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WISCONSIN COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2013AP001398

Circuit Court Case No. 1999PA000270

In re the finding of contempt in
In re the paternity of Aubre M. Petersen:

STATE OF WISCONSIN and KIMBERLY A. UTTENBROEK,

Petitioners-Respondents,

v.

MARK R. PETERSEN,

Respondent-Appellant.

RESPONDENT-APPELLANT'S BRIEF
ON APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY, JUDGE
JOHN A. JORGENSEN PRESIDING

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TABLE OF CONTENTS

STATEMENT ON ORAL ARGUMENT	v
STATEMENT ON PUBLICATION	v
STATEMENT OF THE ISSUES	v
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	
1.	
APPELLANT IS ENTITLED TO A NEW EVIDENTIARY HEARING, THE HEARING IN WHICH A STAY OF JAIL SENTENCE WAS LIFTED FOR FAILING TO PAY CHILD SUPPORT, AS THE APPELLANT WAS ENTITLED TO A FAIR HEARING WHERE ALL EVIDENTIARY AND OTHER EVIDENTIARY HEARING RIGHTS SHOULD HAVE BEEN AFFORDED TO HIM	3
2.	
WHILE THERE MAY BE NO RELIEF PER SE FOR SOMEONE WHO SERVED THE MAXIMUM JAIL COMMITMENT FOR A CONTEMPT FINDING, THAT SHOULD NOT MEAN THE PERSON IS NOT ENTITLED TO A NEW EVIDENTIARY HEARING OR OTHER LEGAL RECOURSE IF IT IS SHOWN THAT THERE WAS LEGAL ERROR AT THE HEARING IN WHICH THE COURT MADE THE DECISION TO ORDER THE JAIL COMMITMENT	6
CONCLUSION	9

ATTACHMENTS:

- 1.CERTIFICATION OF FORM AND LENGHT
- 2.BRIEF APPENDIX CERTIFICATION
- 3.CERTIFICATION OF ELECTRONIC FILING
- 4.CERTIFICATION OF MAILING

APPENDIX (separate document)A-Ap:1,2,3

Findings and Order, file-dated June 14, 2012.....A-Ap:1

Review Hearing Transcript of
June 7, 2012.....A-Ap:2:1-26

Order Denying Respondent's Motion for a New Evidentiary
Hearing, file-dated May 28, 2013
.....A-Ap:3:1-2

TABLE OF AUTHORITIES

Wisconsin Statutes

§ 785.....	4
§ 785.03	4
§ 785.03 (3)	4, 7
§ 785.04 (1) (b).....	2
§ 809.30.....	4, 7
§ 908.01 (3)	6

Federal Case

<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	7, 8
--	------

Wisconsin Cases

<i>Balaam v. Balaam</i> , 52 Wis.2d 20; 187 N.W.2d 867 (Wis.1971)	9
<i>Benn v. Benn</i> , 230 Wis.2d 301; 602 N.W.2d 65 (Ct.App.1999)	4
<i>Biel v. Biel</i> , 130 Wis.2d 335; 387 N.W.2d 295 (Ct.App.1986)	4, 6
<i>State v. Johnson</i> , 153 Wis. 2d 121; 449 N.W.2d 845 (Wis.1990)	8
<i>State v. Love</i> , 2005 WI 116; 284 Wis. 2d 111; 700 N.W.2d 62 (Wis.2005).	8

<i>In re Estate of Omernik</i> , 112 Wis. 2d 285; 332 N.W.2d 307 (Wis.1983) ¹	5, 7
<i>State v. Roberson</i> , 292 Wis. 2d 280; 717 N.W.2d 111 (Wis. 2006)	8
<i>State v. Thiel</i> , 2003 WI 111; 264 Wis. 2d 571; 665 N.W.2d 305 (Wis. 2003)	8

¹ *In the Matter of the Estate of John Omernik, Deceased: Raymond Omernick, Appellant-Petitioner, v. Chester Lepak, Personal Representative of the Estate of John Omernik, Deceased, Respondent, Anton Omernick, Intervenor.*

I.

