STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2013AP1424-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES ELVIN LAGRONE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Richard J. Sankovitz, Presiding, and from an Order Denying the Postconviction Motion, the Honorable Jeffrey A. Wagner, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. A Circuit Court Is Required to Conduct a Personal, On-The-Record Colloquy with a Defendant Regarding the Waiver of the Right to Testify at the Second Phase of a Bifurcated Criminal Proceeding.

A. A defendant has a fundamental constitutional right to testify at the second phase of a bifurcated criminal proceeding.

As the State acknowledges (at 9), in ***State v. Langenbach***, the court held that the Fifth Amendment privilege against self-incrimination applies at the second phase of a bifurcated criminal proceeding. 2001 WI App 222, ¶¶ 1, 19, 247 Wis. 2d 933, 634 N.W.2d 916.

Nevertheless, the State argues that the right to testify, which is a "necessary corollary" to the privilege against self-incrimination, does not apply at the second phase of a bifurcated criminal proceeding. (State's Br. at 10-11). However, significantly, the State provides no examples of a proceeding where the privilege against self-incrimination applies, but the right to testify does not apply.

The State also argues that there is no fundamental constitutional right to testify at the second phase of the trial "because the NGI phase is not constitutional in nature, and because of the many manners in which it is different from the criminal trial…" (State's Br. at 3).

First, as noted above, the State acknowledges (at 10), that a defendant has some constitutional rights at the second phase of a bifurcated criminal proceeding, such as the right against self-incrimination. ***Langenbach***, 247 Wis. 2d 933, ¶

19. Thus, the absence of a constitutional right to a NGI plea does not preclude a finding that an individual has a fundamental constitutional right to testify at the second phase.

Second, Mr. Lagrone does not dispute that there are differences between the two phases of a bifurcated criminal proceeding. *See* ***State v. Koput***, 142 Wis. 2d 370, 388-90, 418 N.W.2d 804 (1988) (emphasizing that the phases of a bifurcated criminal proceeding serve different purposes—the first phase settles the issue of guilt, while the second phase is dispositional in nature). However, the second phase is still a part of a criminal case. In ***Koput***, this Court stated:

> [c]learly, at one time when the burden of proving sanity was on the state and a unanimous finding of sanity was required, the "proceeding" was criminal. Hence, to some degree, in its ancestry at least, it is not completely divorced juris-genetically from its antecedents. *We, therefore, will not denominate it a civil proceeding. Rather, it is a special proceeding in the dispositional phase of a criminal proceeding*-a proceeding that is not criminal in its attributes or purposes.

142 Wis. 2d at 397. Likewise, ***Langenbach*** stated:

> [t]he statute setting forth the procedures for both the guilt phase and the responsibility phase is a part of the chapter on criminal procedure and a defendant can only be found not guilty by reason of mental disease or defect if he or she first admits to the criminal conduct or is found guilty. While we agree that ***Koput*** explains that the decision made in the mental responsibility phase is not criminal in nature, *the fact is that the mental responsibility phase remains a part of the criminal case in general.*

247 Wis. 2d 933, ¶ 19 (citations omitted) (emphasis added); *see also, **State v. Murdock***, 2000 WI App 170, ¶ 20, 238 Wis.

2d 301, 617 N.W.2d 175. Thus, given that the second phase is a part of a criminal case and the right to testify is a fundamental component of the criminal justice system, the right to testify must apply at the second phase. *See* ***Rock v. Arkansas***, 483 U.S. 44, 52 (1987).

Moreover, the fact that the defendant**,** not the State, has the burden at the second phase, supports that a defendant should have a fundamental constitutional right to testify and present his story. ***Wright v. Estelle***, 572 F.2d 1071, 1081 (5th Cir. 1978) (Godbold, J., dissenting) ("Taking the stand is the defendant's opportunity, if he wants it, to face his accusers and the jury, tell his story, submit to examination, and exercise such ability as he may have to persuade those who will make a decision that may vitally affect his life…."). Just as being forced to testify could "cause irreparable harm" in future proceedings (State's Br. at 10-11), not testifying could also harm the defendant in future proceedings. For example, not testifying could also lead to a harsher sentence.

