STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2021AP1526-CR & 2021AP1527-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RASHEEM D. DAVIS,

Defendant-Appellant.

On Appeal from Judgments of Conviction Entered in Milwaukee County Circuit Court, the Honorable Glenn H. Yamahiro Presiding, and an Order Denying a Motion for Postconviction Relief, the Honorable Frederick C. Rosa Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is a dismissal of a criminal case without prejudice a "final disposition" which deprives the circuit court of further subject matter jurisdiction?

The circuit court concluded that the court had not lost jurisdiction because it had the "power to rescind" the dismissal order. (R1 43:6; R2 68:6); (App. 19).

2. Is Mr. Davis entitled to a hearing on his motion alleging that trial counsel was ineffective for not objecting to a lack of personal jurisdiction?

The circuit court concluded, once again, that the dismissal order was not a final disposition and that counsel could not be ineffective for not objecting. (R1 43:7; R2 68:7); (App. 20).

3. Is Mr. Davis entitled to a hearing on his plea withdrawal motion, alleging that he only pleaded guilty in 20CF774 due to the legally infirm conviction in 19CF4828?

Because the circuit court concluded that there was nothing improper about the conviction in 19CF4828, it denied Mr. Davis' motion for plea withdrawal without a hearing. (R1 43:7; R2 68:7); (App. 20).

4. Mr. Davis was charged with robbery for taking his ex-girlfriend's cell phone. However, the undisputed record evidence shows that ARW met up with Mr. Davis shortly after reporting the incident to the police, at which time he returned the phone to her.

   Based on this record evidence, was the evidence sufficient to convict Mr. Davis of robbery?

This issue is being raised for the first time on appeal. Wis. Stat. § 809.30(2)(h).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested.

However, publication may be warranted as this Court has addressed a similar fact pattern raising analogous legal issues in a recent unpublished and uncitable decision.[1]

STATEMENT OF THE CASE AND FACTS

Milwaukee County Case No. 19CF4828

On October 30, 2019, the State initiated this case by filing a criminal complaint which alleged: (1) false imprisonment contrary to Wis. Stat. § 940.30; (2) robbery with use of force contrary to Wis. Stat. §

[1] *State v. Jenkins*, Appeal No. 2017AP418-CR.

943.32(1)(a); (3) misdemeanor battery contrary to Wis. Stat. § 940.19(1); (4) disorderly conduct contrary to Wis. Stat. § 947.01; and misdemeanor bail jumping contrary to Wis. Stat. § 946.49(1)(a). (R2 2:1-2).[2] All five charges carried the domestic abuse surcharge. (R2 2:1-2).

The complaint alleges that on October 28, 2019, ARW had a confrontation with her then-boyfriend, Mr. Davis, while attending class at Milwaukee Area Technical College (MATC). (R2 2:3). ARW told police that Mr. Davis followed her to the bathroom, pushed her inside a bathroom stall, and bit her. (R2 2:3). She also reported that Mr. Davis left the bathroom stall in possession of her iPhone. (R2 2:3). Mr. Davis was out on bail in an unrelated misdemeanor case when that incident occurred. (R2 2:3).

Milwaukee County Case No. 20CF774

On February 19, 2020, the State filed another criminal complaint charging Mr. Davis with: (1) fleeing or eluding an officer contrary to Wis. Stat. § 346.04(3); and (2) second-degree recklessly endangering safety as an act of domestic abuse contrary to Wis. Stat. § 941.30(2) and 973.055(1). (R1 2:1). The complaint alleges that on October 19, 2019, police conducted a "welfare check" regarding ARW. (R1 2:2). Police attempted to conduct a traffic stop on ARW's car, which was being driven by a black male.

[2] This is a consolidated appeal. Counsel will use R1 to refer to the record in 21AP526 and R2 to refer to the record in 21AP527.

