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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 18-AP-1053

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW CURTIS SILLS,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Did the circuit court's failure to advise Mr. Sills of the maximum fine constitute a fair and just reason to grant plea withdrawal prior to sentencing?

   The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Sills does not request oral argument or publication. This case involves the application of well-settled legal principles.

STATEMENT OF THE CASE AND FACTS

Complaint

Matthew Curtis Sills was charged with one count of first-degree sexual assault of a child under the age of thirteen, contrary to Wis. Stat. § 948.02(1)(e). (1:1). Upon conviction, this offense carries a maximum term of imprisonment of 60 years and no fine. (*Id.*). According to the complaint, Mr. Sills had repeated sexual contact with his biological daughter, A.S., who was born on January 18, 2009. (*Id.*).

First Plea Hearing

On August 23, 2016, a plea hearing commenced, the Honorable Jeffrey Wagner presiding.[1] At the beginning of the hearing, trial counsel, Thomas Harris, informed the court that "as I walked in today, I didn't expect to proceed on a plea," but after speaking to Mr. Sills for "a few minutes" in the bullpen, Mr. Sills "wants to proceed with a plea today." (51:3). The case was then passed to obtain jury instructions and for the State to file an amended information. (51:3).

Subsequently, the case was recalled. An amended information was filed charging Mr. Sills with second-degree sexual assault of a child under the age of sixteen, contrary to Wis. Stat. § 948.02(2). (7; 51:4). Upon conviction, this offense carries a maximum term of imprisonment of 40 years, a $100,000 fine, or both. At sentencing, the state and defense would be free to argue. (51:8).

The court informed Mr. Sills that second-degree sexual assault of a child carries a maximum term of imprisonment of 40 years. (51:4, 7). However, the court failed to advise Mr. Sills of the $100,000 fine.

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[1] The circuit court and trial counsel referenced a plea questionnaire and waiver of rights form dated August 13th. (51:2, 3). The electronic record accessible to undersigned counsel did not contain a plea questionnaire dated August 13th. Additionally, Wisconsin Circuit Court Access does not reflect that any plea questionnaire was filed on or prior to the plea hearing on August 23, 2016.

As the court began to discuss the elements of the offense,[2] trial counsel interjected and stated:

> Okay. I've had enough. Your Honor, I think he's having a panic attack. I don't know what's going on. He's trying to focus on his breathing. He tells me he didn't take his meds today. He's answering all my questions in a very rational, lucid manner. But he's doing a lot of heavy breathing over here, and I guess I'm concerned about the fact that he didn't take his meds.

(51:6-7). Trial counsel asked for another date and a competency evaluation. (51:7).

Competency Proceedings

Dr. Deborah Collins conducted a competency evaluation of Mr. Sills. (12). A report was filed opining that Mr. Sills was competent to proceed. The report "acknowledg[ed] sources of concern regarding Mr. Sills' competency to proceed," however, found he was "alert to the substance of the allegation," "motivated and able to reply to the charge from a legally self-serving perspective," understands that the proceedings are adversarial, is aware of the function of defense counsel, and able to communicate. (12:8). The report further stated that:

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[2] The record contains the wrong jury instruction for second-degree sexual assault of a child. The filed jury instruction was for *attempted* second-degree sexual assault of a *fictitious child*. (22; 23).

> It will be imperative that those who communicate with Mr. Sills about his case do so using terms and language commensurate with his ability. Further, he will likely require assistance reading any written documentation. Mr. Sills' performance may be further supported by the use of patient inquires and supportive reassurance when indicated and appropriate. It is recommended that defendant Sills remain compliant with all psychotropic medication[3] during the pendency of his case as a support to his competency to proceed as well.

(12:8).

