STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP000283 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRON ANTHONY CLAYBORN,

Defendant-Appellant.

On Notice of Appeal From The Judgment of Conviction and the Decision Denying Post-Conviction Relief Entered In The Circuit Court For Milwaukee County, The Honorable Glenn H. Yamahiro, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Should Terron Clayborn's guilty plea be withdrawn because factors extrinsic to the colloquy, i.e. the inducements of his attorney, render his plea involuntary?

The circuit court found that although inducements were made to Clayborn by his attorney that those inducements did not create a manifest injustice. Thus, the circuit court denied the motion to withdraw the plea.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by the facts of this case should be sufficiently addressed in briefs. However, the court publication is appropriate in this case. The decision regarding the issues presented will clarify existing law. As such, the publication is appropriate under Wis. Stat. (Rule) 809.23(1)(a)1 and 2.

STATEMENT OF THE CASE

By criminal complaint filed on February 14, 2019, Terron Clayborn was charged with Hit and Run Resulting in Death in violation of Secs. 346.67(1), 346.74(5)(d), and 939.50(d), Wis. Stats. and Knowingly Operate Motor Vehicle While Suspended Causing Death in violation of Secs. 343.44(1)(a) and 939.50(3)(h), Wis. Stats. The complaint alleges that Mr. Clayborn, who was driving a vehicle while his operating privileges were suspended, struck and killed BR, who was working shoveling asphalt for the City of Milwaukee Public Works. The complaint further alleges that the Defendant fled the scene of the accident.
(2)

On May 1, 2019, Mr. Clayborn pleaded guilty to both the Hit and Run Resulting in Death count and

Knowingly Operate a Motor Vehicle While Suspended Resulting in Death count. (33:1-8)

On June 13, 2019, the court sentenced the Defendant to twenty-three years imprisonment comprised of twelve years initial confinement and eleven years extended supervision in regard to Count One and six years imprisonment comprised of three years initial confinement and three years extended supervision on Count Two to run concurrently to Count One. (30:31-41) On September 12, 2019, an Amended Judgment of Conviction was entered amending the term of extended supervision in regard to Count One to ten years because the original eleven-year sentence exceeded the statutory maximum extended supervision term. According to the Amended Judgment of Conviction, Mr. Clayborn is not eligible for either the Challenge Incarceration Program or the Substance Abuse Program. (25)

On April 28, 2020, Mr. Clayborn filed a Motion for Post-Conviction Relief which argued that his sentence should be vacated because the court did not exercise its discretion regarding whether the Defendant should be eligible for either the Substance Abuse Program (aka "The Earned Release Program or "ERP") or the Challenge Incarceration Program ("CIP"). (42) On May 1, 2020, the court issued its Decision and Order Denying Motion for Post-Conviction Relief. (43)

A No Merit Report was filed; however, upon further consideration, the Report was voluntarily dismissed and remanded to the trial court. (59)

A post-conviction motion was filed on April 21, 2022, which argued that the guilty plea should be vacated because Mr. Clayborn's attorney made representations to him regarding his personal relationship with the judge which improperly induced the guilty pleas. (61) On August 3, 2022, the State filed a response to the post-conviction motion. (78) On August 29, 2022, a reply was filed by the defense to the State's response. (82)

On November 17, 2022, a motion hearing was conducted. (91) On January 17. 2023, the court denied the post-conviction motion in an oral ruling (101) and

entered a written order denying the motion on February 1, 2023. (93)

A notice of appeal was filed on February 15. 2023. (94).

STATEMENT OF FACTS

The facts as they relate to the issue presented are taken from the testimony and exhibits admitted at the evidentiary hearing held on November 17, 2022 (Appendix 1), in regard to the motion to vacate the guilty pleas.

The Motion Hearing

Testimony of Attorney Jason Baltz

Attorney Jason Baltz was retained to represent Mr. Clayborn by Mr. Clayborn's girlfriend Santaira Robinson. During their conversations regarding whether to hire him, Attorney Baltz testified that he was aware that Judge Jeffery Wagner had been assigned to the case. Attorney Baltz stated that he clerked for Judge Wagner when he was in law school; that the judge had been helpful in his career; that he viewed him as a "mentor and a friend"; that he knows the judge's son and his whole family; that he knows him socially and that the judge had attended his wedding; and that the judge had written a letter of recommendation for his brother in medical school. (91:7-9)

Attorney Baltz was aware that Mr. Clayborn wanted to file a substitution on Judge Wagner but that he advised against proceeding with a substitution request. When he informed Mr. Clayborn that the State would recommend twelve years of initial confinement if he pleaded guilty, Mr. Clayborn was not "happy". Ultimately, he asked the court for a six-year initial confinement sentence which was rejected by the court in favor of the twelve years recommended by the State. (91:10-11)

