WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal No. 2018AP000802 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR YANCEY, JR.,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Postconviction Relief of the Circuit Court of Milwaukee County, the Honorable William S. Pocan and the Honorable David A. Hansher Presiding, Circuit Court Case No. 2014CF003831

VICTOR YANCEY, JR.'S REPLY BRIEF

Todd G. Smith
State Bar No. 1022380
Bryan J. Cahill
State Bar No. 1055439

Attorneys for Victor Yancey, Jr.

GODFREY & KAHN, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

Victor Yancey, Jr. unknowingly and involuntarily pled guilty because his appointed defense attorney wrongly advised him that the court would address his concerns about police misconduct in an *in camera* hearing or John Doe proceeding, even after entering a guilty plea. The circuit court acknowledged that Yancey's counsel may have performed deficiently and the State concedes that the circuit court applied the wrong standard for prejudice. Despite all that, the State maintains that Yancey is not entitled to a hearing on his ineffective assistance of counsel claim. The State's position is untenable; Yancey is entitled to a hearing.

ARGUMENT

Yancey methodically stated the "five 'w's' and one 'h'" of his ineffectiveness claim, *see State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433—all supported by citations to the record. Initial Br. 13–14.

The State does not grapple with the evidence of the deficient representation that Yancey received. Instead, the State constructs a strawman—Yancey's attorney never "assured" or "promised" him

an *in camera* hearing or John Doe proceeding—to try to resist a finding of deficient performance. But Yancey need not prove an assurance or promise to establish ineffective assistance of counsel. The advice was incorrect and misleading; defense counsel's performance was deficient.

The State also argues that Yancey's plea should stand because he was not prejudiced, arguing: (1) the plea colloquy establishes that Yancey knowingly and voluntarily waived his right to challenge the State's evidence; and (2) there is no evidence that Yancey would have gone to trial rather than plead guilty. Both arguments fail.

First, Yancey does not allege the plea colloquy was deficient; instead, he points to evidence extrinsic to the plea hearing that affected his understanding of the effects of the guilty plea. *See State v. Brown*, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906 (discussing differences between challenges to the plea colloquy itself and challenges to a guilty plea premised on extrinsic evidence). The plea colloquy cannot inoculate Yancey's guilty plea from the faulty advice he received.

Second, the evidence shows it is "reasonably likely" that Yancey would have gone to trial rather than plead guilty, had he received correct advice. *See Harrington v. Richter*, 562 U.S. 86, 111–112 (2011) (explaining that "*Strickland* asks whether it is 'reasonably likely' the result would have been different," which is a lower bar than "more likely than not"). Yancey's postconviction motion adequately alleged prejudice in addition to deficient performance, as discussed below.

I. Yancey's postconviction motion made a *prima facie* showing of deficient performance.

The State relies heavily on *Harrington*, 562 U.S. at 105 (Resp. Br. 4), but its reliance is misplaced. *Harrington* is a federal habeas case reviewing whether the California state courts reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). *Harrington*, 562 U.S. at 100–01. On a habeas review, courts apply an even tougher standard of review than the *Strickland* ineffectiveness standard. *See id*. at 101 ("The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. . . . A state court must be granted a

deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself."). This heightened standard of review does not apply to Yancey's claim.

Moreover, *Harrington* focused on a different strand of ineffectiveness, examining counsel's strategic and tactical trial decisions through the prism of a guilty verdict. *Id.* at 107. In this posture, the *Harrington* Court's concern with hindsight and emphasis on deference to trial counsel's tactical decisions are understandable. By contrast, Yancey's appeal does not present a tactical decision; it is a challenge to the correctness of legal advice that wrongly informed Yancey's understanding of the consequences of his guilty plea.

While the State cites *Harrington* for general principles of law, the State does not address the Wisconsin cases holding that providing affirmative misinformation about settled law constitutes ineffective assistance. *See, e.g.*, *State v. Dillard*, 2014 WI 123, ¶ 93, 358 Wis. 2d 543, 859 N.W.2d 44; *State v. Ortiz-Mondragon*, 2015 WI 73, ¶¶ 33, 60, 364 Wis. 2d 1, 866 N.W.2d 717.

