RECEIVED
02-19-2014
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2012AP378-W

STATE OF WISCONSIN ex rel.
LORENZO D. KYLES,

Petitioner,

v.

WILLIAM POLLARD, Warden,

Respondent.

On Review of the Order of the Wisconsin Court of Appeals, District I

REPLY BRIEF OF PETITIONER

Robert R. Henak
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Melinda A. Swartz
State Bar No. 1001536
LAW OFFICE OF MELINDA
SWARTZ LLC
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 270-0660

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2012AP378-W

STATE OF WISCONSIN ex rel.
LORENZO D. KYLES,

Petitioner,

v.

WILLIAM POLLARD, Warden,

Respondent.

REPLY BRIEF OF PETITIONER

ARGUMENT

The parties agree that:

1. A habeas petition is the proper procedure for raising a claim of ineffective assistance of counsel for failing to file a notice of intent to pursue post conviction relief under Wis. Stat. (Rule) 809.30(2)(a), for failing to remain reasonably available to a client during the time for filing such a notice, and for failing to either seek extension of the time for filing that notice or at least advising one's client of that option;

2. The circuit court and the court of appeals erred in holding that such claims may be raised under Wis. Stat. §974.06;

3. The court of appeals is the proper forum for raising a claim that counsel was ineffective for failing to either file a motion to extend the time for filing a notice of intent or advise the client of that option once the deadline has passed; and

4. On the merits, Kyles properly alleged facts in his ***Knight*** Petition[1] that would entitle him to a hearing on two of his three ineffectiveness claims if no procedural defects bar him relief.

The remaining disputes, therefore, are limited to the following:

1. Whether the court of appeals or the circuit court is the proper forum for a habeas petition challenging the effectiveness of counsel's failure to file the notice of intent or failure to be reasonably available to his client during the time for filing that notice;

2. Whether Kyles' missteps while involuntarily denied his constitutional right to the assistance of counsel procedurally bar him from obtaining relief from that denial; and

3. Whether Kyles adequately alleged his ineffective assistance claim based on his attorney's unreasonable failures either to seek an extension of time to file his notice of intent or to advise Kyles of that option once he knew of Kyles' desire to appeal.

I.

BECAUSE THE ALLEGATIONS OF KYLES' *KNIGHT* PETITION ESTABLISH HIS RIGHT TO THE RELIEF REQUESTED, HE IS ENTITLED TO A HEARING AND DECISION ON THE MERITS OF HIS INEFFECTIVENESS CLAIM

The state concedes that Kyles' ***Knight*** Petition sets forth non-conclusory facts that, if true, would entitle him to relief on two of his three ineffectiveness claims. State's Brief at 28. The state nonetheless claims that Kyle's allegations regarding his third claim are inadequate and that, in any event, his procedural missteps while left to fend for himself while involuntarily denied his constitutional right to counsel bar him from obtaining relief from that denial on any of his claims. *Id.* at 23-30. The state's attempts to benefit from the denial of Kyles' right to counsel are misplaced.

---

[1] *See* ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

A. Kyles Was Denied the Effective Assistance of Counsel on Appeal

1. Kyles' "failure to seek an extension/failure to advise" claim is properly before the Court.

Although properly conceding that Kyle's allegations entitle him to a hearing on two of his claims absent some procedural bar, the state erroneously asserts that Kyles is not entitled to such a hearing on his claim that Attorney Flanagan acted unreasonably by not seeking extension of the time for filing Kyles' notice of intent or to advise Kyles of that option when Kyles confirmed his desire to appeal less than two months after expiration of the deadline. State's Brief at 28-30.

This third ineffectiveness claim is properly before the Court. The state's default argument, State's Brief at 22-23, 29, overlooks the requirement that courts construe *pro se* pleadings liberally. *E.g.*, ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis.2d 111, 700 N.W.2d 62 (*pro se* post-conviction motions construed liberally); ***bin-Rilla v. Israel***, 113 Wis.2d 514, 520-21, 335 N.W.2d 384 (1983) (in *pro se* pleadings, "we look to the facts pleaded, not to the label given the papers filed, to determine whether the party should be granted relief."). The Court's function is "'to do justice between the parties,'" ***Larry v. Harris***, 2008 WI 81, ¶23, 311 Wis.2d 326, 752 N.W.2d 279 (citation omitted), not to grant one party a windfall based on a curable technicality.