After sentencing, Attorney Baltz met with Ms. Robinson in person. She asked him what happened to "the favor" that he said he was going to ask of Judge Wagner in order to get a lesser sentence. Attorney Baltz told Ms. Robinson he could not ask for a favor. He reiterated this close relationship with the court and that he had seen him socially very recently and that he "thought we were teed up" for sentencing. (91:12-15)

Testimony of Santaira Robinson

Santaira Robinson testified that she has been Mr. Clayborn's companion for fifteen years and that he is the father of her children. She was tasked with hiring an attorney for Mr. Clayborn who was in custody. During her second meeting with Attorney Baltz, he described his "great" relationship with Judge Wagner and stated that he had clerked for him in the past, that they were friends, that the Judge had attended his wedding, and that he had written a letter of recommendation. Attorney Baltz further told her his relationship with the court would be beneficial and that he would be able to ask the court for a "favor" on Mr. Clayborn's behalf as part of the sentencing process. (91:24-27)

Ms. Robinson further testified that prior to the preliminary hearing, she told Attorney Baltz that Mr. Clayborn wanted to file a substitution on Judge Wagner. Attorney Baltz told her that if they substituted and were assigned a new judge, he would not be able to ask the court for a favor. (91:28-29) Later, upon learning that the State was going to recommend twelve years in prison if Mr. Clayborn pleaded guilty, she expressed her displeasure and the displeasure of Mr. Clayborn to Attorney Baltz who again spoke of his relationship with the court and his ability to ask for a favor. (91:28-30)

When she met with Attorney Baltz after sentencing, she asked him what happened to the favor he was going to ask the court for because Mr. Clayborn was sentenced to twelve years of initial confinement. For the first time, Attorney Baltz said he could not ask for a

favor but expressed surprise at the sentence because he thought that they were "teed up" and that the Judge always does him right. (91:31)

On cross-examination, Ms. Robinson stated that Attorney Baltz's relationship with Judge Wagner was a major factor in the decision to retain him. (91:42) The favor in terms of the length of the prison sentence that Attorney Baltz told her he was going to ask for was six to eight years imprisonment (as initial confinement). (91:34-36)

Testimony of Terron Clayborn

Mr. Clayborn testified that at their first meeting prior to the preliminary hearing, he asked Attorney Baltz to file a substitution of judge because of Judge Wagner's reputation as a tough sentencer. Attorney Baltz told him that Judge Wagner was his friend and that their families socialized together. Because of their friendship, Attorney Baltz advised not to substitute because he would be able to ask the court "for a favor." (91:50-52)

Eventually, Attorney Baltz informed Mr. Clayborn that the State would recommend twelve years of initial confinement if he entered into a plea agreement. Mr. Clayborn told Attorney Baltz that was too much time and that he wanted to proceed to trial. Attorney Baltz reiterated that he would ask his friend for a favor and that he could guarantee "six to seven, no more than 8 years" in prison, which is why Mr. Clayborn decided to plead guilty. (91:53-54)

Mr. Clayborn signed the plea questionnaire which contained the statement that no other promises had been made other than those contained in the plea. He did not want to sign the questionnaire but did because of what he considered to be Attorney Baltz's guarantee in regard to the sentence. (91:54-55) Also, he recalled that during the plea colloquy, the judge asked him if there were any other promises made aside from the plea negotiation and Mr. Clayborn answered that there were not because Attorney Baltz told him to answer in that manner. (91:56)

Mr. Clayborn testified that he would not have pleaded guilty but for Attorney Baltz's statements regarding his relationship with Judge Wagner. (91:57)

The Trial Court's Decision

In its oral decision, the circuit court concluded that because Mr. Clayborn participated in a plan to get a deal through fraud (i.e., the reliance on his attorney to execute a favor with the court) that it would not reward him by allowing the withdrawal of the guilty pleas. Specifically relying on **Hutchings v. U.S.**, 618 F.3d 693, 699 (7th Cir. 2010), the court specified that the defendant should be bound by his statement during the plea colloquy that there were no promises other than those made in the plea agreement to induce him to plead guilty. Although the court believed that there was a "compelling explanation" for Mr. Clayborn's untruthfulness which was the result of Attorney Baltz's inappropriate conduct, it did not rise to the level of clear and convincing evidence of a manifest injustice. Thus, the motion to vacate the plea was denied. (93; 101:1-14 (App. 1)

On appeal, Mr. Clayborn challenges the circuit court's denial of his motion to vacate his plea.

ARGUMENT

1. The Guilty Pleas Should be Withdrawn Because Factors Extrinsic to the Colloquy, i.e. the Inducements and Promises Made by Terron Clayborn's Attorney, Render the Pleas Involuntary.

