STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1339 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACY LAVER HAILES,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Is a criminal defendant who enters into an illegal and unenforceable plea entitled to withdraw that plea?

The circuit court concluded there was nothing improper about Mr. Hailes' plea. The court of appeals agreed that Mr. Hailes' plea was unlawful, but denied him a remedy for this defect.

2. Did Mr. Hailes' motion entitle him to a hearing on his claim of ineffective assistance of counsel?

The circuit court denied the motion without a hearing and the court of appeals affirmed.

3. Was Mr. Hailes entitled to sentencing relief as a result of his unlawful plea?

The circuit court answered no and the court of appeals affirmed.

4. Did police have probable cause to search two apartments connected to Mr. Hailes for evidence of alleged drug dealing?

The circuit court answered yes and the court of appeals affirmed.

CRITERIA FOR REVIEW

As this Court recognized 50 years ago, "[p]lea bargaining is an accepted and necessary part of the process whereby a good many criminal prosecutions are terminated as a result of a guilty plea." *State ex rel. White v. Gray*, 57 Wis. 2d 17, 21, 203 N.W.2d 638 (1973). Indeed, the modern criminal justice system "is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Plea bargains have been analogized to contracts, although in accepting that analogy, reviewing courts must ensure they are respecting the special legal significance of an agreement to waive constitutional rights in exchange for an admission of criminal wrongdoing. *State v. Deilke*, 2004 WI 104, ¶ 12 n.7, 274 Wis. 2d 595, 682 N.W.2d 945.

Certain kinds of agreements are therefore off the table. Pleas that are not knowing, intelligent, and voluntary are a "manifest injustice" unacceptable to our legal system. *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. Likewise, pleas that are premised on an illegal or unenforceable arrangement should also be invalidated on appeal. *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992); *State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12. Defendants who do not receive the effective assistance of counsel during the plea process should also be entitled to plea withdrawal. *State v. Dillard*, 2014 WI 123, ¶ 84, 358 Wis. 2d 543, 859 N.W.2d 44.

In this case, the court of appeals agreed with Mr. Hailes that his agreement to have multiple enhancers applied to his convictions was illegal and unenforceable. *State v. Hailes*, Appeal No. 2021AP1339-CR, ¶ 2, slip copy, (Wis. Ct. App. May 9, 2023).[1] (App. 4-5). Yet, it denied him a remedy for this error, concluding that he was not entitled to either plea withdrawal or sentencing relief. *Id*.

Review is therefore warranted under Wis. Stat. § 809.62(1r)(d), as the court of appeals decision conflicts with other controlling authority establishing that defendants who enter illegal or unenforceable pleas should find a remedy on appeal. At the very least, the circuit court may well have wanted to know which enhancers were being applied before sentencing Mr. Hailes, an opportunity that was denied by the court of appeals when it rejected Mr. Hailes' resentencing and sentence modification claims.

As stated above, pleas are a significant part of our modern criminal justice system. This published decision threatens to encourage less-than rigorous standards in accepting pleas and in reviewing the sufficiency of those pleas on appeal. Accordingly, this Court should accept review and reverse.

If this Court does accept review, Mr. Hailes would therefore also ask this Court to address his search warrant issue. Although this issue does not independently merit review, analysis of the relevant

[1] Recommended for publication.

legal principles will still be instructive for lower court actors.

STATEMENT OF FACTS

The facts are fairly set forth in the court of appeals decision and will only be briefly summarized here.

Mr. Hailes, a suspected drug dealer, was prosecuted for numerous drug offenses following a lengthy law enforcement investigation involving a confidential informant (CI) and the execution of multiple search warrants. (61). Mr. Hailes tried, without success, to suppress the fruits of a search executed at two apartments ostensibly utilized by Mr. Hailes. (91:1-4; 41:18).

After losing the suppression motion, Mr. Hailes agreed to plead guilty to: (1&2) two counts of possession of a firearm by a felon, as a habitual criminal; (3) possession with intent to deliver heroin (10-50 grams), as a habitual criminal and as a second and subsequent offense; (4) possession with intent to deliver cocaine (greater than 40 grams) as a habitual criminal and as a second and subsequent offense; and (5) possession with intent to deliver cocaine (1 gram or less) as a habitual criminal and as a second and subsequent offense. (39:3; 83:1-4). Several remaining counts were dismissed and read-in. (39:3). Under the terms of the agreement, both sides would be free to argue at sentencing. (87:2).

