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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2020AP000266 - CR

MICHAEL J. BREHM,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

APPEALED FROM MILWAUKEE COUNTY
CIRCUIT COURT, BRANCH 42
CASE NO. 18CF003239
THE HON. DAVID A. HANSHER, PRESIDING

KAY & KAY LAW FIRM
BY: TIMOTHY T. KAY
STATE BAR NO. 1019396
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Wisconsin Cases:

Federal Cases:

Statutes:

STATEMENT OF ISSUES

I. Did the trial court erroneously exercised its sentencing discretion when it relied on improper factors at sentencing?

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

II. Did the trial court err in denying Brehm an evidentiary hearing based on the ineffective assistance of Brehm's trial counsel?

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Michael J. Brehm, would welcome oral argument if the Court believes it is necessary; however, the issues in this appeal are clear and may be fully addressed through briefs of the parties.

STATEMENT ON PUBLICATION

Defendant-Appellant, Michael J. Brehm, does not request publication of this decision for the reason that the factual situation presented herein will not establish any new precedent.

STATEMENT ON THE CASE

This appeal stems from the trial court's Decision and Order Denying Motion for Postconviction Relief dated April 4, 2020. For purposes of this appeal, Defendant-Appellant, Michael J. Brehm, will hereinafter be referred to as "Brehm" and the State of Wisconsin will hereinafter be referred to as the "State."

STATEMENT OF FACTS

I. Facts

On July 7, 2018, Police received a call from T.M. that he observed a neighbor holding a firearm out of the upstairs window and firing it into the air at or about 5309 West Hayes Avenue, Milwaukee, Wisconsin. [R. 1-1]. No one was shot. Police later found casings of a 9mm firearm on the scene along with a Glock 9mm handgun in the residence of said shooting. [R. 1-1].

The neighbor firing the gun was eventually identified as Michael Brehm. [R. 1-1]. While on the scene, the defendant was ordered out of the residence by gunpoint. [R. 1-1].

In an interview, Brehm admitted that he shot a couple of rounds in the air. [R. 1-1]. He stated that he "didn't think for a couple of seconds." [R. 1-1]. "I just want to stress the fact that I didn't have any bad intentions. . . I just had a dumb thought." [R. 1-1]. A preliminary breath test of Brehm yielded a result of 0.71. [R. 1-1].

II. Procedural History

On May 3, 2019, Brehm pled guilty to Possession of a Firearm by a Felon. [R. 44: 3]. Sentencing was then adjourned twice so that Brehm could deal with health issues. [R. 45: 8].

At sentencing, Brehm made an argument this Court had not heard before. [R. 46:8]. Brehm argued that when the statute was silent, the Court had authority to impose and stay a sentence, and in the alternative, imposing and staying the sentence did satisfy the statutory mandatory minimum. [R. 46: 6, 11].

The court stated, "I'd like to do it, but I think the word 'shall' in reading the statute ties my hand... And if there was any type of hearing, I would probably testify against it, if there would have been a hearing. But I think my hands are tied." [R. 46:12-13].

On July 25, 2019, Brehm was sentenced to the "mandatory minimum" of three years confinement, and three years extended supervision. [R. 46: 8].

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION WHEN IT RELIED ON IMPROPER FACTORS AT SENTENCING.

When a circuit court "actually relies on clearly irrelevant or improper factors," it erroneously exercises its sentencing discretion. *State v. Harris,* 326 Wis.2d 685, ¶ 66, 786 N.W.2d 409. A defendant

must prove by clear and convincing evidence that the sentencing court actually relied on improper factors. *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 304, 858 N.W.2d 662, 668.

Reviewing courts employ a two-step test when assessing whether a circuit court erroneously exercised its sentencing discretion. A defendant must prove that: (1) information was inaccurate and (2) the court actually relied on the inaccurate information at sentencing. *State v. Alexander*, 2015 WI 6, ¶ 18, 360 Wis. 2d 292, 305, 858 N.W.2d 662, 669. In *Harris*, this framework was applied to a contention that a sentencing court had relied on "improper factors," rather than "inaccurate information." *Id. Harris* explained that "proving inaccurate information is a threshold question—you cannot show actual reliance on inaccurate information if the information is accurate." *Id* ¶ 21 .

