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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Wisconsin Court of Appeals, District II, Affirming a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Fond du Lac County Circuit Court, the Honorable Robert J. Wirtz Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. Hinkle is entitled to withdraw his pleas because they were not knowing, intelligent, or voluntary.

A. The plain language of § 938.183(1)(b) demonstrates that the adult court did not have competency to proceed on the nontraffic counts.

The state makes special allowances for the examples Hinkle gives in which the legislature uses "a court" and "any court," asserting that the use of those words make sense in every other context. Indeed, if the legislature wanted any juvenile court's waiver throughout Wisconsin to count toward original adult court jurisdiction, it would have *also* made sense to use the words "any" or "a" in § 938.183(1)(b).

"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, ¶14n.9, 316 Wis.2d 47, 762 N.W.2d 652.

The state's analysis of § 938.02(2m) is difficult to follow and misinterprets § 938.02(2m). § 938.02(2m) distinguishes between different court jurisdictions: juvenile, criminal, and municipal. Throughout chapter 938, the word "court" (with the determiners "a," "the," "any," or "any other" preceding it) will often appear without explicitly identifying the jurisdiction. What § 938.02(2m) means is: when the word "court" appears in chapter 938 without qualification as to which jurisdiction applies (juvenile, criminal, or municipal), then it refers to juvenile court. However, when "court" is used in the context of a juvenile who is in criminal court due to § 938.183, then "court" refers to criminal court unless otherwise specified. Finally, when a statute is discussing § 938.17(2), then "court" refers to municipal court.

The definite and indefinite articles/determiners that come before "court" in the text still clearly control whether the noun is definite or indefinite. Otherwise, those determiners would be meaningless and superfluous. "When construing statutes, meaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible." *Hutson v. State of Wis. Pers. Comm'n*, 2003 WI 97, ¶49, 263 Wis.2d 612, 665 N.W.2d 212.

The state largely misses Hinkle's point when he referenced §§ 938.17(2)(a)3.c & 938.17(1)(c). The court of appeals concluded that "the court" in § 938.183(1)(b) "refers only to the court that previously waived jurisdiction. It *cannot* also refer to a current circuit court exercising juvenile jurisdiction and contemplating waiver because the jurisdiction over the juvenile is automatic and starts straightaway in the criminal court." *State v. Hinkle*, 2018 WI App 67, ¶19 (emphasis added). Because of this language, it completely ruled out the possibility of "the court" referring to the present court that would have considered waiver.

However, statutes like §§ 938.17(2)(a)3.c and 938.17(1)(c) show that the court's reasoning in reaching this conclusion is false. The legislature does clearly refer to the juvenile court as "the court assigned to exercise jurisdiction" under chapters 48 and 938, even when jurisdiction skipped that juvenile court and went straight to the criminal court. Thus, what the court of appeals said cannot happen, *did* happen. Faulty reasoning was therefore used to deny Hinkle's claim. "The court" can, and does, mean the corresponding juvenile court in the same county as the criminal or civil court that currently has jurisdiction over the matter.

In a footnote, the state indicates that if transfer of venue in § 938.185(1)(c) applies to § 938.17(1)(c), then this would support the state's argument. (State's Br. 16). However, § 938.183(1)(c) does not apply to § 938.17(1)(c); it only applies after a disposition.

The state argues that Hinkle's policy arguments overlook the statute's plain language. What the state dismisses as policy arguments are actually enumerated purposes that are explicitly laid out in the text or arguments extracted from the statute itself. §§ 938.01(2)(c)&(f), 938.18(5)(c), 301.26. "[S]cope, context, and purpose are relevant to a plain-meaning interpretation of an unambiguous statute as long as ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *State ex rel. v. Kalal v. Circuit Court*, 2004 WI 58, ¶48, 271 Wis.2d 633, 681 N.W.2d 110.

