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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2383-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAIMON VON JACKSON, JR.,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction
Entered in Racine County Circuit Court, the Honorable Faye M. Flancher, Presiding, and an Order Denying Postconviction Relief, the Honorable Mark F. Nielsen, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. Mr. Jackson's attorney's failure to timely communicate with him regarding the State's plea offer violated his constitutional right to the effective assistance of counsel.

Contrary to State's argument, the circuit court ruled on this issue by implicitly concluding that counsel's conduct was not deficient. In its decision's deficiency section, the court stated that "[t]here was some time spent at the motion hearing on M[r.] Anderson failing to communicate a plea offer before a deadline for acceptance stated in an email." (52:23; App.76). The court concluded that because, at the final pretrial hearing, the State agreed to hold the plea offer open until the trial date, "this issue appears to have been raised in error." (*Id*.).

This issue is also within the issue presented for review. Prior counsel's petition presented the issue as "Is a defendant prejudiced when trial counsel does not communicate with the defendant in advance of a homicide trial", described this issue as involving "when a defendant is prejudiced by trial counsel's lack of communication" and as providing this Court "an opportunity to develop the prejudice prong of an ineffective assistance of counsel claim." (Pet. at 2-3,7). The petition also argued, among other things, that Mr. Jackson was prejudiced when he was sentenced as a principal when he was not the principal and received a greater sentence than his co-actors who were directly responsible for the homicide. (Pet. at 6). Mr. Jackson's argument that counsel's failure to timely communicate with him regarding the State's plea offer constituted ineffective assistance of counsel addresses the issue of whether counsel's failure to communicate was prejudicial to Mr. Jackson. Because this argument addresses the issue raised in the petition for review, Mr. Jackson is permitted to assert it. *See State v. Weber*, 164 Wis. 2d 788, 791, 476 N.W.2d 867 (1991) (concluding "[o]nce an issue is raised in a petition

for review, any argument addressing the issue may by asserted in the brief of either party[.]").

If this Court concludes that prior counsel failed to raise this issue below or in his petition for review, Mr. Jackson asks the Court to disregard any forfeiture and consider the merits of the issue. Forfeiture is a rule of judicial administration, not of power, and this Court may in its discretion address the merits of an unpreserved issue. *State v. Beamon*, 2013 WI 47, ¶49, 347 Wis. 2d 559, 830 N.W.2d 681.

There are important legal issues for this Court to develop and clarify in this case. First, the Court needs to correct the misconception that whenever counsel's alleged deficiency involves "the plea process", to establish prejudice, a defendant must show a reasonable probability that, but for counsel's errors, he would not have pled guilty, but would have proceeded to trial. It is true that where counsel's deficient advice leads the defendant to enter a plea instead of proceeding to trial, to prove prejudice, the defendant must show a reasonable probability that he would not have pled but would have proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *See Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017) (but for counsel's deficient advice that a plea would not result in deportation defendant would have gone to trial); *see also*, *State v. Dillard*, 2014 WI 123, ¶¶95,104, 358 Wis. 2d 543, 859 N.W. 2d 44 (but for counsel's deficient advice he faced a mandatory life sentence without the possibility of extended supervision if convicted at trial defendant would have gone to trial).

However, where counsel's deficient conduct leads to a defendant's failure to accept a plea bargain, the prejudice standard is not the *Hill* standard. Where counsel's deficient conduct results in a defendant, who pled, missing out on a more favorable plea bargain from the State, to establish prejudice, the defendant need not show that, but for counsel's error, they would have proceeded to trial. *Missouri v. Frye*, 566 U.S. 134, 148 (2012). Rather, the defendant must

demonstrate a reasonable probability that they would have entered a plea to the earlier offer and the result would have been more favorable by either a lesser charge conviction or a shorter sentence. *Id*. at 147. Similarly, where counsel's deficient advice regarding the availability of a trial defense leads the defendant to reject a favorable plea offer and proceed to trial, the required prejudice showing is the *Frye* standard. *Lafler v. Cooper*, 566 U.S. 156, 164 (2012).

However, this Court in *State v. Cooper* incorrectly broadened the *Hill* prejudice standard to apply to all "plea process" cases: "When the alleged deficiency concerns the plea process, *Hill* says the prejudice component specifically requires that '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.'" 2019 WI 73, ¶29, 387 Wis. 2d 439, 929 N.W.2d 192 (quoting *Hill*, 474 U.S. at 59). *See State v. Savage*. 2020 WI 93, ¶33, 395 Wis. 2d 1, 951 N.W.2d 838 (quoting *Cooper*, *supra*).

In *Cooper*, counsel provided the defendant with the correct plea offer from the State and the defendant entered a plea. 387 Wis. 2d 439, ¶3. Cooper later moved to withdraw his plea, claiming that he was denied the effective assistance of counsel due to his counsel's failure to communicate with him and he entered his plea in haste because he believed that his attorney was not prepared for trial. *Id*. at ¶7. This Court applied the *Hill* prejudice test and concluded that Cooper failed to prove that he would have pled differently but for counsel's conduct. *Id*. at ¶30.

