STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP001339-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACY LAVER HAILES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Orders Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Janet C. Protasiewicz and Michael J. Hanrahan Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

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

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. There was insufficient probable cause to search a distinct location where there was no evidence of drug-dealing.

The State concedes that evidence about drug-dealing at a distinct residence cannot establish probable cause. (State's Br. at 16).

Accordingly, the State relies on two pieces of evidence: (1) Mr. Hailes was hiding a domicile from his probation agent and (2) Mr. Hailes had a "surveillance system" at the apartment complex. (State's Br. at 17). Neither fact is sufficiently suggestive. Thus, while it cannot be denied that there is a reasonable inference that Mr. Hailes was perhaps dishonest with his agent, it does not necessarily follow that he was using that apartment as a drug house and, relevant to the ultimate inquiry, that there would be drugs or drug evidence located therein. Likewise, the claims of "surveillance" and a highly sophisticated team of lookouts is an exaggerated reading of the probation agent's otherwise ambiguous observations. As Mr. Hailes argued in his brief, there is no way to judge the accuracy of the agent's judgments against his observations, as there is no demonstrated experience with drug-trafficking "lookouts" expounded upon in the warrant affidavit on his part.

The State also relies on the averments of Officer Esqueda, describing a medley of behaviors that are

allegedly displayed by drug dealers. (State's Br. at 18-19). The State observes that this overlapping laundry list of drug-dealer behaviors ties in with some of Mr. Hailes' conduct in this case. (State's Br. at 18-19). Such a drug-dealer profile may be suggestive, but cannot independently furnish probable cause. Instead, the probable cause inquiry must be based on the actual facts at hand—and, in this case, there just is not enough actual evidence to conclude that there was a sufficiently strong link between the drug house and the unrelated apartments targeted in these warrants.

The State also distinguishes *State v. Sloan*, 2007 WI App 146, 303 Wis. 2d 438, 736 N.W.2d 189, claiming that it has no application to this case. (State's Br. at 20). In that case, the State had Sloan on video with a package of marijuana in his hands. *Id.*, ¶¶ 2, 29. When police looked at the package, they noticed that he had listed his address as the return mailing address. *Id.*, ¶ 2. Despite these highly suggestive facts, this Court found a lack of probable cause. *Id.*, ¶ 38. In support, the Court rattled off a long list of nonexistent pieces of evidence that *could* have established probable cause, none of which are present in this case. *Id.*, ¶ 32.

Under the totality of the circumstances, there simply was not enough evidence to conclude that Mr. Hailes' drug trafficking at a distinct address permitted

police to search the apartments targeted in this case. Accordingly, this Court should reverse.[1]

II. Both enhancers cannot be applied to the same charge or conviction.

A. The plain language of the text controls the outcome of this case.

As set forth in the brief-in-chief, the language of the statute governing the application of enhancers is clear and does not permit both enhancers to be applied to the same charge or conviction. Because the only meaningful inquiry in assessing statutory meaning is the plain language of the text itself, this should end the inquiry. *State ex rel Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 NW.2d 110.

The State disagrees, constructing a superficially imposing but ultimately unpersuasive chain of reasoning: (1) *State v. Maxey*, 2003 WI App 94, 264 Wis. 2d 878, 663 N.W.2d 811, which interpreted different statutory language, has already established the meaning of *this* language; and (2) the canon of "repeal by implication" establishes that this interpretation holds unless and until Mr. Hailes proves otherwise. (State's Br. at 22-26). Thus, even though the changes to the law might have caused "confusion," it remains Mr. Hailes' burden to prove

[1] Mr. Hailes believes that the issue of good faith can be resolved on the basis of the record. However, he acknowledges that the State has not had an opportunity to develop that issue at an evidentiary hearing.

why this Court should set aside an older common-law interpretation and instead focus on the text itself. (State's Br. at 26).

However, *Maxey* does not control the outcome of this case because it did not—and could not—interpret § 973.01(2)(c). As Mr. Hailes has argued in his brief, this statute creates a meaningful change in the law that distinguishes away *Maxey's* precedential force.

The State responds by invoking a canon of statutory construction, arguing that this statute cannot change the common law. (State's Br. at 24). Yet, the Wisconsin Supreme Court has already held that there is "no need to resort to the canon" if the language at issue is sufficiently clear. *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16. Thus, the State's convoluted argument which places a canon of construction over and above the plain words of this statute should be rejected.

Next, the State argues that in order to obtain a different result, the legislature would have had to have explicitly indicated it was overturning *Maxey* in drafting this statute. (State's Br. at 24). Yet, the language cited is clear, and unambiguously states that both enhancers cannot be applied to the same charge or conviction.

The State then tries to argue that Wis. Stat. § 973.01(2)(c) is merely a "ranking" statute that applies when multiple enhancers are in play and does not trump the legislature's pronouncement, elsewhere in the statutes, that penalties may be increased "by any

applicable penalty enhancement statute." (State's Br. at 25). However, when multiple enhancers are in play, the statute does not permit them to both be applied—meaning that both penalties are not "applicable" in that instance.

