STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP90-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GEORGE E. SAVAGE,

Defendant-Appellant.

APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS PRESIDING

PLAINTIFF-RESPONDENT-PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Savage has not shown that his affirmative defense likely would have succeeded at trial and therefore cannot show prejudice, so plea withdrawal is not necessary to avoid a manifest injustice.

A. Savage makes two arguments in response to the State's brief-in-chief.

In its brief-in-chief, the State explained that Savage is not entitled to withdraw his plea based on a manifest injustice, arguing that he did not show he was prejudiced by counsel's conclusion that he did not have a defense under *State v. Dinkins*[1] because he did not show that his affirmative defense would likely succeed at trial. The State further argued that because the record clearly demonstrates that Savage did not have a viable defense under *Dinkins*, the court of appeals erred when it did not sustain the circuit court's order based on that court's unchallenged credibility findings and findings of fact, and the factual record.

In his response brief, Savage first tries to limit the circuit court's factual findings and credibility determinations on which the State relies. He argues that findings and determinations were made only in connection with the plea promises issue, which was not pursued on appeal, and are therefore not relevant to the *Dinkins* issue raised on appeal. (Savage's Br. 12, 26.) The argument fails. Both issues were addressed in the *Machner* hearing testimony, Savage's lack of credibility is relevant to each, and the facts relevant to the viable defense issue are undisputed. Next, he argues that the "GPS [monitoring device] cutting" and absconding from

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[1] *State v. Dinkins*, 2012 WI 24, 339 Wis. 2d 78, 810 N.W.2d 787.

supervision is a "completely different matter" and is not relevant to the felony charge of violating the sex offender registration statute. (Savage's Br. 23.) This argument fails because 1) DOC requires homeless SORP registrants to be placed on GPS monitoring, as Savage was; and 2) Savage initialed a form before he left prison stating the rules for SORP registrants who are on extended supervision, and the first requirement is to maintain contact with both the probation agent *and* the SORP. Savage's arguments are refuted by the record and the law.

B. The circuit court's factual findings and credibility determinations are relevant to the issue on appeal.

Plea withdrawal "remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice." *State v. Cross*, 2010 WI 70, ¶ 4, 326 Wis. 2d 492, 786 N.W.2d 64. The manifest injustice Savage alleges is ineffective assistance of counsel; to establish that, he must show that trial counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the plea withdrawal context, where the alleged deficient performance is failure to pursue an affirmative defense, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Savage did not show that. He therefore failed to show that counsel's failure prejudiced him.

Savage claims that counsel failed to inform him of a *Dinkins* defense and that counsel made promises to induce him to enter a plea. (R. 19.) Following the evidentiary hearing, the circuit court made findings and concluded that Savage failed to show that he'd been prejudiced by the *Dinkins* issue,

and that he had failed to show that trial counsel had performed deficiently by making false promises.

Its findings occurred after both trial counsel and Savage testified. (R. 45:8, 32.) At the conclusion of the testimony, the circuit court stated, "So, first, credibility determinations; second, a brief discussion of the law; third, mixed findings of fact and conclusions of law." (R. 45:64.)

The circuit court described the testimony of trial counsel and found it "to be more credible, more persuasive, and to carry the day." (R. 45:66, 69.)

As for Savage's testimony, the circuit court stated that there were "three objective pieces of his testimony that compromise his credibility." (R. 45:66.)

The first was Savage's testimony about his conversation with his agent about the GPS device. Savage was asked on cross-examination, "[D]id you say on direct examination that your agent told you that if you cut it off it was okay, you wouldn't be charged?" (R. 45:48.) He answered, "Multiple times she told me this." (R. 45:48.) The circuit court found this testimony not credible: "The agent may have said, . . . you won't be charged with a felony tampering with a GPS device, but I am 100 percent certain, and it doesn't require any additional information because the testimony that the agent would say, well, nothing will happen to you is . . . facially incredible." (R. 45:66.) The circuit court found that "that compromises the defendant's testimony on other things he says people told him." (R. 45:67.)