The state reads Hinkle's argument from pp.22-23 of his brief-in-chief as arguing a juvenile would never again have the opportunity to be in juvenile court upon being waived. Rather, Hinkle specifically stated that the state's interpretation would strip the juvenile of the right in all other counties "to a § 938.18 waiver hearing in which the state carries the burden of clear and convincing evidence, and in which other counties would specifically consider [938.18(5)(c)] under that standard." (Hinkle's Br. 22). The reasoning that followed was explicitly under "that standard" and "that assessment." (Hinkle's Br. 22-23).

That standard at a § 938.18 waiver hearing is: the *state* carries the burden to show by clear and convincing evidence that the juvenile should be in adult court, and the presumption is that the juvenile remains in juvenile court. See §§ 938.18(2),(4)(b)&(6); *State v. Kleser*, 2010 WI 88 ¶79, 328 Wis.2d 42, 786 N.W.2d 144. This is what Hinkle argued that the juvenile would forevermore be deprived of under the state's interpretation.

The provisions in §§ 970.032 and 971.31(13) do not cure the loss of that § 938.18 waiver hearing because the *juvenile* carries the burden to show that he should not be in adult court, and the presumption is that he remains in adult court. Furthermore, if the juvenile fails to prove *any one* of the statutory prongs at a reverse waiver hearing, then the adult court *must* keep the juvenile in adult court "no matter

how compelling" the evidence is on the other prongs. *Kleser*, 2010 WI 88, ¶97. The practical effect is that once a juvenile is in adult court, it is extremely difficult to transfer to juvenile court through reverse waiver.

The report of the Juvenile Justice Study Committee, which the state uses to confirm the state's interpretation, does not clarify the exact scope of the rule. While the report does not specify that 938.183(1)(b) is same-county-specific, neither does it specify that it any court throughout Wisconsin will count. Rather, it uses the passive voice.

The state argues that this Court should not apply the rule of lenity because § 938.183(1)(b) is a procedural statute. However, this Court has previously applied the rule of lenity to the procedural/remedial sentence credit statute in *State v. Floyd*, 2000 WI 14 ¶¶23,29,31, 232 Wis.2d 767, 616 N.W.2d 155.

Our Supreme Court has recognized a rule of lenity in relationship to criminal penalties as well as substantive criminal law:

> Our examination of the meaning of s. 406 must be informed by the policy that the Court has expressed as "the rule of lenity." In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.

Bifulco v. US, 447 US 381, 387 (1980).

The rule of lenity should apply here because the interpretation of this statute determines whether Hinkle was placed on the direct route to criminal punishment or not. As such, it was used in a punitive way and serves the very purpose behind the rule as argued in his brief-in-chief.

B. The waiver order is invalid.

The state argues that the waiver order is not pertinent. (State's Br. 20). It was the state itself that first

injected the waiver order into the postconviction proceedings by presenting it as an exhibit at the adjourned postconviction motion hearing. (84:4). The state's implication was that the adult court had competency to proceed on the non-traffic counts through § 938.18, regardless of Hinkle's § 938.183(1)(b) arguments. While the state quickly, and appropriately, abandoned any reliance on the waiver order by the next hearing, Hinkle must ensure that the waiver order does not hinder him from relief. (85:28-29).

C. Hinkle's pleas were necessarily not knowing, intelligent or voluntary.

Under Hinkle's county-specific interpretation, it was statutorily impossible for the adult court to accept Hinkle's plea. This scenario is even *more* compelling than *Riekkoff, Dawson* and *Woods* because this rendered faulty the very counts to which Hinkle pled—the foundation of the plea itself. If these counts were indeed in the wrong court, then it is hard to imagine a legal impossibility that is more compelling and fundamental to the plea than the one present here. Further, Hinkle lacked the benefit of having a rightful contested § 938.18 waiver hearing that he didn't even know he was entitled to when he entered this plea.

It is irrelevant whether the completely hypothetical future plea that Hinkle may or may not have entered, would have been knowing, intelligent and voluntary. What matters is the plea that Hinkle actually entered and what Hinkle knew at the time he entered it. *See State v. Bangert*, 131 Wis.2d 246, 264, 389 N.W.2d 12, 24.

