IN THE

SUPREME COURT OF THE UNITED STATES

Case No._____

TRAVIS J. GUTTU,

Petitioner,

vs.

CHRISTOPHER BUESGEN,

Respondent,

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A - Decision of Seventh Circuit denying COA

Appendix B - Decision of U.S. District Court of Wisconsin

Appendix C - Decision of Wisconsin Court of Appeals

Appendix D - Warrant for threats to presiding judge

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 20, 2023
Decided January 24, 2023

Before

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2506

TRAVIS J. GUTTU,
Petitioner-Appellant,

v.

CHRIS S. BUESGEN,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 21-cv-600-wmc

William M. Conley,
Judge.

ORDER

Travis Guttu has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Guttu's motion to proceed in forma pauperis is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TRAVIS J. GUTTU,

Petitioner,

v.

CHRISTOPHER BUESGEN,

Respondent.

OPINION AND ORDER

21-cv-600-wmc

Travis J. Guttu, appearing *pro se*, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 as well as a memorandum in support. (Dkt. ##1, 7.) He challenges a June 2010 judgment of conviction entered in Brown County Circuit Court Case No. 09CF394 for one count each of second-degree sexual assault and aggravated battery. Guttu contends that he should be allowed to withdraw his pleas and proceed to trial for three reasons: (1) his plea to aggravated battery was not knowingly entered because the trial court did not ensure that Guttu sufficiently understood the elements of that charge; (2) trial counsel Attorney Reetz was ineffective in declining to pursue a theory concerning Guttu's motive for committing battery that Guttu wanted to use to establish his innocence of sexual assault and in persuading Guttu to sign a "fraudulent" plea deal; and (3) trial counsel Attorney DeBord was ineffective in failing to raise errors in the plea documents and Guttu's lack of awareness of Wis. Stat. ch. 980 ("Chapter 980") at the time of his plea to second-degree sexual assault as grounds for pre-sentencing plea withdrawal. (Dkt. ##1 at 5, 7-8; 7 at 13-14.)

The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 cases. However, the petition is untimely, and Guttu fails to make

a persuasive argument in his memorandum that he qualifies for equitable tolling or that he is actually innocent. Accordingly, the court must dismiss the petition.

OPINION

A state prisoner must file a federal habeas petition within one year of when the state court judgment became final. 28 U.S.C. § 2244(d)(1)(A). Generally, a state court judgment becomes final on the date that direct review has concluded, or on the date that the deadline for seeking direct review has expired. *Id.*

Based on the petition, memorandum, and Wisconsin state court records available online, petitioner pleaded no contest to one count of second-degree sexual assault and one count of aggravated battery on June 30, 2010. Petitioner then pursued postconviction relief, which the trial court denied on December 28, 2011. The Wisconsin Court of Appeals affirmed that decision, rejecting petitioner's arguments that he should be allowed to withdraw his plea: (1) to the sexual assault charge because Attorney DeBord was ineffective in failing to raise petitioner's alleged lack of knowledge about Chapter 980 at the time of the plea as a ground for pre-sentencing plea withdrawal; and (2) to the aggravated battery charge because the trial court allegedly failed to ensure that petitioner sufficiently understood the elements of that charge. *State v. Guttu*, 2013 WI App 1, ¶ 1, 345 Wis. 2d 398, 824 N.W.2d 928 (unpublished decision). The Wisconsin Supreme Court denied petitioner's petition for review on September 17, 2013, and he did not file a petition for certiorari in the United States Supreme Court.

Petitioner's one-year limitations period began running on December 16, 2013, 90 days after the Wisconsin Supreme Court denied review of his direct appeal. *Anderson v.*

Litscher, 281 F.3d 672, 674-75 (7th Cir. 2002) (one-year statute of limitations does not begin to run under § 2244(d)(1)(A) until expiration of 90-day period in which prisoner could have filed petition for writ of certiorari with United State Supreme Court). Because petitioner has not filed any motions for postconviction or other collateral review since December 2013 that would have tolled his habeas clock, his limitations period expired on or about December 16, 2014, and his petition was thus over six years late when he submitted it for mailing on or about September 16, 2021.

The petition is plainly untimely, and petitioner does not argue otherwise. Although an untimely petition may be salvaged if grounds exist to equitably toll, or pause, the running of the limitations period, equitable tolling is an extraordinary remedy that is rarely granted. *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir. 2008). The Supreme Court has explained that a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

In his memorandum, petitioner unpersuasively asserts that he was prevented from diligently pursuing his rights by "[e]xtraordinary circumstances." (Dkt. #7 at 4-5.) In support, he notes that he reached out to the Wisconsin Innocence Project after his direct appeal, which declined to take his case approximately a year later, but he did not pursue other postconviction relief in court until filing the petition in 2021. He argues that he could not be expected to know that he still had ways of challenging his convictions when neither his postconviction counsel nor the Wisconsin Innocence Project informed him of any additional, available steps to properly attack his convictions, and told him nothing

could be done. (*Id.* at 4.) However, "[l]ack of familiarity with the law . . . is not a circumstance that justifies equitable tolling." *Taylor v. Michael*, 724 F.3d 806, 811 (7th Cir. 2013); *see also Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling"). And as for the failure of any lawyer to inform petitioner, "[a] lawyer's ineptitude does not support equitable tolling" either. *Lee v. Cook Cnty.*, 635 F.3d 969, 973 (7th Cir. 2011); *see Cosmano v. Varga*, No. 16-cv-8704, 2017 WL 11318203, at *2 (N.D. Ill, Aug. 18, 2017) (rejecting as a ground for equitable tolling the argument that petitioner's attorneys did not inform him that he could file a habeas petition or that there was a one-year deadline).