A. Even if the Court did not have Authority, the Court Still Accomplishes the Statutory Requirements by Sentencing as Brehm Requested.

Wis. Stat. § 941.29(4m)(a) states that a court shall impose a bifurcated sentence and the confinement portion shall be three years for possession of a firearm if certain conditions are met. The court believed its hands were tied because of the word "shall" in Wis. Stat. § 941.29(4m)(a). [R. 46: 12-13]."I'd like to do it, but I think the word 'shall' in reading the statute ties my hand... And if there was any type

of hearing, I would probably testify against it, if there would have been a hearing. But I think my hands are tied." [R. 46: 12-13]. However, the statute simply states that a three year confinement portion be imposed. Wis. Stat. § 941.29(4m)(a). No part of the statute indicates that a sentence under Wis. Stat. § 941.29(4m)(a) cannot be stayed.

Brehm requested at sentencing that a three year confinement portion of a bifurcated sentence be imposed. [R. 46: 8]. The only difference, is that Brehm requested that the imposed sentence be stayed. [R. 46: 8]. If a person is convicted of a crime, a court may, by order, impose and stay a sentence and "place the person on probation to the [DOC] for a stated period, stating in the order the reasons therefor." *State v. Dowdy*, 2012 WI 12 at ¶28. This request by Brehm satisfies the mandatory minimum of Wis. Stat. §941.29(4m)(a). Even if it is found that the court does not have authority to modify the sentence of the mandatory minimum, Brehm's request would satisfy the mandatory minimum.

B. The Court did have Authority to Sentence other than the Statutory Minimum.

Pursuant to Wis. Stat. § 973.09(1)(a) the legislature has granted a circuit court authority to impose probation. *State v. Dowdy*, 2012 WI 12 at ¶28. "If a person is convicted of a crime, a court may,

by order, impose and stay a sentence and "place the person on probation to the [DOC] for a stated period, stating in the order the reasons therefor." *Id*. The court may impose any conditions which appear to be reasonable and appropriate. *Id*.

In *Strohbeen*, the defendant argues that because sentencing is a purely statutory power, and Wis. Stat. § 973.15 is silent on the authority of a trial court to impose a sentence consecutive to a forfeiture commitment, the court lacked the authority to stay the execution of the defendant's sentence as it did. *State v. Strohbeen*, 147 Wis.2d 566, 570 (1988). The court in *Strohbeen* held that the sentencing court did have the authority to stay the sentence as it did. *Id*. at 574. The court reasoned that a trial court, by necessity, must have authority to impose a commitment consecutive to the jail time provision. *Id*. at 570.

In the case at hand, the court believed that it lacked authority to stay a sentence as argued by the defendant in *Strohbeen*. [R. 46: 12-13]. However, like *Strohbeen*, the court does have the authority here to impose and stay Brehm's sentence. If a person is convicted of a crime, a court may, by order, impose and stay a sentence and "place the person on probation to the [DOC] for a stated period, stating in the order the reasons therefor." *State v. Dowdy*, 2012 WI 12 at ¶28.

The Court here could have sentenced Brehm the way it wished to, but instead thought it was obligated to sentence in accordance with the mandatory minimum. [R. 46: 12-13, 23]. When requested to impose and stay Brehm's sentence, the Court stated, "I'd like to do it, but I think the word 'shall' in reading the statute ties my hand... And if there was any type of hearing, I would probably testify against it, if there would have been a hearing. But I think my hands are tied." [R. 46: 12-13]. Because the legislature was silent, the court does have authority to reasonably modify the sentence. *State v. Strohbeen*, 147 Wis.2d 566, 574 (1988). It does not matter that the requested sentence satisfies the statute, because, as argued at sentencing, in *Dowdy*, and in *Strohbeen*, the Court does have the authority to impose and stay Brehm's sentence.

