STATE OF WISCONSIN

IN SUPREME COURT

CASE NO. 2021AP574 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COLTON R. TREU,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

CAN THE COURT OF APPEALS IGNORE A CLEAR, UNAMBIGOUS DECISION OF THIS COURT AND OTHER COURTS OF APPEAL?

This issue was not raised in the briefs in the court of appeals.

CRITERION FOR REVIEW

The court of appeals' decision is in conflict with controlling opinions of this court and other courts of appeal. For this reason, the criterion of Rule 809.62(1)(d) is satisfied.

STATEMENT OF THE CASE

Statement of Facts

The petitioner, Colton Treu, was charged by complaint with eleven different offenses, the most serious of which were four counts of homicide by intoxicated use of a vehicle and four counts of hit and run resulting in death, all as a result of an incident that occurred on November 3, 2018. R.3. He was bound over for trial after a preliminary hearing on April 12, 2019. R.139:44.

At a hearing on May 24, 2019, the court considered Mr. Treu's motion for change of venue[1], which was based upon his argument that he would not be able to have a fair trial in Chippewa County because of the likely community prejudice against him because of extensive pretrial publicity. R.27. After hearing from counsel, the court noted its agreement with the proposition that Treu was entitled to a fair trial and then made "it clear to everybody in the courtroom that this trial will be held in Chippewa County. One way or the other, it will be held right here in this courtroom." R.140:39. Having denied the defense motion, the court went on to discuss the questionnaire it intended to send out to potential jurors and then scheduled dates for the trial. R.140:40-42.

On November 15, 2019 the parties appeared to consider the defense request to reconsider Treu's motion following the receipt of the jury questionnaires, about which one of Treu's defense counsel[2] noted that there was a "range from as little as 50 percent to 85 percent of the jurors that returned the questionnaire have

[1] Or in the alternative for a jury panel from a different county, as well as for sequestration of the jurors.
[2] Mr. Treu was represented by Assistant State Public Defenders Carly Sebion and Travis Satorius.

come back with the inability to be impartial, Your Honor." R.143:13. After hearing the arguments of counsel, the court noted the various factors that it needed to consider in deciding the motion, commented on the caselaw discussing those factors, noted that 116 jurors had indicated that they could be fair and impartial, and, in the end, concluded that Mr. Treu would receive a fair trial with Chippewa County jurors and denied the motion. R.143:31-36.

When the parties next appeared before the court, it stated that the State would not consent to Treu's waiver of a jury, so that, by statute, there would be a jury trial in January. R.149:2. After discussing some of the State's recently filed motions, defense counsel Sebion informed the court that when they returned for the next court date, they would be asking the court to take a plea. R.149:5. Returning ten days later, the court accepted Mr. Treu's pleas to five counts in the Information and ordered the preparation of a PSI. R.150:12-14. He was sentenced to a total of 54 years of initial confinement at the end of a sentencing hearing on March 11. 2020. R.144:82.

Treu subsequently filed a postconviction motion to withdraw his pleas on the grounds of not having entered knowing, voluntary and intelligent pleas, as well as the ineffective assistance of counsel. R.110. At a hearing on his motion, defense counsel Satorius initially testified that he and co-counsel Sebion had told Treu that if he entered his pleas rather than going to trial, it would "impact his ability to [appeal][3]. R.150:9. After reviewing an email that he had previously sent to appellate counsel, Satorius stated that he and co-counsel had told Treu that by entering his plea, "that changed his ability to appeal certain issues in this case,

[3] While the transcript uses the word "plead," it is counsel's recollection and the belief that the word "appeal" was actually used by Mr. Satorious in response to the question about the possibility of an appeal. Had counsel noticed this discrepancy earlier, he would have filed a motion to correct the transcript.

and that they are impacted by his plea ..." R.150:15.

