STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP001267-CR

EUGENE B. SANTIAGO,

Defendant-Appellant.

APPEAL FROM ORDERS DENYING POSTCONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06 AND MOTION TO CORRECT OR AMEND JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, HONORABLE STEPHEN A. SIMANEK (ITERIM JUDGE) AND HONORABLE ANTHONY MILISAUSKAS, RESPECTIVELY, PRESIDING

BRIEF AND APPENDIX
DEFENDANT-APPELLANT

Eugene B. Santiago
WDOC No. 167293
Defendant-Appellant, Pro se
Racine Correctional Institution
Post Office Box 900
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STATEMENT OF ISSUES

I. DID THE CIRCUIT COURT ERR IN DENYING DEFENDANT-APPELLANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06?

Circuit Court answered: No.

Defendant-Appellant answered: Yes.

II. DID THE CIRCUIT COURT ERR IN DENYING DEFENDANT-APPELLANT'S MOTION TO CORRECT OR AMEND JUDGMENT OF CONVICTION?

Circuit Court answered: No.

Defendant-Appellant answered: No.

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Eugene Santiago, does not request oral argument as this case can be properly addressed through briefing.

STATEMENT ON PUBLICATION

Defendant-Appellant, Eugene Santiago, does not request publication. This case involves the application of established principles of law to the facts presented.

STATEMENT OF THE CASE

This appeal stems from the Kenosha County Circuit Court's denial of Defendant-Appellant, Eugene B. Santiago's (Santiago) Motion for Postconviction Relief pursuant to Wis. Stat. § 974.06 and Motion to Correct or Amend Judgment of Conviction (R63 and 67, respectively) on May 25, 2016 and by Order on August 16 and 17, 2016.

STATEMENT OF FACTS

On or about March 1, 1996, the Kenosha County District Attorney's Office filed a Criminal Complaint against Santiago indicating that he had sexual contact with a child who has not attained the age of thirteen years with the use of threats to injure contrary to Wis. Stats. §§ 948.02(1) and 943.30(1). The State would include charge modifiers/enhancers under Habitual Criminality (Wis. Stat. § 939.62(1)) and Use of a Dangerous Weapon (Wis. Stat. § 939.63(1)(a)2) applying the enhancers to both counts. The State would in error use 1995-96 Wisconsin Statutes (R1; Appx. 107).

On or about March 14, 1996 the State would file an Amended Criminal Complaint alleging the same, however adding a specific date of offense time frame of "between July, 1992 and November, 1992" (R9; Appx 108).

On or about May 17, 1996 Santiago would plea No Contest to both counts; Honorable Michael Wilk, Kenosha County Circuit Court Judge, Branch 7, would accept Santiago's plea.

On or about July 3, 1996 Santiago was sentenced by

Judge Wilk as follows: Count 2: Fifteen (15) years Wisconsin Satet Prison with credit for 113 days served; and Count 1: Sentence withheld, thirty (30) years probation consecutive to Count 2. (R22; Appx 112; and R21).

On or about July 15, 2009 Santiago's probation on Count 1 would be revoked.

On or about September 8, 2010 Santiago would be sentenced to sixteen (16) years Wisconsin State Prison on Count 1 concurrent to Count 2 (R___; Appx. 113).

On or about February 22, 2016, Ms. Amanda Slawson, Offender Records Assistant (ORA) 3, Racine Correctional Institution (RCI), sent a correspondence to Judge Wilk requesting clarification on Santiago's September 8, 2010 Judgment of Conviction (R60).

Santiago did not understand the correspondence and had a friend who is rehearsed in law review the letter and explain it to him. It was at this time that Santiago was informed he was exposed to 1996 penalties when he should have been exposed to a lesser penalties under 1992 statutes. Furthermore, the Judgment of Conviction (R___; Appx. 113) was incorrect in stating the "Date(s) Committed" (Offense Date) as "05-17-1996".

On or about April 6, 2016 Santiago filed a Motion for Postconviction Relief Pursuant to Wis. Stat. § 974.06 (R63). The crux of this motion was that the State charged him under the 1995-1996 rather than the 1991-1992 Wisconsin Statutes with regard to the aforementioned criminal violations and

penalty enhancers. His claim is ineffective assistance of counsel. He sought to withdraw his plea.

On May 25, 2016 a Motion Hearing was held whereas the Honorable Stephen A. Simanek, interim judge, denied the Motion (R70-1; Appx. 102; Cf. R74).

On May 25, 2016 Santiago filed a Motion to Correct or Amend Judgment of Conviction (R67). The crux of this motion was that the "Date(s) Committed" (Offense Date) is wrong. Under the erred Date of offense Santiago is subject to the provisions of Presumptive Mandatory Release (PMR), pursuant to Wis. Stat. § 302.11(1g)(am) (Appx. 127-129).

