STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP2401-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN ORTIZ-RODRIGUEZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF 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

Whether the circuit court properly exercised its discretion when it denied Jonathan Ortiz-Rodriguez's postconviction motion without an evidentiary hearing.

The circuit court said yes.

This Court should say yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Ortiz-Rodriguez accepted the State's offer to plead guilty to first-degree sexual assault of his five-year-old daughter in exchange for dismissing the charge of the repeated sexual assault of a child, which exposed him to a mandatory minimum term of 25 years' initial confinement. After receiving a 30-year term of imprisonment, Ortiz-Rodriguez moved to withdraw his plea, contending that his counsel told him that the State would recommend that he receive 5 to 8 years of initial confinement.

The trial court properly exercised its discretion in denying the motion without a hearing. Ortiz-Rodriguez failed to support his allegation with sufficient facts to show that he would not have entered his plea had counsel informed him that the plea agreement did not obligate the State to make a particular sentencing recommendation.

STATEMENT OF THE CASE

Ortiz-Rodriguez's five-year-old daughter, June,[1] was diagnosed with, and treated for, gonorrhea in 2016. (R. 1:2; 42:7–9.) Shortly after that diagnosis, she told police that her "private parts were hurting because her dad did something really bad." (R. 1:1.) June said that Ortiz-Rodriguez had touched her private parts with his hands and had licked her private parts. (R. 1:1.) June told police that Ortiz-Rodriguez had "put his private parts inside her private parts about seven times" and had "told her to be quiet and don't ask mom." (R. 1:1.)

The State charged Ortiz-Rodriguez with repeated sexual assault of a child, but pursuant to a plea agreement, Ortiz-Rodriguez pleaded guilty to first-degree sexual assault of a child under the age of 13. (R. 1; 7; 10; 18; 41:2; 42:2.) At the plea hearing and at sentencing, the State told the court that the parties had agreed that they were both "free to argue" regarding the sentence that Ortiz-Rodriguez should receive. (R. 41:6; 42:2, 7.) The State recommended that the court impose a 20-year term of initial confinement, to be followed by 20 years of extended supervision. (R. 42:7.) Ortiz-Rodriguez asked for the court "to consider initial confinement in the range of five to seven years." (R. 42:16.) The court sentenced Ortiz-Rodriguez to 20 years' initial confinement, to be followed by 10 years' extended supervision. (R. 18; 42:23.)

Ortiz-Rodriguez moved for postconviction relief, arguing that he should be allowed to withdraw his plea because he did not enter it knowingly, intelligently, and voluntarily. (R. 29.) Specifically, Ortiz-Rodriguez argued that his counsel was ineffective for misinforming him that the

[1] To comply with Wis. Stat. § 809.86(4), the State uses a pseudonym in lieu of the victim's name.

State was going to recommend that he receive five to eight years' initial confinement. (R. 29:2–3.)

The court denied the motion without a hearing, concluding that Ortiz-Rodriguez had "not alleged 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." (R. 34:4.) Ortiz-Rodriguez appeals. (R. 35.)

STANDARD OF REVIEW

Whether a defendant's "motion is sufficient on its face to entitle him to an evidentiary hearing on his ineffective assistance of" counsel claim is a question of law, which this Court reviews de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. When a defendant fails to allege sufficient facts to warrant a hearing, the circuit court has the discretion to deny the motion without a hearing. *Id.* ¶¶ 50, 56–59.

ARGUMENT

The circuit court properly exercised its discretion in denying Ortiz-Rodriguez's postconviction motion without a hearing because he failed to support his motion with specific facts from which the court could assess prejudice.

A. Relevant law.

A defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a manifest injustice will occur unless the court allows the defendant to withdraw the plea. *State v. Hampton*, 2004 WI 107, ¶ 60, 274 Wis. 2d 379, 683 N.W.2d 14. "When, for example, the basis for this injustice is an allegation that defendant involuntarily entered a plea because of the

ineffective assistance of counsel, his claim raises questions about both deficient performance and prejudice." *Id.* "To establish deficient performance, a defendant must necessarily provide the factual basis for the court to make a legal determination." *Id.* "To show prejudice, a defendant must do more than merely allege that he would have pleaded differently but for the alleged deficient performance." *Id.* "He must support that allegation with 'objective factual assertions.'" *Id.* (citation omitted).

"Whether the defendant received ineffective assistance of counsel is a question of constitutional fact." *State v. Dillard*, 2014 WI 123, ¶ 86, 358 Wis. 2d 543, 859 N.W.2d 44. This Court defers to the circuit court's factual findings unless they are clearly erroneous, but it independently determines whether those facts show that counsel was ineffective. *Id.*

B. The circuit court properly exercised its discretion to deny Ortiz-Rodriguez's postconviction motion without a hearing because he made only a conclusory allegation of prejudice, failing to support his assertion with objective facts.[2]

In his postconviction motion, Ortiz-Rodriguez argued that he should be allowed to withdraw his plea because his counsel was ineffective for telling him that the State had agreed to recommend that the court sentence him to five to eight years' initial confinement. (R. 29:4.) Ortiz-Rodriguez said that had he known that the State was "free to argue" for any sentence term—and specifically that it would argue that he should receive 20 years' initial confinement—he would

[2] In focusing solely on Ortiz-Rodriguez's failure to allege facts supporting the prejudice prong of *Strickland*, the State does not concede that counsel was deficient. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) (stating that a court need not consider the performance prong of the ineffective assistance test before turning to its prejudice component).

have rejected the plea offer and gone to trial on the repeated sexual assault of a child charge, which subjected him to a mandatory minimum term of 25 years' confinement upon conviction. (R. 29:1–2.)