Thus, because the statute plainly states that only one or the other enhancer may be applied, this Court must give effect to that plain language and reject the State's arguments. The Court should hold that Wis. Stat. § 973.01(2)(c) permits either the second and subsequent enhancer or the repeater enhancer—but not both.

B. The State has not meaningfully responded to Mr. Hailes' legislative history arguments.

Mr. Hailes also argued that legislative history supports his reading. (Brief-in-Chief at 31-33). The State does not respond to these specific arguments, falling back on its "repeal by implication" argument and asserting that the legislative history must show that the legislature "clearly abrogated" *Maxey*. (State's Br. at 26). Mr. Hailes disagrees that this is the central inquiry. Because the State has not otherwise responded to his specific arguments, they should be conceded in his favor. *Charolais Breeding Ranches, LTD v. FPC Securities Corp.,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

III. Mr. Hailes is entitled to plea withdrawal.

A. Mr. Hailes' plea was not knowing, intelligent or voluntary.

In his brief, Mr. Hailes outlined three legal theories under which he was entitled to plea withdrawal: (1) this was a plea to a legal impossibility under *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992); (2) the "plea was not entered with full knowledge of the information relevant to a decision regarding whether to plead" and (3) this was an "illusory" plea. (Brief-in-Chief at 36-37).[2]

With respect to *Woods*, the State disputes Mr. Hailes' claim that a legal impossibility makes a plea "categorically invalid." (State's Br. at 28). Instead, the State claims that the outcome in that case was only required because the "impossibility" induced the plea. (State's Br. at 28). In *Woods*, however, this Court reversed without requiring the defendant to prove that he had only accepted the plea agreement because of the misinformation. It therefore held that "the plea agreement to a legal impossibility necessarily rendered the plea an uninformed one." *Woods*, 173 Wis. 2d at 140.

---

[2] The State tries to claim that Mr. Hailes has misrepresented binding precedent when he used the word "requires" when discussing cases where plea withdrawal was, in fact, found to be "required." (State's Br. at 28). Mr. Hailes does not dispute, and has never claimed, that any inaccuracy, no matter its materiality, torpedoes any otherwise knowing, intelligent and voluntary plea. The State's straw man is not a faithful recitation of the argument in the brief.

While the Court also observed that Woods made the decision to plead "at least in part" based on the misinformation, the Court did not require any showing that the misinformation induced the plea; the agreement to a legal "necessarily" made the plea uninformed and involuntary. *Id.* This makes sense. If a plea agreement is analogized to a contract, *see State v. Toliver*, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994), it makes no sense to bind the defendant to an agreement that, upon further reflection, is inconsistent with law and therefore unenforceable. Moreover, a closer examination of *State v. Reikkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) rebuts the State's specious misreading of the case law. Just as in *Woods*, the defendant was not required to make a special showing that the error induced his plea; rather the mere fact that he had pleaded guilty to an impossibility was in fact sufficient evidence that the plea was invalid.

Moving to the second legal theory—that the enhancer issue deprived Mr. Hailes of the ability to make an informed evaluation of the plea agreement prior to acceptance—the State claims that Mr. Hailes' claim must fail because he did not establish that this error "induced" his pleas. (State's Br. at 28-29). The State claims that Mr. Hailes must establish, in his motion, the overriding centrality of this issue to his decision whether to accept or reject the plea. (State's Br. at 28-29). The State has read these cases too broadly and constructed a test that almost no defendant can satisfy. As the Wisconsin Supreme Court has held, "for a defendant to show that a plea

was not knowing, intelligent, and voluntary, the case law does not require that the decision to plead no contest be based exclusively on the misinformation the defendant received." *State v. Dillard*, 2014 WI 123, ¶ 60, 358 Wis. 2d 543, 859 N.W.2d 44. Instead, "a guilty or no-contest plea is not voluntary unless the defendant is 'fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel....'" *Id*. Here, Mr. Hailes has satisfied this standard by showing that he believed he was subject to greater penalties than he in fact was; accordingly, he lacked the ability to make these constitutionally requisite assessments.

Finally, as to an illusory plea, the State combines its response to that subsection of Mr. Hailes' argument with its general claim that Mr. Hailes needed to prove the centrality of the mistake in accepting the plea. (State's Br. at 29). As set forth above, the case law conclusively rejects that claim.

The State then claims that the "record" disproves any claim that information about enhancers induced the plea. (State's Br. at 29). The State points to record evidence showing Mr. Hailes' willingness to resolve the case with a plea as well as the significant evidence of guilt following the denial of the suppression motion. (State's Br. at 30). While it then backtracks a little on its claim regarding the need to establish the centrality of the enhancer issue in inducing Mr. Hailes' plea, it then claims Mr. Hailes needs to show that this was at least a factor in

inducing the plea. (State's Br. at 30). Given this evidence, the State is skeptical that such a showing can be made.

