STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001133-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. NELSON,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES 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 firearm rights, is Mr. Nelson entitled to a *Machner*[1] hearing?

   The circuit court answered no.

   The court of appeals answered no.

CRITERIA FOR REVIEW

The court of appeals' decision asserts that Mr. Nelson received correct advice regarding the potential loss of his firearm rights because "[t]he law is not clear" and "[a]ny misunderstanding on Nelson's part cannot clearly be labeled a misstatement of the law." *State v. Nelson*, No. 2021AP1133-CR, unpublished slip op., ¶¶ 17-18 (Wis. Ct. App. March 9, 2022). (App. 12). This reasoning, however, is flawed because there are no circumstances under which a conviction for a crime of domestic violence would result in a temporary rather than permanent loss of one's firearm rights. *See* 18 U.S.C. § 922(g)(9) & Wis. Stat. § 175.60(3)(b).

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

Therefore, review is warranted because the court of appeals incorrectly analyzed the deficiency prong of the ineffective assistance of counsel test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* Wis. Stat. § 809.62(1r)(d).

Furthermore, no published Wisconsin case law addresses ineffective assistance of counsel in the context of incorrect advice regarding the loss of one's Second Amendment rights. Accordingly, review is warranted because a decision by this Court would help develop and clarify the law on an issue which is likely to recur. *See* Wis. Stat. § 809.62(1r)(c)3.

STATEMENT OF 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 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 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., 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 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. (26:2). 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 firearm rights. (34:1; App. 35). 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 rights. (34:5-6; App. 39-40).[2] 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 firearm rights. (34:6-7; App. 40-41).

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. 18-19). However, in the response to a question from the State regarding the sufficiency of the postconviction motion, the court stated the following:

> [The firearm ban] could be temporary, right? If something is not temporary, then what is it by default? It's permanent. It's either one or the

[2] This Court has since held that disorderly conduct is not a misdemeanor crime of domestic violence under federal law, and therefore does not disqualify a person from holding a CCW license in Wisconsin. *Doubek v. Kaul*, 2022 WI 31, ¶ 1, 401 Wis. 2d 575, 973 N.W.2d 756. However, *Doubek* was not in effect when Mr. Nelson entered his plea in August of 2020.

> 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. 21-22).

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. 25). Moments later, however, the court reversed course 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 firearm rights—was "correct advice." (36:10; App. 36). Subsequently, 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. 16).

Mr. Nelson appealed and the court of appeals affirmed. *Nelson*, No. 2021AP1133-CR, unpublished slip op., ¶ 1. (App. 3). According to the court, trial counsel provided correct advice regarding the potential loss of Mr. Nelson's firearm rights because "[t]he law is not clear" and "[a]ny misunderstanding on

Nelson's part cannot clearly be labeled a misstatement of the law." *Id.*, ¶¶ 17-18 (App 12). Additionally, the court indicated that trial counsel's advice did not imply to Mr. Nelson that he was facing only a temporary loss of his rights. *Id.*, ¶ 19. (App.12-13).

ARGUMENT

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

A. General legal principles.

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).

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 firearm. 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).[3]

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).

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[3] 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."

In *Evans v. Wisconsin Dept. of Justice*, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, the court of appeals considered whether a 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).

The 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.

As noted in the statement of facts, this Court has since overruled *Evans*, holding that disorderly conduct is not a misdemeanor crime of domestic violence under federal law and, accordingly, that a disorderly conduct

conviction does not disqualify a person from holding a CCW license in Wisconsin. *Doubek*, 2022 WI 31, ¶¶ 1, 18. However, *Doubek* was not in effect when Mr. Nelson entered his plea in August of 2020. Therefore, this Court's holding in *Doubek* does not control whether trial counsel gave correct legal advice to Mr. Nelson when he entered his plea, at which time *Evans* was still good law.

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 firearm. This advice from trial

counsel clearly demonstrates deficient performance because it was legally incorrect—at the time of Mr. Nelson's plea, *Evans* was good law such that a disorderly conduct conviction could result in a permanent prohibition on Mr. Nelson's ability to obtain a CCW license.

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

Second, under *Evans*, a court could have found that Mr. Nelson's conviction was a crime of domestic violence. The judgment of conviction noted that Mr. Nelson was pleading guilty to an act of domestic violence under 968.075 and, 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 any of these facts, a court could have found that Mr. Nelson pled guilty to violent conduct and that his offense satisfied the use of force prong.

Furthermore, neither federal nor state law provide that the prohibition on firearm 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 40). Mr. Nelson further alleged that if trial counsel had not misinformed him regarding the impact of a disorderly conduct

conviction on his firearm rights, he would not have pled guilty and instead would have insisted on going to a jury trial. (34:7; App. 41). *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 court of appeals and the circuit court erred in finding that Mr. Nelson was not entitled to a *Machner* hearing.

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

> [The firearm ban] 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; App. 21-22).

Similarly, the court of appeals asserted that trial counsel provided correct advice regarding the potential loss of Mr. Nelson's firearm rights because "[t]he law is not clear" and "[a]ny misunderstanding on Nelson's part cannot clearly be labeled a misstatement of the law." *Id.*, ¶¶ 17-18 (App 12). Additionally, the court indicated that trial counsel's advice did not imply to Mr. Nelson that he was facing only a temporary loss of his rights. *Id.*, ¶ 19. (App.12-13).

Neither courts' reasoning supports a 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 firearm rights implies that any potential impact of the conviction would be temporary rather than permanent. By way of analogy, it would surely be deficient performance for an attorney to advise an undocumented immigrant client that pleading guilty to a deportable offense could result in denial of naturalization *rather than* deportation.

Second, neither federal law nor state law provide that the prohibition on firearm 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).[4,5] Therefore, Mr. Nelson's trial counsel performed deficiently by incorrectly advising that a conviction for domestic disorderly conduct could result in a temporary rather than a permanent loss of his firearm rights, and Mr. Nelson is entitled to a *Machner* hearing.

[4] At the postconviction hearing, the State claimed that trial counsel's advice was correct because a condition of Mr. Nelson's probation was to not possess weapons. (36:14; App. 30). 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 firearm rights—not that pleading guilty to crimes in general could result in a probationary condition to not possess weapons.

[5] In affirming the circuit court, the court of appeals incorrectly stated that "whether the federal firearm ban itself could be temporary … is a new argument raised for the first time on appeal. As such, we will not consider it." *Nelson*, No. 2021AP1133-CR, unpublished slip op., ¶ 19 n.4 (App. 12). To the contrary, the record reflects that Mr. Nelson repeatedly argued at the postconviction motion hearing that his trial counsel's advice was incorrect because the federal and state firearms ban for domestic abuse convictions could not be temporary. (36:4, 12-13; App. 9, 17-18).

CONCLUSION

For these reasons, Mr. Nelson asks that this Court grant review, reverse the decision of the court of appeals, and remand to the circuit court for a *Machner* hearing.

Dated this 24th day of June, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,223 words.

CERTIFICATE 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 filed with the court and served on all opposing parties.

Dated this 24th day of June, 2022.

Signed:

DAVID MALKUS
Assistant State Public Defender