A R G U M E N T

I. **DID THE TRIAL COURT ERR IN DENYING DEFENDANT-APPELLANT'S MOTION FOR POSTCONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06?**

This appeal originates from a February 22, 2016 letter written by Racine Correctional Institution (RCI) Records Custodian, Amanda Slawson, OAR3 (R60; Appx. 101) requesting the circuit court to clarify the statute in which Santiago was convicted. Unsure of how to proceed and in need of clarification of the letters content and meaning, Santiago brought the letter to another inmate/friend who is rehearsed in law and requested him to overlook it. During this time it was noted that **(a)** the Judgment of Conviction is flawed in that it reflected an erred statute, but further reflected an erred "Date of Conviction(s)" (Offense date); furthermore, that **(b)** that the State had improperly cited the 1996 penalties

in the Criminal Complaint (R1), Amended Criminal Complaint (R9), and Information (R15). Upon discovery of these errors, Santiago took immediate action without delay bringing his claim before the circuit court for relief. Santiago **immediately** filed his Motion for Postconviction Relief Pursuant to Wis. Stat. § 974.06 (R63) and Motion to Correct or Amend Judgment of Conviction (R64). The delay between the Judgment of Convictions and Santiago's present post-conviction relief motion does not prejudice any parties. Furthermore, the doctrine of Laches does not apply to Wis. Stat. § 974.06 motions. State v. McDaniel, 2005 WI App 126, fn. 3, 284 Wis. 2d 569, 699 N.W. 2d 253 (citation omitted). Santiago had never taken any appeal in this case at any time and is therefore not barred by State v. Escalona-Naranjo, 185 Wis. 2d 178, 517 N.W. 2d 187 (1994).

Procedural Mechanism for Postconviction Relief

The circuit court expresses some confusion as to the procedural mechanism - whether Wis. Stat. § 974.06 or Habeas Corpus is the appropriate mechanism. The State would jump on this bandwagon (R74; 05/26/16 Motion Hearing Tr. 13:25-14:1). However, they are one in the same. See Wis. Stat. § 974.06 History noting that the Judicial Council, 1981 set forth that "Sub (8) has been amended to reflect the fact that habeas corpus relief is now available in an ordinary action in circuit court. See 781.01, Stats., and the note thereto and s. 809.51, Stats. [Bill 613-A]". Cf. State v. Escalona-Naranjo: A Limitation on Criminal Appeals in

Wisconsin. Hunt, heather M., 1997 WLR 207. It is Santiago's contention that Wis. Stat. § 974.06 is indeed the proper procedural mechanism for relief. There is no other method of relief when a criminal sentence is being served (one in which he is currently incarcerated for) other than Wis. Stat. § 974.06 postconviction motion. When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such plea violates fundamental due process. State v. Finley, 2016 WI 63, P13, 370 Wis. 2d 402, 882 N.W. 2d 761 (citations omitted). The circuit court may have been attempting to assert a Writ of Coram Nobis is the proper procedural mechanism as it relates to Count 1 since the prison term has been served. However, this is also in error. This is one case in and of itself with two counts stemming from a single continuous act. This case has not been discharged as the defendant continues to serve the sentence handed down on July 3, 1996. E.g. State v. Olson, 222 Wis. 2d 283, 290, 588 N.W. 2d 256 (Ct. App. 1998) (sentencing court retains jurisdiction until sentence expires).

Fatally Defective Criminal Complaint(s)/Information

No complaint or information shall be dismissed or reversed for any error or mistake where the case and identity of any defendant may be readily understood by the court; and the court may order an amendment curing such defects. See State v. Neutz, 69 Wis. 2d 292, 294-95, 230 N.W. 2d 806 (1975) (citing Wis. Stat. § 971.31(8) (1975)); See also

State v. Russo, 70 Wis. 2d 169, 172 n. 3, 233 N.W. 2d 485 (1975) (citing Wis. Stat. § 971.26 (1975)); Wis. Stats. §§ 971.31(8) and 971.26) (2011-12). In this instant case, there is no remedy curing the amendment without prejudicing the defendant.

Error in Original Motion for Postconviction Relief Pursuant to Wis. Stat. § 974.06 by Defendant-Appellant

On the outset, Santiago would like to make known that he erred in his penalty calculations in his original motion in ¶¶17-19, 24-25, and 28, as it relates to the penalty exposures and differences between 1992 and 1996 Statues. They have been corrected in this Brief and are an accurate and proper reflection as further illustrated in the Appendix "Charging Illustration" (Appx. 130). This error causes no prejudice to any party and is therefore harmless.