Returning for a moment to the contract analogy, the State's argument is clearly flawed. Mr. Hailes may have had a myriad of considerations—in a complex criminal case involving numerous legal issues and hundreds of pieces of potential evidence, this is unsurprising—but that cannot obscure the fundamental nature of Mr. Hailes' claim. Mr. Hailes did not know what enhancers could and could not be applied to him; he did not know how much time he could actually serve in prison; and he certainly did not have the ability to objectively evaluate the proffered plea with those deficiencies present. Accordingly, Mr. Hailes is entitled to plea withdrawal.

B. Ineffective assistance of counsel.

The State claims that trial counsel could not have been ineffective because the legal issue at hand is too novel. (State's Br. at 31). The State claims no reasonably competent attorney would have questioned *Maxey's* precedential force. (State's Br. at 31). However, the State acknowledges that counsel has a duty where the law is "clear." (State's Br. at 31). Here, because the plain language *is* clear, reasonably competent counsel should have spotted the error and taken steps to either challenge the charging scheme or adequately advise the client.

As to prejudice, the State claims there has been an insufficient showing. (State's Br. at 31). However,

Mr. Hailes explained the significance of the misadvice in his decision to take the plea and also stated that, but-for this misadvice, there would have been a different result—he would not have accepted it. While the State insists that a defendant must prove he would have gone to trial but-for the misadvice, the strength of that claim has been called into doubt by later United States Supreme Court authority establishing that such a showing may not be required when the claim centers on ineffective assistance during the plea bargaining phase. *Missouri v. Frye*, 566 U.S. 134, 147 (2012).

Accordingly, this Court should remand for a hearing on Mr. Hailes' plea withdrawal motion.

III. Mr. Hailes is entitled to sentence modification.

The State focuses on the first prong of the analysis, arguing that Mr. Hailes has not proven that the erroneous application of enhancers was highly relevant to his sentence. (State's Br. at 32). The State claims that Mr. Hailes was required to cite to the sentencing transcript in order to prove this proposition and, because he did not, this Court can label his claim as insufficiently developed and move on. (State's Br. at 32). Mr. Hailes disagrees. In a case where the inaccuracy impinges on the available range of sentence and number of enhancers applicable, this is necessarily "highly relevant" information for the sentencing court. In fact, understanding the specific charges or enhancers, and the exposure they create for

the defendant, is probably the *most* relevant consideration at any sentencing.

The State also claims that the court did not "consider the sentences serious just because multiple enhancers applied." (State's Br. at 33). While the State is correct that the State focused on the gravity of Mr. Hailes' criminal offending, information suggesting that Mr. Hailes was *more* criminally responsible due to the application of additional enhancers necessarily factors into that calculus. Accordingly, this Court should find that this is a "new factor" and remand for further proceedings.

IV. Mr. Hailes is entitled to resentencing.

The State first claims that Mr. Hailes has failed to prove reliance, because he has not cited specific portions of the sentencing transcript. (State's Br. at 34). However, as set forth above, the court necessarily relies on inaccurate information when there is information establishing a higher range of penalties than is legally or factually correct. Moreover, the State concedes that the court was considering the "decades" of exposure at issue, asserting that this may constitute "explicit attention." (State's Br. at 35).

Next, the State claims that the error is harmless, as the court would have imposed the same sentence absent the error. (State's Br. at 35). However, the State does not cite or develop the case law regarding harmless error and how the facts of this case satisfy that standard, which requires the State to prove harmlessness beyond a reasonable doubt. *State*

v. Mayo, 2007 WI 78, ¶ 47, 301 Wis.2d 642, 734 N.W.2d 115. The State's harmlessness argument is undeveloped.

The same goes for its forfeiture argument, which consists of only a few brief sentences. (State's Br. at 34-35). Mr. Hailes simply disagrees that the error is forfeited, and the State has not developed any authority explaining why it was not, except to cite a case where forfeiture was found *not* to exist. (State's Br. at 34). Moreover, forfeiture is a principle of judicial administration and not a bar to consideration on the merits. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702.

Moreover, Mr. Hailes preserved the claim by raising ineffective assistance of counsel. The State does not seriously grapple with this portion of the argument, arguing that there can be no deficient performance without meaningfully explaining why not. (State's Br. at 35). And there was no prejudice, in the State's view, because there was no reliance. (State's Br. at 35). This conflates the two prongs of the analysis. In any case, had the court been made aware that Mr. Hailes was actually facing less time and was less culpable (because there were less enhancers) there is a reasonable probability of a different result—a more favorable sentence.

Accordingly, this Court should find that Mr. Hailes is entitled to resentencing or, if it agrees with the State that the issue is forfeited and declines to exercise its discretionary authority to reach the

merits, remand the matter for a postconviction evidentiary hearing on his claim of ineffective assistance of counsel.

CONCLUSION

Mr. Hailes respectfully asks that this Court grant the relief requested herein.

Dated this 10th day of February, 2022.

Respectfully submitted,

Electronically signed by
Christopher P. August

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@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 2,927 words.

Dated this 10th day of February, 2022.

Signed:

Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender