STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LORENZO D. KYLES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOVITZ AND THE HONORABLE MARK A. SANDERS, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Under Wisconsin law, to warrant relief when defense counsel fails to convey a plea offer, defendants must show that they were prejudiced. Here, the offer Defendant-Appellant, Lorenzo Kyles, claims was not conveyed was not more favorable than the one he accepted. Did the circuit court correctly deny Kyles' motion for postconviction relief based on ineffective assistance?

The circuit court answered: Yes

This Court should answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication are warranted. This case involves only the application of well-settled law to the facts, which the briefs will adequately address.

INTRODUCTION

Kyles wants postconviction relief because he claims that his attorney never told him about the State's first plea offer. But the record shows that it is unlikely the first offer was not conveyed to Kyles, and even if it wasn't, the State's first offer was not more favorable than the plea offer Kyles ultimately accepted. Thus, Kyles has not proven that he is entitled to relief.

STATEMENT OF THE CASE

Kyles fatally shot Darrell Stinson outside a Citgo gas station in 2002. (R. 1.) The State charged Kyles with first-degree reckless homicide, while armed, and possession of a firearm by a felon, with a habitual criminality enhancer. (R. 1.) The total exposure for the two counts together was

86 years, composed of 63 years in prison and 23 years of extended supervision. (R. 112:112.)

Plea negotiations began with the Assistant District Attorney making a written offer and sending it to Kyles' attorney, Thomas Flanagan. (R. 88:1.) That letter was dated August 19, 2002. In it, the State indicated that in exchange for Kyles pleading guilty to both counts, it would dismiss the habitual criminality enhancers. The State would also "recommend a substantial period of imprisonment at the Wisconsin State Prison with a substantial period of initial confinement and extended supervision with the exact length of each to the wisdom and discretion of the Court." (R. 88:1; App. 104.) That offer expired on September 12, 2002, at 5:00 p.m. (R. 88:2; App. 105.)

On August 27, 2002, Kyles met with Attorney Flanagan twice and spent over an hour with him in total that day. (R. 82:27, 30.) No notes from the meeting remain. Then, on September 9, 2002, Attorney Flanagan and the ADA had a conversation about the State's offer, and during that conversation, Attorney Flanagan proposed a counteroffer. (R. 82:31.) He offered a plea to second-degree reckless homicide, while armed and as a habitual offender, and a plea to felon in possession of a firearm, as a habitual offender. (R. 112:119.) According to the meeting notes, Kyles' counter offer included a "joint rec of max penalty" which the notes indicate was 41 years, with 33 years of initial confinement and 8 years of extended supervision. (R. 82:31.)

On September 13, 2002, the ADA sent a counteroffer to Attorney Flanagan. (R. 92.) The letter began by stating:

> After discussing your counter proposal to my offer to you in a letter dated August 19, 2002, and after discussing your proposal with the captain of the homicide unit . . . and discussing the negotiations with the mother of the deceased victim I must inform you that the State must reject your

> proposal but, in the alternative, offers the following negotiation for your consideration.

(R. 92.) The letter offered to drop count two completely, and drop the habitual criminality enhancer on count one. (R. 92:1.) The letter explained that the remaining charge of first-degree reckless homicide while using a dangerous weapon had a maximum penalty of 65 years of imprisonment.

On September 20, 2002, Attorney Flanagan met with Kyles again. (R. 82:28.) And on September 30, 2002, Kyles accepted the State's offer and pled guilty to reckless homicide while armed. (R. 7.) In exchange for his plea, the State agreed to dismiss the repeater enhancer as well as the count of possession of a firearm by a felon. (R. 107:2.) The parties agreed to jointly recommend a 41-year sentence, bifurcated as 33 years of initial confinement followed by 8 years of extended supervision. (R. 107:2–3.)

On November 12, 2002, the circuit court sentenced Kyles to 40 years in prison, with 32 years of initial confinement followed by 8 years of extended supervision, concurrent to Kyles' revocation sentence. (R. 108:39–40.)

