STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2021AP000375CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. CARROLL, JR.

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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I. Did the Court of Appeals err in affirming the Circuit Court's denial of Mr. Carroll's motion to withdraw his no contest plea because Mr. Carroll received ineffective assistance of counsel and was coerced into making the plea?

The circuit court held Mr. Carroll did not receive ineffective assistance of counsel. The Court of Appeals affirmed. *State v. James A. Carroll*, No. 2021AP375-CR, slip op. (August 26, 2021), (A102-110); *mot. for recon. denied*. (September 16, 2021). (A111).

II. Did the Court of Appeals err in affirming the Circuit Court's denial of Mr. Carroll's postconviction motion for sentence modification and failure to remove the requirement that Mr. Carroll register as a sex offender for 15 years due to new factors?

The circuit court held it did not err in requiring Mr. Carroll to register as a sex offender for 15 years. The Court of Appeals affirmed. *State v. James A. Carroll*, No. 2021AP375-CR, slip op. (August 26, 2021), (A101-110); *mot. for recon. denied*. (September 16, 2021). (A111).

CRITERIA FOR REVIEW

A decision by the Supreme Court will help clarify the law and the question presented is a novel one, the resolution of which will have statewide impact, satisfying the criteria for review under Wis. Stat. § (Rule) 809.62(1r)(c) and 809.62(1r)(c)2. Specifically, the issue is whether Mr. Carroll was coerced into pleading guilty by his trial counsel's ineffective assistance when trial counsel delayed preparation until three days before trial.

STATEMENT OF THE CASE AND FACTS

A. Procedural Background Leading to Appeal

1. Description of the Nature of the Case

This is an appeal of a sentencing following a plea of no contest pursuant to Wis. Stat. (Rule) § 809.30(2). Mr. Carroll wishes to withdraw his no contest plea

and go to trial; or, in the alternative, to have the requirement that he register as a sex offender removed from his sentence.

2. Procedural Status of the Case Leading up to Appeal and Decisions of the Circuit Court and Court of Appeals

Mr. Carroll pled no contest to offenses charged by the State. Mr. Carroll filed a postconviction motion seeking leave to withdraw his guilty plea and to have the requirement that he register as a sex offender for 15 years be removed from his sentence. The Court denied the postconviction motion on both grounds. Mr. Carroll appealed his judgment of conviction and the denial of his postconviction motion to the Court of Appeals, which affirmed the Circuit Court.

B. Statement of Facts

Detective Leah Meyer of the Jefferson County Sheriff's Office was on duty on February 27, 2015, when she was dispatched to the Fort Atkinson Hospital in Fort Atkinson, WI, to participate in the investigation of a possible sexual assault. (85:11, 12; A147, 148.) She was requested to be present by Johnson Creek Officer Dan Holcombe. (85:12; A148.)

She learned that Officer Holcombe had been dispatched to the apartment of a woman named S.W. in the Village of Johnson Creek, for a welfare check. (85:12; A148.) When he arrived, he found S.W. intoxicated, depressed, and possibly suicidal. (85:12; A148.)

He dispatched an ambulance which transported her to Fort Atkinson Healthcare Hospital for a medical evaluation and clearance and detoxification services by Jefferson County Human Services. (85:13; A149.)

While Officer Holcombe was with S.W., she disclosed a sexual assault that had taken place in her apartment at the hands of an appliance repairman named James Carroll. (85:13; A149.)

Mr. Carroll was standing outside the emergency room, so Officer Holcombe went and spoke with him while Officer Meyer spoke with S.W. (85:13, 14; A149, 150.)

Officer Holcombe learned that Mr. Carroll had been to S.W.'s apartment on the evening prior, February 26th, 2015, for an appliance repair of her refrigerator. This was the second such visit that he had done to her apartment for the same appliance problem, which was it wasn't maintaining its coolant. He had gone earlier in the year in January, 2015, for the first repair visit and the problem cropped up again. He was then contacted by the apartment manager and owner George Falk to go back to S.W.'s apartment. (85:14; A150.)

Mr. Carroll acknowledged that he had held her hand and that he had returned some hugs that she gave him, but denied that anything inappropriate had happened between them. (85:14, 15; A150, 151.)