Erred Penalty Statute

The district attorney **shall** examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial, subject to Wis. Stat. § 970.03(10), shall file an information according to the evidence on such examination subscribing his or her name thereto. Wis. Stat. § 971.01(1). Applicable law is the statute in effect when the last criminal action occurs. State v. Ramirez, 2001 WI App 158, P17, 246 Wis. 2d 802, 633 N.W. 2d 656.

In this case at bar Santiago allegedly committed the offenses in **1992** as indicated in the Criminal Complaint,

Amended Criminal Complaint and Information (R1, 9, 15). The State is required to charge the defendant with a statutory offense and accompanying penalty as it then existed in 1992 despite the defendant not being formally charged until 1996. Ramirez, supra. Santiago was charged, convicted and sentenced with violating Wis. Stat. §§ 948.02(1)(**1995-96**) (appx. 114) 1st Degree Sexual Assault of a Child (a Class B felony) in Count 1 and 943.30(1) (**1995-95**) Threats to Injure or Accuse of a Crime (a Class D Felony) (Appx. 115). Both Counts - in error - included the same repeater enhancer under Wis. Stats. §§ 939.62(1)(c) (**1995-96**) Habitual Criminality (Appx. 118-119) and 939.63(1)(a)2 (**1995-95**) Use of a Dangerous Weapon (infra, "Erred Penalty Enhancer on Count 2"). The State would subject Santiago to erred criminal panalties of §§ 939.50(1)(b) and (d) (**1995-96**) (Appx. 116-117) exposing Santiago to terms in Count 1 not to exceed forty (40) years and in Count 2 not to exceed five (5) years.

However, the State **should have** charged Santiago with a violation of Wis. Stat. § 948.02(1) (**1991-92**) 1st Degree Sexual Assault of a Child (a Class B Felony) Appx. 121) in Count 1 and Wis. Stat. § 943.30(1) (**1991-92**) Threats to Injure or Accuse of a Crime (a Class D felony) (Appx. 122). The criminal penalties of Wis. Stats. §§ 939.50(1)(b) and (d) (**1991-92**) (Appx. 123) exposed Santiago to penalties which were not to exceed twenty (20) years in Count 1 and five (5) years in Count 2.

Erred Penalty Enhancer on Count 2

Furthermore, the State would err in using penalty enhancers as it relates to Count 2 under Wis. Stats §§ 939.62(1)(c) and 939.63(1)(a)2 (**1995-96**) as it did for Count 1 which would increase the overall exposure to ten (10) years and five (5) years, respectively (totaling fifteen (15) years) in Count 2 **improperly**.

The State **should have** alleged a violation of Wis. Stats. §§ 939.62(1)(b) (**1991-92**) (Appx. 124-125) and 939.63(1)(a)3 (**1991-92**) as it relates to Count 2. A proper enhanced penalty under the proper statute and proper year would have increased the penalty by six (6) and four (4) years, respectively (totaling ten (10) years) (See, "Charging Illustration"; Appx. 130). However, the State would double-dip on enhancers illegally using Wis. Stats. §§ 939.62(1)(c) and 939.63(1)(a)2 (**1995-96**) on both counts. The issue as it relates to the penalty enhancers on Count 2 remains that the wrong penalty enhancer was applied to Count 2 exposing Santiago to an increased penalty in excess of that allowed by law.

Prejudice

The purpose of the Information is to inform the defendant of the charges against him. Notice is a factor. Manson v. State, 101 Wis. 2d 413, 431, 304 N.W. 2d 729 (1981) (citing Whitaker v. State, 83 Wis. 2d 368, 373, 265 N.W. 2d 575 (1978)). This would include the notice of penalties accompanying the charges against him. The Information misled Santiago into believing he was facing a more severe punishment than he

was. We are speaking of a twenty-five (25) year difference in penalty exposure. This is an egregious error, that cannot be formed into a mere typographical error as the State would wish, but an error of competency by the State in basic lawyering in completing the Information in accordance to Wis. Stat. § 971.03. This error would create a snowball effect where a deficient, unskilled and/or incompetent defense counsel (Attorney John Caviale), a deficient, unskilled, and/or incompetent district attorney (Assistant District Attorney Jambois), and a sorely misinformed circuit court would lead Santiago through this entire case into a plea that was based off a fatally defective Information. A complaint or information that is so defective as to be void deprives the trial court of jurisdiction. E.g. Champlain v. State, 53 Wis. 2d 751, 754, 754, N.W. 2d 868, 871 (1972).

Santiago concedes that formal violations of Wis. Stat. § 971.08 (Bangert violation) claim in his initial motion at issue may not be remedied under Wis. Stat. § 974.06 and that it is limited to jurisdictional and constitutional matters. State v. Carter, 131 Wis. 2d 69, 81, 389 N.W. 2d 1, 5-6 (1986). Therefore the Bangert claim is abandoned on appeal. However, the Nelson/Bentley claim is what is on appeal. See State v. Bentley, 201 Wis. 2d 303, 548 N.W. 2d 50 (1996), and Nelson v. State, 54 Wis. 2d 489, 195 N.W. 2d 629 (1972).