Petitioner further notes that he can only use the law library for 45 minutes 3 times a week, or 117 hours per year, and conclusorily states that this is insufficient time to research exceptions to filing and procedural bars and prepare and file a petition within the one-year deadline. (Dkt. #7 at 4-5.) But petitioner does not also assert that law library time is the only time he could work on his petition, or that he otherwise did not have access to his legal materials. Nor does petitioner assert that he ever *tried* to use the library within the limitations period to investigate or pursue postconviction remedies or before meeting the inmate who allegedly helped him prepare his "late petition." (*Id.* at 5.)

More to the point, limited law library access is a circumstance most *pro se* petitioners face, and one the Seventh Circuit has held does not per se justify equitable tolling. *See Tucker*, 538 F.3d at 734-35 (lack of legal expertise and limited access to a law library, standing alone, are not grounds for equitable tolling); *see also Ademiju v. United States*, 999

F.3d 474, 478 (7th Cir. 2021) (subpar law library did not support equitable tolling of § 2255 petition); *cf. Socha v. Boughton*, 763 F.3d 674, 684-87 (7th Cir. 2014) (limited access to the law library *along with* administrative confinement, and the failure of former counsel to hand over the case file, was an extraordinary circumstance warranting equitable tolling). Here, petitioner adds that Covid-19 protocols "prevented virtually all access" to the law library "for over a year and half" (dkt. #7 at 5), which is more concerning, but the pandemic did not begin until well after petitioner's limitations period expired in 2014. In sum, petitioner has explained why he did not file a petition before September 2021, but he has not shown that "despite exercising reasonable diligence, [he] could not have learned the information he needed in order to file [a federal petition] on time." *Jones v. Hulik*, 449 F.3d 784, 789 (7th Cir. 2006).

That said, petitioner may also be able to overcome the one-year time limit by arguing for an equitable exception based on a claim of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "Actual innocence" means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To succeed, a petitioner must persuade the court "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995); *see also Perkins*, 569 U.S. at 327 (a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence). This is so even in a case such as petitioner's, where he was convicted pursuant to a plea. *See, e.g.*, *Bousley*, 523 U.S. at 623 (applying "actual innocence" test to case involving guilty plea); *Hanson v. Haines*, No. 13-cv-01145, 2014

WL 4825171, at *1-2 (E.D. Wis. Sept. 26, 2014) (discussing application of *Bousley* to § 2254 petitioner who pled no contest and dismissing petition as untimely); *cf. Taylor v. Powell*, 7 4th 920, 933 (10th Cir. 2021) (a petitioner invoking actual innocence as to a guilty plea "still has to prove his innocence of the charge to which he pleaded guilty"). This is a demanding standard, which permits review only in extraordinary cases. *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir. 2014).

Even construing petitioner's filings liberally, he does not meet this narrow, demanding exception. Indeed, petitioner does not present any new evidence, nor argue in any detail the factual record in support of his actual innocence of the crimes of conviction, beyond pointing to his conclusory assertion to the trial court that he has always maintained his innocence, and that no DNA was found on his sweatpants, and explaining a theory he wanted to present at trial to establish his innocence of sexual assault by admitting to battery, or at least by presenting evidence that could provide motive for battery. (Dkt. #7 at 2, 12-14.) Petitioner contends that he does not need to show it was more likely than not that no reasonable juror would have convicted him, because he never went to trial and is bringing a "procedural innocence" claim that his counsel was ineffective and his plea defective. (*Id.*. at 1-3.) That is not correct. As noted, courts have applied the *Schlup* standard in cases involving pleas. And while the Court in *Schlup* distinguished a substantive claim of actual innocence from a procedural one, a petitioner asserting innocence as a gateway still must support that claim with exculpatory evidence. *See Schlup*, 513 U.S. at 314-16, 329 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of

justice that would allow a habeas court to reach the merits of a barred claim"); *see also Perkins*, 569 U.S. at 386-87; *Arnold v. Dittmann*, 901 F.3d 830, 836-37 (7th Cir. 2018) ("A claim of actual innocence must be both credible and founded on new evidence;" and once a petitioner satisfies the actual innocence exception, he "must show that his conviction violates the Constitution, laws, or treaties of the United States" to obtain any habeas relief). Absent a showing of actual innocence, the court must dismiss the petition.[1]

The only remaining question is whether to grant petitioner a certificate of appealability. Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). For all the reasons just discussed, petitioner has not made such a showing. Therefore, a certificate of appealability will not issue.

[1] As for petitioner's related contention that his claims are not procedurally defaulted, the court does not reach that question.

ORDER

IT IS ORDERED that:

1) Petitioner Travis J. Guttu's petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 is DISMISSED as untimely.

2) No certificate of appealability shall issue. Petitioner may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Entered this 27th day of July, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

345 Wis.2d 398
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME.
THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent,
v.
Travis J. GUTTU, Defendant–Appellant.

Nos. 2012AP128–CR, 2012AP129–CR.
I
Nov. 29, 2012.

Appeals from an order of the circuit court for Brown County: William M. Atkinson, Judge. *Affirmed.*

Before LUNDSTEN, P.J., SHERMAN and BLANCHARD, JJ.

Opinion

¶ 1 BLANCHARD, J.