Then, on July 10, 2017, Kyles filed a postconviction motion alleging that his defense counsel failed to communicate the State's August 2002 plea offer. (R. 79.) The circuit court held a hearing on the motion, and ultimately found that Kyles was not entitled to relief. (R. 111–12.) In making its decision, the court jumped directly to the prejudice prong of the standard. It found that Kyles successfully established that he would have accepted the August offer, that the prosecution would have presented the offer to the court, and that the court would likely have accepted the terms of the offer. (R. 112:131–33.) But the court also found that Kyles could not show that the terms of the August offer would have been less severe than the September offer he accepted. (R. 112:132.) The court noted:

> The September offer, because it is more concrete, limits risk more than does the August offer; and at that end -- to that end is a less serious or more favorable recommendation for the defense.

(R. 112:131.)

The court explained that the sentencing judge's comments revealed that it was likely the judge would have imposed a harsher sentence under the August plea offer. (R. 112:132.) The court noted that the sentencing judge felt this was an intentional homicide, and that the public is outraged over this type of crime. (R. 112:132.) The court also noted that the sentencing judge said he had been considering a sentence close to what the parties agreed to. (R. 112:132.) And the court explained that, while the August offer created a theoretical possibility of a lower sentence, such a possibility is not sufficient to satisfy this prong of the standard. (R. 112:132–3.) Finally, the circuit court explained that the August offer required Kyles to plead to two counts, while the September agreement only required Kyles to plead to one count. (R. 112:135.) So, the August offer was not more favorable either as to counts or total exposure. (R. 112:135.)

This appeal followed.

STANDARD OF REVIEW

"Claims for ineffective assistance of counsel are mixed questions of fact and law, and [this Court] will uphold a circuit court's factual findings so long as they are not clearly erroneous." *State v. LeMere*, 2016 WI 41, ¶¶ 22–23, 368 Wis. 2d 624, 879 N.W.2d 580. Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which this Court reviews de novo. *Id.*

ARGUMENT

Kyles is not entitled to withdraw his plea for ineffective assistance because he has shown neither deficient performance, nor prejudice.

A. Applicable law

"Where, as here, a defendant seeks plea withdrawal after sentencing, the burden on the defendant is much higher: A defendant seeking to withdraw a guilty or no contest plea after sentencing must prove manifest injustice by clear and convincing evidence." *LeMere*, 368 Wis. 2d 624, ¶¶ 22–23 (internal citation omitted).

"The clear and convincing standard for plea withdrawal after sentencing, which is higher than the 'fair and just' standard before sentencing, 'reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists.'" *State v. Shata*, 2015 WI 74, ¶ 30, 364 Wis. 2d 63, 868 N.W.2d 93 (internal citation omitted). "The higher burden 'is a deterrent to defendants testing the waters for possible punishments.'" *Id.* Ineffective assistance of counsel is one type of manifest injustice, but mere disappointment in the eventual punishment is not. *Id.*; *LeMere*, 368 Wis. 2d 624, ¶¶ 22–23.

To prove that counsel rendered ineffective assistance, the defendant must show both that trial counsel's representation was deficient, and that the defendant was prejudiced by the deficient performance. *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have

accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 566 U.S. 134, 147 (2012). "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id.* "To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* This does not require a showing that counsel's actions "more likely than not altered the outcome," but the likelihood of a different result must be "substantial, not just conceivable. *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011).

B. Kyles is not entitled to relief because he has not established that his counsel performed deficiently.

Kyle is not entitled to withdraw his plea because he did not show that his counsel was deficient. Kyles' claim is based on his allegation that his attorney failed to notify him of the State's August 19 offer. But, although the circuit court did not make an express finding on performance, it noted that it was unlikely that Kyles and his attorney would not have discussed the August 19 offer at their meeting a week after the offer was made. (R. 112:116.) Further, the September letter the State sent to Kyles' attorney mentioned the August offer, and Kyles testified that his attorney had brought the State's September letter to their September meeting and discussed its contents. (R. 112:8, 121.) The State's September letter also indicates that Kyles had made a counteroffer in response to the State's August offer. (R. 92.) Kyles would have had a hard time constructing a counteroffer if he had not known of the State's August offer.

