STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP90-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE E. SAVAGE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes

Additional Authorities

ISSUE PRESENTED

A circuit court must allow a defendant to withdraw a guilty plea after sentencing if he proves by clear and convincing evidence that a refusal to allow plea withdrawal would constitute a manifest injustice. A manifest injustice may occur when trial counsel is ineffective. Did George Savage prove that his counsel was ineffective, and therefore, that a manifest injustice would occur if the circuit court did not allow him to withdraw his plea?

The trial court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Savage pleaded guilty to a violation of the sex offender registry law. He claims that his counsel was ineffective for failing to advise him that his homelessness was a defense to the charge. The circuit court correctly determined that counsel was not ineffective because Savage did not have a homelessness defense under *State v. Dinkins*, 2012 WI 24, 339 Wis. 2d 78, 810 N.W.2d 787. This Court should affirm because his counsel's performance was neither deficient nor prejudicial; therefore, there was no manifest injustice warranting plea withdrawal.

STATEMENT OF THE CASE

The charges. The State charged Savage with a violation of the sex offender registry, based on his knowing failure to comply with reporting requirements under Wis. Stat.

§ 301.45(2) to (4), contrary to Wis. Stat. § 301.45(6). (R. 2:1.) The complaint specifically alleged that:

> The defendant has failed to provide the Department with updated information within 10 days after a change to the information required to be provided by Wis. Stat. sec. 301.45(2)(a). The defendant was released from prison on 3/23/16. On May 18, 2016, the agent of record informed the SORP that the defendant cut off his GPS bracelet and absconded from supervision.

(R. 2:2.) The complaint included a copy of Savage's signed sex offender registration form and notice to sex offender registrants. (R. 2:8–10.) The form listed Savage's residence as "Homeless." (R. 2:8.) The form included a certification above Savage's signature in which he acknowledged being notified of his duty to register, his obligation to provide the required information, and that a failure to comply may result in criminal prosecution. (R. 2:8.)

At his initial appearance, Savage's counsel noted: "[T]his is not a situation where he's unwilling or refusing to follow any registry requirements. He, given homelessness, simply has been unable to do so given that he's simply not going to be able to post cash bail whatsoever." (R. 42:4–5.)

The plea colloquy. Savage appeared with counsel and entered a guilty plea. (R. 44:2.) In exchange for his plea, the State agreed to recommend one year in the House of Corrections. (R. 44:2.) Savage and his counsel executed the plea questionnaire. (R. 6:2.) The plea questionnaire had attached to it a copy of Wis. JI-Criminal 2198 (2009), which addresses the elements of failure to comply with sex offender registration requirements. (R. 7:1.) The instructions were modified to reflect that Savage had failed to provide required information, including "provide changes to school; employment; addresses as required by law." (R. 7:1.) Savage initialed each element on the instruction. (R. 7:1.)

The circuit court engaged in a plea colloquy with Savage. Savage understood the charge against him, the maximum penalties, that the circuit court was not bound by the plea agreement, and his constitutional rights (R. 44:3–5, 10–13.) Savage told the circuit court that his attorney reviewed the complaint and information with him, discussed the elements of the offense, the maximum possible penalty, and the information in the DOC reports. (R. 44:15.) Counsel confirmed that she went through these items with Savage. (R. 44:16–17.) Based on its colloquy with Savage and counsel, the circuit court made several findings related to Savage's plea and found him guilty. (R. 44:18–19.)

The sentencing hearing. At sentencing, the State noted that Savage had a prior conviction for failure to register following revocation of a deferred prosecution agreement related to a new sex offense. (R. 44:19–21.) The State also explained that Savage was released from prison to extended supervision for another sex offense on March 23, 2016, and he was placed on discretionary GPS. (R. 44:21.) On May 18, 2016, Savage cut off his GPS, absconded from supervision, and was noncompliant with his registry obligations. (R. 44:21.)

Counsel represented that Savage had called and left messages with phone numbers and addresses. (R. 44:23.) His probation agent told Savage "to use her office address as he would need to see her and then they could continue with the compliance requirements of the registry." (R. 44:24.) Counsel noted a report about Savage's intent to remain compliant, but that compliance can be difficult, "especially with the homeless." (R. 44:24.)

