STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2023AP0283-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRON ANTHONY CLAYBORN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER AND THE HONORABLE GLENN H. YAMAHIRO, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## INTRODUCTION

Terron Anthony Clayborn crashed his car into a Department of Public Works (DPW) truck, killing a DPW worker. Clayborn and his passenger fled on foot. When police found Clayborn 13 days later, the State charged him with hit-and-run resulting in death and operating a motor vehicle while his operating privilege was suspended resulting in death. Clayborn pled guilty to both charges as part of a plea agreement in which the State agreed to recommend 12 years of initial confinement. The trial court imposed a sentence of 23 years, including 12 years of initial confinement.

The issue on appeal is whether Clayborn is entitled to withdraw his pleas. He sought plea withdrawal after sentencing, asserting that his pleas were involuntary because his trial counsel told him that due to counsel's relationship with the trial judge, if Clayborn pled guilty, he would receive a sentence of no more than eight years of initial confinement. The circuit court found that Clayborn's trial counsel inappropriately led Clayborn to believe that he would receive a shorter sentence if he pled guilty. But it also found that Clayborn lied on the plea questionnaire and during the plea colloquy when he affirmed that no one had promised him anything in exchange for his pleas. The court rejected Clayborn's claim that he only lied because his counsel told him to do so. The court therefore concluded that Clayborn failed to prove that not allowing him to withdraw his pleas would be manifestly unjust, so it denied his motion for plea withdrawal. This Court should affirm.

## ISSUE PRESENTED

Is Clayborn entitled to withdraw his guilty pleas based on the ground that his trial counsel told him that if pled guilty, he would receive a shorter sentence than the prosecutor was recommending due to counsel's relationship with the trial judge?

The circuit court answered "no." After an evidentiary hearing, it found that even though counsel led Clayborn to believe that if he pled guilty he would receive a shorter sentence due to counsel's relationship with the judge, Clayborn lied to the court when he said he had not been promised anything to induce him to plead guilty, and he was attempting to perpetrate a fraud on the court. The court therefore concluded that Clayborn failed to show a manifest injustice entitling him to withdraw his pleas.

This Court should affirm.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

## STATEMENT OF THE CASE

Clayborn crashed his car into a DPW truck, and a man working on the road was pinned between the DPW truck and Clayborn's car. (R. 1:2–3.) The DPW worker was taken to the hospital, where he died from blunt force trauma to his leg. (R. 1:2.) Clayborn and his passenger, Santaira Robinson, fled on foot. (R. 1:2.) At the time the crash, Clayborn had 14 convictions for operating a motor vehicle with a suspended operating privilege. (R. 1:3–4.) He had never been issued a driver's license. (R. 1:3–4.)

The State charged Clayborn with hit-and-run resulting in death and operating a motor vehicle with a suspended operating privilege (OAS) resulting in death. (R. 1; 8.) The hit-and-run charge carried a maximum penalty of 25 years of imprisonment, including 15 years of initial confinement and 10 years of extended supervision. (R. 1:1.) The OAS charge carried a maximum penalty of six years of imprisonment, including three years of initial confinement and three years of extended supervision. (R. 1:1–2.)

Before Clayborn was located and taken into custody Robinson looked for attorneys for Clayborn and spoke to Attorney Jason Baltz. (R. 91:6–7; 25–6.) After Clayborn was apprehended, he retained Attorney Baltz. (R. 91:9–10, 51.) The State and Clayborn reached a plea agreement under which the State agreed to recommend sentences with a total of 12 years of initial confinement, and the defense would be free to argue for shorter sentences. (R. 33:2–3; 10:7.)

Clayborn completed a plea questionnaire on which he indicated that no promises had been made to him to induce him to plead guilty, and that he understood the court could impose up to the maximum sentences. (R. 10:1–3.) The circuit court, the Honorable Jeffrey A. Wagner, presiding, accepted Clayborn's guilty pleas. (R. 33.) During the plea colloquy, Clayborn told the court that no promises had been made to him to induce him to plead guilty. (R. 33:5.) The circuit court sentenced Clayborn to a total sentence of 23 years, including 12 years of initial confinement and 11 years of extended supervision on the hit-and-run resulting in death charge. (R. 30:41.) It imposed a concurrent six-year sentence on the OAS resulting in death charge. (R. 30:41.)

