STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP1053-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW CURTIS SILLS,

Defendant-Appellant.

NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Before sentencing, Defendant-Appellant Matthew Curtis Sills moved to withdraw his guilty plea, asserting that he had not understood "sexual contact" as an element in second-degree sexual assault of a child. During the hearing on his claim, he discovered that the court had not told him that his plea exposed him to a fine. He then alleged that the court should allow him to withdraw his plea on this basis, as well.

Did the circuit court erroneously exercise its discretion in denying Sills's motion to withdraw his guilty plea?

The circuit court said no.

This Court should say no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

After Sills pleaded guilty to second-degree sexual assault of his seven-year-old daughter, he moved—pro se—to withdraw his plea, asserting that his attorney had bullied him into entering it. After counsel successfully moved to withdraw, Sills's new counsel moved to withdraw Sills's plea contending that Sills had not understood the meaning of "sexual contact" as used in the statute. But after Sills testified at a hearing on his motion, it "occurred" to Sills's counsel that the court had not advised Sills that his plea had exposed him to a hefty fine. Based on this omission, counsel argued that in addition to Sills's alleged lack of understanding of an element of the crime, the court should also allow him to withdraw his plea because he had not understood the possibility of a fine. The court denied the motion.

On appeal, Sills frames the issue as whether the court's failure to tell him about a fine was a fair and just reason for him to be allowed to withdraw his guilty plea. But Sills never told the court that he wanted to withdraw his plea because he did not know that he could be fined. Instead, he said that he wanted to withdraw his plea because he did not understand an element of the offense. And after sentencing, he did not move the court to withdraw his plea asserting that the colloquy had been inadequate under *Bangert*.[1]

Thus, the question before this Court is whether the circuit court erroneously exercised its discretion in denying Sills's motion to withdraw his plea when Sills discovered an error in the colloquy that he never alleged had an effect on his plea. And this Court should conclude that the circuit court's decision to deny Sills's motion to withdraw his plea was a proper exercise of its discretion.

STATEMENT OF THE CASE

Based on allegations from Sills's seven-year-old daughter, Elizabeth,[2] that Sills had touched her vagina multiple times and rubbed his penis on her vagina, the State charged Sills with first-degree sexual assault of a child under age 13, a Class B felony. (R. 1:1–2; 4.)

Based on Sills's agreement to plead guilty, the State amended the information to one count of second-degree sexual assault of a child under 16 years of age, a Class C felony. (R. 7; 51:2–3.) But at the hearing on Sills's plea, Sills's counsel interrupted the proceeding, telling the court that he believed Sills was having a panic attack. (R. 51:6.) Counsel said, "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

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[1] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[2] The State's brief uses a pseudonym in lieu of the victim's name. *See* Wis. Stat. § 809.86(4).

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." (R. 51:6.) Counsel then successfully moved the court to postpone the colloquy and order a competency hearing. (R. 8; 51:7–9.)

Deborah Collins, a licensed psychologist, then evaluated Sills and concluded that he was competent to proceed. (R. 8; 12; 53:2–7.) Collins testified that although Sills is "likely learning disabled and [has] below average cognitive ability," he was also "able to assert a legally self-serving response to the charge pending. He [was] aware of the sexual assault allegation . . . . He was able to comment about his perspective: there's no physical evidence against him. He displayed the capacity to understand the essentials of legal terms such as the advocacy role of his attorney versus the adversary of prosecutor." (R. 53:7.) Based on Collins's opinion, the court concluded that Sills was competent to proceed. (R. 53:15.)

The State then moved to admit other-acts evidence, which included a report from three-year old Elizabeth that Sills had touched her vagina. (R. 14:1–2.) The State also sought to admit evidence from Sills's Xbox that showed internet searches for pornography with titles like, "Dad fucks daughter." (R. 14:2.)

The State amended the information again—this time to a count of repeated sexual assault of a child, a Class B felony, and incest with a child, a Class C felony. (R. 20.) Four days later, and following a plea agreement, the court held a second plea colloquy. (R. 61.) As relevant here, the court asked Sills if he understood all of the elements of the offense that the State was required to prove, including sexual contact. (R. 61:4–6.) The court asked Sills if he understood that the State had to prove that he had had sexual contact with the victim who had not yet turned 16 years old. (R. 61:6.) Sills

said that he did. (R. 61:6.) The court repeated, "[Y]ou had sexual contact with her." (R. 61:6.) And Sills again said, "Yes." (R. 61:6.) The court then asked, "So you've gone over these elements of the offense with your lawyer; is that correct?" (R. 61:6.) Sills said that it was. (R. 61:6.) The court accepted Sills's plea to second-degree sexual assault of a child. (R. 61:9.)