(R1 2:2). A brief chase ensued before officers lost sight of the car. (R1 2:2). ARW subsequently reported to police that she was in the car and that Mr. Davis was driving it during the chase. (R1 2:2-3).

Pretrial Proceedings

Mr. Davis entered speedy trial demands in both cases. (R1 49:11; R2 33:8).

On August 3, 2020, the parties appeared for the scheduled trial in 19CF4828. (R1 19:2; R2 28:2); (App. 23). Mr. Davis was not produced. (R1 19:2; R2 28:2); (App. 23). The State informed the circuit court, the Honorable Frederick C. Rosa presiding, that it was not ready to proceed because it had failed to issue subpoenas for its witnesses. (R1 19:2; R2 28:2); (App. 23). Counsel for Mr. Davis moved to dismiss. (R1 19:2; R2 28:2); (App. 23). The court granted the motion, dismissing the matter without prejudice. (R1 19:3; R2 28:3); (App. 24). It indicated that if the matter were to proceed, the State would need to refile the charges. (R1 19:3; R2 28:3); (App. 24). The parties went off the record. (R1 19:3; R2 28:3); (App. 24). The case was subsequently recalled, and the State then informed the court that its primary witness, ARW, was present in court. (R1 19:4; R2 28:4); (App. 25). The matter then proceeded to trial after being "spun" to the Honorable Glenn Yamahiro. (R1 19:4; R2 28:4); (App. 25).

Trial in 19CF4828

The State called two witnesses: Officer Christopher Peterson of the Milwaukee Police

Department and ARW. (R1 23:35; R2 31:35; R1 23:52; R2 31:52).

Officer Peterson described receiving the initial report from ARW. (R1 23:38; R2 31:38). His testimony was used to admit photographs of ARW showing her injuries. (R1 23:39; R2 31:39). His body camera recording of his interaction with ARW was also played for the jury. (R1 23:44; R2 31:44). He also testified about retrieving surveillance video from MATC. (R1 23:48; R2 31:48).

ARW testified that, on the evening in question, she was in contact with Mr. Davis via text while at class at MATC. (R1 23:54; R2 31:54). When she left the classroom at around 8:00 p.m., Mr. Davis was waiting in the hallway. (R1 23:55; R2 31:55). She told Mr. Davis she wanted to break up. (R1 23:57; R2 31:57). Mr. Davis prevented ARW from walking away by grabbing her arm. (R1 23:57; R2 31:57). After about two minutes of conversation, ARW "was getting mad." (R1 23:57; R2 31:57). Likewise, Mr. Davis was also "mad" and speaking loudly. (R1 23:58; R2 31:58).

Although the pair "part[ed] ways," Mr. Davis followed ARW to the bathroom. (R1 23:58-59; R2 31:58-59). He continued to argue with ARW. (R1 23:60; R2 31:60). He then followed her into the bathroom and, ultimately, into a bathroom stall. (R1 23:60; R2 31:60). ARW told the jury that Mr. Davis "grabbed" her and demanded that she text a mutual friend that she was still in a relationship with Mr. Davis. (R1 23:61-62; R2 31:61-62). ARW did not immediately comply. (R1

23:63; R2 31:63). Mr. Davis bit her on the face and she handed him the phone. (R1 23:63; R2 31:63).

Mr. Davis took ARW's phone and left the bathroom stall. (R1 23:64; R2 31:64). ARW followed "after him" and continued "arguing" with Mr. Davis. (R1 23:65; R2 31:65). He threw something in the toilet and told ARW it was her phone. (R1 23:65; R2 31:65). He then left the bathroom and then the building itself through a fire exit, triggering a fire alarm. (R1 23:65; R2 31:65). ARW verified that her phone was not in the toilet and "ran after" Mr. Davis, eventually following him into an adjacent alley. (R1 23:65-66; R2 31:65-66).

