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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP001461

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NOAH YANG,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appealed from a Judgement of Conviction in the
Circuit Court of Sheboygan County, Wisconsin,
The Honorable Judge Angela Sutkiewicz Presiding
Trial Court Case No. 2017 CF 373

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STATEMENT ON PUBLICATION AND ORAL ARGUMEMENT

The Plaintiff-Respondent believes that oral argument is not required as the briefs of the parties will fully and adequately address the issues on appeal. Likewise, the Plaintiff-Respondent believes that publication is not required or warranted as the issues shall be addressed on well settled principles and law and that no new rule of law, clarification of existing law or criticism of existing law shall result from the Court ruling on this appeal.

ISSUES PRESENTED

I. WAS THERE A FACTUAL BASIS FROM ALL THE PLEADINGS AND INFORMATION PROVIDED TO THE COURT FOR THE DEFENANT-APPELLANT'S PLEAS OF NO CONTEST TO THE AMENDED CHARGE OF INTIMIDATION OF A WITNESS AND DISORDERLY CONDUCT AS A REPEATER?

The trial court answered this question yes.

II. WAS THE DEFENDANT–APPELLANT ENTITLED TO POST CONVICTION RELIEF SUCH THAT HE SHOULD BE ALLOWED TO WITHDRAW HIS PLEAS?

The trial court found that the defendant-appellant was not entitled to the post-conviction relief sought.

STATEMENT OF THE FACTS AND CASE

The defendant was originally charged with one count of physical abuse of a child, a felony under the laws of the state of Wisconsin for an incident that occurred on April 11th, 2017 in the County of Sheboygan State of Wisconsin. A critical and absolutely necessary witness at trial was C.B.Y.who had taken a cellphone video of the child abuse and had witnessed it firsthand. The case was set to be tried before a jury on Sept 27th, 2017 before Branch 3 of the Circuit Court of Sheboygan , the Honorable Angela Sutkiewicz presiding. The main witness, C.B.Y's presence had been secured by a subpoena where proof of service had been filed, and in fact the State had met with the primary witness, merely two days prior on Sept 25th, 2017. When C.B.Y's mother was informed that not all of her daughter's statement could be introduced into evidence given the rules of evidence C.B.Y's mother's reaction was less than cooperative. C.B.Y at the time of trial was a minor who was not of legal age to drive herself to the jury trial and therefore she relied upon her mother to get her here on the date of trial from West Allis, Wisconsin where they were residing at the time. (App. 123 Defendant-Appellant's Brief)

On the date of trial, the young witness had been instructed to appear at the courthouse by 8:00 am to make sure she was present and to go over any last minute matters before commencement of the trial. The trial was

set to commence as are most trials in Sheboygan County at 8:30. As the time began to inch closer to the start of the trial there was no appearance by C.B.Y. nor any phone calls from her mother to indicate any problems. The State being very sensitive to the fact that jurors, courts and litigants time is valuable and that once a jury is sworn jeopardy attached took the most prudent option available to it at the time and informed the Court and opposing counsel of the issue with the missing witness. With the Court's permission the parties waited until roughly 9 am and when there was neither witness nor any explanation as to her non -appearance the Court correctly discharged the jury, and because of the speedy trial demand in the case on the advice of the State, converted the cash bond to a signature bond. (App. 124-128 Defendant-Appellant's brief).

Afterward the State through its victim witness office received word that the mother of C.B.Y. had called the victim witness staff assigned to assist on this case and informed said staff member of what the issue allegedly was and that was that she didn't have enough money for gas to make it up to Sheboygan. That was relayed to the other party and the Court and in the meantime a new date was chosen and the State openly mulled over in open Court before the Court and opposing counsel the real option at that juncture of doing material witness warrants for C.B.Y. and her mother for the next trial. In the Defendant-Appellant's plea to the amended charges the

Defendant-Appellant by way of counsel's explanation stated that part of the reason the Defendant-Appellant entered the plea was that he didn't want to see C.B.Y. have to testify and potentially arrested on a material witness warrant. (App. 128-129 Defendant-Appellant's brief).

