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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP001424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES WILLIAMS,

Defendant-Appellant.

Appeal from Orders Denying Postconviction Relief
Entered in the Brown County Circuit Court, the Hon.
Donald R. Zuidmulder, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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STATUTE CITED

971.04 7

ARGUMENT¹

I. The record demonstrates Mr. Williams did not waive his right to personal appearance for the plea hearing.

In order to argue that Mr. Williams waived his right to personal appearance, the State decontextualizes what happened and shifts the court's responsibility to ensure a valid waiver onto Mr. Williams.

The State decontextualizes what happened in the case by removing all dates from its argument section. *See* Resp. Br. at 11-13. The plea hearing took place on October 13, 2022. (R.103:1; App. 13). The waiver form was signed by Mr. Williams almost exactly one-year prior. (R.51; App.24). The day Mr. Williams signed, October 22, 2021, was the last time counsel discussed it with him. (R.103:2; App.14). The last time the court mentioned the form or addressed Mr. Williams' right to appear in-person

¹ Mr. Williams notes that the State repeatedly suggests and outright accuses him of intentionally delaying proceedings. Resp. Br. at 12. However, the State never explains why the reasons for delay are relevant on appeal—other than to paint Mr. Williams as difficult. The State does not argue that Mr. Williams somehow forfeited his right to be in-person as a result, nor could it reasonably do so, as the two are not related and the right to be present cannot be forfeited. *State v. Soto*, 2012 WI 93, ¶44, 343 Wis. 2d 43, 817 N.W.2d 848. As such, Mr. Williams does not address the issue further.

with him was January 3, 2022. (R.133:4). The State ignoring the timing appears to be a tacit concession that the length of time that passed significantly diminished the utility of the form to establish a valid waiver. *See* App. Br. at 14-15 n.8.

Rather than addressing the lengthy delay and failure of the court to ascertain Mr. Williams knew he could appear in-person, the State shifts the court's responsibilities onto Mr. Williams. It does this by arguing “[Mr.] Williams never indicated that he wished to rescind that waiver in any way.” Resp. Br. at 14. However, it is the court's responsibility to ensure valid waiver, not the defendant's responsibility to demand an in-person appearance. *See Soto*, 343 Wis. 2d 42, ¶46.

The State also argues that “counsel's statements to the court often suggest that Williams did not want to come to court.” Resp. Br. at 14. The State provides a single citation for this proposition. When going to that citation, the parties are scheduling a status conference in November 2021 and counsel asks “I assume the status will be via Zoom, Judge?” (R.146:1, 4). It is unclear how this is a suggestion that Mr. Williams did not want to come to court as opposed to counsel's preference. Moreover, that counsel assumed a status conference—a hearing Mr. Williams does not have a right to appear in-person for—would be by Zoom has little value in determining whether Mr. Williams waived his right to personal appearance for a plea hearing eleven months later.

Additionally, despite Mr. Williams asserting that he would testify that trial counsel did not discuss his right to be present for the plea hearing, (R.154:14), where the State could have called trial counsel to testify, the circuit court denied Mr. Williams the opportunity for such a hearing. (R.173; App.3).²

Despite the State's decontextualized references to the record and attempt to shift the burden on ensuring a valid waiver onto him, Mr. Williams maintains that the record does not suggest Mr. Williams was aware of his right to appear in-person and affirmatively waived that right. *See* Resp. Br. at 16 n.3; App. Br. at 13.

II. There is nothing supporting that harmless error applies.

The State argues that the violation of Mr. Williams' right to be physically present is subject to harmless error analysis. Resp. Br. at 17. However, this was an issue that was explicitly not addressed in *Anderson. State v. Anderson*, 2017 WI App 17, ¶56, 374 Wis. 2d 372, 896 N.W.2d 364 (assumed without deciding that if the harmless error rule applied, the State did not meet its burden).

The case the State cites deals exclusively with a defendant's right to be present when a court interacts

² Sadly, Mr. Williams' trial counsel has since passed away, limiting the utility of remanding for an evidentiary hearing on the issue.

with a jury. In fact, *State v. Peterson*, 220 Wis. 2d 474, 488-89, 584 N.W.2d 144, 150 (Ct. App. 1998), explains only that *State v. Koopmans*, 210 Wis. 2d 670, 563 N.W.2d 528 (1997), did not *bar* the application of the harmless error test for *all* violations of Wis. Stat. § 971.04. The *Peterson* court went on to distinguish between the significance of the sentencing proceeding at issue in *Koopmans* from the specific jury interaction issue in *Peterson*.

