STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP2151-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARDEZ HARRISON,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLES DAVID A. HANSHER AND WILLIAM S. POCAN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Did Chardez Harrison demonstrate a manifest injustice entitling him to plea withdrawal because his trial counsel was ineffective for not filing a suppression motion based on Harrison's ambiguous response to police that he did not want to make a statement but agreed to answer questions?

I. Did the circuit court properly deny Harrison's motion to withdraw his guilty pleas without a *Machner* hearing, because the record conclusively demonstrated that Harrison's counsel was not deficient and Harrison was not prejudiced?

The circuit court answered: Yes. The record conclusively demonstrated that Harrison's counsel was not ineffective because Harrison did not unambiguously invoke his constitutional right to remain silent, he agreed to answer the detective's questions during the first interrogation without objection, and he again waived his right to remain silent before the second interrogation by a different detective, during which he confessed.

This Court should affirm.

II. By entering his guilty pleas, did Harrison forfeit his substantive claim that his statements to police should have been suppressed?

The circuit court did not answer this question.

This Court should answer: Yes. This Court has the discretion to apply the guilty plea waiver rule to decline to consider Harrison's claim that his trial counsel was ineffective for not filing a motion to suppress. By admitting his guilt and entering his plea to the charges, Harrison forfeited his claim that his statements to police should have been suppressed and that his counsel's failure to file such a motion resulted in a manifest injustice entitling him to withdraw his guilty pleas.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. The issues presented can be decided based on well settled law, the record in this case, and the briefs of the parties.

INTRODUCTION

After a string of carjackings and attempted armed robberies over the course of one night, Harrison confessed to police and pleaded guilty to two counts of armed robbery and one count of possession of a firearm by an adjudicated delinquent. He seeks to withdraw his pleas based on an alleged manifest injustice: that his counsel was ineffective for not filing a motion to suppress his statements to police under the Fifth Amendment. The court denied his motion without a *Machner* hearing, after hearing testimony from the detectives who interrogated Harrison, holding that a suppression motion would not have been successful because the record conclusively demonstrated that he did not unambiguously invoke his right to remain silent.

The circuit court was correct. Harrison was not entitled to a *Machner* hearing on his claim that a manifest injustice entitled him to withdraw his plea. Before the first interrogation, Harrison waived his right to remain silent and, although he declined to make a statement, he agreed to answer the detective's questions. Indisputably, Harrison again waived his right to remain silent before the second interrogation by a different detective, during which he confessed to the crimes. Harrison did not sufficiently allege that he would not have pleaded guilty but-for his counsel's decision to not file a motion to suppress. Moreover, the record conclusively demonstrates that a suppression motion would not have been successful because Harrison's counsel did not

perform deficiently, and Harrison was not prejudiced as a result of his counsel not filing a motion to suppress.

Alternatively, this Court has the discretion to apply the guilty plea waiver rule to decline to address Harrison's ineffective assistance claim because, when he pled guilty, Harrison forfeited his claim that his statements to police should be suppressed.

STATEMENT OF THE CASE

Criminal charges. Between 11:00 p.m. and 2:30 a.m. on February 11–12, 2016, Harrison and his companions participated in one attempted armed carjacking that was interrupted (R. 1:2–3); two armed carjackings, one where Harrison was the gunman, and both involving robbing victims and stealing their cars (R. 1:3–4); and one attempted armed robbery as the victim was walking down the street (R. 1:4–5). Later on February 12, at approximately 11:30 p.m., officers identified two stolen vehicles in an alley and saw two people get into one them, a Chevrolet Malibu. Police followed the Malibu and activated the squad car lights; the driver of the car attempted to flee, accelerating to 50 miles per hour on the city streets. The occupants abandoned the vehicle and officers arrested Harrison, who was the driver. (R. 1:5.) After his arrest, during an interview by Detective Daniel Priewe, Harrison answered questions about the fleeing incident, telling Priewe that he had purchased the Malibu knowing it "was probably stolen because it was so cheap," that he saw the squad car lights, that he knew that police were behind him, and that he "ultimately stopped because the police were yelling at him." (R. 1:5–6.)

The State charged Harrison with two counts of attempted armed robbery as party to a crime; two counts of armed robbery as party to a crime; and one count of possession of a firearm by an adjudicated delinquent. (R. 1:1–2; 6.)

Plea and sentencing. Harrison agreed to plead guilty to two counts of armed robbery and one count of possession of a firearm by an adjudicated delinquent, signing a guilty plea and waiver of rights form and an addendum saying that he understood by entering his plea that he was giving up his "right to challenge the constitutionality of any police action," including "taking a statement." (R. 10; 11.) Harrison entered his plea to the three counts and the attempted armed robbery counts were dismissed and read in. (R. 80:13–15.)