Mr. Sills requested a hearing on the report. (12; 52:2). At the hearing, Dr. Collins opined that Mr. Sills "does not lack the substantial mental capacity to understand the proceedings or aid in his behalf" and that "he is competent to proceed." (53:6-7). However, Dr. Collins acknowledged that Mr. Sills has "borderline intellectual functioning"[4] and "below average cognitive abilities." (53:11). In addition, Dr. Collins opined that Mr. Sills is "prone to acute anxiety" and "[h]is coping skills are less than ideal

[3] Mr. Sills stated that he was currently prescribed a number of medications including Amitriptyline, which is used to treat depression, and Buspar, which is used to treat anxiety. (12:4).

[4] Dr. Collins explained that "[b]orderline intellectual functioning reflects cognitive abilities that fall between an IQ range of approximately 71 and 84. So it's above the range, just above the range of mild intellectual disability." (53:11).

because of his immaturity, which is likely a correlate of his cognitive limitations." (53:11-12).

At the conclusion of the testimony, the court found Mr. Sills competent to proceed. (53:15).

Second Amended Information

On January 30, 2017, a second amended information was filed charging Mr. Sills with two counts:

> (1) repeated sexual assault of a child (3 or more violations of Wis. Stat. § 948.02(1)(am), (b), or (c)), carrying a maximum of 60 years of imprisonment and a minimum term of initial confinement of 25 years, contrary to Wis. Stat. § 948.025(1)(b); and
>
> (2) incest with a child, carrying a maximum of 40 years of imprisonment and/or a $100,000 fine, contrary Wis. Stat. § 948.06(1).

(20).

Second Plea Hearing

On February 3, 2017, a second plea hearing took place, the Honorable Jeffrey Wagner presiding. (61).

A plea questionnaire was filed. (21; App. 143-44). The plea questionnaire stated that the maximum penalty was "40 [years] WSP." (21:1; App. 143). The questionnaire did not state that Mr. Sills was facing a $100,000 fine.

At the beginning of the plea hearing, the State withdrew the second amended information filed on January 30, 2017. (61:2).

Mr. Sills entered a plea to the charge in the first amended information—second-degree sexual assault of a child under the age of sixteen, contrary to Wis. Stat. § 948.02(2).[5] (61:2; 9). In exchange, the State agreed to recommend a prison sentence with the length up to the court. (61:5).

During the plea colloquy, the court advised Mr. Sills that he was "charged with . . . the 40-year felony." (61:2). However, the court failed again to advise Mr. Sills of the fine.

Motion to Withdraw Plea

Twelve days later, on February 15, 2017, Mr. Sills filed a *pro se* request to withdraw his plea alleging that trial counsel: (1) used "profanity towards me twice!"; (2) wanted him to accept a plea without looking at or discussing the discovery and believed he was guilty; (3) refused to file any motions; and (4) failed to communicate. (26).

---

[5] In the middle of the plea colloquy, the court noted that the jury instructions were wrong. (61:5). As stated above, the filed jury instructions were for attempted second-degree sexual assault of a fictitious child. (*See* 23:1). The court verbally instructed Mr. Sills of the elements for second-degree sexual assault.

Subsequently, Mr. Sills filed two other letters alleging that trial counsel "lied to me, and constantly insulted me and bullied me into taking a plea I did not want to take." (27; *see also* 28).

Mr. Sills' attorney, Thomas Harris, moved to withdraw. (29). On March 24, 2017, the court granted the request to withdraw. (56:2).

A new attorney, Patrick Flanagan, was appointed. (57). Attorney Flanagan filed a motion to withdraw Mr. Sills' plea on the grounds that "he did not enter his guilty plea with a full understanding of the elements of the offense, the consequences of his plea, and the information being discussed at the plea hearing." (31:1). The motion did not specifically note the circuit court's failure to advise Mr. Sills of the maximum fine. [6]

On June 15, 2017, an evidentiary hearing was held before Judge Wagner on Mr. Sill's request to withdraw his plea. (59; App. 101-42). Defense counsel called Mr. Sills to testify. (*See* 59:6-19, 37; App. 106-19, 137). The State called Attorney Harris. (*See* 59:20-36; App. 120-36).