***1** Travis J. Guttu appeals a circuit court order denying his consolidated motions for postconviction relief from judgments convicting him of second-degree sexual assault, aggravated battery, and other offenses. Guttu argues that he should be allowed to withdraw his plea to the sexual assault charge because one of his attorneys was ineffective in failing to raise Guttu's alleged lack of knowledge of WIS. STAT. ch. 980 (2009–10)[1] ("Chapter 980") at the time of the plea as a ground for pre-sentencing plea withdrawal. Guttu separately argues that he should be allowed to withdraw his plea to the aggravated battery charge because his plea was not knowing, intelligent, and voluntary, based on the circuit court's alleged failure to ensure that Guttu sufficiently understood the elements of the charge. We reject these arguments and affirm the order.

BACKGROUND

¶ 2 Guttu entered no contest pleas to several charges, including the second-degree sexual assault and aggravated battery charges. At the time of his pleas, Guttu was represented by Attorney Brett Reetz.

¶ 3 Before Guttu was sentenced, he moved for plea withdrawal. The circuit court denied Guttu's motion after a hearing. During this phase of proceedings, Guttu was represented by Attorney Brett DeBord.

¶ 4 After sentencing, Guttu filed a postconviction motion, again seeking plea withdrawal. In this motion, Guttu argued for the first time that he should be allowed to withdraw his plea to the sexual assault charge because he had no knowledge, at the time he entered the plea to that charge, that he might potentially be committed under Chapter 980 ("Sexually Violent Person Commitments"), based in part on the sexual assault conviction. He claimed that, in moving for pre-sentencing plea withdrawal, Attorney DeBord was ineffective in failing to raise Guttu's alleged lack of awareness of Chapter 980 as a basis.[2] In addition, Guttu argued that his plea was not knowing, intelligent, and voluntary because the circuit court failed to ensure that Guttu understood the elements of the sexual assault charge and the aggravated battery charge.[3]

***2** ¶ 5 The circuit court held an evidentiary hearing on Guttu's motion. Attorney Reetz, Attorney DeBord, and Guttu each testified. At the close of the hearing, the court concluded that Attorney DeBord was not ineffective because DeBord was not required to "locate all issues available" and because Guttu failed to show prejudice. The court further concluded that Guttu understood the elements of the charges at the time of the plea and that Guttu's plea was therefore knowing, intelligent, and voluntary. Accordingly, the court denied Guttu's postconviction motion for plea withdrawal.

¶ 6 As indicated above, Guttu now appeals the order denying his postconviction motion. We reference additional facts as needed in our discussion below.

DISCUSSION

¶ 7 In the plea withdrawal context, courts distinguish between *Bangert*-type[4] and *Bentley*-type[5] motions. We need not explain all of the differences between the two types. It is sufficient for our purposes here to note that *Bangert*-type challenges generally involve an allegation that there was some defect in the plea colloquy, while *Bentley*-type challenges generally involve an allegation that the plea was defective on some other basis, such as ineffective assistance of counsel. *See State v. Howell,* 2007 WI 75, ¶ 74, 301 Wis.2d 350, 734 N.W.2d 48.

¶ 8 In this appeal, Guttu makes one of each type of challenge. First, Guttu argues that he should be allowed to withdraw his plea to the sexual assault charge because Attorney DeBord was ineffective

in failing to raise Guttu's alleged lack of awareness of Chapter 980 as a ground for pre-sentencing plea withdrawal on that charge. This is a *Bentley*-type challenge. Second, Guttu argues that he should be allowed to withdraw his plea to the aggravated battery charge because his plea to that charge was not knowing, intelligent, and voluntary, based on the circuit court's alleged failure to ensure that Guttu sufficiently understood the elements of that charge. This is a *Bangert*-type challenge. We address each in turn.

A. Sexual Assault Charge

¶ 9 In order to put Guttu's first argument in context, we review the differing standards for plea withdrawal motions made before and after sentencing:

> ***3** Withdrawal of a plea may occur either before sentencing, or after sentencing. When a defendant moves to withdraw a plea before sentencing, "a circuit court should 'freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.' " However, this rule should not be confused " 'with the rule for post-sentence withdrawal where the defendant must show the withdrawal is necessary to correct a manifest injustice.' " ....
>
> When a defendant moves to withdraw a plea after sentencing, the defendant "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.' " Here, the burden is on [the defendant] to prove that plea withdrawal is warranted because "the state's interest in finality of convictions requires a high standard of proof to disturb that plea." Therefore, in order to disturb the finality of an accepted plea, the defendant must show " 'a serious flaw in the fundamental integrity of the plea.' "

State v. Cain, 2012 WI 68, ¶¶ 24–25, 342 Wis.2d 1, 816 N.W.2d 177 (citations omitted).

¶ 10 Thus, the "fair and just reason" standard that applies to a motion made before sentencing is considerably less stringent than the "manifest injustice" standard that applies when the motion is made after sentencing. Among the circumstances that may constitute a manifest injustice is the circumstance in which the defendant received ineffective assistance of counsel. *Id.*, ¶ 26, 816 N.W.2d 177.

¶ 11 Guttu argues that it would be a manifest injustice to allow his plea to the sexual assault charge to stand because he received ineffective assistance of counsel in connection with that plea. More specifically, as already stated, Guttu argues that he received ineffective assistance of counsel because, in moving for plea withdrawal before sentencing, Attorney DeBord failed to raise Guttu's alleged lack of awareness of Chapter 980 as a basis.