During the plea colloquy, Harrison acknowledged that he had gone over the plea waiver forms with his counsel before he signed them and that he understood the rights he was giving up rights by entering his plea. (R. 80:15–16.) Harrison stated that he understood that he was giving up his right to bring a motion to suppress evidence or statements that he may have made. (R. 80:18.) Harrison admitted his guilt, telling told the court that he was pleading guilty because he was guilty. (R. 80:19.) The court found that Harrison was entering his pleas "freely, voluntarily, and intelligently with full understanding of the nature of the offenses charged, the maximum possible penalties, and all the rights being given up by pleading guilty," accepted his guilty pleas, and found him guilty of two counts of armed robbery and one count of possession of a firearm by an adjudicated delinquent. (R. 80:22.)

The court sentenced Harrison to concurrent sentences on one armed robbery count and the possession of a firearm by an adjudicated delinquent count, consecutive to the sentence on the other armed robbery count, for a total sentence of 14 years of initial confinement and 6 years of extended supervision, and entered a judgment of conviction. (R. 83:60; 22.)

Postconviction motion for sentence modification and plea withdrawal based on ineffective assistance. Harrison filed a postconviction motion seeking sentence

modification or, alternatively, arguing that that he was entitled to plea withdrawal because his counsel was ineffective for not asking for a restitution hearing and for not filing a motion to suppress his statements to police, and requested a *Machner*[1] hearing on his ineffective assistance of counsel claims. (R. 46.) After a motion hearing on Harrison's request for sentence modification and ability to pay restitution (R. 81), the court modified his sentence on count 2 to 6 years of initial confinement and 3 years of extended supervision and declined to reduce his restitution obligation (R. 66). The court entered an amended judgment of conviction. (R. 71).

The court held a hearing on Harrison's motion for plea withdrawal. (R. 84.) To address the issue of whether Harrison's counsel was ineffective for not filing a suppression motion, the court heard testimony from the police officers who interviewed Harrison after his arrest, but did not hold a full *Machner* hearing. (R. 84:3–5.) Detective Priewe testified that he conducted the first in-custody interview of Harrison after his arrest at around 3:39 a.m. on February 13, 2016. (R. 84:13.) Priewe woke Harrison up in his cell, asked "him if he wanted to do an interview" and, although Harrison appeared "somewhat sleepy" and told Priewe that he would like to take a nap, he "agree[d] to do that interview." (R. 84:14.) Priewe determined that Harrison was alert, understanding, and responsive, so Priewe read him his *Miranda*[2] rights from a "department-issued card" and then "interviewed him afterwards." (R. 84:14–15.)

Priewe asked Harrison whether "he was willing to answer questions or make a statement" and Harrison responded, "I don't wanna make a statement." (R. 84:15–16.)

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[1] *State v. Machner,* 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979).

[2] *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

For "clarification," Priewe asked Harrison if he was "willing to answer questions" and Harrison responded by asking "what are the questions?" (R. 84:16.) Priewe asked Harrison to clarify "if he wanted to answer questions" because Harrison's initial "response to if he was willing to make a statement seemed to me like he did not wanna make a statement but he would answer questions" (R. 84:22.)

After Harrison asked., "what are the questions," Priewe began asking Harrison "pedigree questions" about Harrison's "information and address" and Harrison responded. (R. 84:16–17.) Priewe then "continued with the interview" and Harrison answered his questions for approximately one hour. (R. 84:17.) During this interview, Harrison did not confess and denied involvement in the armed robberies and possession of a firearm. (R. 84:22).

Detective Michael Slomczewski testified that he was the second law enforcement officer to interview Harrison after his arrest on February 13, 2016. (R. 84:7.) During that interview, Harrison waived his *Miranda* rights and gave a full statement confessing to the armed robberies. (R. 84:7–8.)

Court decision and appeal. After hearing this testimony and reviewing the transcript of the Priewe's interview with Harrison, the court determined that Harrison's right to remain silent was not violated and denied Harrison's motion for plea withdrawal based on his claim that his counsel was ineffective for not filing a motion to suppress. (R. 74; 85:4–10, A-App. 5–11.)

Harrison appeals. (R. 75.)[3]

[3] Harrison's notice of appeal purports to appeal from the judgment of conviction, the order granting his motion for sentence modification in part, and the order denying his motion for plea withdrawal. (R. 75.) However, Harrison's only claim in this appeal is that the court improperly denied his motion for plea withdrawal

(continued on next page)

STANDARD OF REVIEW

Motion to withdraw plea based on ineffective assistance of counsel. 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 when it does not allow plea withdrawal after a defendant has proved a denial of a constitutional right. *Id.* ¶ 21

"Ineffective assistance of counsel claims 'present mixed questions of fact and law.'" *State v. Reinwand*, 2019 WI 25, ¶ 18, 385 Wis. 2d 700, 924 N.W.2d 84 (citation omitted). The circuit court's findings of fact are upheld unless they are clearly erroneous. *Id.* "However, whether counsel's performance was deficient and whether a defendant was prejudiced thereby" are questions of law that this Court decides de novo. *Id.* (citation omitted).

