RECEIVED
09-26-2013
CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Appeal No. 2013AP190 - CR

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

JAMES HOWARD,

Defendant - Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND THE DENIAL OF A POSTCONVICTION MOTION IN THE
CIRCUIT COURT OF MILWAUKEE COUNTY
L.C. 2009CF1245
JEAN A. DIMOTTO, JUDGE.

APPELLANT'S REPLY BRIEF

Lew A. Wasserman 1019200
Attorney for Defendant - Appellant
Law Offices of Jean M. Kies, S.C.
135 West Wells Street, Suite 330
Milwaukee, WI 53203
(414) 272-7622 office
(414) 272-4744 fax
attywasserman@wi.rr.com

TABLE OF CONTENTS

Cases:

ARGUMENTS

1. The Postconviction Court Erroneously Exercised Discretion in Denying Howard a Hearing on His Claim That Trial Counsel Failed to File a Motion To Suppress Evidence Obtained From the Warrantless Taking of Buccal Swabs

   A. ***State v. Ward,*** 2011 WI App 131, does not control, as the state asserts, because the material facts of Howard are substantially different from the material facts in ***Ward.***

The state argues that the circuit court properly denied relief without a hearing because the record conclusively demonstrates that Mr. Howard is not entitled to relief on his claim that trial counsel was ineffective in failing to file a motion to suppress buccal swabs evidence. Aside from citations to authorities providing the analytical framework for assessing ***Strickland*** [1] claims on appeal, the state puts all its chips on ***State v. Ward,*** 2011WI App 131, claiming that "*Ward* controls here."

This assertion by the state, without citation to any authority, ignores the 'rule' for when precedent is binding: "A judicial precedent attaches to a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." ***Allegheny General Hospital v. NLRB,*** 608 F.2d 965, 969-70 (3rd Cir.1979); ***Jandre v. Wis. Injured Patients & Families Comp. Fund,*** 2012 WI 39, ¶35 ("the facts of the present case are substantially similar to those in *Martin* and *Bubb*."

---

[1] ***Strickland v. Washington,*** 466 U.S. 668 (1984).

(Citations omitted)). "Under the doctrine of stare decisis, a court will adhere to a principle of law adopted after argument as binding precedent where the very point is again in controversy." ***Id,*** 2012 WI 39 at ¶36.

Looking at ***Ward*** through this lens, it is clear that ***Ward*** does not control in this instance because the opinion does not address or discuss claims that police and the state have mislead the defendant and the court in the obtaining and execution of a search warrant and in the introduction of this evidence at trial.

In ***Ward*** the error was the signing of the search warrant by a commissioner without the benefit of the underlying facts being attested to under oath (although the facts were apparently supplied during the course of a hearing on the record!). 2011 WI App 151, ¶4. There was no subterfuge in ***Ward,*** no 'lost' Affidavit or Warrant or Return; certainly no representations made to the SATC that police had a warrant authorizing seizure of buccal cells when they knew they did not have such a warrant, as herein.

Moreover, Howard's trial counsel's understanding of the necessity to file a motion to suppress the buccal swab search warrant, a precondition to the ***Ward*** analysis being controlling, never materialized solely because of the state's lack of candor. In ***Ward*** trial counsel had all the information necessary to conclude a motion to suppress would have been successful; herein the state made that kind of analysis virtually impossible.

Thus, as argued in the Appellant's Brief, this case is more closely controlled by ***Mapp v. Ohio,*** 367 U.S. 643 (1961), and its progeny. The factual similarity with *Mapp* is obvious - in *Mapp* police waived a piece of paper (no one ever determined what it said) in front of Mapp and claimed it was a warrant. 367 U.S. at 644. In this case police waived a piece of paper (it was a penile swab warrant, we think) in front of the

SATC tech and claimed it was (also) a buccal swab warrant.

As the ***Mapp*** Court noted, and in close parallel to Howard, "At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for." 367 U.S. at 645. That is a much different scenario from the signing of a search warrant upon representations made in open court but without benefit of the information being sworn to, as in ***Ward,*** *supra.*

And how is lying about having a warrant (***Mapp***) any different than lying about having a warrant (Howard). The state offers no explanation how this court should get from lying about having a buccal swab warrant to the safe place of ***Ward.*** Thus, Ward's safety valve for the inadvertent failure to have the information offered under oath does not provide 'control' or any guidance for Howard. It was error for the postconviction court to deny a hearing on Howard's claim that his counsel was ineffective in not filing a motion to suppress the evidence taken without benefit of any warrant.

2. The Postconviction Court erred in denying Howard a hearing on his claim that trial counsel's failure to object to inadmissible trial testimony was deficient performance that prejudiced Howard.

    A. The Nurse Examiner's Testimony at issue was not an opinion on Marletha's physical condition but an opinion on her credibility.

The state asserts that the nurse examiner's testimony at issue was solely an opinion on Marletha's physical condition (Respondent's Brief, at 31-32). Perhaps the question by the district attorney at trial needs repeating; he asked, "Is the absence of more injury a reason to disbelieve her story?" Without reference to any authority other than common sense, there is no possibility that this question would trigger

an answer (whether it was 'yes' or 'no') that was not providing an opinion on whether to disbelieve or believe 'her story.'

As the state helpfully notes, the essence of the ***Haseltine*** 'rule' is that the credibility of a witness is ordinarily something 'a lay juror' can determine without the interference of an expert. ***State v. Haseltine,*** 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Any response to the question inquiring whether the jury should "disbelieve her story" violates the clear line that cannot be crossed: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** The question at issue herein did not occur during the cross examination of an eye-witness to the crime. *See* ***State v. Johnson,*** 2004 WI 94, ¶14. Thus it boils down to whether the question was one of those, "were they lying" types. 2004 WI 94, at ¶31 (Bradley, J., concurring).

How is "disbelieve her story" different from "was she lying"? Because there is no difference, if you are a lay juror, it was deficient performance that prejudiced Howard, in this close credibility case, for counsel to fail to object, and thus it was error for the postconviction court to deny Howard a hearing wherein trial counsel could explain, if there is an explanation, why no timely objection was made.

CONCLUSION

For all the reasons stated in the Appellant's Brief, and for those stated herein, James Howard asks that this court reverse the verdicts and judgment of the circuit court.

Dated this 25th day of September 2013.

Respectfully submitted,

/s/
Lew A. Wasserman 1019200
Attorney for Defendant - Appellant James Howard

PO Address:
Law Offices of Jean M. Kies, S.C.
135 West Wells Street, Suite 330
Milwaukee, Wisconsin 53203
[414] 272-7622
[414] 272-4744 Fax
attywasserman@wi.rr.com

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this reply brief is 1,623 words.

/s/
Lew A. Wasserman 1019200

CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 25th day of September 2013.

/s/
Lew A. Wasserman 1019200