He went on to testify that they had not specifically told Treu that he would not be able to appeal the denial of the change of venue motion. "It was more just general descriptions in regard to his ability to appeal. R.150:16. Under cross examination, defense counsel testified that he did not believe that he and co-counsel had provided false information to Mr. Treu regarding his right to appeal the venue issue[.]" R.150:19.

When co-counsel took the stand, she agreed that she had told her client "that he would be able to pursue an appeal of any issue in this case, including the change of venue, even if he entered his plea[.]" R.150:29. She then agreed that her understanding of the guilty plea waiver rule was that "If you enter your pleas, you can't appeal any issues other than jurisdictional issues ...." R.150:30. Finally, Ms. Sebion agreed that neither she nor Mr. Satorious would have told Treu that "If you enter your pleas, you're not going to be able to appeal anything[.]" R.150:31.

Mr. Treu then took the stand and testified that he had wanted to appeal the denial of the change of venue motion, that his attorneys never told him that he would not be able to do so if he entered his pleas instead of going to trial and that if they had told him this fact, he would not have entered his pleas, but would have gone to trial. R.150:35-36. He then told the court that he did not understand that he would not be able to appeal the denial of the change of venue motion (or any other motion) if he did not go to trial and that he did not believe he entered a knowing and intelligent plea in his case as a result. Under cross examination, he explained why he would have gone to trial rather than entering his pleas, had he known he wouldn't have been able to appeal the denial of the change of venue motion. R.150:36. R.150:37-39.

Appellate counsel then mentioned the court's agreement, at an earlier scheduling conference, to allow for briefing on the motion following the postconviction motion hearing, to which the prosecutor did not object (R.151:39-40), but the court later said that it didn't need any briefing. R.151:42.

The trial court denied Treu's motion, stating that a case relied upon by Treu was distinguishable, that he had entered a knowing and voluntary plea and that there was no deficient performance by trial counsel because there was "no evidence of misadvice (sic)." R.150:43-47. Mr. Treu appealed the judgment of conviction (R.97) and the order denying his postconviction motion (R.131), on the grounds that the trial court erred, as a matter of law, when it denied his motion.

Procedural History

This is an appeal from the judgment of conviction, entered March 11, 2020 in the circuit court for Chippewa County, James Isaacson, Judge, as well as the decision and order denying Mr. Treu's postconviction motion, entered March 8, 2021. In a decision dated July 13, 2022, the court of appeals affirmed the judgment and the order. App., A101-111.

ARGUMENT

I. This court should take review to reinforce the doctrine of stare decisis, in particular, that when a defendant enters a plea under a misapprehension with respect to the effect of the plea, that plea was not knowingly and voluntarily entered and may, as a matter of law, be withdrawn.

A. Mr. Treu did not enter knowing and intelligent pleas because he did not know that by doing so, he was waiving his right to appeal the trial court's denial of his motion for change of venue.

Standard of Review

"Whether a plea was voluntarily, knowingly and intelligently entered is a legal issue which we review de novo." *State v. Bangert*, 131 Wis.2d 246, 284-85, 389 N.W.2d 12, 30 (1986).

A defendant seeking to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that a manifest injustice would result if the motion to withdraw is denied. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *State v. Giebel*, 198 Wis.2d 207, 212, 541 N.W.2d 815 (Wis. App., 1995). "It is well established that a guilty or no contest plea must be knowingly, voluntarily, and intelligently entered." *State v. Bollig*, 2000 WI 6, ¶15, 232 Wis.2d 561 605 N.W.2d 199 (*citing Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986)).

> When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. One way for a defendant to meet this burden is to show that

> he did not knowingly, intelligently, and voluntarily enter the plea. (citations omitted).
>
> When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea "violates fundamental due process." *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *Trochinski*, 253 Wis. 2d 38, ¶16. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *Id.*
>
> *State v. Brown*, 2006 WI 100, ¶18-19, 293 Wis.2d 594, 716 N.W.2d 906.

