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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP90-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GEORGE E. SAVAGE,

Defendant-Appellant.

PLAINTIFF-RESPONDENT-PETITIONER'S BRIEF AND APPENDIX

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ISSUES PRESENTED FOR REVIEW

1. To show prejudice in a plea withdrawal context, a defendant must prove a reasonable probability that he would have gone to trial and that his defense would have succeeded. While on supervision and under orders to comply with sex offender registry requirements, Savage cut off his GPS device and absconded. He was charged with violating the sex offender registry statute and accepted a plea agreement with favorable terms. He sought plea withdrawal on grounds of manifest injustice, asserting ineffective assistance of counsel. He argued that *State v. Dinkins*, 2012 WI 24, ¶ 28, 339 Wis. 2d 78, 810 N.W.2d 787, provided a defense to a defendant who "attempted to comply with the registration requirements but was unable to find housing," and that he'd have gone to trial if counsel had told him about that defense. Did Savage prove a reasonable probability that he would have gone to trial and that his defense would have succeeded at trial?

The circuit court answered no on the grounds that Savage "did not have a defense" under *Dinkins*.

The court of appeals concluded that Savage "may have a defense" under *Dinkins* and remanded for a second evidentiary hearing.

This Court should reverse because Savage has not shown likely success of the *Dinkins* defense at trial and has therefore not shown manifest injustice warranting plea withdrawal.

2. An appellate court will sustain a circuit court's decision if facts in the record support the decision even if the circuit court's reasoning was flawed. Here, the circuit court's credibility findings and findings of fact were not clearly erroneous and supported the decision. Should the court of

appeals have addressed the flawed reasoning but sustained the circuit court's decision based on facts in the record?

The court of appeals answered no.

This Court should answer yes.

STATEMENT OF THE CASE

This Court issued its decision in *State v. Dinkins.*

In *State v. Dinkins*, this Court recognized that homelessness may create challenges for offenders seeking to comply with sex offender registration requirements. The State charged Dinkins with failing to comply with his registry obligation[1] to provide the Department of Corrections (DOC), no later than ten days before his release, the address at which he would reside after being released from prison. *Dinkins*, 339 Wis. 2d 78, ¶ 1. He appealed, and the court of appeals reversed his conviction, noting "an apparent unintended gap [with respect to homeless prisoners] in the address reporting requirement of the sex offender registration law." *State v. Dinkins*, 2010 WI App 163, ¶ 4, 330 Wis. 2d 591, 794 N.W.2d 236.

This Court affirmed the court of appeals on a different rationale, holding that "a registrant cannot be convicted . . . for failing to report the address at which he will be residing when he was unable to provide this information" because it "does not exist, despite the registrant's reasonable attempt to provide it." *Dinkins*, 339 Wis. 2d 78, ¶ 52. Nevertheless, it emphasized that "homeless registrants are not exempt from registration requirements and that homelessness is not a defense to failing to comply with the registration requirements." *Id.* ¶¶ 27, 61.

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[1] Under Wis. Stat. § 301.45(2)(e)4.

This Court also recognized that, in response to the court of appeals' decision, DOC had "attempted to close [the] unintended gap" recognized by the court of appeals by issuing a directive that provided "guidance for addressing homeless registrants who are on active DOC supervision as well as homeless registrants who have been terminated from supervision." *Id.* ¶ 26 (citing Wisconsin Department of Corrections Administrative Directive # 11-4, DOC-1356 (Rev.), effective July 1, 2011).[2] [3]

Savage was ordered to register as a sex offender.

Savage was convicted in 2014 of a child sex offense and was sentenced to 18 months in prison and two years of extended supervision. (R. 2:3.) He was also ordered to register as a sex offender for ten years. (R. 2:4.)

He was released from prison on March 23, 2016. (R. 35.) The day before his release, on March 22, 2016, Savage signed a form acknowledging that he had a duty to register as a sex offender. (R. 2:8, 10.) The first page, titled "Sex Offender Registration," listed Savage's address as "Homeless" in the city of Milwaukee and listed a Milwaukee zip code. (R. 2:8.) The second page is titled "Notice of Requirements to Register." Savage initialed the form

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[2] DOC subsequently reissued the directive effectuating the *Dinkins* holding. Wisconsin Department of Corrections Administrative Directive # 15-12, DOC1356 (Rev.), effective March 1, 2015, was in effect when Savage was released from prison in March 2016.

[3] As the Court will see below, the circuit court and the court of appeals disagreed on the application of *Dinkins* to this case. See *infra* at 14, 16–17. Although the State considers the circuit court's analysis more thoughtful and persuasive, the State takes the position that this case can be resolved in the State's favor without disturbing the holding in *Dinkins*.

beneath the statement, "When on Wisconsin Department of Corrections Supervision[:] Prior to any change in residence, . . . report the change *directly to your assigned Community Corrections agent*. You will *also* need to report the change to SORP [the Sex Offender Registry Program] by calling 1-888-963-3363." (R. 2:10 (emphasis added).)

Under the Department of Corrections (DOC) policy in effect when Savage was released from prison, a registrant who is released from prison will not be criminally charged for being unable to provide an address to the registry before he leaves prison. The policy requires that "[e]very effort must be made" to help registrants find housing. If registrants remain homeless despite those efforts, DOC will place registrants on discretionary Global Position Satellite (GPS) tracking. The DOC policy lists eight rules for agents who are supervising homeless registrants, including that they "utilize supervision strategies to accommodate" the registrant's reporting needs. It lists four rules for homeless registrants to follow, including that they call their agent weekly.[4]

Savage's agent put him on discretionary GPS monitoring.[5] (R. 45:48.)