ADA Wells asserts that he had read Santiago's Motion for Postconviction Relief Pursuant to Wis. Stat. § 974.06.

(R74; 05/26/16 Motion Hearing tr. 2:9). However, he appears to continuously refer to a "typographical error" in the Judgment of Conviction as the issue (R74; 05/26/16 Motion Hearing Tr. 5:1-3, 6-11, 15-24; 6:9-21). The Court then inquires "It is your position, Mr. Wells., that this is simply a typographical error and does not rise to the level of allowing relief for Mr. Santiago with the difference potential of five years? Because his argument is I believe, and Mr. Santiago correct me if I'm wrong, you accepted a plea agreement here and it turns out that your exposure was not as great as you were originally led to believe." (R74; 05/26/16 Motion Hearing Tr. 7:2-8). Yet, ADA Wells would go on a rant about Santiago's guilt of the charged offense (R74; 05/26/16 Motion Hearing Tr. 12:24-13:12; 24:1-14:1), then makes the same reference to a typographical error in Judgment of Conviction as the issue (R74; 05/26/16 Motion Hearing Tr. 13:13-14). One has to question whether ADA Wells truly read the Motion because even after being advised by the Court as to the issue, he continued down the "typographical error" road as to the core issue. That was not and is not the issue during the proceeding or in Santiago's Motion.

ADA Wells seemingly confuses the Court when he side-tracks it into the issue being that of a discrepancy in the statutory citation for the offense citation as it relates to Count 1 (1st Degree Sexual Assault of a Child) in violation of Wis. Stat. § 948.02(1), which he is correct, had a (c) appended to it and (c) did not exist in 1992 or 1996 when

Santiago was convicted. The Court stated that:

> ".. this could be remedied by simply filing an amended judgment of conviction listing the correct statutory citation and I believe that this would be the best way to handle it here, summarily dismiss this motion for postconviction relief under 974.06, not set the matter for an evidentiary hearing, but advise Mr. Santiago that he has the right to appeal this determination that I essentially have found his 974.06 motion without merit. That then may entitle him to get onto the Public Defender track and have the Court of Appeals handle it. I'm not trying to pass the buck, but I think that's the best way to address this at this juncture."

(R74:16; 05/26/16 Motion Hearing tr. 16:15-17:5). This is relative as to the letter sent to the Court by Ms. Slawson (R60) (Appx. 101). But what does this have to do with the issue(s) raised by Santiago or the requested relief therein? The Motion at issue clearly raised issues that were side-tracked and avoided. Which raises question if this was intentional and/or strategically devised diversion tactic employed by ADA Wells?

Mr. Santiago clearly explains, in addition to his motion, his position to the Court and State in a prepared statement given to the Court (R74:8-12; 05/26/16 Motion Hearing Tr. 8:23-12:17). Yet, the Motion and Mr. Santiago's statement continued to get lost in this utter confusion created by ADA Well's insistent typographical error in the judgment of conviction position. Again, this is <u>not</u> the issue raised and contested here.

Nelson/Bentley Violation - Misinformed as to Penalty

A defendants understanding of the potential punishment if convicted of a crime is relevant for determining whether the plea was knowingly, intelligently, and voluntarily entered.

Finley, 370 Wis. 2d 402, ¶94. When a defendant alleges that his plea was not knowing, intelligent, and voluntary because of factors extrinsic to the plea colloquy, he is making a Nelson/Bentley motion. State v. Hoppe, 2009 WI 41, P3, 317 Wis. 2d 161, 765 N.W. 2d 794; Bentley, Id.; and Nelson, Id. A defendant is entitled to a hearing on a Nelson/Bentley motion if the motion alleges sufficient, nonconclusory, material facts that, if true, would entitle the defendant to relief. Hoppe, 317 Wis. 2d 161, ¶59; See also State v. Howell, 2007 WI 75, ¶76, 301 Wis. 2d 350, 734 N.W. 2d 48. A defendant alleging that his plea was not knowing, intelligent, and voluntary made will allege "who, what, when, where and how" in his motion. State v. Allen, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W. 2d 433. Santiago has done just that and who, what, when, where and how can be easily ascertained within the four corners of his Motion. A well pled complaint may be denied without an evidentiary hearing if the record **as a whole** conclusively demonstrates relief is not warranted. Howell, 301 Wis. 2d 350, ¶77. Unless the record conclusively demonstrates that Santiago is entitled to no relief, the circuit court **must** grant an evidentiary hearing. Id.