As explained in Yancey's brief, opportunities for a John Doe proceeding or an *in camera* hearing are rare, and none apply to Yancey's allegations of police misconduct. Initial Br. 17–18. And even if one were applicable, Yancey would likely have waived such a hearing if his guilty plea had been knowing and voluntary. *See State v. Muldrow*, 2018 WI 52, ¶ 1, 381 Wis. 2d 492, 912 N.W.2d 74 (citing *State v. Bangert*, 131 Wis. 2d 246, 270, 389 N.W.2d 12 (1986)). The advice that he could plead guilty and expect a hearing was not correct; it fell below "prevailing professional norms." *Harrington*, 562 U.S. at 105.

The State wrongly focuses on the fact that Attorney Richard Poulson did not guarantee Yancey a hearing. Resp. Br. 4 (quoting the circuit court's observation that Poulson did not "assure" or "promise" Yancey he would get a John Doe proceeding or an *in camera* hearing). The question is not whether Poulson advised Yancey in terms of absolutes and guaranteed Yancey a hearing; it is whether the advice was correct, or at least equal to that which an ordinarily prudent attorney would give. *See State v. Shata*, 2015 WI 74, ¶ 71, 364 Wis. 2d 63, 868 N.W.2d 93 ("*Padilla* [*v. Kentucky*,

559 U.S. 365 (2010)] requires advice to be correct . . ."); *id.* at ¶ 79 ("Shata's attorney was required to 'give correct advice' to Shata about the possible . . . consequences of his conviction."). Indeed, advice that "grossly exaggerate[s]" the effects of a guilty plea will support plea withdrawal. *See Dillard*, 358 Wis. 2d 543, ¶ 39 at n.15 (quoting *Hammond v. United States*, 528 F.2d 15, 19 (4th Cir. 1975)).

Here, it was highly unlikely that Yancey would be granted an *in camera* hearing or John Doe proceeding after pleading guilty. Poulson's advice should have been unequivocal. In response to Yancey's concern that pleading guilty would prevent an investigation of his allegations, Yancey's postconviction motion alleged that Poulson assured Yancey that he could raise his concerns and "the judge could either order a John Doe hearing or conduct an *in camera* inspection of the records." R.33:7; App. 14.

Context deeply affects meaning. By advising Yancey that the judge "could" pick between two alternatives, the reasonable inference was that at least one of the alternatives was likely. Correct advice—the advice of an ordinarily prudent attorney—would have

made clear that a hearing was highly unlikely once Yancey pled guilty. Yancey's postconviction motion adequately alleged this affirmative misadvice.

Although it was possible that Poulson could have given even worse advice by assuring Yancey that he would certainly receive either an *in camera* hearing or John Doe proceeding, this does not transform Poulson's "unrealistic" answer, R.34:4; App. 4, into acceptable advice. The circuit court seemed to recognize this, acknowledging that Poulson's performance "may have been deficient." R.34:5; App. 5. The circuit court was correct: failing to accurately advise a client on settled, clear law is constitutionally deficient under Wisconsin law. *Dillard*, 358 Wis. 2d 543, ¶ 93.

The State's only other argument is that Poulson's advice was not inaccurate because Yancey was provided an opportunity to speak at his sentencing hearing. Resp. Br. 4. This argument is not persuasive.

Yancey was not seeking an opportunity to vent in open court. Rather, he wanted assurances that by pleading guilty he would not lose the opportunity to expose corruption and misconduct in a

meaningful judicial proceeding. R.33:7; App. 14. Poulson knew this. R.34:5; App. 5. Being allowed to make an unprepared, repentant statement without the assistance of counsel at a sentencing hearing is a far cry from the *in camera* hearing or John Doe proceeding Yancey desired.

Poulson provided objectively inaccurate advice to Yancey, and the State has not provided any legal authority supporting its contention that Poulson's advice fell within "professional norms." *Harrington*, 562 U.S. at 105. Instead, it relied on the circuit court's opinion, which, as outlined above, is flawed. The State's response does not undermine Yancey's *prima facie* showing of ineffectiveness.

II. Yancey's postconviction motion made a *prima facie* showing of prejudice.

The parties agree that the circuit court applied the incorrect standard for prejudice in denying Yancey's postconviction motion. Resp. Br. 6; *see also* R.34:5. Despite the circuit court's erroneous exercise of discretion, *State v. Bentley*, 201 Wis. 2d 303, 318, 448 N.W.2d 50 (1996), the State appears to argue harmless error. Resp. Br. 7. The error was far from harmless.