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[4] See DOC Administrative Directive #15-12, effective March 1, 2015., available at https://doc.wi.gov/Guidance%20Documents/DCC/DCC_AD15-12_Homeless%20Sex%20Offender%20Registrants.pdf.

[5] Wisconsin Stat. § 301.48 governs the GPS tracking system for sex offenders. Wisconsin Stat. § 301.48(2)(a) addresses lifetime, mandatory tracking, and Section 301.48(2)(d) addresses discretionary tracking. Wisconsin Stat. § 946.465 makes it a felony to tamper with a GPS monitoring device. Savage testified that his agent told him he "would not be charged with a felony charge for removing the bracelet." (R. 45:48.) The specialist also

Savage cut off his GPS bracelet and absconded.

The sex offender registry specialist documented her communication with Savage's agent and Savage's contact with the registry. (R. 35; 45:14.)

On May 5, 2016, Savage cut off his GPS bracelet and ceased contact with his probation agent. (R. 35.) On May 18, the agent emailed the sex offender registry specialist that Savage had cut off the bracelet and absconded. (R. 35.) On May 20, responding to the specialist's question, the agent sent an email "advising that registrant absconded from active supervision on 5/05/16." (R. 35.)

Savage left a voicemail with the SORP on May 15, 2016, reporting a temporary address. (R. 35.) The next day, not yet informed of Savage's absconder status, the specialist sent Savage's agent an email asking for information. (R. 35.) The agent responded that Savage had cut off his GPS bracelet. (R. 35.)

The specialist replied, describing Savage's conduct as consistent with the strategy of experienced homeless registrants who attempt to evade supervision while avoiding criminal charges by staying in contact with SORP:

> When did he abscond? . . . Since he reported the address to SORP, it may appear his intent is to remain compliant with SORP and just does not want to be on supervision (or follow the rules). This is happening quite a bit especially with the homeless and [those] who have been through [failure to report] court cases already. I also note that he is on

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stated in her notes that such a charge "could not be issued." (R. 35.) The basis for the specialist's statement is not given. The fact that no felony tampering charge issued does not have any bearing on the question of whether Savage had a defense to the charge of failing to comply with registry requirements.

> discretionary GPS so if arrested, a felony charge for tampering with it could not be issued. We will wait to see the outcome of the letter for any further non-compliance.

(R. 35.)

On May 19, 2016, the specialist mailed a letter to Savage at the temporary address he had provided on May 15; on June 2, 2016, the letter was returned as undeliverable. (R. 35.)

On June 17, 2016, Savage contacted the SORP by telephone to report that he had not received the letter. In that call, he claimed that he had called in with an address change on or about May 24. (R. 35.) But the specialist reported there was no record of the voicemail he claimed to have left. (R. 35.) The specialist instructed Savage that he "need[ed] to update his agent" and get a mailing address approved. (R. 35.)

On June 20, 2016, the specialist noted that Savage's agent emailed advising that he remained an absconder. (R. 35.) The entry from that date also notes that Savage had not "contacted Specialist as directed to request mailing address." (R. 35.)

Savage was charged.

On August 4, 2016, the State charged Savage with failing to comply with sex offender registry reporting requirements, a Class H felony,[6] and issued a warrant. (R. 1; 2:1–2.) He was arrested and made his initial appearance in this case in February 2017. (R. 3; 44:22.)

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[6] He was charged under Wis. Stat. §§ 301.45 (2)-(4), (6), (6)(a)1., and 939.50(3)(h).

Savage pleaded guilty.

Savage entered a guilty plea. (R. 44:2.) He faced a maximum sentence of six years' imprisonment. (R. 2:1.) The terms of the plea agreement were that Savage would plead to the charge, and in exchange the State would recommend a 12-month sentence. (R. 6:2; 44:2.)

The circuit court engaged in an extensive plea colloquy before it accepted Savage's guilty plea. (R. 44:2–19.) The parties stipulated to the use of the complaint as the factual basis for the plea, and the circuit court found Savage guilty. (R. 44:18–19.)

The circuit court sentenced Savage.

In its sentencing argument, the State detailed Savage's criminal record, focusing on Savage's two prior cases of failing to comply with registry requirements. A 2006 charge was dismissed after Savage returned to compliance. A 2012 charge was initially resolved with a deferred prosecution agreement but ultimately resulted in a 12-month sentence because the DPA was revoked after Savage was charged with a new child sex offense. (R. 44:20, 21.) Consistent with the plea agreement, the State requested a 12-month sentence in this case. (R. 44:22.)

Trial counsel's sentencing argument focused on the difficulties Savage encountered in complying with the registry requirements. (R. 44:23–25.) Quoting from the agent's notes, she informed the circuit court that Savage had made attempts to call in address updates to the registry and that "at one point in time his agent told him . . . to use her office address as he would need to see her and then they could continue with the compliance requirements of the registry." (R. 44:24.) Counsel informed the circuit court that Savage's failure to report had led to the revocation of his extended supervision and a revocation sentence equal to the

full balance of his sentence: two years and three days. (R. 44:25.) She requested that any sentence be ordered to run concurrent with his revocation sentence. (R. 44:25.)

