STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP001770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN ANTHONY TAYLOR,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

Defendant-Appellant-Petitioner, Brian Anthony Taylor, respectfully petitions this Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District I, dated July 28, 2020, which affirmed an order denying a motion for plea withdrawal in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner presiding. Mr. Taylor also seeks review of the order denying his motion for reconsideration dated August 14, 2020.

ISSUES PRESENTED

1. Mr. Taylor's pre-sentencing plea withdrawal motion was denied, in part, because of perceived prejudice to the State—in this case, the alleged degradation of the complaining witness's memory. The State made only conclusory allegations to support this contention, essentially arguing for a categorical standard that would not allow plea withdrawal in any case involving a young witness. The court of appeals affirmed, citing this Court's decision in *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199. *State v. Taylor*, Appeal No. 2019AP1770-CR, ¶ 17, unpublished slip op., (Wis. Ct. App. July 28, 2020). (App. 108).

Mr. Taylor asks this Court to accept review in order to reign in the court of appeals' overbroad reading of *Bollig* and require, at a minimum, that in determining "substantial prejudice," the circuit court assess the overall strength of the State's case (and

not just the degradation of one witness's memory) and, if memory degradation is an issue, require that the record contain proof as to that alleged infirmity.

2. The decision of the court of appeals rests on a provable misstatement of fact, that Mr. Taylor unreasonably delayed the outcome of this case by repeatedly requesting new counsel. Although Mr. Taylor moved for reconsideration in the court of appeals, that motion was summarily denied.

Because the court of appeals has discretion to grant or deny a motion for reconsideration, Mr. Taylor asks this Court to accept review and require that this discretionary decision be subject to its holdings in *State v. Scott,* 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141 and *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971), asserting that the court of appeals must provide a rational explication for their decision. He asks this Court to hold that the order of the court of appeals does not satisfy that standard.

3. Finally, if this Court accepts review, he asks the Court to consider the totality of the claim for pre-sentencing plea withdrawal, acknowledging that these subsidiary issues do not independently merit review.

CRITERIA FOR REVIEW

Under well-settled law, a defendant who pleads guilty or no contest is entitled to plea withdrawal under the permissive "fair and just reason" standard so long as that motion is filed prior to the sentencing hearing. *State v. Cooper*, 2019 WI 73, ¶ 15, 387 Wis. 2d 439, 929 N.W.2d 192; *see also State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). This "liberal rule," *Cooper*, 2019 WI 73, ¶ 15, "contemplates the mere showing of some adequate reason for the defendant's change of heart." *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

Of course, because our system of justice is an adversarial one, there is a countervailing consideration that the circuit court must also address in deciding whether to grant plea withdrawal—whether the State will be "substantially prejudiced" by withdrawal. *Canedy*, 161 Wis. 2d at 582. Substantial prejudice is usually understood in context of the State's ability to adequately prosecute the allegations against the defendant. *See State v. Nelson*, 2005 WI App 113, ¶ 18, 282 Wis. 2d 502, 701 N.W.2d 32. A child witness's memory loss can cause substantial prejudice, at least under some circumstances. *Bollig*, 2000 WI 6, ¶ 43.

In this case, the State made only conclusory allegations at the motion hearing, asserting that it would be prejudiced because "the child's memory undoubtedly fades." (36:3-4). The State made no case-specific allegations and, in fact, asserted that it was

not required to do so. (36:4). The court of appeals affirmed the denial of Mr. Taylor's motion, thereby endorsing a broad reading of this Court's ruling in *Bollig*. Accordingly, Mr. Taylor seeks review and asks this Court to place meaningful limits on its holding in *Bollig* so as to avoid the incidental creation of a new *per se* rule that will make plea withdrawal constructively unavailable for any defendant whose case involves a child witness.

Second, Mr. Taylor seeks review of the court of appeals' order denying his motion for reconsideration. As that motion pointed out, the court of appeals decision rests on a demonstrable misstatement of the facts in this case. Despite Mr. Taylor carefully articulating the controverted section of the court of appeals decision and explaining, with citation to the record, why that conclusion was in error, the court of appeals summarily denied Mr. Taylor's motion a few days after it was filed, using a standardized template.