Mr. Davis stopped and "let" ARW "catch up" to him. (R1 23:66-67; R2 31:66-67). ARW continued to yell at Mr. Davis and demand her phone. (R1 23:67; R2 31:67). In response, Mr. Davis gave ARW "his pack of cigarettes and baby pictures." (R1 23:67; R2 31:67). According to ARW, Mr. Davis wanted her to hold on to his effects "[t]o insure [sic] me that he's coming back to give me my phone."[3] (R1 23:67; R2 31:67). She refused the offer. (R1 23:67; R2 31:67). Mr. Davis then told ARW "to meet him around the corner" because he was "scared" the police were going to "pull up" due to the still-active fire alarm. (R1 23:68; R2 31:68). Mr. Davis told ARW she "would" get her phone back. (R1 23:89-90; R2 31:89-90).

ARW waited for Mr. Davis for approximately 30 minutes. (R1 23:68; R2 31:68). She then went to the

[3] She later testified that she already had his ID, which she later gave to police. (R2 31:90).

police to report the incident. (R1 23:68; R2 31:68). However, after ARW reported the incident, she successfully arranged for Mr. Davis to give her back the phone. (R1 23:72; R2 31:72).

After she got her phone back, ARW sent an email to the Milwaukee County District Attorney's Office with a different account of the event:

> That night, I was in class. The class ended at 8:30 PM. I left around 8 pm because I was arguing with my family through text. I was sitting outside of class and Rasheem came and sat by me. He usually always met me after class. When we were sitting there I was telling him that I just needed some space and tried to walk away. He started following me trying to talk but I didn't want to. We ended up in the S building female bathroom. He followed me into the stall and kept asking if I wanted to be with him. I didn't say anything. Then he started kissing on me, then my face he was trying to give a hickey. He asked again and I said no. Then he started yelling and asked for my phone. I gave it to him, then I started screaming and he ran out of the door and then the fire door. I ran after him and he told me to meet him around the corner because the siren was going off. He still had my phone. I talked to him late that night after I went to the police station and we met at the [S]ojourner [T]ruth building before my meeting with the DA so I could get my phone back.

(R2 58:1). ARW testified that her statement about the hickey was not true and her intent was to make the incident seem "less serious." (R1 23:84; R2 31:84). On cross-examination, however, ARW stated she *was*

being truthful when she wrote the email. (R2 32:86). However, she eventually testified that parts of the email were, in fact, not true. (R1 23:86; R2 31:86; R1 23:88; R2 31:88).

ARW's testimony was also used to introduce security camera footage from MATC. The first video captures ARW and Mr. Davis' initial conversation, showing her walking over to meet up with Mr. Davis, her breaking up with him, Mr. Davis briefly blocking her from leaving, and then following her down a hallway. (R1 23:78-79; R2 31:78-79). The second video shows Mr. Davis following ARW into the bathroom. (R1 23:80; R2 31:80). The third video shows ARW following Mr. Davis out of the bathroom. (R1 23:81; R2 31:81). The fourth and final video shows the final argument over the phone in the alleyway. (R1 23:82; R2 31:82).

Aside from these witnesses, the only other evidence consisted of a stipulation that Mr. Davis was out on bail when the MATC incident occurred. (R1 23:93; R2 31:93).

Following the close of evidence, Mr. Davis was convicted of all five counts. (R2 13:1-5).

Plea in 20CF774 and Global Sentencing

Shortly after the unfavorable jury verdict, Mr. Davis agreed to resolve his remaining legal matters, including 20CF774. (R1 24:2; R2 35:2). Mr. Davis agreed to plead guilty to the fleeing charge. (R1 24:2; R2 35:2). In exchange, the remaining charge would be

dismissed and read-in, as would two other misdemeanor files. (R1 24:2; R2 35:2). Both sides would be free to argue. (R1 24:2; R2 35:2).

