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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

REPLY BRIEF OF DEFENDANT-APPELLANT

Thomas J. Erickson
316 N. Milwaukee St., Suite 550
Milwaukee, WI 53202
(414) 271-0678
State Bar No. 01011245
E-mail: thomerick@aol.com

Attorney for Defendant-Appellant

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ARGUMENT

I. Terron Clayborn's Guilty Pleas Should Be Withdrawn Because The Misconduct of His Attorney Rendered His Plea Involuntary.

The State hews to the logic of the circuit court's decision in arguing that a manifest injustice has not been shown by Mr. Clayborn. Specifically, the State hangs its hat on the finding by the court that because Mr. Clayborn lied to the trial court when he said no one had promised him anything to induce him to plead guilty, he could not be rewarded for participating with his attorney in an attempt to perpetrate a fraud upon the court. (State's Brief, 10-11) Thus, despite the recognized connivance of his attorney and because of "his (Mr. Clayborn's) responsibility to tell the truth", the plea was knowing, intelligent, and voluntary. (State's Brief, 15)

Compelling reasons exist to allow his pleas. *Hutchings v. United States*, 618 F.3d 693 (7th Cir. 2010), which the trial court relied upon as its sole authority, opens the door for plea withdrawal. Hutchings was not allowed to withdraw his plea, because the court found that he must be bound by the representations he made during the plea colloquy that no promises had been made to him to induce his plea. *Id.* at 699. Hutchings, however, did not allege that his attorney "personally directed him to hide the truth" from the judge. *Id.* The court concludes that its decision could have been different had he made such an allegation: "Absent a showing that his attorney personally directed him to hide the truth from the judge, we simply cannot accept Hutching's explanation for lying to the court." *Id.*

In its Brief, the State embraces the trial court's conclusion that there was no "showing" that Attorney Baltz directed Mr. Clayborn "to hide the truth" which should lead to the denial of the motion to withdraw. (State's Br. 13) In fact, there was such a showing.

The trial court recognized that Mr. Clayborn's attorney had acted inappropriately in regard to how the guilty plea hearing was to proceed in regard to his misguided responses to the court regarding whether any promises were made to induce his pleas. "I think it is clear that the defendant had the understanding that that was the answers he was to provide to Judge Wagner..." (R101:12) Furthermore, the court determined that Mr. Clayborn "had the understanding" that he should tell the court that no promises had been made to him to induce him to plead guilty. (R101:12) The court, though, concluded that the "inappropriate actions of Attorney Baltz" did not equate clear and convincing evidence of a manifest injustice. (R101:12) In other words, the court, while not expressly stating that Mr. Clayborn's attorney told him "to lie", concluded that he, for all intents and purposes, did that very thing.

Plainly, the trial court recognized that Attorney Baltz did direct Mr. Clayborn to "hide the truth" from the judge as referenced in *Hutchings*. at 699. The trial court, however, found that Mr. Clayborn's "responsibility to tell the truth" trumped "the guidance given to him and what he was told by Attorney Baltz." (R. 101:9) However, the court's findings in regard to Attorney Baltz's actions are enough to withdraw the pleas regardless of Mr. Clayborn's misguided statements to the court. "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 or voluntary." *State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983). Mr. Clayborn was induced to plead guilty expressly because his attorney incontrovertibly informed him that his ability to ask for a favor, based on his personal relationship with the judge, would only remain in effect if he pleaded guilty. Consonant with *Riekkoff*, Mr. Clayborn believed that the material advantage of a sentence of no more than eight years had been preserved because of his attorney's direction to hide the truth. The

right to be sentenced to no more than eight years could not, of course, be guaranteed. Accordingly, the pleas are involuntary.

The State argues that there is no manifest injustice because Mr. Clayborn lied to the court and that he should not be rewarded for attempting to perpetrate a fraud upon the court. (State's Br. 14-15) Undoubtedly, there is an expectation that a court as well as a defendant must take the defendant's representations very seriously during a change-of-plea hearing. *United States v. Loutus*, 383 F.3d 615, 619 (7th Cir. 2004). What cannot be ignored though, is the effect of Mr. Clayborn's attorney on his decision to plead guilty. The trial court and the State put too much of the onus on Mr. Clayborn in this factually unique case.

First, the fraud was not perpetrated by Mr. Clayborn; it was created and fashioned by his attorney. While it is true that Mr. Clayborn did not "have to lie" to the court, as the State emphasizes (State's Br. 15), Mr. Clayborn was following the lead of his attorney. The trial court and the State fail to appreciate the conundrum presented to Mr. Clayborn in this unique case: Either lie to the court and get the deal his attorney promised him **because** of his close personal relationship with the court, or tell the truth and blow the deal. No defendant, under the circumstances of the drumbeat from his attorney and the "understanding" from his attorney of the answers he was to give (as the trial court recognized (R101:12)), would have said what the trial court and the State expects under the circumstances: "Yes, judge, my attorney has led me to believe I have a deal of no more than eight years if I plead guilty because you guys are friends. Oh yeah, it was my understanding from my attorney not to tell you about this." Such a predicament, entirely of his attorney's making, should render the plea involuntary.

Much has been made of Mr. Clayborn's statements to the court as well as his signed plea questionnaire which states that no promises have been made other than

those contained in the plea agreement. (R10:1-3) (State's Br. 6) Attorney Baltz signed the plea agreement, too, attesting that "The defendant is making his plea freely, voluntarily, and intelligently." (R10:3) By extension, Attorney Baltz also lied to the court. Such a scenario, in which an attorney creates a fraud and then foists it upon his client, cannot abide.

A manifest injustice occurs when a defendant does not knowingly and voluntarily enter his plea. *State v. Woods*, 173 Wis. 2d 129, 141-142, 496 N.W.2d 144 (Ct. App. 1992). 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." (emphasis added) *State v. Booth*, 142 Wis.2d 232, 238, 418 N.W.2d 20, 22 (Ct. App. 1987). Mr. Clayborn's pleas are attributable to fraud. Accordingly, he should be allowed to withdraw his guilty pleas.

CONCLUSION

For the reasons stated here and in his brief-in-chief, Terron Clayborn requests that this court reverse the trial court and order that the guilty be withdrawn.

Dated this 8th day of August, 2023.

Respectfully submitted,

Electronically signed by:
Thomas J. Erickson

Thomas J. Erickson
Attorney for Defendant-
Appellant
State Bar No. 01011245

Address and Phone:
316 N. Milwaukee St., Suite 550
Milwaukee, WI 53202
(414) 271-0678
Email: thomerick@aol.com

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. s. 809.19(8)(b)& (c) for a brief and appendix produced with a proportional font and contains 1,538 words.

Dated: August 8, 2023

Electronically signed by:
Thomas J. Erickson
Thomas J. Erickson

CERTIFICATE OF EFILE/SERVICE

I hereby certify that in compliance with Wis. Stat. sec. 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 8th day of August, 2023.

Electronically signed by:
Thomas J. Erickson

Thomas J. Erickson
Attorney for Defendant –
Appellant
State Bar No. 01011245

Address and Phone:
316 N. Milwaukee St., Ste. 550
Milwaukee, WI 53202
(414) 271-078
Email: thomerick@aol.com