About a month later, Sills moved—pro se—to withdraw his plea, asserting that he was doing so a "simply because [he] was forced to [plead] by [his] lawyer." (R. 27.) Sills alleged that his lawyer lied to him, "constantly insulted [him] and bullied [him] into taking a plea [he] did not want to take." (R. 27.) Sills filed a second motion to withdraw the plea, asking for a jury trial based on his assertion that counsel lied to him and told him to "shut up and he used profanity." (R. 28:1.) Counsel then successfully moved to withdraw. (R. 29; 56.)

Sills's new counsel then filed another motion to withdraw his guilty plea, but this time he argued that Sills had not had a "full understanding of the elements of the offense, the consequences of his plea, and the information being discussed by the court at the plea hearing." (R. 31:1.) Specifically, he asserted that he had not understood that the term "sexual contact" as used in second-degree sexual assault of a child requires that the State prove that he acted with the intent to become sexually aroused or gratified or to degrade or humiliate the victim. (R. 31:2.)

At a hearing on Sills's motion, Sills testified that he wanted to withdraw his plea. (R. 59:6.) He said that he has a learning disability and suffers from schizophrenia and depression. (R. 59:6.) Sills said that he and his trial counsel spent about 20 minutes going through the plea form together before he entered his plea. (R. 59:7.) Postconviction counsel and Sills then engaged in the following exchange:

Q. When you were in court, you seem to express to the Court that you were not sure what the elements of the offense were. Is there a reason why you told the Court you were unsure?

A. Because I really don't understand a lot about questions that was told and said.

Q. When you were going through the plea form with your attorney, did you express to him you had any confusion about what was being discussed?

A. I just said can he speak clearly. And he said I am speaking clearly as possible. I told him I'm slow learning. But he didn't really believe me, I don't think.

Q. You also told the Court that you only understood some things about the plea. What is it that you didn't understand?

A. I don't know what *sexual arousal* means. Never heard that in my life.

Q. There was a point in the plea hearing where you asked for the Court to allow a different attorney to represent you. Why did you make that request?

A. Because my attorney at the time, he was bullying me and he was being disrespectful to me. I told him that I want to go to trial. And he made a phone call to my dad, who was in the discussion, and he told my dad to tell me to take a plea and stuff. I found that was very disrespectful.

Q. When you entered your plea, you initially told the Court your plea was "I guess guilty." Why did you say it that way?

A. Because I wanted to say not guilty.

Q. And why didn't you say that?

A. Because I was scared and I didn't want people to get mad.

Q. Did your lawyer tell you that elements of sexual contact require that you acted with intent to become sexually aroused or gratified?

A. No.

Q. Or to sexually degrade or humiliate the victim?

A. No.

Q. Did you know that was a part of what the state was required to prove if you went to trial?

A. No.

(R. 59:7–9.) Sills said that he had not heard the term "sexual arousal" until postconviction counsel used it after his plea. (R. 59:9.) He explained that had he understood all of the elements of second-degree sexual assault of a child, he would not have pleaded guilty. (R. 59:9–10.)

On cross-examination, Sills admitted that he had told the court at the plea hearing that he understood the element of sexual contact and that he knew this guilty plea waived any defenses he could have presented at trial. (R. 59:14.) He also admitted that he took time throughout the hearing to discuss the proceedings with his trial counsel. (R. 59:13–15.) In addition, Sills acknowledged that he had signed the plea questionnaire on which it indicated that Sills's counsel had explained the elements of the offense to him. (R. 33:1; 59:16–17.) The form also included a page that defined "sexual contact" and this page had Sills's signature on it, as well. (R. 33:2; 59:17.)

