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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REPLY BRIEF OF DEFENDANT-APPELLANT

DAVID MALKUS
Assistant State Public Defender
State Bar No. 1094027

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
malkusd@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. Mr. Nelson is entitled to a *Machner*[1] hearing on his postconviction motion to withdraw his guilty pleas.

A. Mr. Nelson properly alleged deficient performance.[2]

Mr. Nelson alleged in his postconviction motion that trial counsel advised him that pleading guilty to disorderly conduct could result in a temporary rather than a permanent loss of his right to possess a gun. As noted in his initial brief, this advice clearly demonstrates deficient performance because it is legally incorrect—Mr. Nelson's disorderly conduct conviction would most likely result in a permanent prohibition on his ability to possess a gun and obtain a CCW license, and if applicable this prohibition would not be temporary. *See* 18 U.S.C. § 922(g)(9); Wis. Stat. § 175.60(3)(b).

In response, the State attempts to analogize Mr. Nelson's case to *State v. Shata*, 2015 WI 74, 364 Wis.

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[1] *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] Because the State does not contest that Mr. Nelson properly alleged the prejudice prong of ineffective assistance of counsel, Mr. Nelson does not address prejudice further. *See State v. Alexander*, 2005 WI App 231, ¶ 15, 287 Wis. 2d 645, 706 N.W.2d 191 ("Arguments not refuted are deemed admitted.").

2d 63, 868 N.W.2d 93. (State's Br. at 10). In *Shata*, trial counsel advised his client that he faced a "strong chance" of deportation if he pled guilty to possession of marijuana with intent to deliver. *Shata*, 2015 WI 74, ¶¶ 1-3. On appeal, Shata argued that trial counsel performed deficiently by not advising that the conviction would "absolutely" result in deportation. *Id.*, ¶¶2-3. The Wisconsin Supreme Court held that trial counsel's advice was not deficient because it was in fact correct advice. *Id.*, ¶ 58. The court reasoned that, although a controlled substance conviction made Shata deportable, it would not necessarily result in deportation because "prosecutorial discretion and the current administration's immigration policies provide possible avenues for deportable aliens to avoid deportation." *Id.*, ¶¶ 58-59.

According to the State, Mr. Nelson's case is analogous to *Shata* because it is not a certainty that his domestic disorderly conduct conviction will permanently prevent him from possessing a gun. (State's Br. at 11). However, Mr. Nelson's case is clearly distinct from *Shata*. First, Mr. Nelson's postconviction motion did not assert that his conviction would "absolutely" result in a permanent firearms prohibition, nor did it allege that trial counsel advised that a domestic disorderly conduct conviction carried a "strong chance" of a permanent prohibition. To the contrary, the motion alleged that trial counsel advised that a conviction for domestic disorderly conduct could result in a temporary *rather than* a permanent loss of his gun rights.

Additionally, as noted in Mr. Nelson's initial brief, advising a client that a disorderly conduct conviction could result in a temporary rather than a permanent loss of his gun rights implies that any potential impact of the conviction would be temporary rather than permanent. The State fails to respond to this point and fails to cite any case law that supports its argument. Instead, the case law the State relies on actually provides a useful point of reference in support of a finding that trial counsel's advice to Mr. Nelson was deficient. In *Shata*, trial counsel's advice was not deficient because he gave correct advice, but the outcome likely would have been different had the facts of the case been more analogous to Mr. Nelson's case. For instance, trial counsel in *Shata* surely would have performed deficiently if his advice in sum had consisted of incorrectly advising his client that a conviction could result in denial of naturalization *rather than* deportation.

Finally, the State claims that trial counsel's advice on gun rights was correct because a condition of Mr. Nelson's probation was to not possess weapons. (State's Br. at 11-12). However, Mr. Nelson's postconviction motion alleged that his trial attorney advised that pleading guilty specifically to disorderly conduct could result in a temporary rather than a permanent loss of his gun rights—not that pleading guilty to crimes in general could result in a probationary condition to not possess weapons. In Mr. Nelson's case, the only thing specific to his disorderly conduct charge, as opposed to his other charges, that carries a potential prohibition on gun possession is the

federal and state prohibition on persons convicted of crimes of domestic violence. And, as noted in Mr. Nelson's initial brief, these prohibitions are permanent rather than merely temporary. *See* 18 U.S.C. § 922(g)(9); Wis. Stat. § 175.60(3)(b).

CONCLUSION

For the reasons stated above and in his initial brief, 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 January, 2022.

Respectfully submitted,

Electronically signed by
David Malkus
DAVID MALKUS
Assistant State Public Defender
State Bar No. 1094027

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
malkusd@opd.wi.gov

Attorney for Defendant-Appellant

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 789 words.

Dated this 20th day of January, 2022.

Signed:

Electronically signed by
David Malkus
DAVID MALKUS
Assistant State Public Defender