C. Wisconsin Statute § 941.29 is Unconstitutional.

The Court here is not in favor of mandatory minimums. [R. 46: 12]. The court wants to have the option to rule against the mandatory minimum here. [R. 46: 12]. The Court should rule against the necessity of a mandatory minimum here for all arguments outlined, including that Wis. Stat. § 941.29 is unconstitutional.

In *Thomas*, the defendant was charged with possession of a gun by a felon in violation of Wis. Stat. § 941.29. *State v. Thomas*, 2004 WI App 15 at ¶ 1. The defendant challenged Wis. Stat. § 941.29

as unconstitutional after he had pulled out an illegally concealed gun on a police officer. *Id*. at ¶1, ¶3. The Court in *Thomas* ruled that Wis. Stat. § 941.29 was constitutional. *Id*. at ¶39. The Court reasoned that the statute was not unconstitutionally over broad because "The restriction on a convicted felon's ability to possess firearms comes about incident to firearm regulation out of concerns of public safety. *Id*. at ¶23.

Like in *Thomas*, Brehm has been charged with possession of a firearm by a felon in violation of Wis. Stat. § 941.29. [R. 1:1]. However, upon information and belief, the gun did not belong to Brehm. Unlike *Thomas*, Brehm did not pull the gun out with intention to harm anyone, Brehm did not illegally conceal the firearm, and Brehm was not in public with any gun. [R. 1:1]. Brehm grabbed his roommate's gun in the safety of his own home. [R. 1:1]. The Court's reasoning of public safety is infinitely less applicable for Brehm as it was in *Thomas*. Wis. Stat. § 941.29 is unconstitutionally over broad to include a mandatory minimum for Brehm's actions. Because Wis. Stat. § 941.29 is unconstitutionally over broad, Brehm is entitled to a sentence modification or re-sentencing hearing.

D. Improper Factor.

Inaccurate information was deemed to be an improper factor in *Harris*. *Id*. In this case, inaccurate information is provided to the

Court that the Court did not have the authority to impose and stay a sentence under Wis. Stat. § 941.29. [R. 46: 12-13]. Because the Court actually did have the authority to impose and stay Brehm's sentence, the accepted fact that the Court could not impose and stay the sentence was inaccurate information. The inaccurate information that the Court could not impose and stay Brehm's sentence was an improper factor relied upon by the court at sentencing.

E. Actual Reliance.

In the case at hand, the court actually relied on the inaccurate information. At sentencing, the Court stated, "I'd like to do it, but I think the word 'shall' in reading the statute ties my hand... And if there was any type of hearing, I would probably testify against it, if there would have been a hearing. But I think my hands are tied." [R. 46: 12-13]. The Court clearly relied on this inaccurate information as the court references the Court's hands being tied right before handing down their sentence. [R. 46: 12-13]. Because the Court actually relied on improper factors, Brehm is entitled to sentence modification or a re-sentencing hearing.

F. Brehm was Sentenced on the Basis of Unreliable Information.

A defendant has the right to be sentenced on the basis of reliable information. *United States v. McClinton*, 135 F.3d 1178,

1192 (7th Cir. 1998). Brehm was sentenced based on unreliable information.

While sentencing, the Court used the unreliable information that the Court lacked the authority to impose and stay Brehm's sentence. [R. 46: 12-13]. "I'd like to do it, but I think the word 'shall' in reading the statute ties my hand... And if there was any type of hearing, I would probably testify against it, if there would have been a hearing. But I think my hands are tied." [R. 46: 12-13]. Because Brehm was sentenced based upon unreliable information, Brehm is entitled to a sentence modification or a re-sentencing hearing.

G. Public Policy.

When there is doubt as to the application of a statute, a court should apply the rule of lenity and interpret the statute in favor of the accused. *State v. Morris*, 108 Wis.2d 282, 289 (1977). Mandatory minimum's in Wisconsin have a clear common link. Mandatory minimum sentences are given to the worst of the worst crimes.