The circuit court's application of the incorrect standard permeates its analysis. The court repeatedly stated that Yancey was not prejudiced because it deemed Yancey's defense as unlikely to succeed at trial. Br. 25; R.34:5; App.5. "An error that pervades the record is more likely to be harmful than an error that appears only a few times . . . ." *State v. Monahan*, 2018 WI 80, ¶ 36, 383 Wis. 2d 100, 913 N.W.2d 894. Here, the circuit court analyzed the wrong issue for prejudice.

Under the correct standard, Yancey alleged sufficient facts to state a *prima facie* claim of prejudice. The standard is whether "there is a reasonable probability that, but for [Poulson's] errors, [Yancey] would not have pleaded guilty and would have insisted on going to trial." *Bentley*, 201 Wis. 2d at 312 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The State contends that "there is nothing in the record" to support that position, "other than Yancey saying it." Resp. Br. 7. The record belies the State's assertion.

First, the record establishes Yancey's commitment to a judicial hearing, describing Yancey's bullpen conversation with

Poulson, including what was said, when it occurred, and where it occurred. R.33:4-5, 7-9; App. 11-12, 14-16.

Second, Yancey stated at his sentencing hearing that he was concerned with police corruption and requested that the circuit court act on it. R.63:16, 18; App. 62, 64. Contrary to the State's suggestions, Resp. Br. 6, Yancey need not have uttered "magic words," specifically demanding an *in camera* hearing or John Doe proceeding. Yancey made known the importance of this issue when he stated his belief that "a crime" had been committed and "should be investigated." R.63:17; App.63.

The State argues that Yancey's admissions at the plea and sentencing hearings establish he would have pled guilty even absent the deficient advice. Resp. Br. 6. The State's position ignores that Yancey misunderstood the consequences of the colloquy because of his attorney's faulty advice. Yancey followed the prescribed procedure for entering a guilty plea and when given the opportunity to make his own statement, he requested an investigation of alleged police corruption. R.36:16-18; App. 62-64.

Third, Yancey went to trial in all four of his other cases, demonstrating that he would have done the same here. Initial Br. 21. Indeed, by pursuing this postconviction motion and appeal, he is seeking to do just that.

Finally, Yancey's belief in the cross-contamination of faulty evidence across his cases establishes a special circumstance consistent with his stated motivations and actions. *See* Initial Br. 22–23. The supreme court has recognized that special circumstances may exist that animate a defendant's willingness to go to trial in a case and, therefore, support a finding of prejudice. *See, e.g. Dillard*, 358 Wis. 2d 543, ¶¶ 100-104. Again, the State neither addresses nor denies this point.

In its response, the State—without addressing the several specific facts in the record cited by Yancey—simply concludes that the entire record is bereft of anything to support Yancey's prejudice claim. *See* Resp. Br. 6-7. But Yancey's initial brief presents numerous facts (all with citations to the record) that support his contention that he would not have pled guilty but for Poulson's inaccurate advice.

The State has not provided additional or different facts undermining Yancey's position, or explained how Yancey's arguments and supporting factual citations are otherwise misplaced. It simply ignores them and cites to Yancey's plea colloquy as dispositive of the entire issue. Resp. Br. 6. The State's argument conflicts with the supreme court's recognition that even if a plea colloquy is perfectly executed, a defendant may still succeed in setting aside his plea by presenting extrinsic evidence that the plea was not knowingly, intelligently and voluntarily made. *See Brown*, 293 Wis. 2d 599, ¶ 24.

Yancey has provided extrinsic evidence to support his *prima facie* case for ineffective assistance of counsel and, ultimately, that his plea was not entered knowingly and voluntarily.

CONCLUSION

For the foregoing reasons, as well as those presented in Yancey's initial brief, this case should be remanded to the circuit court for an evidentiary hearing on Yancey's ineffective assistance of counsel claim.

Dated this 27th day of November, 2018.

GODFREY & KAHN, S.C.

By: *s/Bryan J. Cahill*
Todd G. Smith
Bar No. 1022380
Bryan J. Cahill
State Bar No. 1055439

Attorneys for Defendant-Appellant Victor Yancey, Jr.

P.O. ADDRESS:
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
tsmith@gklaw.com
bcahill@gklaw.com

RULE 809.19(8)(d) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,135 words.

Dated: November 27, 2018.

s/Bryan J. Cahill
Bryan J. Cahill
State Bar No. 1055439

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, 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: November 27, 2018.

s/Bryan J. Cahill
Bryan J. Cahill
State Bar No. 1055439