Clayborn moved for postconviction relief, seeking to withdraw his pleas. (R. 61.) He asserted that his trial counsel had induced him to plead guilty by telling him that he had a personal relationship with Judge Wagner and promising him that he would get a sentence of five to six years, or at most eight years, if he pled guilty. (R. 61.) The circuit court, the Honorable Glenn H. Yamahiro, presiding, held an evidentiary hearing on Clayborn's motion at which Clayborn, Robinson, and Attorney Baltz all testified. (R. 91.)

Robinson testified about Attorney Baltz's representation of Clayborn. (R. 91:24–45.) She testified that during their second conversation, Attorney Baltz said he had a friend who was a judge and if the case were assigned to that judge, he could promise or guarantee that Clayborn would get

six or seven years, no more than eight. (R. 91:26–27, 38.) Attorney Baltz told her that he had a "great relationship" with Judge Wagner, that he had clerked for him, they were friends, and the judge had attended his wedding. (R. 91:26.) Attorney Baltz told her that he would use his relationship with Judge Wagner to Clayborn's advantage and would ask the judge for a favor. (R. 91:27.) The favor Attorney Baltz had talked about was "six to seven years, no more than eight years, no media coverage, and the victim's family wouldn't be present in the courtroom." (R. 91:34.) Attorney Baltz made that promise before the preliminary hearing, before the police took Clayborn into custody, and before he had even seen the criminal complaint. (R. 91:36–37.) Robinson thought Attorney Baltz could get Clayborn a deal that other defendants would be unable to get. (R. 91:43.) Robinson testified that Clayborn decided to retain Attorney Baltz because he wanted to plead guilty and wanted a sentence with no more than eight years of initial confinement. (R. 91:38.) Clayborn wanted to substitute Judge Wagner, but Attorney Baltz said he should not do so because he would not be able to ask a different judge for a favor. (R. 91:28.) After the prosecutor extended a plea offer in which he would recommend 12 years in prison, Attorney Baltz said that Clayborn should take the offer because then he could argue for a shorter sentence and ask the judge for a favor. (R. 91:29–30.) After sentencing, Attorney Baltz told her he could not ask the judge for a favor. (R. 91:32–33.)

Clayborn testified that on the day of his initial appearance he told Attorney Baltz that Judge Wagner was assigned to the case, and he wanted to substitute, but Attorney Baltz said it wouldn't be a good idea because Judge Wagner was a friend, and he could get Clayborn a better deal from Judge Wagner. (R. 91:52.) Clayborn wanted a preliminary hearing, but Attorney Baltz told him to waive it because it would look better to Judge Wagner. (R. 91:53.)

When Attorney Baltz later told him that the prosecutor was offering to recommend 12 years if he pled guilty, Clayborn "would rather go to trial for 12 years and prove the case was an accident," but Attorney Baltz said that was a bad idea. (R. 91:53.) He said he could ask the judge for a favor and Clayborn would get six to seven years, no more than eight. (R. 91:53–54.) Clayborn testified that he signed a plea questionnaire affirming that no one had made any promises to him after Attorney Baltz told him to sign it and guaranteed that he would get six to seven years, no more than eight. (R. 91:55.) Attorney Baltz also told him that when Judge Wagner asked him if anyone had promised him anything, he should say "no." (R. 91:56.) Attorney Baltz told him he was in good hands and would get "nowhere near 12 years." (R. 91:56.) Clayborn knew that he was lying to the court when he said no one had promised him anything. (R. 91:69.) Clayborn pled guilty because Attorney Baltz told him he could get a benefit because of his relationship with Judge Wagner. (R. 91:57.)