The court, the Honorable Janet Protasiewicz, imposed a global sentence of 16 years initial confinement followed by 11 years of extended supervision. (30:1); (App. 30).

Mr. Hailes filed two postconviction motions arguing that it was improper to apply both the habitual criminality enhancer under § 939.62 and the second and subsequent drug offender enhancer under § 961.48 to the same charge or conviction. (56; 80). As a remedy, Mr. Hailes sought plea withdrawal, resentencing, and sentence modification. (56; 80). Both motions were denied. (57; 95)l (App. 33-37; App. 38-39).

Mr. Hailes appealed and, in addition to renewing his arguments from the postconviction motions, also asked the court of appeals to review his preserved suppression motion.

The court of appeals affirmed. *Hailes*, No. 2021AP1339-CR, ¶ 2. (App. 4-5). As to the search warrant issue, the court concluded that the challenged search warrants established "a reasonable inference that evidence of drug-related activity would be found at the two apartments […] given all the circumstances set forth in the affidavits attached to the search warrants." *Id*., ¶ 15. (App. 10).

With respect to the enhancers, the court of appeals agreed that it was improper to apply both enhancers to the same conviction. *Id*., ¶ 31. (App. 16). Conducting an independent review of the record, the court of appeals nonetheless concluded this error did

not induce Mr. Hailes' plea. *Id*., ¶ 42. (App. 22). Moreover, counsel could also not be ineffective as it was not clearly established that this enhancer scheme was unlawful when Mr. Hailes pleaded. *Id*., ¶ 49. (App. 24-25). The court of appeals was also skeptical of Mr. Hailes' ability to establish prejudice under these circumstances. *Id*., ¶ 51. (App. 25). Finally, the court also rejected arguments for sentencing relief, finding that the number of enhancers was not highly relevant and that the circuit court did not rely on an erroneous understanding of what enhancers were applicable at the time it sentenced Mr. Hailes. *Id*., ¶¶ 57 & 61. (App. 27, 28-29).

This petition follows.

ARGUMENT

I. This Court should accept review and hold that Mr. Hailes was entitled to plea withdrawal because he unknowingly agreed to enter an unenforceable plea.

In this case, the court of appeals held that Mr. Hailes' agreement to have multiple enhancers applied to his drug convictions was legally unenforceable. The Wisconsin legislature does not permit both the habitual criminality enhancer and the second and subsequent drug offender enhancer to be applied to the same conviction. *Hailes*, Appeal No. 2021AP1339-CR, ¶ 31. (App. 16).

Yet, notwithstanding the clear unlawfulness of Mr. Hailes' plea, Mr. Hailes has not been permitted to withdraw his plea. The holding of this published case therefore contradicts two other published cases of the court of appeals establishing that an unenforceable or illegal plea entitles the defendant to plea withdrawal as a matter of law. Reversal is therefore warranted.

In *Dawson*, the defendant agreed to a unique "reopen-and-amend" plea agreement, whereby he would plead guilty to first-degree sexual assault of a child and be placed on probation. *Dawson*, 2004 WI App 173, ¶ 2. If Dawson successfully completed probation, the State further agreed to reopen the case and amend Dawson's conviction to a less serious offense. *Id*. Because this procedure is not actually authorized under Wisconsin law, the court of appeals concluded that "Dawson entered his plea under a misapprehension that he had preserved the possibility of a material benefit to him that was legally impossible for him to obtain, and the State and the trial court acquiesced in this mistaken view." *Id*., ¶ 14. Dawson had agreed to a legally unenforceable plea agreement and his plea was therefore categorically not knowing, intelligent or voluntary. *Id*.

Likewise, in *Woods*, the defendant pleaded guilty under a scheme whereby an adult prison sentence would be run consecutive to a juvenile disposition order. *Woods*, 173 Wis. 2d at 134. That, however, is a legal impossibility and a "plea agreement to a legal impossibility necessarily rendered the plea an uninformed one." *Id*. at 140.