¶ 12 In order to address Guttu's argument, and the State's response, we first summarize two opinions of this court: *State v. Myers*, 199 Wis.2d 391, 544 N.W.2d 609 (Ct.App.1996), and *State v. Nelson*, 2005 WI App 113, 282 Wis.2d 502, 701 N.W.2d 32.

¶ 13 In *Myers*, the defendant sought to withdraw his plea after sentencing on the ground that the circuit court had not informed him at the time of his plea that his sexual assault conviction could lead to a Chapter 980 commitment. *Myers*, 199 Wis.2d at 393–94, 544 N.W.2d 609. We concluded that the potential for a future Chapter 980 commitment is a collateral consequence of a plea and that the defendant did not need to have "knowledge of the potential for a future chapter 980 commitment in order to make his plea knowing and voluntary." *Id.* at 394–95, 544 N.W.2d 609. The basis for this decision was that any potential commitment was contingent on a future commitment hearing. *See id.* While the underlying conviction could serve as a predicate offense for, and therefore an essential element of, a potential commitment, the conviction itself would not trigger commitment. *See id.*

***4** ¶ 14 In *Nelson*, the defendant entered guilty pleas to charges that included sexual assault. *See Nelson*, 282 Wis.2d 502, ¶ 5, 701 N.W.2d 32. The defendant subsequently changed attorneys and, prior to sentencing, the new attorney filed a motion seeking plea withdrawal, asserting that the defendant's previous attorney neglected to advise the defendant that the conviction resulting from the defendant's plea could provide the predicate offense for a Chapter 980 commitment. *Id.*, ¶¶ 5–6. The circuit court concluded that the defendant established a fair and just reason for pre-sentencing plea withdrawal, but denied plea withdrawal on the ground that withdrawal would be prejudicial to the State. *Id.*, ¶ 6. On appeal, we agreed with the circuit court that the defendant had shown a fair and just reason:

> Just like the lack of knowledge as to the sex offender registration requirement is a fair and just reason to withdraw one's plea, so too is the lack of knowledge that one is now eligible for a Chapter 980 commitment a fair and just reason. In fact, eligibility for a Chapter 980 commitment has the potential for far greater consequences than registering as a sex offender. Sex offender registration merely centralizes information already in the public domain. A Chapter 980 commitment, however, could be lifelong.

Id., ¶ 15. However, we disagreed with the circuit court as to prejudice, concluding that the State failed to show that plea withdrawal would result in substantial prejudice to the State. *Id.*, ¶ 22. We therefore reversed and remanded so that the defendant could withdraw his pleas to the sexual assault counts. *Id.*, ¶¶ 3, 22, 25.

¶ 15 In *Nelson,* we distinguished *Myers* as a case in which plea withdrawal was sought "after sentencing in a postconviction motion and, thus, was subject to a different and more stringent test." *Id.,* ¶ 16 n. 3, 544 N.W.2d 609. We did not elucidate further.

¶ 16 Guttu contends that *Myers* is distinguishable from his case because, among other reasons, *Myers* involved the *court's* failure to provide information and did not involve the question of ineffective assistance of counsel. In contrast, Guttu argues here that Attorney DeBord was ineffective in failing to raise Guttu's alleged lack of Chapter 980 knowledge as a ground under *Nelson* for pre-sentencing plea withdrawal.

***5** ¶ 17 The State argues, in part, that Guttu's case is not materially different from *Myers.* The State does not, however, develop this part of its argument in significant detail. The State concedes that, "under *Nelson,* a defendant's lack of knowledge about Chapter 980 provides a fair and just reason for allowing the defendant to withdraw his plea prior to sentencing."

¶ 18 We will assume, without deciding, that *Myers* does not preclude Guttu's ineffective assistance of counsel claim. Nonetheless, the question remains whether Guttu is correct that, given *Nelson,* Attorney DeBord was ineffective. We conclude for the reasons that follow that the circuit court correctly determined that Guttu fails to show prejudice, and therefore Guttu fails to show ineffective assistance of counsel.

1. Ineffective Assistance of Counsel Standards

¶ 19 To prevail on an ineffective assistance of counsel claim, "a defendant must demonstrate that (1) counsel's performance was deficient, and (2) the deficiency was prejudicial." *State v. Harbor,* 2011 WI 28, ¶ 67, 333 Wis.2d 53, 797 N.W.2d 828. "We need not address both components of the inquiry if the defendant fails to make an adequate showing on one." *Id.*

¶ 20 To show that the performance was deficient, a defendant must show that counsel made errors so serious that counsel was not functioning as the effective "counsel" guaranteed by the Sixth Amendment. *State v. Balliette,* 2011 WI 79, ¶ 64, 336 Wis.2d 358, 805 N.W.2d 334. One example is when a defendant shows that counsel was "objectively unreasonable" in "failing to find arguable issues." *See id.*

¶ 21 To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Harbor,* 333 Wis.2d 53, ¶ 72, 797 N.W.2d 828 (citation omitted).

¶ 22 " '[B]oth the performance and prejudice components ... are mixed questions of law and fact.' " *State v. Pitsch,* 124 Wis.2d 628, 633–34, 369 N.W.2d 711 (1985) (citation omitted). The circuit

court's findings of fact will not be overturned unless clearly erroneous. *State v. Johnson,* 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). However, whether the attorney's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review de novo. *Id.* at 128, 449 N.W.2d 845.

2. Application of Standards

***6** ¶ 23 As indicated above, the circuit court concluded that Attorney DeBord's performance in moving for pre-sentence plea withdrawal was not deficient because, in the circuit court's words, DeBord was not required to "locate all issues available." The court also concluded, without further explanation, that Guttu failed to show prejudice.

¶ 24 We will assume, without deciding, that Attorney DeBord's performance was deficient. We nonetheless conclude for the following reasons that Guttu fails to show prejudice.

¶ 25 Guttu's prejudice argument is a nuanced one that is based on *Nelson* and on the differing standards for pre- and post-sentencing plea withdrawal. Guttu summarizes his argument this way:

> [H]ad Attorney DeBord argued Chapter 980 and *Nelson* during the presentencing hearing, Guttu would not now be left with arguing manifest injustice. Rather, had Attorney DeBord argued Chapter 980 and *Nelson,* and had the trial court still denied the presentence motion, this appellate court's standard of review of the trial court would be as it was in *Nelson.* It would have been an easier standard of review than the present manifest injustice standard.

Similarly, Guttu summarizes his argument in another portion of his briefing as follows:

> [H]ad Attorney DeBord raised the Chapter 980 issue, even if the trial court had still denied the [pre-sentencing] plea withdrawal motion, at least Guttu could have positioned himself as the defendant in *Nelson* did. By Attorney DeBord not making the argument, Guttu now must allege[ ] ineffective assistance of counsel. Therefore, Guttu was prejudiced by Attorney DeBord.

In short, Guttu's argument is that Attorney DeBord's failure to raise the Chapter 980 issue under *Nelson* before sentencing put Guttu in a much weaker position to seek plea withdrawal after sentencing.

¶ 26 While Guttu's argument has some superficial attraction, it is defective when viewed under the correct test for prejudice.

¶ 27 Guttu's argument frames the test incorrectly. The test is not, as Guttu's argument suggests, whether the defendant is in a comparatively weaker position because of his counsel's errors. Undoubtedly, that is often the case, including when, as here, counsel's performance results in the forfeiture of direct review of an issue. However, we do not assume prejudice in such circumstances. The test is as stated above: whether "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different.*" *Harbor,* 333 Wis.2d 53, ¶ 72, 797 N.W.2d 828 (emphasis added). Thus, what Guttu needed to show is that there is a reasonable probability that, but for Attorney DeBord's failure to raise the Chapter 980 issue before sentencing, Guttu would have been permitted to withdraw his plea to the sexual assault charge. We conclude that Guttu failed to carry his burden of proving a reasonable probability that, had Attorney DeBord raised Guttu's alleged lack of awareness of Chapter 980 before sentencing, Guttu would have been allowed to withdraw his plea to the sexual assault charge.

*7 ¶ 28 Applying the correct test, Guttu's argument is defective because it is based on a factual premise that we reject based on our reading of the record, namely the premise that the record shows that Guttu lacked knowledge of Chapter 980 when he entered his plea. [6]

¶ 29 It is true that Guttu averred and testified as part of his postconviction motion that he was not aware of Chapter 980 when he entered his plea. It is also true that the circuit court made no express finding as to whether it believed these assertions. However, Guttu fails to provide any reasonable interpretation of the court's prejudice determination. We conclude that the most likely interpretation, as we explain below, is that the court made a credibility determination that Guttu did not aver or testify truthfully in claiming that he was ignorant on this topic at the time of the plea. *See State v. Leutenegger,* 2004 WI App 127, ¶ 30 n. 7, 275 Wis.2d 512, 685 N.W.2d 536 (We "assume facts, reasonably inferable from the record, in a manner that supports the trial judge's decision.").

¶ 30 And, as to that determination, as discussed further below, it is evident to us that the circuit court had a sound basis to discredit Guttu's assertions of ignorance regarding the potential for Chapter 980 commitment. We therefore agree with the circuit court that Guttu failed to show prejudice.

¶ 31 In reaching this conclusion, we rely in particular on the record of what occurred during Guttu's pre-sentencing plea withdrawal hearing addressing other, related issues. There, the circuit court found that Guttu lacked credibility on a closely related point, namely Guttu's claim that he did not know about the sex offender registry, or at least had not discussed the registry with his attorney before entering his plea. [7] The court made this finding based, in part, on a further finding that Guttu's case had been pending for a long time and that Guttu had shown a high level of involvement in his case, "discussing and ... digesting every bit of law and fact" relating to it.

*8 ¶ 32 The record of postconviction proceedings further supports our conclusion that the circuit court discredited Guttu's claim that he lacked knowledge of the potential for Chapter 980 commitment. Attorney Reetz's postconviction affidavit and testimony showed that, although Reetz had no specific recollection of or record of discussing Chapter 980 with Guttu, it was Reetz's customary practice to advise clients of potential Chapter 980 consequences when they pled to offenses that could constitute predicate offenses for a Chapter 980 commitment.

¶ 33 Further, Guttu's affidavit on the topic suggests a credibility problem on its face. Specifically, Guttu averred that, at the prison meeting where he first learned of Chapter 980, *not one* of the fourteen to seventeen inmates that were present had ever heard of civil commitment under Chapter 980, and that the inmates all "gasped" when informed of it. Considered alone, Guttu's highly unlikely account might not undermine his ability to demonstrate prejudice. However, considered in combination with the other factors we list, it supports the circuit court's conclusion that Guttu failed to show prejudice and our conclusion that the court discredited Guttu's claim that he was unaware of the potential for Chapter 980 commitment.