The State then recommended a global sentence of five years initial confinement followed by four years of extended supervision. (R1 24:9; R2 35:9). Counsel for Mr. Davis asked for an imposed and stayed prison sentence with a probation disposition. (R1 24:18; R2 35:18). The Court then sentenced Mr. Davis to a global sentence of 45 months initial confinement followed by 36 months of extended supervision. (R1 24:25; R2 35:35).

Postconviction Proceedings

Mr. Davis filed a Rule 809.30 postconviction motion seeking: (1) vacatur of the judgment of conviction in 19CF4828; (2) a hearing on his claim that trial counsel was ineffective in that case; (3) a hearing on his request for plea withdrawal with respect to 20CF774.[4] (R1 29:1; R2 42:1).

Mr. Davis argued that the court lost subject matter jurisdiction when it dismissed 19CF4828 prior to trial and, as a result, the resulting conviction was a legal nullity. (R1 29:3; R2 42:3). Mr. Davis further argued that his lawyer was ineffective for not timely challenging the court's personal jurisdiction over him in proceeding with an unlawful trial. (R1 29:5; R2 42:5). Moreover, because Mr. Davis only pleaded guilty

[4] The motion also sought additional sentence credit. (R1 29:1). The circuit court granted that request. (R1 43:8).

in 20CF774 due to the unfavorable jury verdict in 19CF4828, he also asked to withdraw his plea. (R1 29:6; R2 42:6).

The circuit court, the Honorable Frederick C. Rosa presiding, denied the motion in a written order. (R1 43; R2 68); (App. 14). The court relied heavily on persuasive case law from the D.C. Circuit Court of Appeals in concluding that a dismissal order did not terminate the trial court's jurisdiction. (R1 43:4-6; R2 68:4-6); (App. 17-19. The court also focused on the fact that "jeopardy had not attached" at the time the dismissal order was entered. (R1 43:6; R2 68:6); (App. 19). Because it found that its reinstatement of the case was not legally improper, the court concluded that counsel could not have been ineffective for failing to object. (R1 43:6; R2 68:6); (App. 19). It also denied the request for plea withdrawal, which depended on a finding that the conviction in 19CF4828 was legally improper. (R1 43:7; R2 68:7); (App. 20).

This appeal follows. (R1 44; R2 71).

ARGUMENT

I. The circuit court was without subject matter jurisdiction after having dismissed the action. Accordingly, any further proceedings are a legal nullity.

A. Legal principles.

The Wisconsin Constitution provides the circuit court with subject matter jurisdiction in criminal cases. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738. "Criminal subject matter jurisdiction is defined as the power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment in a court of a judicial proceeding." *Mack v. State*, 93 Wis. 2d 287, 294, 286 N.W.2d 563 (1980).

Notably, subject-matter jurisdiction cannot be lost due to an underlying legal defect such as a defective criminal complaint or an invalid law. *Id.* at 295. While these errors may impact the circuit court's competency to exercise its authority in a given case, they do not deprive the court of its jurisdiction. *Booth,* 2016 WI 65, ¶ 14. Thus, for example, even when a law is facially unconstitutional, the circuit court still has jurisdiction over the action, which is a necessary prerequisite to obtaining a ruling as to that law's constitutionality. *Id*., ¶ 18.

However, subject matter jurisdiction does not endow circuit courts with untethered legal authority over suspected wrongdoers. Because the court's

subject matter jurisdiction is "conferred by law," *Mack*, 93 Wis. 2d at 294, the court's jurisdiction "attaches when the complaint is filed." *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). "Once criminal subject-matter jurisdiction attaches, it continues until a final disposition of the case." *Id*. "Without jurisdiction, criminal proceedings 'are a nullity.'" *State v. Randle*, 2002 WI App 116, ¶ 18, 252 Wis. 2d 743, 647 N.W.2d 324 (*quoting Hotzel v. Simmons*, 258 Wis. 234, 240, 45 N.W.2d 683 (1951)).