STATEMENT ON ORAL ARGUMENT

Respondent-Appellant, Mark A. Petersen (hereafter, Petersen), through his attorney, George S. Pappas, Jr., is not requesting oral argument, as the undersigned believes that the issue will be adequately briefed herein.

II.

STATEMENT ON PUBLICATION

Given that the issues raised in this appeal will be adequately briefed herein, the undersigned does not believe publication is necessary.

III.

STATEMENT OF THE ISSUES

1. Whether Petersen is entitled to an evidentiary hearing that comports with the rules of evidence and mandates requiring the State to meet its burden of proof before a trial court may order the lifting of a stayed jail commitment for failure to pay child support. This assumes the initial contempt hearing, whereby Petersen was held in contempt and the jail commitment stayed, was consistent with the law and Petersen's underlying rights to a fair hearing were met.

2. Whether Petersen is entitled by law to a post-evidentiary hearing (post-conviction hearing)—challenging the post-contempt hearing in which the trial court ordered that Petersen's stayed jail sentence, which was ordered at the contempt hearing, be lifted—after Petersen had already served the maximum commitment time. The trial court held that since the post-evidentiary (post-conviction hearing) came after Petersen had already sat the length of his commitment, that a post-hearing appeal is moot.

IV.

STATEMENT OF THE CASE

- 1.) This is a paternity action that dates back to 1999, when a Summons and Petition was filed in support of paternity; a paternity determination was made; thereafter placement of the minor child was determined and child support ordered; the case has been active since, as there have been several motions and appeals filed. Suffice it to say, the issues presented to this Court on this appeal include just a portion of the paternity action's long history, namely that beginning with the stay of contempt that was ordered on June 14, 2012.
- 2.) On December 5, 2011, Respondent-Appellant, Mark Petersen (hereafter, Petersen), was found in contempt for failure to pay child support; a 120-day jail commitment was ordered but stayed (1;A-Ap:1); On June 7, 2012, on motion of the State, by and through the Winnebago County Child Support Agency, Petersen appeared in court for a review hearing whereby the State moved the court to lift the 120-day jail commitment stay. (Tr. Of June 7, 2012 Review

Hearing: A-Ap:2:1-26¹); the trial court, Winnebago County Circuit Court, Branch V, The Hon. John A. Jorgensen presiding, held that Petersen failed to meet the purge conditions, that of paying child support, and so it lifted the 120-day jail commitment, and Petersen was thereby ordered to jail for failing to purge the contempt. (1;A-Ap:1).

- 3.) Petersen was committed to the Winnebago County Jail for 120 days pursuant to Wis. Stat. § 785.04(1)(b). (*Id.*)
- 4.) The State alleged that Peterson did not pay his court-ordered child support or service fees and that he did not file work search affidavits. (A-Ap:2:9-12).
- 5.) The court advised Petersen that if the State met its burden of showing that he did not pay child support, then he would have an opportunity to explain why there may be good cause that the stay not be lifted. (*Id* at 13).
- 6.) The State called a "case specialist" worker with the child support agency who testified

¹ The Transcript of this Hearing does not appear in the Compilation of Record; so counsel is unable to cite to the Record; so, the entire transcript is attached to this brief.

that in his opinion Petersen did not pay his child support or arrears. (*Id* at 13,15); the court held that the County met its burden and so the court lifted the 120-day jail stay. (*Id.* at 24).

- 7.) On behalf of Petersen, on March 4, 2013, the undersigned filed "Respondent's Motion for New Evidentiary Hearing". (2).
- 8.) The aforementioned motion was heard by the court on May 15, 2013. (7).
- 9.) By order, file-dated May 28, 2013, the court held that proper procedures were followed at the June 7, 2012 hearing; that there is no remedy available to Petersen because he has already served the 120-day jail commitment; the issues addressed on post-disposition relief were considered "moot". (4:2;A-Ap:3:2).
- 10.) This appeal follows.