¶ 34 Even Guttu's postconviction counsel recognized Guttu's credibility problem on the Chapter 980 issue, and could do little to rehabilitate him. Specifically, during the postconviction hearing, counsel addressed the topic during examination of Guttu as follows:

> Q.... Well, the Court found at the [presentencing plea] withdrawal hearing that [the court] basically didn't believe you. [The court] said that [it] thought you did know what the sex registry program was, correct?
>
> A Correct.
>
> Q So, how—what's the best way for us to believe you today that you didn't know about 980? You knew about the registry, but you didn't know about Chapter 980. Why is that?
>
> A I've never heard that in the news or anywhere else.

Guttu's response, if viewed in isolation, may have provided a plausible explanation for Guttu's claim that he lacked awareness of Chapter 980, but it was an unlikely one, given all the other information in the record.

¶ 35 During closing argument to the postconviction court, defense counsel acknowledged, "Now, the Court did find ... in the plea withdrawal hearing that the Court did not believe Mr. Guttu as to his representation that he did not know of the sex registration law. I would ask the Court to not automatically find that he would have known of 980 also." Thus, counsel's argument all but conceded that there was an ample basis for the circuit court to reject Guttu's claim of ignorance, and simply urged the court not to do so "automatically."

*9 ¶ 36 In sum, the record supports the circuit court's implicit finding that Guttu was not credible in asserting that he did not know about Chapter 980 when he entered his plea. Therefore, we agree with the circuit court that Guttu fails to carry his burden of showing prejudice based on Attorney DeBord's failure to raise Guttu's alleged lack of knowledge as a ground for pre-sentencing plea withdrawal under *Nelson*. Guttu thus has not shown that he should be allowed to withdraw his plea to the sexual assault charge based on ineffective assistance of counsel in connection with that charge. [8]

B. Aggravated Battery Charge

*10 ¶ 37 We turn to Guttu's argument that his plea to the aggravated battery charge was not knowing, intelligent, and voluntary. Guttu makes this argument under *Bangert*, meaning that Guttu alleges that his plea was not knowing, intelligent, and voluntary because of a defect in the plea colloquy. *See Howell*, 301 Wis.2d 350, ¶ 74, 734 N.W.2d 48.

¶ 38 In a *Bangert* motion, the procedure is as follows.

> If the motion establishes a prima facie violation of WIS. STAT. § 971.08 or other court-mandated duties and makes the requisite allegations [that the defendant did not know or understand information that should have been provided at the plea hearing], the court must hold a postconviction evidentiary hearing at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy.... In meeting its burden, the state may rely "on the totality of the evidence, much of which will be found outside the plea hearing record." For example, the state may present the testimony of the defendant and defense counsel to establish the defendant's understanding. The state may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden.

State v. Brown, 2006 WI 100, ¶ 40, 293 Wis.2d 594, 716 N.W.2d 906 (citations and footnotes omitted).

¶ 39 Guttu argues that his plea to the aggravated battery charge was not knowing, intelligent, and voluntary because the circuit court failed to determine that Guttu entered the plea with a sufficient understanding of the elements of that charge. He cites WIS. STAT. § 971.08(1)(a), which provides, in part, that the court must determine that a plea is made "with understanding of the nature of the charge and the potential punishment if convicted." [9]

*11 ¶ 40 As indicated above, the circuit court held an evidentiary hearing and concluded that Guttu's plea to the aggravated battery charge was knowing, intelligent, and voluntary. We agree and we conclude that, whether or not Guttu met his initial burdens entitling him to that hearing, the

State in any case proved by clear and convincing evidence based on the entire record that Guttu's plea was knowing, intelligent, and voluntary.

¶ 41 In deciding whether a defendant's plea is knowing, intelligent, and voluntary, we accept the circuit court's findings of historical fact unless they are clearly erroneous. *State v. Hoppe*, 2009 WI 41, ¶ 45, 317 Wis.2d 161, 765 N.W.2d 794. However, we review de novo the question of whether those facts show that the plea was knowing, intelligent, and voluntary. *Id.*

¶ 42 Guttu's argument is based on errors in the plea questionnaire and waiver form. He points to three: (1) although the top portion of page one of the form correctly states "Aggravated Battery w/ Intent," the bottom portion of that page shows the lesser crime of "Substantial Battery;" (2) the form references an "attached sheet," and the attached sheet is for a misdemeanor battery offense; and (3) page one of the form shows the maximum penalty for a substantial battery conviction.

¶ 43 The State concedes that the form contains errors. The State argues, however, that other portions of the record establish that Guttu understood that he was pleading to aggravated battery, understood the elements of aggravated battery, and understood the maximum penalty for aggravated battery.

¶ 44 The errors in the form are unfortunate and, especially in combination, unsettling. Nonetheless, we agree with the State for four reasons.

¶ 45 First, as the State points out, the circuit court received the form at the beginning of the plea hearing, and the ensuing colloquy supports a conclusion that, despite the form's errors, Guttu understood that he was pleading to aggravated battery, understood the elements, and understood the maximum penalty. During the pertinent portion of the colloquy, a question arose as to whether Guttu had an opportunity to read the final amended complaint. Guttu stated, "But the one that was amended to-increasing the charge and adding the charge, *increased it from substantial to aggravated* ... I have not read that Criminal Complaint, the Amended Criminal Complaint." (Emphasis added.) In response, the court read to Guttu from the amended information, which indicated to Guttu the elements of aggravated battery and the maximum penalty:

> [T]he above-named defendant, on or about Monday, March 23, 2009 ... did cause great bodily harm to [the alleged victim] by an act done with intent to cause great bodily harm to that person, contrary to Section 940.19(5) of the Wisconsin Statutes, a Class E felony, and upon conviction, may be fined not more than $50,000 or imprisoned not more than 15 years or both.

