STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2401-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN ORTIZ-RODRIGUEZ,

Defendant-Appellant.

On appeal form a judgment of conviction and an order denying postconviction relief 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

> Was Mr. Ortiz-Rodriguez entitled to a hearing on his motion for plea withdrawal in which he alleged that he intended to have a trial, but was persuaded to plead guilty based on his attorney's misrepresentation that the State would be recommending 5-8 years of initial confinement, when the State actually recommended 20 years of initial confinement?

Circuit Court Decision: The circuit court ruled that Mr. Ortiz-Rodriguez's motion for plea withdrawal did not contain a sufficient allegation of prejudice to warrant a hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted, as this case addresses the application of the United States Supreme Court decision in *Hill v. Lockhart*, 474 U.S. 52 (1985), in which the Court explained that in order to establish prejudice sufficient to require a hearing on a motion for plea withdrawal, the defendant is required to allege that but for counsel's error, "he would not have pleaded guilty but would have insisted on going to trial." *Id*., at 60. The circuit court applied more stringent requirements than the United States Supreme Court set forth in *Hill* and denied a hearing to Mr. Ortiz-Rodriguez when he failed to meet them. This is a recurring problem. As an

example of this, see *State v. Yancey*, 2018AP802-CR (Slip Opinion, Jan. 8, 2019). For this reason, oral argument may be helpful and is requested.

STATEMENT OF FACTS

Mr. Ortiz-Rodriguez was charged in a criminal complaint with one count of repeated sexual assault of a child in violation of Wis. Stat. §948.025(1)(b), a Class B felony. (1). Under Wis.Stat. §939.616(1r), he was subject to a minimum of 25 years of initial confinement in the event of a conviction. (1). The charge resulted from the report of his five-year-old daughter, MO, that Mr. Ortiz-Rodriguez had sexual contact, including sexual intercourse, with her on several occasions and infected her with Gonorrhea. (1). Ultimately, Mr. Ortiz-Rodriguez entered a plea to an amended charge of first degree sexual assault in violation of Wis. Stat. §948.02(1)(e), a class B felony, with no mandatory minimum. (18).

Near the end of the plea hearing, the prosecutor said "the plea bargain, if I didn't mention it earlier, is that both sides are free to argue on this amended plea deal." (41: 6). The plea questionnaire and waiver of rights form filed with the Court indicated "see attachment" for the plea agreement. (7). An attachment contained the following: "At sentencing both sides are free to argue as to what the appropriate sentence should be." (7).

At sentencing, the State recommended 20 years of initial confinement and 20 years of extended

supervision. (42: 7). Defense counsel recommended an initial confinement of five to seven years. (42: 16). The Court sentenced Mr. Ortiz-Rodriguez to 20 years of initial confinement and 10 years of extended supervision. (42: 23).

Mr. Ortiz-Rodriguez filed a timely notice of intent to pursue postconviction relief, and undersigned counsel was appointed to represent him. (20). Mr. Ortiz-Rodriguez filed a motion for postconviction relief. (29; App. 105-109).

The postconviction motion alleged that Mr. Ortiz-Rodriguez would testify at a hearing[1] that he intended to have a trial. The motion indicated that he would testify that he accepted the plea offer because it did not involve a mandatory minimum sentence and because his attorney told him that the recommendation the State would be making would be 5-8 years of initial confinement. (29: 2; App. 106). The motion stated that Mr. Ortiz-Rodriguez would testify that although he heard the language about both sides being free to argue, he believed based on his attorney's representations that the State was free to argue and would be recommending 5-8 years of initial

[1] "Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Wis. Stat. § 802.05(1). Further, by signing the postconviction motion, undersigned counsel certified that: "The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Wis. Stat. § 802.05(2)(c).

confinement. (29: 2; App. 106). The motion stated that Mr. Ortiz-Rodriguez would testify that he would not have pled guilty if he had known that the State had not agreed to recommend an initial confinement of 5-8 years, but might recommend any amount of initial confinement up to the maximum of 40 years. If he had known that it was possible that the State would make the 20 year initial confinement recommendation it made, he would have insisted on a trial. (29: 2; App. 106).

The circuit court denied the motion without a hearing. The court ruled that even if counsel gave Mr. Ortiz-Rodriguez the faulty advice he described, the postconviction motion did not contain a sufficient allegation of prejudice to warrant a hearing. (34: 3-4; App. 103-104).

Mr. Ortiz-Rodriguez appealed. (35).

ARGUMENT

I. Mr. Ortiz-Rodriguez was entitled to a hearing on his motion for plea withdrawal.

A. Introduction and standard of review.

In his postconviction motion, Mr. Ortiz-Rodriguez asserted that his plea was not knowing and voluntary due to evidence outside of the record — specifically, conversations with his trial attorney before the plea hearing. *See, State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See, State v.*

Brown, 293 Wis.2d 594, 716 N.W.2d 906; *Santobello v. New York*, 404 U.S. 257, 261-62 (1971). (29: 3; App. 107).