Counsel explained that Savage became frustrated with the difficulties of finding housing, employment, basic services, being part of the registry, and the GPS monitoring. (R. 44:24–25.) "I believe he became frustrated, aggravated, and cut it off and then didn't report." (R. 44:25.) Savage's act of not reporting led to service of his revocation papers. (R. 44:25.)

The circuit court sentenced Savage to a 54-month term of imprisonment, consisting of a 30-month term of initial confinement and 24-month term of extended supervision. (R. 44:29.) The circuit court ordered Savage to serve the sentence concurrently with another sentence that he was already serving. (R. 44:29–30.)

Savage's postconviction motion. Savage moved for postconviction relief, seeking to withdraw his plea due to a manifest injustice. (R. 19:13.) He contended that his plea was involuntary because his counsel had assured him that he would not receive any additional time when he pleaded to the sex offender registry charge. (R. 19:1–2.) He also asserted that his counsel was ineffective for failing to inform him that he had a defense based on good faith efforts to comply with the registration requirements, i.e., he was homeless and did not have an address. (R. 19:2.)

Savage supported his postconviction motion with his affidavit and a DOC document that identified his activity related to his registry obligations. (R. 20:11–14.) The attached DOC record provided several entries for Savage from December 3, 2014, through June 20, 2016, including the following:

- On March 23, 2016, Savage was released from a DOC institution. (R. 20:11.)
- On March 24, 2016, DOC staff noted that Savage "is homeless at zip code 53212." (R. 20:11.)
- On March 28, 2016, DOC staff noted that "[r]eported address already on record." (R. 20:11.)
- On May 16, 2016, DOC staff noted: "Received telephone call from Registrant—left [voice mail message] on 888 line on 5/15/16 at 3:20 p.m. . . . reports temp address of [####] N. 53rd St, Milwaukee 53210 with no phone." (R. 20:11.)

- On May 18, 2016, DOC staff noted: "He is still homeless and is currently an absconder. I have no idea who resides there. He cut off his GPS bracelet." (R. 20:11.)
- On May 19, 2017, DOC staff asked when Savage absconded. Staff also commented, "[s]ince he reported his address to the [Sex Offender Registry Program] SORP, it may appear his intent is to remain compliant with SORP and just does not want to be on supervision (or follow the rules). This is happening quite a bit especially with the homeless-and who have been through FTR court cases already. . .We will wait to see the outcome of the letter for any further non-compliance." (R. 20:11.)
- On May 19, 2016, DOC staff mailed a letter to Savage at the 53rd Street address. (R. 20:11.)
- On May 20, DOC staff noted that Savage had absconded on May 5, 2016. (R. 20:11.)
- On June 2, 2016, the letter previously sent to the 53rd Street address had been returned. (R. 20:11.)
- On June 17, 2016, DOC staff reported that Savage called and reported that he did not receive the letter. He reported a new mailing address on North 39th Street. (R. 20:11.)
- On June 20, 2016, DOC staff noted that Savage remained an absconder. (R. 20:11.)

Savage's postconviction hearing. The circuit court granted Savage an evidentiary hearing. (R. 45.) Counsel told Savage that "homelessness was not an absolute defense to the charge . . . I explained as well there was, in fact, a homeless protocol in place through the Sex Offender Registry." (R. 45:13.) Counsel explained that she was familiar with this protocol, including "that they would accept park locations, cross streets as long as a call was made in accordance with the registry conditions." (R. 45:24.) Counsel said that the act of cutting off the GPS bracelet and his absconding from

probation "reflect[ed] a level of intent not to comply by physically cutting it off." (R. 45:25–26.) According to his counsel, Savage "was using his probation officer's address as a mailing address with the consent of the agent to do so." (R. 45:13.) Counsel stated that she did not make any promises or guarantees about the sentence that the circuit court would impose following his plea. (R. 45:27.) Counsel explained what Savage wanted: "[H]e was adamant that he did not want any more supervision. . . He wanted concurrent time [and] not to have that exceed the revocation time he would be serving." (R. 45:27–28.)