V.

ARGUMENT

1.

APPELLANT IS ENTITLED TO A NEW EVIDENTIARY HEARING, THE HEARING IN WHICH A STAY OF JAIL SENTENCE WAS LIFTED FOR

FAILING TO PAY CHILD SUPPORT, AS THE APPELLANT WAS ENTITLED TO A FAIR HEARING WHERE ALL EVIDENTIARY AND OTHER EVIDENTIARY HEARING RIGHTS SHOULD HAVE BEEN AFFORDED TO HIM

Petersen was committed to jail for 120 days after a hearing in which the trial court held that the child support agency met its burden in showing that Peterson failed to pay court-ordered child support. The rules of evidence were not properly applied, though.

The issue on appeal centers on a post-contempt hearing. After Petersen was held in contempt, a subsequent hearing, of which is being appealed from, was held to determine whether the stayed jail sentence should be lifted. Contempt is governed by Wis. Stat. Chapter 785². Appeals of Wis. Stat. § 785.03 follow Wis. Stat. § 809.30 procedures when contempt proceedings are prosecuted by the State. *See* § 785.03(3). *See also, generally, Biel v. Biel*, 130 Wis.2d 335; 387 N.W.2d 295 (Ct.App.1986).

Trial courts' factual findings in contempt cases are reviewed under the clearly erroneous standard. *Biel*, 130 Wis.2d 335; 387 N.W.2d 295. This assumes that the proper legal standard was applied by the trial court. *Benn v. Benn*, 230 Wis.2d 301, 308; 602 N.W.2d 65, 68 (Ct.App.1999).

² All references in this brief to the Wisconsin Statutes are to the 2011-2012 version.

Questions of law are reviewed without deference to the trial court. *In re Estate of Omernik*, 112 Wis. 2d 285, 290; 332 N.W.2d 307, 309 (Wis.1983)³.

The review hearing of June 7, 2012, whereby Petersen's stayed commitment to jail was lifted, was in contravention of law.

At that hearing, there was some discussion whether Petersen would stipulate that the State had met its burden, namely that Petersen failed to pay his court-ordered child support obligations. (A-Ap:2:3-13). The matter did proceed to an evidentiary hearing whereby the State was put to its burden. (*Id* at 13-16). The State's case consisted merely of the testimony of Paul Schwarz, a child support "case specialist", who testified that an order he was shown in court said that Petersen was ordered to pay \$94 per week in addition to \$25 per week in arrears; that Petersen did not file any child support payments since December 8, 2011 (*Id* at 14); and that Petersen had not filed any work search affidavits or service fees. (*Id* at 15).

The State's witness testified to what he read in a file. The witness did not testify to any personal observations; the record does not reflect that the witness

³ Full case caption: *In the Matter of the Estate of John Omernik, Deceased: Raymond Omernick, Appellant-Petitioner, v. Chester Lepak, Personal Representative of the Estate of John Omernik, Deceased, Respondent, Anton Omernick, Intervenor.*

looked to the file to refresh his memory; the witness' testimony was hearsay. However, it was held sufficient for the court to find that the State met its burden in showing that Petersen failed to meet his child support obligations. (1;Ap:1).

As defined in Wis. Stat. § 908.01(3), hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The testimony of Paul Schwarz was offered for the truth of the matter asserted.

More to the point of this appeal, though, is the trial court's erroneous ruling that because Petersen had already served the entire 120-day contempt commitment mean his motion for a new evidentiary hearing is "moot". (4:2;A-Ap:3;7:8).

2.

WHILE THERE MAY BE NO RELIEF PER SE FOR SOMEONE WHO SERVED THE MAXIMUM JAIL COMMITMENT FOR A CONTEMPT FINDING, THAT SHOULD NOT MEAN THE PERSON IS NOT ENTITLED TO A NEW EVIDENTIARY HEARING OR OTHER LEGAL RECOURSE IF IT IS SHOWN THAT THERE WAS LEGAL ERROR AT THE HEARING IN WHICH THE COURT MADE THE DECISION TO ORDER THE JAIL COMMITMENT

On post-disposition (conviction) motion, Petersen

raised the issues of ineffective assistance of counsel, his right to due process, his right to present a legal justification (defense), among others. (3). The court did not address the ineffective assistance of counsel claim, reasoning that Petersen had no remedy available, as he had already served the 120-day jail commitment for contempt. (4:2;A-Ap:3:2;7:8).

This is a legal determination that is reviewed *de novo*. *In re Estate of Omernik*, 112 Wis. 2d 285, 290; 332 N.W.2d 307, 309 (Wis.1983).

The court's ruling that Petersen has no remedy and his appeal is moot simply because he has already "sat" 120 days jail seems contrary to the contempt statute's procedural dictates. See Wis. Stat. § 785.03(3). Wis. Stat. § 785.03(3) applies to Petersen, as he was "aggrieved by a determination under [the contempt chapter]". So, Petersen has the statutory right to appeal under § 809.30. That statute does not limit Petersen's appellate rights or make them moot simply because he has already served a jail commitment. Thus, the trial court's ruling was in error.

The court should have addressed Petersen's ineffective assistance of counsel claim.

Wisconsin applies the two-part test described in Strickland, 466 U.S. 668, 104 S. Ct. 2052, 80 L.

Ed. 2d 674, for evaluating claims of ineffective assistance of counsel. State v. Johnson, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that his or her counsel's performance was deficient and that the deficiency prejudiced his or her defense. Id. at 127.

To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's error(s), the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. Thiel, 2003 WI 111, 264 Wis. 2d 571, P20, 665 N.W.2d 305; Strickland, 466 U.S. at 694. "The focus of this inquiry is not on the outcome of the trial, but on the reliability of the proceedings." Thiel, 2003 WI 111, 264 Wis. 2d 571, P20, 665 N.W.2d 305 (citation omitted). See also State v. Love, 2005 WI 116, P30, 284 Wis. 2d 111, 700 N.W.2d 62.

State v. Roberson, 292 Wis. 2d 280, 300-302; 717 N.W.2d 111 (Wis. 2006) (all citations original) (for cases not fully cited above: *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Thiel*, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305 (Wis. 2003)).

Petersen's trial counsel did not object to the evidentiary errors discussed in this brief, under ¶ V, Argument 1, *supra*. The hearsay testimony was the basis for the court's determination that Petersen had in fact failed to purge his contempt. (A-Ap:2) And, trial counsel failed to present evidence regarding a legal justification for Petersen's failure to purge the contempt. (*Id.*) Trial

counsel acknowledge that such evidence was available, but chose not to present it. (Id at 21). If such evidence was available, then Petersen was not afforded effective representation of counsel, as he was entitled to present a legal justification. See, *Balaam v. Balaam*, 52 Wis.2d 20; 187 N.W.2d 867 (Wis.1971). The trial court did not entertain any testimony regarding the issue of ineffective assistance of counsel, thus there is no evidentiary testimony from the post-disposition motion hearing on this point for this Court to review. (7).

Petersen should be given the opportunity to present the testimony he intended on presenting to the trial court, including that regarding a legal justification.

VI.

CONCLUSION

Petersen respectfully asks and moves this Court to remand this matter back to circuit court, granting him a new evidentiary hearing.

Respectfully Submitted,

Dated this ____ day of August, 2013.

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1.

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

_____ Monospaced font: 10 characters per inch;
double-spaced; 1.5-inch margin on left side and
1-inch margins on the other 3 sides. The length
of this brief is ____ pages.

Dated this ____ day of August, 2013.

George S. Pappas, Jr.

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court;
- (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of August, 2013.

Signed: _____

George S. Pappas, Jr.

CERTIFICATE OF COMPLIANCE WITH WIS STAT. § 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. § 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 ____ day of _____, 2013

George S. Pappas, Jr.

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, postage pre-paid

Dated this ____ day of August, 2013.

Signature: _____
George S. Pappas, Jr.