Attorney Baltz testified that he told Robinson about his relationship with Judge Wagner. (R. 91:7.) When Clayborn said he wanted to substitute Judge Wagner, Attorney Baltz told Clayborn that Judge Wagner was his "preferred judge." (R. 91:10.) And when the prosecutor offered the plea deal, Robinson texted him to say that Clayborn would accept it so long as they could argue for less than 12 years. (R. 91:11.) They wanted something like five to eight years in prison. (R. 91:11.) Attorney Baltz testified that he never promised or guaranteed Robinson or Clayborn that he could get Clayborn a sentence of eight years or less and never told them he would ask Judge Wagner for a favor. (R. 91:15–16.) He went over the plea questionnaire with Clayborn, including the provisions that no promises were made to him and that the court could impose any sentence up to the maximum (R. 91:16–19), and he never told Clayborn to lie to the court during the plea colloquy, (R. 91:22–23). After sentencing, when Robinson was

disappointed about Clayborn's sentence, Attorney Baltz again told Robinson about his relationship with Judge Wagner but said he could not ask the judge for a favor. (R. 91:13.)

After the hearing, the circuit court denied Clayborn's motion for postconviction relief in an oral ruling (R. 101), and a written order (R. 93). The court found that Robinson was the most credible witness at the evidentiary hearing. (R. 101:2.) It found that Attorney Baltz acted inappropriately by telling Clayborn and Robinson about his relationship with Judge Wagner and by leading them to believe that he could get Clayborn a shorter sentence than another lawyer could because of that relationship. (R. 101:6–7.) But the court found "a certain irony in this entire proceeding that one is going to assert a manifest injustice based upon the fact that there are attempts to secure some kind of unethical and inappropriate bargain [that] did not come to fruition." (R. 101:8.) The court found that Clayborn was not credible when he said he only lied to the court because Attorney Baltz told him to do so. (R. 101:8.) The court found that Clayborn had a responsibility to tell the trial court the truth during the plea colloquy, and it said it would not reward Clayborn for "engag[ing] in a plan to basically perpetuate a fraud and get a deal that you are otherwise not entitled to." (R. 101:10.) The court concluded that Clayborn failed to show a manifest injustice, so it denied his motion for postconviction relief. (R. 101:13.)

Clayborn now appeals. (R. 94.)

## ARGUMENT

### The circuit court properly denied Clayborn's motion to withdraw his pleas after sentencing.

#### A. A defendant who seeks plea withdrawal after sentencing must prove that a refusal to allow withdrawal of the plea would result in a manifest injustice.

A defendant who seeks to withdraw a guilty or no contest plea after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906 (quoting *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836). A plea that is not entered knowingly, intelligently, and voluntarily constitutes a manifest injustice and may be withdrawn. *Id.* ¶¶ 18–19.

Whether a plea was made knowingly, intelligently, and voluntarily is a question of constitutional fact. *State v. Straszkowski,* 2008 WI 65, ¶ 29, 310 Wis. 2d 259, 750 N.W.2d 835. Upon review, an appellate court upholds the circuit court's findings of evidentiary or historical facts unless those findings are clearly erroneous. *Id.* This court determines the application of constitutional principles regarding a knowing, intelligent, and voluntary plea to those evidentiary facts independently of the circuit court but benefiting from that court's analysis. *Id.*

#### B. As the circuit court recognized, Clayborn has not shown a manifest injustice entitling him to plea withdrawal.

The circuit court denied Clayborn's motion for postconviction relief because it found that Clayborn lied to the trial court when he said that no one had promised him anything to induce him to plead guilty, and it concluded that

Clayborn should not be rewarded for his fraud on the court. (R. 101:8, 10, 13.) The circuit court noted that neither party had cited a Wisconsin case or other binding case governing the issue. (R. 101:8.) It therefore relied on a Seventh Circuit Court of Appeals case, *Hutchings v. United States*, 618 F.3d 693 (7th Cir. 2010). (R. 101:11–12.)