Savage testified that he pleaded guilty because his attorney told him that he would not serve more prison time than the two-year revocation time that he was serving and would not receive additional supervision. (R. 45:33–34.) Savage said that he expected to receive a one-year sentence concurrent to his revoked sentence. (R. 45:34–36.)

Savage claimed that his counsel did not speak to him about his good faith efforts to comply with sex offender registration requirements and whether there was a defense. (R. 45:37.) Savage said that he did not have a home or an address to provide to the agent and was having difficulty, due to the bracelet, finding satisfactory housing. (R. 45:37, 39.) Savage insisted that he would have gone to trial if he had known that he had a defense. (R. 45:39–40.) But he also insisted that he pleaded guilty because his attorney promised him that he would receive concurrent time. (R. 45:51.)

On cross-examination, Savage admitted that he had previously been noncompliant with his registry obligations and had previously been convicted for failing to register. (R. 45:41–42.) Savage, who had entered guilty pleas on six previous occasions, acknowledged that the circuit court told him that it was not bound by the State's recommendation. (R. 45:44.) Savage also admitted that he cut off his bracelet,

absconded from probation, and stopped complying with his agent. (R. 45:49.)

The circuit court found Savage's counsel credible. (R. 45:64–65.) It also found Savage not credible for three reasons. First, the circuit court did not believe Savage's testimony that his agent told him to cut off the GPS device. (R. 45:66.) Second, the circuit court did not accept Savage's explanation that he removed the GPS because it inhibited his movement as a homeless person. (R. 45:67–68.) Rather, the circuit court determined that Savage cut it off because he "didn't like people knowing where he was." (R. 45:67–68.) Third, Savage's primary motivation was to avoid additional jail time. (R. 45:68.)

The circuit court determined that counsel was not deficient with respect to her representations to Savage about sentencing. (R. 45:70.) It found counsel told Savage "that the court did not have to follow the recommendation." (R. 45:70.)[1]

The circuit court also rejected Savage's ineffective-assistance claim based on a failure to pursue a defense under *Dinkins*. (R. 45:71, 75.) The circuit court found that *Dinkins* did not apply because Dinkins, unlike Savage, was still in custody and was unable to locate a residence. (R. 45:71–72.) The trial court explained, "*Dinkins* stands for the proposition that if it is impossible for a person to report an address because of something outside of their control like, for example, being in prison at the time, then there may be a defense." (R. 45:75.)

The circuit court denied Savage's postconviction motion. (R. 37:1.)

Savage appeals.

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[1] On appeal, Savage does not advance the claim that he pleaded guilty because his counsel promised him that he would not receive additional jail time. (Savage's Br. 8.)

ARGUMENT

Because Savage did not establish that his trial counsel was ineffective, he did not prove by clear and convincing evidence that he was entitled to withdraw his plea based on a manifest injustice.

A. Standard of review and legal principles

1. Standard of review

This Court reviews the circuit court's exercise of its discretion to grant or deny a plea-withdrawal motion under an erroneous exercise of discretion standard. *State v. Cain*, 2012 WI 68, ¶ 20, 342 Wis. 2d 1, 816 N.W.2d 177. A circuit court erroneously exercises its discretion "as a matter of law" when it does not allow plea withdrawal after a defendant has proved a denial of a constitutional right. *See id.* ¶ 21.

Whether counsel was ineffective is a question of constitutional fact, which this Court analyzes under a mixed standard of review. *State v. Dillard*, 2014 WI 123, ¶ 86, 358 Wis. 2d 543, 859 N.W.2d 44. The Court "upholds the circuit court's findings of fact unless they are clearly erroneous." *Id.* But this Court independently reviews whether those facts constitute ineffective assistance. *Id.*

2. Post-sentencing plea withdrawal

A defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482. A defendant may bring a *Nelson/Bentley*[2] motion to withdraw his or her plea on manifest injustice

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[2] *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), *modified by State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

grounds based on a factor extrinsic to the plea colloquy that renders the plea infirm. *State v. Sulla*, 2016 WI 46, ¶ 25, 369 Wis. 2d 225, 880 N.W.2d 659 (citations omitted).

