

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 04-2658-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

JEREMY K. MORSE,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM THE JUDGEMENT
OF CONVICTION ENTERED IN MILWAUKEE
COUNTY CIRCUIT COURT, THE HONORABLE
RICHARD J. SANKOVITZ, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

- I. MR. MORSE'S REQUEST TO WITHDRAW HIS PLEA WAS NOT PREVIOUSLY LITIGATED BEFORE THIS COURT AND SHOULD BE CONSIDERED.

Mr. Morse has moved to withdraw his plea virtually from the moment he entered it, based on various grounds (14; 15; 29; 42; 54; 56; 57). When represented by Appellate Counsel Henak, Mr. Morse moved to

withdraw his plea because it was not knowingly, intelligently and voluntarily made because he did not understand the implications of a no contest plea and he requested resentencing (58). The portion of the motion seeking to withdraw his plea was denied by Judge Hansher in a written decision dated September 18, 2002 (20); however, Mr. Morse's original sentence was eventually vacated (30).

After resentencing, Mr. Morse was appointed undersigned counsel, who, among other things, moved the trial court to withdraw his plea because it was not knowingly, intelligently and voluntarily made (42:13-16). Judge Hansher again denied Mr. Morse's motion, this time in a written decision dated September 27, 2004 (43).

The state argues that the Court should ignore Mr. Morse's request to withdraw his plea because it was previously litigated and relies on *State v. Witkowski*, 163 Wis.2d 985, 473 N.W.2d 512 (Ct. App. 1991) (*Witkowski II*) in support. The state's reliance is misplaced and Mr. Morse is not relitigating the issue. His argument for withdrawal of his no contest plea should be considered.

A. *State v. Witkowski*

Gerald Witkowski was convicted of attempted armed robbery and directly appealed his conviction to the court of appeals. *See State v. Witkowski*, 143 Wis.2d 216, 420 N.W.2d 420 (Ct. App. 1988) (*Witkowski I*). The sole issue in *Witkowski I* was "whether a determination that a robbery victim reasonably believed the robber to be armed may be made on the basis of the robber's verbal representations alone, unaccompanied by any physical gestures or other visual evidence of the weapon's existence..." *Id.* The *Witkowski* court answered this question affirmatively and upheld Witkowski's conviction. *Id. See also Witkowski II*, 163 Wis. 2d 985, 987, 473 N.W.2d 512 (1991).

Witkowski later brought a motion under sec. 974.06, Stats., arguing that the evidence was insufficient to sustain his conviction because the case was submitted to the jury on the theory that he had a weapon when he threatened the bartender when in fact he never possessed a weapon. *Witkowski II*, 163 Wis.2d at 987.

This court again affirmed Witkowski's conviction holding, in part, that "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *Witkowski II*, 163 Wis. 2d at 990. The court had ruled on the issue already and Witkowski was not entitled to bring the same issue before the same court by merely using a different vehicle. *Id.*

Witkowski II addresses relitigating issues before brought before the Court of Appeals in both a direct appeal and through a sec. 974.06, Stats., motion. It does not apply to the instant case. This is the first time Mr. Morse's case has been brought before this Court. As a result, the issue has never been litigated. The *Witkowski II* court's reference to a "subsequent postconviction proceeding" refers to a sec. 974.06 , motion, not a sec. 809.30 postconviction motion used in a direct appeal. *Id.* at 990. Mr. Morse's argument for withdrawing his plea should be considered as *Witkowski II* does not apply.

II. THE TAPED JAIL CONVERSATIONS AND BLOOD TRAIL EVIDENCE MEETS THE TEST FOR NEWLY DISCOVERED EVIDENCE.

The taped conversations between inmate Joel Rhodes and others discussing Mr. Morse taking the fall for someone else were recorded after Mr. Morse pleaded no contest (42:35-36). The tapes were first turned over to Attorney Backes, who was appointed to represent Mr. Morse after he was ordered resentenced.

During the first conversation, recorded June 6, 2001, an inmate says that "if Jeremy is dumb enough to admit he did it he needs to be in jail." (42:35). The second recorded conversation took place the next day, June 12, 2001. The tape says "Lying Ass Chubs-How could you betray the family. You did the crime, do the time." However, the transcript has Mr. Morse's name listed rather than Chubs. The transcript of the recording is inaccurate. (42:36) The testimony of Joel Rhodes, who the state theorizes ordered the crime, would support Mr. Morse's claim of innocence, and explain the taped conversations.


Mr. Morse has tried to withdraw his plea virtually since the day he entered it, claiming his innocence. The tapes support Mr. Morse's claims of innocence and meet the test for newly discovered evidence as laid out in his original brief. The court that convicted Mr. Morse was erroneously deprived of knowledge of the tape recordings discussing Mr. Morse's case. He should have the opportunity to present them and evidence in support of their credibility. As a result, a new trial is warranted based on this newly discovered evidence and in the interests of justice.

CONCLUSION

For these reasons, as well as for those in his original brief, Mr. Morse respectfully submits that the circuit court erred in denying his postconviction motion. Mr. Morse requests that this court reverse the order of the circuit court and order vacation of his conviction and withdrawal of his plea.

Dated at Milwaukee, Wisconsin, this 14th day of
March 2005.

Respectfully submitted,


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CERTIFICATION

I certify that this brief meets the form and length requirements of Wis. Stat. §§ (Rules) 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points and maximum 60 characters per line. The text is 13-point type and length of the brief is 1,306 words.

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