Denial of ineffective assistance motion without a Machner hearing. The circuit court must hold an evidentiary hearing on a motion alleging ineffective assistance of counsel only when the motion alleges sufficient facts that, if proven true, would establish that the defendant is entitled to relief. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. Whether a motion alleges sufficient facts on its face is a question of law to be reviewed *de novo* on appeal. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Bentley,* 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996). However, the decision to grant or deny a hearing is left to the circuit court's discretion where "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is

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alleging that his trial counsel was ineffective for not filing a motion to suppress without holding a *Machner* hearing.

not entitled to relief." *State v. McAlister*, 2018 WI 34, ¶ 26, 380 Wis. 2d 684, 911 N.W.2d 77.

Application of guilty plea waiver rule. Whether a defendant's guilty plea relinquished his right to appeal is a question of law that this Court reviews de novo. *See State v. Kelty*, 2006 WI 101, ¶ 13, 294 Wis. 2d 62, 716 N.W.2d 886.

ARGUMENT

I. Harrison was not entitled to a *Machner* hearing on his motion to withdraw his guilty pleas based on a manifest injustice that his counsel was ineffective for not filing a motion to suppress.

The question on appeal is whether Harrison was entitled to a *Machner* hearing on his claim that his counsel was ineffective for not filing a motion to suppress his statements to police, and that this ineffective assistance was a manifest injustice entitling him to withdraw his guilty plea. The record conclusively shows that Harrison is not entitled to relief. Harrison has failed to sufficiently allege that his counsel was ineffective for not filing a suppression motion, and the record conclusively demonstrates that such a motion would not have been successful. Thus, Harrison is not entitled to a hearing on his claim for plea withdrawal.

A. A motion to withdraw a guilty plea may be based on allegations of ineffective assistance, but a court has discretion to deny the motion without a *Machner* hearing under certain circumstances.

"A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." *Bentley*, 201 Wis. 2d at 311. This standard, "which is higher than the 'fair and just' standard before sentencing, 'reflects the State's interest in the finality of convictions and reflects the fact that the presumption of

innocence no longer exists.'" *State v. Taylor,* 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W. 2d 482 (citation omitted).

One way that a defendant may demonstrate a manifest injustice is by establishing that he received ineffective assistance of counsel. *See Bentley*, 201 Wis. 2d at 311; *Taylor,* 347 Wis. 2d 30, ¶ 49. In order to show such a manifest injustice entitling a defendant to plea withdrawal, the defendant must prove that his trial counsel performed deficiently, and that those deficiencies prejudiced his defense. *State v. Villegas*, 2018 WI App 9, ¶ 23, 380 Wis. 2d 246, 908 N.W.2d 198; *see Strickland v. Washington*, 466 U.S. 668, 687 (1984.) The United States Supreme Court recently restated that this interest in finality has "special force" where a defendant seeks to withdraw a guilty plea on *Strickland* grounds: "Surmounting *Strickland's* high bar is never an easy task, and the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (citations omitted).

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.* Failure to raise a meritless issue is not deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

Establishing prejudice under *Strickland* is also difficult. To do so, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. In the context of a plea withdrawal, the defendant must show a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Bentley*, 201 Wis. 2d at 312. "As 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.

Both prongs of Strickland must be proved by clear and convincing evidence. *Taylor*, 347 Wis. 2d 30, ¶ 24. But, if this Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

A postconviction motion alleging ineffective assistance of counsel "does not automatically trigger" a *Machner* hearing. *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157. A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *Bentley*, 201 Wis. 2d at 309–10; *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). If the defendant fails to raise facts in the motion sufficient to entitle him to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98.

B. A defendant's invocation of the right to remain silent must be unequivocal and unambiguous.

A suspect's Fifth Amendment right to remain silent includes two separate protections: (1) the right to remain silent prior to any questioning and (2) the right to cut off questioning. *State v. Hampton*, 2010 WI App 169, ¶ 46, 330 Wis. 2d 531, 793 N.W.2d 901 (citing *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), and *Michigan v. Mosley*, 423 U.S. 96, 103 (1975)). To avail him or herself of either protection, the suspect must "unequivocally" invoke the right to remain

silent. *State v. Markwardt*, 2007 WI App 242, ¶ 36, 306 Wis. 2d 420, 742 N.W.2d 546 "If the suspect does not unambiguously invoke his or her right to remain silent, the police need not cease their questioning of the suspect." *State v. Ross*, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996). Indeed, "the police need not even ask the suspect clarifying questions" if he or she makes an ambiguous statement regarding the right. *Id.*

To unequivocally invoke the right, "[a] suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent." *Ross*, 203 Wis. 2d at 78. The suspect's articulation of her desire to remain silent or cut off questioning must be "sufficiently clear[] that a reasonable officer in the circumstances would understand the statement to be an invocation of the right to remain silent." *Id.* (citations omitted). When "a suspect's statement is susceptible to 'reasonable competing inferences' as to its meaning, then the 'suspect did not sufficiently invoke the right to remain silent.'" *State v. Cummings*, 2014 WI 88, ¶ 51, 357 Wis. 2d 1, 850 N.W.2d 915 (quoting *Markwardt*, 306 Wis. 2d 420, ¶ 36).