Nelson/Bentley instructs that "if a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." Bentley, 201 Wis. 2d at 210 (citing Nelson, 54 Wis. 2d at 497-98). This poses the assumption that if Defense Counsel Caviale was in

fact ineffective in advising Santiago of the wrong penalties, Santiago is entitled to an evidentiary hearing. This did not happen here. The circuit court should have scheduled an evidentiary hearing to determine whether Santiago had entered his pleas in a knowing, intelligent, and voluntary fashion and then provided appropriate relief accordingly. It is clear that if a Nelson/Bentley motion "on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." Bentley, 201 Wis. 2d at 310. Albeit raised by Santiago in his original motion (R63:7), the circuit court ruled to the contrary.

Misinformation as to Penalty

Due process requires that an accused repeater know the range of punishment at the time of plea. Block v. State, 41 Wis. 2d 205, 211, 163 N.W. 2d 196, 199 (1968). Santiago did not know or understand the information that should have been provided at the plea hearing, but was not. See e.g. State v. Brown, 2006 WI 100, ¶38, 293 Wis. 2d 594, 716 N.W. 2d 906. For clarity, "potential punishment", "maximum statutory penalty" and "range of punishment" are synonymous with one another. Finley, 370 Wis. 2d 402, ¶96.

The deviation at issue here is "substantial" in that the penalty Santiago was informed of by the State, the circuit court, and his defense counsel, Attorney Caviale, that he was facing a total sum of seventy-five (75) years in prison (55 years on Count 1 and 20 years on Count 2) (R1, 9, 15).

However, had the penalties portion of the criminal complaint(s) and information been correct as outlined in 1992 Wis. Stats., Santiago was exposed to thirty-five (35) years on Count 1 and Fifteen (15) years on Count 2. We are speaking of a **twenty-five (25) year deviation.** This far exceeds the Cross, infra, bright line rule of in excess of ten (10) years and is thus "substantial" as to necessitate relief.

This is no minor deviation. See e.g. Cross, 2010 WI 70, ¶¶32, 41,326 Wis. 2d 492, 786 N.W. 2d 64 (Cross was informed he faced 40 years, when in reality he faced 30; a 10 year deviance); State v. Quiroz, 2002 WI App 52, ¶1, 251 Wis. 2d 245, 641 N.W. 2d 715 (Quiroz was informed he faced 14 years instead of 13 years; a 1 year deviation); State v. Harden, 2005 WI App 252, ¶2, 287 Wis. 2d 871, 707 N.W. 2d 173 (Harden was informed he face 19 years instead of 16 years; a 3 year deviation). None of the cases outlined in Cross and connected with Cross exceed the 10 year deviation. In looking at the Cross line of cases, none of them exceed that ten (10) year deviation. See e.g. Finley, 370 Wis. 2d 402 (Finley was informed he was facing 19 years, 6 months rather than 23 years, 6 months; a 4 years deviance); State v. Taylor, 2013 WI 34, 347 Wis. 2d 30, 829 N.W. 2d 482 (Taylor was informed he faced 6 years when in reality he faced 8 years; a 2 year deviance). None of these cases exceed the ten-years. However, the issue herein exceeds this ten-year barrier where Cross seems to draw that bright-line rule by more than double.

At this point Santiago is barred from claiming a Bangert

violation and concedes on this claim in his motion (R63). Be that as it may, the circuit court reinforced this misinformation in its plea colloquy and this should be considered within the totality of the circumstances. Actually, it gives pause as to how this could even occur when reviewing the penalty differences in 1992 and 1996 as it relates to Wis. Stats. §§ 939.50(b)(d), 939.62(1)(b)(c) and 939.63(1)(a)2 and the States application thereof. Then to have the State ignore such an obvious issue when brought before it is repugnant. The State would like to place fault on a typographical error of some form (which is a far stretch of the imagination in this case). Thank God ADA Wells is "not king of the world" (R74:13; 05/25/16 Motion Hearing Tr. 13:16-18).

In Bentley-type cases, Santiago has the burden of making a prima facie case for an evidentiary hearing, and if he succeeds, he still has the burden of proving all the elements of the alleged error, such as deficient performance and prejudice. The defendant must prove the linkage between his plea and the purported defect. The defendant's proof must also add up to manifest injustice. State v. Love, 2005 WI 116, ¶74, 284 Wis. 2d 111, 700 N.W. 2d 62. Santiago has proven manifest injustice - a direct, obvious, and observable error. When a reviewing court applies the manifest injustice test, the issue is no longer whether the plea should have been accepted, but rather whether the plea should be withdrawn. State v. Cain, 2012 WI 68, ¶30, 342 Wis. 2d 1, 816 N.W. 2d 177. In a word, it would simply not make sense to vacate a conviction as the

result of an error at the plea hearing when later proceedings unambiguously demonstrate the error did not amount to manifest injustice. Id., 342 Wis. 2d 1, ¶31.

