STATE OF WISCONSIN

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

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018AP000996 CR

v.

Fond du Lac County Case
No. 16 CM 823

SAMANTHA H. SAVAGE-FILO,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT BRANCH II, THE HONORABLE PETER L. GRIMM, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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DEFENDANT-APPELLANT'S BRIEF

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-appellant, Samantha H. Savage-Filo (hereinafter "Savage-Filo"), anticipates that the briefs of the parties will

fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule and decide a case of substantial and continuing public interest. Wis. Stat. §§ 809.22 and 809.23(1)(a)1, 5.

STATEMENT OF THE CASE

This matter was commenced by the filing of a Complaint on October 13, 2016, charging Savage-Filo with one count of Theft-Movable Property <=$2500, under Wis. Stat. § 943.20(1)(a) (1), and one count of Resisting or Obstructing an Officer, under Wis. Stat. § 946.41(1). An initial appearance took place on November 1, 2016. A plea/sentencing hearing was scheduled for February 20, 2017 and a Jury trial was scheduled for February 21, 2017. Witness lists were filed by both the State and the defendant on January 13, 2017 and February 17, 2017, respectively. At a Plea/Sentencing hearing on May 31, 2017, Savage-Filo entered an Alford plea to count 1(Theft-Movable Property).

Sentencing took place on the same day as the Alford plea. The Court sentenced Savage-Filo to a withheld

sentence, 12 months of probation, 60 days stayed that could be broken up into increments for use by the probation agent, and restitution to be paid in full and probation to be extended year by year until the restitution is paid in full. The Judgment of Conviction was filed on June 1, 2017 (R17:1-3). Trial counsel filed a Notice of Intent to Pursue Post-Conviction Relief on June 14, 2017 (R20:1-2).

A Post-Conviction Motion was filed by appellate counsel on March 9, 2018 (R28:1-8). The Post-Conviction Motion hearing took place on May 2, 2018 (R46:1-30). The trial court denied Savage-Filo's Post-Conviction Motion at the conclusion of the motion hearing and an Order denying the Post-Conviction Motion was signed by the court on May 11, 2018 (R32). A Notice of Appeal was timely filed on May 23, 2018 (R35).

STATEMENT OF FACTS

At issue in this case is whether trial counsel was ineffective for his failure to inform Savage-Filo of her constitutional rights such that the plea would be knowingly, voluntarily and intelligently made. Savage-Filo was charged with Theft-Movable Property <=$2500

under Wis. Stat. § 943.20(1)(a) (4). Savage-Filo made an Alford pled to that same count on May 31, 2017.

Savage-Filo alleged that trial counsel was ineffective for trial counsel's failure to adequately investigate prior to counseling Savage-Filo on any plea offers. This includes but is not limited to, trial counsel's failure to consult with an expert regarding the value of the missing jewelry, failure to investigate whether the purse involved could have even contained as much jewelry as being alleged, and that trial counsel failed to discuss possible defenses, the elements of the offense that could have been argued at trial prior to the plea. The issues will be dealt with in turn within this brief and other facts will be set forth as necessary within the argument section of this brief.

STANDARD OF REVIEW

On appellate review, a claim of ineffective assistance of counsel is a mixed question of law and fact. State v. Thiel, 264 Wis. 2d 571, 665 N.W.2d 305 (2003). The court should uphold the findings of fact by the trial court unless they are clearly erroneous. State v. Thiel, 264 Wis. 2d at 588, 665

N.W.2d at 314. Whether counsel's performance satisfied the constitutional standards for ineffective assistance of counsel is a question of law, which the appellate court should review de novo. Id.

ARGUMENT

I. FOR AN ORDER GRANTING WITHDRAWAL OF THE PLEA BECAUSE SAVAGE-FILO DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AND/OR BECAUSE THE PLEA WAS NOT ENTERED IN A KNOWING, VOLUNTARY AND INTELLIGENTLY MADE MANNER. TRIAL COUNSEL WAS INEFFECTIVE BECAUSE OF INADEQUATE INVESTIGATION BY TRIAL COUNSEL.