In *Hutchings*, a defendant was charged with conspiracy to distribute methamphetamine and cocaine, crimes which subjected him to a life sentence. *Hutchings*, 618 F.3d at 695. The defendant's attorney told him that if he pled guilty, he would be sentenced to life in prison. *Id.* The defendant later claimed that his attorney also told him that "if he pled guilty and cooperated with the government, one year later the government would move to reduce his sentence to twenty to twenty-five years." *Id.* At the plea hearing, the district court asked the defendant "if there had been 'any promises or assurances of any kind made to [him] in an effort to induce [him] to plead guilty?'" *Id.* The defendant answered, "No, sir." *Id.* The court accepted the plea and sentenced the defendant to life in prison. *Id.* at 696.

When the defendant's sentence ws not later reduced, he petitioned for a writ of habeas corpus, alleging that his counsel promised him a sentence reduction to induce him to plead guilty. *Id.* He said that had counsel not promised him sentence reduction, he would have gone to trial rather than pleading guilty. *Id.* The district court denied the claim, and the Seventh Circuit Court of Appeals affirmed, concluding that the defendant failed to show that he would not have pled guilty had his counsel told him that sentence reduction was not guaranteed, so he failed to prove prejudice. *Id.* at 697. The court noted that the defendant's claim that he would have gone to trial if not for his counsel's promise was contradicted by his telling the trial court during the plea colloquy that no promises had been made to induce him to plead guilty. *Id.* at 699. The court of appeals pointed out that the purpose of a

plea colloquy is "to expose coercion or mistake, and the district judge must be able to rely on the defendant's sworn testimony at that hearing." *Id.* (quoting *United States v. Loutos*, 383 F.3d 615, 619 (7th Cir. 2004)). The court of appeals noted that a court "takes a criminal defendant's rights at a change-of-plea hearing very seriously," so "a defendant is normally bound by the representations he makes to a court during the colloquy." *Id.* (citing *Loutos*, 383 F.3d at 619). The court concluded 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 district court that there were no promises made to him to induce his guilty plea." *Id.*

The circuit court in the present case noted that in *Hutchings*, there was no "showing that [the defendant's] attorney personally directed him to hide the truth" from the judge. (R. 101:12); *Hutchings*, 618 F.3d at 699. The court did not find that Attorney Baltz told Clayborn to lie to the court, but it concluded that Clayborn "had the understanding" that he should tell the trial court that no promises had been made to him. (R. 101:12.) However, the court found "a certain irony in this entire proceeding that one is going to assert a manifest injustice based upon the fact that there are attempts to secure some kind of unethical and inappropriate bargain did not come to fruition." (R. 101:8.) The court found that Clayborn's testimony that he only pled guilty because of what his attorney told him was not credible. (R. 101:8.) The court said, "The defendant is not a ten-year-old. He is a grown man. He is in front of a Court. He acknowledged that he lied to the Court throughout the plea colloquy." (R. 101:8–9.) The court concluded that although Clayborn attributed his lying "to guidance given to him and what he was told by Attorney Baltz," he still had a "responsibility to tell the truth." (R. 101:9.) The court concluded that Clayborn "engage[d] in a plan to basically perpetuate a fraud and get a deal that [he

was] otherwise not entitled to," and that "the Court is not going to reward that." (R. 101:10.) The court said that a person cannot come to the court "with dirty hands and request relief." (R. 101:10.) The court concluded that Clayborn failed to show a manifest injustice entitling him to withdraw his guilty pleas, so it denied his motion for postconviction relief. (R. 101:13.)