While the *Hill* prejudice standard was correct for the *Cooper* situation, as explained above, the *Hill* standard is not the correct prejudice standard for counsel's deficient conduct in all "plea process" cases. Unlike *Cooper*, this case involves counsel's deficient conduct resulting in the defendant missing out on a more favorable plea offer and thus the *Frye* prejudice standard applies. This Court needs to clarify and develop the law regarding the prejudice standard in plea cases

involving counsel's deficient advice leading to a defendant rejecting a plea offer or missing out on a more favorable plea offer.

Second, the Court needs to clarify the misconception that party to a crime liability for acting as a lookout versus principal actor liability is the same for all purposes. Most critically, and relevant here, there is a functional difference between the two regarding individual culpability for sentencing purposes.

The State's argument that counsel's failure to timely communicate the State's plea offer was not deficient performance fails. First, any argument that the State's offer did not include pleading as a party to the crime is belied by the prosecutor's October 17th email, in which the offer was for Mr. Jackson to plead to second degree reckless homicide as a party to a crime. (46:34, 78:23).

Next, contrary to the State's argument, Mr. Jackson did not learn the substance of its plea offer at the October 17th hearing, as the prosecutor failed to recite the specifics of the offer. (70:5). Mr. Jackson's October 19th showed only that he knew the State had offered a plea bargain, but did not show that he knew the substance of the offer; rather, he complained that counsel "hasn't even gone over the plea offer with me." (83).

Contrary to the State's suggestion, the portion of the plea offer that would have allowed Mr. Jackson to plead to the homicide as a party to a crime lapsed. Per the prosecutor's email, the offer was open until October 31st. (46:34). Further, the November 1st amended information, while charging felon in possession of a firearm as a party to a crime, did not charge the homicide as a party to a crime. (25).

The State's attempt on pages 19-21 to limit the constitutional deficiency standard to unreasonable conduct in preparing for trial, in counsel's plea advice, or in "actually meeting the State's case"[1] either in a plea or at trial fails. The

[1] State's Br. at 21.

applicable deficiency standard here is the *Frye* standard where "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 566 U.S. at 145. Here, Mr. Jackson's attorney failed to timely communicate the State's plea offer with more favorable terms prior to its expiration.

Further, counsel failed to recognize that the State's offer to allow Mr. Jackson to plead to the homicide as a party to a crime had lapsed. At the plea hearing, he told the judge that he had reviewed the homicide as party to a crime with Mr. Jackson and indicated that he (counsel) was confused by the amended information. (71:11). According to his *Machner*[2] hearing testimony, counsel was "surprised" that the amended information did not include party to a crime liability for the homicide charge. (78:42). According to Mr. Jackson's testimony, counsel told him that the State's offer was for him to plead to the homicide as a party to a crime and counsel reviewed the homicide charge with him as a party to a crime. (78:65-67).

The State's argument that Mr. Jackson was not prejudiced by counsel's failure to timely communicate the State's plea offer fails. First, the lapsed offer from the State would was more favorable than plea Mr. Jackson accepted. The earlier offer would have enabled Mr. Jackson to plead to the crime in his admitted role as a lookout, not the shooter.

Mr. Jackson has shown a reasonable probability of a lower sentence had he been so able to plead. By pleading to the homicide charge as party to a crime Mr. Jackson could have shown at sentencing what he had maintained from the beginning, that he was part of the plan to rob Carter but he was not the shooter. As outlined in his initial brief at page 10, evidence in the record corroborates that Mr. Jackson was not the shooter. It is worth noting that the State's claim that, in the

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

casino surveillance video, Mr. Jackson was wearing clothes similar to the eyewitness' description of the two men involved in the shooting[3] is incorrect. The video surveillance showed Mr. Jackson wearing all white clothing. (78:60; 81:Ex.2). However, the eyewitness reported that one man was wearing a grey hoodie and grey sweatpants and the other man was wearing all black clothing. (46:20-23). This same video showed one of the co-actors wearing all black clothing and the other co-actor wearing a grey hoodie and grey sweatpants. (78:59-60; 81:Exs.1,2).

Contrary to the State's argument, there is a functional and important distinction between being found guilty of a homicide as a party to a crime in a lookout role and being found guilty as the principal in the shooter role. Although the technical legal liability is the same for a principal actor who directly commits the homicide and person who aids and abets, or is a party to a conspiracy to commit, the homicide, there is an important functional difference between the two actors for sentencing purposes.

The individual culpability differs for the shooter versus the lookout for sentencing purposes. As Judge Reilly explained here: "[f]or anyone to suggest that a judge at sentencing would treat a cold-blooded killer the same as a 'lookout' is sorely lacking in the understanding of what a judge at sentencing is tasked with doing." State v. Jackson, No. 2019AP2383-CR, 2021 WL6132278, ¶81 (Wis. Ct. App. Dec. 29, 2021) (unpublished) (Reilly, J., dissenting). (App.47). Therefore, Mr. Jackson has proven a reasonable probability of a lower sentence had he pled to the homicide charge as a party to a crime.