S.W. told Officer Meyer that she was highly intoxicated. When Mr. Carroll had arrived, S.W. had been in a state of depression and grief following the death of her long-term boyfriend. They had been together twenty years and he had died on January 1st, 2015. She had been off of work that entire time. (85:15, 16; A151, 152.)

S.W. stated she was a recovering alcoholic who lapsed. She was self-medicating to get through her depression and grief with alcohol. She had consumed a high volume of alcohol before Mr. Carroll arrived at her apartment that Thursday evening. (85:16; A152.)

S.W. had also taken a Trazodone pill which is prescribed for sleeping, prior to his arrival. The combination of the two made her extremely tired and she lay down on a futon that was folded out to a bed in the living room. She lay down during the repair visit since it was becoming protracted. She fell asleep or passed out at some point while waiting for Mr. Carroll to finish his repair work. When she next woke, Mr. Carroll was lying behind her on the futon and had his hand up her blouse. She did not have a bra on at the time and he was groping her breasts and kissing her neck. She said that she was still highly disoriented. She told him to stop. Then she passed out again. She had no idea what transpired after she passed

out, whether or not he stopped touching her. The next time she awoke it was 4:30 a.m. Friday morning and Mr. Carroll was gone. (85:16; A152.)

Later when she woke up, she was highly upset. She continued to drink heavily that day which led her to the point of a high level of intoxication on Friday evening that resulted in her detoxification placement in Madison. They took a urine sample from her that Friday evening at the hospital and she was a .435 percent BAC. (85:17, 18; A153, 154.)

S.W. said that on the day of the alleged assault, she had started drinking at approximately 9:00 or 10:00 a.m. She finished drinking at approximately 7:00 p.m. that evening while Mr. Carroll was present fixing her refrigerator. She had consumed six large mixed drinks in a glass that she said was twelve ounces in volume. (85:19; A155.)

The SANE nurse took multiple swabbings of S.W.'s body including from around her mouth, her neck, her breasts, and external vaginal area. The clothing she was wearing at the hospital on Friday evening was collected because it was determined that she had never changed clothes from the day before and was wearing the exact same clothes at the time that she was wearing at the time of the assault on Thursday evening, February 26th. (85:20; A156.)

In May of 2015, Officer Meyer received a report indicating there were multiple areas of S.W.'s body where the swabbings took place where there was there was amylase detected, which is an enzyme that is found in human saliva. That was located on the left side of her neck around her mouth and also her right breast and external vaginal area. There were positive results regarding several areas of her body that were swabbed. They found a mixture of DNA on the left side of S.W.'s neck. They concluded that the STR DNA mixture profile at that location was 2.4 million times more likely to be a combination of the victim's DNA with Mr. Carroll's than the victim's DNA and an unidentified male. They also concluded that the swabbing of both the right breast and the inside and

outside of her underwear band contained DNA profiles that were consistent with Mr. Carroll's. (85:20-23; A156-159.)

Officer Meyer testified that S.W. stated she did not consent to physical contact with Mr. Carroll. (85:23; A159.)

On August 7, 2015, Mr. Carroll was charged with one count of second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(cm), a class C felony; and two counts of misdemeanor bail jumping, in violation of Wis. Stat. § 946.49(1)(a). class A misdemeanors. (1:1; A118.)

On September 11, 2015, at the Arraignment hearing, Mr. Carroll pled not guilty to all three counts. (86:3.)

Mr. Carroll's trial attorney at the time, Jason Gonzalez, prepared to go to trial, and on August 4, 2016, filed six Motions in Limine (20, 21, 22, 23, 25, 26); proposed Jury Instructions (24); and filed a Notice of Intent to Use Expert Witness Testimony (19; A121).

At a hearing on October 10 2016, the Court said it would like to set the trial for January 30, 2017, and Mr. Carroll's attorney stated he had to check with the expert witness about availability. (88:3.)

The case was set for trial on January 30, 2017 (91:1; A168), but Mr. Gonzalez withdrew from representing Mr. Carroll that day, due to statements Mr. Carroll made which presented Mr. Gonzalez with a conflict that the Wisconsin State Bar Ethics Hotline told Mr. Gonzalez was not a waivable conflict. (91:5; A172.)