After Sills testified, the State called his trial counsel, Thomas Harris, as a witness. (R. 59:20.) Harris said that he had advised Sills that "it was probably in his best interest to resolve the matter short of trial" because of the strength of the State's case. (R. 59:21–23.) Sills asked Harris questions about the plea and trial process that Harris answered to the best of his ability and which Sills seemed to understand. (R. 59:23–24.) Harris acknowledged that while Sills vacillated between

wanting to plead to the crime and wanting to have a trial, Sills "ultimately said that he wanted to resolve it." (R. 59:24.) When it came time to go through the plea questionnaire, Harris explained that he spent more time with Sills on the forms than is usual for him because the competency examiner believed that Sills required more time to understand matters than a typical defendant. (R. 59:25–26.) Harris said that he not only explained each element of second-degree sexual assault of a child, but he believed that Sills understood each element. (R. 59:26, 29–30.) He specifically explained to Sills that "sexual contact requires that [he] acted with the intent to either become sexually aroused or gratified, or in the alternative to sexually degrade or humiliate his daughter." (R. 59:30.)

On cross-examination, Sills's counsel asked Harris if he had written on the plea form that the maximum fine Sills faced as a result of his plea was $100,000. (R. 59:35.) Harris responded, "Looks like I neglected to do that." (R. 59:35.) And when counsel asked Harris if he explained the potential fine to him, Harris said that he did not remember. (R. 59:35.)

Sills's counsel then recalled Sills and asked him if he had understood that he faced a maximum term of 40 years' imprisonment as a result of his plea. (R. 59:37.) Sills said that he had. (R. 59:37.) But Sills said that he had not known that he faced a $100,000 fine and had not discussed the fine with Harris. (R. 59:37.)

At that point, the court turned to Sills's claim that he had offered a fair and just reason to withdraw his plea with his assertion of his lack of understanding of the meaning of sexual contact. (R. 59:37–39.) The court found that because it had read the guilty plea questionnaire to Sills, the elements of the offense were included with the questionnaire, and Sills had ample time with his lawyer to ask questions and have matters explained to him, Sills had not demonstrated a fair

and just reason to withdraw his plea. (R. 59:37–39.) The court concluded, "So the plea stands." (R. 59:39.)

Sills's counsel then asked the court to "address another issue." (R. 59:39.) Counsel said that it had "occurred to [him] as [he] was listening to the testimony and looking at the transcript" that the record did not show that Sills "was aware of the maximum fine" and that this lack of knowledge was "another basis to allow him to withdraw his plea." (R. 59:39.)

The court then pointed to the complaint as the basis from which Sills would have known of the potential fine. (R. 59:40.) But counsel countered that the complaint contained a different charge from the one to which Sills pleaded.[3] (R. 59:40.) The court maintained that it would not grant Sills's motion. (R. 59:40.) It said 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." (R. 59:40.) The court denied Sills's motion. (R. 59:40.)

The court sentenced Sills to nine years' initial confinement, to be followed by six years' extended supervision. (R. 38.) Sills appeals. (R. 45.)

STANDARD OF REVIEW

A "circuit court's decision to grant or deny a motion for plea withdrawal is within its discretion." *State v. Jenkins*, 2007 WI 96, ¶ 6, 303 Wis. 2d 157, 736 N.W.2d 24. Such a decision "is subject to review under the erroneous exercise of discretion standard." *Id.* ¶ 30. As long as the decision "was demonstrably 'made and based upon the facts appearing in the record and in reliance on the appropriate or applicable

[3] As stated previously, in the complaint, the State charged Sills with first-degree sexual assault of a child, which is a Class B felony. (R. 1.) There is no fine associated with a Class B felony. *See* Wis. Stat. § 939.50(3)(b).

law,'" this Court will affirm the circuit court's decision. *Id.* (citation omitted).

ARGUMENT

The circuit court properly exercised its discretion in denying Sills's motion to withdraw his plea.

A. Relevant law.

A defendant who seeks to withdraw his plea before sentencing must provide the court with a fair and just reason to do so. *Jenkins*, 303 Wis. 2d 157, ¶¶ 31–32. Plea withdrawal "before sentencing is not an absolute right." *Id.* ¶ 32. The defendant has the burden to prove a fair and just reason by a preponderance of the evidence. *Id.*

Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. *State v. Canedy*, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). It also must be more than "belated misgivings about the plea." *Jenkins*, 303 Wis. 2d 157, ¶ 32.