The Defendant-Appellant by his trial counsel and the State negotiated a plea to one count of intimidation of a witness as a repeater and one count of disorderly conduct as a repeater and the Defendant-Appellant tendered his pleas of no contest to those amended charges on Oct 5, 2017 and after the Trial Court had a chance to review a concurrent chips file dealing with the minor victim in this case the Trial Court pronounced sentence of a total of one year initial confinement and one year of extended supervision on each count to run consecutively to one another. This sentencing took place on Oct 9th, 2017 and the Trial Court made specific reference to the chips proceeding files. (App 164-166 Defendant-Appellant's brief). In regards to the timing of the filing of the notice of intent to pursue post-conviction relief, the post-conviction motion and the hearing held on said motion for post-conviction relief in the trial court, and finally the notice of appeal, the State would agree with the dates submitted in the Defendant-Appellant's brief.

STANDARD OF REVIEW

The posture of this appeal is post sentencing therefore the standard is to be found in the case of State v. James, 176 Wis 2d230, 500 N.W.2d 345 (Ct. App 1993). In James the court specifically held, "generally, a defendant wishing to withdraw a plea of guilty or no contest has the burden of showing by clear and convincing evidence that with-drawl is necessary to correct a manifest injustice." Id at 349. "Whether a defendant has made a prima facie showing that his plea was entered involuntarily or unknowingly is a question of law which we review de novo." Id.

ARGUMENT

THE TRIAL COURT CORRECTLY ACCEPTED THE DEFENDANT-APPELLANT'S PLEAS OF NO CONTEST FROM ALL THE FACTS AND CIRCUMSTANCES OF RECORD AND CORRECTLY DENIED THE DEFENDANT'S POST CONVICTION MOTION TO WITHDRAW HIS PLEAs BASED ON ALL THE FACTS, CIRCUMSTANCES AND REASONABLE INFERENCES TO BE DERIVED THEREFROM.

The initial starting point for any case involving plea with-drawl is a firm understanding of the law involving plea with-drawls and that different burdens apply pre-sentencing as opposed to post sentencing. The beginning point in any plea with-drawl analysis is the case of State v. Bangert, 131,Wis 2d 246 (1986) and all its progeny. Following a sentencing, the defendant bears the burden initially of establishing that a manifest injustice would occur if the trial court does not allow the with-drawl of the plea. This burden must be satisfied by clear and convincing evidence. For this proposition the State would also cite the Court to the case of State v. Howell, 2007WI 75 in which the Supreme Court addresses the mechanisms involving a Bangert motion quite well. The duties that are mandated on a trial court in taking and accepting a defendant's plea of either guilty or no contest (as SM32 in its commentaries do not distinguish any meaningful differences for constitutional analysis), are found in Wisconsin Statute 971.08.

Whether a plea is knowingly and intelligently and voluntarily entered is a constitutional fact issue and the trial court's findings of historical and evidentiary fact will not be upset upon review unless they are clearly erroneous. For this proposition the State would cite the Court to the case of State v. Van Camp, 213 wis2d 131, 140, 569 N.W. 2d 577 (1997). In order to meet the burden under Bangert, a defendant seeking to withdraw his or her plea must make a prima facia showing that first, the plea was taken without the trial court's following Wisconsin statute 971.08 or other mandatory duties imposed on our trial courts and secondly that the defendant must properly allege that he in fact did not understand information which should have been provided to him or her in the plea hearing. Id at page 583.

In a post-conviction motion to withdraw a plea the defendant bears the burden of proving there would be a manifest injustice if he were not allowed to do so. For this proposition the State cites the Court to the case of State v. James, 176 Wis 2nd 230, 236-237, 500 N.W. 345, 348. (Ct. App. 1993). In order to meet this burden, the defendant must show a flaw serious enough to bring into question the fundamental integrity of the plea. State v. Krieger, 163 Wis 2d 241, 252, 471 N.W.2d 599, 603 (Ct.App. 1991). This is not all the defendant must do. He must also make a prima facia showing he is even entitled to a hearing on these issues. This he has not done despite his protestations. The plea transcript clearly shows the

Trial Court personally addressed the Defendant-Appellant as contemplated and required under Wisconsin Statue 971.08 and the applicable case law. The Defendant-Appellant was represented by competent counsel and in fact he was so aware of the facts of the case that he, through his counsels representations, clearly indicated to the Trial Court some of the disputes he was having with some of the facts and was quick again through counsel to point out that he the Defendant-Appellant never personally called C.B.Y. and intimidated her into not coming. But the Defendant-Appellant misses a very important point in the law that still provides a factual basis; one which the Trial Court very astutely picked up on in its sentencing statements. Specifically at pages 12 and 13 of the sentencing transcript held on 10/09/17 which are contained in pages App 166 -167 Defendant-Appellant's brief the Court in pronouncing sentence stated; "We have the defendant saying in calls if the witness doesn't show up, his daughter—and we know what she told social services—the case would be dismissed. Then we have the mother, the defendant's mother saying, well I called Cerrenity's mother and then all of a sudden, Cerrenity didn't show up and her mother is making all kinds of excuses for not brining Cerrenity. It doesn't take more than just reasonable inferences or a reasonable person looking at this to see what happened here... (emphasis added).