A manifest injustice based on a claim of ineffective assistance of counsel. "One way to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." *Dillard*, 358 Wis. 2d 543, ¶ 84. A defendant who has proved that his or her counsel was ineffective has demonstrated a manifest injustice that entitles the defendant to withdraw his or her plea. *Cain*, 342 Wis. 2d 1, ¶ 26. The defendant bears the burden at an evidentiary hearing to prove by clear and convincing evidence that plea withdraw is necessary to avoid a manifest injustice. *State v. Hoppe*, 2009 WI 41, ¶ 60, 317 Wis. 2d 161, 765 N.W.2d 794.

A defendant alleging ineffective assistance of trial counsel has the burden of proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. A court should presume that counsel rendered adequate assistance. *Id.*

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

To satisfy the prejudice prong in the plea withdrawal context, the defendant must allege "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). "As a general matter . . . a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

As the Supreme Court explained, "A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Lee*, 137 S. Ct. at 1966. Further, the Supreme Court cautioned courts assessing prejudice in the plea withdrawal context that they "should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 1967. Instead, courts should consider "contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

A manifest injustice grounded in a claim that a plea was involuntarily entered. "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which rendered it unknowing, involuntary, and unintelligently entered." *State v. Denk*, 2008 WI 130, ¶ 71, 315 Wis. 2d 5, 758 N.W.2d 775. Thus, "[o]ne way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." *Sulla*, 369 Wis. 2d 225, ¶ 24 (citations omitted). The defendant must be "aware of the nature of the offense to which he [is] pleading." *State v. Trochinski*, 2002 WI 56, ¶ 30, 253 Wis. 2d 38, 644

N.W.2d 891. Therefore, "[a] plea is not voluntary if the defendant did not understand the essential elements of the charged offense at the time the plea was entered." *State v. Nichelson*, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998).

3. Violation of the sex offender registry law

Wisconsin Stat. § 301.45 creates a statewide sex offender registry. Subject to specific exceptions, it requires certain sex offenders to comply with the section's reporting requirements. Wis. Stat. § 301.45(1g) and (1m). It specifies the offender information that must be included in the registry, including identifying information, information about their offenses, and addresses where they will be residing. Wis. Stat. § 301.45(2)(a).

DOC is responsible for entering the required information under subsection (2)(a) for offenders under DOC supervision. Wis. Stat. § 301.45(2)(b). Under Wis. Stat. § 301.45(2)(f), DOC may require the offender to provide certain information required under subsection (2)(a).

Wisconsin Stat. § 301.45(4) requires an offender to update information required under subsection (2)(a) as circumstances change on an ongoing basis. The offender must provide DOC the updated information within 10 days after the change occurs. Wis. Stat. § 301.45(4)(a). Further, the offender must provide advance notice to DOC updating information about an address change if the offender knows that his or her address will be changing. Wis. Stat. § 301.45(4)(a). DOC has promulgated administrative rules to help implement section 301.45's requirements. *See* Wis. Admin. Code ch. DOC 332.

An offender who knowingly fails to comply with his or her obligations under Wis. Stat. § 301.45(4) may be criminally prosecuted. Wis. Stat. § 301.45(6)(a). The State must prove

three elements: First, that the defendant was a person required to provide information under section 301.45; second, that the defendant failed to provide the required information; and third, the defendant knowing failed to provide this information. Wis. JI—Criminal 2198.

In *State v. Dinkins*, the supreme court recognized that homelessness may create challenges for offenders seeking to comply with their registration requirements. There, the State charged Dinkins with failing to comply with his registry obligation under Wis. Stat. § 301.45(2)(e)4. because he did not provide DOC with the address where he would be residing at least ten days before his release from prison. *Dinkins*, 339 Wis. 2d 78, ¶ 1. The supreme court vacated Dinkins' conviction, holding that "a registrant cannot be convicted . . . for failing to report the address at which he will be residing when he was unable to provide this information" because it "does not exist, despite the registrant's reasonable attempt to provide it." *Id.* ¶ 52. It emphasized that "homeless registrants are not exempt from registration requirements and that homelessness is not a defense to failing to comply with the registration requirements." *Id.* ¶¶ 27, 61.