The State would like to chalk this up to a non-prejudicial "typographical error" in some attempt to make it as though it is a harmless error. The erred penalties in both the Criminal Complaint(s) (R1, 9) and the Information (R15), and the advice provided by Defense Counsel Caviale is indicative of poor research and reporting; not a typographical error. How does the State charge a 1992 offense using 1996 penalty schedule and/or statutes? Or charge erred penalty enhancers as to Count 2? This is no mere typographical error by any stretch of the imagination. Santiago has alleged sufficient, non-conclusory, material facts that entitle him to an evidentiary hearing under Nelson/Bentley.

As stated in Santiago's original motion, he would not have plead guilty and "would've insisted on trial" (R63:7). In addition, the substantial increase of twenty-five (25) years Santiago thought he was facing was substantial enough to induce a plea. When a defendant establishes a denial of a relevant constitutional right, plea withdrawal is a matter of right. State v. VanCamp, 213 Wis. 2d 131, 139, 569 N.W. 2d 577 (1997). To prove prejudice, Santiago must show "that there is a reasonable probability that, but for the [defense] counsel's errors, he would have not pleaded guilty and would have insisted on going to trial." See Bentley, 201 Wis. 2d at 312 (citation omitted). A "reasonable probability means a probability

sufficeint to undermine the outcome of the proceeding." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A reasonable probability "means that the likelihood of a different result is great enough 'undermine [] confidence in the outcome of the trial'". Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (internal quotation and citation omitted).

Ineffective Assistance of Counsel - Nelson/Bentley Violation

The bottom line is that an attorney's advice must be adequate to allow a defendant to knowingly, intelligently, and voluntarily decide to enter a guilty plea. State v. Shata, 2015 WI 74, ¶77, 364 Wis. 2d 63, 868 N.W. 2d 93. The Shata Court explains:

> Both the United States Constitution and the Wisconsin Constitution guarantees criminal defendants the right to counsel. Carter, 324 Wis. 2d 640, P20 (citing U.S. Const. amend. VI; Wis. Const. art. I, §7). "The United States Supreme Court has recognized that 'the right to counsel is the right to effective assistance of counsel.' Id. (quoting Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052. 80 L.Ed. 2d 674 (1984)(quotation marks omitted).
>
> Whether a convicted defendant received ineffective assistance of counsel is a two-part inquiry. Id., P21 (citing Strickland, 466 U.S. at 687). "First, the defendant must prove that counsel's [performance was deficient]." Id. (citing Strickland, 466 U.S. at 687). "Second, if counsel's performance was deficient, the defendant must prove that the deficiency prejudiced the defense." Id. (citing Strickland, 466 U.S. at 681). To succeed on a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Id. (citing Strickland, 466 U.S. at 687).

Shata, 364 Wis. 2d 63, ¶¶32-33. A defendants decision whether to go to trial or plead no contest (or guilty) is generally the most important decision to be made in a criminal case. A defendant should have the benefit of an attorney's advice on

this crucial decision. State v. Dillard, 2014 WI 123, ¶¶90 and n. 33, 358 Wis. 2d 543, 859 N.W. 2d 44 (citiation omitted). The Dillard court would further state: "Our decision in State v. Carter, 2010 WI 40, 324 Wis. 2d 640, 782 N.W. 2d 695, and State v. Domke, 2011 WI 95, 333 Wis. 2d 268, 805 N.W. 2d 364, are instructive regarding the extent which trial counsel is required to know and investigate relevant law. These cases teach that to meet the constitutional standard for effective assistance of counsel, counsel must either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary." Id. (quotation and citation omitted). It is black-and-white that Caviale failed to conduct the most basic elementary research or he'd discovered the discrepencies in the criminal complaint(s) and information. Even if there was an evidentiary hearing held, Caviale could not concoct or posit any reasonable strategic decision for finding that further investigation was unnecessary. Santiago was misled by defense counsel as to the maximum penalty he truly faced before his plea, during his plea and at sentencing. Further, Santiago was misled as to the potential possibilities as it related to parole and parole eligibility in assessing plea offer(s).

The State would spend a significant amount of time testifying at the 05/25/2016 Motion hearing as to Defense Counsel Caviale's representation as "exceptional" and "outstanding" as if he were present during those hearings in 1996 or at least well rehearsed with this particular case