"There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). Namely, the requirement "results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity. *Id.* (citing *Davis v. United States*, 512 U.S. 452, 458–59 (1994)). "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'" *Id.* at 382 (citing *Davis*, 512 U.S. at 461). "Suppression of a voluntary confession [under those]

circumstances would place a significant burden on society's interest in prosecuting criminal activity." *Id.*

C. The circuit court properly exercised its discretion to deny Harrison's motion for plea withdrawal without a *Machner* hearing because he failed to allege sufficient facts showing that he was prejudiced, and the record conclusively demonstrated that a motion to suppress would not have been successful.

This Court should conclude, as did the circuit court, that Harrison was not entitled a *Machner* hearing on his claim that he is entitled to withdraw his plea because his counsel provided ineffective assistance by not filing a motion to suppress his statements to Detective Priewe and Detective Slomczewski. Harrison asks this Court to "reverse the circuit court's order holding that the evidence obtained during" both interrogations "would not have been suppressed," and "remand the case for a full *Machner* hearing on Harrison's ineffective assistance of counsel claim." (Harrison's Br. 23.) Harrison is not entitled to this relief. Harrison has failed to sufficiently allege that he was prejudiced because he would have gone to trial if his counsel had filed a suppression motion. Based on the record, a suppression motion would not have been successful because he did not unambiguously invoke his right to remain silent. Thus, Harrison has not shown that he suffered a manifest injustice as a result of his trial counsel not making such a suppression motion that entitles him to withdraw his guilty pleas.

1. Harrison failed to allege that he would not have pled guilty and would have gone to trial.

In order to obtain a *Machner* hearing on his motion, Harrison had to allege sufficient facts entitling him to relief. *Bentley*, 201 Wis. 2d at 309–10; *Nelson,* 54 Wis. 2d at 497–98. "[T]o satisfy the 'prejudice' requirement [under *Strickland*], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Bentley*, 201 Wis. 2d at 312. Harrison failed to sufficiently allege that he was prejudiced, especially in light of the "strong societal interest in finality" of guilty pleas. *Lee,* 137 S. Ct. at 1967.

In his postconviction motion, Harrison makes the conclusory allegation that if the court granted his request for an evidentiary hearing, "counsel anticipates Mr. Harrison would testify that, had trial counsel successfully suppressed this evidence, Mr. Harrison would not have pled guilty but would have gone to trial." (R. 46:20.) Harrison cannot rely on a conclusory allegation that he would have gone to trial if his counsel had filed a motion to suppress, hoping to supplement at an evidentiary hearing. *See Bentley*, 201 Wis. 2d at 313–14. And counsel is not ineffective for failing to pursue challenges that have no merit. *See State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W. 2d 110. Harrison insufficiently pled prejudice in his plea withdrawal motion. As explained below, because a suppression motion would not have succeeded, Harrison is unable to show that his counsel's performance was deficient or that he was prejudiced and suffered a manifest injustice as a result of his trial counsel not moving to suppress his statements.

2. Harrison's counsel was not deficient and Harrison was not prejudiced by his counsel not filing a suppression motion because it would not have succeeded.

Harrison argues that his counsel was ineffective for not filing a motion to suppress because, after receiving his *Miranda* warnings, he invoked his right to remain silent after Detective Priewe asked him if he was willing to make a statement or answer questions, by responding, "I don't wanna make no statement." (Harrison's Br. 13–20.) However, the record, including the transcript Harrison's interview with Priewe and Priewe's testimony at the postconviction hearing, conclusively demonstrates that Harrison did not unequivocally invoke his right to remain silent. Thus, his counsel was not deficient for not filing a meritless motion to suppress and Harrison was not prejudiced.

The transcript of Priewe's interview outlines that Priewe read Harrison his constitutional rights, including the right to remain silent, asked Harrison if he understood, and Harrison responded "yeah" that he heard them and understood them. (R. 54:1–2, A-App 13–14.) Priewe then asked Harrison if he was "now willing to answer some questions or make a statement," and Harrison responded, "I don't want to make no statement right now." (R. 54:2, A-App. 14.) Priewe asked a clarification question: "Will you answer some questions that I have for you?" and Harrison responded, "what's the question?" (R. 54:3, A-App. 15.) Priewe then asked Harrison a series of "pedigree," informational questions, which Harrison answered without objection. (R. 54:3–13, A-App. 15–25.) Next, Priewe asked Harrison, "Tell me about what happened tonight." (R. 54:13, A-App. 25.) Harrison described that he was driving a Chevy Malibu and saw police lights, did not stop, but instead continued driving 50 or 60 miles per hour until "something happened to the tire.

(R. 54:13, A-App. 25.) Then everybody just jumped out and ran." (R. 54:13, A-App. 25.) Harrison continued to answer Priewe's questions, admitted that he fled from police, but denied that he was involved in any burglaries or possessed a firearm. (R. 54:15–47, A-App. 27–59.)