"Whether to grant or deny a motion for reconsideration under Wis. Stat. (Rule) § 809.24 is an exercise of discretion." *Estate of Miller v. Storey*, 2017 WI 99, ¶ 26, 378 Wis. 2d 358, 371–72, 903 N.W.2d 759, 765. In exercising its discretionary authority, this Court has already held "the court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review." *Scott*, 2018 WI 74, ¶ 40. This Court is currently reviewing whether this standard applies to an order denying a petition for

leave to appeal. *State v. Jendusa*, Appeal No. 2018AP2357-LV.

Here no explication was offered, and no reasoning can be inferred from the summary denial. Mr. Taylor therefore asks this Court to accept review and to make the motion for reconsideration process meaningful. The Court should hold that its case law requiring an explicable reasoning process applies to the court of appeals when it grants or denies a motion for reconsideration. Because the court of appeals failed to satisfy this standard, the court of appeals therefore erroneously exercised its discretion.

Finally, if this Court grants review, Mr. Taylor seeks review of the subsidiary fact-based issues presented in his appeal concerning whether pre-sentencing plea withdrawal should have been granted.

STATEMENT OF RELEVANT FACTS

This case involves a report of sexual abuse by A.B. against her mother's then-boyfriend, Mr. Taylor. *Taylor*, Appeal No. 2019AP1770-CR, ¶ 2. (App. 102). The State delayed swift prosecution of this matter by requesting three adjournments, one because they failed to subpoena essential witnesses, one because they had a speedy trial calendared in another branch, and one because the assigned prosecutor opted to travel out-of-state for a conference. (76:3; 81:2; 22). But-for the State's multiple adjournment requests, the case could have been tried as early as May 22,

2017, based on appointed counsel's representations that he was ready and willing to litigate the matter on that date. (80:3).[1] While Mr. Taylor did have repeated changes of counsel, this did not meaningfully delay resolution of the case. For example, his first request for substitution was initially denied and then only granted "since" the circuit court was already agreeing to reschedule the trial at the State's request. (76:5).

His second lawyer was only on the case for a short period before an ugly scene with Mr. Taylor—in which counsel is alleged to have "cussed at" his client—forced Mr. Taylor to request new counsel. (78:3). Importantly, the court did not reset the trial date after allowing the withdrawal and Mr. Taylor's third lawyer subsequently informed the court that he would be ready to go on that date. (79:2). As set forth above, the State's second request for an adjournment derailed that opportunity for a speedy resolution.

Although Mr. Taylor subsequently made a speedy trial demand, (21), the circuit court told him his case was "not a speedy" and made no effort to honor that request. (84:3). When the case was rescheduled after the State's third adjournment, appointed counsel overlooked a scheduling conflict in his calendar, promptly contacted the court, and

[1] And perhaps even earlier, as the State adjourned the first trial date because it had failed to subpoena essential witnesses. (76:3).

proposed a new date only a few weeks after the scheduled trial date. (24:2). This was the first defense request for an adjournment.

Mr. Taylor never asked his third lawyer to withdraw, instead making what appears to have been a reasonable complaint to the Office of Lawyer Regulation regarding his attorney's failure to meet with him about the case. (84:3). His lawyer, not Mr. Taylor, then asked the court for an order permitting his withdrawal, alleging that the existence of an OLR complaint mandated this outcome. (84:2).

When new counsel was appointed, the State Public Defender neglected to inform her of the calendared trial date. (85:2). She asked for the second, and final, defense adjournment of roughly one month. (85:3).

On the date of the scheduled trial, Mr. Taylor received a new offer from the State that greatly reduced the charges and potential exposure. (87:2). According to his testimony and the averments of counsel, the plea was brought to Mr. Taylor while he was changing into his court clothes, discussed very briefly, and then immediately placed on the record. It is also undisputed that Mr. Taylor did not receive medication for a mental health disorder prior to entering that plea.

Accordingly, Mr. Taylor promptly filed a motion for pre-sentencing plea withdrawal, (35), and the circuit court held an evidentiary hearing on the motion. (92). At the conclusion of the hearing, the

State stipulated that Mr. Taylor had established a fair and just reason entitling him to plea withdrawal. (92:42-44). However, the State alleged that it would be substantially prejudiced by plea withdrawal, because: (1) the child's memory "undoubtedly fades" (36:3-4), (2) a letter from a social worker articulated that the criminal proceedings were difficult for the victim, even though she remained steadfast in her desire to cooperate (39), and (3) "The state has been ready for trial on six prior dates. And we've drug this girl through the system preparing her for trial every time."[2] (92:43).