A. The Relevant Legal Standard

Under the Sixth Amendment to the United States Constitution, defendants are guaranteed the right to assistance of counsel for their defense. It has long been recognized that this right is not merely the right to have an attorney present, but also to have the effective assistance of that attorney. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). At the heart of any ineffective assistance of counsel claim is a fairness inquiry, the focus of which is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., at 686. The answer to this inquiry is

arrived at through the application of a two-prong test. Counsel's performance must be shown to be deficient *and* the deficiency must be demonstrated to have caused prejudice to the defendant. Id., at 687. Application of the test need not proceed in any particular order; failure to prove either prong is fatal to the defendant's argument. Id.

To prove deficient performance, the defendant must show that the attorney's performance fell below an objective standard of reasonableness for services rendered, based upon prevailing professional norms, as evaluated in the totality of the circumstances. Id., 687-88. In making this showing, the defendant must overcome the strong presumption that counsel's performance was not deficient. Id., at 690. Appropriately assessing an attorney's conduct "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id., at 690. "A strategic decision rationally based on the facts and the law will not support a claim of ineffective

assistance of counsel". State v. Felton, 110 Wis. 2d 485, 501-02, 329 N.W.2d 161, 169 (1983).

Prejudice is proven by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. "The focus in this inquiry is not on the outcome of the trial, but on the reliability of the proceedings." State v. Thiel, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (2003). "Certainty on [the court's] part of a different outcome is not required." State v. Jeannie M.P., 286 Wis. 2d 721, 742, 703 N.W.2d 694 (Ct. App. 2005). In making this determination, a court "may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfie[s] the standard set forth in Strickland. Thiel, at ¶60. Counsel has a duty to consult with the defendant on important decisions. Id. Counsel must also follow the defendant's instructions on fundamental defense objectives. See

State v. Divanovic, 200 Wis. 2d 210, 546 N.W.2d 501 (Ct. App. 1996).

As part of effective assistance of counsel, trial counsel has the duty to make reasonable investigations or to make reasonable decisions that make a particular investigation unnecessary. State v. Thiel, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (2003), and Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). While an attorney's failure to investigate is not deficient when an attorney makes reasonable judgment that the defendant's story is not related to critical factors at trial, failure to investigate potential evidence prior to the defendant making a plea would be ineffective assistance of counsel. State v. Schultz, 148 Wis. 2d 370, 435 N.W.2d 305 (Ct. App. 1988), aff'd 152 Wis. 2d 408 (1989). Because Attorney Curtis Julka did not adequately represent Savage-Filo, Savage-Filo's plea should be allowed to be withdrawn. State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

B. As Applied to the Instant Case

Savage-Filo was represented at the trial level by Attorney Curtis Julka (Hereinafter "Julka"). Savage-Filo entered an Alford plea to count 1, theft-movable property <=$2500, contrary to Wis. Stat. § 943.20(1)(a). The Court sentenced Savage-Filo to a withheld sentence, 12 months of probation, 60 days stayed that could be broken up into increments for use by the probation agent, and restitution to be paid in full and probation to be extended year by year until the restitution is paid in full. (R44:43-44). However, Julka did not adequately investigate prior to counseling Savage-Filo on pleading. Specific instances of failure to investigate by Julka are set forth below; however, before that specific analysis, a general analysis concerning a failure of Julka and the Court to understand the role of defense counsel in the course of representation and at trial needs to be discussed.

It was testified to at the Post-Conviction Motion hearing that, according to Julka, Savage-Filo maintained her innocence throughout the process (R46:7, App. 108). Julka also very clearly stated there was a video where [Savage-Filo] had taken the purse … but she had

maintained to me that she had eventually returned the purse, but there was no record to corroborate that that had happened, so my opinion to her was that she was probably going to lose at trial. (R46:7, App. 108). While Julka wasn't very specific on what the video did or did not show, the general tone was that the evidence indicated that Savage-Filo did in fact steal the purse from the Walmart parking lot and did not return it. (R46:7-10, App. 108-111). From that simple disclosure, Julka, and the Court (when the Court analyzed the situation), leapt to the conclusion that Savage-Filo would not be able to go to trial and contest the charges and the only thing Savage-Filo would be able to do is pursue a plea in this case. To jump to that conclusion and determine that the only strategic choice after an alleged video of the crime by the defendant was to still continue with an Alford plea to the charge is wrong.

