STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SANDRA D. SOLOMON,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

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

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. Ms. Solomon was entitled to a hearing on her postconviction motion in which she alleged that her plea was involuntarily entered because of the circumstances preceding her plea.

In its response brief, the state unpersuasively parrots the language of the postconviction decision and insists Ms. Solomon's assertions were "speculative" and "directly contradicted by the record." (State's Brief p.11).

The state argues that Attorney Ksicinski's self-serving statement that he was fully prepared to proceed to trial somehow directly contradicts *Ms. Solomon's* fear about her attorney's ability to represent her. (State's Br.11,12). Notably, Attorney Ksicinski had not informed the court that he had taken Ms. Solomon's case; did not show up when her case was called in the morning; admitted he had only received her discovery *that day*; had informed the court he *had no information about her case*; and was not even aware of a 911 call until the state made him aware while the parties were awaiting jurors for voir dire. Attorney Ksicinski's personal assessment of his ability to try Ms. Solomon's case has absolutely no bearing on Ms. Solomon's assessment of his preparation; thus, it does not bear on the voluntariness of her plea.

The state next argues that in *State v. Basley*, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671, the defendant's allegation was "highly specific and clearly explains why the plea colloquy did not adequately assess how voluntary Basley's plea had been." (State's Br.12). It observes that Ms. Solomon had answered "yes" when she was asked if she was satisfied with Attorney Ksicinski's representation of her. (State's Br.11, 12, 14). The state asserts, "In this case, Solomon makes no specific allegations and relies on speculations that are clearly and specifically refuted by the record." (State's Br.12).

Yet, a defendant's potentially contradictory answers at the time of the plea hearing do not necessarily undercut the postconviction claim that the plea was not voluntarily entered. As Ms. Solomon preemptively argued in her brief-in-chief, (*see* Solomon brief-in-chief, p.15-16), in appellate briefing in *Basley*, the state made a nearly identical, losing argument:

> Basley specifically concedes that the trial court complied with Wis. Stat. § 971.08 and other, mandatory duties prior to accepting his no contest plea. …Basley now claims that his trial attorney coerced him into entering a no contest plea by threatening him with withdrawal from the case or with sabotaging the trial. However, at the plea hearing, the trial court gave Basley every opportunity to express his dissatisfaction with counsel. In fact, the court specifically asked Basley whether anyone had threatened him to get him to enter a no contest plea.

(*State v. Basley*, No.2005AP2449, Response Brief of Plaintiff-Respondent p.3, filed Apr.12, 2006). The state in *Basley* also argued that at his sentencing hearing, "the court allowed Basley to make a very long allocution, covering eight pages of transcript. Nothing in the defendant's statement suggested he felt coerced into entering his no contest plea." (*Basley*, Brief of Plaintiff-Respondent p.3).

Despite the state's arguments in *Basley*, the defense prevailed. So too should Ms. Solomon. This Court explained precisely why the state's arguments failed:

> In the State's view, because 'Basley was given a full opportunity to present his complaints at the plea hearing and later at sentencing,' he should not be entitled to a postconviction hearing at which he would testify in contradiction to the responses he gave during the plea colloquy. We reject the State's reasoning. The State is simply incorrect that a good and sufficient plea colloquy, one that concededly complies with the requirements of *Bangert*, can be relied on to deny an evidentiary hearing for a defendant who seeks to withdraw his or her plea on non-*Bangert* grounds. The entire premise of a *Nelson/Bentley* plea withdrawal motion is that something not apparent from the plea colloquy may have rendered a guilty or no contest plea infirm.

Basley, 298 Wis. 2d 232, ¶¶14-15.

The state next argues that Ms. Solomon apparently cannot seek plea withdrawal unless she

formally alleges ineffective assistance of trial counsel. (State's Br.13). Again, the state's argument is incorrect. In *Basley*, this was another argument set forth by the state: that Mr. Basley would only be entitled to an evidentiary hearing if the post-conviction motion contained a "properly pleaded claim of ineffective assistance of trial counsel so as to trigger an evidentiary hearing at which counsel testifies regarding his challenged conduct." (*State v. Basley*, Reply Brief of Defendant-Appellant p.2, filed May 1, 2006). This Court disagreed with the state's assertion and reversed and remanded for an evidentiary hearing on Basley's motion. *Basley*, 298 Wis. 2d 232, ¶20.