The circuit court sentenced Savage to 30 months in prison followed by 24 months of extended supervision. (R. 44:29.) The circuit court ordered the sentence to run concurrent with the revocation sentence, thereby adding nine months in prison and two years of supervision to the combined sentences. (R. 44:29–30.)

Savage moved for postconviction relief and was granted an evidentiary hearing.

Savage moved for postconviction relief, seeking an evidentiary hearing on his motion to withdraw his plea due to a manifest injustice. (R. 19:14.) He claimed that his trial counsel was ineffective for failing to inform him that he had a defense under *Dinkins*, citing the case and arguing that "because he did not have an address" his homelessness "had prevented him from being able to provide an address," and that "[t]his defense was an absolute defense." (R. 19:12.) He also claimed that "on multiple occasions" trial counsel had assured him that if he pled guilty, he would receive a concurrent sentence that would not exceed his revocation sentence and would require no additional time in prison.[7] (R. 19:2.)

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[7] Savage was deemed to have abandoned the sentence-related claim on appeal. *See State v. George E. Savage*, No. 2019AP90-CR, 2020 WL 356735, ¶ 2 n.1 (Wis. Ct. App. Jan. 22, 2020) (unpublished). (R-App. 101, 106.) However, evidence adduced and credibility determinations made on that claim are relevant to the remaining ineffective assistance claim, so the State is including it here.

In his affidavit attached to the motion, Savage averred that counsel had made an "unequivocal promise" that he would not serve any additional time. (R. 20:12–13.) He further averred that trial counsel had "never informed [him] that good faith efforts to comply with . . . sex offender supervision requirements would bar [his] conviction"; that he was homeless at the relevant time; and that "this homelessness was a defense[.]" (R. 20:13.)

The circuit court granted Savage an evidentiary *Machner* hearing. (R. 45.)

Trial counsel testified about how Savage wanted to resolve the case and why she did not pursue a Dinkins *defense.*

At the hearing, Savage's trial counsel testified that she had more than 28 years' experience as a public defender. (R. 45:8.) On direct examination she testified that when presented with the State's offer letter, Savage had been "adamant that he did not want any more supervision and wanted concurrent time." (R. 45:11, 27–28.) She testified that she told Savage that she would "argue[ ] for concurrent time and ask the court not to exceed the two years and three days [he] received on the revocation" and that the State would not take a position on whether the time would be concurrent or consecutive. (R. 45:11–12.) Critically, she testified that she told Savage that the recommendations were not binding and the sentence was ultimately up to the judge. (R. 45:11, 12–13.)

In response to questions about the relevance of homelessness to Savage's case, trial counsel responded that she "discussed with him that homelessness was not an absolute defense to the charge" and "explained . . . there was, in fact, a homeless protocol in place through the Sex Offender Registry." (R. 45:13.) Counsel said that she was familiar with this protocol and was "aware that the registry

specialist . . . will accept cross streets, parks, different locations as long as people are calling in as required by the registry." (R. 45:21–22.) Counsel testified that she never advised Savage that an inability to comply was a defense to the charge "[b]ecause there was a bigger issue that he also cut off the GPS monitoring unit." (R. 45:22.)

On cross examination, the prosecutor followed up on the relevance of the DOC protocol[8] for homeless registrants:

> Q [Prosecutor]: And you're familiar with the homelessness protocol ?
>
> A [Trial counsel]: Yes.
>
> Q: And that is a protocol that is I guess even more prevalent since the *Dinkins*[] decision. And you've seen that protocol [being] used in other situations; is that fair?
>
> A: I have. And I've also spoken to specialists at the preliminary hearing to inquire specifically more details of that . . . so I could share it with clients who are facing that situation.
>
> Q: Because ultimately if people can become compliant and aware and understand the protocol, it benefits everybody; is that fair?
>
> A: Very much so.
>
> Q: So you have it sounds like almost done your own research into the homelessness protocol so that you would be able to better explain it to other clients that you had had. Is that accurate?
>
> A: That is. I've asked the specialist specifically what it is, and I can share it with other individuals. I even asked if they had a written one. I wasn't given a written one that described that they would accept park locations, cross streets as long as

[8] *See supra* note 2.

> a call was made in accordance with the registry conditions.

(R. 45:23–24.)

Counsel was also asked whether the fact that Savage cut off his GPS device and absconded "factor[ed] into [her] evaluation of the case." (R. 45:25, 26.) She testified that both facts did. (R. 45:25, 26.) This was because "the agent knew that the GPS bracelet had been removed" for several months and "had not been returned." (R. 45:25.) She testified that cutting off the GPS bracelet reflected Savage's "level of intent not to comply" with his registry obligations, and so did the absconding. (R. 45:25–26.)

Savage testified about why he took the plea.

Savage testified as well. He said he took the plea because he "was under the belief that [he] would not serve any more time than the two year revocation time [he] was serving and that [he] wouldn't be given any following supervision upon release." (R. 45:33–44.) He testified that trial counsel brought him the plea agreement paperwork and told him "it will just be a quick in and out, you'll get a year to go with ran with your two year revocation time, there won't be any additional supervision for you," and they would simply go to court and "just get it over with." (R. 45:35.)