Harrison argues that he "clearly invoked his right to remain silent when he told Detective Priewe 'I don't want to make no statement right now." (Harrison's Br. 12.) Harrison's assertion that this was a "clear" invocation of his rights is belied by the transcript of the interview and Priewe's testimony. Both conclusively show that, in response to Priewe's two-part question whether he wanted to make a statement or was willing to answer questions, Harrison refused to make a statement but then asked, "what's the question," and answered Priewe's questions without objection. (R. 54:3–47, A-App. 15–25; 84:16–22.) Harrison's responses to Priewe's two-part question were "susceptible to 'reasonable competing inferences'" and thus "did not sufficiently invoke the right to remain silent." *Cummings,* 357 Wis. 2d 1, ¶ 51 (citation omitted.)

Cummings is particularly instructive. In that case, the co-defendant argued that his two statements made together to the officer—"I don't want to talk about this. I don't know nothing about this"—were an unequivocal invocation of his right to remain silent. *Cummings*, 357 Wis. 2d 1, ¶ 60. The supreme court held that standing alone, the statements might constitute an invocation of the right to remain silent, but "[i]n the full context of his interrogation," these "statements were not an unequivocal invocation of the right to remain silent." *Id.* ¶ 61.

The statements were ambiguous for several reasons. First, the statements were contrasting because the second statement "I don't know nothing about this," proclaimed innocence, which was "incompatible with a desire to cutoff questioning." *Cummings*, 357 Wis. 2d 1, ¶ 64. Second,

indicative of "the apparent confusion" caused by these contrasting answers, the officer asked a clarifying question: "Do you want to tell me about [the robberies]?" In response, the defendant "again proclaimed his innocence, stating: 'I don't know nothing about no robbery, see that's what I'm saying! I don't rob people.'" *Id.* ¶ 65. Third, the defendant's additional statements "indicated a continued willingness to answer questions." *Id.* ¶ 66. Moreover, the court noted that a defendant could "selectively waive his *Miranda* rights, deciding to respond to some questions but not others," which does "not assert an overall right to remain silent." *Id.* ¶ 67 (quotations and citations omitted.) The court concluded that "the mere fact that [the defendant's] statements *could* be interpreted as proclamations of innocence or selective refusals to answer questions [was] sufficient to conclude that they [were] subject to 'reasonable competing inferences' as to their meaning." *Id.*¶ 68 (*citing Markwardt*, 306 Wis. 2d 420, ¶ 36.)

Cummings is on all fours with this case. As in that case, here, Harrison's response to Priewe's questions about making a statement or answering questions proclaimed that he did not want to make a statement and his second, contrasting response of "what's the question" was "incompatible with a desire to cut off questioning." *Cummings*, 357 Wis. 2d 1, ¶ 64. As did the officer in *Cummings*, Priewe demonstrated his "apparent confusion" when Harrison said he did not want to make a statement, by asking for clarification on whether Harrison was willing to answer questions and Harrison's response indicated his "willingness to answer questions." *Id.* ¶¶ 65–66. Thus, Harrison's two responses, one declining to make a statement and the other affirmatively agreeing to answer questions, did "not assert an overall right to remain silent" and were subject to "reasonable competing inferences as to their meaning." *Id.* ¶¶ 67–68

On appeal, Harrison relies on this Court's unpublished decision, *State v. Wiegand*, 2012 WL 371972, No. 2011AP939-CR (Wis. Ct. App. Feb. 7, 2012) (unpublished), to support his claim that he "unambiguously invoked his right to remain silent." (Harrison's Br. 14–15.) Not only is *Wiegand* not binding authority, it does not help Harrison. In that case, the suspect succinctly stated, "I don't want to say anything more," yet the detective did not terminate his questioning. *Wiegand*, 2012 WL 371972, ¶ 4. In this case, Harrison responded to Priewe asking him if he wished to make a statement that he did not want to make a statement, and then responded to Priewe's clarification question asking if he would be willing to answer questions, "what's the question?" (R. 54:3, A–App. 15.) By these two separate responses, Harrison did not unambiguously invoke his right to remain silent.

Harrison also relies on the federal district's court's decision on habeas review in *Saeger v. Avila*, 930 F. Supp. 2d 1009 (E.D. Wis. 2013). (Harrison's Br. 16–17.) In *Saeger,* a suspect cut off an interrogation that was in progress, saying he had nothing "more to say to you. I'm done. This is over" *Id.* at 1011. This Court concluded that in the context of the interrogation, "it was reasonable for the detectives to conclude that his statement was merely a fencing mechanism to get a better deal." *Id.* at 1012–13. The federal district court disagreed, finding that Saeger's words were unambiguous and sufficient to "meaningfully invoke the right to remain silent." *Id*. at 1016.

