STATE OF WISCONSIN

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

DISTRICT II

Case No. 2020AP1699-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAKYTA V.T. CHENTIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MARIA S. LAZAR (JUDGMENT) AND THE HONORABLE JACK A. MELVIN, III (ORDER), PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

In exchange for dismissal of another charge and a probation sentencing recommendation, Defendant-Appellant Nakyta V.T. Chentis entered an agreement in which he pleaded no contest to a single count of possession of a narcotic drug—a small amount of heroin discovered along with an assortment of drug paraphernalia littered throughout his car.

1. Is Chentis entitled to withdraw his plea on the ground that there was an insufficient factual basis for the circuit court to accept his plea?

The circuit court answered: No.

This Court should answer: No.

2. Is Chentis entitled to withdraw his plea on the grounds that his defense counsel was ineffective for not seeking dismissal of the charge to which Chentis entered his no-contest plea?

The circuit court did not answer this question having decided that there was a sufficient factual basis to support Chentis's charge and plea.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

STATEMENT OF THE CASE

The charges and criminal complaint

In July 2017, the State charged Chentis with one count of possession of narcotic drugs, contrary to Wis. Stat.

§ 961.41(3g)(am), and one count of possession of drug paraphernalia, contrary to Wis. Stat. § 961.573(1). (R. 1:1.)

In the criminal complaint's probable cause section, the State presented a summary of facts contained in a Brookfield Police Department investigative report. (R. 1:2.) Specifically, the complaint advised that Officer Kevin David stopped a Jeep upon determining that the vehicle's registered owner, Chentis, had a suspended driver's license. (R. 1:2.)

While preparing a citation for Chentis, Officer David requested a police canine unit to respond to the scene. (R. 1:2.) Thereafter, Officer David asked Chentis to exit the vehicle. (R. 1:2.) He observed "fresh track marks" on Chentis's left elbow area, which he knew from training and experience to be consistent with recent intravenous drug use. (R. 1:2.) After the police canine alerted on Chentis's vehicle, officers searched inside and located several drug-related items. (R. 1:2.)

Between the driver's seat and center console, officers discovered a clear plastic bag containing a white powdery substance that yielded a positive field test result for the presence of oxycodone. (R. 1:2.) Based on that result, the State charged Chentis with possessing a narcotic drug, oxycodone, as Count 1 in the criminal complaint. (R. 1:1.)

Officers also discovered a blue nylon bag jammed between the driver's seat and center console. (R. 1:2.) In that bag, officers found needles wrapped in a blue constrictor band, along with "a metal cap commonly used to cook controlled substances." (R. 1:2.) Based on those findings, the State charged Chentis with possessing drug paraphernalia, i.e., a

"tin cooker used to inject a controlled substance," as Count 2 in the criminal complaint. [1] (R. 1:1.)

The criminal complaint also contained facts revealing that officers discovered other pieces of drug paraphernalia in Chentis's car for which the State did not bring charges. In the glove compartment, officers located a black case containing needles, cotton balls, and a solution believed to be water; officers also discovered what appeared to be a "crack pipe" at an unidentified location in the vehicle. (R. 1:2.)

When officers attempted to establish ownership of the contraband, the sole vehicle passenger denied all knowledge of drug paraphernalia found in the vehicle, and Chentis declined to answer questions following his arrest. (R. 1:2.)

The plea and sentencing

One week before the scheduled trial date, Chentis entered a plea agreement with the State in which he agreed to plead no contest to the charge of possession of narcotic drugs. (R. 64:2, 5.) In exchange, the State moved to dismiss the remaining charge and recommend that the court place Chentis on probation with various conditions. (R. 64:2.)