The central focus of Kyles' petition was, like the court of appeals' in denying his ***Knight*** Petition (App. 3-4), on the proper forum for raising his claims. Although Kyles did not identify the "failure to request extension/failure to advise" claim in his petition for review with the precision expected of an attorney, he fully alleged the facts supporting that claim, Petition for Review at 7-8, and also made specific reference to seeking "guidance on how to process and decide habeas petitions based on a claim of ineffective assistance of trial counsel for the purpose of seeking extensions for filing notices of intent, that is, the procedure that commences the postconviction process under Wis. Stat. 809.30 (2)(a) and (b)." *Id.* at 2.

As the state concedes, State's Brief at 9-10, 23, Kyles raised that claim in his ***Knight*** Petition. *See* ***Knight*** Petition at 19. It is directly related to the other two ineffectiveness claims that the state concedes are properly raised, and the state has had ample opportunity to respond to it. Even if the Court should conclude that the claim does not fall within the liberal reading required of *pro se* pleadings, the state has suffered no prejudice, and this Court has the authority to consider it. Wis. Stat. (Rule) 809.62(6).

2. Kyles properly pled his "failure to seek an extension/failure to advise" claim

The state's suggestion that Kyles did not adequately allege the "failure to seek an extension/failure to advise" claim in his ***Knight*** Petition, State's Brief at 29-30, both ignores the requirement that *pro se* pleadings be read liberally and, since the perceived defects either do not exist or are easily curable, seeks to benefit from an unfair game of judicial "gotcha."

The state effectively concedes that Flanagan in fact had an obligation to properly advise Kyles regarding the need for an immediate extension motion as fully explained in counsel's opening brief. State's Brief at 29-30. It nonetheless claims that the Court must ignore these obvious truths and focus entirely on Kyles' *pro se* allegations. *Id.*

In ***State v. Sutton***, 2012 WI 23, ¶¶19-21, 339 Wis.2d 27, 810 N.W.2d 210, this Court unanimously recognized the general applicability of the statutory principle that leave to amend to pleadings should be "freely given at any stage of the action when justice so requires," even though a motion is not technically a "pleading" and even after, unlike here, the motion has been denied as insufficient on its face. Application of this principle is especially appropriate where, as here, the defendant was denied his constitutional right to counsel and was forced to fend for himself, despite his sixth grade reading level,[2] with only the

[2] Contrary to the state's claim, State's Brief at 27, n.6, Kyles' verified (continued...)

assistance of whatever "jailhouse lawyers" might be willing to assist him at the time (Pet. 17; Pet. App.E:3, ¶19).

The assertion that the *pro se* ***Knight*** Petition failed to demonstrate that an extension motion would have succeeded, State's Brief at 30, suffers from the same "gotcha" mentality: failure to account for liberal reading required of *pro se* pleadings; failure to account for allegations of Kyles' opening brief that it does not dispute; and failure to account for ***Sutton's*** liberal attitude toward amendments to correct easily curable technical pleading defects. The state also applies the wrong legal standard for prejudice, requiring proof that the extension motion "would have succeeded" while Kyles need only show a reasonable probability of such a result. *E.g.*, ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

The assertion that Kyles suggested no "good cause" for the extension similarly ignores the fact that, as the state already has conceded, his petition demonstrated not just the "good cause" required for an extension, but *constitutional* grounds based on Flanagan's failures. Moreover, even if Flanagan were unwilling to admit his own ineffectiveness, the miscommunication obvious from Kyles' petition amply demonstrates good cause for what would have been a very short extension.

Because Kyles has provided non-conclusory facts that, if true, would entitle him to relief, he is therefore entitled to a hearing and decision on the merits of *all* of his claims. *E.g.*, ***Love***, 2005 WI 116, ¶26.

B. Because He Was Abandoned by Counsel and Unconstitutionally Left to Fend for Himself, Kyles Has Not Procedurally Defaulted His Claims

The state notes a number of procedural errors committed by

---

[2] (...continued)
Knight Petition expressly alleged that "[h]e was reading on a sixth grade level and only completed the ninth grade." (Pet. 17).