II. Trial counsel provided ineffective assistance.

Lemberger is irrelevant to the question of unsettled law, because the law was settled at the time of Lemberger's trial *against* him; this Court found no ineffective assistance for failing to argue contrary to controlling precedent. 2017 WI 39, ¶ 3. In *McMahon*, to which *Lemberger* cites at ¶ 33, the authorities on the subject were split. *State v. McMahon*, 186 Wis.2d 68 (Ct. App. 1994).

Here, in light of this reasonable, plain interpretation of the statute, counsel should have known to raise the issue based on the words of the statute itself. It would be absurd to argue that every statute is unsettled if it is not accompanied by case law interpreting it. There was no need for "case law definitively interpreting" §938.183(1)(b) because the statute is clear on its own. (State's Br. 21).

Regarding prejudice, Hinkle has already explained what would have happened had counsel brought a motion. (Hinkle's Br. 30). Counts 5-18 would have transferred to juvenile court and Hinkle would have chosen to contest the waiver at his rightful § 938.18 waiver hearing, and there is ample evidence that he had originally intended to do so. (62:3; 85:10-11,16-17).

If the state is suggesting that Hinkle must prove not only that he would not have entered his plea, but also that he would have been successful at a waiver hearing and would have ultimately received a juvenile disposition, then that is not the law.

When a defendant argues that he pled guilty because his attorney, for example, failed to investigate a defense for trial, in order to withdraw his plea he must demonstrate there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have taken it to trial. *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54.

The defendant need not show that he would have won at trial. That standard would require a faux trial for every plea withdrawal claim. Likewise, that standard in Hinkle's context would require its own faux waiver hearing. The burden is on the state at waiver hearings. § 938.18(2),(4)(b)&(6). It would be pure speculation to guess what evidence the state would have presented, what the state's witnesses would have testified to, and how the juvenile court would have exercised its discretion

regarding each piece of evidence and 938.18(5) factor. That is not what the law requires.

III. Hinkle has not forfeited his claims.

A. The State has forfeited its own forfeiture claims.

Ironically, the State is asking this Court to address forfeiture claims that the State itself forfeited, as the claims were neither raised in Hinkle's petition for review nor a response to Hinkle's petition for review. *See State v Smith*, 2016 WI 23, ¶ 41, 367 Wis. 2d 483, 878 N.W.2d 135.

B. This Court should not reach the forfeiture claims.

If this Court will reach the merits of Hinkle's 938.183(1)(b) plea withdrawal argument regardless of forfeiture, then consideration of the State's forfeiture argument is unnecessary. *See Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶48, 326 Wis.2d 300, 786 N.W.2d 15 (cases should be decided on the narrowest possible grounds); *see also Gross v. Hoffman*, 224 Wis.2d 296, 300, 277 N.W.2d 663 (1938)(only dispositive issues need be addressed).

C. The direct challenge to jurisdiction is not forfeited because it goes directly to the voluntariness of the plea.

The waiver order is clearly a clerical error; 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). An ineffective claim is not necessary to correct a clerical error. *See State v. Oglesby*, 2006 WI App 95, 715 N.W.2d 727; *see also State v. Prihoda*, 2000 WI 123, 239 Wis.2d 244, 618 N.W.2d 857.

Regarding the court-competency claim, the guilty plea waiver rule states that a *knowing, intelligent and voluntary* guilty plea waives all non-jurisdictional defects. *Mack v. State*, 93 Wis.2d 287, 286 N.W.2d 563 (1980); *State v. Aniton*, 183 Wis.2d 125, 515 N.W.2d 302 (Ct. App. 1994).

The law is well established that one way for a defendant to meet the burden to show "manifest injustice" is by demonstrating that he did not knowingly, intelligently, and voluntarily enter the plea. *State v. Brown*, 2006 WI 100, ¶18, 716 N.W.2d 906. In none of the cases cited by the state for its forfeiture proposition did the defendant even argue a plea was not knowing, intelligent, or voluntary. *Kraemer*, 156 Wis.2d 761, 767; *Sanders*, 2018 WI 51, *Bembenek*, 296 Wis.2d 422, ¶12.