Thus, contrary to the State's argument, Mr. Jackson's case is not on "all fours" with *Cooper*. As explained above, unlike Mr. Jackson's case, in *Cooper* defense counsel communicated the correct plea bargain to the defendant, which

[3] State's Br. at 9.

the defendant accepted. In Cooper's circumstances, the *Hill* prejudice standard applied. Further, unlike *Cooper*, Mr. Jackson's attorney's unreasonable failure to communicate affected the outcome of the proceedings. His conduct prevented Mr. Jackson from accepting a more favorable plea bargain and, as argued in his initial brief at pages 22-24 and above, there is a reasonable probability that Mr. Jackson would have received a shorter sentence had he pled to the homicide charge as a party to a crime.

Therefore, for all of the above reasons and the reasons asserted in his initial brief, Mr. Jackson has proven that he was denied the effective assistance of counsel when his attorney failed to timely communicate and discuss with him the State's earlier plea offer which had lapsed. He is thus entitled to plea withdrawal.

II. The trial court misused its discretion by failing to follow up to determine whether counsel had visited Mr. Jackson as she instructed when she denied Mr. Jackson's request for a new attorney on October 17th and decide Mr. Jackson's October 28th motion for a new attorney.

This issue is arguably within the issue presented for review. Prior counsel's petition presented the issue as "Should a defendant be allowed to obtain new counsel when that defendant's counsel is deficient", arguing among other things, that review was warranted for this "Court to develop the standard for trial court's duty in assessing whether new counsel is warranted." (Pet. at 2,7). For this issue, among other things, counsel argued that the court conducted a "curt" colloquy with Mr. Jackson, in which he complained that counsel was not keeping in contact with him and that had the court simply followed up with Mr. Jackson and his attorney, the court would have discovered that counsel's lack of communication was stunning and merited his removal prior to trial. (Pet. at 7). Yet, the case cited in section involves whether extraneous information in a juror's possession constituted prejudicial error requiring reversal of the verdict. (Pet. at 7, citing *State v. Broomfield*, 223 Wis. 2d 225, 481, 589 N.W.2d 225 (1999)).

If this Court concludes that prior counsel failed to raise this issue below or in his petition for review, Mr. Jackson asks the Court to disregard any forfeiture and consider the merits of the issue. Whether, in exercising its discretion to appoint new counsel pursuant to *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988), a circuit court has a duty to follow up with counsel and the defendant is an issue of law that this Court should develop.

Where a court exercises its discretion under *Lomax* where, among other things, a defendant complains that counsel has not kept in contact with him and the court orders counsel to meet with the defendant in advance of trial, the court should have a duty to revisit the issue with counsel and the defendant at the beginning of the next hearing. This is true especially if the next hearing is a firm jury trial date. At this point, a trial court can determine whether trial counsel has in fact met with his client in advance of the trial date and communicated sufficiently with the defendant about the evidence, the strengths and weaknesses of both the State's and the defense's cases and his right to testify, and ensure that any plea offer has been thoroughly discussed.

Here, despite her directive to counsel and Mr. Jackson's subsequent filings, Judge Flancher failed to follow up with counsel and Mr. Jackson prior to or at the November 1st hearing to determine whether he had visited with Mr. Jackson prior to November 1st as she directed. The court's failure to do so was an erroneous exercise of discretion because she had reason to believe that counsel's communication with his client was not happening and ignored it.

If she had so followed up with counsel and Mr. Jackson, she would have learned that after October 17th counsel had not met with Mr. Jackson prior to the trial date and had only met with Mr. Jackson three times prior to the trial date. She would have also learned that counsel met with Mr. Jackson that day for less than 1½ hours. This lack of communication would have warranted the court appointing a new attorney for Mr. Jackson when it would have mattered, before he decided to

enter a plea and not have a jury trial. Mr. Jackson's responses during and following the plea colloquy do not negate the harm caused by the court's failure to revisit this issue, especially his response that he "guessed, yes" that he was satisfied with counsel's representation. (71:14).

Therefore, because the court erroneously exercised its discretion in failing to hear and grant his motion for new counsel prior to the entry of his plea, Mr. Jackson is entitled to plea withdrawal and to proceed with new counsel.

CONCLUSION

For all of the reasons set forth above and in his initial brief, Mr. Jackson respectfully requests that this Court enter an order reversing the court of appeals' decision dated December 29, 2021, reversing the circuit court's denial of the defendant's motion to withdraw his plea, and remanding this case to the circuit court for further proceedings with an order that Mr. Jackson's plea is withdrawn.

Dated this 9th day of November, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a reply brief. The length of the brief is 2,913 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) (2019-2020)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated this 9th day of November, 2022.

Respectfully submitted,

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