STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001133-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. NELSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Kenosha County Circuit Court, the Honorable Larisa V. Benitez-Morgan Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Where Mr. Nelson filed a postconviction motion seeking plea withdrawal based on ineffective assistance of counsel, and alleged that he pled guilty based on his trial counsel's incorrect advice that pleading to disorderly conduct could result in a temporary rather than permanent loss of his gun rights, is Mr. Nelson entitled to a *Machner*[1] hearing?

   The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Nelson does not request oral argument because the briefs will fully address the issue presented. *See* Wis. Stat. § 809.22(2)(b). This is a one-judge appeal under Wis. Stat. § 752.31(2)-(3); therefore, a request for publication is prohibited by Wis. Stat. § 809.23(4)(b).

STATEMENT OF THE CASE AND FACTS

On April 27, 2020, the State filed a complaint charging Mr. Nelson with one count of disorderly conduct with use of a weapon, one count of operating a firearm while intoxicated, and one count of resisting

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

an officer. (2:1-2). The State alleged that the disorderly conduct charge was an act of domestic abuse under Wis. Stat. § 968.075(1)(a), and that conviction for this offense would subject Mr. Nelson to the domestic abuse assessment. (2:1).

According to the complaint, police responded to the scene of a family disturbance on April 26, 2020, following a 911 call from Mr. Nelson's wife which alleged that Mr. Nelson was intoxicated and beating up his adult children. Upon arrival, police observed Mr. Nelson being physically restrained by his daughter and son. Police also observed that Mr. Nelson was intoxicated and in possession of a gun. Mr. Nelson refused to comply with commands from police, but police were able to physically restrain him and place him under arrest. (2:2-4).

Following the arrest, police took statements from Mr. Nelson's wife and children. According to Mr. Nelson's son and daughter, K.N. and V.N., there was a verbal argument between Mr. Nelson and K.N. that escalated when V.N. became involved in the argument. Both K.N. and V.N. reported that Mr. Nelson was not physically violent towards them but had pulled out a gun and threatened to shoot himself. K.N. also reported that, before pulling out the gun, Mr. Nelson had gotten in his face and made K.N. fear for his own safety. According to Mr. Nelson's wife, T.N., Mr. Nelson had been verbally aggressive with her for no reason and she went to the bathroom to get away from him. T.N. stated that she then overheard Mr. Nelson get into a verbal argument with their children

and heard a loud slap, whereupon she left the bathroom and found V.N. holding her face and crying. (2:4-6).

Subsequently, Mr. Nelson reached a plea agreement with the State. Pursuant to the agreement, Mr. Nelson pled guilty to disorderly conduct with use of a weapon as an act of domestic abuse, and operating a firearm while intoxicated. (26:2). The State moved to dismiss and read-in the resisting an officer charge and recommend probation, but remained free to argue as to the conditions of probation. (*Id.*). At sentencing, the Court withheld sentence and placed Mr. Nelson on two years of probation on each count with six months of conditional jail for disorderly conduct and three months of concurrent conditional jail for operating a firearm while intoxicated. (26:28-30).

Thereafter, Mr. Nelson filed a motion for postconviction relief seeking plea withdrawal on the grounds that trial counsel had misadvised him that pleading guilty to disorderly conduct could result in a temporary rather than permanent loss of his gun rights. (34:1; App. 24). The motion noted that under federal and state law, Mr. Nelson's disorderly conduct offense could result in a permanent, not temporary, loss of his gun rights. (34:5-6; App. 28-29). The motion further stated that at a *Machner* hearing, Mr. Nelson would testify that he was a longtime gun owner, had worked as a security guard, and would not have pled guilty but for the incorrect advice he received from trial counsel regarding his gun rights. (34:6-7; App. 29-30).

The circuit court held a postconviction hearing on June 11, 2021. At the outset of the hearing, the court confirmed that it would proceed with testimony from Mr. Nelson and his trial counsel. (36:2-3; App. 7-8). However, in the response to a question from the State regarding the sufficiency of the postconviction motion, the court stated the following:

> I think the argument that [the State] is trying to make is that there is not enough clarity….
>
> [Mr. Nelson] said he would testify to the following: his trial attorney advised him that pleading guilty to disorderly conduct could have a temporary rather than a permanent effect on his right to possess a firearm.
>
> So what does that mean? That it could be temporary, right? If something is not temporary, then what is it by default? It's permanent. It's either one or the other. It just doesn't go away. It's not nonexistent but -- and that's what we're saying. … So a lot of these are could's. We don't know yet. There's no definitive fact but did he say it or did he not? Nobody knows.
>
> You present-- Or the other option that I would not have to have a hearing would be if you presented conclusory allegations or a subjective opinion. Subjective opinion I think is -- is rampant throughout this entire motion that you're wondering well, I think that's what he said.

