues not raised first in the circuit court "where the issue is one of law, the facts are not disputed, the issue has been thoroughly brief by both sides and the question is one of sufficient interest to merit a decision." *City News & Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 20-21, 487 N.W.2d 316 (Ct. App. 1992). This Court should reach the merits on this argument because all the relevant factors apply here. The issue has been briefed on both sides. The underlying facts are undisputed. This is a purely legal issue that requires interpretation of a statute. Hinkle has found no Wisconsin case law interpreting this statute, and an interpretation from this Court would provide guidance to circuit courts and practitioners.

No forfeiture should be found for the direct challenge that the § 938.18 waiver is invalid. The waiver order is clearly a clerical error. As argued in his postconviction motion, the court's unambiguous oral pronouncement conflicts with the written judgment, and the oral pronouncement should control. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). Hinkle refutes that an ineffective claim is necessary to correct a clerical error. None of the applicable case law Hinkle has reviewed regarding clerical errors has required an ineffective claim. *See State v. Oglesby*, 2006 WI App 95, 715 N.W.2d 727, *State v. Prihoda*, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857; *State v. Lipke*, 186 Wis. 2d 358, 521 N.W.2d 444 (Ct. App. 1994); *State v. Brown*, 443 N.W.2d 19, 150 Wis. 2d 636 (Ct. App. 1989). Nonetheless, counsel stated that Hinkle was not agreeing to waiver through § 938.18. That the objection to 938.18 waiver came before the court order should not matter – there was still an objection to waiver based on § 938.18 on the same date as the signed court order.

A faulty § 938.18 waiver order should not hinder Hinkle from relief if he is successful on his § 938.183 claim.

Regarding the state's forfeiture argument for ineffective assistance of counsel (Response Brief, pp. 10-11), published Wisconsin case law does not support the state's argument. *See State v. Milanes*, 2006 WI App 259 (court decided ineffective claim even though the underlying claims involved a Fifth Amendment violation and a statutory defense); *State v. Kelty*, 2006 WI 101, ¶ 43, 294 Wis. 2d 62 (a guilty plea waives constitutional trial rights, but does not waive the rights implicated in a challenge that 1) a guilty plea is not knowing, intelligent, and voluntary, and 2) that the defendant received ineffective assistance of counsel.); *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (one way a defendant can demonstrate a "manifest injustice" is to prove he received ineffective assistance of counsel during the plea process.)

Regardless, that is a non-issue here because the deficiency that Hinkle alleged relates directly to the fairness and propriety of his plea. If the adult court did not have competency over counts to which he pled, then that strikes at the heart of whether his plea was knowingly and intelligently made because, as argued before, Hinkle did not know this crucial information and his decision to enter his pleas would have been different if he had known this information. (85:15). Hinkle was entitled to correct advice and knowledge of which court had competency, in deciding whether to take the plea. *See State v. Kelty*, 2006 WI 101, ¶ 43, 294 Wis. 2d 62, 716 N.W.2d 886; *see also State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

The fact that a legal issue – the proper interpretation of § 938.183(1)(b)) – must first be determined in order to decide the plea withdrawal issue does not take away from the unknowing and unintelligent nature of the plea if the legal issue is ultimately resolved in Hinkle's favor. If the legal information he received was false, then the plea was necessarily uninformed.

A manifest injustice is met by showing "serious questions affecting the fundamental integrity of the plea."

State v. Dawson, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12; *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). Counts being in the wrong court would certainly constitute a serious question affecting the fundamental integrity of the plea.

II. The Fond du Lac county adult court lacked competency to proceed on counts 5 though 18, as neither Wis. Stat. §§ 938.18 nor 938.183 entitled the court to attain jurisdiction over those counts.

A. Hinkle was not properly waived under § 938.18.

The state questions the point of Hinkle's argument that waiver was not valid under Wis. Stat. § 938.18. To explain, if this Court agrees with Hinkle's statutory interpretation of § 938.183 and finds that adult court competency was not proper under § 938.183, then he would still have the hurdle of the § 938.18 waiver to overcome if that issue were left unaddressed. Hinkle must argue that the § 938.18 waiver is invalid so it does not hinder him from relief if he is successful on the § 938.183 claim.

B. The plain meaning of § 938.183(1)(b) permits original adult court jurisdiction over a juvenile only if the juvenile court in the same county had waived jurisdiction over the juvenile for a previous violation. Resort to legislative history is not necessary and, regardless, does not clarify the scope of the rule.

The state argues that the intent of 938.183 is "plain from 938.183's language" and that the "legislature's intent is expressed in the statutory language." (State's Response Brief, p. 12-15). The state therefore argues that the statute is unambiguous, yet it resorts to an extrinsic source which is not typically the appropriate analysis for unambiguous statutes. *See State v. Williams*, 2013 WI App 74, ¶¶ 6, 8, n.2, 350 Wis. 2d 311, 833 N.W.2d 846.