He testified that while he was under supervision he did not have an address to provide to his agent. (R. 45:37.) When asked if he ever "call[ed] the agent up to talk – to tell her what was going on," he answered that he had "called the SOR people in Madison." (R. 45:38.) He testified that trial counsel had never indicated that his inability to provide an address because he did not have one was a defense even though he had told her his situation:

> I told her I was homeless and that several attempts to try to stay in compliance, several attempts with

> my agent, my probation agent, to try to find some type of a satisfactory housing and was basically told, there's nothing I can do for you from my agent who, you know, I told her it made it impossible with me being on a bracelet to be anywhere.

(R. 45:39.)

On cross-examination Savage did not dispute that he had been on the sex offender registry for more than 20 years (R. 45:41); that he had a 2006 charge for failing to comply with registry requirements that was dismissed after he regained compliance (R. 45:42); and that he had been charged with the same offense in 2012 and placed on a deferred prosecution agreement that was revoked when he committed a new sex offense. (R. 45:43.) He admitted that he cut off his bracelet, absconded from probation, and stopped complying with his agent. (R. 45:49–50.) He explained, when asked what he thought would happen after he cut off his GPS monitoring bracelet, "I knew that there would be consequences. I didn't believe I would be charged as long as I stayed compliant with the registry." (R. 45:48.) When asked to confirm whether he had "stopped complying with [his] agent," Savage paused to clarify before answering:

> [Savage]: With my agent?
>
> [State]: Your probation agent.
>
> [Savage]: Yes.

(R. 45:49–50.)

Savage testified that he pled guilty only because of counsel's promise about the sentence outcome and failure to tell him about a defense under *Dinkins,* and that he would have gone to trial otherwise. (R. 45:40.)

The circuit court heard arguments and made credibility determinations, findings of fact, and conclusions of law.

Postconviction counsel's argument—that the facts supported a defense under *Dinkins*—was premised not on trial counsel's *Machner* testimony, but on her sentencing argument, which postconviction counsel referenced ten times. (R. 45:55–58.)

The State instead pointed to this evidence adduced at the *Machner* hearing:

1) Savage's testimony about his 2006, 2012, and 2016 charges for failure to comply with registry requirements as evidence that he knew the compliance requirements;

2) Savage's lack of credibility based on his statement that his agent told him "[m]ultiple times" that if he "cut [the GPS] off it was okay, [he] wouldn't be charged" (R. 45:48);

3) trial counsel's testimony from that she was "familiar" with procedures for homeless registrants and "even did her own research . . . on the homelessness protocol" showing that she had reasonably assessed that Savage did not have a defense (R. 45:62–63); and

4) the facts that Savage was on the registry "for quite some time," cut off his GPS device, and absconded from supervision for months. (R. 45:63.)

The State argued that this evidence supported a determination that trial counsel's testimony was more credible than Savage's and that the court should deny Savage's motion on that basis.

The circuit court first made the determination that counsel's testimony was "credible and worthy of belief" (R. 45:64) and found it, compared to Savage's testimony, "more credible, more persuasive, and to carry the day." (R. 45:69.) It described her testimony as "fairly direct and

concrete" and said she did not "qualify" or hedge her testimony. (R. 45:66.)

The circuit court detailed why it concluded Savage's testimony "was less than truthful." The first problem was Savage's statement that an agent would tell him that he could cut his GPS bracelet off, which was "facially incredible" and compromised his testimony "on other things he says people told him." (R. 45:66–67.) The second problem was that Savage's explanation that he cut off the GPS device off because it "wouldn't let [him] go anywhere" was "a non sequitur." "[A] much more persuasive and much more logical motive" was that "he just didn't want any more supervision." (R. 45:67.) The circuit court found that Savage "didn't like people knowing where he was. So he cut off his GPS device." (R. 45:67–68.) The third problem with Savage's credibility was that the real motive for his plea withdrawal motion was clear from his testimony: he didn't want the sentence of jail time and supervision he got and wanted a do-over. (R. 45:68.)

The circuit court addressed Savage's argument about *Dinkins* at length. It stated that *Dinkins* did not stand for the proposition Savage advanced. The circuit court stated that this Court's analysis was based on "the context of the entire case," which was that Dinkins was charged with failing to provide an address before he was even released from prison. (R. 45:74.) Thus, the court concluded that Savage could not show that he was prejudiced by trial counsel's failure to tell him about a potential *Dinkins* defense because "he did not have a defense in *Dinkins*." (R. 45:75.) The circuit court stated, "*Dinkins* stands for the proposition that if it is impossible for a person to report an address because of something outside of their control like, for example, being in prison at the time, then there may be a defense." (R. 45:75.) It explained, "[C]ompared to Mr.

Savage's circumstances, Mr. Dinkins' circumstance was impossible. Mr. Savage's circumstance was not."[9] (R. 45:74.)

The court of appeals reversed and remanded.

Savage renewed on appeal his claim that he was entitled to withdraw his plea because trial counsel was ineffective for failing "to inform him that good faith efforts to comply with the sex offender registry requirements could be a defense to the charge" pursuant to *Dinkins*. *State v. Savage*, No. 2019AP90-CR, 2020 WL 356735, ¶ 13 (Wis. Ct. App. Jan. 22, 2020) (unpublished). (R-App. 103.)