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[6] The motion incorrectly cites the standard for post-sentencing plea withdrawal set forth in *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). (31:2). As discussed below in the argument section, a different standard applies to pre-sentencing plea withdrawal requests.

Many of questions at the hearing related to whether Mr. Sills was advised of and understood the definition of sexual contact. Pertinent to this appeal, during the cross-examination of Attorney Harris, the following exchange occurred:

> DEFENSE COUNSEL [ATTORNEY FLANAGAN]: The maximum penalty for a Class C felony with second-degree sexual assault of a child is 40 years and $100,000 fine; is that right?
>
> HARRIS: Yes, I think so.
>
> DEFENSE COUNSEL: And on the plea form you had a space where you're to write out the maximum penalties; is that right?
>
> HARRIS: Yes.
>
> DEFENSE COUNSEL: And on the first page of that plea form, if you look at it, you'll see that you wrote out 40 years; is that right?
>
> HARRIS: Yes.
>
> DEFENSE COUNSEL: And that's the prison component?
>
> HARRIS: Right.
>
> DEFENSE COUNSEL: Did you write out the fine, the maximum fine?
>
> HARRIS: Looks like I neglected to do that.
>
> DEFENSE COUNSEL: Is that something that was not explained to Mr. Sills by you?

HARRIS: I don't recall.

(59:35; App. 135). The State did not ask Attorney Harris any questions about the fine. (*See* 59:36; App. 136).

Attorney Flanagan then recalled Mr. Sills. The following exchange occurred:

> DEFENSE COUNSEL [ATTORNEY FLANAGAN]: Mr. Sills, did you understand that at the time that you entered a plea, the maximum penalty for second-degree sexual assault was 40 years in prison?
>
> HARRIS: Yes.
>
> DEFENSE COUNSEL: Did you understand the maximum fine you faced was $100,000?
>
> HARRIS: No.
>
> DEFENSE COUNSEL: Is that something that you and your lawyer discussed?
>
> HARRIS: No.
>
> DEFENSE COUNSEL: Okay. And that's not something you saw in the plea form when you signed it?
>
> HARRIS: No.

(59:37; App. 137). The State did not ask any follow-up questions. (*See id.*).

The parties did not present any argument. The court immediately stated:

> Well, it appears after having the Court read the guilty plea questionnaire and waiver of rights form, and the fact that the instructions were in fact included as to the elements of the offense and including contact, that transcript that was taken on that date -- I think it was February 3, 2017 -- it would appear that the Court went over completely what the elements were. Appropriate questions were in fact asked of the defendant, whether or not he understood what was -- what the issues were. And when the Court -- at times during the colloquy with the defendant, there were times when the Court took -- went off the record, and the defense then had the opportunity to explain more based upon the questions that were being solicited by the Court. So there's -- there was time that was taken. It appeared that the answer that the defendant was giving did appear to be somewhat appropriate, but that was rectified by the Court going off the record and counsel discussing with him those issues.
>
> It does appear that the attorney had read the complaint or the defendant had read it to him. That he understood what the penalties were. That he understood his rights. He understood the discovery. What his options were in the case.

(59:37-38; App. 137-38). The court concluded that there was "no fair and just reason to allow him to withdraw his plea." (59:39; App. 139).

Defense counsel then requested that the court address the fine issue because: (1) the fine was not on the plea form; (2) the circuit court did not advise Mr. Sills of the $100,000 fine; (3) Attorney Harris did not

recall whether he advised Mr. Sills about the fine; and (4) Mr. Sills testified that he did not understand the maximum fine. (59:39; App. 139). The following exchange occurred:

> THE COURT: Well, he understood what the complaint said. And within that complaint there's the penalty provision.
>
> DEFENSE COUNSEL: Well—
>
> THE COURT: So –
>
> DEFENSE COUNSEL: It was an amended information. The original complaint had a different charge.
>
> THE COURT: Or the information. I'm not going to allow to withdraw his plea because I thought quite – from the testimony and based upon the transcript, I believe that the plea was taken voluntarily and knowingly and intelligently. And there was a significant amount of time that defense counsel went over that paperwork with the defendant, as did the Court. So that's the decision of the Court.