The court, the Honorable Jeffrey A. Wagner presiding, then entered a confusing order, appearing to apply the wrong legal standard. (92:44). (App. 115) The court also relied on a finding that the case had been ready for trial on seven different occasions and that Mr. Taylor had caused unreasonable delay. (92:44). (App. 115). The court asserted that the victim's memory would be impacted by further delay and that her "development" would also be harmed. (92:45). (App. 116).

Mr. Taylor appealed, and the court of appeals affirmed. *Taylor*, Appeal No. 2019AP1770-CR, ¶ 18. (App. 108). The court of appeals concluded "that the circuit court properly exercised its discretion in

[2] Based on its three prior adjournments, including one that was sought because the State did not subpoena witnesses, this is a concerning factual misstatement.

determining that there would be substantial prejudice to the State if Taylor were to withdraw his plea." *Id*. ¶ 13. (App. 107). Delays caused by Mr. Taylor (according to the court of appeals) in conjunction with the victim's young age, adequately supported the circuit court's order, notwithstanding its obvious confusion as to the governing law. *Id*., ¶ 17. (App. 108).

Mr. Taylor then filed a motion for reconsideration, focusing on the court of appeals' assertion that "The record also reveals that Taylor's case was scheduled for trial six times, but that his dissatisfaction with multiple lawyers led to multiple delays spanning nearly two years." *Id*., ¶ 16. (App. 107-108). Mr. Taylor argued that, at best, this represents an incomplete and misleading picture of the pretrial proceedings. At worst, it is a flat-out misstatement of the available record evidence.

Mr. Taylor's motion was filed on August 10, 2020. On August 14, 2020, the court of appeals—utilizing a file labeled "standard MRC denial"—summarily denied the request for reconsideration. (App. 110-111). No explanation was offered.

This petition follows.

ARGUMENT

I. This Court should grant review and hold that a witness's young age, in conjunction with generalized allegations of memory deterioration, does not create *per se* substantial prejudice to the State, especially when the child's statements are admissible through other means.

In their submissions to the circuit court, the State asked the court to take "note" of "the age of the case and the age of the child victim." (36:3). After falsely informing the court that "The only reason this case has taken so long to come to this stage is because of the Defendant himself, and his multiple motions for new attorneys[,]" the State went on to argue that "the child's memory undoubtedly fades." (36:3-4). The State flatly asserted that it was not required to provide "actual evidence of the victim's current mental state or ability to recall the events." (36:4). The circuit court did not make detailed findings of fact and instead appears to have merely reiterated this conclusory justification for denial of the motion. (92:45). (App. 116).

The court of appeals affirmed, citing this Court's decision in *Bollig*. *Taylor*, Appeal No. 2019AP1770-CR, ¶ 17. (App. 108). In *Bollig*, this Court confronted a challenge to the lower court's denial of a motion for pre-sentencing plea withdrawal involving a defendant who filed multiple motions seeking plea withdrawal after agreeing to plead to a

reduced charge of child sexual assault. *Bollig*, 2000 WI 6, ¶ 3-9. Notably, the Court first held that it was the State's burden—and not Bollig's—to prove the existence of substantial prejudice. *Id.*, ¶ 34. Citing "the record," this Court then concluded that the circuit court appropriately exercised its discretion when it found that Bollig's "numerous dilatory tactics would adversely affect the child victim's ability to recall her testimony and the events underlying the offense." *Id.*, ¶ 42. While the Court did not articulate why this factual conclusion was reasonable, this is perhaps understandable given the deferential standard of review for such determinations. *Id.*, ¶ 41.

This Court should accept review and establish that *Bollig* does not support the State's position in the circuit court—that conclusory allegations of memory degradation, without more, will conclusively rebut the defendant's "fair and just" reason for plea withdrawal. In doing so, Mr. Taylor seeks four conceptually linked holdings.