The second was Savage's asserted reason for cutting off the device, which was that "the bracelet was making it impossible for [him] to go anywhere." (R. 45:49.) The circuit court found that "that doesn't make any sense," and "[w]hen [Savage] says that was his motive, he's not telling the truth." (R. 45:67-68.) The circuit court said that "a much more

persuasive and much more logical motive" for cutting off the GPS device was what Savage admitted he told trial counsel: that he did not want any more supervision. (R. 45:67.)

The third factor that undermined Savage's credibility was Savage's motive to testify falsely in order to undo the consequences of his plea. (R. 45:68.) Savage testified that he took the plea only because he was assured of no more jail time and no more supervision. (R. 45:33-34, 68.) The circuit court found that Savage's motive to obtain his desired sentence "is borne out in his testimony and results in his testimony" about counsel "being less than truthful." (R. 45:68.)

When discussing the false promises allegation (R. 45:33-34), the circuit court found as fact that Savage "didn't like people knowing where he was[,] [s]o he cut off his GPS device." (R. 45:67-68.) When discussing the viable defense allegation, the circuit court assumed the undisputed facts that Savage was "living on the street" and that trial counsel "did not tell [Savage] that he had a defense" based on *Dinkins*. (R. 45:73, 75.) However, the circuit court found that Savage was not, like Dinkins, in circumstances where it was "impossible" to report an address "because of something outside of [his] control," such as being in prison, so it concluded that *Dinkins* had no application, and Savage could not show prejudice. (R. 45:75.)

Additional evidence undermined Savage's credibility. Savage testified that he did not expect to be charged with violating the sex offender registry statute, even after cutting off his GPS bracelet and absconding, "as long as [he] stayed compliant with the registry," presumably by calling the SORP number. (R. 45:48.) Postconviction counsel argued that

Savage's phone call on June 17, 2016,[2] showed that he was attempting to remain compliant. (R. 45:56.) But Savage was on notice that SORP compliance required contact with his *probation agent* as well. Attached to the criminal complaint is the "Notice of Requirements to Register Department of Corrections - Sex Offender Registry Program (SORP)" form initialed by Savage. The top of that form states, "When on Wisconsin Department of Corrections Supervision[:] Prior to any change in residence . . . report the change *directly* to your assigned Community Corrections agent. You will *also* need to report the change to SORP by calling [the SORP toll-free number]." (R. 2:10 (emphasis added).) Savage did not dispute that he initialed the form.

Savage does not argue that the circuit court's prejudice analysis is flawed because the credibility determinations and findings it made are clearly erroneous. His argument—that there were no credibility determinations made "concerning the *Dinkins* issue" and that the credibility determinations that were made are "neither relevant nor applicable" to the prejudice analysis—instead amounts to an unduly compartmentalized reading of the circuit court's oral ruling. (Savage's Br. 20, 27.) He faults the circuit court for rejecting his *Dinkins* claim without restating findings of fact it had just stated moments before when it rejected his plea promises claim.

It is well established that an appellate court may search the record for reasons to support the circuit court's decision even if the circuit court made a legal error. *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) ("If a trial court reaches the proper result for the wrong reason it will be

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[2] The SORP specialist's notes reflect that after absconding on May 5, 2016, Savage left a voicemail on the SORP toll-free line on May 15, 2016. (R. 35.)

affirmed."). The circuit court's legal conclusion is supported by the facts that trial counsel did not tell Savage he had a *Dinkins* defense; that Savage was "living on the street"; that he did not want people to know where he was so he cut off his GPS device; and that he was not unable to comply. (R. 45:67-68, 73-75.)

Savage's assertions are premised on his testimony that he was in fact attempting to comply with the SORP rules. That is undermined by his lack of credibility, by the signed SORP form showing that compliance with SORP required compliance with Savage's probation agent, and by the fact that his GPS monitoring was required by DOC for homeless registrants. (R. 2:10.) Although the circuit court did not base its ruling on the GPS and absconding evidence, both undisputed facts are highly relevant and support the circuit court's conclusion that Savage did not show prejudice on the *Dinkins* issue.