There is no support for the claim that the harmless error rule applies to all violations of the defendant's right to be present or the violation of the specific right at issue in this case. *Koopmans* is an example of our Supreme Court not applying harmless error to a violation of a defendant's right to be present at sentencing under Wis. Stat. § 971.04. 210 Wis. 2d 670. As such, there is no law supporting the assertion that harmless error applies to the violation of a defendant's right to be in the same courtroom as the judge at his plea hearing.

While the *Soto* court distinguished *Koopmans* on the issue of whether the statutory right to be present under Wis. Stat. § 971.04 was subject to waiver, *Soto* also did not address the application of the harmless error rule to the violation of a defendant's right to be present at a plea hearing. 343 Wis. 2d 43, ¶¶41-44. Thus, the State assumes without explaining why, the harmless error rule applies.

III. The State misstates its burden and as a result, its harmless error analysis is flawed.

Even if the harmless error rule applies, the State has not met its burden. The State incorrectly states its burden as:

In order to establish that any error in conducting Williams's plea hearing while he was appearing by videoconference was harmless, the State must show that Williams's plea was knowing, intelligent, and voluntary consistent with the requirements of Wis. Stat. § 971.08. *Anderson*, 374 Wis. 2d 372, ¶¶ 53–55.

Resp. Br. at 17. The issue is not whether Mr. Williams' **plea** was knowing, intelligent, and voluntary. Once Williams establishes that the waiver was defective, "the burden [shifts] to the State to prove that [his] **waiver** was knowing, intelligent, and voluntary" *Anderson*, 374 Wis. 2d 372, ¶55 (emphasis added).

Having confused what it is required to show once a defendant establishes a deficient colloquy, the State then combines it with the harmless error standard and argues that any error is harmless because Mr. Williams' plea was knowingly, voluntarily, and intelligently made. Resp. Br. at 17-19. The question is not whether the plea was done properly, but whether he would have maintained his plea otherwise. *Anderson*, 374 Wis. 2d 372, ¶¶56-58.

The State argues that “no rational person would have risked an 80-year sentence at trial on these facts.” Resp. Br. at 19. However, its citation to *Padilla v. Kentucky* is misplaced. 559 U.S. 356 (2010); Resp. Br. at 19. Here, the Court is not faced with a defendant trying to withdraw a plea after receiving an unfavorable sentence. Mr. Williams tried to withdraw his plea before he was sentenced. (R.99). The standard cannot be that defendants must do the “rational” thing, as determined by the State’s one-sided view of the evidence for a case that never went to trial. Thus, there is no reason for Mr. Williams to show that his decision would have been “rational” at the time.³

³ Additionally, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the case cited by *Padilla* for the proposition that the decision to withdraw a plea must be “rational,” was actually concerned with appeals. In that case, the Supreme Court stated:

We instead hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Flores-Ortega, 528 U.S. at 480. If there was no waiver of Mr. Williams right to personal appearance, that would be a non-frivolous ground for wanting to withdraw his plea, and Mr. Williams trying to withdraw his plea reasonably demonstrated that he was interested in doing so.

Notably, this Court discussed Anderson testifying that he would have withdrawn his plea pre-sentencing if he had known he had a legal basis for doing so. *Anderson*, 374 Wis. 2d 372, ¶¶57-58. Again, Mr. Williams actually filed the motion to withdraw his plea before sentencing. (R.99).⁴ However, trial counsel failed to raise the lack of personal appearance issue. (R.99).

Moreover, in *Anderson*, this Court considered that “Anderson's ability to communicate with his attorney during the plea hearing was limited, in that they could not see each other and had no ability to communicate privately while the hearing was in progress.” *Id.*, ¶58. Again, the circuit court failed to confirm that Mr. Williams could see the court or attorneys, that he could hear the attorneys, or that he was told—or even able—to meet privately with his attorney. App. Br. at 16.⁵ Given Mr. Williams later assertions about his confusion regarding the plea, (R.99), it cannot be said that the violation of his right to personal appearance was harmless beyond a reasonable doubt. *See Anderson*, 374 Wis. 2d 372, ¶58.

⁴ Had counsel raised the issue, Mr. Williams would have faced the much less burdensome “fair and just reason” standard. *See State v. Jenkins*, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24.

⁵ Notably, the concurring opinion in *Anderson* agreed that even if the minimal requirements of *Soto* showed that the video technology was working via the defendant’s appropriate responses, his right to be present was still violated and was not harmless. *See Anderson*, 374 Wis. 2d 372, ¶64 (Hruz, J. concurring).

CONCLUSION

The record demonstrates that Mr. Williams did not waive his right to be physically present for his plea, and that the error was not harmless. Thus, Mr. Williams respectfully requests the Court vacate his conviction and order his plea withdrawn.

Dated this 23rd day of December, 2024.

Respectfully submitted,

Electronically signed by Lucas Swank

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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 1,634 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 23rd day of December, 2024.

Signed:

Electronically signed by

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