STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2021AP0001133-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL L. NELSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED BY THE KENOSHA COUNTY CIRCUIT COURT IN FILE NO. 2020CM000539, THE HONORABLE LARISA V. BENITEZ-MORGAN PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

1. Whether Mr. Nelson is entitled to a *Machner*[1] hearing on his ineffective assistance of counsel claim where he specifically alleged that his trial attorney incorrectly advised him that pleading guilty to disorderly conduct could have a temporary rather than permanent effect on his right to possess a firearm and that he was prejudiced by that advice.

   The Circuit Court held that Mr. Nelson was not entitled to a *Machner* hearing and denied his postconviction motion.

   This Court should affirm the decision of the Circuit Court.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22(2)(b). As this is a one-judge appeal,

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

a request for publication is prohibited by Wis. Stat. § 809.23(4)(b).

STATEMENT OF CASE AND FACTS

On April 27, 2020, Michael L. Nelson the Defendant-Appellant was charged in Kenosha County Circuit Court File Number 2020CM000539 with Disorderly Conduct, Domestic Abuse, Use of a Dangerous Weapon (Count 1) in violation of Wis. Stat. §§ 947.01(1), 968.075(1)(a), and 939.63(1)(a); Possession of a Firearm While Intoxicated (Count 2) in violation of Wis. Stat. § 941.20(1)(b); and Resisting an Officer (Count 3) in violation of Wis. Stat. § 946.41(1). (R.2:1-2). On August 4, 2020, pursuant to a plea agreement, Mr. Nelson pled guilty to Counts 1 and 2. (R.26:2, 11-12). Count 3 was dismissed and read-in and the State agreed to recommend at sentencing, probation, free on length and conditions. (R.26:2). On that same day Mr. Nelson was sentenced. (R.26:28-30). The Court placed Mr. Nelson on probation for 2 years with 6 months of conditional jail time on Count 1 and 3 months of conditional jail time concurrent on Count 2. (*Id.*). The Court also specifically ordered no firearms as a condition of probation: "And you [Mr. Nelson] are not during the

period of your supervision going to be allowed to possess any weapon, including any firearms." (R.26:30).

For the plea and sentencing hearing, the Court used as the factual basis the Criminal Complaint. (R.26:8). The Criminal Complaint provided a detailed factual basis for all three counts--the Disorderly Conduct, Domestic Abuse, Use of a Dangerous and the Possession of a Firearm While Intoxicated charges for which Mr. Nelson was convicted and the Resisting an Officer charge which was dismissed and read-in. (R.2:2-6). According to the Criminal Complaint, on April 26, 2020 at approximately 12:55 am, multiple Officers with the Kenosha Police Department responded to Mr. Nelson's residence where he resided with his wife, T.N., his adult son, K.N., and his adult daughter, V.N. (R.2:2). Multiple of the responding Officers noted that Mr. Nelson appeared intoxicated. (*Id.*). Mr. Nelson immediately resisted the Officers who were concerned about Mr. Nelson being in possession of a firearm and Mr. Nelson had to be tazed multiple times before Officers were able to handcuff him. (R.2:2-3). Mr. Nelson was found to have been in possession of a Glock 9mm handgun loaded with 15 rounds. (R.2:4).

The Complaint summarizes statements given by T.N., K.N., and V.N. regarding what had occurred at the residence

before police arrived. (R.2:4-6). K.N. indicated that Mr. Nelson was intoxicated and said he wanted to kill himself. (R.2:4). K.N. indicated that Mr. Nelson got in his face then removed a gun from his waistband. (*Id.*). K.N. stated that Mr. Nelson did not threaten anyone with the gun, but he pointed it at the ceiling and threatened to kill himself if anyone called the police. (*Id.*). K.N. stated that Mr. Nelson put the gun back in his waistband and K.N. and V.N. attempted to restrain Mr. Nelson while their mother called the police. (R.2:4-5).

T.N. also stated that Mr. Nelson was highly intoxicated. (R.2:5). T.N. stated that Mr. Nelson was "verbally aggressive toward her" and yelling at her. (*Id.*). T.N. stated that Mr. Nelson called her vulgar names and yelled profanity at her. (*Id.*). T.N. stated that she went into the bathroom to take a bath hoping that Mr. Nelson would just fall asleep by the time she got out. (*Id.*). T.N. left the bathroom when she heard Mr. Nelson arguing with K.N. and V.N. (*Id.*). T.N. stated that she heard what sounded like a loud slap and she saw V.N. holding her face and crying. (*Id.*). T.N. stated that K.N. looked at her and told her to call 911. (*Id.*). T.N. stated that Mr. Nelson said if she did he would "blow his head off." (*Id.*). T.N. stated that she called the police

and went back into the bathroom. (*Id.*). T.N. did not see Mr. Nelson with a gun and did not see K.N. and V.N. attempting to restrain Mr. Nelson. (*Id.*).