It is only once the *entire* action is disposed of that jurisdiction expires. For example, if individual counts in a multi-count information are dismissed—but then reinstated—within the same continually existing criminal case, then the court will still have jurisdiction. *State v. Asfoor*, 75 Wis. 2d 411, 424, 249 N.W.2d 529 (1977). Likewise, if the prosecutor improperly amends the charging document to add or modify the charges, that error does not impact the court's jurisdiction over an action which had been previously initiated by the proper filing of a criminal complaint. *State v. Webster,* 196 Wis. 2d 308, 319, 538 N.W.2d 810 (Ct. App. 1995).

Importantly, "[j]urisdiction over the subject matter is derived from law and cannot be waived nor conferred by consent." *Mack*, 93 Wis. 2d at 293. Whether a trial court lacks subject matter jurisdiction is a question of law reviewed *de novo*. *State v. Schroeder*, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999).

B. The court's order dismissing the matter without prejudice was a "final disposition." Accordingly, there was no valid criminal action before the court when it tried Mr. Davis for these crimes.

In this case, the court ordered that 19CF4828 be dismissed in its totality. (R1 19:2; R2 28:2). If the State wanted to try Mr. Davis for these allegations, it was instructed to "refile" those allegations in a new criminal complaint. (R1 19:3; R2 28:3); (App. 24). Importantly, the State did not object to the Court's order dismissing the case.

Accordingly, once the Court dismissed the case—as opposed to dismissing individual counts—and indicated that the State would need to initiate a new criminal action if it wanted to try Mr. Davis for these allegations, it had entered a "final disposition" of the underlying action. Moreover, because the court never rescinded that order—and the State never asked the Court to reconsider it —the court could not *sua sponte* resurrect the case, initiate a jury trial, convict Mr. Davis, and then sentence him to prison. Post-dismissal, these actions are a legal nullity. *Randle*, 2002 WI App 116, ¶ 18.

To hold otherwise contradicts the straightforward precedents set forth above. While ordinary legal errors will not impact the court's jurisdiction, there must in fact be an existing legal action which activates or "attaches" the court's power to exercise its impressive powers under the criminal

code—the filing of a criminal complaint. *See Aniton*, 183 Wis. 2d 125 at 129. Without a live, non-dismissed case, there is nothing for the circuit court to exercise jurisdiction over. If the court is allowed to conduct a criminal trial absent an "active" complaint, the court is exercising a free-floating power untethered from law.

Here, the circuit court disagreed. However, its reasoning is unpersuasive. Rather than focusing on clearly stated Wisconsin authorities, the court relied on persuasive authority from other jurisdictions to conclude there is a "power to rescind" the oral dismissal which exists, according to the court, "at least to the point that the order of dismissal is entered on the docket." (R1 43:6; R2 68:6); (App. 19).

The court did not, however, identify any textual source for this perceived authority, nor did the court logically explain why the power to rescind attaches only to oral rulings but vanishes once those oral rulings are captured on a docket sheet. This failure to ground the "power to rescind" in any legal authority is a fatal flaw. It is a fundamental principle of our legal system that the circuit court's primary source of power is an express grant of authority from established, textually-evident sources, including most relevantly the Wisconsin Constitution. *State v. Schwind*, 2019 WI 48, ¶ 12, 386 Wis. 2d 526, 926 N.W.2d 742.

Because the court did not identify a source for its perceived power, the only possible conduit for the court's action would be its "inherent authority […] to

ensure the efficient and effective functioning of the court, and to fairly administer justice." *Id.*, ¶ 16. However, the Wisconsin Supreme Court has instructed reviewing courts to exercise great caution in relying on inherent authority in justifying a judicial act:

> Recognizing the need for caution in this area, we are careful to invoke inherent authority if, but only if, invocation is necessary to "maintain [the courts'] dignity, transact their business, [and] accomplish the purposes of their existence." *Id.* In other words, "[a] power is inherent when it 'is one without which a court cannot properly function.' "

Id., ¶ 15 (quoting *State v. Henley*, 2010 WI 97, ¶ 29, 328 Wis. 2d 544, 787 N.W.2d 350).