(36:5-6; App. 10-11).

The court also stated that it could rely on its plea colloquy with Mr. Nelson in deciding whether to hold a *Machner* hearing:

> And we talked about on page 4 of the [plea hearing] transcript, lines 11 through 18 that -- and the Court said: The plea questionnaire tells me you're intending to plead to the charge of disorderly conduct, use of a dangerous weapon … as well as -- I'm assuming the domestic abuse enhancer as well; is that correct? You understand that? And you said: I don't like it but I do understand it….
>
> So I don't believe that the record as it exists that you would be entitled to relief just based on the record itself. So at this point I am agreeing with the State that this is a lot of conclusory what if's.

(36:7-9; App. 12-14).

Thereafter, the court stated that it would proceed with taking testimony from Mr. Nelson's trial counsel because there was "a fact in question and that alone would give rise to it." (36:9; App. 14). Moments later, however, the court reversed course again and declared that there were no grounds for testimony because the advice trial counsel allegedly provided to Mr. Nelson—that his conviction could result in a temporary loss of his gun rights—was "correct advice." (36:10; App. 15).

On June 24, 2021, the court entered an order denying Mr. Nelson's motion for postconviction relief

for the reasons stated on the record at the postconviction hearing. (38:1; App. 5).

This appeal follows.

ARGUMENT

I. Mr. Nelson is entitled to an evidentiary hearing on his postconviction motion to withdraw his guilty pleas.

A. General legal principles and standard of review.

A defendant is entitled to withdraw his guilty plea after sentencing when he can show a manifest injustice by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is met if the defendant received ineffective assistance of counsel. *Id.*

In assessing ineffective assistance of counsel claims in the context of a guilty plea, courts use the classic two-part test delineated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Consequently, a defendant must show that counsel's performance was both deficient and prejudicial. *Bentley*, 201 Wis. 2d at 312. To prove deficient performance, he must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. To establish prejudice, a defendant seeking to withdraw a guilty plea must

show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Bentley*, 201 Wis. 2d at 313-314 (citing *Hill*, 474 U.S. at 59).

When reviewing a circuit court's decision to deny a claim of ineffective assistance of counsel without an evidentiary hearing, a reviewing court determines as a matter of law, independently of the circuit court, whether a defendant's motion to withdraw a guilty plea on its face alleges facts which would entitle the defendant to relief, and whether the record conclusively demonstrates that the defendant is entitled to no relief. *State v. Howell*, 2007 WI 75, ¶ 78, 301 Wis. 2d 350, 734 N.W.2d 48.

B. Legal principles regarding the firearms prohibition for persons convicted of misdemeanor crimes of domestic violence.

Under federal law, it is unlawful for any person who has been convicted of a misdemeanor crime of domestic violence to possess a gun. 18 U.S.C. § 922(g)(9). A person also may not obtain a concealed carry (CCW) license in Wisconsin if he has been convicted of a misdemeanor crime of domestic violence. *See* Wis. Stat. § 175.60(3)(b).[2]

[2] Pursuant to Wis. Stat. § 175.60(3)(b), the Wisconsin Department of Justice shall not issue a CCW license to an individual who "is prohibited under federal law from possessing a firearm that has been transported in interstate or foreign commerce."

A misdemeanor crime of domestic violence is a misdemeanor which satisfies the following two prongs: (1) it has, as an element, the use or attempted use of physical force; and (2) it is committed by a person who has at least one of several specified relationships with the victim, including being the victim's spouse or parent. 18 U.S.C. § 921(a)(33)(A). Even the "slightest offensive touching" will satisfy the use of force prong. *U.S. v. Castleman*, 572 U.S. 157, 163 (2014).

In *Evans v. Wisconsin Dept. of Justice*, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, this Court considered whether the defendant's disorderly conduct conviction satisfied the use of force prong. The Court noted that the first element of disorderly conduct ("violent, abusive, indecent, profane, boisterous, unreasonably loud ***or*** otherwise disorderly conduct") allows for alternatives. *Id.*, ¶ 10 (emphasis added). Accordingly:

> When a statute defines an element in the alternative … courts consult a "limited class of documents," including charging documents, transcripts of plea colloquies, and jury instructions. The purpose of consulting such documents is "to identify, from among several alternatives, the crime of conviction."

