STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2011AP001467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONYIL LEEITON ANDERSON, SR,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and the Order Denying Post-Conviction Relief Entered in the Circuit Court for Rock County, the Honorable James P. Daley Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Circuit Court Erred at the Trial in Instructing the Jury that a Mental Responsibility Defense, Wis. Stat. § 971.15(1), Cannot Be Sustained by Evidence that Anderson's Temporary Mental State Was Brought Into Existence, in Part, by His Lawful Use of Prescribed Medicine.

A. The relevant statute, the applicable general principles of law and the standards of appellate review.

The state does not dispute Anderson's general summary of the applicable general principles of law and the standards of appellate review. (respondent's brief, generally).

In particular, the state does not disagree that the issue of mental responsibility is a "policy question," ***Gibson v. State***, 55 Wis. 2d 110, 116, 197 N.W.2d 813 (1972), or a "moral issue," ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963), ***State v. Esser***, 16 Wis. 2d 567, 609, 115 N.W.2d 505 (1962) (Currie, J., dissenting in part), as to whether "society cannot, in good conscience, hold [the accused] responsible for the conduct as a crime." ***State v. Shoffner***, 31 Wis. 2d 413, 419, 143 N.W.2d 458 (1966); ***State v. Esser***, *supra*, at 585. (respondent's brief, generally).

B. The jury instructions failed to distinguish between the lawful use of prescribed medicine and the use of illegal drugs, and failed to distinguish between the reasonable consumption of alcohol and the excessive consumption of alcohol in combination with prescribed medicine.

The state has implicitly waived all argument on the merits with respect to the legal correctness of the jury instructions, presumably as a matter of strategy. (respondent's brief, at 6-9).[1]

Instead, the Attorney General contends only that Anderson's appellate legal arguments were waived because he did not present the same justifications for his position in the trial court. (respondent's brief, at 6-9).

However, the state's omnipresent waiver claim fails in this case for three different reasons.

First, the state is estopped from raising a waiver issue by virtue of the prosecutor's own conduct, and the trial court's decision, at the post-conviction motion hearing. See ***State v. Petty***, 201 Wis. 2d 337, 347-48, 548 N.W.2d 817 (1996) ("The equitable doctrine of judicial estoppel,. . . . precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position."); ***State v. Dziuba***, 148 Wis. 2d 108, 115, 435 N.W.2d 258 (1989) (the doctrine of equitable estoppel bars a

[1] The court of appeals has stated that it cannot act as both an advocate for the state and an impartial adjudicator under such circumstances. ***State v. Longcore***, 226 Wis. 2d 1, 10, 593 N.W.2d 412 (Ct. App. 1999), *aff'd* 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.

claim which is inconsistent with the same party's previous action or inaction which had induced reliance by another to the other party's detriment). The historical reasons are as follows.

At the outset of the jury instructions conference at the trial, Judge Daley observed that he had prepared a packet of draft instructions for each of the attorneys in order to facilitate their discussion. (93:108).

When the discussion turned to the jury instruction on the definition of mental responsibility, ***Wis. J.I. – Criminal: No. 605***, in particular, the prosecutor promptly requested that "the two stock instructions of [*sic*] a voluntary induced state of intoxication by drugs or alcohol or both" be added to the proposed instruction. (93:116). The trial court replied, "[y]ou noticed I took out struck [*sic*] on that," and Anderson's counsel promptly argued that "I think the Court's modification is accordance [*sic*] with the law. * * * So I think the Court's modification is definitely accurate." (93:116-17).

Legal argument then ensued, and the ultimate result was that the trial court changed its draft instruction and added one of the two requested optional statements to the final jury instruction. (93:124-28).

After the trial, Anderson filed post-conviction motions to supplement the record with the trial court's draft packet of jury instructions, alleging that it was necessary for a fair understanding of the parties' instruction requests and objections. (67; 69). In support, Anderson's motion cited ***State v. Perry***, 136 Wis. 2d 92, 100-02, 401 N.W.2d 748 (1987) (a new trial must be granted if a missing portion of the record cannot be accurately reconstructed). (*id*.).

At the post-conviction motion hearing, Judge Daley initially advised the parties that the packet of draft jury instructions is no longer in existence. (95:7-10). The court also indicated that he could not recall the specific language of the draft instruction on mental responsibility, which he considered to be legally unimportant at this time. (95:15).

The prosecutor and the court also both agreed that the parties' requests for, and objections to, the jury instructions were preserved for the record. (95:17). For that reason, the prosecutor concurred with the court that the only material issue now is "what did we instruct the jury and did it [*sic*] appropriately instruct them on the law." (95:21-22). The court approved the prosecutor's view, and Anderson's counsel accepted their understanding that no waiver of objection had occurred and did not demand a new trial under ***State v. Perry*** due to the impossibility of reconstructing the record. (95:24).

Therefore, the Attorney General's present claim of waiver is inconsistent with the prosecutor's action and the trial court's decision at the post-conviction hearing. The facts were the same at both times, and the prosecutor successfully persuaded the trial court to adopt his position. Finally, the prosecutor's action induced Anderson to rely on that understanding to his detriment. Under these circumstances, the Attorney General's appellate waiver argument "plays fast and loose with the courts," and it deserves reproach.

Second, the state's waiver claim is flawed by a fundamentally erroneous characterization of the facts. The Attorney General declares, without any references to the record, that "on appeal Anderson raises claims that are new and different from the claims he raised in the trial court. In the trial court, he never objected that it would be error for the

trial court to give the optional standard instruction." (respondent's brief, at 7).

Anderson concedes that the relevant portion of the jury instruction conference during the trial (93:108-28) was not a model of clarity. However, the trial record and the post-conviction record, taken together, readily demonstrate that Anderson advanced the same claims at the trial, the prosecutor addressed those same claims and the trial court considered and denied those same claims. See ***State v. Neudorff***, 170 Wis. 2d 608, 616, 489 N.W.2d 689 (Ct. App. 1992) (the appellate courts "have in the past explained that they will not elevate form over substance when addressing waiver arguments. The keystone of any waiver argument is whether a party has registered an objection with sufficient prominence such that the court understands what it is asked to rule upon.").

At the trial, the prosecutor requested the two optional jury instructions relating to the voluntary use of drugs or alcohol, and Judge Daley remarked that he had stricken them from his draft instruction. (93:116). Anderson's counsel took the position that the court's view was legally correct, advocating a distinction between lawfully-prescribed medicine with alcohol and "street drugs" with "drunk[enness]." (93:116-17). The prosecutor acknowledged that an issue was posed with respect to the confluence of Anderson's prescribed drug and his consumption of alcohol. (93:117).

The trial court then observed that the "key" question was whether Anderson's ingestion of prescribed medication and alcoholic beverages was an "involuntarily produced condition." (93:121). In response, the prosecutor agreed that Anderson could argue that he had had an "involuntary

reaction" but the state would argue that "he did know about potential bad side effects, and. . .that alcohol may increase those side effects." (93:121). Anderson emphasized that his "reading of the law" was that the optional jury instruction relating to the voluntary use of drugs or alcohol "didn't mean prescribed medications." (93:122).

Judge Daley repeated that "[t]he whole question is whether or not it is a voluntary condition," and the court concluded that if Anderson had taken prescribed medicine and had afterward consumed alcohol, "which might exacerbate it," then "I guess an argument could be made that, in fact, at that point it's voluntary." (93:122-23). The court explained that it had decided to overrule Anderson's objection and insert one of the two optional jury instructions. (93:124-25). Having lost the legal battle, Anderson then requested the court to use the "temporary mental state" optional instruction instead of the "intoxication" optional instruction, and the court honored that request. (93:128). Significantly, Judge Daley expressly concluded that "you have both put your position on record, you're not waiving it." (93:128).

The proceedings at the post-conviction hearing conclusively confirmed this point.

The trial court and the prosecutor both agreed that Anderson's legal objection was based primarily upon the fact that he had taken a prescribed medicine, Strattera. (95:4). Indeed, the prosecutor conceded that Anderson's argument was "real clear on the record" (95:9), and the prosecutor and the court both acknowledged that the parties' requests and objections to the jury instructions "were preserved for the record." (95:17). The court, in particular, recalled that it had been troubled by whether a patient's taking of prescribed

medicine would suffice to defeat a mental responsibility defense, but the court believed that "the combination of drugs and alcohol" justified adding the "fourth bracketed" optional sentence in ***Wis. J.I. – Criminal: No. 605***. (95:18-19, 23). Judge Daley made it clear that, contrary to Anderson's position, "I don't think this instruction just deals with street drugs." (95:22).

In sum, it has always been Anderson's claim that the optional jury instruction language is erroneous in relation to the use of lawfully prescribed medicine, whether or not some alcohol was also consumed, and the trial court understood and considered that argument. Accordingly, there was no waiver. See ***State v. Gilmore***, 201 Wis. 2d 820, 836-37 at n.14, 549 N.W.2d 401 (1996). The Attorney General is apparently confused because Anderson's primary appellate brief has merely provided additional legal authorities and more-trenchant legal analysis. ***State v. Winkler***, 206 Wis. 2d 538, 547-48, 557 N.W.2d 464 (1996); ***State v. Markwardt***, 2007 WI App 242, ¶ 33, 306 Wis. 2d 420, 438-39, 742 N.W.2d 546.