In a 1983 case, this court found that a defendant who had been told that he would be able to appeal the denial of his intention to offer expert testimony at trial after entering a guilty plea to a felony charge was entitled to withdraw his plea because he had not entered a knowing and voluntary plea. *State v. Riekkoff*, 112 Wis.2d 119, 332 N.W.2d 744 (Wis. 1983). Because the defendant thought he could "stipulate to the right of appellate review, it is clear that Riekkoff was under a misapprehension with respect to the effect of his plea. He thought he had preserved his right of review, when as a matter of law he could not. Under these circumstances, as a matter of law his plea was neither knowing nor voluntary. *Riekkoff*, 112 Wis.2d at 128.

Like the defendant in *Riekkoff*, Mr. Treu entered his pleas under a misapprehension with respect to his pleas, which led him to enter pleas that were "neither knowing nor voluntary". For those same reasons, Mr. Treu should be allowed to withdraw his pleas. "A plea that was 'not entered knowingly, voluntarily, and intelligently violates fundamental due process, and a defendant

therefore may withdraw the plea as a matter of right.'" *State v. Dillard*, 2014 WI 123, ¶74, 859 N.W.2d 44.

The court of appeals refused to follow the clear dictate of *Riekoff* because it "concluded" that the guilty-plea-waiver rule is a collateral consequence, as a result of which it held that it was not enough for Treu to show that he mistakenly believed that he would have been able to appeal the venue decision; rather, he would have to show that he was "actually misinformed about any collateral consequences. App, A107.

Its decision is flawed for two reasons, the first being that even if the guilty-plea-waiver rule was a collateral consequence in *Riekoff* (which was not made clear in the decision), this court still found that the defendant was entitled to withdraw his plea as a matter of law because it was not knowingly and voluntarily entered. In addition, the court of appeals has followed this court's decision in *Riekoff* on multiple occasions since it was issued. "Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were collateral. *See, e.g., State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983); *State v. Woods*, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992)." *State v. Brown*, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543 (Wis. App. 2004).

In *Brown*, the defendant was allowed to withdraw his pleas because he was misinformed of the consequences of his pleas by his attorney (and the prosecutor).

> Here, Brown's misunderstanding of the consequences of his pleas undermines the knowing and voluntary nature of his pleas. Brown's plea agreement was purposefully crafted to only include pleas to charges that would not require him to register as a sex offender or be subject to post-incarceration commitment under WIS. STAT. ch. 980. Brown entered his pleas believing he would not be subject to those collateral consequences. Brown's belief was not

> the product of "his own inaccurate interpretation," but was based on affirmative, incorrect statements on the record by Brown's counsel and the prosecutor. The court did not correct the statements.
>
> Under these circumstances, we conclude that Brown's pleas, as a matter of law, were not knowingly and voluntarily entered and he must, therefore, be permitted to withdraw his pleas.
>
> *Brown*, 2004 WI App at ¶¶13-14.

In *Woods*, the defendant was allowed to withdraw his plea because he was provided with inaccurate information regarding his potential sentence. "Because Woods pled guilty based on inaccurate information from the attorneys and the judge ... Woods' guilty plea was neither knowing nor voluntary. Woods has thus demonstrated 'manifest injustice" such that his plea cannot stand." *Woods*, 173 Wis.2d at 140-41.

The court of appeals' decision is also flawed because of its erroneous claim that Mr. Treu was not misinformed about any collateral consequence, most importantly the forfeiture of his right to appeal the denial of his motion for change of venue. When co-counsel took the stand at the postconviction motion hearing, she agreed that she had told her client "that he would be able to pursue an appeal of any issue in this case, including the change of venue, even if he entered his plea[.]" R.150:29. It doesn't get any clearer than that, yet the court of appeals apparently chose to ignore this most important fact in finding that Treu was not misinformed about losing his right to appeal the venue decision. It is this fact that also leads to the conclusion that Treu was denied the effective assistance of counsel.

