STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP001770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN ANTHONY TAYLOR,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

ARGUMENT

I. The circuit court erred in denying Mr. Taylor's motion for presentence plea withdrawal.[1]

A. The circuit court erroneously exercised its discretion in finding no fair and just reason for plea withdrawal.

1. The State conceded that a fair and just reason existed.

The State takes issue with Mr. Taylor's claim that the State conceded the existence of a fair and just reason, calling Mr. Taylor's reading of the record "unfair." (State's Br. at 14).

At the plea withdrawal hearing, the State made no arguments about whether a fair and just reason existed, telling the court: "our position is there might

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[1] Roughly two pages of the State's brief are devoted to an "introduction." (State's Br. at 1-3). In that section, the State makes multiple factual and legal averments which are unsupported by any record or legal citation. Mr. Taylor asks this Court to not lend any weight to the highly argumentative, yet unsourced, claims in the State's "introduction." Mr. Taylor also takes issue with the State's slanted depiction of the facts; accordingly, he encourages this Court to review the statement of facts in the initial brief as well as the record in this case when confronted with the State's assertions.

be a fair and just reason, but the state would result in -- it would be substantially prejudicial to the state if this Court were [to allow plea withdrawal.]" (92:42).

Shortly thereafter, counsel for Mr. Taylor stated, "Judge, it appears the state concedes the fair and just reason." (92:43). Then, during the court's ruling, the circuit court stated "the state believes that there might be a reason to concede the fair and just reason." (92:44). The State did not correct trial counsel or the court. In light of this record, it is not unfair to assert that a concession was made. The State tries to contrive a different meaning, claiming that the State was only making an "alternative legal analysis." (State's Br. at 14). On the basis of this record, this reading must fail.

2. State's remaining arguments as to the fair and just reason.

The record shows that the circuit court made only a conclusory assertion that no "credible" reason existed while vaguely referencing the "totality of the circumstances." (92:45). This is not an adequate exercise of discretion, especially when these "findings" are intermixed with a confusing mishmash of inapplicable legal standards.

The State relies on the colloquy to establish that Mr. Taylor's ability to understand was not "impaired" and that he "understood all of the proceedings." (State's Br. at 15). However, Mr. Taylor is not claiming to have been legally incompetent and

is not making a claim pursuant to *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986). Instead, his argument is that he entered a rushed plea without the benefit of his medication and with pressure from counsel. These assertions are not disproved by the colloquy; in fact, the colloquy establishes that Mr. Taylor did not have his medication when he made this decision. (87:4). The colloquy also shows that the circuit court was pushy in obtaining an affirmation of understanding from Mr. Taylor, interrupting his less-than clear answers on that topic in order to obtain a conclusory "yes." (87:4). Moreover, the colloquy does not have to be defective for Mr. Taylor to prevail, contrary to the lower court's ruling.

The State also tries to play up the circuit court's reasoning as being grounded in sound factual premises, pointing out that "the case had been set for trial several times, and Taylor had gone through four lawyers." (State's Br. at 15). The State's primary focus appears to be on Mr. Taylor's incredibility, which they derive from his allegedly dilatory tactics leading up to the plea withdrawal motion.

The State glosses over the multiple adjournments requested by the State. This is especially problematic because the lower court believed that the case had been prepared to go to trial on seven different dates and relied on that deficient understanding in coming to a decision. (92:44).

Two days before the first scheduled trial date, the State requested an adjournment because it had

failed to subpoena essential witnesses. (76:3). While the court also granted a change of counsel on that date, the court made clear it was doing so "since" it had already decided to adjourn the matter at the State's request.[2] (76:3).

Although Mr. Taylor asked his second lawyer to withdraw, he appears to have done so for entirely understandable reasons.[3] While the court granted Mr. Taylor's request, the court left the trial date on the calendar. (78:4). The third lawyer on the case then told the court he would be ready, hence, the matter remained calendared for trial. (79:2). It was at this point that the State expressed a scheduling concern. (79:3). Mr. Taylor, however, remained "firmly in trial posture." (80:2). The State ultimately asked for, and was granted, an adjournment on the day of trial. (81:2).

Following this second adjournment at the State's request, the State asked for a third adjournment to accommodate the prosecutor's desire

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[2] The court had previously denied Mr. Taylor's request to substitute counsel and had left the trial date on the calendar. (75:2).

[3] Mr. Taylor only requested new counsel after he was "cussed at" by his lawyer. (78:3). The lower court did not find these assertions incredible and therefore granted Mr. Taylor's request, telling Mr. Taylor that appointed counsel "doesn't want you either." (78:4)

to attend a conference. (22:1). That motion was also granted. (82:2). The next "adjournment" can be counted as such only in the most technical sense: counsel for Mr. Taylor overlooked the fact that this date did not work for his calendar and promptly alerted the court to the oversight. (24:2).