On February 9, 2017, the State Public Defender appointed Jeffrey De La Rosa to represent Mr. Carroll. (38.) At the status hearing held on March 27, 2017, Mr. De La Rosa stated he was waiting for some materials from the prior attorney, Mr. Gonzales. (92:3; A175). The court set the final status conference for June 8, 2017 (92:6; A178), and the trial for June 14 and 15. (92:5; A177.)

The court issued a Scheduling Order on April 13, 2017, requiring the parties to schedule a hearing on pretrial motions to be held before the final status

conference. (43:1; A128.) The court stated that brief motions *in limine,* which would take 15 minutes of court time or less, could be filed at or before the Final Status/Scheduling Conference. (43:1; A128).

On June 8, 2017, Mr. Carroll pled no contest to the one count of the Class A misdemeanors of fourth degree sexual assault and one count of bail jumping, in violation of Wis. Stat. §§ 940.225(3m) and 946.49(1)(a). (93:11, 12; A190, 191; 47; A115.) The other counts were dismissed but read in. (93:12; A191; 47:3; A117.)

The Court sentenced Mr. Carroll to probation, sentence withheld, of three years on the sexual assault count to be served concurrently with two years on the bail jumping count. (93:23; A202; 47:1-3; A115-117.)

The Court adopted the Sex Offender Registry for the length of probation plus fifteen years on each count. (93:24; A203; 47:1, 2; A115, 116.)

On the day of his sentencing, Mr. De La Rosa checked a box stating that Mr. Carroll was undecided about appealing and Mr. Carroll signed the form. (96:7; A233.)

A few days after the June 8, 2017 hearing, Mr. Carroll decided he wanted to appeal his conviction. (96:8; A234.) Mr. Carroll telephoned Mr. De La Rosa's direct line, and his office, on at least six occasions from the Jefferson and Dane County Jails but did not get a response. (96:9; A235.)

Mr. Carroll finally met with Mr. De La Rosa in September, 2017, to tell him he wanted to appeal but Mr. De La Rosa told him it was too late. (96:13; A239.) In December, 2018, to January, 2019, Mr. De La Rosa contacted the Appellate Division of the State Public Defender and learned it was possible to get an extension. (96:14; A240.)

On September 14, 2018, the Department of Corrections revoked Mr. Carroll's probation. (49:5, 6.)

On October 19, 2018, Mr. Carroll was sentenced following the revocation of his probation to nine months in jail on each count, to be served consecutively.

(95; A207; 51:1; A113.) Mr. Carroll had 434 days of credit and therefore with credit for good time served, had served two days longer than required. (95:17; A223.)

Mr. Carroll filed a Notice of Intent to Pursue Postconviction Relief on February 1, 2019. (52.) The Notice was filed out of time and on July 19 and July 24, 2019, a two-day hearing was held on Mr. Carroll's Motion for Extension of Time to File a Notice of Intent to Pursue Postconviction Relief. (96; A227.)

On November 25, 2019, the Court of Appeals reinstated Mr. Carroll's direct appeal rights allowing him to appeal his 2017 conviction (68:1-3; A129-131.)

On December 6, 2019, Mr. Carroll filed a Notice of Intent to Pursue Postconviction Relief. (69.) The undersigned counsel was appointed on April 20, 2020 (82), and filed a Motion to Withdraw his Plea of No Contest; or, in the Alternative, Motion for Sentence Modification on August 18, 2020 (72; A132). Mr. Carroll sought to withdraw his plea based on ineffective assistance of counsel. Specifically, he alleged his second trial attorney coerced him into pleading no contest to an offense he did not commit by failing to investigate the case. (72:3; A134.)

In the alternative, Mr. Carroll argued his sentence should be modified and the court should remove the condition of having to register as a sex offender due to the new factor of information that the registry caused him to be homeless for two years at age 63. (72:4; A135.)

The circuit court held a hearing on November 19, 2020, and January 29, 2021. (99; 100; A241.) The Court denied the motion on both grounds. (81; A112.) Mr. Carroll appealed and the Court of Appeals affirmed the Circuit Court. (A101-112.)

STANDARD OF REVIEW

"Whether counsel was ineffective presents a mixed question of fact and law. *State v. Johnson,* 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). We will not

reverse a circuit court's factual findings unless they are clearly erroneous. *Id.* However, we independently review whether counsel's performance was deficient and prejudicial. *Id.* at 128, 449 N.W.2d 845." *State v. Dillard*, 2014 WI 123, 132, 358 Wis.2d 543, 859 N.W.2d 44.