The burden to justify plea withdrawal before sentencing is "more difficult" than it sometimes appears. *Id.* ¶ 43. In moving to withdraw the plea, "the defendant faces three obstacles." *Id.* First, he or she must provide the fair and just reason. *Id.* Second, the circuit court must find that reason credible. *Id.* Third, the defendant must rebut the State's evidence that it would be substantially prejudiced if the court allowed the defendant to withdraw the plea. *Id.*

And when the defendant did "not overcome these obstacles in the view of the circuit court, and [was] therefore not permitted to withdraw his plea, the defendant's burden to

reverse the circuit court on appeal becomes relatively high." *Id.* ¶ 44. This is because before this Court the defendant must overcome the deferential standard of review and the plea colloquy, which "is designed to secure a knowing, intelligent, and voluntary plea." *Id.*

B. The circuit court properly exercised its discretion to deny Sills's motion to withdraw his guilty plea.

The denial of a defendant's motion to withdraw his plea is one left to the circuit court's discretion. *State v. Shanks*, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). This Court will uphold a court's exercise of discretion if the record shows the court applied the facts to a proper view of the law. *Id.* at 289. But if the court misapplied the law, this Court independently reviews the record to determine if the court's decision can nevertheless be affirmed when the correct law is applied to the facts. *Id.*

When Sills moved for plea withdrawal before sentencing, he argued that he had not understood the term "sexual contact" as used in second-degree sexual assault of a child.[4] But at the hearing on his motion, Harris—his counsel at and before the plea hearing—testified that he had spent ample time explaining the elements of the offense and their meaning to Sills before Sills entered his guilty plea. And the court noted that at the plea hearing, it went over the elements of the crime with Sills. Sills specifically said that he understood that the State had to prove him guilty of "sexual contact" had he gone to trial. Given this record, the circuit

[4] As stated previously, Sills had moved pro se to withdraw his plea on the ground that his attorney had forced him to enter it. (R. 27.) But he abandoned this claim and does not raise it now. Thus, this Court need not address it. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998).

court's decision to deny Sills's motion to withdraw his plea because he had not provided a credible fair and just reason to withdraw it was a proper exercise of the court's discretion.

In this Court, Sills no longer argues that he did not understand the term "sexual contact" as used in the crime second-degree sexual assault of a child. Because Sills has ceased to assert that he did not understand the term "sexual contact" and abandoned his claim that the circuit court should have allowed him to withdraw his plea on this basis, this Court should decline to address it. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998).

Sills now argues only that it was an erroneous exercise of discretion for the circuit court to deny his motion to withdraw his plea because it failed to advise him of the potential fine he faced.[5] But Sills is not entitled to relief on this claim because he failed to satisfy his burden of proof.

As stated, Sills did not raise any issue regarding the fine until he cross-examined Harris at the hearing. None of his motions to withdraw his plea asserted that he wanted to proceed to trial because he had not understood that he faced a fine. But more importantly, he did not state at the plea hearing that he wished to withdraw his plea for this reason.

At the hearing, Sills elicited from Harris that Harris had not written on the plea questionnaire that Sills's guilty plea subjected him to a potential fine. And Harris admitted that he could not remember whether he explained to Sills whether he faced a fine upon the court's acceptance of his plea. Sills, when counsel recalled him to testify, said that he and Harris had not discussed the fine and he had not understood that one could be imposed. And there is no

[5] Sills's Br. 14–18.

indication that the court advised Sills that his plea subjected him to a monetary penalty.

Nonetheless, the burden is on Sills to show a credible fair and just reason by the preponderance of the evidence for the circuit court to exercise its discretion to allow him to withdraw his plea. *See Jenkins*, 303 Wis. 2d 157, ¶¶ 31–32. And Sills never suggested—much less credibly so—that he sought to withdraw his plea because he had not understood that he faced a fine.

Plea withdrawal is not an absolute right. *Id.* ¶ 32. It is appropriate when a defendant meets his burden to establish a credible fair and just reason and, where relevant, rebuts the State's showing of prejudice.[6] *Id.* ¶ 32. And on appeal, this Court may remand for plea withdrawal only when the defendant has overcome the deferential standard of review that this Court owes the circuit court. *Id.* ¶ 44. In other words, the standard to justify plea withdrawal before sentencing is "more difficult" than it sometimes appears. *Id.* ¶ 43. And where Sills failed to argue that he wanted to withdraw his plea because he did not understand the fine, he failed to meet his burden of proof.[7] Thus, this Court should affirm the judgment of conviction.