Kyles while he was unconstitutionally denied the right to counsel and suggests that the state should benefit from those missteps by denial of Kyles' claims. State's Brief at 23-28. However, the state ignores Kyles' showing that the right to counsel unconstitutionally denied to him here is intended to protect the defendant from just such errors, *e.g.*, ***Evitts v. Lucey***, 469 U.S. 387, 396 (1985); ***Betts v. Litscher***, 241 F.3d 594, 596 (7th Cir. 2001), and that "[t]he Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel." ***Id.*** at 598. *See also* ***Coleman v. Thompson***, 501 U.S. 722, 754 (1991) (procedural defaults of defendant unconstitutionally denied counsel are "imputed to the State" (citation omitted)). Kyles' Brief at 20-24.

This constitutional bar to the state's procedural default arguments is controlling. However, the state's specific arguments are meritless in any event.

Kyles' first ***Knight*** Petition would not bar relief because the court of appeals dismissed, believing (albeit erroneously, *see* Section III, *infra*) that the circuit court was the proper forum to resolve Kyles's claim (Pet. App.L; App. 11-12). This is a ruling on competency rather than on the merits, ***State v. Starks***, 2013 WI 69, ¶36, 349 Wis.2d 274, 833 N.W.2d 146, *reconsid. pending*, and thus is without prejudice, *see* ***In Interest of Jason B.***, 176 Wis.2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993) (loss of competency "is properly remedied by dismissal without prejudice").

Kyles' *pro se* habeas petition in the circuit court likewise would not bar relief. If this Court finds that the proper forum is the court of appeals, then the circuit court petition can have no preclusive effect at all.

Even if the Court holds that Kyles must split his ineffectiveness claims between the circuit court and the court of appeals, as suggested by the state, the state concedes that (as Kyles has argued all along), a §974.06 motion is not the proper remedy for Kyles' claims. The circuit

court's *sua sponte* conversion of the habeas petition to a §974.06 motion and the denial of that motion accordingly was beyond its competency.

The suggestion that the circuit court's decision was with prejudice also ignores the fact that it expressly contemplated reopening the petition upon presentation of additional information (as authorized by ***Sutton***, *supra*) and therefore was expressly *not* with prejudice. Moreover, as the state notes, State's Brief at 25-26, 28, Kyles' current *pro se* petition contains exactly the allegations necessary to entitle Kyles to a hearing but which were missing from his initial *pro se* efforts drafted by a far less competent "jailhouse lawyer."

Of course, if the state is correct that circuit courts have the inherent power to vacate and reinstate judgments of conviction, State's Brief at 20-21, the authority relied upon by the state for that proposition establishes that they also have the inherent authority to vacate an order in light of information unavailable to the court at the time of the original decision. ***State v. Brockett***, 2002 WI App 115, ¶14, 254 Wis.2d 817, 647 N.W.2d 357 (court has inherent authority to reconsider order based on additional information).

The state's unsupported suggestion that the defendant is forever limited to the factual allegations of his first pleadings, State's Brief at 25-26, once again ignores the teaching of ***Sutton***, *supra*, and its own authority in ***Brockett***, *supra*, and the Court's obligation "'to do justice between the parties,'" ***Larry***, 2008 WI 81, ¶23 (citation omitted). Post-conviction motions, like sentencings, *see* ***State v. Upchurch***, 101 Wis. 2d 329, 336, 305 N.W.2d 57 (1981), are not games wherein one party is entitled to a windfall whenever the other party commits an easily curable mistake. As an equitable remedy, habeas review cannot fairly be aborted under these circumstances.

II.

A *KNIGHT* PETITION IN THE COURT OF APPEALS IS THE PROPER PROCEDURE FOR REMEDYING THE FORFEITURE OF ONE'S DIRECT APPEAL RIGHTS DUE TO THE INEFFECTIVENESS OF COUNSEL

For a number of reasons, a ***Knight*** Petition in the court of appeals is the appropriate procedure and forum for challenging counsel's unreasonable failure to file the notice of intent or to take other actions necessary to commence the appellate process under Wis. Stat. (Rule) 809.30. Kyles' Brief at 24-30.

The state concedes that the Court of Appeals is the proper forum for Kyles' claim that Flanagan should have either sought to extend the time for filing his notice of intent or at least advised him of that option. State's Brief at 12. However, it claims that Flanagan's unreasonable failure to file the notice of intent or to be available to Kyles during the time for filing that document must be raised in the circuit court. *Id.* at 12-16.