A very reasonable inference and one which the State believes the Trial Court logically found from the emphasized language above was that the Defendant-Appellant called his mother making these statements hoping and /or knowing that the information would somehow get back to the witness in the hopes of doing exactly what happened; dissuading her from coming to testify. On pages 4 and 5 of the sentencing transcript which are App 158 -159 of Defendant-Appellant's brief, the State brought to the Court's attention that the phone calls to the Defendant-Appellant's mother came on Sept 9 and Sept 16, roughly two weeks before the scheduled trial on the 27th.(emphasis added). The timing of things fully supports the State's theory of the amended charges; it provides a factual basis in the record for the Defendant-Appellant to enter pleas on the amended charges and allows the Court to make the statements above that it did. Many times circumstantial evidence is just as powerful if not even more convincing than direct evidence. All the pieces of what happened fit very nicely and logically together to point to one very sound, logical and true conclusion; the Defendant-Appellant got his mother to do his work for him. On an intimidation of a witness theory looking at the record as a whole the Defendant-Appellant knew what he was doing when he entered the pleas, he did not correct anything the prosecution or his counsel stated and did not exercise his right of allocution to have the court further hear his side of the controversy which

obviously he has a right to do, but nonetheless the State believes it can be another factor to consider in the defendant's post-conviction motions and now this appeal. The Defendant-Appellant may not so blithely forfeit by his initial wrong doing in dissuading through his mother, C.B.Y from coming to testify wait to see what the Trial Court's sentence would be, and then when it turned out to be more than he expected now cry foul. A litigant should not be allowed to wait in the woods and test the waters so to speak to see (to coin a phrase from a popular children's story) whether the porridge is too hot, the porridge is too cold or the porridge is just right. ("Goldilocks and the three bears", by Robert Southey, 1837). This is precisely why different burdens apply in the with-drawl of a plea pre-sentencing as opposed to post-sentencing.

It is not necessary that the Defendant–Appellant himself have direct contact with a victim or witness to dissuade him or her from attending court hearings and giving testimony. In support of that fact that a conspiracy or solicitation theory of prosecution can satisfy the elements of an intimidation prosecution the State would cite the case of State v. Hawthorne, 364 Wis 2d 407, 866 N.W.2d 405 (Ct.App.2015). In Hawthorne, the defendant made telephone calls from jail to three individuals and he pretended to be someone named Royce and attempted to have these individuals he telephoned contact witnesses in the case and dissuade them from testifying. Sure enough, as in the instant case before this Court the two witnesses,

though having been subpoenaed with proofs of service on file, failed to appear. The state in Hawthorne had an alternative means to get their statements into evidence (something the State in the instant case did not have available to it at trial as C.B.Y. was the only witness who could authenticate the video in question), and the Court found that the defendant had engaged in wrong doing, had benefitted from it to the extent the live witnesses were not present, and ruled he should not profit from it and thus allowed the alternative means to present the evidence to be admitted.

In looking at the plea hearing and really the record as a whole in this case now before the Court, the Defendant–Appellant by way of trial counsel's arguments totally missed the theory of the prosecution on the intimidation charge in that in the sentencing hearing held on October 9, 2017 before the trial court, the Defendant-Appellant's trial counsel keep clinging to the fact that the Defendant-Appellant himself did not contact the witness. At pages 7-8 of the sentencing transcript, App161-162 Defendant-Appellant's brief, trial counsel argued: "I would also like to point out that there is no proof that Mr. Yang, Noah Yang thwarted justice. I listened to the jail phone calls and visits with his mother, Olivia Yang, there were maybe two hours of conversations, they were not specific of Olivia Yang saying you need to contact Sarah Garcia the mother or you need to contact Cerrenity and tell her not to come to Court. There was none of that."