A competent and zealous representative of Savage-Filo would have actually viewed all of the discovery materials and still tried to discredit it against Savage-Filo. To simply throw up one's hands and say the equivalent of "well he's guilty so I don't have to defend

him" (as Julka seems to have done in this case) is not zealous or even effective representation. This is the antithesis of effective assistance of counsel. This would be deficient performance by Julka because he did not adequately investigate the case and it would be prejudicial to Savage-Filo because it would affect the final outcome in this case. The final outcome of a case takes place whether it is a plea or whether it is a trial. To ignore the investigation in this case because Julka came to the conclusion that he believes Savage-Filo might be guilty means that Julka's representation was deficient.

While, at times, it might be a reasonable trial strategy to seek a plea if a defendant is unlikely to win at trial, one needs to prepare a case first and work on the case before pleading to a charge without any offer of leniency or compromise made by the State. If Julka, after doing his duties as competent trial counsel (investigation into witnesses against Savage-Filo, actually going through the electronic discovery, and researching whether or not the jewelry alleged even existed), came to the conclusion that a plea was a

reasonable strategic choice, he could be forgiven. However, to make a strategic decision before an examination of the facts was undertaken is not a reasonable strategic decision. Further, it is a defendant's decision whether or not to plea in a case. Savage-Filo should not be forced to decide whether or not she wants to plea until his attorney has done what competent trial counsel would have done (i.e., investigate and inform Savage-Filo).

In addition, Julka seems to throw up his hands and say, because he believed Savage-Filo guilty, that there was no reason to inform Savage-Filo of rights she could have at trial. Julka was not clear in his testimony what piece of discovery explicitly implicated Savage-Filo that would lead him to believe that pleading to the crime was the only thing Savage-Filo could do. Julka essentially threw up his hands and did the legal equivalent of saying Savage-Filo is guilty so there is no reason to go forward, I will take whatever offer the State makes and we will argue at sentencing. Savage-Filo did not need an attorney to do what a non-attorney could have done; in other words, give up. For that most basic

of reasons, Julka was ineffective and his ineffective assistance was prejudicial to Savage-Filo.

1. Julka should have done adequate investigation into the electronic discovery; specifically, the videos, to determine whether Savage-Filo did in fact steal the purse.

If Julka adequately reviewed the discovery, he would have seen that the State had no case against Savage-Filo. The Complaint alleged that the victim left her purse in a cart in the Walmart parking lot where Savage-Filo picked it up and took off with it. (R1:1-4). A simple review of the appalling quality of video would have allowed Julka to see the State actually had very little evidence of what occurred at the Walmart. At the Post Conviction Motion hearing, appellate counsel questioned Julka on the video because Savage-Filo stated she never saw it. Julka stated he recalls viewing said video and that "the video showed a purse in a cart in the entry area of Walmart and then a person who appeared to be Ms. Filo taking that purse there, and then there was some footage of the parking lot as well, which showed

various cars leaving. One of them, I believe, was hers eventually." (R46:8-9, App. 109-110). However, upon appellate counsel's review of the discovery, none of it shows what Julka testified to at the Post-Conviction Motion hearing. If trial counsel had done an adequate review of the discovery, this information would have been available for Savage-Filo to consider and would have allowed Savage-Filo a chance to rebut the victim's allegations at trial. Without an investigation into this matter, Savage-Filo was unaware of the State's case against her.