(59:40; App. 140).

Sentencing

At sentencing, pursuant to the plea agreement, the State recommended "a prison sentence" with the length to the Court's discretion. (62:8). The defense recommended a fifteen-year prison sentence (ten years of initial confinement and five years of extended supervision). (62:15).

The Honorable Jeffrey A. Wagner imposed a fifteen-year prison sentence (nine years of initial confinement and six years of extended supervision).

This appeal follows.

ARGUMENT

I. Mr. Sills presented a "fair and just reason" for plea withdrawal.

A. Standard of review.

The standard of review on appeal for a pre-sentencing plea withdrawal motion is not clear.

In *State v. Jenkins*, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24, which analyzed a claim for pre-sentencing plea withdrawal, the Wisconsin Supreme Court stated that:

> A circuit court's discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard. All that "this court need find to sustain a discretionary act is that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach."

Id. ¶ 30 (internal citations omitted).

However, subsequently, the Court suggested that a mixed standard of review applies:

> On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. The standard also applies to credibility determinations. In reviewing factual determinations as part of a review of discretion, we look to whether the court has examined the relevant facts and whether the court's examination is supported by the record.
>
> When there are no issues of fact or credibility in play, the question whether the defendant has offered a fair and just reason becomes a question of law that we review de novo.
>
> Where the circuit court provides an inadequate account to show an application of the facts to the proper legal standard, we "independently review the record to determine whether the trial court's decision can be sustained when the facts are applied to the applicable law." This review is evidence of an appellate court's desire to uphold a circuit court's discretionary decision if there is good justification for the decision present in the record.

Id. ¶¶ 33-35 (internal citations omitted).

In this case, regardless of the standard of review applied, this Court should reverse the circuit court's order denying Mr. Sills' motion for plea withdrawal.

B. The failure of the circuit court to advise Mr. Sills of the fine constitutes a fair and just reason for plea withdrawal.

"The appropriate and applicable law in the case before the court is that a defendant *should* be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be substantially prejudiced." *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991) (emphasis in original). This standard "contemplates the mere showing of some adequate reason for the defendant's change of heart." *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). Thus, the "circuit court is to look only for a fair and just reason and freely allow the withdrawal" when requested by the defendant. *State v. Kivioja*, 225 Wis. 2d 271, 287, 592 N.W.2d 220 (1999).

The defendant bears the burden of proving that a fair and just reason exists by a preponderance of the evidence. *Jenkins*, 2007 WI 96, ¶ 32. A liberal rather than a rigid view of the reasons should be taken. *Libke*, 60 Wis. 2d at 127-28.

In this case, the circuit court discussed the consequences of entering a plea to second-degree sexual assault of a child under sixteen with Mr. Sills on two different occasions—August 23, 2016 and February 3, 2017. Both times the circuit court failed to advise Mr. Sills that in addition to a prison term, the offense carried a maximum $100,000 fine. (*See* 51:4; 61:2). Additionally, at the pre-sentencing plea withdrawal hearing, Mr. Sills testified that he did not

understand that the maximum fine he faced was $100,000. (59:37; App. 137). This testimony was bolstered by the fact that the fine was not on the plea form and Attorney Harris did not recall explaining the fine to Mr. Sills. (21:1; App. 143; 59:35; App. 135).

A circuit court is statutorily required to advise a defendant of a fine prior to the entry of a plea. Wis. Stat. § 971.08(1)(a) requires the circuit court to "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the crime with which he is charged *and the range of punishments*" before accepting a plea. *See also State v. Bangert*, 131 Wis. 2d 246, 262, 389 N.W.2d 12. A fine is part of the range of punishments a defendant faces. *See* Wis. Stat. § 939.51; *State v. Ramel*, 2007 WI App 271, ¶ 15, 306 Wis. 2d 654, 743 N.W.2d 502.