The state bizarrely argues that Ms. Solomon "cannot be compared to the defendant in *Basley* because she did not experience the sort of coercive time pressure invoked in the *Basley* case." (State's Br.13). Yet, the state admits that Ms. Solomon's case was "on the precipice of jury trial" and the jury was "on the way up." (State's Br.13). While the coercive time pressure Ms. Solomon faced was not identical to that the defendant in *Basley* faced (which Ms. Solomon never argued), the time pressure she faced was very real. The court was insistent that Ms. Solomon's case would be tried that day. (58:3-4; Brief-in-chief appendix p.111-12) ("At 1:30, we will be trying this case.").

Ms. Solomon therefore felt she had no reasonable alternative other than to plead because she had "no choice" but to proceed with Attorney

Ksicinski, yet she was seriously concerned about his ill-preparedness based on his own representations to the court the day of her trial: that he had no information about her case, that he had not filed his motions in limine, that he was not aware of the existence of a 911 call, that he was not aware of an ownership issue. (58:3-4, 59:4, 8-9; Brief-in-chief app.111-12, 113-14), (Solomon brief-in-chief p.8-16). Ksicinski's statement that he was nevertheless prepared does not defeat Ms. Solomon's assertion that her plea was not knowingly, voluntarily, and intelligently entered because her choice to plead was legally coerced. While this time pressure is indeed a different variety than that faced by the defendant in *Basley*, it is no less legitimate.

The state argues that Ms. Solomon made "no specific allegations." (State's Br.12). Simply because the state takes a different view of events than Ms. Solomon does not mean that Ms. Solomon failed to make specific allegations. Indeed:

- Ms. Solomon specifically alleged she was 45 years old and had no prior experience with the criminal justice system.

- Ms. Solomon specifically alleged she believed she was required to hire an attorney because the court had not allowed her to represent herself after Attorney Schoenfeldt tried to withdraw from her case.

- Ms. Solomon specifically alleged she was sincerely concerned when the court noted her newly retained attorney, Mr. Ksicinski, had not notified the court he was representing her and had told the court he had no information about her case on the day of her jury trial.

- Ms. Solomon specifically alleged she felt she lacked any reasonable alternative to pleading guilty when the court insisted that she had to have her jury trial on the date it was scheduled, even though Attorney Ksicinski received her discovery materials just before her case was called a second time that afternoon, and was made aware of the 911 call by the state while the jury was being brought up for voir dire.

(Solomon brief-in-chief p.10-11, 13, 15). Ms. Solomon offered specific allegations regarding the voluntariness of her plea that hinged on her credibility; yet, the court did not give her the opportunity to testify, and therefore the court was not able to assess the credibility of her allegations.

The state inaccurately asserts that Ms. Solomon analogized her case to *State v. Leitner*, 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 207. (State's Br.13). She did not; she merely cited to *Leitner* for the proposition that, "When facts are in dispute and credibility is an issue, live testimony is

generally preferable." (Solomon brief-in-chief p.12). Moreover, Ms. Solomon did not analogize the facts of her case to those in *Leitner*, because of the distinct procedural differences. In *Leitner*, the defendant sought pre-sentencing plea withdrawal. *Leitner*, 247 Wis. 2d at ¶10. Unlike Ms. Solomon's case, the court held a hearing on Leitner's plea withdrawal motion, and denied his request for plea withdrawal after determining Leitner failed to meet his burden of proof. *Id*., ¶¶10-11. On appeal, Leitner argued the circuit court erred in not finding a "fair and just" reason for plea withdrawal. *Id*., ¶21.

