

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2018AP000996 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SAMANTHA H. SAVAGE-FILO,

Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe this case meets the statutory criteria to justify publication or oral argument.

STATEMENT OF THE ISSUES

- I. Did Atty. Julka provide ineffective assistance of counsel?

Trial Court Answered: No, because his representation was not deficient.

- II. Did Ms. Savage-Filo enter her *Alford* plea knowingly, intelligently, and voluntarily?

Trial Court Answered: Yes

STATEMENT OF THE CASE

On October 28, 2015, after shopping at a Wal-Mart store, Kimberly Walsh accidentally left her purse in a shopping cart in the store's parking lot and drove away. R.3:1. After she realized her purse was missing, Ms. Walsh returned to Wal-Mart, but the purse was gone. *Id.* This alarmed Ms. Walsh because she kept a large amount of valuable jewelry inside her purse. R.3:1-2. Mr. Walsh checked with the Wal-Mart customer service desk and was told that no one had returned the purse. R.3:2.

Wal-Mart's security director was able to determine (presumably by watching security camera footage) that an unknown female found the purse and took it without returning it to Wal-Mart customer service. R.3:1. Additionally, the security director later confirmed that no one called Wal-Mart advising them of a purse being left in a shopping cart. R.3:2. From watching the security footage, Officer Endries observed that the unknown female left in a blue Ford F-150 pickup truck. *Id.*

The unknown female was identified by Officer Bednarek as Samantha Filo from a photo on November 1, 2015. *Id.* On November 4, 2015, Officer Endries and Detective Mueller spoke with Ms. Filo at her home. *Id.* Before entering the home, the officers saw a blue 1999 Ford F-150 pickup truck in the driveway. *Id.*

During her interview, Ms. Filo admitted to finding a purse in a shopping cart when she left Wal-Mart on the evening of October 28, 2015.

Id. She admitted to taking possession of the purse, but said she tried to catch up to Ms. Walsh's vehicle in order to return the purse. *Id.* She said that afterwards she walked into Wal-Mart and returned the purse to customer service. *Id.* Detective Mueller and Officer Endries, however, noted that Wal-Mart security footage does not show anyone returning the purse. *Id.*

Subsequently, Ms. Filo—or rather Ms. Savage-Filo—was charged with Misdemeanor Theft and Obstructing an Officer. R.3:1. On May 31, 2017, Ms. Savage-Filo entered an *Alford* plea to the Misdemeanor Theft charge with the Obstructing an Officer charge being dismissed and read in. R.44:3. The State and Ms. Savage-Filo's attorney, Curtis Julka, jointly recommended one year of probation with some conditional jail time to be imposed and stayed for use by the probation agent to motivate Ms. Savage-Filo to make prompt monthly restitution payments. *Id.*

The missing jewelry was never recovered and there was no joint agreement on the amount of restitution, so the court conducted a restitution hearing. R.44:15. Following testimony from Ms. Walsh, the court ordered that Ms. Savage-Filo pay \$8,306.76 in restitution. R.17:2; 44:36.

Overall, the court ordered that Ms. Savage-Filo serve 12 months on probation, with 120 days of conditional jail (broken up into 6 different increments) imposed and stayed for use by the probation agent as a penalty for failure to make restitution payments, and payment of \$8,306.76 in

restitution. R.17:2. The court did not order any upfront, conditional jail time. *Id.*

On March 9, 2018, Ms. Savage-Filo filed a post-conviction motion with the circuit court arguing that she is entitled to withdraw her *Alford* plea due to Atty. Julka's ineffective assistance of counsel. R.28:1. Ms. Savage-Filo based her motion on Atty. Julka's alleged failures to: (1) consult an expert on the value of the jewelry, (2) investigate the amount of jewelry that the purse could hold, (3) failing to discuss possible defenses and the elements of the crime, and (4) to investigate the location of the missing jewelry. R.28:5-7.