ARGUMENT

I. The Court of Appeals erred in affirming the Circuit Court's denial of Mr. Carroll's motion to withdraw his no contest plea because Mr. Carroll received ineffective assistance of counsel and was coerced into making the plea.

At the hearing on the motion to withdraw his plea of no contest, Mr. Carroll testified that:

> I did not feel that I had been properly prepared by the attorney, with the attorney, for – for trial. The only substantive meeting we had together was about two or three months – let's see – yeah, two or three months prior. It was in April of that year for about two hours that – that we had gotten together to discuss the case. We didn't have a meeting. We basically mostly argued because he was saying he felt that I was guilty, so I felt like I really wasn't being passionately represented at that point. (100:12, 13; A362, 363.)
>
> So all that time had gone by and then I kind of felt strong-armed basically at the last minute a day before or two days before the last hearing, the hearing before trial was scheduled. And I had also – I found myself feeling hopeless that I had counsel that didn't want to represent me. He had not called a professional witness that was listed as a – a witness, a doctor of psychology, I think, to – that my previous attorney had named as a witness. But he also failed to subpoena that witness, which I've already alleged was his reason for making the accusations against me that he did to put himself in a situation of withdrawing from the case.
> (100:13; A253.)

Mr. De La Rosa testified that he thought that he met with Mr. Carroll "twice" during the trial preparation period. (100:41; A281.) Mr. De La Rosa never contacted the expert witness Mr. Gonzales had lined up. (100:42; A282.) Mr. De La Rosa testified that, "at that final status, we had – I had started to prepare, but not as much as it would be, say, you know, the third or four days before then, before the trial would have started." (100:43; A283.)

The Court found Mr. Carroll to be not credible and denied the motion to withdraw the plea. (100:60, 62; A300, 302; 81; A112.)

The Court erred in finding Mr. Carroll to be not credible because Mr. Carroll *did* feel coerced into pleading no contest. (100:12, 13; A252, 253.) His trial attorney met with him once and told Mr. Carroll he felt he was guilty. (100:12; A252.) His trial attorney did not call his expert witness and saved the trial preparation for the three or four days before trial. (100:43; A283.) With his attorney having failed to contact the expert witness and to prepare Mr. Carroll for trial, Mr. Carroll felt "strong-armed" and "hopeless." (100:13; A253.)

Contrast Mr. De La Rosa's trial preparation with Mr. Gonzales'. Mr. Gonzales had not agreed to a trial date until he had checked with the expert. (88:3.) Mr. De La Rosa never contacted the expert. (100:42; A282.) Mr. Gonzales filed six motions *in limine*. (20, 21, 22, 23, 25, 26.) Mr. De La Rosa never attempted to have a hearing on those motions. (43:1; A128.) Mr. De La Rosa was saving the bulk of the trial preparation for the last "three or four days…before the trial would have started." (100:43; A283.)

Mr. Carroll always maintained his innocence of the charges and always wanted to go to trial. But with an attorney who had not prepared Mr. Carroll or his expert, Mr. Carroll felt coerced into pleading no contest to the charges.

Wisconsin courts hold that:

> Ineffective assistance of counsel claims are rooted in the United States and Wisconsin constitutions. Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution (applied to the states by the Fourteenth Amendment) guarantee criminal defendants the right to effective assistance of counsel.

State v. Dillard, 2014 WI 123, ¶84, 358 Wis.2d 543, 859 N.W.2d 44

> To show he has been deprived of that right [to effective assistance of counsel], the defendant must prove (1) that trial counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

State v. Dillard, 2014 WI 123, ¶¶83, 84, 85, 358 Wis.2d 543, 859 N.W.2d 44.

> Whether the defendant received ineffective assistance of counsel is a question of constitutional fact. An appellate court upholds the circuit court's findings of fact unless they are clearly erroneous. "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" An appellate court independently determines whether those historical facts demonstrate that defense counsel's performance met the constitutional standard for ineffective assistance of counsel, benefiting from the analyses of the circuit court and court of appeals.