V.N. provided a statement substantially similar to K.N.'s and T.N's. (R.2:6). She verified that Mr. Nelson had argued with T.N., that he had a handgun and waived it around, that he threatened to kill himself, and that she and K.N. restrained him while waiting for the police to come. (*Id.*).

On April 19, 2021, Mr. Nelson by his attorney David Malkus, filed a postconviction motion seeking to withdraw his guilty pleas based on ineffective assistance of counsel. (R.34). In the motion, Mr. Nelson indicated that he would testify that his trial attorney advised him that pleading guilty to disorderly conduct could have a temporary rather than permanent effect on his right to possess a firearm. (R.34:5). Mr. Nelson alleged that this was deficient performance and that he was prejudiced by this deficient performance as he would have taken the case to trial rather than entering a plea if he knew the possibility that his plea would result in a permanent loss of his right to possess a firearm. (R.34:5-7).

On June 11, 2021, a hearing was held on this motion and the Circuit Court denied the motion without testimony

being taken from either Mr. Nelson or his trial court attorney. (R.36). The Court decided that the motion was not properly pled as, based on the wording of the motion, the advice that Mr. Nelson's trial attorney gave him was actually correct. (R.36:10-11).

The Court entered a written order denying the motion on June 24, 2021 (R.38). This appeal followed.

ARGUMENT

1. The Circuit Court appropriately denied Mr. Nelson's ineffective assistance of counsel claim without holding a *Machner* hearing because Mr. Nelson's postconviction motion did not allege facts sufficient to show deficient performance of his trial court attorney.

A. Standard of Review

"Whether a defendant's [postconviction motion] . . . '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' are questions of law that [an appellate court] review[s] *de novo*." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). If the motion does not allege sufficient facts that would entitle the defendant to relief, or relies on conclusory allegations, or the record

conclusively refutes the defendant's claims, the circuit court has discretion to deny the motion without a hearing. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

B. Defendants seeking to withdraw their guilty pleas by claiming ineffective assistance of counsel must allege sufficient facts in the motion to establish both deficient performance and prejudice.

When a defendant seeks to withdraw his guilty plea after sentencing, the defendant must prove "manifest injustice" by clear and convincing evidence. *State v. Shata*, 2015 WI 74, ¶ 29, 364 Wis. 2d 63, 868 N.W.2d 93. "Ineffective assistance of counsel is one type of manifest injustice." *Id.*

Ineffective assistance claims are evaluated using the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail under *Strickland*, a defendant must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687. "To prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). To prove prejudice, the 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." *State v. Romero-Georgana*, 2014 WI 83, ¶ 41, 360 Wis. 2d 522, 849 N.W.2d 668.

C. Mr. Nelson's postconviction motion failed to allege sufficient facts to demonstrate deficient performance and, as a result, was appropriately denied by the Circuit Court without a *Machner* hearing.

In his postconviction motion, Mr. Nelson indicated that he would testify that his trial attorney advised him that pleading guilty to disorderly conduct could have a temporary rather than permanent effect on his right to possess a firearm. (R.34:5). Far from being deficient, this advice is actually legally correct.

In both the postconviction motion and Defendant-Appellant's Brief, Mr. Nelson acknowledges that it is in no way certain that his conviction for Disorderly Conduct, Domestic Abuse, Use of a Dangerous Weapon guarantees that he will be barred from possessing a firearm under federal law. (R.34:3-4; Nelson's Br. 11-13). Mr. Nelson cites the case of *Evans v. Wisconsin Dept. of Justice*, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, in which this Court considered whether Evans was properly denied a concealed carry license due to a Disorderly Conduct conviction. *Id.* ¶ 1. This Court addressed the issue of whether that

Disorderly Conduct conviction had as an element the use of force so that Evans would have been barred from possessing a firearm under federal law and therefore barred from obtaining a concealed carry permit under state law. *Id.* ¶¶ 8-25. The *Evans* Court decided that his disorderly conduct conviction did have as an element the use of physical force. *Id.* ¶ 8. The Court in its analysis relied on the fact that Evans was convicted based on the element of "violent, abuse, *and* otherwise disorderly conduct." *Id.* ¶ 20.