Saeger is distinguishable. Saeger's words were not ambiguous on their face when he stated he had nothing "more to say," he was "done," and "this is over." *Saeger* 930 F. Supp. 2d at 1011. In contrast, Harrison's response to Priewe asking him whether he wished to make a statement or was willing to answer questions was facially ambiguous: Harrison responded that he did not want to make a statement, an ambiguous response to the two-part question that prompted

Priewe's follow-up to clarify whether Harrison was willing to answer questions, to which Harrison responded "what's the question?" (R. 54:3, A-App. 15.) Harrison then answered all of Priewe's questions without any objection, but never made a statement or confessed to the crimes during this first interrogation. (R. 54:3–47, A-App. 15–59.)

Harrison's argues that he "unequivocally respond[ed] that he did not want to make a statement," that he should not also have to "say that he did not want to answer questions," and that the court "improperly put the burden on Harrison to repeatedly invoke his rights," because he "should not have had to tell Detective Priewe a second time that he would not waive his right to remain silent." (Harrison's Br. 17–18.) Harrison also claims that Priewe's "compound question" required Harrison "to repeatedly invoke [his] rights, that "his negative response" to making a statement should have required Priewe to cease questioning, and that officers should not be able to "purposefully use compound questions" to require multiple invocations of Miranda rights. (Harrison's Br. 19–20.)

Harrison's arguments are meritless and do not entitle him to a *Machner* hearing on his ineffective assistance claim. As shown above, the record conclusively demonstrates that Harrison declined to make a statement and did not make a statement about his involvement in the crimes during the first interview by Priewe. But he never refused to answer questions and in fact, asked "what's the question" and then answered all of Priewe's questions without objection. On this record, Harrison did not unequivocally or unambiguously invoke his right to remain silent.

The circuit court's decision reflects this correct analysis. After hearing Priewe's testimony and reviewing the transcript of Priewe's interview with Harrison, the court found that Priewe asked Harrison "two separate questions": first, "are you now willing to answer some questions or,"

second, "make a statement to me." (R. 85:4–5. A-App. 5–6.) After Harrison responded, "I don't wanna make no statement right now," Priewe then asked Harrison, "Will you answer some questions that I have for you?" and Harrison responded, "what's the question." (R. 85:5, A-App. 6.) Significantly, during the ensuing one hour of questioning, Harrison did not refuse to answer any of Priewe's questions: "not once during that interrogation" did Harrison say "I'm cutting this off. I'm too tired. Not once during the interrogation did Mr. Harrison say, you know, I said I'm not going to answer any questions." (R. 85:5–6, A-App. 6–7.) Thus, the court concluded that Harrison did not unequivocally state to Priewe "that he would not answer questions," but instead told him that "he would not make a statement." (R. 85:8, A-App. 9.) Harrison "could have cut him off at any time," but instead affirmatively agreed to answer questions after waiving his right to remain silent; thus, a motion to suppress his statements to Priewe would not have been successful. (R. 85:9–10, A-App. 10–11.)

`The circuit court was correct. A motion to suppress Harrison's statements was meritless. Based on this record, police did not violate his constitutional right to remain silent. Because the record conclusively demonstrates that Harrison did not unequivocally invoke his right to remain silent when he told Priewe he did not want to make a statement, Harrison's counsel did not perform deficiently by not making a suppression motion that was meritless. *See Berggren*, 320 Wis. 2d 209, ¶ 21, *Wheat*, 256 Wis. 2d 270, ¶ 14. This Court should affirm the circuit court's discretionary decision to deny Harrison's plea withdrawal without a *Machner* hearing.

3. Harrison did not cut off questioning and invoke his Fifth Amendment rights during the first interrogation; thus, his confession during the second interrogation is not subject to suppression.

Harrison also claims that because Priewe did not cut off questioning after Harrison said he did not want to make a statement, his right to remain silent was not "scrupulously honored" and as such, his confession during the second interrogation by Detective Slomczewski violated his constitutional rights. (Harrison's Br. 20–23.) The circuit court did not reach this question because it determined that Harrison's right to remain silent was not violated during the first interrogation. The circuit court was correct.

A suspect's right to remain silent includes the right to cut off custodial questioning. *Michigan v. Mosley,* 423 US 96, 103 (1975); *State v. Hartwig,* 123 Wis. 2d 278, 284, 366 N.W. 2d 866 (1985) ("The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence.") Whether statements made after a person in custody cuts of questioning and invokes the right to remain silent are admissible depends "on whether his [or her] 'right to cut off questioning' was 'scrupulously honored.'" *Ross,* 203 Wis. 2d at 74 (*citing Mosely*, 423 U.S. at 103). The factors a court analyzes to determine whether, after an individual invokes the right to remain silent, that right was scrupulously honored are: (1) the original interrogation was promptly terminated; (2) the interrogation was resumed only after the passage of significant time; (3) the suspect was given *Miranda* warnings before the second interrogation; (4) a different officer resumed questioning; (5) the second interrogation was limited to a crime not the subject of the earlier interrogation. *See Mosley,* 423 U.S. at 103; *Hartwig*, 123 Wis. 2d at 284. These factors are not a rigid test, but instead provide a

framework to determine whether the right to silence was scrupulously honored. *Hartwig*, 123 Wis. 2d at 284–85.