The circuit court subsequently held a post-conviction hearing on May 2, 2018. R.46:1. Atty. Julka testified at the hearing. R.46:2. Ms. Savage-Filo did not testify at the hearing. *Id.*

Following Atty. Julka's uncontested testimony, the circuit court made, in part, the following findings of fact:

- 1) Atty. Julka spent a lengthy amount of time on the case. R.46:23.
- 2) Atty. Julka had two or three office visits with Ms. Savage-Filo and also met with her at the courthouse. *Id.*
- 3) Atty. Julka checked with Wal-Mart store security for confirmation that Ms. Savage-Filo returned the missing purse. *Id.*

- 4) Atty. Julka provided Ms. Savage-Filo with copies of all the police reports. R.46:23-24.
- 5) Atty. Julka discussed Ms. Savage-Filo's options, the pros and cons of having a trial, the likelihood of what a jury might do, and the possibility of the case being reissued as a felony. R.46:24.
- 6) Ms. Savage-Filo, despite asserting her innocence, did authorize Atty. Julka to engage in plea negotiations with the State. *Id.*
- 7) That at the plea hearing, Attorney Julka correctly explained to Ms. Savage-Filo what an *Alford* plea is, how it operates, and that she understood that, and decided to forgo the risk of trial and accept a plea bargain. *Id.*
- 8) Nothing that Atty. Julka could have investigated would have been fruitful or likely to lead to evidence. It would have been futile to visit every pawn shop in the surrounding area for the missing jewelry. R.46:25.
- 9) Atty. Julka watched Wal-Mart security footage with Ms. Savage-Filo. *Id.*
- 10) Ms. Savage-Filo understood the evidence against her. R.46:25-26.

Consequently, the Court denied Ms. Savage-Filo's post-conviction motion and ruled that Atty. Julka's representation was not deficient and that

Ms. Savage-Filo made her *Alford* plea freely, intelligently, and with proper advice of competent counsel. R. 32:1; 46:28-29.

On appeal, Ms. Savage-Filo now asserts that Atty. Julka failed to undergo adequate investigation into the electronic discovery and that he failed to discuss possible defenses to Misdemeanor Theft, which means she did not enter her plea knowingly, voluntarily, and intelligently. Def. Br. 13, 16.

SUMMARY OF THE ARGUMENT

The trial court did not err when it denied Ms. Savage-Filo's motion to withdraw her plea after sentencing. First, Ms. Savage-Filo's trial counsel provided effective assistance of counsel. In the alternative, even if trial counsel was defective, Ms. Savage-Filo was not prejudiced. Lastly, Ms. Savage-Filo has not properly raised or supported her claim that she did not enter her plea freely, knowingly, and voluntarily.

STANDARD OF REVIEW

Because Ms. Savage-Filo is seeking to withdraw her plea after sentencing, she must prove by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *State v. Villegas*, 2018 WI App 9, ¶ 18, 380 Wis. 2d 246, 908 N.W.2d 198.

There are two established ways to meet the manifest injustice test. *Id.* First, Ms. Savage-Filo can argue that she was denied the effective assistance of counsel. *Id.* ¶ 19; *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). Second, Ms. Savage-Filo can make a showing she did not enter her plea knowingly, intelligently, and voluntarily. *Villegas*, 2018 WI App 9 at ¶ 20; *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

As for the first option, a claim of ineffective assistance of counsel is a mixed question of fact and law. *State v. Shata*, 2015 WI 74, ¶ 31, 364

Wis. 2d 63, 868 N.W.2d 93. This Court must uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* But the ultimate determination of whether Attorney Julka's performance fell below the constitutional minimum is a question of law that this Court reviews independently. *Id.*

Regarding the second option, whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906. This Court must accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous. *Id.* Even so, this Court independently determines whether those facts demonstrate that Ms. Savage-Filo's plea was knowing, intelligent, and voluntary. *Id.* Likewise, whether Ms. Savage-Filo has sufficiently alleged that she did not know or understand information that should have been provided at the plea hearing is a question of law which this Court reviews *de novo*. *Id.* ¶ 21.

