STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018AP0001810-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOBY J. VANDENBERG,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Door County Circuit Court,
the Honorable David L. Weber Presiding

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Vandenberg Established Counsel Rendered Deficient Performance.

A. Arguing for probation in an OWI 7 sentencing hearing is deficient performance.

There are many problems with the state's position that defense counsel's argument for probation was a reasonable strategic decision. First arguing for probation in an OWI 7 case is not arguing for "a novel approach to the law." Response Brief at 10. Novel is defined as "of a new kind; different from anything seen or known before."[1] This approach was previously tried, and rejected, in *State v. Williams,* 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467.

Thus, defense counsel argument, "under the current law there's strong argument there's a mandatory minimum of three years incarceration. There's specific law, it's not exactly on point but it's fairly – it's close" was wrong. (34:9; 101). *Williams* is not a "close" case, it is directly on point and it unequivocally holds that there is a mandatory minimum period of three years incarceration in a OWI 7 case. Defense counsel's belief that there was a "sliver of a window there" is an incorrect interpretation of the law and therefore deficient as a matter of law. (40:32); *see also* Opening Brief at 8-9; *State v. Thiel,* 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 3.

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[1] *See* dictionary.com at https://www.dictionary.com/browse/novel?s=t.

Furthermore, under the reasonable prudent attorney standard, a reasonable prudent attorney would not ask the circuit court to issue a sentence that the legislature and Wisconsin Supreme Court have prohibited. If this court sanctions this as a reasonably strategic argument, it would undermine legislative intent and the rule of law.

Third, objectively, it cannot be said that defense counsel's argument in anyway supports a probation disposition in this case. Defense counsel argued:

- "This is a difficult case to argue in some respects because of the past history of my client." (34:9; App. 101)
- "…it brings to mind an Alcoholics Anonymous saying, the definition of insanity is doing the same thing over and over again. (34:9; App. 101).
- "We've tried everything. He's been to prison, he's been to counseling, he's been to treatment in prison, he's been on extended supervision. It fails over and over and over again." (34:9; App. 101).
- "In terms of protecting the public, certainly drunk drivers on the road are just an extreme danger, and it's --- it's just the most awful type of tragedy when a drunk driver kills an innocent person or injures an innocent person. It's a shocking, unexpected bold of lightning in somebody's life." (34:9-10; App. 101-102).

- "To the extent there's a prison sentence it's only – if history repeats itself, it's only really delaying that, only really delaying the protection of the public. They're protected while he's in prison. There's not really much in the history of it to say the extended supervision will do that, because it's failed." (34:10; App. 102).

- "...if there's something after this, it's only going to get worse." (34:10; App. 102).

- "he's got all these consequences and he keeps going back to the use of alcohol. And over and over and over, despite all the efforts by the State and the system to get him into a long-established, accepted recovery." (34:10; App. 102).

- "[a prison sentence] really is just doing the same thing over and over again and if history repeats itself, it just delaying the inevitable which will have more consequences." (34:11; App. 103).

In short, defense counsel's argument was Mr. Vandenberg is dangerous and he has failed "over and over and over" again and "if history repeats itself" he will fail again. And next time it will be worse. Even if the court had the authority to place Mr. Vandenberg on probation, no reasonable judge would conclude past repeated failures support a probation disposition. Prison sentences always involve a supervision component and counsel was informing the court that these periods of supervision had not helped Mr. Vandenberg. The only logical

conclusion from counsel's arguments is the public is not safe unless Mr. Vandenberg is incarcerated. A longer confinement period is warranted.

The state argues defense counsel's argument was "an attempt[] to persuade the court that prison would not aid in Vandenberg's recovery." Response Brief at 14. Yet, when prison is mandatory and identified by the legislature as the primary means of addressing Mr. Vandenberg's behavior, it makes no sense to argue prison would not aid in recovery. This argument is only detrimental to the defense.

The strategy to argue for probation was unreasonable as a matter of law and unsupported by the facts. Defense counsel was deficient for making it focus of the defense argument.

B. Highlighting the defendant's failures and dangerousness combined with saying nothing positive is not effective advocacy.