Harrison argues that Detective Priewe should have terminated the interrogation because Harrison "unequivocally invoked his right to remain silent" and maintains that because Detective Slomczewski did not "scrupulously honor" this his right to remain silent that he invoked during the first interrogation, "the second interrogation on the same subject was improper." (Harrison's Br. 21–23.) This Court only need apply the factors outlined above if this court finds that Harrison unambiguously invoked his right to remain silent during the first interrogation when he told Priewe that he did not want to make a statement but then asked him "what's the question." (R. 54:3, A-App. 15.) As Harrison admits in his brief, the second, third and fourth factors are met. (Harrison's Br. 21.) With respect to the first factor, this Court should find that Priewe did not terminate the first interrogation because, after he asked for clarification of Harrison's refusal to make a statement, Harrison indicated to Priewe that he was willing to answer questions. With respect to the fifth factor, the record demonstrates that the first interrogation by Priewe focused almost exclusively on the "pedigree questions" and the events leading to Harrison's arrest when he fled from officers. (R. 54:3–47, A-App. 14–59.) It was not until the second interrogation by Detective Slomczewski that Harrison confessed to the armed robberies. (R. 55:2–6; 84:7–8.)

However, this Court does not need to analyze or apply the *Mosely* factors. As explained above, Harrison's claim that he invoked his right to remain silent during the first interrogation is conclusively refuted by the record. Harrison told Priewe that he did not want to make "a statement," but then affirmatively agreed to answer Priewe's questions. The further questioning of Harrison by Slomczewski during the second interrogation did not violate his right to remain silent.

Based on the transcript of the second interrogation and Slomczewski's testimony, it is undisputed that Slomczewski read Harrison his *Miranda* warnings and that Harrison responded that he understood his rights and had no questions about his rights. (R. 55:1–2; 84:7.) Harrison then answered Slomczewski's questions without any objection and gave a full statement to police, admitting that he fled from police and that he participated in stealing the cars at gunpoint. (R. 55:2–6; 84:7–8.)

In sum, Harrison is not entitled to *Machner* hearing on his ineffective assistance claims because the record conclusively refutes Harrison's claim that his attorney was deficient or that he was prejudiced by his attorney not filing a suppression motion. Such a motion was meritless because Harrison did not unambiguously invoke his right to remain silent during the first interrogation and he confessed to the crimes, after again waiving his right to be silent, during the second interrogation. This Court should affirm the circuit court's decision denying his motion for plea withdrawal without a *Machner* hearing on his allegations of ineffective assistance.

II. This Court can apply the guilty plea waiver rule and decline to address Harrison's forfeited claim that his counsel was ineffective for not moving to suppress his statements to police, because the claim is not related to the plea itself.

A. The guilty plea waiver rule results in forfeiture of ineffective assistance claims unrelated to the plea itself.

As an alternative grounds to affirm the court's decision denying Harrison's motion for plea withdrawal, this Court can apply the guilty-plea waiver rule.

In Wisconsin, a knowing and voluntarily guilty plea "constitutes a waiver of non-jurisdictional defects and defenses, including claims of violations of constitutional rights prior to the plea." *Foster v. State*, 70 Wis. 2d 12, 19–20, 233 N.W.2d 411 (1975) (identifying constitutional claims forfeited through a guilty plea).[4] "Like the general rule of waiver, the guilty-plea-waiver rule is a rule of administration and does not involved the court's power to address the issues raised." *Kelty*, 294 Wis. 2d 62, ¶ 18. Accordingly, the rule does not deprive this Court of subject matter jurisdiction and it could choose to consider the issue even though the defendant, by pleading guilty, waived the right to assert it. *State v. Riekkoff*, 112 Wis. 2d 119, 123–24, 332 N.W. 2d 744 (1983).

Ineffective assistance of counsel may provide an "exception" to the guilty-plea waiver rule "when the alleged ineffectiveness is put forward as grounds for plea withdrawal." *Villegas*, 380 Wis. 2d 246, ¶ 47. "This is so because . . . a valid guilty plea 'represents a break in the chain of events which has preceded it in the criminal process.'" *Id.* (*citing Tollett v. Henderson*, 411 U.S. 258, 267 (1973)).

Both the Supreme Court and Wisconsin courts have limited the types of ineffective assistance claims that a defendant may raise after a guilty plea. When the defendant admits his guilt through a plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to* the entry of the guilty plea." *Tollett*, 411 U.S. at 267 (emphasis added);

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[4] Wisconsin Stat. § 971.31(10) creates a limited exception to the guilty-plea waiver rule to allow a defendant who pled guilty to appeal the denial of a motion to suppress evidence or motion challenge the admissibility of a defendant's statement. Here, Harrison is not appealing from the denial of a suppression motion but rather is appealing from the denial of a plea withdrawal motion alleging that his counsel was ineffective for not filing a suppression motion, so the exception does not apply.