During the plea colloquy, the court inquired from the prosecutor whether he was offering the factual allegations

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[1] The container in Chentis's vehicle that officers recognized as paraphernalia used to "cook" controlled substances was referred to by several names throughout the case's pendency. In the complaint, the State referred to the container as both a "tin cooker used to inject a controlled substance," (R. 1:1), and "a metal cap commonly used to cook controlled substances," (R. 1:2). At Chentis's sentencing hearing, defense counsel referred to the vessel as "a teacup" and "the metal tin that a teacup sits in." (R. 64:15.) Postconviction counsel referred to the container as a "metal cup" in his motion. (R. 33:5, 7.) To alleviate confusion stemming from the use of interchangeable terms, the State will refer to the container at issue as a "tin cooker" unless citing to a direct quotation.

from the information and criminal complaint as a factual basis for Chentis's plea, and the prosecutor answered, "We are, Your Honor." (R. 64:11.) When asked if he had any objection to that, defense counsel answered, "No objection, Your Honor." (R. 64:11.)

The court then proceeded to question Chentis whether there were sufficient facts in the criminal complaint upon which it could conclude that he possessed oxycodone as alleged. (R. 64:11.) Before Chentis could respond, defense counsel interjected to explain the status of the pretrial drug testing, acknowledging that, although the criminal complaint originally contemplated an oxycodone-based possession charge, the State would now be pursuing a heroin-based possession charge following the laboratory analysis:

> Your Honor, the reason for the -- the substance that they tested is not what he ultimately would have been convicted on if the case went to trial. There's been some lab testing of some of the paraphernalia that found trace amounts of heroin, and that's the basis. So I just want to put that on the record, that that's the basis for his no contest plea today.

(R. 64:11.) The court verified with defense counsel that the laboratory had discovered a different controlled substance than that previously alleged. (*See* R. 64:11.)

Counsel further explained his understanding that the State could have filed an appropriate amended information before trial, opining, "[I]f the case were to proceed to trial, given what we know through discovery and through the complaint, there is sufficient evidence that Mr. Chentis understands that he could have been found guilty at trial." (R. 64:12.) After confirming that defense counsel was referring to the crime of possessing a controlled substance, the court inquired whether Chentis understood the same. (R. 64:12.) Chentis answered, "Yes." (R. 64:12.)

The court found a factual basis for Chentis's plea, found Chentis guilty, and proceeded to sentencing. (R. 64:12.) During his sentencing argument, defense counsel reiterated that a substance that tested positive for the presence of heroin was found in a tin cooker in Chentis's vehicle. (R. 64:15.) However, defense counsel suggested that Chentis was not aware of the tin cooker found in his vehicle's "glove box." (R. 64:15.) He clarified that he had spoken with Chentis about "whether he knew or reasonably should have known what was in his car, and he's in control of that vehicle." (R. 64:15.) Defense counsel explained, "And he does understand, and he's obviously here to take responsibility for that." (R. 64:15.)

The circuit court ultimately sentenced Chentis to five months' jail, but the court stayed that sentence and placed Chentis on probation for two years with various conditions. (R. 22; 64:19–20.)

Postconviction proceedings

After sentencing, Chentis, by successor counsel, filed a section 809.30 motion seeking to withdraw his plea on the ground that "his plea lacked a factual basis and because he was denied the effective assistance of counsel." (R. 33:1.)

In support, Chentis contended that the facts presented to the court at the plea hearing were "insufficient to show that he knowingly possessed a narcotic, and those facts would have been insufficient as a matter of law had the case proceeded to trial." (R. 33:5.) More specifically, he contended that his case was "directly controlled by the Wisconsin Supreme Court's decision in *Kabat v. State*, holding that a defendant cannot

knowingly possess an immeasurable residue." (R. 33:5 (citing *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977)).)[2]

After both parties submitted their respective briefs, (R. 33; 37; 38), and after both parties were granted an opportunity to present oral argument and answer the court's questions, (R. 65:3–42), the circuit court denied Chentis's motion in an oral ruling, (R. 65:43–46).