The state argues "Counsel chose to highlight Vandenberg's failures to build credibility with the court and to highlight that the court should focus on rehabilitation." Response Brief at 14. Acknowledging negative facts to gain credibility may be a reasonable strategy, however, a reasonable strategy when executed in an unreasonable manner is deficient performance. *State v. Harris*, unpublished slip op. No. 2016AP548-CR (May 31, 2017) *citing State v. Oswald,* 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207.") ("Not every trial counsel action grounded in strategy can be construed as reasonable. We must measure whether trial counsel's performance was reasonable under the circumstances of the particular

case.")[2] Here, the strategy was reasonable. The means of implementing it was not.

Counsel's statements regarding Mr. Vandenberg's failures were not made in the context of a larger argument in which defense counsel also presented relevant, mitigating arguments. Defense counsel's argument did not mention a single positive attribute of Mr. Vandenberg. (40:37, 38-39). As noted above, counsel's focus on the legally unsupported argument for probation provided an additional basis for the court to conclude a longer prison sentence was necessary.

Further, defense counsel's was not asking the court to focus on rehabilitation. Rather, counsel focused the court's attention on Mr. Vandenberg's inability to be rehabilitated. There was no discussion of the kinds of treatment available to Mr. Vandenberg, how he might avail himself of it or why a focus on rehabilitation this time might differ from the litany of failures with past attempts at rehabilitation.

The state argues that the court would already have been aware of any positive information because the PSI contained positive facts and therefore there was no need for defense counsel to repeat them. Response Brief at 14. But the PSI is not an advocacy piece. It contained primarily negative information and did not present a narrative contextualizing or mitigating Mr. Vandenberg's conduct in this instance. That is the job of the defense attorney and in this

[2] Unpublished opinions may be cited as persuasive authority. Wis. Stat. Rule 809.23(3)(b).

case, defense counsel did not do it. The argument was therefore deficient. *See Davis v. Comm' of Corr.,* 126 A. 3d 538, 565 (Conn. 2015) (rejecting as unreasonable counsel's "strategy" of relying on the PSI as a substitute for sentencing advocacy); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (reliance on court's familiarity with case at sentencing cannot substitute for defense advocacy).

Defense attorneys are charged with presenting evidence to the court to assist the court in reaching a disposition favorable to the defendant. ABA Standards § 4-8.3(c). Nothing in defense counsel's argument tempered the negative, incorrigible portrait defense counsel had painted of Mr. Vandenberg, despite numerous positive mitigating arguments available to defense counsel. *See* Opening Brief at 13-14. As such, the defense argument provided no counter to the state's argument for an 8 year bifurcated prison sentence and was therefore deficient.

II. Mr. Vandenberg Established Prejudice.

A. Prejudice should be presumed.

Sometimes defense counsel makes an argument s/he shouldn't have made. When the alleged error is one component of a larger proficient argument or not relevant to sentencing objectives, our courts have concluded the deficiency is not prejudicial. *See e.g. State v. Harbor,* 2011 WI 28, ¶¶ 72-76, 333 Wis. 2d 53, 797 N.W.2d 828; *State v. Alexander,* 2015 WI 6, ¶40, 360 Wis. 2d 292, 858 N.W. 2d 662; *State v. Benson,* 2012 WI App 101, 344 Wis. 2d 126, 822 N.W.2d 484. Mr. Vandenberg is not alleging various

components of the argument were in error. Rather, he contends the entire argument was deficient.

When the argument as a whole is deficient, prejudice should be presumed. The "main thing" defense counsel argued was for probation, an impossibility, and in addition defense counsel argued nothing positive about his client. (40:66; App. 124). The defense argument presented further basis for the court to conclude a longer confinement period was necessary. As such, counsel abdicated his duty to his client and undermined the functioning of the adversary system. This is the situation where prejudice must be presumed. *State v. Cronic,* 466 U.S. 648, 659 (1984).

The response brief mischaracterizes Mr. Vandenberg's argument regarding *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997). The opening brief cited *Smith*, which involves a defense attorney's failure to object to a plea breach, as another situation in which prejudice has been presumed. The state contends that because "there was no breach of the plea agreement in this case, let alone a failure by defense counsel to object to one," *Smith* is not on point. Respondents Brief at 18. But *Smith* wasn't cited as binding authority; it was cited for its analogical relevance.