In contrast, here, Mr. Nelson pled to the charge in the Criminal Complaint which defined the offense as engaging in "violent, abusive, indecent, profane, boisterous, unreasonably loud, *or* otherwise disorderly conduct." (R.2:1). This is also the wording that the Circuit Court used to define the offense in the plea colloquy. (R.26:9). Because Mr. Nelson pled to Disorderly Conduct in the disjunctive where the term "or" was used rather than in the conjunctive where the term "and" was used, his case is distinguishable from *Evans*. And because his case is distinguishable from *Evans* and there appears to be no other binding authority on point, it is not clear or certain that Mr. Nelson's Disorderly Conduct conviction

would permanently prevent him from legally possessing a firearm under federal law.

The issue in this appeal is in some ways analogous to that in *State v. Shata*, 2015 WI 74, 364 Wis.2d 63, 868 N.W.2d 93. *Shata* involved an ineffective assistance of counsel claim as it related to advice about the immigration consequences of a guilty plea. *Id.* ¶¶ 2-3. In the *Shata* case, Shata's attorney advised that his guilty plea carried a "strong chance" of deportation. *Id.* ¶ 22. Shata argued that because his conviction clearly made him deportable that the advice was deficient because there is a difference between a "strong chance" and "absolute certainty." *Id.* ¶ 53. However, the Wisconsin Supreme Court noted that just because the conviction made Shata deportable that did not mean that the conviction would necessarily result in deportation as that depends on things like prosecutorial discretion and a particular government administration's policies on deportation. *Id.* ¶¶ 59-60. The Wisconsin Supreme Court concluded "[b]ecause deportation is not an absolutely certain consequence of a conviction for a deportable offense, *Padilla* does not require an attorney to advise an alien client that deportation is an absolute certainty upon conviction of a deportable offense...." *Id.* ¶ 60. Ultimately the Wisconsin Supreme Court held that

Shata's attorney did not perform deficiently because the advice he gave was correct. *Id.* ¶ 79.

Here, the advice that Mr. Nelson challenges--that his trial attorney advised him that pleading guilty to disorderly conduct could have a temporary rather than permanent effect on his right to possess a firearm--is correct. Just as it was not certain that Shata would be deported as a result of his conviction, it is also not certain that Mr. Nelson will be permanently prevented from possessing a firearm as a result of his conviction. It is possible that a Court would view Mr. Nelson's conviction as distinguishable from the Disorderly Conduct conviction at issue in *Evans* and conclude that Mr. Nelson's conviction does not fall within the federal firearm prohibition. Because it is a matter of interpretation and not certain that Mr. Nelson's conviction will result in a permanent prohibition on his right to possess a firearm the advice that Mr. Nelson was purportedly given is correct.

Finally, Mr. Nelson appears to argue that his trial attorney's advice was deficient because if he was prohibited under federal law from possessing a firearm that prohibition would be permanent, not temporary. (Nelson's Br. 15). However, what was pled in the postconviction motion was that Mr. Nelson would testify that his trial

attorney advised him that pleading guilty to disorderly conduct could have a temporary rather than permanent effect on his right to possess a firearm. (R.34:5). The postconviction motion does not assert that Mr. Nelson's attorney told him that the federal ban on the possession of firearms for persons convicted of a misdemeanor crime of domestic violence is temporary or expires after some length of time.

As a result of his plea to Counts 1 and 2 in the Criminal Complaint, Mr. Nelson was placed on probation and specifically ordered as a condition of probation that he could not possess firearms. So, his right to possess a firearm has been temporarily affected by his plea including his plea to the Disorderly Conduct charge consistent with the advice given by his attorney. Once again, the advice of Mr. Nelson's trial attorney as described in the postconviction motion is correct.

CONCLUSION

Mr. Nelson's postconviction motion failed to allege sufficient facts to demonstrate deficient performance. In fact, the advice Mr. Nelson points to as deficient is actually accurate legal advice. As a result, the postconviction motion was appropriately denied by the

Circuit Court without a *Machner* hearing. For all of the reasons stated above, the Respondent respectfully requests this Court to affirm the order denying Mr. Nelson's postconviction motion.

Respectfully submitted this 5th day of January, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.25 inch margin on left and right sides and 1 inch margins on the top and bottom. The length of this brief is 2,497 words, 13 pages.

Dated this 5th day of January, 2022.

Carli A. McNeill
Deputy District Attorney

CERTIFICATE OF EFILE/SERVICE

I hereby certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of January, 2022.

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