Leitner is therefore an unsuitable comparison to Ms. Solomon's case, because it involved a different plea withdrawal standard and because Leitner was afforded an evidentiary hearing at which he chose not to present the testimony of his alibi witness. *Id*., ¶28. Ms. Solomon was sentenced immediately after she pled, and has never been afforded an evidentiary hearing on her plea withdrawal claim.

Problematically, throughout the state's response brief, it parses out the many issues that arose over the course of Ms. Solomon's case, seeking to isolate and minimize the greater problem. Yet, Ms. Solomon's experience of these problems was a cumulative experience, which, prior even to Ms. Solomon's plea, Attorney Schoenfeldt had described as "not the way practice should be", and thus resulted in her involuntary plea. (*See* 58:3-4; Brief-in-chief app.111-12).

Ms. Solomon was entitled to an evidentiary hearing at which the court could assess the credibility of her allegations. Ms. Solomon sufficiently explained the specific circumstances that led her to feel she had no real choice other than to plead. Therefore, this Court should reverse and remand for an evidentiary hearing.

II. The domestic abuse modifier should be stricken from the judgment of conviction because there was not a sufficient factual basis for its imposition.

The state argues that Ms. Solomon's case is distinguishable from *O'Boyle*, likely because the postconviction court admitted that *O'Boyle* "tended to support the defendant's argument." (46:9; Brief-in-chief app.130). *See O'Boyle*, No.2013AP1004-CR, unpublished slip op. (WI App. Feb. 4, 2014) (Brief-in-chief app.101-112). However, the state's attempts to distinguish *O'Boyle* are unsuccessful. It argues that because criminal damage to property is enumerated under the domestic abuse surcharge statute, its inclusion "suggests that the legislature specifically contemplated damage to property as an offense which might satisfy the requirement that a victim feared imminent fear of physical harm." (State's Br.17). Yet, the state ignores the fact that disorderly conduct, the charge at issue in *State v. O'Boyle* is also enumerated in Wis. Stat. § 973.055(1)(a)1.

The state also argues that Ms. Solomon's case was not charged under Wis. Stat. § 968.075, ignoring

Ms. Solomon's argument that the charging document and judgment of conviction applied the functional equivalent of the domestic abuse modifier by attaching the language "domestic abuse assessments" to Ms. Solomon's charges and conviction despite not specifically listing Wis. Stat. § 968.075. (Solomon brief-in-chief p.16-17).

The state asserts that Ms. Solomon's argument fails because she stipulated to the criminal complaint. (State's Br.16, 17). Nevertheless, whether the undisputed facts qualify as domestic abuse is a legal question for this Court's de novo review. *State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Here, like in *O'Boyle*, there was no physical contact between V.G.-J. and Ms. Solomon, and while Ms. Solomon's behavior, like O'Boyle's, could be characterized as inappropriate and potentially frightening, there was no violence against V.G.-J. nor threats made by Ms. Solomon at the time of the incident. *See O'Boyle*, No.2013AP1004-CR at ¶¶22, 25.

The state fails to offer any meaningful response to Ms. Solomon's argument regarding the objective reasonability of fear of the imminent occurrence of the intentional infliction of physical pain, physical injury or illness, intentional impairment of physical condition, or a violation of the sexual assault statute, other than to repeat the postconviction court's conclusion. (State's Br.17); (*See* Solomon brief-in-chief p.18-19); (*See also Charolais Breeding Ranches, Ltd. v. FPC Secs, Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d

493) (unrefuted appellate arguments are deemed conceded).

Without a sufficient factual basis for its imposition, the domestic abuse modifier should be stricken.

CONCLUSION

For the foregoing reasons, and those argued in her brief-in-chief, Ms. Solomon respectfully requests that this Court reverse the order denying postconviction relief and remand for an evidentiary hearing on Ms. Solomon's motion for plea withdrawal. In addition, this Court should order that the reference to "domestic abuse assessments" be stricken from the judgment of conviction as it modifies the charge.

Dated this 23rd day of August, 2018.

Respectfully submitted,

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@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 2,077 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 23rd day of August, 2018.

Signed:

CARLY M. CUSACK
Assistant State Public Defender