In both the plea breach setting and Mr. Vandenberg's case, one attorney or another failed to present a proper sentencing argument. In both the plea breach setting and Mr. Vandenberg's case, determining how the improper argument factored into the circuit court's sentencing decision "would

necessarily involve speculation." *Id.* at 280. Wisconsin courts presume prejudice in the former context and should also do so here—not because *Smith* is on all fours with this case, but because much of the rationale for presuming prejudice in *Smith* applies here with equal force.

The state relies mainly on *State v. Erikson*, 227 Wis. 2d 758, 770-71, 596 N.W.2d 749 (1999) to support its argument that prejudice should not be presumed. *Erikson* lists three situations in which courts have presumed prejudice but only the third is relevant here: when "the actual assistance rendered by a particular attorney has been deemed so outside the bounds necessary for effective counsel … a court has presumed prejudice." *Id.* at 771.

Erikson reviews a couple examples of deficient representation that have triggered this third type of prejudice presumption, and the state points out that Mr. Vandenberg's case is factually distinct. *See* Respondent's Brief at 15-16. But the examples in *Erikson* are not presented as an exhaustive list of the circumstances in which deficient performance might be deemed "so outside the bounds necessary for effective counsel" that prejudice is presumed. *Erikson*, 227 Wis. 2d at 771. They are merely illustrations.

Cronic holds that when a proceeding "loses its character as a confrontation between adversaries, the constitutional guarantee" of effective assistance of counsel "has been violated." *Cronic,* 466 U.S. at 656-57. It further holds that such a breakdown in the adversary process is automatically prejudicial,

obviating the need for any further showing of prejudice by the defendant. *Id.* at 659. It follows that a defense attorney's failure to act as a meaningful adversary to the state—a *Cronic*-style deficiency—falls "so outside the bounds necessary for effective counsel" that prejudice must be presumed. *Erikson,* 227 Wis. 2d at 771. Here, counsel's conduct amounted to abandonment of Mr. Vandenberg's interests and a breakdown in the adversarial process. This court's analysis of Mr. Vandenberg's ineffectiveness claim should end there.

B. Prejudice has been proven.

To establish prejudice, Mr. Vandenberg need not show that the outcome "more likely than not" be different. *State v. Sholar,* 2018 WI 53, PP 44, 381 Wis. 2d 560, 912 N.W.2d 89. In this case, because counsel's performance was not isolated errors, but rather the sentencing argument as a whole was deficient, the state's position was not subjected to adversary testing and confidence in the proceeding is therefore undermined.

"The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The focus in an ineffective assistance of counsel claim is not on the fairness of the result, but rather, the integrity of the proceeding. This Court may agree with the sentence handed down to Mr. Vandenberg and still agree that the process was fundamentally unfair.

Attorneys' sentencing recommendations, their comments about the propriety of probation or jail or prison, their discussions of the character of the defendant, their explanations of why the defendant does or doesn't deserve a particular amount of confinement time or why imposing it will deter future criminality or help ensure the defendant's rehabilitation – *those things matter*. They are factors the circuit court considers in exercising its sentencing discretion. Thus, the negative light defense counsel cast upon Mr. Vandenberg mattered. A basic appreciation of the function of attorneys at sentencing—of their value—compels the conclusion that there is a reasonable probability competent advocacy on Mr. Vandenberg's behalf would have produced a different result. To conclude otherwise would render the role of the defense attorney superfluous.

This sentence was imposed in the absence of meaningful advocacy by defense counsel. A new sentencing hearing should be ordered where Mr. Vandenberg has counsel who presents relevant arguments in support of a legal minimum sentence.

CONCLUSION

Mr. Vandenberg respectfully asks this Court to reverse the circuit court and remand for a new sentencing hearing.

Dated this 13th day of March, 2019.

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 2,275 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 13th day of March, 2019.

Signed:

FRANCES REYNOLDS COLBERT
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.

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SUPPLEMENTAL APPENDIX

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