(R74:4, 12-14; 05/25/16 Motion Hearing Tr. 4:23-5:1, 12-14 [attesting to the "excellent counsel" Santiago received]; 13:21-23 [attesting to what Santiago allegedly knew with regard to Caviale's representation]). ADA Wells is basing his testimony as to Caviale's representation on their friendship "for years and years and years". (R74:5; 5/25/16 Motion Hearing Tr. 5:12-14). However, the fact of the matter is that ADA Wells was not present during any prior proceeding. The State was represented by ADA Jambois [1996] (R21-22, 72) and ADA K. Birschbach [2010] (R28, 33, 72). ADA Wells cannot and should not be permitted to testify as to the representation of Attorney Caviale. ADA Wells was not there and is not a personal representative of Caviale's. Only Attorney Caviale can testify on his own behalf at an evidentiary hearing. Unfortunately ADA Wells is under-informed as it relates to this particular case (See R74:6; 5/25/16 Motion Hearing Tr. 6:16-18). A Witness cannot testify that another mentally and physically competent witness is telling the truth. See e.g. State v. Romero, 147 Wis. 2d 264, 278, 432 N.W. 2d 899, 905 (1988); State v. Haseltine, 120 Wis. 2d 92, 96, 352 N.W. 2d 673, 676 (Ct. App, 1984). Is the State a witness?

Nelson/Bentley Summary Conclusion

There is no equitable way to remedy the error without prejudice other than a plea withdrawal. Santiago attempted to work with the State by appropriately offering a fair and equitable resolution to this very serious issue (R74:8-12: 5/25/16 Motion Hearing Tr. 8:23-12:17). However, to Santiago's

surprise, ADA Wells would condescendingly retort that if he "were king of the world, [Santiago] would never get out..." (R74:2; 5/25/16 Motion Hearing Tr. 13:16). However, it would appear ADA Wells' insistent reference to the judgment of conviction throughout the proceeding and continual argument that the issue is a typographical error in nature, he apparently had not read the motion. Quite frankly, the transcript reveals ADA Wells as being indecisive, if not confused, as to the matter before the court. This indicates his unfamiliarity with the case as well as the motion before the court.

Unfortunately, in this case the original plea hearing transcript has been purged pursuant to SCR 72.01(47). The plea hearing transcripts were never prepared because direct appeal was never taken. Santiago followed the advice of then counsel Caviale that Santiago did not have any appealable issues and got a good deal. It is true that the unavailability of the transcripts lies squarely with Santiago by his inaction shy of twenty-years before noticing and claiming the error. However, it should be kept in mind that Santiago was unaware of any claim prior to February 22, 2016. He trusted that his privately paid for non-appointed attorney had provided him with the proper and adequate advice. Regardless, information as it relates to the issues on appeal and the crux of Santiago's motion can be easily ascertained and decided by reviewing the record as a whole. When reference to a plea hearing transcript is impossible because that transcript is unavailable, a defendant's claim for plea withdrawal should not be evaluated

under Bangert but should instead be evaluated under the standards set forth in Bentley. Bentley, supra; State v. Negrete, 2012 WI 92, ¶¶3, 20, 343 Wis. 2d 1, 819 N.W. 2d 749.

This forces Santiago and other reviewing parties to look to extrinsic sources (circumstantial evidence) such as the court's minutes (Appx. 111), the plea questionaire and waiver of rights (Appx. 109; R16), or other transcripts of proceedings, etc. to determine if evidence can be ascertained by other reliable means. To the benefit of all parties, we are able to do just that. The Plea Hearing Minutes (Appx. 111) and Plea Questionaire and Waiver of Rights (R16; Appx. 109) leave much to be desired and reveal nothing as it relates to the issues on appeal. Nevertheless we can look at the criminal complaint(s) (R1, 9) and information (R15) as well as the sentencing transcript(s) for guidance as will be illustrated herein.

Unfortunately, and to the benefit of the State, is barred from making a Bangert claim. Be that as it may, assuredly the circuit court and State reinforced Santiago's belief in the total sum in error as explained to Santiago by Attorney Caviale. Everyone relied on erred filings. The circuit court failed to comply with the mandates of Wis. Stat. § 971.08(1). The circuit court would make reference to the time Santiago was exposed to time and time again during Sentencing (R72:2, 11, 18: 7/3/96 Sent. Tr. 2:10-15; 11:19-24; 18:7-12) and Sentencing After Revocation (R73:3, 4, 32, 33; 8/8/10 Sent. After Rev. Tr. 3:9-22; 21:4-7; 27:21-25; 32:14-15, 20-21; 33:17-18). Plea negotiations, the plea agreement, and

sentence recommendations were made under this mistaken belief. The court and State thus supported Caviale's misleading advice; a factor which should be at minimum considered in the totality of the circumstances. Even a good sufficient plea colloquy, one that complies with Bangert, cannot be relied on to deny an evidentiary hearing. State v. Basley, 2006 WI App 253, ¶15, 298 Wis. 2d 232, 726 N.W. 2d 761.