Finally, Attorney Flanagan testified that he could not recall one instance in his 25 years of experience that he failed to convey an offer to a client. (R. 111:11.)

Considering all these facts, Kyles has not shown that his attorney was deficient.

C. Kyles is not entitled to relief because he did not establish prejudice.

Regardless of whether Kyles can show that his attorney was deficient, the circuit court properly denied Kyles' motion because he failed to establish that he was prejudiced.

The State's August offer was not more favorable to Kyles than the deal he got. The State's August offer indicated that it would be willing to drop the habitual criminal enhancer if Kyles would plead guilty to both counts, first-degree reckless homicide with a dangerous weapon and felon in possession of a firearm. (R. 88.) These crimes have a maximum possible penalty of 70 years. (R. 88.) The August offer explained that the victim's family would be free to address the court, and the State would be free to comment on the facts of the case and Kyles' record. (R. 88.) The offer indicated that the State would then:

> recommend a substantial period of imprisonment at the Wisconsin State Prison with a substantial period of initial confinement and extended supervision with the exact length of each to the wisdom and discretion of the Court. The State would also leave to the Court's discretion whether the sentences were to run concurrent or consecutive to each other and any other sentence the defendant may be serving.

(R. 88:1.) So, the August offer would have required Kyles to plead guilty to two counts, with a total exposure of 70 years, in exchange for the State dropping the habitual criminality enhancer and recommending a substantial period of

imprisonment with a substantial period of initial confinement. (R. 88.)

In contrast, the State's September offer, which Kyles accepted, agreed to drop count two completely, and drop the habitual criminality enhancer on count one, for a total exposure of 65 years. (R. 92:1.) In exchange, Kyles would plead guilty to first-degree reckless homicide with a dangerous weapon and the State would recommend a sentence of 41 year, with 33 years of initial confinement and 8 years of extended supervision. (R. 92.)

The circuit court denied Kyles relief because it concluded that, even if his attorney had failed to disclose to him the State's August offer, Kyles had not shown that he was prejudiced. After considering the terms of the offers and the circumstances of Kyles' case, the court found that the August offer was not more favorable than the September offer.

In fact, as the circuit court explained, the August offer can easily be viewed as a worse offer. (R. 112:130.) The August offer required Kyles to plead guilty to two crimes as opposed to one, and had a greater maximum exposure. (R. 88, 92.) And by recommending a substantial period of imprisonment with a substantial period of initial confinement, the August offer left the judge with an unlimited recommendation by the State. (R. 88; 112:130.) Meanwhile, the September offer limited risk by setting a limit on what the State believed was an appropriate sentence duration. (R. 112:130–31.)

The circuit court also considered the sentencing judge's comments and found that, under the August offer, the judge would likely have sentenced Kyles to a similar or greater sentence. (R. 112:132.) The court noted that the sentencing judge viewed the crime as intentional homicide and was concerned with public anger over such crimes.

(R. 112:132.) The sentencing court ultimately found that all Kyles could show was a "theoretical possibility" of a lower sentence, which is insufficient under the relevant case law. (R. 112:133.); *See also Harrington*, 131 S.Ct. at 792.

The circuit court denied Kyles' ineffective assistance claim because it found that Kyles was not prejudiced by not knowing about the August offer. Specifically, the circuit court found that Kyles did not show a reasonable probability that the August offer would have resulted in a more favorable outcome for him. This Court should affirm because the lower court's factual findings are not clearly erroneous, and based on those findings, the lower court correctly determined that Kyles failed to show sufficient prejudice.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the Court affirm the circuit court.

Dated this 7th day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,330 words.

Dated this 7th day of June, 2018.

_____
ABIGAIL C. S. POTTS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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.

Dated this 7th day of June, 2018.

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