Third, the court of appeals should eschew a waiver finding, in any event, because review of the merits is justified by the posture of the case. The waiver rule is one of administration and does not involve the court's power to address the issues raised. ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980).

Here, as in ***Wirth v. Ehly***, the issues raised are legal questions, the parties have thoroughly briefed the issues and there are no disputed issues of fact. The issues raised in this case are also of sufficient public importance to warrant decision.

For these reasons, Anderson's assertion that the trial court's optional jury instruction was erroneous and misleading remains unrebutted, and Anderson's objections to it were not waived.

II. In the Alternative, the Real Controversy Was Not Fully Tried and a New Trial Should Be Granted in the Interests of Justice Because the Jury Instructions Were Confusing and Misleading Concerning Anderson's Use of Alcohol.

In general, the state's argument against discretionary relief misses the mark because it repeatedly mischaracterizes Anderson's legal position, both at the trial and on appeal.

Anderson's mental responsibility defense at the trial rested upon expert testimony that his prescribed medicine, Strattera, had been the primary cause of his mental defect during the criminal acts, acting together with three other less significant factors, including alcohol ingestion. (74:Exhibit 40:6; 92:161-62).

Anderson has argued that his taking of lawfully prescribed medicine is unlike the use of illegal street drugs because medical treatment is essentially involuntary as a matter of law, citing ***State v. Gardner***, 230 Wis. 2d 32, 41, 601 N.W.2d 670 (Ct. App. 1999). (appellant's brief, at 22-23). This is so even if the patient had been aware of the medicine's potential side effects. ***Id***.

If Anderson's argument is correct, then the optional jury instruction's reference to "the voluntary taking of drugs" was simply erroneous and inapplicable in this case. No re-phrasing of that instruction is in order.

The state offers no legal authorities or legal reasoning for the court of appeals to depart from the general rule of ***State v. Gardner***. After all, there was no evidence at the trial that Anderson had been taking a prescription medicine other than Strattera, and there was no evidence that Anderson had actually known about the potentially homicidal side effects of Strattera. On the other hand, the evidence did show that Anderson took the baneful Strattera medicine less frequently, or three times per week, than the daily Crossroads prescription by Dr. Hann directed. (92:56, 117-18).

Instead, the state contends that Anderson was not entitled to the benefit of the rule of ***State v. Gardner*** because he had mixed prescription medicine with alcohol. (respondent's brief, at 16-20).

But the state's counter-thrust fails because there was no evidence at the trial that "alcohol may increase those [homicidal] side effects" of Strattera, as the prosecutor posited (93:121), or that the consumption of alcohol "might exacerbate" them, as the trial court surmised. (93:123). The only relevant evidence was the ShopKo pharmacy records, which cautioned only that the use of alcohol with Strattera could increase possible aftereffects of "dizziness, drowsiness, lightheadedness or fainting." (74:Exhibit 35:5).[2]

Further, the Attorney General now concedes that, under one reasonable view of the trial evidence, Anderson had not consumed an unreasonable or intoxicating quantity of alcoholic beverages. The jury was told that one of Anderson's

[2] Dr. Johnston's expert testimony that Anderson's inability to conform his conduct to the requirement was "compounded by his ingestion of alcohol" (92:161-62) is a different issue.

post-arrest blood tests showed a blood alcohol concentration of only 0.0176 % (92:220). (respondent's brief, at 2).

Therefore, even the state's attempt to take refuge in ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 267 N.W.2d 321 (1978) (respondents brief, at 20-23), a case that was expressly limited to its own facts, ***id.*** at 503, is grossly misplaced. Both Kolisnitschenko and his two expert witnesses, respectively, acknowledged that Kolisnitschenko had been intoxicated or "acute[ly] intoxicated." ***Id.***, at 496, 497.

Obviously, the issues of moral conscience regarding mental responsibility change appreciably for a person who had only drunk alcohol in moderation. If the jury believed that Anderson was not intoxicated by alcohol, then the optional jury instruction's reference to "the voluntary use of alcohol" was likewise erroneous and inapplicable.

For these reasons, the integrity of the fact-finding process was compromised by the misleading optional jury instruction. A new trial should be granted in the interests of justice.

CONCLUSION

For the reasons set forth above, Anderson requests the Court of Appeals to enter an order vacating the judgment of conviction and remanding to the trial court for a new trial on the issue of mental responsibility.

Dated this 24th day of February, 2012.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,463 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of February, 2012.

Signed:

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