For unambiguous statutes, a court generally looks at clues from textual, *intrinsic* sources, and no further. *See State ex rel Kalal v. Circuit Court of Dane Cnty.,* 2004 WI 58, ¶¶ 44-51, 271 Wis. 2d 633, 681 N.W.2d 110. This rule generally

"prevents courts from tapping legislative history to show that an unambiguous statute is ambiguous." *Id*. ¶ 51 (quoting *State v. Sample*, 215 Wis. 2d 487, 495-96, 573 N.W.2d 187 (1998)). "[S]cope, context, and purpose are relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Kalal*, 2004 WI 58, ¶ 48. *Kalal* explains that Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous, which the state does not allege.[1] *Id*. ¶ 50.

In any event, the report of the Juvenile Justice Study Committee offered by the state does not specify the exact scope of the rule. The quote used by the state uses the passive voice and therefore does not speak to how far-reaching this rule is. (Response Brief, pp. 15-16). Just as the state uses the report to argue that a previous juvenile waiver in another county should qualify, the report could just as well be used to argue that a previous juvenile waiver from another state qualifies.

"In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt,* 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967). Courts must presume that the legislature "says in a statute what it means and means in a statute what it says." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 14 n.9, 316 Wis. 2d 47, 762 N.W.2d 652.

The state takes Hinkle's statutory argument to mean that the words take on special meaning in § 938.183(1)(b). To clarify, Hinkle's argument is that, throughout chapter 938, "*the* court assigned to exercise jurisdiction" consistently means the specific court handling the specific case at issue. Also throughout chapter 938, "*any* court assigned to exercise jurisdiction under this chapter and ch. 48" means any court throughout the state that is, will be, or has been assigned to exercise jurisdiction in *another* case regarding that juvenile.

[1] Extrinsic sources are interpretive resources outside the statutory text - typically items of legislative history. *Kalal,* 2004 WI 58, ¶ 50.

The term "the court assigned to exercise jurisdiction under this chapter and ch. 48" is used repeatedly throughout chapter 938 and presumably has a consistent meaning throughout. *Bank Mutual v. S.J. Boyer Constr., Inc.,* 2010 WI 74, ¶ 31, 326 Wis. 2d 521, 538 785 N.W.2d 462, 470 (when the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears).

If "the court assigned to exercise jurisdiction" meant "any juvenile court in any county," as the state contends, it would lead to absurd or unreasonable results. For example, under Wis. Stat. § 938.17(c), if a juvenile's case is in adult court pursuant to § 938.17 (certain traffic-related offenses), and if the adult court orders six months or more of incarceration, then the adult court is required to "petition the court assigned to exercise jurisdiction under [chs. 938 and 48] to order one or more of the dispositions under s. 938.34…" If Fond du Lac County juvenile court ordered a juvenile to six months incarceration, it would be absurd for the Fond du Lac county circuit court to petition the Milwaukee County juvenile court – or a juvenile court in any other county – to order a disposition under 938.34. The reasonable interpretation is that "the court assigned to exercise jurisdiction" would be the Fond du Lac County juvenile court.

III. To the extent that trial counsel is deemed to have forfeited issues raised in this appeal, Hinkle was denied effective assistance of counsel.

While Hinkle concurs that there is no Wisconsin case law interpreting § 938.183, he disagrees there is a blanket rule that failure to raise an unsettled issue of law can never be the basis for a finding of ineffective assistance of counsel. The test is whether "reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Here, in light of this reasonable, plain interpretation of the statute, counsel should have known to raise the issue of adult court competency based on the Milwaukee waiver.

The state appears to argue that in order to establish prejudice, Hinkle must show that the juvenile court would have not waived jurisdiction and he would have remained in juvenile court. (Response Brief, p. 20). Hinkle refutes that he must go so far as to prove what would have happened at a waiver hearing and that it would have successfully kept him in juvenile court. Hinkle never had a true waiver hearing, and so it is speculation what evidence would have been presented and what the court would have decided. That is not what the law requires. Rather, to show prejudice in the context of a request for plea withdrawal, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50; *see Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Thus, the prejudice is entering a plea to which he otherwise would not have.

Hinkle testified that he would not have pled guilty to counts 5-18 if he had known the adult court did not have competency over those counts. (85:15). It is *more* than reasonable to accept that a person charged at age sixteen would not have wanted to plead guilty to counts in adult court after being told that the counts actually belong in juvenile court. It is almost inconceivable that a person would want to be in adult court under those circumstances.

CONCLUSION

WHEREFORE, for the reasons stated, Mr. Hinkle respectfully asks this court to allow Hinkle to withdraw his pleas, vacate his convictions and transfer counts 5-18 to the juvenile court.

Dated this 5th day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 2,094 words.

Dated this 5th day of January, 2018.

_____
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CERTIFICATION 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 context 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 5th day of January, 2018.

_____
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CERTIFICATION AS TO MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by first class or priority mail on January 5, 2018. Postage has been pre-paid. This brief is addressed to: Aaron O'Neil, Assistant Attorney General, P.O. Box 7857, Madison, WI 53707-7857 and Diane Fremgen, WI Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 5th day of January, 2018.

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