The point here was an attempt by Santiago to resolve the issue which would be fair and equitable to all parties; even more so when the core issue that created this entire state of affairs is the fault of the State and not Santiago. Santiago simply seeks fair and equitable resolution to an issue that assuredly would have changed the dynamics of the case from the very beginning had the State done its job properly as well as defense counsel Caviale. A defendant is entitled to withdraw guilty plea after sentencing upon showing "manifest injustice" by clear and convincing evidence, which has been satisfied in this case even without an evidentiary hearing. State v. Rock, 92 Wis. 2d 554, 558-59, 285 N.W. 2d 739 (1979). Plea withdrawal is the sole remedy and the record conclusively demonstrates that Santiago is entitled to plea withdrawal. State v. Krieger, 163 Wis. 2d 241, 471 N.W. 2d 599 (Ct. App. 1991) (A court should only permit post sentencing withdrawal of a guilty or no contest pleas only to correct "manifest injustice").

II. ERRED JUDGMENT OF CONVICTION

Wis. Stat. § 972.13(6) requires the Judgment of Conviction to include the "date of offense." The Amended Complaint (R9;

Appx. 108) and Information (R15) clearly indicate the date of the offense as required by law as "between July, 1992 and November, 1992". The court further states the 1992 offense date on record during sentencing (R73; 8/8/10 Sent. After Rev. Tr. 34:11-12). The error complained of in Santiago's Motion to Correct or Amend Judgment of Conviction (R67) which was denied (70-3, ___; Appx. 103-106) is that of a typographical error in nature. In denying the motion, the circuit court stated: "Your request is denied - Wisconsin Statutes allow the dates listed in the documents." (R___; Appx 105). The circuit court errs.

The Judgment of Conviction dated July 3, 1996 (R21, 22) reflect the proper date of offense. The error initially appears in the Judgment of Conviction dated September 9, 2010 (R___; Appx. 113). The error continues through the Corrected Judgment of Conviction dated May 25, 2016 (R64). The Judgment of Conviction shall reflect the proper "date of offense" as "between July, 1992 and November, 1992" and not the date of revocation or any other inaccurate date. That is what is proper according to statute in completing a judgment of conviction. See, Wis. Stat. § 972.13(6).

The current offense date reflected on the Judgment of Conviction subjects Santiago to the provisions of Presumptive Mandatory Release (PMR). See Wis. Stat. § 302.11(1g)(am) (any offense committed on or after July 21, 1994 through December 31, 1999 is subject to PMR). With the current error in the Judgment of Conviction reflecting an offense date of May 17, 1996, a serious prejudicial problem arises. The Department

of Corrections (DOC) is under the impression Santiago's offense was committed "on or after July 21, 1994 through December 31, 1999" (i.e. May 17, 1996) and can thus further incarcerate Santiago beyond his mandatory release subjecting him to the provisions of PMR. Take note of the DOC penned in markings on the Judgment of Conviction dated September 9, 2010 (R___; Appx. 113).

The circuit court has the power to correct formal or clerical errors or an illegal sentence or void a sentence at any time. State v. Prihoda, 2000 WI 123, P5 et al., 239 Wis. 2d 244, 618 N.W. 2d 857; Hayes v. State. 46 Wis. 2d 93, 101-02, 175 N.W. 2d 627, 629 (Ct. App. 1992), overruled on other grounds, State v. Russel, 60 Wis. 2d 712, 211 N.W. 2d 637. The sentencing court's oral prouncement trumps the inaccurate judgment of conviction. Prihoda, 239 Wis. 2d 244, ¶15. The circuit court errs and must correct/amend the Judgment of Conviction to reflect the proper and correct date of offense (Date(s) Committed) to rectify this prejudicial error.

CONCLUSION

Santiago demonstrated that he was incorrectly advised of the potential penalties he was facing in excess of twenty-five (25) years, unlike the Cross line of cases. Fundamental fairness and accuracy must exist in criminal justice proceedings. To turn a blind eye to very serious and egregious constituional violations is to endorse unacceptable litigation techniques and/or under-educated/untrained persons holding

positions they are unqualified for. The State would like to revive the core criminal actions of the defendant, his guilt and how horrible of a person Santiago is as the issue (R74:12; 5/25/16 Motion Hearing Tr. 12:24-14:1). The facts are that Santiago received ineffective assistance of counsel. The fact is that he was repeatedly and continually advised of the wrong penalties. The case revolves around carelessness on the the part of the State and defense counsel Caviale and the circuit court blindly trusting that they both are trained and educated enough to perform their constitutional and statutory mandates properly. It is Santiago's hope that the Court of Appeals does not allow the true issues her to get side tracked.

Secondly, the Judgment of Conviction necessitates correction to comply with statute.

WHEREFORE Santiago requests the Court of Appeals to (a) permit Santiago to withdraw his plea and/or dimiss the case; and/or (b) if necessary, correct/amend the Judgment of Conviction to reflect the proper Date of Offense.

Dated this 17 day of October, 2016.

Respectfully,

Eugene Santiago

Eugene B. Santiago
Defendant-Appellant, Pro se

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