C. Savage could not remain compliant with the sex offender registry statute while simultaneously absconding from supervision.

In his response brief, Savage characterizes the State's argument concerning absconding as "erroneous," and he argues that when he cut off the GPS device and absconded from extended supervision, that "did not indicate that he did not want to remain compliant on SORP." (Savage's Br. 23.) He argues that "[a]bsconding from extended supervision based upon a separate 2014 felony offense is a completely different matter." (Savage's Br. 23.)

As noted above, Savage initialed a form giving him notice of the SORP requirements. (R. 2:10.) That form requires him, when there is "any change" in his "residence," to "report the change directly" to his "assigned Community

Corrections agent" and "*also* . . . to SORP." (R. 2:10.) The form makes explicit the link between the two forms of supervision. This is fatal to the argument that Savage could remain in compliance with SORP while simultaneously absconding from extended supervision.

The Department of Corrections requires GPS monitoring for homeless registrants such as Savage. *See* DOC Admin. Dir. #15-12, DOC-1356 (Rev.), available at https://doc.wi.gov/Guidance%20Documents/DCC/DCC_AD15-12_Homeless%20Sex%20Offender%20Registrants.pdf.
Savage testified about being placed on GPS monitoring. (R. 45:39-40, 48.) The Administrative Directive also provides further confirmation that Savage's phone calls to SORP on May 15, 2016, and June 17, 2016, (R. 35) fall well short of compliance. The directive states that homeless registrants "must be placed on discretionary GPS *within five working days* of becoming homeless" and must inform their agent that they are homeless; stay in the county of supervision; "call and speak with the agent once every seven days"; and report the addresses "or nearest locations" where he or she has "frequented and slept." Wisconsin Dep't of Corrections Admin. Dir. #15-12, DOC-1356.

At the hearing, postconviction counsel asked Savage on direct examination, "Did you ever call the agent up to talk—to tell her what was going on?" (R. 45:38.) Savage answered that he called "the SOR people in Madison." (R. 45:38.) During cross-examination, Savage admitted cutting off his GPS device and testified, "I knew that there would be consequences. I didn't believe I would be charged as long as I stayed compliant with the registry." (R. 45:48.)

What's missing from Savage's reasoning, when he absconded and in his brief to this Court, is the fact that the GPS monitoring device and compliance with his probation agent were both parts of his SORP compliance. His view of

them as separate issues is contrary to the facts. For that reason, Savage cannot show that his affirmative defense likely would have succeeded at trial, cannot show *Strickland* prejudice, and cannot show manifest injustice.

II. Because the evidence in the record supported sustaining the circuit court's ruling on grounds that any deficient performance did not prejudice Savage, the court of appeals should have affirmed without a remand.

A. Savage's arguments in response to the State's brief in chief.

In Part II of his Argument, Savage addresses the question of what an appellate court is authorized to do when it "disagrees with the trial court's reasoning, but the facts support the trial court's decision." (Savage's Br. 28.) Savage merely repeats his argument that there are not any existing factual findings relevant to this determination and accuses the State of arguing "that the appellate courts may make findings of fact and conclusions of law." (Savage's Br. 24.) As shown above, these arguments are unavailing.

B. The factual findings, credibility determinations, and evidence in the record supported the circuit court's ruling that Savage did not show prejudice on the *Dinkins* issue, and the court of appeals should have affirmed on that basis.

As discussed above, the circuit court based its ruling on the *Dinkins* issue on findings of fact and undisputed facts, including that Savage cut off his GPS monitoring device and absconded from supervision. The court's ruling is further supported by the evidence in the record that there was a

homeless protocol[3] in place for SORP registrants and that complying with extended supervision was in fact one of Savage's SORP requirements.