The concept of inherent authority thus recognizes that there are certain acts without which "courts would not perform their constitutionally mandated functions." *Id.*, ¶ 19. Here, however, application of inherent authority would be illogical. The court's jurisdiction derives from the constitution and attaches upon the filing of a criminal complaint. Once the complaint is dismissed, however, logically the court no longer has jurisdiction—meaning it is not exercising lawful authority. Rather than assisting the court in performing its constitutionally mandated functions, the alleged power to rescind actually allows the court to act in a circumstance where it otherwise has no authority to do so.

In addition to this problematic conception of inherent judicial power, the circuit court also relied on a finding that jeopardy had not attached at the time of the dismissal and that Mr. Davis was not prejudiced by the court's rescission of the dismissal order. (R1 43:6; R2 68:6); (App. 19). However, there is nothing in the cited case law which would require a finding of prejudice. And, while *Asfoor* does make a passing reference to the nonexistence of jeopardy, *Asfoor*, 75 Wis. 2d at 424, that single sentence is not dispositive to its analysis of whether the dismissal of individual counts in an overall action was a "final disposition" affecting the court's jurisdiction. Unlike in *Asfoor*, where individual counts could be reinstated within the continually-existing criminal case, here the court dismissed the entire action, so that nothing remained.

Accordingly, because a "final disposition" was entered in this case when the circuit court dismissed the case, it had no authority to *sua sponte* continue the proceedings and try Mr. Davis. The subsequent proceedings are a legal nullity and must be vacated on appeal.

II. The circuit court did not have personal jurisdiction over Mr. Davis after dismissing the action. Trial counsel was ineffective for not objecting to this legal defect.

A. Legal principles.

"Personal jurisdiction in a criminal case attaches by an accused's physical presence before the

court pursuant to a properly issued warrant, a lawful arrest or a voluntary appearance, and continues throughout the final disposition of the case." *Kelley v. State*, 54 Wis. 2d 475, 479, 195 N. W. 2d 457 (1974). Subsequent case law shows that a legally valid complaint is sufficient to establish personal jurisdiction over the defendant. *State v. Jennings*, 2003 WI 10, ¶ 26, 259 Wis. 2d 523, 657 N.W.2d 393. As set forth above, this Court independently assesses whether the court had personal jurisdiction over Mr. Davis. *Schroeder*, 224 Wis. 2d at 711.

However, unlike subject matter jurisdiction, a defendant who does not timely object to a lack of personal jurisdiction waives the objection. *State v. Chabonian*, 55 Wis. 2d 723, 726, 201 N.W.2d 25 (1972). Accordingly, Mr. Davis' personal jurisdiction challenge must be assessed through the lens of ineffective assistance of counsel.

A defendant who raises a claim of ineffective assistance of counsel in a postconviction motion must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 689-694 (1984). A lawyer performs deficiently when their conduct falls "outside the wide range of professionally competent assistance." *Id.*, at 689. That deficient performance prejudices the defendant when there is a reasonable probability of a different outcome but-for the failings of counsel. *Id.*, at 694.

To obtain a hearing on the claim of ineffective assistance of counsel, Mr. Davis' motion needed to

allege facts which, if true, would entitle him to relief. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether he satisfied these pleading requirements is a question of law reviewed *de novo*. *Id*.

B. Mr. Davis was entitled to a hearing on his claim of ineffective assistance of counsel.

As set forth above, an order dismissing the action—with instructions that the State must refile—is a "final disposition" such that the court no longer possessed jurisdiction over Mr. Davis.