First, this Court should reaffirm that *Bollig* still imposes a burden on the State to prove the existence of substantial prejudice and that this burden requires more than merely conclusory allegations. Defendants seeking relief in Wisconsin courts have long been scolded for reliance on "merely conclusory" allegations, which are well-established as failing to meet the affirmative pleading requirements to even obtain a hearing on otherwise colorable legal claims. *See State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). It should not be unduly

burdensome to impose similar requirements on the State.

Second, this Court needs to reiterate that if memory degradation is to be relied on for proof of substantial prejudice, the discretionary standard requires that "the court's determination was made upon the facts of the record." *Bollig*, 2000 WI 7, ¶ 41. Here, the court of appeals claims to have applied this rule. *Taylor*, Appeal No. 2019AP1770-CR, ¶ 17. (App. 108). Yet, the actual record is devoid of facts or inferences which would support the circuit court's conclusion. While the court of appeals is certainly empowered to search the record to support an otherwise deficient explication, *McCleary*, 49 Wis. 2d at 282, the facts need to be present in the record itself. At the very least, this should require the reviewing court to articulate how and why it believes the record to support the lower court's order. In turn, this appears to require more than merely conclusory averments, as offered in this case.[3]

Third, this Court should also hold that the *Bollig* "rule" must be considered in context of the entire case. The overriding focus must be on the overall strength of the State's case, after factoring in

[3] Although the State cited to this Court's decision in *State v. Lopez*, 2014 WI 11, 353 Wis. 2d 1, 843 N.W.2d 390 as conclusively establishing that no such requirement exists, *Lopez* is superficially distinguishable and involves an application of facts to law that is much more in-depth than what transpired in this case.

the alleged loss of evidence occasioned by "delay." *Nelson*, 2005 WI App 113, ¶ 21. The proper inquiry is not whether, in a vacuum, the child's testimony will be weakened by the passage of time, but whether the State retains an effective ability to adequately prosecute their case but-for any harm caused by such delay. Here, for example, there is a forensic interview of the child which appears to be admissible. (2:1). The court should have considered the existence of that recording, in conjunction with the ability of the State to call as witnesses the law enforcement officers who participated in the investigation, in determining whether damage to the victim's memory—if such damage really exists—would "substantially" prejudice the State's case.

Fourth, this Court must dissuade lower courts from creating an inflexible, *per se* rule by insisting on the original linkage set forth in *Bollig*—that degradation of memory, to be a relevant consideration, must be linked back to the defendant's dilatory tactics. *Bollig*, 2000 WI 7, ¶ 41. In other words, merely incidental memory loss or damage to the State's case caused by their own delays should not be a basis for denying a defendant's otherwise valid motion for pre-sentencing plea withdrawal.

II. This Court should accept review and hold that the discretionary denial of a motion for reconsideration by the court of appeals must be accompanied by a meaningful explication.

Under Wis. Stat. § 809.24, a party believing that the court of appeals has erred in restating the facts or law in its decision has the right to file a motion for reconsideration within 20 days of the date the written decision is issued. As the Judicial Council Note to Supreme Court Order No. 00-02 asserts, "Reconsideration is intended for those rare cases in which the court of appeals overlooks or misapprehends relevant and material facts or law, not for cases in which a party simply disagrees with the court of appeals."

The motion for reconsideration is thus an important mechanism which allows for the prompt correction of flawed decisions. It is especially important in our system of appellate review, where review by this Court is comparatively rare (of the hundreds of cases heard each year by the court of appeals, this Court accepts only a fraction of the petitions for review which are ultimately filed). More importantly, this Court has made clear that it is not in the business of error-correction; the Court's clearly established institutional role is law development. *See State v. Gajewski,* 2009 WI 22, ¶ 11, 316 Wis. 2d 1, 762 N.W.2d 104. Thus, the party who loses in the court of appeals based on an erroneous statement of fact or law likely does not qualify for grant of a petition for review; their best shot at obtaining redress is the reconsideration procedure. Accordingly, that procedure needs to be meaningful and not just a *pro forma* exercise.

The grant or denial of a motion for reconsideration is left to the discretion of the court of appeals. *Storey*, 2017 WI 99, ¶ 26. In exercising its discretion, this Court has held that "the court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review." *Scott*, 2018 WI 74, ¶ 40. Mr. Taylor is asking this Court to accept review and to hold that this applies equally to an order denying a motion for reconsideration.