When assessing the sufficiency of the factual basis and whether a jury could have convicted Chentis on the facts presented had the case proceeded to trial, the court made clear that it was not only the tin cooker or the tin cooker's contents that drove its decision. (*See* R. 65:44–45.) Rather, the court considered "the other evidence of the other drug paraphernalia as well as the physical characteristics of the defendant at the time of the arrest" before ultimately deciding that a jury reasonably could have convicted Chentis based on the facts in the complaint. (R. 65:45.) Moreover, the court noted that Chentis knew the evidence he was facing if he went to trial and made an "intelligent decision and an informed decision when he did plead no contest." (R. 65:45.)

Turning to Chentis's ineffective-assistance-of-counsel claim, the court did not take testimony from defense counsel after deciding that there was a sufficient factual basis for Chentis's charge and plea. (*See* R. 65:45–46.) Postconviction

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[2] Both in his postconviction motion and appellate brief, Chentis's argument has always focused on whether he could be convicted of knowingly possessing a controlled substance in minute quantities. Assuming the newly confirmed substance is detected in large enough quantities, Chentis has never suggested that the State would be precluded from modifying its theory of prosecution to fit the reported evidence, *i.e.*, proving that Chentis possessed a different narcotic drug than that originally suspected.

counsel acknowledged that he had no additional argument following the circuit court's earlier ruling. (R. 65:46.)

The circuit court later issued a written order denying Chentis's motion for the reasons stated during the hearing. (R. 42.)

Chentis appeals. (R. 48.)

ARGUMENT

The circuit court properly denied Chentis's motion to withdraw his no contest plea after sentencing.

A. Chentis had the burden of showing a manifest injustice.

After sentencing, "[t]he circuit court has discretion to determine whether a plea should be withdrawn, and a plea will not be disturbed unless the defendant establishes by clear and convincing evidence that failure to withdraw the guilty or no contest plea will result in a manifest injustice." *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482.

There are different ways a defendant may establish a manifest injustice. Relevant to Chentis's claims on appeal, a circuit court's failure to establish a sufficient factual basis for a defendant's plea "is one type of manifest injustice that justifies plea withdrawal." *State v. Scott*, 2017 WI App 40, ¶ 30, 376 Wis. 2d 430, 899 N.W.2d 728; *accord State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999). A defendant may also demonstrate a manifest injustice by establishing that he or she received ineffective assistance of trial counsel. *State v. Dillard*, 2014 WI 123, ¶ 84, 358 Wis. 2d 543, 859 N.W.2d 44.

When applying the manifest injustice test, the reviewing court is not limited to the plea record but can consider the "totality of the circumstances," including the

sentencing record, defense counsel's statements, and other portions of the record. *State v. Cain*, 2012 WI 68, ¶ 31, 342 Wis. 2d 1, 816 N.W.2d 177; *Scott*, 376 Wis. 2d 430, ¶ 30.

B. Chentis was not entitled to withdraw his plea due to an allegedly deficient factual basis.

Chentis moved to withdraw his plea, in part, on his contention that the factual basis supporting his plea was insufficient as a matter of law because he could not be convicted of possessing a drug's "immeasurable residue." (R. 33:4.) The circuit court denied Chentis's claim after considering all the facts before it, not just those surrounding the tin cooker and the remaining heroin it contained. (R. 65:44–45.) The court was correct. Even if the circuit court were required to meticulously scrutinize every fact supporting a defendant's negotiated plea (under well-established law, it wasn't), the court nevertheless drew a reasonable inculpatory inference from the aggregate facts set forth by the criminal complaint and the attorneys' verbal representations. Chentis is not entitled to plea withdrawal based on a lacking factual basis.