The State argued that Savage could establish neither deficient performance nor prejudice in light of counsel's testimony that Savage's removal of his GPS bracelet and his absconding from supervision demonstrated that he did not intend to comply with his registry obligations. On these facts, the State argued, counsel reasonably concluded that Savage did not have a *Dinkins* defense because he could not show that he made reasonable attempts to provide the required registry information.[10] Besides, Savage had been

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[9] On the claim of the alleged guarantee regarding the sentence, the circuit court found as fact that trial counsel "told the defendant on two occasions at least that the court did not have to follow the recommendation." (R. 45:70.) It concluded that the claim failed because there was no deficient performance. (R. 45:70.)

[10] In his appeal, Savage sought publication of the court's decision on the grounds that the appeal "involve[d] issues of law which are not settled," and the State argued, citing *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93, that if the law on *Dinkins* application to unincarcerated registrants is unsettled, it cannot be a basis for a deficient performance claim. *Savage*, 2020 WL 356735, ¶¶ 18–19. (R-App. 104.) Without analysis, the court of appeals declined to consider the State's assertion, appearing to treat Savage's statement on

adamant that he wanted to do only the revocation time with no additional supervision, and the State's offer included a recommendation for a year in the county jail, and counsel was free to argue for a concurrent sentence. Therefore, counsel could not be deficient for pursuing Savage's adamantly stated goal of minimizing additional exposure through a plea agreement.

The State also argued that Savage could not show that any deficient performance prejudiced him. Savage had the benefit of a favorable plea offer that provided a better resolution than what would have been likely after trial. (State's Br. 16.) And Savage's decisions to abscond from supervision and remove his GPS device undermined his chance of a successful defense based on homelessness.

The court of appeals focused its analysis on *Dinkins* and its application to Savage's circumstances. It held that the circuit court had erred; *Dinkins* was not limited to situations where "it was impossible" for registrants to report due to something outside of their control. *Savage*, 2020 WL 356735, ¶ 23. (R-App. 105.) Rather, it interpreted *Dinkins* to mean only that to support a defense, "the registrant must make reasonable attempts to provide the required information." *Id.* ¶ 24. (R-App. 105.)

Based on the "reasonable attempts" language from *Dinkins* and without reference to or discussion of the evidence from the *Machner* hearing or other parts of the record,[11] the court of appeals stated, "Savage may have a

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publication as something other than a substantive argument. It continues to be the State's position that Savage's two propositions are legally inconsistent and mutually exclusive.

[11] The court of appeals did not address any of the testimony or exhibits from the evidentiary hearing. It quoted at length from

defense for his failure to register as a sex offender." *Id.* ¶¶ 24, 27. (R-App. 105.) The court of appeals expressly declined to find counsel's performance deficient or prejudicial. *Id.* ¶ 31. (R-App. 106.) Relying on *Sholar*,[12] the court of appeals remanded Savage's case for a determination of whether counsel was ineffective for failing to advise Savage that he might have a *Dinkins* defense, directing the circuit court to apply the court of appeals' interpretation of *Dinkins*. *Id.* ¶¶ 28–29. (R-App. 105–06.)

This Court granted the State's petition for review.

ARGUMENT

I. Savage is not entitled to withdraw his plea based on a manifest injustice because he did not show that he was prejudiced by counsel's conclusion that he did not have a defense.

A. Standard of review.

This Court reviews the circuit court's exercise of its discretion to grant or deny a plea-withdrawal motion under an erroneous exercise of discretion standard. *State v. Cain*,

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Savage's pre-hearing affidavit, not his hearing testimony, and from trial counsel's sentencing argument. *Savage*, 2020 WL 356735 ¶¶ 8–11. (R-App. 102–03.) *See* Wis JI-Crim 160 (counsel's "arguments and conclusions and opinions are not evidence").

[12] *State v. Sholar*, 2018 WI 53, ¶¶ 53–54, 381 Wis. 2d 560, 912 N.W.2d 89, reiterated that a *Machner* hearing is required before a court may conclude a defendant received ineffective assistance of counsel and holds that "an appellate court should not decide prejudice exists in an ineffective assistance claim without a *Machner* hearing." It held that "when an appellate court remands for a *Machner* hearing, it must leave both the deficient performance and the prejudice prongs to be addressed." *Id.* ¶ 54.

2012 WI 68, ¶ 20, 342 Wis. 2d 1, 816 N.W.2d 177. A circuit court erroneously exercises its discretion "as a matter of law" when it does not allow plea withdrawal after a defendant has proved a denial of a constitutional right. *See id.* ¶ 21 n.6. Whether counsel was ineffective is a question of constitutional fact, which this Court analyzes under a mixed standard of review. *State v. Dillard*, 2014 WI 123, ¶ 86, 358 Wis. 2d 543, 859 N.W.2d 44. This Court "upholds the circuit court's findings of fact unless they are clearly erroneous." *Id.* But it independently reviews whether those facts constitute ineffective assistance. *Id.*

This case also involves credibility determinations made by the circuit court. Appellate courts defer to a circuit court's credibility determinations. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (the "trial judge is the ultimate arbiter of the credibility of the witnesses").

B. The societal interest in finality is given great weight in a plea withdrawal analysis, especially when the defendant has already been sentenced.

