STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP000296 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LORENZO D. KYLES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Richard J. Sankovitz and the Honorable Mark A. Sanders Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Kyles has established that he was prejudiced by his trial attorney's failure to communicate the August offer. His case should be remanded back to the circuit court for a factual determination on deficient performance.[1]

a. Mr. Kyles has established prejudice under ***Frye*** because the August offer creates a reasonable probability of less prison time.

The State argues in its response that the August offer does not create a reasonable probability of less prison time. (State's Response at 8-9). The State offers two reasons for this argument. (*Id.*). First, the September offer that Mr. Kyles ultimately accepted limited the State's recommendation to 33 years of initial confinement. (*Id.*). Second, the State argues that the sentencing court's comments indicate that Mr. Kyles may have gotten more time under the August offer. (*Id.*). Neither reason is persuasive.

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[1] The State argues in its response that Mr. Kyles is not entitled to withdraw his plea in this case. (State's Response at 5-6). The State's argument on this point is misplaced for at least two reasons. First, Mr. Kyles unequivocally withdrew that part of his postconviction motion seeking plea withdrawal at the postconviction motion hearing. (112:58-63, 83-87). Mr. Kyles made clear that he is seeking specific performance of the August offer. (*Id.*). Second, at this time, given the postconviction court's decision not to address deficient performance, Mr. Kyles simply asks that this Court find that he has established prejudice and remand to the circuit court to enter findings and a decision with regard to deficient performance.

First, when the State argues that the September offer set a limit on the State's recommendation while the August offer set no such limit, the State is missing a key difference between the two offers. The September offer required Mr. Kyles to jointly recommend the same 33 years of initial confinement that the State recommended. The August offer allowed Mr. Kyles to freely argue for whatever sentence he thought appropriate.

This is an important distinction. By agreeing to jointly recommend 33 years of initial confinement, Mr. Kyles was all but guaranteed to get that amount of time. He certainly had no chance to get less prison time. It would be the rare case where a defendant asked for a certain amount of prison time and the court gave less. The sentencing court in this case even acknowledged this by stating that it was "inclined to follow a joint recommendation." (108:19).

On the other hand, had the August offer been conveyed to Mr. Kyles and he subsequently entered his plea on those terms, he would have been free to argue for less prison time. He would have been able to set the tone regarding what "substantial" prison meant under the State's recommendation. He would have found support for an argument of less than 32 years initial confinement in the presentence investigation report that recommended a range of 26 to 40 years of initial confinement. A sentence recommendation of 26 to 31 years of initial confinement would certainly be a "substantial" prison term.

Second, the State argues that Mr. Kyles would have received "a similar or greater sentence" under the August offer based on comments made by the sentencing judge. (State's Response at 8). The State focuses on the sentencing court's view of the crime as intentional, as well as public

anger regarding such crimes. (*Id.*). That focus leaves out other aspects of the sentencing that point toward a lower prison sentence for Mr. Kyles had he not agreed to jointly recommend 33 years of initial confinement and been able to freely argue for even a slightly lower sentence.

Specifically, the sentencing court rejected the most aggravated depiction of the offense and indicated that it did not view Mr. Kyles' crime as an "ambush" or a "revenge killing." (108:23). The court also noted that it was satisfied that the case was charged and resolved as a reckless crime. (108:23). The court acknowledged positive factors about Mr. Kyles, such as his employment history, his character letters, his remorse and acceptance of responsibility in this case. (108:36). Finally, the court acknowledged that the victim's family was asking for a more lenient sentence than was being recommended by the parties. (108:38-39).

The State also overlooks Mr. Kyles' arguments in his opening brief regarding the circumstantial indications that the sentencing court would have been inclined to impose less prison time had Mr. Kyles been free to argue for it. Again, on the only relevant question the September offer left open to the sentencing judge's discretion—whether to run the new sentence consecutive or concurrent to Mr. Kyles' 5 year revocation sentence—the court chose to be more lenient and ran the new sentence concurrent. (108:40).

Furthermore, the sentencing court did not hesitate to lower the sentence from 33 years initial confinement to 32 years initial confinement after the parties agreed to this downward deviation in the face of concerns regarding the bifurcation of the original 33 years initial confinement and 8 years extended supervision joint recommendation. (108:37). These two factors indicate that the sentencing court would

have been open to considering less prison had Mr. Kyles been free to argue for it.

Given the concurrent order, the ease with which the court accepted the downward deviation from 33 years initial confinement to 32 years, the recommendation of a more lenient sentence by the victim's family, the amount of remorse expressed by Mr. Kyles, and the PSI supporting a range of initial confinement that included up to 6 years less than what Mr. Kyles ultimately was sentenced to, the August offer certainly creates a reasonable probability that Mr. Kyles would have gotten less prison time, even if that means only one year less. ***Glover v. United States***, 531 U.S. 198, 203 (2001)(recognizing that "any amount of [additional] jail time has Sixth Amendment significance"). Indeed, even the postconviction court found that the August offer creates "favorable risk that [the sentence] could be lower than…41 years." (112:130-131).