1. A circuit court must establish a factual basis before accepting a defendant's guilty or no-contest plea.

Before accepting a defendant's guilty or no-contest plea, circuit courts are instructed to satisfy certain requirements. Wis. Stat. § 971.08(1). Among those duties, a circuit court is directed to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b). A sufficient factual basis exists if an inculpatory inference can reasonably be drawn by the fact-finder from the facts, even if an exculpatory inference can also be drawn and the defendant insists that the exculpatory one is the correct inference. *State v. Black*, 2001 WI 31, ¶ 16, 242

Wis. 2d 126, 624 N.W.2d 363; *State v. Spears*, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988).

Moreover, when the guilty plea is the product of a negotiated plea agreement like in Chentis's case, the trial court need not go to the same lengths in assessing whether the facts would sustain the charge as it would if there had been no negotiated plea agreement. *See State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 645–46, 579 N.W.2d 698 (1998).

2. The facts alleged in the criminal complaint, paired with the laboratory test results verbally described to the court, were sufficient to support Chentis's plea.

This Court should affirm because the facts contained in the criminal complaint, paired with defense counsel's factual representations about the laboratory's testing results, permitted the circuit court to draw a reasonable inculpatory inference that Chentis knew he possessed an illegal narcotic drug when stopped by police. *See Black*, 242 Wis. 2d 126, ¶ 16; *Spears*, 147 Wis. 2d at 435.

Recall that, according to the criminal complaint, officers discovered a bag containing assorted drug paraphernalia used to process and inject drugs, including needles, a constrictor band, and a tin cooker. (R. 1:2.) Officers found that bag in a car that Chentis owned and drove minutes earlier, stuck between the vehicle's center console and the seat Chentis occupied seconds earlier. (R. 1:2.) Chentis's car also contained numerous other pieces of drug paraphernalia, including a suspected "crack pipe." (R. 1:2.)

Further establishing knowledge and ownership of the items, Officer David observed "fresh track marks" on Chentis's left elbow area, a known indicator of recent intravenous drug use. (R. 1:2.) Chentis's lone passenger

denied knowledge of (and thus ownership of or responsibility for) the contraband contained in the vehicle. (R. 1:2.)

In addition to the criminal complaint's contents, before the circuit court accepted Chentis's plea, defense counsel explained that laboratory testing identified trace amounts of heroin in Chentis's drug paraphernalia. (R. 64:11.)

Reviewing these aggregate facts, it was reasonable for the circuit court to infer that Chentis knew that he possessed heroin. *See Black*, 242 Wis. 2d 126, ¶ 16; *Spears*, 147 Wis. 2d at 435. Although one could undoubtedly come up with innocent explanations for the officers' observations, it was reasonable to suppose that an intravenous drug user driving his own car filled with his own drug paraphernalia *knew* that the bag next to his seat, holding all the items necessary to prepare and inject a drug, still contained some heroin.

Again, the State did not need to prove Chentis's guilt beyond a reasonable doubt at his plea hearing; it merely had to present the circuit court with enough facts to draw an inculpatory inference supporting Chentis's guilt, even if one could also draw conflicting, exculpatory inferences from those same facts or even if Chentis had explicitly disputed those facts. *See Black*, 242 Wis. 2d 126, ¶ 16; *Spears*, 147 Wis. 2d at 435. Notably, had Chentis entered an *Alford* plea and outright denied his guilt, the State still would not have needed to

negate all exculpatory inferences before the court could accept his plea.[3] *See Schwarz*, 219 Wis. 2d at 645.

Still, to convince this Court that his plea should never have been accepted, Chentis insists that his claim is "controlled" by the supreme court's decision in *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977), and he simultaneously tries to distinguish *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). (Chentis's Br. 8–9.) As the State will explain, this Court should easily reject Chentis's argument because both *Kabat* and *Poellinger* concern whether the State presented sufficient trial evidence to support a conviction, not whether facts allowed a circuit court to draw the reasonable inculpatory inferences necessary to accept a defendant's plea.