*12 At this point in the colloquy, neither Guttu nor his counsel indicated any confusion or objection regarding the aggravated battery charge.

¶ 46 At another point in the colloquy, the court and Guttu had a second exchange regarding the aggravated battery charge and the maximum penalty:

> THE COURT:.... I may have to apologize if I am being redundant, Mr. Guttu. You understand the maximum penalty *for the Aggravated Battery* is $50,000 or 15 years or both?
>
> TRAVIS GUTTU: Yes.

(Emphasis added.) Again, neither Guttu nor his counsel indicated any confusion or objection regarding the aggravated battery charge.

¶ 47 Second, the circuit court made a finding of fact at the postconviction hearing that Attorney Reetz reviewed the pattern jury instructions for aggravated battery with Guttu before Guttu entered his plea. This finding is supported by evidence in the record, including the following: Attorney Reetz's testimony; a copy of the pattern jury instructions in the record, located near the plea questionnaire and waiver form; the court's recollection that it had directed court staff to provide the jury instructions to Attorney Reetz at the time of Guttu's plea; and the court's belief based on its prior experience that the proximity of the pattern jury instructions and plea form in the record showed that Attorney Reetz had reviewed the instructions with Guttu before submitting them as a packet to the court. [10]

¶ 48 Guttu asserts that "it is not plausible" that Attorney Reetz could have gone over the correct elements using the correct jury instructions while at the same time providing the circuit court with the error-filled form. We disagree. The circuit court could reasonably find that Attorney Reetz reviewed the correct jury instructions with Guttu even if Attorney Reetz made errors on the form.

¶ 49 Third, to the extent Guttu averred or testified that he did not understand that he was pleading to aggravated battery, did not understand the elements of aggravated battery, or did not understand the maximum penalty, it is apparent that the circuit court discredited Guttu's averments and testimony, at least implicitly. [11] This court may not second-guess the court's credibility determinations. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647 (1979).

***13** ¶ 50 Fourth, Guttu points to nothing in the record suggesting that he had a reduced capacity for understanding, as did the defendant in *Brown*, the primary case on which Guttu relies. *See Brown*, 293 Wis.2d 594, ¶ 9, 716 N.W.2d 906 (defendant was "illiterate and had been diagnosed with reading and mathematics disorders," and attorney representing defendant stated that defendant was "as deficient [in reading] as anybody I've ever represented in 20–some years"). Nor is *Brown* otherwise analogous. *See id.*, ¶¶ 11–12, 53, 58, 79 (concluding that circuit court must hold hearing on plea withdrawal when there was no plea questionnaire and waiver form, the court never addressed any elements of the crimes to which the defendant pled, and the defendant adequately alleged that he did not understand the nature of the charges).

¶ 51 Taking all of these considerations together, we are satisfied that the State showed by clear and convincing evidence that Guttu's plea to the aggravated battery charge was knowing, intelligent, and voluntary.

CONCLUSION

¶ 52 In sum, we affirm the circuit court order denying Guttu's consolidated motions for postconviction relief.

Order affirmed.

Not recommended for publication in the official reports.

All Citations

345 Wis.2d 398, 824 N.W.2d 928 (Table), 2012 WL 5949512, 2013 WI App 1

Footnotes

1 All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

2 It is undisputed that Guttu's conviction on the second-degree sexual assault charge could serve as a predicate offense for a Chapter 980 commitment.

3 In this appeal, Guttu has abandoned his argument that the circuit court failed to ensure that he understood the elements of the sexual assault charge, but, as discussed in the text below, he renews his argument that the court failed to ensure that he understood the elements of the aggravated battery charge.

4 *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

5 *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996).

6 Guttu argues that, at minimum, we should remand for additional fact finding because the circuit court failed to make an express finding as to whether Guttu knew about Chapter 980 when he entered his plea. The State takes the position that, if we otherwise agree with Guttu's argument based on *State v. Nelson*, 2005 WI App 113, 282 Wis.2d 502, 701 N.W.2d 32, such a remand would be appropriate. However, we conclude for the reasons given in the text that remand would not be appropriate because Guttu fails to show prejudice.

7 Under WIS. STAT. § 301.45, Wisconsin's sex offender registration statute, offenders may be required to register with the Department of Corrections as sex offenders, based on convictions for defined offenses, and may be prosecuted for failure to register.

8 We need not and do not rely on the State's argument that Guttu's ineffective assistance of counsel claim fails because Guttu did not sufficiently allege or prove that he would not have entered his plea to the sexual assault charge if he had known about Chapter 980 at the time. The State bases this argument on a statement in *Bentley*. In *Bentley*, the court stated that, "[i]n order to satisfy the prejudice prong of the [ineffective assistance of counsel] test, the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* at 312, 548 N.W.2d 50 (emphasis added) (citation omitted).

> We do not understand the State's reliance on this statement in *Bentley*. In *Bentley*, the ineffective assistance of counsel claim pertained to counsel's failure to provide correct information regarding the defendant's parole eligibility date *before* the defendant entered his plea. *See id.* at 307, 315, 548 N.W.2d 50. Here, in contrast, Guttu has been careful to explain that he is not challenging his plea counsel's (Attorney Reetz's) failure to provide information about Chapter 980. Guttu's claim is that his subsequent counsel (Attorney DeBord) failed to raise Guttu's alleged lack of Chapter 980 knowledge as a ground for pre-sentencing plea withdrawal under *Nelson*. Thus, so far as we can tell, it makes no sense to ask, in the words of *Bentley*, whether "there is a reasonable probability that, but for [Attorney DeBord]'s errors, [Guttu] would not have pleaded guilty," because by the time Attorney DeBord was acting as Guttu's attorney, Guttu had already entered his plea.