Mr. Taylor then had a third change of counsel when his lawyer asked to withdraw, citing the existence of an OLR complaint.[4] (84:2). Mr. Taylor was not the one asking for withdrawal; although it does appear he was reasonably aggrieved that his lawyer was not communicating with him. (84:5). The merit of holding these circumstances against Mr. Taylor in this appeal is questionable, especially when the court left the scheduled trial date on the calendar. The SPD then appointed a new lawyer without first informing her of the scheduled trial date. (85:2). She therefore moved for a brief adjournment. (85:2).

Thus, the State's insistence that Mr. Taylor was incredible because his prior lawyers were ready to go to trial and Mr. Taylor managed to avoid that eventuality by firing them, is not supported by the record.

[4] The record does not disclose whether the complaint was meritorious or whether it resulted in discipline for Attorney Jones. Mr. Taylor does not concede that his lawyer was legally obligated to withdraw.

The State goes on to claim that Mr. Taylor "pull[ed] the plug" on the scheduled trial because the "witnesses were present." (State's Br. at 16). The State also claims that Mr. Taylor was "upset" when his lawyer could not tell him how the victim would testify. (State's Br. at 16). However, the testimony at the hearing merely established that Mr. Taylor was "concerned" as to how the victim would testify at the trial. (92:36). This is a perfectly rational consideration. More problematically, these post-hoc rationalizations and attempts to discredit Mr. Taylor were not a basis for the circuit court's exercise of discretion. There is no suggestion in the record that witness unavailability was a real possibility in this case and the mere fact that Mr. Taylor wanted to know "what the victim was going to say" at the trial before making his decision does not support the State's position.[5] This Court should not allow rampant speculation to stand in for a real exercise of circuit court discretion.

Mr. Taylor also takes issue with the State's suggestion that Mr. Taylor only decided to withdraw his plea only because he became aware that the victim was going to speak at his sentencing. (State's Br. at 10-11). Consider:

[5] Counsel for Mr. Taylor averred, in his postconviction motion, that Mr. Taylor had defeated the substantive allegations in a revocation proceeding. (62:5). It was therefore entirely reasonable for Mr. Taylor to want to know if his lawyer thought the charges could be beat a second time.

Counsel: And then at some point, it appears from the motion February 1, 2018, that you had some telephone conversation with Ms. Cleghorn?

Mr. Taylor: Yes.

Counsel: Did you call her or --

Mr. Taylor: No. She called up there to me.

Counsel: And why did she call you; do you know?

Mr. Taylor: No. She was telling me if I wanted -- you know what I'm saying -- was I ready to go for the sentencing and if I had any other thoughts about this sentencing. I told her, like, right then and there I wanted to withdraw this plea because she -- she was telling me that -- about the people that was there for my sentencing and all that. And I told her, well, my family was telling me wasn't nobody there. And I'm, like, it really doesn't matter what my family was saying. I just don't want to go through with the plea. To withdraw my plea and go to trial.

Counsel: And did you tell her why, why you wanted to withdraw the plea? What was wrong with it?

Mr. Taylor: Because I feel I was under pressure when I took the plea. She

> asked me was there anything that had to do with her? I told her -- I said -- I said most of it had to do because you were pressuring me to take this plea and not giving me time to actually think about it or to even discuss it with my family.
>
> Counsel: So it was more so -- was the pressure from your lawyer than the lack of medication?
>
> Mr. Taylor: It was both. Because I told her I wasn't on my medication at the time I entered this plea.

(92:16-17).

The State's reading is not a faithful reading of Mr. Taylor's testimony. Admittedly, the testimony is somewhat confusing, because Mr. Taylor appears to be interweaving two topics—his lawyer called him to prepare for sentencing and, during that conversation, he announced that he wanted to withdraw his plea. Yet, the record is clear that Mr. Taylor unambiguously stated the conflicting information he was receiving about whether the victim would show up to sentencing did not "matter;" rather, he wanted to withdraw the plea because of the reasons stated in the defense motion. Importantly, the court did not rely on a finding that this was a motivation for making the plea withdrawal motion.

The record is clear that Mr. Taylor had a very short time to enter his plea; in fact, the State never

challenged this assertion and the testimony of their witness corroborates it. The record is also clear that Mr. Taylor was reluctant to enter a plea, that he relied on coaxing from his counsel to do so, and that he did not have the benefit of medication at the time he made that choice. The court's cursory findings—and its singular use of the word "credible," without any factual or credibility findings ever being made on the record and with certain factual misstatements being incorporated into its explication—do not establish that the court adequately exercised its discretion. Instead, the record is clear that Mr. Taylor offered an "adequate reason" for his change of heart and, therefore, the circuit court should have granted the motion. *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

C. The State's substantial prejudice arguments are unavailing.

The State's submissions in the circuit court contained no specific allegations of prejudice, preferring to rely on conclusory allegations (as well as the superficially contradictory letter from SaintA indicating that the child was willing to continue cooperating in this case.) The State does not necessarily disagree that the assertions were, conclusory, merely defensively asserting that those assertions are sufficient in light of *State v. Bollig*, 2000 WI 6, ¶ 46, 232 Wis. 2d 561, 605 N.W.2d 199 (State's Br. at 17).