The state's sole basis for bifurcating Kyles' ineffectiveness claims is essentially a semantic one. According to the state, the defendant's "trial counsel" is obliged to file the notice of intent and the ineffectiveness of trial counsel "always" must be raised in the circuit court. State's Brief at 13-14.

While each prong of the state's argument is independently correct, combining the two is not for the simple reason that "trial counsel" has different meanings in the two contexts. In the first, "trial counsel" is a generic or shorthand reference to the individual who had represented the defendant at the trial (or plea) and the sentencing, or even just the sentencing if the defendant obtained new counsel after the conviction. *See* Wis. Stat. (Rule) 809.30(2)(a) ("Counsel representing the person at sentencing . . . shall continue representation by filing a notice under par. (b) if the person desires to pursue postconviction . . . relief unless counsel is discharged by the person or allowed to withdraw

by the circuit court before the notice must be filed").

In the second context, however, "trial counsel" is used to identify the actions that are subject to the requirement of a ***Machner*** hearing in the circuit court, *i.e.*, the actions of counsel through the plea or trial and sentencing. *See* ***State v. Curtis***, 218 Wis.2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). The circuit court hearing requirement is important in those circumstances to "allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion." ***Id.***

As the state concedes, the same attorney can occupy different roles at different times. State's Brief at 14. The trial ends with the verdict, the sentencing ends with imposition of sentence, and the prosecution ends with entry of judgment. Counsel's obligation to initiate the post-conviction/appellate process by filing the notice of intent thus is part of that process rather than part of the trial/sentencing process.

The rationale for requiring challenges in the circuit court to the effectiveness of counsel who represented the defendant through the trial and sentencing do not apply to challenges to the unreasonable failure to file the notice of intent. Filing that notice generally does not take place before the circuit court judge, so that judge would be in no better position than any other judge to assess counsel's actions. Also, the attorney obligated to file it may never have set foot in the circuit court courtroom, as where the defendant discharges "trial counsel" and hires new counsel immediately after sentencing to handle the post-conviction proceedings and appeal. *See* Wis. Stat. (Rule) 809.30(2)(a) (relieving prior counsel of obligation to file notice when discharged before the notice is due).

Moreover, the published appellate opinions have focused on substance rather than semantics when assessing the proper forum for an ineffectiveness claim, consistently holding that a ***Knight*** Petition in the court of appeals is the proper vehicle for attacking counsel's failure to

commence an appeal governed by Wis. Stat. (Rules) 809.30 or 809.32, even if counsel's alleged failure was in the circuit court. ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶4, 288 Wis.2d 707, 709 N.W.2d 515; ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶9 n.4, 269 Wis.2d 810, 676 N.W.2d 500; ***State ex rel. Smalley v. Morgan***, 211 Wis.2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997); *see* ***State v. Evans***, 2004 WI 84, ¶39 n.14, 273 Wis.2d 192, 682 N.W.2d 784.

Where the actions or inaction of counsel absolutely deprive the defendant of his or her right to an appeal, as here, it makes no sense to require some such claims to be raised in the court of appeals under ***Evans*** and ***Smalley*** and others to be raised in the circuit court. It makes even less sense to require, as the state suggests here, that Kyles raise two of his abandonment claims in the circuit court and one in the court of appeals. State's Brief at 12.

True, this Court might authorize the circuit court to cobble together a remedy in the "oblique manner" it rejected in ***Knight***, 168 Wis.2d at 519, by vacating and reinstating the judgment. The question remains, however, why should it unnecessarily complicate the process in that manner. The state has provided no reason to do so.

CONCLUSION

The Court therefore should reverse the Court of Appeals' Order denying Kyles' ***Knight*** Petition and remand to that Court with directions that it order a hearing on Kyles' abandonment claims. Should the Court not grant such relief, it should declare Kyles' right to have his abandonment claims heard in the circuit court.

Dated at Milwaukee, Wisconsin, February 19, 2014.

Respectfully submitted,

LORENZO D. KYLES,
Petitioner-Petitioner

HENAK LAW OFFICE, S.C.

_____

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:
316 North Milwaukee Street, #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Melinda A. Swartz
State Bar No. 1001536
LAW OFFICE OF MELINDA SWARTZ LLC
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 270-0660

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,995 words.

_____

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____

Robert R. Henak

Kyles Reply Brief.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 19th day of February, 2014, I caused 22 copies of the Reply Brief of Lorenzo D. Kyles to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

Kyles Reply Brief.wpd