9 Guttu also cites WIS. STAT. § 971.08(1)(b), which provides that the circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." However, Guttu does not develop any separate argument involving § 971.08(1)(b) and we therefore consider § 971.08(1)(b) no further. *See State v. Pettit*, 171 Wis.2d 627, 646–47, 492 N.W.2d 633 (Ct.App.1992) (court of appeals need not address insufficiently developed arguments).

10 Guttu does not argue that the circuit court could not rely, at least in part, on its recollection and prior experience. We take this as a concession by Guttu that the court could consider its recollection and prior experience.

11 The relevant portions of Guttu's affidavits and testimony are not clear in these respects. What is clear, however, is that the court did not credit Guttu on the most pertinent points. For example, Guttu averred that Attorney Reetz failed to review the jury instructions for aggravated battery with him, but the court clearly rejected that averment when it made a finding of fact to the contrary based on other evidence. *See* ¶ 47, *supra*. Guttu also claimed in both his affidavit and in testimony that he was unable to pay attention to what the circuit court was saying during the plea colloquy because he was upset and confused by various aspects of his plea and plea hearing, but it is apparent that the circuit court must have implicitly rejected that claim in concluding that Guttu's plea was knowing, intelligent, and voluntary.

End of Document

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TRAVIS J. GUTTU,

Petitioner,

v.

CHRISTOPHER BUESGEN,

Respondent.

ORDER

21-cv-600-wmc

On July 27, 2022, the court denied petitioner Travis J. Guttu's petition for a writ of habeas corpus under 28 U.S.C. § 2254 and denied him a certificate of appealability. (Dkt. #9.) Now, Guttu has filed a notice of appeal and a motion for leave to proceed *in forma pauperis* on appeal. (Dkt. ##14, 16.) Under Fed. R. App. P. 24(a)(3), a district court may allow an appellant to proceed without prepaying the appellate filing fee if it finds that the appellant is indigent and that the appellant filed the appeal in good faith. Although it appears from the materials that Guttu submitted that he is unable to pay the full filing fee, the motion will be denied because Guttu's appeal is not taken in good faith.

The court declined to issue a certificate of appealability in this case, but the Seventh Circuit has warned district courts against conflating the good faith and certificate of appealability standards "because the standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding." *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000). "To determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Id.*

The court dismissed the petition because Guttu failed to show good cause for his six-year delay in filing a habeas petition. He also failed to substantiate that he is actually innocent. Having reviewed Guttu's motion and the order of dismissal, the court concludes that no reasonable person could suppose that his appeal has some merit. Although the court does not conclude that Guttu is motivated by any ill will, the court certifies that Guttu's appeal is not taken in good faith for purposes of Fed. R. App. P. 24(a)(3). Accordingly, Guttu cannot proceed with his appeal without prepaying the $505 filing fee unless the court of appeals gives him permission to do so.

ORDER

IT IS ORDERED that:

1) Petitioner Travis J. Guttu's request for leave to proceed *in forma pauperis* on appeal (dkt. #16) is DENIED because the court certifies that his appeal is not taken in good faith.

2) Guttu may appeal this decision under Fed. R. App. P. 24(a)(5) by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, United States Court of Appeals for the Seventh Circuit, within 30 days of the date of this order. With that motion, he must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), along with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Guttu should be aware that he must file these documents in addition to the notice of appeal he has filed previously.

Entered this 12th day of September, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

APPENDIX D

- Original -

State of Wisconsin **Circuit Court** 2 **Brown County**

STATE OF WISCONSIN

-vs- Plaintiff,

DA Case No.: 2010BR002289
Assigned DA/ADA: David L. Lasee
Agency Case No.: BCSD1011462
Court Case No.: 2010CF 351

Travis J Guttu
2955 Brookview Drive
Green Bay, WI 54313
DOB: 09/19/1982
Sex/Race: M/W
Eye Color: Gray
Hair Color: Brown
Height: 6 ft 1 in
Weight: 150 lbs
Alias:

FILED
MAR 26 2010
CLERK OF COURTS
BROWN COUNTY, WI

WARRANT

Defendant,

THE STATE OF WISCONSIN TO ANY LAW ENFORCEMENT OFFICER:

A complaint, a copy of which is attached, having been made before me accusing the defendant of committing the crime(s) of:

THE CRIME(S) OF:	DATE OF VIOLATION:	CONTRARY TO WIS. STATUTE(S).:
Stalking	September 2009	940.32(2)
Battery or Threat to Judge	through March 2010	940.203(2)
Bailjumping-Felony	03/17/2010	946.49(1)(b)
Bailjumping-Felony	03/25/2010	946.49(1)(b)
	03/25/2010	

And having found that probable cause exists that such violation was committed by the defendant, you are, therefore, commanded to arrest the defendant and bring him before me, or if I am not available, before some other judge of this county.

Date: March 26, 2010

Lawrence Dugdale
~~Circuit Court Judge~~/Court Commissioner

EXTRADITION: YES: XX NO:
ENTER: Wisconsin Only: Nationwide: XX Adjoining Counties/States:

(1) 3/26/2010