In this case, Mr. Hailes was also agreeing to an impossibility when he acquiesced, via his plea agreement, to an unlawful charging scheme applying multiple enhancers to the same conviction. That agreement to a legal impossibility, following *Dawson* and *Woods,* should therefore merit plea withdrawal.

The court of appeals disagrees, finding implicit in these cases a requirement that the record establish that the legal impossibility induced the plea in question. *Hailes*, Appeal No. 2021AP1339-CR, ¶ 42. (App. 22). In the court of appeals' view, unless the record establishes that the defendant was pleading *because of* the legal error which renders the plea infirm, he will not be entitled to plea withdrawal. *Id*. (App. 22).

That holding is problematic for obvious reasons. Under this now-binding Wisconsin authority, there is no apparent prohibition against entering into unenforceable or legally impossible plea agreements. Unlike run-of-the-mill contractual agreements, there is no recourse for a party who enters into an agreement waiving important constitutional rights without also knowing that what they are agreeing to is unenforceable and illegal. So long as the record demonstrates, in the view of a court reviewing a case in which no postconviction motion hearing occurred, that the defendant "really" pleaded guilty because of some other extrinsic consideration—such as disappointment over a motion ruling—it simply does not matter whether the defendant is also agreeing to be bound by an unlawful enhancer scheme.

The ramifications for plea bargaining and appellate review of plea bargains is obvious. Rather than delineating a bright-line rule that legally impossible or unenforceable plea agreements are *per se* invalid, the court of appeals has legitimated a situation whereby defendants can (unknowingly) agree to illegal arraignments, including having enhancers carrying additional years of prison added to their potential exposure, all while still entering a "knowing" and "intelligent" plea. Accordingly, this Court should accept review and reverse.

II. This Court should accept review and hold that Mr. Hailes was entitled to a hearing on his claim of attorney ineffectiveness.

A. This Court should accept review and resolve when an issue is too "novel" for counsel to reasonably act on his client's behalf by raising it.

In determining whether trial counsel rendered ineffective assistance for the purposes of the federal constitution, the United States Supreme Court has set a very clear and straightforward legal test, that of objective reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "More specific guidelines are not appropriate." *Id*. The United States Supreme Court therefore disfavors "*per se*" rules. *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000).

However, Wisconsin courts interpreting *Strickland* have struggled to consistently apply this standard when confronting what they believe to be

"novel" legal challenges. While the court of appeals formerly applied a more permissive standard of review requiring assessment of whether "the law or duty is clear such that reasonable counsel should know *enough* to raise the issue," *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994) (emphasis added), recent decisions of this Court have encouraged a restrictive reading of *Strickland's* deficient performance prong when assessing anything other than the most clear-cut legal errors. Thus, this Court has discouraged findings of deficient performance where the law is "unsettled." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93; *State v. Hanson*, 2019 WI 63, ¶ 28, 387 Wis. 2d 233, 928 N.W.2d 607.

This Court, however, has not meaningfully clarified what it means for law to be sufficiently "unsettled" such that no duty to raise an issue exists. For example, in *State v. Robinson*, Appeal No. 2020AP1728-CR, this Court was asked whether it was sufficient that a broad constitutional rule had already been promulgated by the United States Supreme Court or whether, in the State's view, counsel needed a binding Wisconsin case applying that rule to a specific local practice which appeared to violate United States Supreme Court precedent. This Court, however, did not resolve that issue, instead vacating its certification and returning the matter to the court of appeals, where the parties are still awaiting an answer.

Just as Robinson argued that the plain dictates of United States Supreme Court case law should be enough to guide reasonably competent counsel under *Strickland*, in this case Mr. Hailes asks for a similar rule with respect to the plain language of the Wisconsin legislature. As it is our legislature—and not this or any other court—that is the dominant source of textual authority in our system of laws, reasonably competent counsel, when faced with a plain language instruction that certain conduct is illegal, ought to yield to that instruction. To hold otherwise endorses inaction, less-than-zealous lawyering, and threatens to demean both the *Strickland* standard and to unseat the proper deference owed to plain text authority.

Accordingly, this Court should accept review and reverse.

B. This Court should accept review and hold that Mr. Hailes' motion otherwise satisfied the *Allen*[2] standard to obtain a hearing.