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[6] Because the circuit court concluded that Sills failed to meet his burden on his first two "obstacles," the State did not present evidence of prejudice. *See State v. Jenkins*, 2007 WI 96, ¶ 43, 303 Wis. 2d 157, 736 N.W.2d 24. As argued in section C., if this Court decides that the circuit court erroneously exercised its discretion and Sills met his burden, it should remand the case to give the State the opportunity to establish prejudice.

[7] Tellingly, and as will be discussed below, Sills did not move for postconviction relief under *Bangert*, in which a defendant alleges that there was a defect in the plea colloquy. *See State v. Hampton*, 2004 WI 107, ¶¶ 51, 57, 274 Wis. 2d 379, 683 N.W.2d 14.

C. If this Court concludes that the circuit court erroneously exercised its discretion in declining to find a fair and just reason for plea withdrawal, the Court should remand the case for a retrospective hearing for the State to show prejudice.

At the plea withdrawal hearing, the circuit court denied Sills's motion after it concluded that he had not presented a fair and just reason for plea withdrawal. Consequently, it was not necessary for the State to present evidence that it would be prejudiced if Sills were allowed to withdraw his plea. *Jenkins*, 303 Wis. 2d 157, ¶ 43. And the circuit court therefore heard no such evidence. Because the State was not allowed the opportunity to rebut a finding that Sills provided a credible fair and just reason, the State should be afforded the chance to do so at a retrospective hearing.

Sills seems to contend that if this Court concludes that the circuit court erroneously exercised its discretion when it found no fair and just reason, the only available remedy to this Court is to remand the case for Sills to withdraw his plea and proceed to trial.[8] But this is not the case. "The United States Supreme Court in *Morris v. Slappy*, 461 U.S. 1, 14–15 (1983) stated why new trials are not always the only remedy to correct alleged errors, but rather other remedies which protect the defendant's interest may be preferable." *State v. Lomax*, 146 Wis. 2d 356, 364, 432 N.W.2d 89 (1988).

"The efficient administration of justice must include fair consideration of the interests of the victims of crime." *Id.* at 365. Here, if this Court concludes that that the circuit court should have found that Sills presented a credible fair and just reason, a retrospective hearing would allow the State to present evidence of prejudice, which would include a consideration of the victim's interests. This is important

[8] Sills's Br. 17–18.

because "courts may not ignore the concerns of victims." *Slappy*, 461 U.S. at 14–15 (1983). "Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for the public testimony about a humiliating and degrading experience such as was involved here." *Id.* Here, a retrospective hearing on prejudice would strike an appropriate balance between Sills's rights and the administration of justice. *See Lomax*, 146 Wis. 2d at 365.

A hearing is particularly appropriate in this case because Sills failed to move for postconviction relief, contending he did not knowingly, intelligently and voluntarily enter his plea because there was a defect in the colloquy. *See State v. Hampton*, 2004 WI 107, ¶¶ 51, 57, 274 Wis. 2d 379, 683 N.W.2d 14. Had Sills made this assertion, the postconviction court would have been compelled to provide him a hearing. *Id.* But at the hearing, the State would have had the chance—and the burden—to show that despite the error, Sills entered his plea knowingly, intelligently, and voluntarily. *State v. Howell*, 2007 WI 75, ¶ 9, 301 Wis. 2d 350, 734 N.W.2d 48. The State could have then had Harris testify with an accurate understanding of the nature of Sills's claim—that it concerned the fine, not the elements of the offense—and perhaps refute Sills's assertion that he had not explained to him the potential fine.

In any event, the shifting nature of Sills's claim shows how he failed to meet his burden before sentencing and why, should this Court disagree, the State should be afforded a hearing to address Sills's current contention.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the judgment of conviction. In the alternative, the State requests a retrospective hearing to demonstrate prejudice from Sills's attempt to withdraw his plea.

Dated this 5th day of March, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,310 words.

Dated this 5th day of March, 2019.

_____
KATHERINE D. LLOYD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 5th day of March, 2019.

_____
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