But the trial court rejected Ortiz-Rodriguez's motion, concluding that even if counsel had misinformed his client on the meaning of "free to argue," Ortiz-Rodriguez had "not alleged sufficient facts to demonstrate that he was prejudiced." (R. 34:3.) It said that Ortiz-Rodriguez had not offered any objective facts to explain why he would have rejected the plea offer and risked a conviction for a crime with a substantial mandatory minimum sentence. (R. 34:4.)

On appeal, Ortiz-Rodriguez fails to adequately identify any error on the part of the circuit court. According to him, his allegation that he would have rejected the plea agreement in favor of a trial was sufficient to warrant a hearing under *Hill v. Lockhart*, 474 U.S. 52 (1985).[3] But Ortiz-Rodriguez is incorrect.

In *Hill*, the petitioner moved for habeas relief, challenging the entry of his guilty plea on the basis that counsel had been ineffective for misinforming him of his parole eligibility date. *Hill*, 474 U.S. at 53–55. The district court rejected the claim without a hearing. *Id.* at 53. The Supreme Court affirmed, concluding that the petitioner had not satisfied *Strickland*'s[4] prejudice prong because he failed to allege that but for counsel's error, "he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. The Court said that because the petitioner "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding

[3] Ortiz-Rodriguez's Br. 7–8.

[4] *Strickland*, 466 U.S. 668.

whether or not to plead guilty," his motion was insufficient to warrant a hearing and, therefore, relief. *Id.*

The Wisconsin Supreme Court incorporated the *Hill* standard in *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Bentley argued that his attorney had misinformed him of his parole eligibility date and if he had known that he would not be eligible for parole for an additional two years than he erroneously believed, he would not have pleaded guilty. *Bentley*, 201 Wis. 2d at 315–16. The court held that this assertion was not sufficient to raise the issue of prejudice. *Id.* at 316. The court held that under *Hill*, a defendant who asserts that counsel's deficiency led him to plead guilty must allege more than that he would have pleaded differently absent the error. *Id.* at 315–16. He must present the trial court with facts that support his allegation "that he pled guilty only because of the misinformation." *Id.* at 316. Otherwise, the motion is "merely a self-serving conclusion." *Id.*

Contrary to Ortiz-Rodriguez's suggestion that the circuit court incorrectly read *Bentley* to require a higher standard than *Hill*,[5] the circuit court soundly interpreted and applied the *Bentley*/*Hill* standard. Here, like *Bentley*, Ortiz-Rodriguez's motion set forth only a conclusory assertion that his attorney's alleged deficiency caused him prejudice: he said simply that he would have gone to trial for the repeated sexual assault of his five-year-old daughter had he known that the State was "free to argue" its sentencing recommendation. (R. 29; 33.)

But Ortiz-Rodriguez does not explain why the State's recommendation was so significant to him. He does not explain why he would have risked receiving a 25-year minimum term of confinement had he understood that the State was not obligated to recommend any particular

[5] Ortiz-Rodriguez's Br. 8.

sentence. Further, he does not address how any misunderstanding of the State's agreement squared with his assertion at the plea hearing that he knew that the court was not bound by the negotiations or the plea bargain. (R. 41:2–3, 6.) Without such facts, which both *Bentley* and *Hill* require, supporting his self-serving assertion that he would not have entered his plea had counsel advised him differently, he was not entitled to a hearing, and the circuit court properly exercised its discretion in denying his motion without one.

Ortiz-Rodriguez says that he met the *Bentley* standard by showing that the State's recommendation was 12 to 15 years of confinement longer than he had anticipated it would recommend. He contrasts his case with *Bentley*, in which Bentley alleged only a two-year difference in his parole eligibility.[6] According to Ortiz-Rodriguez, the *Bentley* court rejected Bentley's postconviction motion as insufficiently pleaded in part because "the difference between the reality and the defendant's expectations was so facially insignificant."[7] But Ortiz-Rodriguez's argument is flawed.

Contrary to Ortiz-Rodriguez's assertion, the *Bentley* court did not call Bentley's two-year difference in the parole eligibility date "facially insignificant."[8] Instead, the court rejected Bentley's argument that his motion presented sufficient evidence of prejudice because Bentley failed to explain how the two-year difference affected his decision to plead guilty.

The same is true here. Ortiz-Rodriguez does not explain why the State's recommendation of a more lenient sentence—one he acknowledged was not binding of the court—was so important to him that he would have instead faced trial and

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[6] Ortiz-Rodriguez's Br. 7–8.

[7] Ortiz-Rodriguez's Br. 7.

[8] Ortiz-Rodriguez's Br. 7.

risked a mandatory minimum 25-year term of confinement. He fails to support his assertion with any facts that explain how it was the alleged misinformation from counsel that led him to plead to the lesser charge. Because he failed to provide any facts in support of his allegation, the circuit court properly exercised its discretion in denying Ortiz-Rodriguez's postconviction motion to withdraw his plea. This Court should affirm that decision and the judgment of conviction.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the judgment of conviction and the postconviction order denying relief.

Dated this 31st day of May, 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 1,921 words.

Dated this 31st day of May, 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 31st day of May, 2019.

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