Consequently, here, the circuit court's failure to advise Mr. Sills of the maximum fine coupled with Mr. Sills' undisputed testimony that he did not understand the maximum fine constitutes a fair and just reason for plea withdrawal. The Wisconsin Supreme Court has stated that:

> [a]s a general rule, a fair and just reason for plea withdrawal before sentence will likely exist if the defendant shows that the circuit court failed to conform to its statutory or other mandatory duties in the plea colloquy, and the defendant asserts misunderstanding because of it. In such a circumstance, the State may show that it has been prejudiced, in which case the court will

> have to decide whether the deficiency in the plea colloquy compromised the knowing, intelligent, and voluntary nature of the defendant's plea.

Jenkins, 2007 WI 96, ¶ 62. Thus, given that Mr. Sills provided a fair and just reason for plea withdrawal and the State failed to put forth any argument that it was prejudiced, this Court should reverse the circuit court's decision denying plea withdrawal.

In denying Mr. Sills' request for plea withdrawal, the circuit court stated that Mr. Sills "understood what the complaint said." (59:40; App. 140). However, as defense counsel pointed out, Mr. Sills pled to an amended charge of second-degree sexual assault. The complaint contained a different charge—first-degree sexual assault of a child, which does not have a fine. (*See* 1). The penalty for first-degree sexual assault of a child is simply a maximum term of imprisonment of 60 years.

Moreover, while the $100,000 fine for second-degree sexual assault appears on the first amended information that was filed, the circuit court never inquired during either of the colloquies whether Mr. Sills read (or had read to him)[7] the first amended information. And, given that a second amended information with two completely different charges—

[7] The competency report stated that Mr. Sills "will likely require assistance reading any written documentation." (12:8). Additionally, at the competency hearing, Dr. Collins opined that Mr. Sills has "borderline intellectual functioning" and "below average cognitive abilities." (53:11).

repeated sexual assault of a child and incest—was filed approximately three days prior to the entry of Mr. Sills' plea on February 3, 2017 and then withdrawn, it makes sense that Mr. Sills would not understand he was facing a $100,000 fine.

In addition, the circuit court stated that:

> . . . I'm not going to allow to withdraw his plea because I thought quite – from the testimony and based upon the transcript, I believe that the plea was taken voluntarily and knowingly and intelligently. *And there was a significant amount of time that defense counsel went over that paperwork with the defendant, as did the Court.* So that's the decision of the Court.

(59:40; App. 140) (emphasis added). The circuit court's statement that "defense counsel went over that paperwork with the defendant" completely ignores that the fine was *not* on the plea questionnaire. (21:1; App. 143). It also ignores that the Attorney Harris testified that he did not recall explaining the fine to Mr. Sills. (59:35; App. 135).

Therefore, regardless of the standard of review applied—erroneous exercise of discretion or de novo—this Court should find that Mr. Sills met his burden to establish a fair and just reason for plea withdrawal by a preponderance of the evidence. The circuit court's decision is contrary to, and unsupported by, the record. The pre-sentence plea withdrawal standard "contemplates the mere showing of some adequate reason for the defendant's change of heart"

and by pointing to the circuit court's failure to advise him of the maximum fine, and by testifying that he did not in fact understand the maximum fine, Mr. Sills has satisfied this standard. *Libke*, 60 Wis. 2d at 128.

CONCLUSION

Mr. Sills respectfully requests that this Court reverse the circuit court's ruling, order that the plea be withdrawn, and vacate the judgment of conviction.

Dated this 29th day of November, 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 3,550 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 29th day of November, 2018.

Signed:

KAITLIN A. LAMB
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of 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 29th day of November, 2018.

Signed:

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APPENDIX

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