"Once the defendant waives his [or her] constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. This is especially true when the defendant attempts to withdraw his plea after he has been sentenced. Then, the law requires him to prove a "manifest injustice" by clear and convincing evidence. *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482 (citations omitted). This standard, "which is higher than the 'fair and just' standard before sentencing, 'reflects the State's interest in the finality of convictions and reflects the fact that the presumption of innocence no longer exists.'" *Id.* "The higher

burden 'is a deterrent to defendants testing the waters for possible punishments.'" *Id.* (citation omitted). The United States Supreme Court recently restated that this interest in finality has "special force" where a defendant seeks to withdraw a guilty plea on *Strickland* grounds: "Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas.'" *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (citations omitted).

C. What Savage must show to withdraw his plea.

As noted, a defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. *Taylor*, 347 Wis. 2d 30, ¶ 24. "One way to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." *Dillard*, 358 Wis. 2d 543, ¶ 84.

A defendant alleging ineffective assistance of trial counsel must prove both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of *Strickland* must be proved by clear and convincing evidence. *Taylor*, 347 Wis. 2d 30, ¶ 24.

To satisfy the prejudice prong in the plea withdrawal context, the defendant must show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); *Dillard*, 358 Wis. 2d 543, ¶ 95 (citing *Hill*, 474 U.S. at 59).

In *Hill*, the Supreme Court explained that in the plea context, when the alleged error relates to counsel's failure to advise a defendant of a potential defense to the charged crime, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59.

The Supreme Court illustrated the analysis by referencing *Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984). *Hill*, 474 U.S. at 59. In *Evans*, the Seventh Circuit determined that the defendant was not entitled to withdraw his guilty plea because he did not affirmatively prove that the intoxication defense he claimed counsel should have raised would have caused him to go to trial or that he would have been better off if he had done so. *Evans*, 742 F.2d at 375. "It is inconceivable to us . . . that Evans would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." *Id.*

Hill stands for the proposition that a defendant must do more than simply assert that he would not have pleaded guilty but for his counsel's failure to advise him of a potential defense. Whether a reasonable defendant would have pleaded guilty but for counsel's errors is informed by the likely "outcome of a trial," based on an objective assessment of the record. *Hill*, 474 U.S. at 59–60. "A defendant without any viable defense . . . will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Lee*. 137 S. Ct. at 1966, 1967.

In *Burton*, this Court did not cite *Hill* but applied the *Hill* standard in substance. *State v. Burton*, 2013 WI 61, ¶ 70, 349 Wis. 2d 1, 832 N.W.2d 611. Burton moved to withdraw his plea, claiming that he would not have pleaded

guilty but for counsel's failure to pursue an insanity defense. *Id.* ¶ 63. Even if Burton could establish deficient performance, this Court stated, his pleading did not sufficiently allege prejudice because "it [did] not assert *how* the option of bifurcation on mental responsibility would have caused him to decline the plea bargain and proceed to trial." *Id.* ¶ 68. In its analysis, this Court reviewed the evidence available to both parties and the burden of proof Burton would have had at trial. *Id.* ¶ 70. While this Court did not directly quote *Hill*'s language about likely success at trial, the analysis is consistent with *Hill*'s rule.

In *Dillard*, another plea withdrawal case predicated on an ineffective assistance of counsel claim, this Court explicitly applied *Hill*'s "would have insisted on going to trial" standard. *Dillard*, 358 Wis. 2d 543, ¶ 95 n.36. The defendant claimed that trial counsel "mistakenly advised the defendant he would face a mandatory sentence of life in prison without the possibility of extended supervision if he did not accept the plea agreement." *Id.* ¶ 81. This Court described why it credited the defendant's assertion that he would have gone to trial:

> The defendant does not rely on a conclusory assertion of prejudice. Rather, he presented a persuasive factual account of the special circumstances that support his contention that he would have gone to trial absent the misinformation he received about the persistent repeater enhancer. The defendant detailed why his plea of no contest was a direct consequence of the misinformation he received about the penalty he faced. The defendant's testimony is supported by trial counsel's testimony and the record. The record allows the court to meaningfully address the defendant's claim of prejudice.

Id. ¶ 100.

Based in part on factual distinctions between *Hill* and *Dillard*, this Court granted plea withdrawal. *Dillard*, 358 Wis. 2d 543, ¶ 100 n.38 (discussing *Hill*, 474 U.S. at 60).

There is a narrow exception to the likely success at trial rule where counsel's deficient performance on a critical issue "affected [the defendant's] understanding of the consequences of pleading guilty." *Lee*, 137 S. Ct. at 1965. The defendant in *Lee* moved to withdraw his guilty plea because he had entered it based on counsel's incorrect assurance that the conviction would not result in deportation. *Lee*, 137 S. Ct. at 1963. Based on Lee's and his counsel's postconviction testimony, a magistrate determined that "deportation was the determinative issue" in Lee's decision to plead guilty. *Id.* Contemporaneous evidence that substantiated Lee's claim included Lee's statements during the plea colloquy in response to the judge's questions about potential deportation. *Id.* at 1968.

Both the district court and the Sixth Circuit agreed that under *Hill* Lee could not show prejudice because he did not have a viable defense. *Id.* at 1964. The Supreme Court held that "[a]s a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Lee*, 137 S. Ct. at 1966. However, the Court declined to adopt a categorical rule—emphasizing that *Strickland* is a case by case, totality of the evidence analysis—and reversed based on the "unusual circumstances" present in the case. *See id.* at 1963. The Supreme Court concluded that notwithstanding the slim likelihood of success at trial, Lee had demonstrated a reasonable probability that he would have rejected the plea had he known it would lead to mandatory deportation. *Id.* at 1967.

The *Lee* Court importantly reaffirmed that "*post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies" are insufficient without "contemporaneous evidence to substantiate" them. *Lee*, 137 S. Ct. at 1961, 1965. This principle has been stated again and again in the Wisconsin cases. *See*, e.g., *Bentley*, 201 Wis. 2d at 313 ("A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.").

D. Savage did not establish *Strickland* prejudice because he did not show by clear and convincing evidence that but for the alleged deficiency he would have gone to trial.

The record reflects the following facts relevant to whether, had counsel discussed the *Dinkins* defense with him, Savage would have gone to trial.

First, Savage faced a maximum sentence of six years' imprisonment on the charge of knowingly failing to comply with sex offender registry reporting requirements. (R. 2:1.) He had seven prior convictions, including one prior conviction for failure to comply with registry requirements and a child sex offense conviction from 2014. (R. 45:41; 2:3.) His criminal record (R. 44:19–22) and the fact that he had been on the sex offender registry for more than 20 years (R. 45:41) would have made a light sentence unlikely.

Second, the testimony at the evidentiary hearing from both Savage and trial counsel was that Savage's objective in resolving this case was to serve no additional time and to avoid any extended supervision. (R. 45:11, 34.)

Third, for a plea to the charge, the State agreed that its sentencing recommendation would be a twelve-month sentence. (R. 45:11–12, 27–28, 35–37, 39.)

Fourth, the circuit court determined that Savage was motivated to withdraw his plea by his after-the-fact disappointment that he would serve more than his revocation sentence and would have supervision that he did not want to have. (R. 45:68) The court, as factfinder, deemed Savage's *post hoc* assertions at the hearing that he was motivated by the possibility of a *Dinkins* defense incredible. *See Lee*, 137 S. Ct. at 1965. Moreover, as a matter of black-letter law, a defendant's dissatisfaction with the sentence he received is not a legitimate reason for plea withdrawal. *See Dillard*, 358 Wis. 2d 543, ¶ 67 ("defendant's subsequent satisfaction or dissatisfaction with his sentence has no bearing on whether his initial decision to enter a plea was knowing, intelligent, and voluntary").

The question is whether given those facts, Savage can show this Court that he would have insisted on going to trial. Savage's plea of guilty gave him a chance to argue for a concurrent sentence, the benefit of the State's recommendation that was a fraction of his sentencing exposure, and favorable sentencing consideration for accepting responsibility. (R. 44:2.) These opportunities, coupled with the fact that Savage adamantly wanted to limit his exposure, all weigh against the conclusion that he would have passed on a plea resolution and instead gone to trial. Against that record, he has only a *post hoc* assertion that he would have rejected the plea and taken the chance on an acquittal at trial. He has not carried his burden, and he therefore cannot show *Strickland* prejudice.

E. Savage has not shown a likelihood of success at trial.

Savage's claim "depend[s] largely on whether the affirmative defense likely would have succeeded at trial." *See Hill*, 474 U.S. at 59. His argument appears to be that he

would succeed at trial because there is evidence that he made reasonable attempts to obtain housing and that he made documented phone calls to the sex offender registry even when he absconded from supervision. The evidence of his compliance attempts is found in his testimony at the postconviction hearing and in the specialist's case notes documenting his compliance. (R. 35; 45:38–39.) There are two reasons his defense would not likely have succeeded at trial.

First, the record includes the document signed by Savage before his release from prison showing that he understood that his sex offender registration requirements included maintaining contact with *both* his probation agent and the sex offender registry. (R. 2:10.) His artful distinction between the two, and his careful testimony that he continued complying with the sex offender requirements (so that he would not subject himself to a new charge) while admittedly not complying with his supervision (which subjected him only to revocation) is unavailing. Complying with the sex offender requirements included reporting address changes "directly to [his] assigned Community Corrections agent" and "also . . . report[ing] the change to SORP[.]" (R. 2:10.) As noted above, Savage initialed the relevant portion of the "Notice of Requirements to Register" form. (R. 2:10.) His admission that he absconded from supervision, which is also well documented in the record, is therefore fatal to his claim that he made reasonable efforts to remain in compliance with the SORP. Accordingly, he cannot show a likelihood of success at trial.

Second, unless *Dinkins* means that the kind of spotty compliance that Savage managed is sufficient, the decision does not stand for any proposition that would help Savage at trial. It certainly does not stand for the proposition that homelessness is a defense to a charge of violating the sex

offender registry statute, as the opinion states clearly and repeatedly. It does not stand for the proposition that a registrant can decide how much compliance is enough. Savage, a two-decade registry veteran, was released from prison into a post-*Dinkins* world where DOC had promulgated and refined policies to enable homeless registrants to remain compliant. Savage's reliance on *Dinkins*, which came from a time when a homeless registrant faced a felony charge for non-compliance before he was released from prison, is misplaced and out-of-date.[13]

Savage cannot show a likelihood of success at trial, and under *Hill*, that dooms his plea withdrawal claim. The narrow exception recognized in *Lee* does not change the analysis because Savage has not shown that his case presents "unusual circumstances" that demonstrate a reasonable probability that he would have rejected the plea and insisted on going to trial.