Why then does the Defendant-Appellant two weeks before trial tell his mother that if Cerrenity doesn't come to court, the District Attorney would drop the case? This comment was before any meeting for trial prep which according to the record took place on September 25 It is not a stretch in any way shape or form to determine what was going on behind the scenes.

A trial court in its discretion is in the best position to determine, whether at the time of a plea the defendant has entered that knowingly and voluntarily and intelligently. The trial court can see things that are equally important at hearings, that do not come through in a transcript of a hearing. Things such as body language of the participants, at what stages of the colloquy a defendant may turn to his or her attorney for guidance or clarification of points, facial expressions and much more. The record clearly shows a very detailed and thoughtful taking of the Defendant-Appellant's pleas and one which passes constitutional muster.

From the State's perspective, the Defendant-Appellant has gotten a bit ahead of the procedural steps in the plea with-drawl process. If, and the State underscores the word if, the Defendant-Appellant is successful in his Bangert challenge, that in the State's analysis does not automatically entitle him to with-drawl of his pleas. In an attempt to withdraw a plea of guilty or no contest once a defendant has met his or her initial burden the burden then shifts to the State to bring forth evidence to show

that indeed the plea was knowingly, intelligently and voluntarily made. That is often done with an evidentiary hearing at which the parties may call trial counsel to testify to discuss the issues at bar. That was not done in the initial post-conviction matter since the Trial Court did not find the Defendant-Appellant made the initial prima facia showing and if this Appellate Court should find for the Defendant-Appellant (and the State still strongly argues it should not), then the proper remedy under the law is not vacation of the pleas but for a remand to the circuit court for further proceedings consistent with this court's findings.

Since the Trial Court found that the Defendant-Appellant had not met his initial burden by clear convincing and satisfactory evidence of establishing a prima facie case that he plea hearing was defective, there was no need for the burden to shift to the State to rebut that prima facie showing in the post-conviction proceedings in the trial court. The defendant also complains that the wrong date of April 11, 2017 appears in the amended information. This is really nothing more than a scrivener's error, as the calls in question were provided in discovery (recall trial counsel admitted to listening to all of them) and there really is no confusion about what the trial court and the State are referring to in their respective statements. The Defendant-Appellant was certainly cognizant from the entirety of the case and the record made, as to the evidence which forms the basis for

the amended information and the times of the acts which he committed.

That State has spent a great deal of paper space addressing the intimidation with repeater count but we must not forget the disorderly conduct with repeater count. This matter is very easily disposed of since a factual basis is detailed in the criminal complaint which defendant through counsel stated could be utilized to find a factual basis. It appears that the Defendant-Appellant in his brief has essentially conceded this point. No more need be said on the plea to this charge.

CONCLUSION

The with-drawl of a plea post sentencing is a multi -level. The Defendant-Appellant bears the initial burden. To establish relief from the entry of his pleas. On the threshold level the Defendant-Appellant must aver certain facts from which it can be said that the pleas entered into the charges is suspect and that failure to allow the with-drawl of the pleas would result in a manifest injustice. The Defendant-Appellant has admittedly written a very well organized brief but should not succeed in his arguments. The State would argue that with-drawl of a plea is not automatic and a court whether it be a trial court or appellate court looks at the entirety of the record, the timeline of events and the reasonable inference which the court correctly drew from the sequence of events and the Defendant-Appellant's actions in close proximity to the jury trial date there should be a finding that the Defendant-Appellant is not entitled to the relief he seeks. A fine tooth combing of the entire record, by the Appellate Court should lead to the conclusion that no manifest injustice has occurred and the Defendant-Appellant's pleas should stand. In the alternative, if this reviewing Court should find the Defendant-Appellant has made the requisite prima facie showing then the remedy under law is not vacation of his pleas but a remand to the trial court for further proceedings consistent with the Appellate Court's findings. If the reviewing Court has found that the Defendant-Appellant has made a prima

facie showing then the matter must be sent back to the Trial Court, to afford the State an opportunity on the shifting of the burden to show that the plea should not be withdrawn.

Dated this 11th day of October, 2018.

Respectfully submitted,

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CERTIFICATIONS

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 **3,415** words.

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with Wis. Stat. § 809.19(12)(f).

I further certify that this brief was delivered to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, by placing a copy of the same in the U.S. Mail with proper postage affixed on October 11, 2018.

Dated this 11th day of October, 2018.

Respectfully Submitted,

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