At the Post-Conviction Motion hearing, Julka stated that, "…she had maintained to me that she had eventually returned the purse, but there was no record to corroborate that that happened, so my opinion to her was that she was probably going to lose at trial." (R46:7, App. 108). It is difficult for Savage-Filo to know if she was guilty without clearly understanding the elements of the offense and possible defenses that could be used at trial. Appellate counsel took the opportunity to thoroughly review the discovery. Whether or not there was "no record" of Savage-Filo's version of events, there

is no strategic reason to fail to actually review the discovery that was handed over by the State.

Instead, Julka fell back on his mantra that his strategy in this case was getting the most favorable plea for Savage-Filo even if it meant pleading to the actual charge that was made, and without concessions, and that obtaining evidence that might be relevant and probative at a trial or at a plea and sentencing hearing was not necessary. However, Julka (and, in some respect, the trial court) seems to have forgotten that the State has the burden of proving a case beyond a reasonable doubt. In other words, Savage-Filo does not have to prove her innocence. Julka's strategy of looking for the best plea bargain because, in his estimation, Savage-Filo could not be innocent based on the facts in the complaint, ignores that the constitution puts the burden of proof on the State. This strategy ignores that a vigorous defense, challenging each and every one of the State's arguments, trying to present additional evidence consistent with innocence, does not mean that a case would result in only "a trial or not trial scenario". In other words, the same evidence that might be helpful

at trial certainly can be helpful as part of a plea-bargaining scenario as the State would understand that certain aspects of their case were not as strong as they initially thought, that this evidence could be useful as the basis for reasonable doubt.

Furthermore, Julka forgets that it might be beneficial to a client to gather information that might be helpful against the State's case as part of the plea-bargaining process. It is not a reasonable strategic choice to not investigate matters that may prove to be helpful as part of a plea negotiation or trial preparation rather than to hope that later on such investigation might get done if it is deemed necessary.

2. Julka should have discussed possible defenses, the elements of the crime and what could have been argued at trial with Savage-Filo prior to acceptance of the Alford plea.

Even if Julka would have received a favorable plea offer and sentencing recommendation, it still would not excuse the lack of investigation into possible defenses in this case. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and State

v. Thiel, 264 Wis. 2d 571, 665 N.W.2d 305 (2003). Julka's performance was deficient and prejudicial to Savage-Filo. While the plea questionnaire itself was adequate (14), a plea to charges when a defendant is unaware of defenses (due to lack of investigation), leaves a plea that is not knowingly, voluntarily, and intelligently given. State v. Thiel, 264 Wis. 2d 571, 665 N.W.2d 305 (2003).

To show ineffective assistance of counsel as alleged above, Savage-Filo needs to show prejudice to herself and prejudice to the defense in that the actions of Julka deprived her of a fair trial with a reliable result. State v. Mayo, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115 (2007). Savage-Filo must affirmatively show that there is a reasonable probability that, but for counsel's unprofessional errors as set forth above, the results of the proceedings would have been different. State v. Hunt, 2014 WI 102, ¶ 40, 360 Wis. 2d 576, 851 N.W.2d 434 (2014). Savage-Filo has shown that she would not have accepted the plea bargain but for the deficient performance. State v. Fritz, 212 Wis. 2d 284, 569 N.W.2d 48 (Ct. App. 1997). While it is possible that Julka's

failure to investigate could be forgiven if he had done a reasonable investigation (State v. Thiel, 264 Wis. 2d 571, 665 N.W.2d 305 [2003]), trial counsel well versed in criminal defense should have discussed with Savage-Filo the lack of evidence that State had against her. As set forth above, Julka was ineffective in that he ignored his duties as a defense attorney by not engaging in a proper investigation, by not informing Savage-Filo of possible defenses, and by not acting as effective representation for Savage-Filo.

CONCLUSION

Because of the ineffective assistance of counsel, the Court should allow Savage-Filo to withdraw her plea.

Dated this _____ day of June, 2018.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve

confidentiality and with appropriate references to the record.

Dated this _____ day of June, 2018.

Brittany R. Running

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 mono spaced font. This brief has twenty-one (21) pages.

Dated this _____ day of June, 2018.

Brittany R. Running

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 _____ day of June, 2018.

Brittany R. Running