In *Kabat*, the supreme court assessed whether sufficient trial evidence supported a defendant's conviction for possessing a controlled substance—namely, marijuana found inside a smoking pipe. 76 Wis. 2d at 227. At trial, a Wisconsin State Crime Laboratory chemist testified to removing, testing, and identifying less than one half-gram of drug residue from a smoking pipe seized at a party Kabat attended. *Id.* at 225–26. Kabat testified to using that pipe to smoke marijuana two weeks before the party at which officers seized his smoking device, but he denied knowledge that the pipe still contained marijuana that night, insisting that he had cleaned it since he last used it. *Id.* at 226. Other party

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[3] *North Carolina v. Alford*, 400 U.S. 25 (1970). The Wisconsin Supreme Court has defined an *Alford* plea as "a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime." *State v. Multaler*, 2002 WI 35, ¶ 4 n.4, 252 Wis. 2d 54, 643 N.W.2d 437. Before accepting an *Alford* plea, a circuit court is required to not only find the existence of a factual basis as required by Wis. Stat. § 971.08(1)(b) but must also determine whether "the evidence the state would offer at trial is strong proof of guilt." *State v. Johnson*, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981).

attendees corroborated Kabat's story, testifying "that they had not seen anyone using the pipe during the party." *Id*. Still, the circuit court found Kabat guilty of knowingly possessing the drug in the pipe. *Id*.

The supreme court reversed Kabat's conviction and ordered his complaint be dismissed. *Id*. at 229. The court noted that the pipe in question contained less than one-half gram of ash material, and it held that "[u]nder the circumstances of the case it cannot be said that the presence of the narcotic was reflected in such a form as reasonably imputed knowledge to Kabat that it was marijuana." *Id*. at 228. The court made clear, as Chentis correctly argues, "Guilt or innocence on a charge of illegal possession may not be determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant." *Id*. at 228 (quoted source omitted).

In *Poellinger*, the State presented trial evidence that the defendant possessed a purse containing several items, including a metal compact that appeared to have been licked or wiped, leaving a powdery residue, along with a small glass vial containing residual amounts of cocaine in the threads of the cap. 153 Wis. 2d at 498. Similar to *Kabat*, Poellinger testified that the paraphernalia (in her case, a vial) contained cocaine at one time, but she believed the vial was empty because she and her boyfriend had used the cocaine months earlier. *Id*. at 498–99. A crime laboratory analyst was able to remove white powdery residue on the threads of the vial and tested that substance, revealing residual amounts of cocaine. *Id*. at 498. A jury found Poellinger guilty. *Id*. at 499.

Poellinger attempted to have her conviction overturned under the same rationale driving *Kabat*, arguing that the trial evidence presented to prove *knowing* possession of cocaine was lacking. *Id*. at 499. The supreme court disagreed. *Id*. at 508–09. The court explained that the jury was entitled to

consider matters of common knowledge and experience when weighing the evidence, such as the recognition that people usually look at a bottle when replacing its cap, and the jury could infer that Poellinger would have seen the white powdery residue when replacing the vial's cap. *Id*. at 509. Or the jury could have inferred that, unless one took "extraordinary measures" to remove the cocaine from the vial, "some of those contents will remain behind." *Id*. at 509. The court concluded that, "On the basis of this common knowledge, together with the defendant's admission that she knew that the vial contained cocaine at one time, the jury could reasonably infer that the defendant knew that the vial contained residual amounts of cocaine at the time of her arrest." *Id*. at 509.

To summarize, both *Kabat* and *Poellinger* assessed whether certain trial evidence was sufficient to support a trial verdict. Neither opinion examined whether a circuit court was presented sufficient facts to accept a defendant's plea. Nevertheless, Chentis draws two overarching principles from *Kabat* and *Poellinger* to support his argument, but both miss the mark.

First, Chentis stresses *Kabat*'s recognition that "[g]uilt or innocence on a charge of illegally [sic] possession may not be determined *solely* by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant." (Chentis's Br. 9 (emphasis added).)

