STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2022AP001695-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MATTHEW ROBERT MAYOTTE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT OF TAYLOR COUNTY THE HONORABLE ANTHONY J. STELLA JR. PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE COURT SHOULD NOT BYPASS THE GUILTY PLEA WAIVER RULE BECAUSE IT DOES NOT REMEDY THE FACT THAT MAYOTTE'S PLEA AS ACCEPTED IS NOT FREELY, VOULNTARILY AND INTELLIGENTLY ENTERED WHERE HE WAS MISINFORMED AS TO HIS POSTCONVICTION RIGHTS.

The State is correct that this Court has the power to decline application of the guilty plea waiver rule, when appropriate. State v. Tarrant, 2009 WI App 121, ¶6, 321 Wis.2d 69, 772 N.W.2d 750. The court should not bypass the waiver rule because, here, not apply the waiver rule does not remedy the fact that his plea was involuntary as it was not entered knowingly, intelligently or freely.

Here, Mayotte seeks plea withdrawal on the grounds that his plea was involuntary where his plea was entered with the understanding that he could pursue the denial of his motion to dismiss on appeal and where trial counsel was ineffective where he informed Mayotte that an Alford plea would result in the waiver of his ability to challenge the filed motion to dismiss on appeal.

A plea will be considered manifestly unjust if it was not entered knowingly voluntarily, and intelligently. State v. Giebel, 198 Wis.2d 07, 541 N.W.2d 825 (Ct. App. 1995).

The state argues that Mayotte's reliance on Riekkoff, is misplaced. In Riekkoff, the defendant expressly conditioned

a plea upon the preservation of his right to appeal a pretrial evidentiary ruling. Riekkoff, 112 Wis.2d 119, 121-22, 332 N.W.2d 744, 745-746 (1983) The supreme court held that "any condition which a defendant seeks to place upon the plea is a nullity." Riekkoff, 112 Wis.2d at 128, 332 N.W.2d at 749.

The state argues that Riekkoff is distinguishable from this case because: (1) the guilty plea waiver rule is a collateral consequence of a plea; and (2) the state alleges that trial counsel did not misinform Mayotte of the right to appeal the motion to dismiss following entry of his plea.

The direct consequences of a plea about which a defendant must be informed "are those that have a definite, immediate, and largely automatic effect on the range of a defendant's punishment." State v. LeMere, 2016 WI 41, ¶31, 368 Wis. 2d 624, 879 N.W.2d 580 (citation omitted). In contrast, collateral consequences are indirect and, rather than flowing from the conviction, "'may be contingent on a future proceeding in which a defendant's subsequent behavior affects the determination' or may 'rest[] not with the sentencing court, but instead with a different tribunal or government agency.'" Id. (citation omitted).

Riekkoff does not explicitly state whether the court there treated the guilty plea waiver rule as a direct or

collateral consequence. The defendant agrees with the state that there appear to be no published opinions in Wisconsin that address this issue. However, even if this Court determines that the guilty plea waiver rule is a collateral consequence, as in Riekkoff, if counsel misinformed Mayotte as to the consequences of his plea he must be allowed to withdraw the same.

The State argues that Mayotte's attorney did not directly misinform Mayotte regarding his appellate rights. However, the State ignores that Mayotte testified that he believed based upon communications with his trial counsel he would be able to challenge the same despite entering his plea. (R126:14-15,17)(A:49-50,52) Mayotte's statements at the motion hearing constituted evidence. His statements are believable where trial counsel testified that he knew the motion was important to Mayotte. (R128:26)(A:88)It was trial counsel who could not specifically remember the conversations he had with Mayotte regarding whether there could be a postconviction challenge to the motion to dismiss following a guilty plea. (R128:26)(A:88) Therefore, the only testimony regarding conversations on the issue of whether Mayotte could appeal the motion to dismiss was from Mayotte. Trial counsel testified he had conversations with Mayotte regarding appeal

close to trial. (R128:26)(A:88) Additionally, trial counsel made efforts to preserve the issue for appeal.

There is direct testimony from Mayotte that his counsel told him that the motion to dismiss could be challenged after entry of his plea. Counsel admitted that Mayotte may not have understood his explanation of his postconviction rights following his plea. (R128:21-22)(A:83-84)

The record supports a conclusion that Mayotte entered his plea with the belief that he could appeal the motion to dismiss post-judgment. This is incorrect and as a result his pleas are neither knowing or voluntary. Because Mayotte's plea was not entered knowingly, voluntary, and intelligently he should be allowed to withdraw his plea as a matter of right. See State v. Dillard, 2014 WI 123, ¶74, 859 N.W.2d 44.

II. THE TRIAL COURT ERRED IN DENYING MAYOTTE'S MOTION TO DISMISS UNDER YOUNGBLOOD.

The Court should not address the Youngblood issues because Mayotte has demonstrated that he is entitled to withdraw his plea by right. Regardless, Mayotte will address the Youngblood issue in response to the state's brief.

When the State fails to preserve evidence, that failure violates a defendant's due process rights when the State either: "(1) fails to preserve evidence that is apparently

exculpatory or (2) acts in bad faith by failing to preserve evidence that is potentially exculpatory." State v. Luedtke, 2015 WI 42, ¶ 53, 362 Wis. 2d 1, 863 N.W.2d 592; see also Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988). If either of those prongs are satisfied, the trial court has discretion to sanction the State for its violation, including dismissal of the case when appropriate. See, e.g., State v. Huggett, 2010 WI App 69, ¶¶ 27–28, 324 Wis. 2d 786, 783 N.W.2d 675. Whether the trial court properly applied the constitutional standard to the facts when it denied Mayotte's motion is a question of constitutional fact this Court reviews de novo. State v. Greenwold, 189 Wis. 2d 59, 66, 525 N.W.2d 294 (Ct. App. 1994)

The state is correct that Mayotte relied on the first prong, that the video evidence was apparently exculpatory. The matter was litigated in the trial court and a transcript of the proceedings exist. When the police have in its possession a piece of evidence that "might be expected to play a significant role in the suspect's defense" it is exculpatory and the state has a constitutional duty to preserve that evidence. Trombetta, 467 U.S. at 488. There can be no doubt that the video would be expected to play a significant role in any suspect's defense. Detective Balsis

confirms this by testifying that his review of the video made it impossible to identify Mayotte as the likely suspect. (R47:8-11, R82:9) However, Mayotte's defense was that his brother, Jeremy, was the individual who committed the crime. (R62:1-6) The video itself was more than "potentially useful" to Mayotte, and based on the Detective Balsis' testimony was "apparently exculpatory."

CONCLUSION

For the aforestated reasons, Mayotte respectfully request that the court grant his request to withdraw his plea in this matter.

Dated this 24th day of May, 2023.

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 6 pages.

Dated this 24th day of May, 2023.

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CERTIFICATION OF COMPLIANCE WITH RULE 801.18(6)

I hereby certify that in compliance with Section 801.18(6), Stats., I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users. The undersigned has also served by mail a copy of said brief to the defendant-appeallant.

Dated this 9th day of January, 2023

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