A. General legal principles and standard of review.

To satisfy due process rights, a guilty plea must be entered knowingly, voluntarily and intelligently. *See* **State v. Hampton**, 2004 WI 107, ¶ 22, 274 Wis. 2d 379, 683 NW2d 14. This means that the defendant has to be aware of the nature of the crime with which he is charged, the constitutional rights he is waiving by pleading guilty, and the direct consequences of the plea. **Id.**, ¶¶ 22-24. Sec. 971.08(1)(a), Wis. Stats. protects the defendant's due process rights by requiring that the trial court "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted."

A defendant must be permitted to withdraw his plea, even after sentencing, where it is necessary to correct a manifest injustice. **State v. Nawrocke**, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). A defendant seeking a post-sentence plea withdrawal must show the manifest injustice with clear and convincing evidence. **State v. Truman**, 187 Wis. 2d 622, 624, 523 N.W.2d 177 (Ct. App. 1994). However, when a defendant establishes the denial of a constitutional right, withdrawal of the plea is a matter of right. **State v. Bangert,** 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). The decision to plead guilty is a personal right of a defendant. See **Boykin v. Alabama**, 395 U.S. 238 (1969). A plea that is not knowingly, intelligently, and voluntarily entered violates fundamental due process. **Bangert,** 131 Wis. 2d at 257. A manifest injustice, therefore, occurs when a defendant does not knowingly and voluntarily enter his plea. **State v. Woods**, 173 Wis. 2d 129, 141–42, 496 N.W.2d 144 (Ct. App. 1992) (finding that a guilty plea that was neither knowing nor voluntary constitutes a manifest injustice).

Thus, factors extrinsic to the plea colloquy warrant plea withdrawal. Plea withdrawal motions based on extrinsic factors follow cases under **State v. Nelson**, 54 Wis. 2d 489 (1972) and **State v Bentley**, 201 Wis. 2d 303 (1996). The burden remains with the defendant to prove by clear and convincing evidence that his guilty

plea was not knowingly and voluntarily entered and that withdrawal is necessary to prevent manifest injustice. **State v Brown**, 293 Wis. 2d 594, ¶42,716 N.W.2d 906 (2006). The premise of a *Nelson/Bentley* plea withdrawal motion is that something not apparent from the plea colloquy may have rendered a guilty or no-contest plea infirm. *See* **Brown**, 716 N.W.2d 906, ¶ 64; **State v. Howell**, 2006 WI App 182, 722 N.W.2d 567, ¶ 16.

On appeal, to determine whether the trial court abused its discretion in denying a defendant's motion to withdraw his guilty plea after sentencing we must consider whether withdrawal was necessary to correct a "manifest injustice." Further, to decide that, the court must determine "whether the plea of guilty was voluntarily, advisedly, intentionally and understandingly entered or whether it was, at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake." **State v. Booth**, 142 Wis.2d 232, 238, 418 N.W.2d 20, 22 (Ct.App. 1987); *see also* **State v. Reppin**, 35 Wis.2d 377, 384, 151 N.W.2d 9, 13 (1967).

B. The Guilty Pleas Should Be Withdrawn Because Attorney Baltz's Representations Regarding his Personal Relationship with the Court Rendered Terron Clayborn's Plea Involuntary.

As the court found in its Decision, Attorney Baltz played a constant refrain to Mr. Clayborn and Ms. Robinson of how his personal relationship with Judge Wagner would lead to a good result if he pleaded guilty, waived his preliminary hearing, and did not file a judicial substitution. In making it clear that the court believed that Attorney Baltz "overpromised", it stated:

> "He had no business saying that this will be six or seven years, no more than eight…that there is no way that you are going to get 12 years in this case. You know, it started almost from day one…At least on that date, if not earlier, with the

> constant drumbeat of how I am Judge Wagner's friend and he is going to come through for us as long as I am on the case. **I can't emphasize more how improper that was**…**He repeatedly led the defendant and Ms. Robinson to believe that if they only got him on the case, because of his relationship with Judge Wagner, that he was going to obtain a better sentence than he otherwise perhaps should expect.** (emphasis added) (101:10-11)(App. 1)

The court also concluded that Ms. Robinson was a more credible witness than Attorney Baltz. (101:2) (App.1) To summarize, Ms. Robinson, who was often the conduit of information between Mr. Clayborn who was in custody, and Attorney Baltz, testified that Attorney Baltz repeatedly drew attention to his personal relationship with Judge Wagner as a means of getting a better deal than the State was offering at sentencing. These statements took the form of guarantees in the minds of Mr. Clayborn and Ms. Robinson as Attorney Baltz unequivocally stated that he would get significantly less time than the twelve years to be proposed by the State if Mr. Clayborn pleaded guilty.