Not to further belabor the point, but the State has already shown how the inference that Chentis knew he possessed heroin in his car was not based *solely* on the laboratory test results; Chentis's arm showed signs of recent intravenous drug use as he drove his own car filled with drug paraphernalia, including needles, a constrictor band, and a cooking tin containing leftover heroin. *See supra* pp. 9–10.

Second, Chentis appears to read *Poellinger* to hold that the State can only prove a defendant's awareness of drugs in negligible concentrations if the defendant makes an inculpatory admission. (Chentis's Br. 10–11.)

But *Poellinger* established no such a bright-line rule. Rather, the supreme court merely recognized that a jury could reasonably conclude that Poellinger knowingly possessed cocaine residue based on its common knowledge and Poellinger's admission that she knew the vial previously contained cocaine. 153 Wis. 2d at 509. It should go without saying that a court's recognition that specific evidence is sufficient to support a conviction in one case does not set the lowest threshold by which evidence is to be judged in all other cases. In other words, just because the court decided that the jury could have convicted Poellinger, in part, due to her admission does not mean that other sorts of circumstantial evidence could not carry the day in other cases.

Simply put, the circuit court in this case heard no facts suggesting that Chentis tried to rid himself of illegal substances like in *Kabat*, and it was reasonable for it to infer, like the court in *Poellinger*, that when one possesses or uses an illegal substance in a container, that container is likely to retain some amount of the substance thereafter, even if in minute amounts. Neither *Kabat* nor *Poellinger* supports Chentis's position that he could not be convicted based on the facts presented to the circuit court in his case.

As a final matter, the State perceives a fleeting argument from Chentis that the factual basis supporting his plea was somehow undermined based on his defense counsel's sentencing arguments. (Chentis's Br. 11.) His logic is confusing as it was not until *after* the court found a sufficient factual basis, accepted Chentis's plea, and proceeded to sentencing that defense counsel attempted to minimize Chentis's culpability by arguing that his client was unaware of the tin cooker in his vehicle. (R. 64:15.)

But even ignoring that defense counsel's statements occurred *after* the court had already found a factual basis at the parties' stipulation, counsel's sentencing arguments made no sense in context, and the circuit court had no reason to revisit its factual basis finding. Recall that defense counsel raised no objection to the circuit court accepting the facts alleged in the criminal complaint to find a factual basis for Chentis's plea. (R. 64:11.) Minutes later, however, defense counsel argued Chentis was unaware of the illegal heroin not because of the quantity in which it was found but because it was inside the vehicle's glove box. (R. 64:15.) Although clearly aimed at minimizing his client's culpability rather than undermining the plea that Chentis had just entered, defense counsel's argument directly contradicted the facts alleged in the criminal complaint, which indicated that officers located the tin cooker in a bag alongside Chentis's seat, not in the glove compartment. (R. 1:2.)

In sum, the factual basis threshold to accept Chentis's plea was low, and the court merely had to draw an inculpatory inference from the facts presented. *See Black*, 242 Wis. 2d 126, ¶ 16; *Spears*, 147 Wis. 2d at 435. Even confronted with defense counsel's sentencing argument, the contents of the criminal complaint and the summary of the laboratory test results were enough for the court to find that Chentis knowingly possessed heroin. Because a sufficient factual basis existed for his plea, Chentis failed to establish by a preponderance of the evidence that a manifest injustice would occur if he were not allowed to withdraw that plea. *Taylor*, 347 Wis. 2d 30, ¶ 48; *Scott*, 376 Wis. 2d 430, ¶ 30. Accordingly, the circuit court was correct to deny his motion, and this Court should affirm.