Accordingly, the order of the court of appeals must be supported by "evidence that discretion was in fact exercised." *McCleary*, 49 Wis. 2d at 277. Ideally, this should be demonstrated via a reasoned explication which makes clear to the reader why the decision at issue is being reached. Given the complexity of most appellate matters, Mr. Taylor believes that a formal explanation—even a brief one—will ordinarily be required. The explanation need not be as robust as a formal written decision, however. For example, a defendant who alleges that certain facts have been misconstrued may have their motion denied with an explanation that the controverted facts, even when taken into consideration, do not impact a harmless error analysis given other evidence in the record.

Importantly, asking the court of appeals to adequately explain its reasoning will not create an onerous burden, as reconsideration motions are relatively rare. Moreover, in counsel's experience, the court of appeals customarily responds, at length, to

procedural motions with detailed court orders that evince a more robust process of reasoning. Asking the court of appeals to issue a few dozen extra such orders each year will not handicap the orderly administration of justice.

At the same time, Mr. Taylor concedes that an explanation may not be required in each case, although Mr. Taylor believes those circumstances to be rare. For example, if the motion to reconsider is obviously defective, does not follow the rules of Wis. Stat. § 809.24, or rests upon a mistaken view of the facts or law, then the court of appeals' reasoning will be apparent from the record, meaning that the court of appeals will not therefore be overburdened by having to respond at length to plainly frivolous or defective motions.

Requiring that the court of appeals be held to account in denying a motion to reconsider will assist the administration of justice in our state and ensure that intellectually rigorous and factually complete opinions are disseminated by what is, in practical terms, the court of last resort for most litigants.

Finally, review is appropriate given *State v. Jendusa*, Appeal No. 2018AP2357-LV, where the State has asked this Court to apply a similar discretionary framework to an order denying a petition for leave to appeal. Mr. Taylor notes that, based on a review of the briefs, both parties appear to be in agreement that more explication, and not less, ought to be required of the court of appeals. Just as

the appellant in *Jendusa* is clearly dissatisfied by "single sentence rote orders" denying a petition for leave to appeal, (Appellant's Br. at 37), so too is Mr. Taylor aggrieved by a practice of summarily denying motions to reconsider in a similar fashion. Like the appellant in *Jendusa*, Mr. Taylor believes that a rule requiring more of the court of appeals will avoid the appearance of arbitrariness and go a long way in ensuring confidence in the appellate process itself. After all, a careful reader who spots a factual error deserves more than a mere "no," especially when significant effort has been expended under a tight deadline to succinctly and respectfully bring that matter to the attention of the court of appeals.

Here, Mr. Taylor received a summary denial, utilizing a "standard" template, that does not engage with his arguments or explain why the motion is being denied. Mr. Taylor is therefore left to guess at why his motion was not granted. Is it because the court of appeals stands by its obviously mistaken description of the facts? Does the court of appeals believe that the deferential standard of review still supports their affirmance? Or has Mr. Taylor ascribed undue weight to this factual assertion within the scope of its overall decision? Based on the court of appeals' scant reasoning, we will never know. This is clearly an erroneous exercise of discretion under *Scott* and, accordingly, Mr. Taylor asks this Court to accept review.

III. Finally, if this Court grants review, Mr. Taylor asks the Court to examine the remaining aspects of the plea withdrawal motion on the merits.

While the court of appeals decision largely rested on a determination of substantial prejudice in terms of memory loss for the victim, the case presents additional subsidiary questions, including the weight to be given to "delay" attributable to Mr. Taylor, whether the circuit court adequately assessed credibility at the hearing, and whether the circuit court's discretionary decision is sound in light of the available record. While Mr. Taylor acknowledges that these issues do not independently merit review, he asks this Court to allow the full scope of the circuit court's discretionary decision to be litigated should it accept review.

CONCLUSION

For the reasons stated above, Mr. Taylor asks that this Court grant review of the court of appeals' decision as well as their order denying the motion for reconsideration.

Dated this 10th day of September, 2020.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,075 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 10th day of September, 2020.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender

APPENDIX

INDEX
TO
APPENDIX