ARGUMENT

I. ATTY. JULKA PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.

Criminal defendants are guaranteed the right to counsel under both the U.S. Constitution and the Constitution for the State of Wisconsin. U.S. Const. amend. VI; Wis. Const. art. 1, § 7. This right encompasses the right to effective assistance of an attorney. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984); *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. Before a court can find that Atty. Julka was ineffective, however, Ms. Savage-Filo must show that: (1) Atty. Julka's performance was deficient and (2) that she was prejudiced by the deficient performance. *Id.* This Court need not address both prongs if Ms. Savage-Filo makes an insufficient showing on one of them. *State v. Maloney*, 2005 WI 74, ¶ 14, 281 Wis. 2d 595, 698 N.W.2d 583.

In evaluating Atty. Julka's performance, the Court must be "highly deferential" and "must avoid the distorting effects of hindsight." *Thiel*, 2003 WI 111, ¶ 19. Furthermore, counsel's performance "need not be perfect, or even very good, to be constitutionally adequate." *Id.* The question is whether an attorney's representation amounted to incompetence under prevailing professional norms. *Villegas*, 2018 WI App 9 at ¶ 24. To show prejudice, Ms. Savage-Filo must show that there is a reasonable probability that, but for Atty. Julka's deficient performance, the result of

the proceeding (the *Alford* plea) would have been different. *Id.* Ms. Savage-Filo, moreover, must make this showing by clear and convincing evidence. *Id.* ¶ 19.

A. Atty. Julka's representation was not deficient.

As noted in the State's Statement of the Case, at the conclusion of the post-conviction hearing, the circuit court made extensive factual findings regarding Atty. Julka's representation of Ms. Savage-Filo. R. 46:23-28. Taken as a whole, these factual findings provide a more than sufficient basis to support the legal conclusion that Atty. Julka provided adequate representation. Atty. Julka spent more time on the case than is normal for a misdemeanor level case, he met with Ms. Savage-Filo several times both at his office and at court, he reviewed the Wal-Mart security footage, he checked with Wal-Mart security for confirmation that Ms. Savage-Filo returned the purse, and any further investigation into the value of the jewelry would have been fruitless. *Id.* In fact, the circuit court did not make any finding of fact that would support the legal conclusion that Atty. Julka's representation was deficient.

The State would also point out that Ms. Savage-Filo, in her brief, did not argue that any of the circuit court's factual findings were clearly erroneous. Although Ms. Savage-Filo takes a dim view of Atty. Julka's representation, at no point did she single out one of the court's factual

findings regarding his representation and argue why the finding was wrong. Furthermore, the security footage is not in the record.¹ Consequently, this Court is not in a position to evaluate Ms. Savage-Filo's claims regarding the quality of the video or its evidentiary value. Thus, on the whole, the circuit court's factual findings are uncontested.

Because the factual findings are uncontested and universally support the legal conclusion that Atty. Julka provided adequate representation, this Court should affirm the circuit court's ruling on the matter. Additionally, because Ms. Savage-Filo has not shown that Atty. Julka was deficient, this Court need not address whether Ms. Savage-Filo was prejudiced and should deny Ms. Savage-Filo's ineffective assistance of counsel claim.

B. Even if Atty. Julka provided deficient representation, his representation did not prejudice Ms. Savage-Filo.

Despite Ms. Savage-Filo's displeasure with Atty. Julka's representation, she has not shown that his representation prejudiced her. First, Ms. Savage-Filo was charged with two offenses, Misdemeanor Theft and Obstructing an Officer, both Class A Misdemeanors, but was only convicted of Misdemeanor Theft. R. 3:1; 17:1. Even more, given the large restitution request submitted by the victim (\$13,454.38), the Misdemeanor Theft charge could have been amended to a Felony Theft charge. R. 11:2;

¹ Granted, it appears that Ms. Savage-Filo's post-conviction counsel did not receive the security footage from Atty. Julka until after the post-conviction hearing. R. 46:9. But that still does not enable this Court to review or analyze it.

See also Wis. Stat. § 943.20(3) (2015-16). This would have dramatically increased the classification of the offense from a Class A Misdemeanor to a Class G Felony. Wis. Stat. §§ 943.20(3)(a); 943.20(3)(c). In terms of imprisonment time, a Class A Misdemeanor has a maximum penalty of 9 months of jail while a Class G Felony has a maximum penalty of 10 years of imprisonment. Wis. Stat. §§ 939.50 (2015-16); 939.51 (2015-16). Thus, with Atty. Julka's counsel, Ms. Savage-Filo substantially limited her criminal liability by entering an *Alford* plea to only Misdemeanor Theft.