Because he has not shown likely success at trial, Savage's argument that he was prejudiced by counsel's alleged deficient performance must fail.

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[13] The best illustration of the disconnect is that pursuant to this Court's holding in *Dinkins*, Savage was able to be released from prison on March 23, 2016, having listed no address on his sex offender registration form—the very scenario under which Dinkins was charged with a felony. As noted, see *infra* n.3, the State does not ask this Court to overrule *Dinkins*.

II. The factual record clearly demonstrates that Savage did not have a viable defense under *Dinkins*; therefore, the court of appeals' order remanding to the circuit court to make factual findings about the viability of the *Dinkins* defense should be reversed.

The court of appeals determined that the circuit court misconstrued *Dinkins* and therefore improperly assessed Savage's ineffective assistance claim. *Savage*, 2020 WL 356735, ¶¶ 27–28. (R-App. 105.) It remanded the case to assess deficient performance and prejudice under the court of appeals' interpretation of *Dinkins*. *Id.* ¶ 30. (R-App. 106.)

The circuit court's factual record includes substantial and uncontroverted evidence that Savage is not entitled to a *Dinkins* defense. The court of appeals erred by failing to examine that record for a factual underpinning that would support the circuit court's denial of Savage's plea withdrawal motion. A proper examination of the record should have led to an affirmance of the circuit court's decision, even if the court of appeals did not agree with its legal analysis.

A. Standard of review.

The application of law to facts is a question of law, and this Court reviews such questions *de novo*. *State v. Pitsch*, 124 Wis. 2d 628, 633–34, 369 N.W.2d 711 (1985).

B. Principles of law.

This Court has stated that an appellate court "will not reverse a [circuit] court decision though the reason for that decision may have been erroneously or inadequately expressed." *Mueller v. Mizia*, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967). The concern is with "the holding and not so much with the reasoning; if the holding is correct, it should be sustained, and this court may do so on a theory or

on reasoning not presented to the lower courts." *State v. Horn*, 139 Wis. 2d 473, 490–91, 407 N.W.2d 854 (1987).

As this Court explained, "an appellate court is concerned with whether a court decision being reviewed is correct, rather than with the reasoning employed by the circuit court. If the holding is correct, it should be sustained, and this court may do so on a theory or on reasoning not presented to the trial court." *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). Thus, an appellate court should not reverse a circuit court's ruling "if the ruling is correct and the record reveals a factual underpinning that would support the proper findings." *State v. Fishnick*, 127 Wis. 2d 247, 264, 378 N.W.2d 272 (1985).

C. The evidence in the record supported sustaining the circuit court's ruling on grounds that any deficient performance did not prejudice Savage.

The circuit court granted Savage a *Machner* hearing and made factual findings based on its determination of Savage's credibility and many other factors. (R. 45:64–70.) *See supra* at 11-14. In addition to the facts the court listed in its oral ruling, the record contained additional facts that supported its decision that Savage was not entitled to plea withdrawal on grounds of manifest injustice.

The record includes the document signed and initialed by Savage before his release from prison showing that he understood that his sex offender registration requirements included maintaining contact with *both* his probation agent and the sex offender registry. (R. 2:10.) The record contains his testimony that he cut off his GPS device, absconded from supervision, and stopped complying with his agent. (R. 45:48–49.) And the record contains the trial court's unfavorable credibility determination. (R. 45:66.) The

maximum penalty for the charge Savage faced was six years, and the State's sentencing recommendation in the plea agreement was for one-sixth of that (R. 2:1; 44:2.) Trial counsel testified about the DOC homeless registrant protocols and Savage's lack of compliance, and the circuit court determined that the testimony was highly credible. (R. 45:13, 25–26, 66.)

Instead of considering whether the trial court's decision that Savage had not shown a manifest injustice warranting plea withdrawal could be sustained on the facts cited by the circuit court as well as these additional facts and determinations, the court of appeals stated that the circuit court had misinterpreted *Dinkins*, and reversed and remanded for additional fact-finding, citing *Sholar*. *Savage*, 2020 WL 356735, ¶ 29. (R-App. 106.) This was error. *Sholar* simply stands for the proposition that an appellate court cannot decide without a *Machner* hearing that a defendant has satisfied either prong of the *Strickland* test. *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89. That was not the case here. There was a *Machner* hearing, and the factual issues were fully developed at that hearing.

Based on this Court's decisions in *Mueller*, *Horn*, *Baudhuin*, and *Fishnick*, the court of appeals should have examined the record and sustained the circuit court's decision to deny Savage's plea withdrawal motion.

CONCLUSION

Savage has not carried his burden to show that manifest injustice warrants plea withdrawal. He has not shown he was prejudiced by trial counsel's failure to advise him of the holding of *Dinkins* because he has not shown that but for his counsel's failure to do so, he would have gone to trial and his defense was likely to succeed. The court of appeals erred when it failed to sustain the circuit court's decision based on facts in the record that supported it.

Dated this 18th day of June 2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,952 words.

Dated this 18th day of June 2020.

Sonya Bice Levinson

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 18th day of June 2020.

Sonya Bice Levinson

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Appendix
State of Wisconsin v. George E. Savage
Case No. 2019AP90-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 first names and last initials 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.

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Dated this 18th day of June 2020.

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