> …
> The test for deficiency of performance is objective: Under the totality of the circumstances, did trial counsel's performance fall "outside the wide range of professionally competent assistance"? "Normally, judicial scrutiny of an attorney's performance will be highly deferential."

State v. Dillard, 2014 WI 123, ¶¶86, 88, 358 Wis.2d 543, 859 N.W.2d 44.

Trial counsel in this case left the preparation for trial to the last three days before trial. Trial counsel's performance was deficient in that he did not prepare the defendant and the expert long before the last few days before trial.

> To prove prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Dillard, *Id*., ¶95.

To prove prejudice in this case, Mr. Carroll must show that but for Mr. De La Rosa's unprofessional errors, Mr. Carroll would have gone to trial. "…A defendant must make more than a bare allegation that he 'would have pleaded differently and gone to trial." *Id*., ¶99. He may not rely on a "conclusory assertion of prejudice." *Id.*, ¶100.

Mr. Carroll did not rely on conclusory allegations. The record shows a factual account of his first trial attorney's extensive preparation for trial; of Mr. Carroll's desire to go to trial with the expert; and Mr. Carroll's consistent frustration with his second attorney's lack of trial preparation which coerced Mr. Carroll into pleading no contest.

The ineffective assistance of counsel Mr. Carroll received coupled with the prejudice mean that the trial court erred in denying Mr. Carroll's Motion to Withdraw his No Contest Plea.

The Court of Appeals failed to discuss the fact that trial counsel had left the bulk of the preparation for the last three or four days before trial. This procrastination would panic any reasonable defendant, and is ineffective assistance of counsel. This Court should reverse the Court of Appeals on this ground.

II. The Court of Appeals erred in affirming the Circuit Court's denial of Mr. Carroll's postconviction motion for sentence modification and failure

to remove the requirement that Mr. Carroll register as a sex offender for 15 years due to new factors.

In Mr. Carroll's Motion to Withdraw his Plea of No Contest; or, in the Alternative, Motion for Sentence Modification, Mr. Carroll argued that the new factor which would justify his having the registration requirement removed is that the requirement caused him to be homeless, and to suffer more than an average person would, due to his having Chron's disease which necessitates his taking many medications to control it. (72:4; A135.) His rent is now $560 per month whereas it had been $160 per month before this requirement was imposed. (100:40; A280.)

The Court found there was no new factor and that the registry requirement promotes the important factors of recognizing the seriousness of the offense and protecting the public. (100:60, 61; A300, 301.) The Court of Appeals affirmed the denial. (A101-112.)

Mr. Carroll pled to the crime of fourth degree sexual assault, a Class A misdemeanor in violation of Wis. Stat. § 940.225(3m). This is not one of the crimes that the sexual offender registry statute requires registration for under Wis. Stat. § 301.45(b). Therefore, the circuit court had discretion to not require it. In light of Mr. Carroll's age (63 at the time of sentencing) and medical issues, the circuit court erroneously exercised its discretion in requiring Mr. Carroll to register as a sexual offender for fifteen years.

"'We review a circuit court's sentencing decision for an erroneous exercise of discretion,' *State v. Gallion,* 2004 WI 42, ¶ 17, 270 Wis.2d 535, 678 N.W.2d 197," quoted in *State v. Jackson*, 2012 WI App 76, ¶ 7, 343 Wis.2d 602, 819 N.W.2d 288.

In light of Mr. Carroll's age and medical conditions, the Circuit Court erroneously exercised its discretion and the Court of Appeals erred in reversing the Circuit Court. This Court should reverse that decision of the Court of Appeals.

CONCLUSION

For the reasons stated above, Mr. Carroll respectfully requests that the Court grant his Petition for Review and reverse the decision of the Court of Appeals.

Dated this 12th day of October, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,853 words.

Dated this 12th day of October, 2021.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Petition, including the Appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic Petition is identical in content and format to the printed form of the Petition filed on or after this date. A copy of this certificate has been served with the paper copies of this Petition hand-delivered to the Court and mailed on this day by U.S. first-class mail to the opposing parties.

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CERTIFICATION AS TO APPENDIX

I hereby certify that I submitted an 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 served on opposing counsel as of this date by U.S. mail.

I hereby certify that filed with this Petition, either as a separate document or as a part of this Petition, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the court of appeals and circuit court; (3) a copy of any unpublished opinion cited under § 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, 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.

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