B. Mr. Treu did not enter knowing and intelligent pleas as a result of the ineffective assistance of counsel.

Standard of Review

"Whether an individual is denied a constitutional right is a question of constitutional fact that this court reviews independently as a question of law." *State v. Cummings*, 199 Wis.2d 721, 748, 546 N.W.2d 406, 416 (1996).

A defendant is guaranteed effective assistance of counsel by the sixth amendment to the United States Constitution and by art. I, sec. 7 of the Wisconsin Constitution. He is denied this assistance when counsel's performance is deficient and the defendant is prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984). In order to show prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Eckert*, 203 Wis.2d 497, 553 N.W.2d 539, 543 (Ct.App. 1996). Colton Treu is entitled to withdraw his pleas because he entered unknowing and unintelligent pleas (and was denied his right to appeal the trial court's denial of his motion for change of venue) as a result of the ineffective assistance of counsel.

1. Trial counsel's performance was deficient.

"The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness." *State v. McMahon*, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct.App.1994) (*citing Strickland* at 687-88, 104 S.Ct. at 2064-65). The court should "not look to what would have been ideal, but rather to what amounts to reasonably effective representation." *Id.* Mr. Treu's counsel's performance, as a whole, fell well below objective standards of reasonableness because they failed to

clearly advise him that he would be waiving his right to appeal the denial of his change of venue motion if he entered his pleas.

Defense counsel's testimony at the evidentiary hearing make it clear that they misinformed Mr. Treu regarding the consequences of entering his pleas. They led him to believe, falsely, that it was possible that he would be able to appeal the denial of the change of venue motion, or other motions, but that it was up to the discretion of appellate counsel. Under the guilty-plea waiver rule[4] (a rule about which at least one defense counsel was not familiar until the filing of the postconviction motion), Mr. Treu lost his ability to do any such thing.

He lost the ability to appeal a decision that might well have led him to eventually obtain a fair trial in a different county, which is no small thing. In fact, it is a manifest injustice, which is what a defendant must show in order to withdraw his plea after sentencing. It is also the prejudice that resulted from his attorneys' deficient performance.

2. Mr. Treu was prejudiced by trial counsel's deficient performance.

The second prong of the *Strickland* ineffective assistance of counsel test is prejudice. A defendant attempting to satisfy this prong must show a reasonable probability that absent counsel's deficient performance, the result of the proceeding would have been different. *State v. Eckert*, 553 N.W.2d at 543. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Mr. Treu made it abundantly clear, when he testified at the motion hearing, that the

[4] Which "has its modern genesis in Wisconsin in *Hawkins v. State*, 26 Wis.2d 443, 132 N.W.2d 545 (1965)." *Riekkoff*, 112 Wis.2d at 122.

outcome in his case would have been completely different because he would have gone to trial if he had been told by his attorneys that by entering his pleas, he was forfeiting his right to appeal the denial of the change of venue motion. He explained in no uncertain terms exactly why he wanted to have the chance to appeal that decision and it makes perfect sense. There is more than a reasonable probability that the result of the proceeding would have been different if not for the deficient performance of his attorneys. For that reason as well, he should be allowed to withdraw his pleas.

In its decision, the court of appeals found that defense counsel did not perform deficiently because they had no duty to tell their client about the guilty-plea-waiver rule. App., A109. The problem with this finding is that this court has never issued a decision on the question of whether the guilty-plea-waiver rule is a collateral consequence or not.

CONCLUSION

For the foregoing reasons, this court should grant review to reverse the court of appeals' decision that ignored this court's holding in *Riekoff*. This court should also grant review to settle the question of whether the guilty-plea-waiver rule is a collateral consequence.

RESPECTFULLY SUBMITTED this 5th day of August, 2022.

Schertz Law Office
Attorney for the Defendant-
Appellant-Petitioner

By: _____
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CERTIFICATION

I certify that this petition for review conforms to the rules contained in sec. 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,177 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.62 (4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of sec. 809.62 (4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of the petition for review filed with the court and served on all opposing parties.

Dated this 5th day of August, 2022.

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