Id., ¶ 18 (internal citations omitted).

This Court held that Evans' conviction satisfied the use of force prong because at the plea hearing he specifically pled guilty to "violent, abusive, *and* otherwise disorderly conduct," and the term "violent

conduct" necessarily implies the use of force. *Id.*, ¶ 12 & n.3. However, the Court indicated that it would have been a closer call if the defendant had been convicted of "violent, abusive, *or* otherwise disorderly conduct." *See id.*, ¶ 20. Subsequent to *Evans*, no Wisconsin case has analyzed whether a disorderly conduct conviction meets the use of force prong in this latter context, which is how Mr. Nelson pled guilty to disorderly conduct. (2:1; 26:9, 12).

C. Mr. Nelson is entitled to a *Machner* hearing on his claim of ineffective assistance of counsel.

1. Mr. Nelson properly alleged deficient performance.

Defense counsel has a duty to make a reasonable investigation of the law that may be applicable to the facts of a case. *State v. Pico*, 2018 WI 66, ¶ 22, 382 Wis. 2d 273, 914 N.W.2d 95. "The duty to investigate is certainly one of the components of effective representation." *Id.* "Counsel must either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary" in order to "meet the constitutional standard for effective assistance." *State v. Dillard*, 2014 WI 123, ¶ 92, 358 Wis. 2d 543, 859 N.W.2d 44.

In this case, Mr. Nelson alleged in his postconviction motion that his trial attorney advised him that pleading guilty to disorderly conduct could result in a temporary rather than permanent loss of

his right to possess a gun. This advice from trial counsel clearly demonstrates deficient performance because it is legally incorrect—Mr. Nelson's disorderly conduct conviction would likely result in a permanent prohibition on his ability to possess a gun and obtain a CCW license, and the prohibition could not be temporary.

Under the two-pronged definition of "crime of misdemeanor violence" discussed in section I.B., a court reviewing this issue would likely find that Mr. Nelson's disorderly conduct conviction makes him permanently ineligible for a CCW permit. First, Mr. Nelson's conduct satisfies the relationship prong because the victims of his disorderly conduct were his wife and children. *See* 18 U.S.C. § 921(a)(33)(A).

Second, a court would likely find that Mr. Nelson's conviction was a crime of domestic violence because it was noted in the judgment of conviction that he was pleading guilty to an act of domestic violence under 968.075. Moreover, according to the complaint Mr. Nelson was being "physically restrained" by his children when police arrived at the residence. (2:2, 6). Additionally, although both of Mr. Nelson's children claimed that he was not physically violent towards them (2:4-6), the complaint alleged that Mr. Nelson's wife told police that Mr. Nelson was "beating up" his children (2:2). Thus, relying on either of these facts or the fact that Mr. Nelson's conviction was denoted as an act of domestic abuse under Wis. Stat. § 968.075(1)(a), a court would likely find that Mr. Nelson pled guilty to violent conduct and that his

offense satisfies the use of force prong. As noted above, even the "slightest offensive touching" satisfies this prong. *U.S. v. Castleman*, 572 U.S. 157, 163 (2014).

Furthermore, neither federal nor state law provide that the prohibition on gun possession for persons convicted of crimes of domestic violence is merely temporary. *See* 18 U.S.C. § 922(g)(9); Wis. Stat. § 175.60(3)(b). Rather, the prohibition is permanent; consequently, trial counsel's advice was clearly legally incorrect and therefore deficient.

2. Mr. Nelson properly alleged prejudice.

As stated previously, when a defendant pleads guilty and then seeks plea withdrawal based on ineffective assistance of counsel, the defendant shows prejudice if there "is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. In assessing whether such a reasonable probability exists, the court should consider objective factual assertions and any special circumstances a defendant alleges that might show why he placed particular emphasis on trial counsel's misinformation in deciding to plead guilty rather than go to trial. *See Bentley*, 201 Wis. 2d at 313-314 (citing *Hill*, 474 U.S. at 60).

In his postconviction motion, Mr. Nelson alleged that he was a longtime gun owner, had worked as a security guard, and that, as a result, it was important to him that he not permanently lose his right to

possess a gun. (34:6; App 29). Mr. Nelson further alleged that if trial counsel had not misinformed him regarding the impact of a disorderly conduct conviction on his gun rights, he would not have pled guilty and instead would have insisted on going to a jury trial. (34:7; App. 30). *See Lee v. U.S.*, 137 S.Ct. 1958, 1968-1969 (recognizing that it is rational for a defendant to go to trial in order to avoid a significant collateral consequence even if doing so only slightly reduces the risk of that consequence).