C. Chentis was not entitled to withdraw his plea due to alleged ineffective assistance of counsel.

Chentis also moved to withdraw his plea, in part, on his contention that defense counsel "was ineffective for failing to seek dismissal of the narcotic charge and instead for advising Chentis to plead no contest." (R. 33:7.) The circuit court never reached Chentis's claim because, as he freely admits in his appellate brief, he "conceded [below] that he could not prevail on his claim of ineffectiveness if the court concluded a factual basis existed to accept his no contest plea." (Chentis's Br. 16 n.2.) This Court need not reach Chentis's second claim because he effectively abandoned it below. Even if this Court elects to decide Chentis's second claim, it should affirm because defense counsel was not ineffective for failing to advance meritless or novel legal arguments.

1. To prove ineffective assistance of counsel, Chentis needed to prove both that counsel performed deficiently and that the deficient performance resulted in prejudice.

To prevail on an ineffective-assistance-of-counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." *State v. (John) Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* ¶ 26 (citations omitted). Where the alleged deficient performance is a failure to make a legal argument, the defendant "need[s] to demonstrate that counsel

failed to raise an issue of settled law." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93. "As a general matter, '[c]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective.'" *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232 (alteration in original) (citation omitted). Moreover, it is well-established that defense counsel is not ineffective for failing to advance meritless arguments. *State v. Allen*, 2017 WI 7, ¶ 46, 373 Wis. 2d 98, 890 N.W.2d 245.

To prove prejudice, a defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

2. Chentis failed to show that his defense counsel was ineffective for failing to advance meritless or, at best, novel legal arguments.

Chentis argues on appeal that defense counsel "performed deficiently by failing to seek dismissal of the felony narcotic charge after receiving the exculpatory crime lab report." (Chentis's Br. 15.) He also argues that defense counsel "compounded his ineffectiveness by counseling Mr. Chentis to plead no contest to the residue in the metal cup." (Chentis's Br. 15.)

As the State has already explained, there was a sufficient factual basis presented to the circuit court to accept Chentis's plea. *See supra* pp. 9–15. Had defense counsel filed a motion to dismiss his case based on the results of the crime laboratory report, that motion would have failed because the State could have proven circumstantially that he knowingly

possessed the heroin amongst the cornucopia of drug paraphernalia littered throughout his car.[4]

Defense counsel was simply not ineffective for failing to raise a meritless argument to dismiss Chentis's case. *See Breitzman*, 378 Wis. 2d 431, ¶ 49. But should this Court find arguable merit to Chentis's factual basis claim, that still would not mean that defense counsel was ineffective. Up to this very point, Chentis has failed to present any authority establishing that a circuit court cannot accept a negotiated plea to possessing miniscule amounts of a controlled substance, especially when facts circumstantially prove that the defendant was aware that he possessed the drug.

At best, defense counsel could have raised a novel legal argument, like that raised in Chentis's postconviction motion and appellate brief, that *Poellinger* and *Kabat* somehow preclude a circuit court from finding a factual basis to support his plea, even though neither case addressed whether certain facts were sufficient to support a defendant's guilty plea. But defense counsel is not ineffective for failing to raise novel legal arguments. *See Lemberger*, 374 Wis. 2d 617, ¶ 18.

Because defense counsel was not ineffective by foregoing meritless or novel legal arguments to dismiss Chentis's case, Chentis failed to establish by a preponderance of the evidence that a manifest injustice would occur if he were not allowed to withdraw his plea. *Taylor*, 347 Wis. 2d 30, ¶ 48; *Dillard*, 358 Wis. 2d 543, ¶ 84. Accordingly, the circuit court was correct to deny his motion, and this Court should affirm.

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[4] Moreover, Chentis fails to explain what kind of motion defense counsel was supposed to file. (*See* Chentis's Br. 15.) If he felt that the State's evidence was insufficient to prove his guilt, Chentis's recourse was to proceed to trial, not to file a motion to dismiss his case.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying Chentis's motion for postconviction relief.

Dated this 5th day of March 2021.

Respectfully submitted,

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Electronically signed by:

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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 4989 words.

Dated this 5th day of March 2021.

Electronically signed by:

s/ John W. Kellis
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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 the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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