Further, Mr. Ortiz-Rodriguez alleged that he was entitled to plea withdrawal because his plea resulted from the ineffective assistance of counsel. *See*, *Bentley*, 201 Wis. 2d at 311, 548 N.W.2d 50, (The "manifest injustice" test for plea withdrawal "is met if the defendant was denied the effective assistance of counsel."). (29: 3; App. 107).

To prove ineffective assistance of counsel, Mr. Ortiz-Rodriguez must show that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The two-part test of *Strickland* applies to challenges to guilty pleas based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370 (1985).

An ineffective assistance of counsel claim ordinarily presents a mixed question of fact and law. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Where, as here, the circuit court has denied the defendant a *Machner*[2] hearing, this court independently reviews whether the postconviction motion was sufficient to warrant a hearing. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

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[2] *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

B. Mr. Ortiz-Rodriguez is entitled to an evidentiary hearing on his motion for plea withdrawal.

Mr. Ortiz-Rodriguez alleged in his postconviction motion that his attorney incorrectly informed him that upon a plea of guilty to the amended charge, the State had agreed that at sentencing it would recommend an initial confinement of 5-8 years. (29: 2; App. 106). The motion asserted that when defense counsel misadvised Mr. Ortiz-Rodriguez about what the State had agreed to recommend, counsel's performance was deficient. (29: 4; App. 108). *See, State v. Frey*, 2012 WI 99, ¶103, 343 Wis. 2d 358, 393, 817 N.W.2d 436, 453 ("It is the responsibility of defense counsel to assure that the defendant understands and consents to the terms of any plea bargain. . .").

In his motion, Mr. Ortiz-Rodriguez asserted that he was prejudiced by counsel's deficient performance because he would not have entered his guilty plea but for counsel's error. *See Hill,* 474 U.S. at 59, 106 S. Ct. at 370. ("in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). Specifically, he alleged that he was persuaded to plead guilty because the State had agreed to a charge that did not involve a mandatory minimum sentence and because his attorney misadvised him that the State had agreed to recommend an initial confinement of 5-8 years. He alleged that he would

not have entered his plea but would have insisted on a trial if he had known that the State would be free to recommend the 20-year initial confinement it ultimately recommended. (29: 2; App. 106). This was sufficient under *Hill* to entitle Mr. Ortiz-Rodriguez to a hearing on his motion.

In denying the motion without a hearing, the circuit court began by mischaracterizing Mr. Ortiz-Rodriguez's motion, claiming that the motion contained only a single sentence alleging prejudice. (34: 3; App. 103). The circuit court then dubbed the allegation a "bare bones allegation," which it found insufficient under *Bentley*. (34: 3; App. 103, citing *Bentley*, 201 Wis. 2d at 316).

In *Bentley*, the Supreme Court of Wisconsin found the allegation of prejudice to be "bare-bones" where Bentley claimed that he would not have pled guilty if he had known that his parole eligibility would be in 13 years, 4 months, rather than the 11 years, 5 months he was led to expect. 201 Wis. 2d at 316-317. Where the difference between the reality and the defendant's expectations was so facially insignificant, the court found the lack of explanation of why the difference between parole eligibility dates affected Bentley's plea decision to be dispositive. Without that additional explanation, there were no "factual assertions which would allow a court to meaningfully assess Bentley's claim that he was prejudiced by the misinformation." *Id*., at 316. Here, in contrast, Mr. Ortiz-Rodriguez alleged that he would have taken his chances at trial if he had known the State could recommend as much as 20

years of initial confinement, but he was persuaded to plead guilty by the promise of a 5-8 year recommendation. This is not a facially insignificant difference. No additional factual explication is necessary to explain why a difference of 12-15 years in the prison recommendation would have affected Mr. Ortiz-Rodriguez's plea decision.

Mr. Ortiz-Rodriguez's allegation of prejudice satisfied *Hill*. *Bentley* cannot be read to set a higher bar than the United States Supreme Court has set in *Hill* for a defendant to clear in order to be entitled to a hearing on his constitutional claim that his plea was not knowing and voluntary.

At bottom, the circuit court denied Mr. Ortiz-Rodriguez a hearing on his motion because it did not believe him. The court was simply not convinced upon reading the motion that Mr. Ortiz-Rodriguez really would have opted for a trial if he had not secured what he believed was a favorable sentencing recommendation. The court faulted Mr. Ortiz-Rodriguez for not alleging "any facts to show why he would have rejected the plea offer, which drastically altered his incarceration exposure, and risked a conviction on a charge of repeated sexual assault of a child and a minimum 25 years of confinement." (34: 4; App. 104). This would have been a valid subject for cross examination of Mr. Ortiz-Rodriguez at a hearing to test the credibility of his claim. However, in deciding whether to grant him a hearing, the court was not permitted to evaluate his credibility without the benefit of testimony. The court was required to assume the facts alleged in the motion to be true.

State v. Allen, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. "If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing." *Id.*, n. 6, *citing State v. Leitner,* 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony).

CONCLUSION

Mr. Ortiz-Rodriguez requests that the Court reverse the decision of the circuit court denying his motion for plea withdrawal and remand for a *Machner* hearing.

Dated this 26th day of February, 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 1,741 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 26th day of February, 2019.

Signed:

PAMELA MOORSHEAD
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 26th day of February, 2019.

Signed:

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APPENDIX

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