However, *Bollig* does not create the near-flat rule requested by the State—that the mere existence of a child witness will cause substantial prejudice—and is readily distinguishable, chiefly because *Bollig* relied on the interplay between a young child's memory and the defendant's "numerous dilatory tactics." *Id.*, ¶ 42-43. Here, the record belies the State's claim that "Taylor repeatedly caused delay." (State's Br. at 17). As has been asserted repeatedly in this brief, the case could have gone to trial on at least three occasions but-for the State's requested adjournments. The State acknowledges Mr. Taylor's argument on this point but refuses to engage him on the merits, shifting the focus of its claim to speculative assumptions as to what the circuit court apparently thought, but did not actually say, in making its ruling. (State's Br. at 18). The State takes one comment from a hearing out of context and otherwise avers that the competence of Mr. Taylor's prior lawyers undergirded the court's exercise of discretion in determining that substantial prejudice existed. (State's Br. at 18).

The State also ignores other arguments made by Mr. Taylor, including his argument regarding the admissibility of the victim's forensic interview and the contemporaneous nature of her disclosure.

On the substantial prejudice issue, the State was required to make a sufficient record in the court

below. It did not.[6] The lower court's ruling reflects a concerning per se rule that would seemingly apply whenever a defendant attempts to withdraw their plea in this type of case.

Finally, the State makes a variety of scattered arguments against plea withdrawal, asserting that the record does not establish that a single missed dose of Prozac would have caused confusion and asserting that this circumstance is not a fair and just reason for plea withdrawal. (State's Br. at 19). These arguments are being made for the first time on appeal, however, because the State did not challenge the fair and just reason below. Finally, the State alleges that the record overall supports the court's exercise of discretion. (State's Br. at 19). Mr. Taylor simply disagrees and directs this Court to the fully-fleshed out arguments in his brief-in-chief.

D. An independent review of the record does not support the circuit court's exercise of discretion.

Finally, the State tries to salvage this case by asking this Court to ignore the deficient reasoning of the circuit court and instead to independently uphold the outcome on different grounds. (State's Br. at 19). This effort should also fail.

[6] For evidence of what constitutes a sufficient record establishing prejudice, see *State v. Rushing*, 2007 WI App 227, 305 Wis. 2d 739, 740 N.W.2d 894.

First, the State claims that the plea was not hasty, citing to inconsistent testimony from a hearing which occurred roughly 1.5 years after the plea withdrawal hearing in this case. (State's Br. at 20). However, the witness was never given an opportunity to explain any inconsistency and, in any case, neither was the court given an opportunity to make the dispositive finding of fact required to resolve the matter. More to the point, the testimony is not necessarily inconsistent, as while there may have been "back and forth" about negotiations, this does not mean that Mr. Taylor was not given scant time to consider the final offer conveyed.

The State also claims, wrongly, that "Taylor decided to change his plea after learning that the witnesses against him were present in the courtroom." (State's Br. at 20). This is a flat misstatement. The testimony cited by the State is merely that counsel informed her client that the witnesses were present. (92:32). There was no testimony establishing that Mr. Taylor then pleaded guilty because he was hoping they would not show and, as argued above, there is no evidence in the record that nonappearance was ever a contemplated possibility in this case.

Next, the State points out that Mr. Taylor asked if the State would run his time concurrent. (State's Br. at 20). In their view, this routine question somehow eliminates any haste or confusion. The simple fact that Mr. Taylor wanted to know if the time offered could be run concurrent does not defeat

any of the claims he made in his motion, nor does it undermine the testimony presented at the motion hearing.

The State then asserts that there was no proof of attorney pressure, pointing to Mr. Taylor's somewhat confusing testimony about the no-contest plea. (State's Br. at 20). However, trial counsel's testimony is clear-cut—she told Mr. Taylor that a no-contest plea was in the "middle." (92:39). Once again, no credibility or factual findings were made to resolve this issue and, to the extent the State appears to think Mr. Taylor was incredible in his testimony generally, it is bizarre to now claim that his testimony should be accepted over that of his lawyer, as the State does here.

The State also points out that Mr. Taylor omitted information concerning which questions counsel was unable to answer. (State's Br. at 21). Mr. Taylor does not believe this factual issue to be dispositive to the case, although it is worth pointing out that Mr. Taylor was making a decision without his lawyer being able to fully answer any questions he might have about the expected evidentiary picture.

The State then concedes that the court may have applied incorrect legal standards but asserts that this does not matter. (State's Br. at 21). They ask this Court to recognize implicit credibility findings wherever doing so would benefit their case. (States' Br. at 22).

Overall, however, it is clear that the record does not support the court's exercise of discretion. Mr. Taylor satisfied the low bar required of him at the plea withdrawal hearing and should therefore have been permitted to go to trial on these allegations.

CONCLUSION

Mr. Taylor therefore respectfully requests that this Court allow him to withdraw his plea.

Dated this 12th day of February, 2020.

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 3, 000 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 12th day of February, 2020.

Signed:

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Christopher P. August
Assistant State Public Defender