In Wisconsin, there are mandatory minimum sentences for child sex offenses, repeat serious sex crimes, repeat serious violent crimes, and repeat firearm crimes. Wis. Stat. § 939.617; Wis. Stat. § 939.618; Wis. Stat. § 939.619; Wis. Stat. § 939.6195. The mandatory minimum sentence for felony possession of a firearm seemingly goes hand in hand with mandatory minimum sentences for repeat firearm

crimes. Wis. Stat. § 939.6195; Wis. Stat. § 941.29. The statute for repeat firearm crimes has the felony possession of a firearm as a pre-requisite to violating the statute. Wis. Stat. § 939.6195(1)(a)(1). This mandatory minimum sentence being imposed upon Brehm is meant for dangerous repeat firearm offenses.

It is clear that in Wisconsin, mandatory minimum sentences are meant for horrible crimes that result in serious injury. In the case at hand, no one was injured, no one was shot, no one was threatened, there was no sex crime, no serious violent crime, merely shots fired into the sky. [R. 46: 21]. A man did fire a weapon into the air, but public policy does not support a mandatory three years of confinement for such an act.

Brehm's crime does not fall into the typical category for mandatory minimum sentences. The Court had the authority to modify the mandatory minimum for Brehm. *State v. Dowdy*, 2012 WI 12 at ¶28. Even if the Court could not modify the mandatory minimum, the requested sentence complies with the mandatory minimum sentence in Wis. Stat. § 941.29. The Court relied upon the improper factor in its belief that it could not sentence Brehm as requested. The rule of lenity requires the court to interpret a statute in favor of Brehm when it is ambiguous. *State v. Morris*, 108 Wis.2d 282, 289 (1977). For all of these reasons, Brehm is entitled to a

sentence modification in accordance to the requested sentence, or a re-sentencing hearing.

II. TRIAL COUNSEL WAS INEFFECTIVE ENTITLING BREHM TO AN EVIDENTIARY HEARING TO WITHDRAW HIS PLEA.

A. Standards of Proof Applicable to Plea Withdrawal.

A defendant has the right to withdraw a plea before or after sentencing. *State v. Sulla,* 2016 WI 46, ¶ 24, 369 Wis.2d 225, 246, 880 N.W.2d 659 (citing *State v. Cain*, 2012 WI 68, ¶ 24, 342 Wis.2d 1, 816 N.W.2d 177). A different standard is appropriate depending on whether a defendant moves to withdraw his plea before or after sentencing. If a defendant moves to withdraw his plea before sentencing, the defendant may do so if he provides "any fair and just reason" for withdrawal. *State v. Canedy*, 161 Wis.2d 565, 582, 468 N.W.2d 163 (1991). If a fair and just reason for withdrawal is found by a preponderance of the evidence, then the state must prove substantial prejudice to defeat the motion. *State v. Bollig*, 2000 WI 6, ¶34 (Wis., 2000). However, if a defendant moves to withdraw a plea after sentencing, he or she carries the heavy burden of establishing that the trial court should permit a plea withdrawal to correct a "manifest injustice." *Id*. ¶ 24; see also *State v. Reppin*, 35 Wis.2d 377, 385-86, 151 N.W.2d 9, 13-14 (1967). A defendant can meet this

burden if he or she did not "knowingly, intelligently, and voluntarily enter the plea." *Id*. (citing *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis.2d 594, 716 N.W.2d 906).

The manifest injustice test occurs in situations that "involve serious questions affecting the fundamental integrity of the plea." *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331, 334 (1973). Accordingly, a manifest injustice is present whenever the defendant proves one of the following:

> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, state, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.

Reppin, 35 Wis. 2d at 386.

A defendant has two paths to withdraw a plea after sentencing. *Sulla*, 2016 WI 46, ¶25. The first option is *Bangert* motion. *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986). The defendant invokes *Bangert* when the plea colloquy is defective. *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 384, 734 N.W.2d 48.

The second option is a *Nelson/Bentley* motion. A "defendant invokes *Nelson/Bentley* when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." *Id*.

A *Nelson/Bentley* motion has two prongs. The first prong requires that "[I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50, (1996). However, the second prong requires the following:

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id.