(continued on next page)

Villegas, 380 Wis. 2d 246, ¶ 47 n.19 (and cases cited therein). Rather, the defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*."[5] *Tollett*, 411 U.S. at 267 (cited with approval in *State v. Pohlhammer*, 82 Wis. 2d 1, 4, 260 N.W.2d 678 (1978) (per curium)). In *State v. Villegas*, this Court held that after "admitting guilt in open court, a defendant 'may not thereafter raise independent claims relating to the deprivation of constitutional rights' outside of an attack on the plea itself." *Villegas*, 380 Wis. 2d 246, ¶ 47. "[T]he 'exception' to the guilty plea waiver rule does not provide an independent ground to challenge the effectiveness of counsel during preplea proceedings outside of an attack on the defendant's plea." *Id.*

Thus, when a defendant pleads guilty, a claim of ineffective assistance of counsel is limited to whether counsel ensured that the defendant understood the consequences of a guilty plea, including an understanding of the constitutional rights that he or she waives through the plea. *See State v. Bangert*, 131 Wis. 2d 246, 270–72, 389 N.W.2d 12 (1986) (discussing rights generally). To this end, "defense counsel, too, is obligated to inform the defendant of the nature of the charge, of his constitutional rights which will be waived by virtue of the plea, and of the general legal effect of the guilty or no contest plea" *Id.* at 279.

B. By pleading guilty, Harrison forfeited his argument that his counsel was ineffective for not filing a suppression motion.

Harrison signed both guilty plea and waiver of rights form and an addendum stating that he understood by entering his plea that he was giving up his "right to challenge

[5] *McMann v. Richardson*, 397 U.S. 759 (1970).

the constitutionality of any police action," including "taking a statement." (R. 10; 11.) At the plea hearing, Harrison pled guilty to two counts of armed robbery and one count of possession of a firearm by an adjudicated delinquent (R. 80:13–15.) Harrison acknowledged that he was giving up his right to challenge the admissibility of this statements to police admitting his guilt, and admitted that he was guilty of the crimes. (R. 80:17–19.) After confirming that Harrison understood his pleas, the court found that Harrison entered his pleas "freely, voluntarily, and intelligently with full understanding of the nature of the offenses charged, the maximum possible penalties, and all the rights being given up by pleading guilty," accepted his guilty pleas, and found him guilty of the two armed robbery counts and the possession of a firearm by an adjudicated delinquent count. (R. 80:22.)

Now, Harrison claims that his counsel was ineffective for not filing a motion to suppress his statements to police and seeks a *Machner* hearing on that claim. (Harrison's Br. 10–23.) Harrison seeks an order from this Court "revers[ing] the circuit court's order holding that the evidence obtained during the first interrogation by Detective Priewe and the second interrogation by Detective Slomczewski would not have been suppressed." (Harrison's Br. 23.) Harrison is not entitled to this relief because he has not raised a *Bentley* claim for plea withdrawal alleging that he would not have pled guilty but for his counsel's ineffectiveness. Thus, he has forfeited his claim that his counsel should have filed a suppression motion.

By pleading guilty, Harrison forfeited his right to challenge a deprivation of his constitutional rights that occurred *before* he pleaded guilty. *See Tollett*, 411 U.S. at 267. Harrison's claim that his counsel was ineffective for failing to file a suppression motion relates to an alleged deprivation that occurred *before* he pleaded guilty. It is not an "attack" on "the voluntary and intelligent character of [his] plea." *Tollett*, 411 U.S. at 267; *Villegas*, 380 Wis. 2d 246, ¶ 47. Harrison has

not asserted that his trial counsel's "alleged ineffectiveness" by not filing a motion to suppress "had anything to do with his later decision to plead guilty." *Villegas*, 380 Wis. 2d 246 ¶ 48; *Bentley*, 201 Wis. 2d at 315–16." Harrison does not allege that his counsel not filing a suppression motion resulted in his decision to enter his guilty plea. Rather, he seeks a substantive order from this Court reversing the circuit court's decision that that a suppression motion would have been unsuccessful. (Harrison's Br. 23.) Because Harrison has not raised a *Bentley* claim for plea withdrawal "that his counsel's ineffective assistance entitles him to withdraw his plea because, but for counsel's errors, he would not have pled guilty," his claim is "waived by virtue of his valid guilty plea." *Villegas*, 380 Wis. 2d 246 ¶ 48.

In sum, Harrison's guilty plea triggered the guilty plea waiver rule. Harrison forfeited his claim that he suffered a manifest injustice because his trial counsel was ineffective for not moving to suppress his statements to police. This court may, in its discretion, apply the rule and not consider Harrison's plea withdrawal claim further.

CONCLUSION

For all these reasons, the State respectfully requests that this Court affirm the circuit court's decision denying plea withdrawal based on ineffective assistance without a *Machner* hearing and the judgment of conviction.

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 7538 words.

_____
ANNE C. MURPHY
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 12th day of August 2020.

_____
ANNE C. MURPHY
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