Attorney Baltz' improper conduct induced Mr. Clayborn to plead guilty. Mr. Clayborn testified that he did not want to accept the State's plea negotiation and wanted to proceed to trial. He changed his mind only because Attorney Baltz guaranteed that he would get "six to seven, no more than eight years" because of his relationship with the court. His ability to ask for a favor would only be in effect if he pleaded guilty. (91:54) Also, this is consistent with Mr. Baltz's advice regarding the waiver of the preliminary hearing and the decision not to substitute on Judge Wagner because those matters would affect his ability to ask the court for a favor. Attorney Baltz testified that in a post-sentencing meeting with Ms. Robinson that he reiterated his close relationship with the court and that he had seen Judge Wagner socially the Friday before sentencing. He said

that he believed they were all "teed up" for sentencing. (91:14-15)

The manifest injustice is evident because Mr. Clayborn pleaded guilty based on the sustained representations by his attorney regarding his personal relationship with the judge. But for Attorney Baltz's representations, Mr. Clayborn would not have pleaded guilty. Attorney Baltz's statements were inducements of a type to render the Defendant's guilty plea to be involuntary. "A plea agreement that leads a defendant to believe that a material advantage or right has been preserved when, in fact, it cannot be legally obtained, produces a plea that is 'as a matter of law…neither knowing nor voluntary." **State v. Riekkoff**, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983).

In denying the motion, the court relied on **Hutchings v. U.S.**, 618 F. 3d 693 (7th Cir. 2010). In **Hutchings**, the 7th Circuit considered a claim that trial counsel promised a sentence reduction to the defendant. The appellate court found that the defendant's claim of a promise was directly contradicted by his statement to the trial court that no promises had been made (other than a plea agreement) to induce his guilty plea It specified that "Justice would be ill-served and the utility of the plea colloquy would be undermined, by allowing the defendant to renege on his representation under oath to the Court that there were no promises made to him to induce his guilty plea." at 699.

The appellate court noted, however, that while a defendant is "normally bound by the representations he makes to a court during the colloquy", the defendant is not bound by those representations if his attorney told him to lie as part of the plan to gain a back-channel inducement. "**Absent a showing that his attorney personally directed him to hide the truth from the judge**, we simply cannot accept the defendant's explanation for lying to the court. (emphasis added) **Id.**

Herein, it is uncontroverted that Mr. Clayborn signed a plea questionnaire in which he affirmed that there were no other promises made to him other than

those in the plea agreement. Also, the record reflects that he answered "No." to the question by the court of other promises during the plea colloquy. (91:54-56) Although it is clear that Mr. Clayborn was not truthful with the court, it is equally as clear that he did not tell the court about his understanding of the back door deal his attorney guaranteed because his attorney told him not to disclose it on both the plea form and during the colloquy. (91:54-56;68-70) Mr. Clayborn admitted that he did lie to the court but he did so based on his attorney's advice and representations. (91:68-70)

In regard to Mr. Clayborn's misrepresentations, the trial court stated that "I think it is clear that the defendant had the understanding that that was the answers he was to provide to Judge Wagner" but nonetheless found that the "inappropriate actions of Attorney Baltz" did not rise to clear and convincing evidence of a manifest injustice. (101:12) (App. 1)

The trial court decision, while acknowledging **Hutchings**, ignores the appellate court's holding that if a defendant can show that his attorney personally directed him to lie to the judge about a promise outside of the plea agreement then the plea should be vacated. The trial court obviously found Mr. Clayborn to be credible on this point. (101:12) (App. 1) Attorney Baltz's direction to Mr. Clayborn only makes sense. The only way the promise would work is by having Mr. Clayborn inform the court that no other promises other than those contained in the plea agreement had been made. The favorable arrangement which Attorney Baltz presented to Mr. Clayborn based on his personal relationship with the judge would have been able to be effectuated if not kept secret.

Thus, Mr. Clayborn was in a box but he was put there by his attorney. Either lie to the court and get the deal that was promised to him or not lie and ruin the deal. The trial court abused its discretion in denying the post-conviction motion. The only fair result and the one consistent with **Hutchings** is to vacate the pleas.

CONCLUSION

There is clear and convincing evidence that Terron Clayborn's guilty pleas were the result of inducements by his lawyer which render his pleas involuntary. Terron Clayborn's plea should be withdrawn to correct the manifest injustice.

Dated this 26th day of April 2023.

Respectfully submitted,

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CERTIFICATION AS TO LENGTH AND E-FILING

I certify that this brief conforms to the rules contained in Wis. Stat. s. 809.19(8)(b)(bm) & (c) for a brief. The length of the brief is 3,819 words.

Dated this 26th day of April, 2023.

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