If this Court accepts Mr. Hailes' argument above, then it is clear his motion correctly pleaded deficient performance. (56:11). And, while the court of appeals concluded there was no prejudice pleaded in this case, that holding relies on overly strict reading of the requirements for obtaining a postconviction motion hearing.

[2] *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.

In *Allen*, this Court made clear that the reviewing court needs to begin with an assumption that the averments in the motion are true. *Allen*, 2004 WI 106, ¶ 12. So long as those averments are not "conclusory" and, if true, would entitle the movant to relief, then the Court must hold a hearing on the motion. *Id*., ¶ 9.

Mr. Hailes satisfied that requirement here, asserting that but-for his misunderstanding about the enhancers, he would not have accepted this plea. (56:11-12). Essentially, the court of appeals rejected that claim as superficially incredible given its opinion that the change in exposure caused by any misunderstanding was immaterial. *Hailes*, Appeal No. 2021AP1339-CR, ¶ 51. (App. 25). While this may be relevant to probing the believability of Mr. Hailes' testimony at a postconviction motion hearing, as a veiled credibility judgment it is simply inappropriate at this juncture. Accordingly, this Court should accept review and reverse.

III. Mr. Hailes was entitled to sentencing relief.

While plea withdrawal, as a remedy, is likely the best "fit" for Mr. Hailes' scenario, this Court should also consider whether sentencing relief is an appropriate remedy if it determines that the error is not a "manifest injustice" entitling Mr. Hailes to plea withdrawal.

Respectfully, why wouldn't the nature of Mr. Hailes' convictions be relevant information at a

sentencing hearing? The dismissal of the repeater enhancer or the second and subsequent enhancer on seven of the nine charges in the amended information would have reduced Mr. Hailes' total charged exposure significantly—by approximately 30 years. Likewise, the dismissal of the repeater enhancer or the second and subsequent enhancer on the three charges to which Mr. Hailes pled, would have reduced the total exposure Mr. Hailes faced at the time of sentencing by 16 years.

Information about what exposure the defendant faces is therefore categorically "highly relevant" information that needs to be correctly placed before the sentencing court. When, as here, a circuit court acts on an erroneous understanding of the legal penalties, a reviewing court should allow that court the opportunity to reassess its decision via either a resentencing hearing or by remanding the matter so that the lower court can consider the appropriateness of sentence modification. *See State v. Ray*, 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992).

This Court should therefore accept review and reverse.

IV. If this Court accepts review, it should also address Mr. Hailes' suppression issue.

Finally, if this Court accepts review, it should also address Mr. Hailes' preserved suppression claim. It is well-settled in Wisconsin law that just because a person may be a drug dealer, police do not have carte blanche to search any domicile to which he *may* be

linked. *State v. Higginbotham*, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991); *State v. Ward*, 2000 WI 3, ¶ 27, 231 Wis.2d 723, 604 N.W.2d 517. Previously, the court of appeals interpreted that "nexus" requirement in a stringent fashion in *State v. Sloan*, 2007 WI App 146, ¶ 38, 303 Wis. 2d 438, 736 N.W.2d 189, where the court of appeals forbid law enforcement from searching a residence, even when that address was listed as the return address on a package of marijuana attempted to be delivered through the mail.

Here, Mr. Hailes has conceded the legality of a search at a residence where actual drug-dealing was observed. (Ct. App. Br. at 20). Yet, following *Sloan*, he asked the court of appeals to follow that precedent and reject the search of two other apartments where no actual drug activity was reported. The court of appeals refused to do so, discerning factual distinctions with which to argue away the precedential force of *Sloan*—despite also conceding "similarities" between the challenged affidavits in both cases. *Hailes*, Appeal No. 2021AP1339-CR, ¶ 24. (App. 13-14).

The "nexus" requirement is an important concept for Fourth Amendment law, and works to prohibit general searches of unrelated domiciles merely because a person who previously committed a crime had contact with it. This Court should therefore accept review, vindicate the reasoning of *Sloan*, and reverse.

CONCLUSION

For the reasons set forth herein, Mr. Hailes asks this Court to accept review and reverse the court of appeals.

Dated this 5th day of June, 2023.

Respectfully submitted,

Electronically signed by Christopher P. August

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,076 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 5th day of June, 2023.

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