On appeal, Clayborn does not point to any case in any jurisdiction in which a court has held that a defendant was entitled to withdraw his plea because his counsel promised him something yet the defendant assured the court that no one had promised him anything to induce his plea. Clayborn relies on *Hutchings*, arguing that the circuit court misapplied that case by ignoring its 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." (Clayborn's Br. 15.) However, that was not the holding of *Hutchings*.[1] The court in *Hutchings* concluded that since the defendant in that case could not show that his attorney told him to lie to the court, his representation during the plea hearing that he was not promised anything for his plea should not be discarded. *Hutchings*, 618 F.3d at 699. And he could therefore not show that he would not have pled guilty absent his trial counsel's

[1] This passing suggestion in *Hutchings* has been rejected by the courts that have actually addressed it. *See, e.g.*, *Alfred v. State*, 71 So. 3d 138, 139 (Fla. 4th DCA 2011); *Commonwealth v. Rogers*, 335 Pa. Super. 130, 136, 483 A.2d 990 (1984). The Seventh Circuit would surely examine the issue with more care in a case where it mattered, because such a rule would permit a defendant to withdraw a plea precisely because he not only lied to the court but conspired with his attorney to do so. One cannot justifiably rely on an attorney's advice to perjure oneself, and a rule permitting it would condone perjury by defendants and subornation of perjury by defense attorneys. *See Iacono v. State*, 930 So. 2d 829, 830–31 (Fla. 4th DCA 2006).

deficient performance, so he could not prove ineffective assistance of counsel. *Id.* The court did not hold that had the defendant shown that his counsel had told him to lie, his lying to the court would be excused and this plea would be vacated. And even if the court had so held, Clayborn would not be entitled to relief because he did not show that Attorney Baltz told him to lie to the court, and therefore did not show that he would not have pled guilty absent his attorney telling him to lie to the court.

Clayborn argues that Attorney Baltz told him to lie to the court, and that "The trial court obviously found Mr. Clayborn to be credible on this point." (Clayborn's Br. 15.) But he ignores that the circuit court explicitly found that he was *not* credible about lying during the plea colloquy because his counsel told him to do so. The circuit court said, "I dispute, disagree, and did not find the defendant credible when he said I was only lying because my lawyer told me to do so." (R. 101:8.) Therefore, even if *Hutchings* were both authoritative and could be read as providing 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" (Clayborn's Br. 15), neither of which is the case, it would not help Clayborn because the circuit court explicitly rejected the notion that Clayborn lied to the court during the plea colloquy because his counsel told him to do so.

Clayborn argues that it would be manifestly unjust not to allow him to withdraw his pleas because the only way he could get the short sentence he claims his counsel told him he would get was "by having Mr. Clayborn inform the court that no other promises other than those contained in the plea agreement had been made." (Clayborn's Br. 15.) He argues that he "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." (Clayborn's Br. 15.)

Clayborn was not "in a box." He did not have to lie to the court. If Clayborn believed that his counsel had promised that he would get a short sentence if he pled guilty, when the court asked him if he had been promised anything other than what was in the plea agreement, he was duty bound to say "yes" and explain what he believed. If that meant he would not get the deal he believed his counsel promised, he still would not have been "in a box," because he could simply have gone to trial like he now claims he wants to do. Clayborn's argument is not that his trial counsel was ineffective, that he did not want to plead guilty, that he was innocent, or even that he now believes he has a defense. It is that he perpetrated a fraud on the court but then did not get the benefit he thought he would get by doing so. Clayborn says he was induced to give up his right to a trial and to lie to the court. But as the circuit court stated, Clayborn "is not a ten-year-old. He is a grown man. He is in front of a Court. He acknowledged that he lied to the Court throughout the plea colloquy." (R. 101:8–9.) And even if he believed that he had to lie to get a deal that the State did not offer and that he knew the trial court did not have to accept, as the circuit court concluded, it was still his "responsibility to tell the truth." (R. 101:9.) Clayborn knew what he was doing when he pled guilty and when he told the court that no one had promised him anything to induce him to plead. His plea was knowing, intelligent, and voluntary, and he has not shown by clear and convincing evidence that it would be manifestly unjust not to allow him to withdraw it. The circuit court properly denied Clayborn's motion for postconviction relief, and this court should affirm.

## CONCLUSION

This Court should affirm the circuit court's order denying Clayborn's motion for postconviction relief.

Dated: July 19, 2023.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3826 words.

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of July 2023.

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