In this case, the court's decision to reinstate the proceedings came on the heels of a successful motion by counsel which resulted in a dismissal order. Having already prevailed on a motion to dismiss with an order favorable to Mr. Davis, there is no basis for reasonably competent counsel to not object to the court's improper reinstatement of the criminal case—an order unsupported by any legal authority. Under the authorities discussed above, counsel's motion would have been meritorious and would have resulted in a favorable outcome for his client—dismissal of the case.

These arguments are set forth in Mr. Davis' postconviction motion. (R1 29:6; R2 42:6). Accordingly, if this Court agrees that the court was without jurisdiction, then counsel's deficient performance follows automatically.

As to prejudice, a dismissal of the criminal case is obviously a favorable outcome for Mr. Davis—but-for his attorney's failure to object, he would not have

been tried, convicted, and sentenced to prison for these offenses. This is a sufficiently reasonable probability of a different outcome and, because this argument was set forth in the postconviction motion, (R1 29:6; R2 42:6), Mr. Davis was therefore entitled to a hearing on his claim.

Accordingly, because Mr. Davis sufficiently alleged both deficient performance and prejudice in his postconviction motion, this Court must reverse and remand for an evidentiary hearing. *Allen*, 2004 WI 106, ¶ 9.

III. Because Mr. Davis sufficiently alleged that he only entered a plea in 20CF774 due to the invalid jury verdict in 19CF4828, he is entitled to a hearing on his plea withdrawal motion.

A. Legal principles.

"After conviction and sentencing, a defendant seeking to withdraw a plea must demonstrate by clear and convincing evidence that withdrawal is required to correct a manifest injustice." *State v. Dillard*, 2013 WI App 108, ¶ 13, 350 Wis. 2d 331, 838 N.W.2d 112.

It is well-settled that a plea which "is not voluntarily, knowingly, and intelligently entered violates fundamental due process." *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). A defendant who can establish that their plea was not knowing, intelligent, or voluntary will therefore have established a "manifest injustice" entitling them to

plea withdrawal. *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. The Court does not have discretion to refuse the defendant's request; the defendant is entitled to withdrawal of their plea as a matter of right in such a circumstance. *Van Camp*, 213 Wis. 2d at 139.

Circuit courts are instructed to use a plea colloquy meant to ensure a constitutionally sound plea. *State v. Bangert,* 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). However, the mere existence of a thorough plea colloquy does not preclude a challenge to the validity of the plea. Instead, a defendant may still challenge the plea by asserting that some "extrinsic" factor invalidates the knowing, intelligent, and voluntary nature of the plea. *State v. Howell*, 2007 WI 75, ¶¶ 75-76, 301 Wis. 2d 350, 734 N.W.2d 48.

As set forth above, a defendant seeking to obtain a hearing on his postconviction must plead facts which, if true, would entitle him to relief. *Allen*, 2004 WI 106, ¶ 9. Whether Mr. Davis' motion satisfied that requirement is a question of law reviewed *de novo*. *Id*.

B. Mr. Davis' motion sufficiently established that he only pleaded guilty in 20CF774 due to the invalid conviction in 19CF4828.

In his motion, Mr. Davis averred that he "would testify at a postconviction motion hearing that the conviction after jury trial in 19CF4828 directly impacted his decision to plead guilty in 20CF774." (R1 29:7; R2 42:7). He further averred that he knew, as a result of the verdict in 19CF4828, he was facing

significant prison time and therefore would testify that he made a deliberate choice, following the guilty verdict, to resolve the other pending felony case with a plea. (R1 29:7; R2 42:7).

Mr. Davis further averred that by taking the plea, he hoped to minimize the risk of additional prison time and, by accepting responsibility at the joint hearing held shortly after the jury trial loss, curry favor with the court and thereby hopefully obtain a more lenient sentence. (R1 29:7; R2 42:7).