Under *Nelson/Bentley*, Brehm is entitled to an evidentiary hearing for plea withdrawal because of a ineffective assistance of counsel.

B. Trial counsel was ineffective because he did not request a Presentence Investigation Report (PSI).

Trial counsel was ineffective because he did not request a Presentence Investigation Report (PSI). Trial counsel's performance

was deficient because a reasonable attorney would order a PSI for a felony case where the defendant is facing substantial prison time. Trial counsel was prejudicial because but for the trial counsel's failure to order a PSI, the defendant could have received a more favorable sentence.

A PSI is not required prior to sentencing. *State v. Greve*, 2004 WI 69, ¶ 10, 272 Wis. 2d 444, 454, 681 N.W.2d 479. However, the securing of a PSI is an integral part of the sentencing function and is solely within the judicial function. *State v. Washington*, 2009 WI App 148, ¶ 9, 321 Wis. 2d 508, 515, 775 N.W.2d 535. A PSI was an integral part of Brehm's sentencing.

If a defendant moves to withdraw a plea after sentencing, he or she carries the heavy burden of establishing that the trial court should permit a plea withdrawal to correct a "manifest injustice." *Id*. ¶ 24; see also *State v. Reppin*, 35 Wis.2d 377, 385-86, 151 N.W.2d 9, 13-14 (1967). A defendant can meet this burden if he or she did not "knowingly, intelligently, and voluntarily enter the plea." *Id*. (citing *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis.2d 594, 716 N.W.2d 906).

Here, *Bangert* is not at issue for Brehm. The second way in which a defendant can withdraw a plea after sentencing is with a *Nelson/Bentley* motion. *Sulla*, 2016 WI 46, ¶ 25. A "defendant

invokes *Nelson/Bentley* when the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." *Id*. This option is at issue for Brehm. A *Nelson/Bentley* motion has two prongs. The first prong requires that "[I]f a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." *State v. Bentley*, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, (1996). To meet this first prong, a defendant should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why and how." *Sulla*, 2016 WI 46, ¶ 26.

The second prong states:

> [I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Bentley, 201 Wis.2d 303, 309.

The test for ineffective assistance of counsel in Wisconsin follows the United States Supreme Court test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant's counsel must be both (1) deficient and (2) prejudicial. *Strickland*, 466 U.S. at 687.

First, deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Johnson*, 153 Wis.2d at 127 (quoting *Strickland*, 466 U.S. at 687). In analyzing whether deficient performance occurred, courts use "an objective standard of reasonableness." *Behnke*, 203 Wis.2d at 62. The reviewing court looks at whether the attorney acted within "the wide range of professionally competent assistance." *Oswald*, 232 Wis.2d at 88.

Second, prejudice is proven by showing a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *Huff*, 319 Wis.2d at 270, 769 N.W.2d at 160. A reasonable probability is one sufficient to undermine confidence in the outcome of a proceeding. *Id*.

Here, trial counsel's performance was ineffective because it was deficient and prejudicial. Trial counsel's performance was deficient because a reasonable attorney would request a PSI in a felony case where substantial prison time is involved. "After a conviction the court may order a presentence investigation, except that the court may order an employee of the department to conduct presentence investigation only after a conviction for a felony." Wis. Stat. § 972.15(1).

To meet this first prong of *Nelson/Bentley*, a defendant should "allege the five 'w's' and one 'h'; that is who, what, where, when, why, and how." *Sulla*, 2016 WI 46, ¶ 26. The defendant alleges *who* failed to act, which was his trial counsel who failed to request a PSI in a felony conviction for someone facing substantial prison time. The defendant alleges *what* the PSI would state, which would be more detail regarding his mental and physical health, outlined in sentencing. [R. 46: 21]. The PSI would have also highlighted Brehm's cognitive abilities and his family upbringing, as it is referenced that he is clearly a loving father. [R. 46: 21]. The defendant alleges *where* and *when* this inaction occurred, which was to the court and prior to the sentencing hearing. The defendant alleges *how* the PSI was relevant, which is that the PSI would have given insight into his mental health, physical health, and type of man Brehm is, which could have delved deeper into his mental health and the reasons for the decisions he made. In addition, a PSI is relevant because it would have given additional insight into the defendant's cognitive abilities and family upbringing, which, coupled with his mental health, could be seen as possible mitigating factors.