In *Dinkins*, the supreme court recognized that DOC had subsequently issued a directive that provided "guidance for addressing homeless registrants who are on active DOC supervision as well as homeless registrants who have been terminated from supervision." *Dinkins*, 339 Wis. 2d 78, ¶ 26 (citing Wisconsin Department of Corrections Administrative Directive # 11-4, DOC-1356 (Rev.), effective July 1, 2011).[3]

[3] DOC subsequently reissued the directive. Wisconsin Department of Corrections Administrative Directive # 15-12, DOC-1356 (Rev.), effective March 1, 2015. (R.-App. 101–104.)

B. Savage did not prove that his trial counsel was deficient because he was not entitled to a homelessness defense under *Dinkins*.

Savage argues that he could not be convicted for a registration violation based on a failure to report his address when he is homeless. (Savage's Br. 18.) Therefore, he contends that his counsel's performance was deficient because she did not inform him that, under *Dinkins*, good faith efforts to comply with the registration requirements constituted a defense to the charge. (Savage's Br. 2, 8, 18.)

The circuit court properly rejected Savage's ineffective assistance of counsel claim because it correctly recognized that *Dinkins* did not apply to his situation. (R. 45:71–75.) The record supports the circuit court's decision.

"[F]or trial counsel's performance to have been deficient, [Savage] would need to demonstrate that counsel failed to raise an issue of settled law." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93 (citation omitted). Savage cannot demonstrate that his counsel was ineffective for failing to raise a *Dinkins* good-faith defense to the sex offender registry charge because, as he conceded in his request for oral argument and publication, "*This Appeal involves issues of law which are not settled*." (Savage's Br. 2 (emphasis added).) Therefore, by Savage's own concession, counsel's failure to raise a *Dinkins* good-faith defense did not fall below the objective standard of reasonableness necessary to sustain his ineffective assistance of counsel claim. *See Breitzman*, 378 Wis. 2d 431, ¶ 49 (citations omitted).

But even without his concession that the law was unsettled, *Dinkins* involved "narrow circumstances" inapplicable to Savage's case. *Dinkins*, 339 Wis. 2d 78, ¶ 28. Dinkins was convicted for failing to comply with the requirement to provide notice of his address no later than "10 days prior to release from prison" because he had reached his maximum discharge date. *Id.* ¶¶ 7–8 (citing Wis. Stat.

§§ 301.45(2)(a)5. and (2)(e)4.) Dinkins was unable to locate housing before his release, and the State charged him with a registry violation before his release. *Dinkins*, 339 Wis. 2d 78, ¶¶ 10–16. The supreme court held that Dinkins could not be convicted for "failing to report the address at which he will be residing when he was unable to provide this information" because it "does not exist, despite the registrant's reasonable attempt to provide it." *Id*. ¶ 52.

Like Dinkins, Savage did not have a place to live as he approached his March 23, 2016, release date. (R. 20:11.) Savage listed "homeless" for his address on his sex offender registration form. (R. 2:8.) But DOC handled Savage's release differently from Dinkins' release. When DOC released Dinkins, it had not yet adopted its protocol for addressing homeless registrants. *Dinkins*, 339 Wis. 2d 78, ¶ 26. The absence of a protocol was critical to the supreme court's decision in *Dinkins*. "Because it was not in effect at the time of Dinkins' violation and prosecution, this new directive does not resolve the issues presented in this case." *Id*.

In contrast, DOC had adopted procedures to facilitate Savage's compliance with the registry despite his homelessness. (R. 45:13, 23–24, R.-App. 101–02.) His counsel was familiar with these procedures. (R. 45:13, 23–24.) Unlike Dinkins, Savage's inability to provide an address as he approached release did not trigger his prosecution. Indeed, the record reflects that Savage called the registry on May 16, 2016, and provided an address, but when DOC sent a letter to the address days later, it was returned. (R. 20:11.) As counsel explained, Savage's removal of his GPS bracelet and his absconding from supervision demonstrated an intent not to comply with his registry obligations. (R. 20:11; 45:25–26.) Pursuing a good-faith defense would also have been challenging considering Savage's previous noncompliance with the registry requirements. (R. 45:41–42.) On this record, even if the legal parameters of the good-faith defense were

settled law, counsel reasonably assessed that Savage did not have a *Dinkins* good-faith defense.