Mr. Kyles has therefore established a reasonable probability of a different outcome as required by ***Strickland v. Washington***, 466 U.S. 668 (1984) and ***Missouri v. Frye***, 566 U.S. 134 (2012).

b. The postconviction court explicitly chose not to decide the deficient performance question, but to the extent that it made factual findings related to the deficient performance question, those findings support Mr. Kyles' position.

In its response brief, the State makes several factual allegations regarding the deficient performance prong/question that are not supported by the record.

First, the State asserts that Mr. Kyles testified that his trial counsel brought the State's September offer letter to their

September 20, 2002 meeting and discussed its contents. (State's Response at 6). However, Mr. Kyles explicitly testified that his trial counsel did not have the actual September offer letter during their September 20, 2002 meeting, but rather had the September offer's terms written on a piece of notepad paper and simply read them to Mr. Kyles. (112:8-10).

Second, the State asserts that the September offer letter indicates that it was Mr. Kyles himself who made the counter-offer to the State's August offer. (State's Response at 6). Yet, nothing about the language used in the September offer letter gives that impression. In relevant part, the September offer letter states:

> Dear Mr. Flanagan:
>
> 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 my immediate supervisor, Assistant District Attorney Mark Williams 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.

(92:1, emphasis added). With the September offer letter being addressed to trial counsel and then using the pronoun *your* multiple times in the first paragraph, the language of the letter gives no indication that the counter-proposal was made by anyone other than trial counsel.

Finally, the State points out that Mr. Kyles' trial counsel testified that he could not recall a single time in 25 years as an attorney of not communicating an offer to a client. (State's Response at 7). Of course, this statement means little

in the face of counsel's earlier testimony that in *this case* he does not recall whether or not he communicated the August offer to Mr. Kyles. (111:10).[2]

In its response, the State attempts to use the above factual assertions to support the conclusion that Mr. Kyles has not established deficient performance. (*See* State's Response at 6-7). However, the postconviction court specifically chose not to make a decision on deficient performance and as a result that question is not properly before this Court. (112:136).

Another problem with the State's claim that Mr. Kyles has not established deficient performance is that it overlooks a significant way in which that finding would be logically inconsistent with the findings that the postconviction court already made. In order to show prejudice in a case where there is an uncommunicated offer, a defendant must satisfy a three part test articulated by the United States Supreme Court in ***Frye***. The first prong of that test requires that a defendant show "a reasonable probability the defendant would have accepted the earlier plea offer had they been afforded the effective assistance of counsel." ***Id.*** at 147.

In finding that Mr. Kyles had established this first prong of the prejudice test, the postconviction court stated:

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[2] It should also be noted that the State asserts that Mr. Kyles and his trial counsel met twice on August 27, 2002. (State's Response at 2). This is not correct. August 27, 2002 was the day of Mr. Kyles' revocation hearing. (111:48-51; 112:33-35; 94:1; 95:2). Trial counsel represented Mr. Kyles on both his revocation and this case. (111:57). Mr. Kyles met with trial counsel the morning of August 27, 2002 and had his revocation hearing at 1:00 p.m., but did not meet with counsel a second time that day. (112:33-35).

> I think [Mr. Kyles'] credibility is sufficient for me to conclude, though, that the August – that the defendant would have been – or that the defense has been willing to demonstrate that the defendant would have accepted that plea had it been offered at the time. I don't mean –
>
> That does not necessarily mean for the purposes of my findings of fact that it was not offered.
>
> But in looking at the prejudice prong, there is sufficient testimony for me to reach the conclusion that the defendant would have accepted that plea.

(112:128). Thus, the postconviction court's finding that Mr. Kyles satisfied the first prong of the ***Frye*** test is based on its finding that Mr. Kyles testified credibly that had he been presented with the August offer back in 2002 he would have accepted it. It would be hard to reconcile this conclusion with a finding that the August offer *was* in fact communicated because in that case, Mr. Kyles would have accepted it. So, to the extent that the postconviction court made any findings related to deficient performance, those findings support the conclusion that Mr. Kyles' trial counsel performed deficiently.

CONCLUSION

Mr. Kyles respectfully requests that this Court reverse the postconviction court's decision, conclude that he has established prejudice under ***Frye***, and remand the case to the circuit court to make findings regarding deficient performance.

Dated this 22nd day of June, 2018.

Respectfully submitted,

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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 1,887 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 22nd day of June, 2018.

Signed:

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