Not requesting a PSI for a felony conviction of a defendant who is facing substantial prison time is outside the range of

professional competent assistance. A PSI is free to public defender clients and trial counsel had nothing to lose by requesting it.

Trial counsel was prejudicial because but for the trial counsel's inaction to order a PSI, the defendant could have received a more favorable sentence that reflected his mental health and other mitigating factors highlighted in the PSI.

Accordingly, the defendant has alleged facts that entitle him to request a *Nelson/Bentley* evidentiary hearing.

C. Counsel Failed to Enter Evidence of Non-Possession.

As further proof of ineffective assistance of counsel, trial counsel failed to enter evidence of non-possession. Upon all information and belief, Brehm is not the owner of the gun that fired, and trial counsel was aware of that. Brehm has admitted to shooting a gun into the air in an interview, but during that time, Brehm had provided a dangerously high intoxication level of 0.71 on a Breathalyzer test. [R. 1:1]. For reference, that is almost nine times greater than the legal limit to drive of 0.08. Brehm even stated that he did not fully remember everything that happened that day at sentencing. [R. 46: 21]. Despite all of this information that Brehm may not have possessed a firearm, trial counsel failed to provide any evidence to the court showing non-possession. Because trial counsel

failed to enter evidence of non-possession, trial counsel was ineffective. Brehm is entitled to an evidentiary hearing for plea withdrawal because of ineffective assistance of counsel.

D. Counsel Failed to Advise Brehm not to Make Statements to his detriment.

As additional proof of ineffective assistance of counsel, trial counsel failed to advise Brehm to not make statements to his detriment. Brehm did admit immediately to all actions accused of. [R. 1:1]. However, Brehm recorded a dangerous level of intoxication that night, which could have rendered those statements unusable. [R. 1:1]. Brehm even stated at sentencing that he did not fully remember everything that happened the day of the incident. [R. 46: 21]. Brehm then made statements to his detriment afterwards including at sentencing. [R. 46: 21]. Trial counsel should have advised him against every statement after the initial interview. Upon information and belief the gun did not belong to Brehm, and Brehm himself did not fully remember what happened. Because trial counsel failed to advise Brehm of his rights and to not make a statement to his detriment, trial counsel was ineffective. Because trial counsel was ineffective, Brehm is entitled to an evidentiary hearing for plea withdrawal.

CONCLUSION

The trial court erred in denying Brehm's motion for postconviction relief.

The defendant respectfully requests this Court to grant an Order remanding this case for a plea withdrawal and sentence modification.

Dated: July 6, 2020

Respectfully Submitted:

ATTORNEY FOR APPELLANT

s/ TIMOTHY T. KAY

Timothy T. Kay
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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 and appendix produced with a proportional serif font. The length of this brief is 3889 words.

Signed:

s/ TIMOTHY T. KAY

_____

Timothy T. Kay
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CERTIFICATION OF ELECTRONIC FILING OF BRIEF

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. § 809.9(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed of this date.

Dated: July 6, 2020

ATTORNEY FOR APPELLANT

s/ TIMOTHY T. KAY

Timothy T. Kay
Attorney for Defendant-Appellant
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CERTIFICATION OF ELECTRONIC FILING OF APPENDIX

I hereby certify that I submitted and electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content and format to the printed form of the appendix field as of this date.

Dated: July 6, 2020

ATTORNEY FOR APPELLANT

s/ TIMOTHY T. KAY

_____

Timothy T. Kay
Attorney for Defendant-Appellant
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INDEX TO APPENDIX

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.12(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

s/ TIMOTHY T. KAY

_____

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CERTIFICATION OF MAILING

I certify this brief was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on July 6, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

s/ TIMOTHY T. KAY

_____

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