Hinkle's pleas were necessarily not knowing, intelligent or voluntary because the entire plea was premised on a legal impossibility about which he had no knowledge. For the reasons already addressed in argument I(C) above, Hinkle's legal impossibility claim is even more compelling here than in *Riekkoff*, *Dawson*, and *Woods*. None of those cases required an objection, and in none of the three cases did the guilty plea forfeit the issue. Neither should it apply here.

D. Hinkle's ineffective assistance of counsel claim is not forfeited.

Regarding the state's forfeiture argument for ineffective assistance, 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, 716 N.W.2d 886 (a guilty plea waives constitutional trial rights, but does not waive the rights implicated in a challenge that a guilty plea is not knowing, intelligent, and voluntary, and 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.)

However, this Court need not reach that issue because the ineffectiveness that Hinkle alleged relates directly to the fairness and propriety of his plea. Even the

state agrees claim are not forfeited if they affect whether the pleas were knowing, voluntary, or intelligent. (State's Br. 24, 27). If the adult court did not have competency over counts to which he pled (by way of counsel's failure to identify the issue), that strikes at the heart of whether his plea was knowingly and intelligently made because Hinkle did not know this crucial aspect of his pleas, and he would not (and could not) have pled had he known it. (85:15). Hinkle was entitled to correct advice and knowledge about which court had competency, in deciding whether to take the plea. *See Kelty*, 2006 WI 101, ¶ 43; *see also Bentley*, 201 Wis.2d 303, 311.

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.

State v. Villegas, to which the state cites, is inapposite. 2018 WI App 9, 380 Wis.2d 246. Villegas was waived into adult court following a waiver hearing. 2018 WI App 9, ¶6. Before entering adult court, he specifically declined his attorney's invitation to appeal the waiver decision. *Id*. ¶10. Villegas then entered a guilty plea in adult court. He appealed, arguing (among other things) that the waiver hearing decision should be overturned because the juvenile court erroneously exercised its discretion and because his attorney who represented him at the waiver hearing handled it ineffectively. *Id*. ¶48.

That is the argument the court of appeals addressed in its refusal to apply ineffective assistance of counsel, where Villegas did not draw any connection between that and the plea:

> …Villegas does not assert that [counsel's] alleged ineffectiveness during the waiver proceedings had anything to do with his later decision to plead guilty. … Villegas does not even request plea withdrawal on this ground. Rather, he implores us to overturn the

> juvenile court's waiver decision. Because Villegas does not raise a plea withdrawal claim under Bentley—i.e, that his counsel's ineffective assistance entitles him to withdraw his plea because, but for counsel's errors, he would not have pled guilty—it is, along with his other challenges to the juvenile waiver hearing, waived by virtue of his valid guilty plea.

Id. ¶48. Unlike *Villegas*, Hinkle's claims of court competency and ineffective assistance go directly to whether his plea was knowingly and intelligently made, rending *Villegas* inapposite. Here, the connection between counsel's performance and Hinkle's faulty plea could not be clearer.

CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Hinkle respectfully asks this court to reverse the court of appeals, remand with directions to permit Hinkle to withdraw his pleas, transfer counts 5-18 to the juvenile court, and for the juvenile court to vacate its faulty § 938.18 waiver order.

Dated this 2nd day of July, 2019.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,996 words.

Dated this 2nd day of July, 2019.

Signed:

_____

Christina C. Starner
Attorney for Defendant-Appellant-Petitioner

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 2nd day of July, 2019.

Signed:

_____

Christina C. Starner
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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 certified priority mail on July 3, 2019. Postage has been pre-paid. This brief is addressed to: Aaron R. O'Neil, P.O. Box 7857, Madison, WI 53707-7857 and Sheila Reiff, Clerk of the Supreme Court, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 3rd day of July, 2019.

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