Because correct results are affirmed even if the circuit court made a legal error in its analysis, the court of appeals erred when it reversed in this case. *See King*, 120 Wis. 2d at 292 (affirming result where the circuit court based its ruling on the wrong statute). Here the court of appeals reversed on the ground that the circuit court misread *Dinkins*. As the State argued in its brief-in-chief, under any reading of *Dinkins*, the ruling should have been sustained because the facts detailed above supported it. Savage does not argue that these findings are clearly erroneous.

The unchallenged facts defeat what Savage terms "the crux of [his] contention," which is that he "stood a reasonable chance of an acquittal at trial" and that "[t]here would not have been *any* conviction, much less to a recommendation of less time." (Savage's Br. 29-30.) Savage wrongly asserts, repeatedly, that the State seeks to have this Court make findings of fact, but that is untrue. (Savage's Br. 13, 22, 24, 27.) No further factfinding is necessary. The court of appeals should have sustained the circuit court's order because the facts supported it.

[3] The predecessor to the administrative directive in effect at the time of Savage's release from prison was developed in response to the court of appeals' decision in *Dinkins*, as noted in this Court's opinion. *State v. Dinkins*, 2012 WI 24, ¶ 26, 339 Wis. 2d 78, 810 N.W.2d 787.

III. Contrary to the argument made in WACDL's nonparty brief, *Lee* did not reject *Hill*'s likely-success-at-trial standard for prejudice, and *Hill*, not *Lee*, controls here.

This Court granted leave for the State to respond to the nonparty brief filed by the Wisconsin Association of Criminal Defense Lawyers (WACDL).

WACDL addresses the argument that, under *Hill*, 474 U.S. at 58, Savage is required to show that the *Dinkins* defense likely would have succeeded at trial. WACDL cites the discussion of *Hill* in *Lee v. U.S.*, 137 S. Ct. 1958 (2107), and argues that *Lee* "specifically rejected the notion that counsel's errors cannot prejudice defendants with no viable defense or a very strong case against them." (WACDL Br. 4-5.) That is an imprecise statement of *Lee*'s holding.

Lee involved an error by trial counsel "that affected [the defendant's] understanding of the *consequences* of pleading guilty." *Lee*, 137 S. Ct. at 1965 (emphasis added). The Court found that fact significant, distinguishing it from cases in which errors by counsel, such as failure to investigate, affect the prospect of success at trial, and the defendant's decision about going to trial turns on his prospects of success. *Id.* Because Lee, unlike the defendant in *Hill*, *did* allege "special circumstances that might support the conclusion that he placed particular emphasis on [the issue counsel misinformed him of] in deciding whether or not to plead guilty" and because "[his] claim that he would not have accepted a plea had he known it would lead to deportation [was] *backed by substantial and uncontroverted evidence*," the Court concluded he had shown that counsel's deficient performance prejudiced him notwithstanding unlikely success at trial. *Id.* at 1965, 1969 (emphasis added).

WACDL quotes *Lee*'s statement that "[s]ometimes . . . there is more to consider than simply the likelihood of success

at trial." (WACDL Br. 5.) The Court explicitly limited that, however, to cases where counsel's error affects defendant's understanding of the consequences of the plea *and* the defendant alleges (and backs up with "substantial and uncontroverted evidence") special circumstances that might support the conclusion that he placed particular emphasis on the fact he was misinformed about. *Lee*, 137 S. Ct. at 1965, 1969. Far from rejecting *Hill*, *Lee* restated its rule that "[a]s a general matter, it makes sense that 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*, 137 S. Ct. at 1966 (emphasis added).

Savage alleged a failure to advise of an affirmative defense, not an error that affects his understanding of the consequences of the plea, so *Lee* is inapplicable.

CONCLUSION

For the reasons stated herein and in the State's brief-in-chief, the State respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 12th day of August 2020.

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 2,999 words.

Dated this 12th day of August 2020.

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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 12th day of August 2020.

SONYA BICE
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