Second, although Ms. Savage-Filo was ordered to serve a year of probation, she was not ordered to serve any upfront, conditional jail time. R. 17:2. All of the conditional jail time was imposed and stayed for use by the probation agent in order to encourage payment of restitution. *Id.* Therefore, assuming the timely repayment of restitution, Ms. Savage-Filo was able to avoid serving any jail time in connection with her conviction.

Lastly, the circuit court's order of a probationary term did not prejudice Ms. Savage-Filo because, under Wisconsin law, "probation should be considered as the first alternative." *State v. Gallion*, 2004 WI 42, ¶ 25, 270 Wis. 2d 535, 678 N.W.2d 197. So, by receiving a probationary term, with no upfront, conditional jail time, Ms. Savage-Filo cannot argue that she received a harsher penalty than is normal for someone that is convicted of stealing a purse containing valuable jewelry.

In summary, because Ms. Savage-Filo was not prejudiced by her plea to the Misdemeanor Theft charge or by her penalty, she has not shown she was prejudiced by Atty. Julka's representation. Accordingly, this Court should deny her ineffective assistance of counsel claim.

II. MS. SAVAGE-FILO HAS NOT PROPERLY ASSERTED OR SUPPORTED HER CLAIM THAT HER PLEA WAS NOT ENTERED FREELY, KNOWINGLY, AND VOLUNTARILY.

As noted in the Standard of Review, Ms. Savage-Filo may meet the manifest injustice test by showing that her plea was not entered knowingly, intelligently, and voluntarily. *Villegas*, 2018 WI App 9 at ¶ 20. This requires Ms. Savage-Filo to make a prima facie showing that the plea colloquy failed to comply with Wis. Stat. § 971.08 (2015-16) or other required procedures. *Id.* Ms. Savage-Filo must also allege that she did not enter a valid plea because she did not know or understand information that should have been provided at the plea hearing. *Brown*, 2006 WI 100 at ¶ 59.

Looking at the record, Ms. Savage-Filo has failed to properly assert or support her claim. Although she claims that her plea was not knowingly, intelligently, or voluntarily made, she has never alleged that the plea colloquy was deficient. She has never pointed to a section of the plea hearing transcript and alleged that the court failed to comply with required procedures. She has never asserted that she did not understand the

elements of Misdemeanor Theft or how an *Alford* plea operates. She has never requested an evidentiary hearing on the validity of her plea. She did not testify at the post-conviction hearing. R. 46:2. She does, however, agree that the plea questionnaire was “adequate.” Def. Br. 17.

Additionally, at the hearing, Atty. Julka testified that he explained the meaning of an *Alford* plea to Ms. Savage-Filo. R. 46: 12-13. And the circuit court found that her plea was “made freely and intelligently with proper advice of competent counsel.” R. 46:28. Once again, Ms. Savage-Filo has never asserted that she did not understand the elements of Misdemeanor Theft or how an *Alford* plea works.

Given these deficiencies, this Court should deny her claim. To the State, it appears that Ms. Savage-Filo is conflating what is commonly known as a *Bangert* claim (i.e. the plea was not entered freely, knowingly, voluntarily) with what is commonly known as a *Bentley* claim (i.e. there was ineffective assistance of counsel). But Ms. Savage-Filo has failed to cite—and the State has been unable to find—any legal authority which supports the mixing of these two, distinct claims.

CONCLUSION

For the above stated reasons, this Court should find and Ms. Savage-Filo has failed to carry her burden, and deny her claims.

Dated this 2nd day of August, 2018.

Respectfully submitted,

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CERTIFICATION TO FORM AND LENGTH

I hereby certify that this brief conforms to the rule contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional and serif font. The length of this brief is 2,748 words.

Dated this 2nd of August, 2018,

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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 2nd day of August, 2018.

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