Counsel's performance was not deficient for another reason. Savage, who was being revoked on another charge, pleaded guilty to minimize his exposure. (R. 44:25.) As counsel explained, "[Savage] was adamant that he did not want any more supervision. . . He wanted concurrent time [and] not to have that exceed the revocation time he would be serving." (R. 45:27–28.) To this end, counsel secured a promise from the State to recommend one year in the county jail on Savage's guilty plea. (R. 44:2.) And Savage confirmed that he "was okay with just doing a year if it will be concurrent with my revocation time" and no additional supervision time. (R. 45:34–35.) Savage pleaded guilty, fully knowing that the circuit court was not bound by the plea agreement. (R. 44:4; 45:11, 70.) At sentencing, counsel argued that the circuit court should order Savage to serve his sentence concurrently with his revoked sentence. (R. 44:25.)

Counsel's performance cannot be deemed deficient for pursuing Savage's goal of minimizing additional exposure through a plea agreement rather than pursuing an uncertain defense due to Savage's noncompliance with the registry rules. *See Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

Savage's claim of ineffective assistance is grounded in his assertion that counsel failed to advise him that his homelessness was a defense to the charge. (Savage's Br. 2, 17.) In fact, the record demonstrates that counsel spoke to Savage about the homelessness defense. She explained to him that "homelessness was not an absolute defense to the charge" and that DOC had "a homeless protocol in place through the Sex Offender Registry." (R. 45:13.) The circuit court's determination that counsel was credible and Savage was not

defeats Savage's claim that counsel never spoke to him about a homelessness defense. (R. 45:66–69.)

Savage did not demonstrate that his counsel performed deficiently for failing to pursue a good-faith defense under *Dinkins*. Counsel provided reasonably competent professional advice that allowed Savage to knowingly, intelligently, and voluntarily entered his plea. No manifest injustice occurred, and he is not entitled to plea withdrawal.

C. Savage did not prove that his trial counsel's allegedly deficient performance prejudiced him.

Savage also failed to prove that counsel's allegedly deficient performance prejudiced him. That is, Savage did not demonstrate to a "reasonable probability, that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Bentley*, 201 Wis. 2d at 312.

Here, Savage accepted a guilty plea agreement that offered "him a better resolution than would be likely after trial." *Lee*, 137 S. Ct. at 1966. Savage made clear to counsel that he wanted to avoid additional incarceration and supervision. (R. 45:11, 27–28.) The State capped its recommendation at one year of jail time without additional supervision. (R. 44:19.) The record, including counsel's statements to Savage, his plea questionnaire, and the plea colloquy, demonstrates that he understood the circuit court did not have to follow the plea agreement. (R. 6:1; 44:4; 45:70.)

Savage's decisions to abscond from supervision and to remove his GPS device evinced his intent not to comply with his registry obligations. (R. 45:25–26.) Unlike Dinkins, for whom compliance with the registry obligations was legally impossible, in part because DOC had not yet developed registry homeless protocols (R. 45:74–75), Savage's conduct undermined his chance of successfully mounting a homelessness defense. Under the circumstances, Savage's

decision to accept a plea offer that advanced his goals of limiting additional incarceration and supervision was a reasonable alternative to pursuing a risky trial strategy. (R. 45:68.) That the circuit court did not impose the sentence that Savage wanted does not render his counsel's allegedly deficient performance prejudicial. This Court should decline to find that counsel's alleged deficiencies prejudiced Savage based on his "post hoc assertions" "about how he would have pleaded but for his attorney's deficiencies." *Lee*, 137 S. Ct. at 1967.

Savage did not prove that, but for counsel's alleged failure to discuss the homelessness defense with him, that he would not have pleaded guilty and would have gone to trial. Therefore, he has not proved prejudice, and this Court should reject his ineffective assistance of counsel claim.

CONCLUSION

This Court should affirm Savage's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 6th 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 4,773 words.

_____
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 6th day of May, 2019.

_____
DONALD V. LATORRACA
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. George E. Savage
Case No. 2019AP0090-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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, 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.

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DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 6th day of May 2019.

_____
DONALD V. LATORRACA
Assistant Attorney General