Most significantly, Mr. Davis explicitly asserted he would testify that, but-for the verdict in 19CF4828, he would have taken 20CF774 to trial. (R1 29:7; R2 42:7). He offered to testify "that it was his desire to take the case to trial because he did not believe the alleged victim to be credible, was skeptical of her willingness to actually come to court and is factually innocent of those charges." (R1 29:7; R2 42:7). Finally, he averred that he was "completely unaware" that 19CF4828 had originally been dismissed; if that dismissal had not been improperly ignored, he would have continued to push for a prompt trial on 20CF774 and would not have entered a plea.

Here, the record is clear that the Court improperly conducted a legally null jury trial and entered a non-legally binding judgment of conviction, having lost jurisdiction after dismissing 19CF4828. Accordingly, because that unlawful action directly influenced Mr. Davis' ability to fully assess the State's offer to resolve 20CF774 and caused him to waive

constitutional rights that he would not have waived but-for the error in 19CF4828, the record is clear that the plea cannot be considered intelligent or voluntary.

Accordingly, Mr. Davis is entitled to a hearing on his postconviction motion and, if the court on remand finds his testimony credible, an order granting plea withdrawal in 20CF774. This Court should therefore reverse and remand for an evidentiary hearing on Mr. Davis' plea withdrawal motion.

IV. The evidence was insufficient to convict Mr. Davis of robbery in 19CF4828, as the State did not prove he intended to "permanently deprive" ARW of her phone.

A. Legal principles.

The Due Process Clause of the United States Constitution guarantees that a person accused of a crime is presumed innocent and that the burden of proof is upon the State to establish guilt of every essential fact beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970).

A challenge to the sufficiency of the evidence is evaluated via the "reasonable doubt standard of review." *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). This Court must evaluate the available evidence in the light most favorable to the finding of guilt and ask whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *Id*. (citing

Johnson v. State, 55 Wis. 2d 144, 148, 197 N.W.2d 760 (1972)).

B. The State did not prove that Mr. Davis intended to permanently deprive ARW of her phone.

In this case, the State charged Mr. Davis with robbery with use of force for taking ARW's iPhone. (R2 2:1). This required proof beyond a reasonable doubt that Mr. Davis "took the property with the intent to steal." Wis. JI-Criminal 1479. "This requires that the defendant had the mental purpose to take and carry away property of another without consent and that the defendant intended to deprive [ARW] permanently of possession of the property." *Id.*

Here, the evidence is clear that Mr. Davis and ARW were in a romantic relationship and during an argument, he forcibly took her phone from her person. However, his actions after taking the phone do not establish that he intended to permanently deprive ARW of the phone. For example, Mr. Davis, rather than fleeing from MATC with the phone, allowed ARW to catch up with him outside of the building, at which time he offered her collateral in exchange for his temporary possession of the phone. (R1 23:66-67; R2 31:66-67). ARW testified that she understood him to be offering her his personal effects in order to "insure" that she would get her phone back. (R1 23:67; R2 31:67). Mr. Davis then arranged to meet up with ARW and to return her phone. (R1 23:67; R2 31:67). While he did not show up within a half-hour window (the

record is not clear when ARW anticipated that the exchange would occur), the record is nonetheless clear that Mr. Davis eventually met up with ARW and returned her phone without further incident. (R1 23:72; R2 31:72).

Accordingly, the evidence does not demonstrate that Mr. Davis had an intent to permanently deprive ARW of her phone. Instead, the evidence shows Mr. Davis offering collateral in exchange for his temporary usage of the phone, arranging for the return of the phone, and then ultimately returning the phone to ARW. These acts are flatly contradictory to a finding of the requisite intent.

Accordingly, this Court must vacate the robbery conviction.

CONCLUSION

For all the reasons set forth herein, Mr. Davis asks this Court to vacate the judgment of conviction in 19CF4828, to remand for an evidentiary hearing, and to vacate the robbery conviction in 19CF4828.

Dated this 8th day of November, 2021.

Respectfully submitted,

Electronically signed by
Christopher P. August

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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 5,201 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief 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 8th day of November, 2021.

Signed:
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