Given these facts, trial counsel's advice resulted in prejudice. All that is required to show prejudice is "a reasonable probability that, but for the counsel's errors, [Mr. Nelson] would not have pleaded guilty and would have insisted on going to trial." *Bentley*, 201 Wis. 2d at 312; *Hill*, 474 U.S. at 59. Therefore, Mr. Nelson received ineffective assistance of counsel and is entitled to plea withdrawal.

D. The circuit court erred in refusing to hold a *Machner* hearing.

At the postconviction hearing, the court questioned the sufficiency of Mr. Nelson's postconviction motion as follows:

> I think the argument that [the State] is trying to make is that there is not enough clarity….
>
> [Mr. Nelson] said he would testify to the following: his trial attorney advised him that pleading guilty to disorderly conduct could have a temporary rather than a permanent effect on his right to possess a firearm.

> So what does that mean? That it could be temporary, right? If something is not temporary, then what is it by default? It's permanent. It's either one or the other. It just doesn't go away. It's not nonexistent but -- and that's what we're saying. … So a lot of these are could's. We don't know yet. There's no definitive fact but did he say it or did he not? Nobody knows.

(36:5-6).

The court's reasoning does not support its decision to deny Mr. Nelson's postconviction motion without a *Machner* hearing. First, advising a client that a disorderly conduct conviction could result in a temporary rather than permanent loss of his gun rights implies that any potential impact of the conviction would be temporary rather than permanent. Additionally, as noted in section I.B., this statement clearly misconstrues the law—neither federal law nor state law provide that the prohibition on gun possession for persons convicted of crimes of domestic violence is ever temporary. *See* 18 U.S.C. § 922(g)(9); Wis. Stat. § 175.60(3)(b).[3]

[3] At the postconviction hearing, the State claimed that trial counsel's advice on gun rights was correct because a condition of Mr. Nelson's probation was to not possess weapons. (36:14; App. 19). However, Mr. Nelson's postconviction motion alleged that his trial attorney specifically advised that a disorderly conduct conviction could result in a temporary rather than permanent loss of his gun rights—not that pleading guilty to crimes in general could result in a probationary condition to not possess weapons.

Furthermore, the court was incorrect when it labeled Mr. Nelson's allegations as "a lot of conclusory what if's." (36:9; App. 14). To the contrary, Mr. Nelson alleged that trial counsel provided clearly incorrect legal advice and asserted that he would have gone to trial but for this advice. Moreover, he did not offer a conclusory allegation that he would have gone to trial but for trial counsel's incorrect advice—he specifically alleged that he was a longtime gun owner, had worked as a security guard, and that as a result it was important to him that he not permanently lose his right to possess a gun. (34:6; App. 29). As such, his allegation that his plea rested on trial counsel's incorrect advice is supported by objective factual assertions and special circumstances which indicate that he placed particular emphasis on trial counsel's incorrect advice. *See Bentley*, 201 Wis. 2d at 313-314 (citing *Hill*, 474 U.S. at 60).

Finally, the court erred when claiming that it could deny the postconviction motion based on its plea colloquy with Mr. Nelson:

> And we talked about on page 4 of the [plea hearing] transcript, lines 11 through 18 that -- and the Court said: The plea questionnaire tells me you're intending to plead to the charge of disorderly conduct, use of a dangerous weapon … as well as -- I'm assuming the domestic abuse enhancer as well; is that correct? You understand that? And you said: I don't like it but I do understand it….

> So I don't believe that the record as it exists that you would be entitled to relief just based on the record itself.

(36:7-9; App. 12-14).

For the purposes of deciding whether to hold a *Machner* hearing in this case, it is irrelevant that the court informed Mr. Nelson he was pleading guilty to an offense which included the domestic abuse modifier/surcharge. Mr. Nelson has not alleged that he was unaware of this information, but rather that he was misadvised by his attorney—off-the-record—of the impact of a disorderly conduct conviction on his gun rights. Nothing in the plea colloquy remedies the misinformation which Mr. Nelson has alleged he received from trial counsel, and as a result nothing in the plea colloquy alleviates the need for a *Machner* hearing.

CONCLUSION

For these reasons, Mr. Nelson respectfully requests that this Court reverse the judgment of the circuit court and remand the case to the circuit court for a *Machner* hearing.

Dated this 20th day of September, 2021.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,282 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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.

Dated this 20th day of September, 2021.

Signed:
Electronically signed by
David Malkus
DAVID MALKUS
Assistant State Public Defender