Lastly, the State argues that "a defendant claiming he is not responsible for the crime will have very little of value to add to the proceeding." (State's Br. at 13). However, this is speculation. This Court has stated that there are instances in which lay testimony will be enough to satisfy the defendant's burden of proof at the second phase of a bifurcated criminal proceeding. ***State v. Magett***, 2014 WI 67, ¶¶ 43-44, 355 Wis. 2d 617, 850 N.W.2d 42.

B. A circuit court is required to conduct a personal, on-the-record colloquy regarding the waiver of the right to testify at the second phase of a bifurcated criminal proceeding.

In ***State v. Weed***, which mandated a personal, on-the-record colloquy regarding the waiver of the right to testify at

a criminal trial, the State conceded that colloquies are "beneficial to the criminal justice system." 2003 WI 85, ¶ 42, 263 Wis. 2d 434, 666 N.W.2d 485.

Here, however, the State argues that a colloquy regarding the waiver of the right to testify would *not* be beneficial. (State's Br. at 12-14). The State argues that this Court should instead follow ***State v. Denson***, 2011 WI 70, 335 Wis. 2d 681, 799 N.W.2d 831, which declined to require a colloquy regarding the right *not* to testify.

Mr. Lagrone disagrees. Given that this case involves the waiver of the right to testify, it would be illogical to ignore ***Weed***, which also involved the right to testify, and instead apply ***Denson***, which involved the right *not* to testify.

C. Mr. Lagrone is entitled to an evidentiary hearing because the circuit court failed to conduct an on-the-record colloquy regarding the waiver of the right to testify at the second phase of the bifurcated criminal proceeding.

The State repeatedly notes that Mr. Lagrone "refuses to reveal what his testimony would have been." (*See, e.g.*, State's Br. at 16). However, the law imposes no such requirement.

In ***State v. Garcia***, the court held that when a circuit court fails to conduct a colloquy regarding the waiver of the right to testify, the remedy is an evidentiary hearing. 2010 WI App 26, ¶ 4, 323 Wis. 2d 531, 779 N.W.2d 718; *see also* ***Denson***, 335 Wis. 2d 681, ¶¶ 66, 68-70 (declining to require a colloquy regarding the right not to testify, but stating that a circuit court "must" hold an evidentiary hearing when a defendant properly raises the issue of an invalid waiver of the right not to testify).

Under ***Garcia***, to obtain an evidentiary hearing a defendant must file a motion alleging that (1) there was no colloquy, and (2) he did not understand that he had a right to testify. 323 Wis. 2d 531, ¶¶ 9, 14. The burden then shifts to the State to show that the defendant's waiver of the right to testify was nonetheless knowing and voluntary. ***Id.***

Thus, pursuant to ***Garcia***, Mr. Lagrone properly filed a postconviction motion requesting an evidentiary hearing on the grounds that the circuit court failed to conduct a colloquy and that he did not understand that he had a right to testify.

The State argues that ***State v. Winters***, 2009 WI App 48, 317 Wis. 2d 401, 766 N.W.2d 754, which denied relief based on the defendant's failure to provide an offer of proof, is "more instructive." (State's Br. at 17-19). The State notes that "…whether or not there was a colloquy had no bearing on the ***Winters*** court's conclusion that a defendant must make an offer of proof…" (State's Br. at 18-19). However, in its analysis, ***Winters*** explicitly noted that the defendant "does not challenge the colloquy wherein he knowingly, voluntarily, and intelligently waived his right to testify. There is no dispute that Winters's waiver…constituted a valid waiver of his fundamental constitutional right to testify on his own behalf." ***Id.***, ¶ 15. Thus, ***Winters*** is inapplicable to this case as it does not address the remedy or the postconviction pleading requirements for a circuit court's failure to conduct a colloquy.

In addition, the State asserts in a footnote that Mr. Lagrone "ignores that he, [like Winters], previously waived his right to testify." (State's Br. at 18 n.18). First, to be clear, the circuit court never specifically confirmed during the plea colloquy that Mr. Lagrone understood that he was giving up the right to testify in the first phase. (*See* 48:9-11). Second,

regardless, as the State acknowledges, Mr. Lagrone is not challenging the waiver of the right to testify in the first phase. Rather, Mr. Lagrone is challenging the waiver of his right to testify at the second phase. And, unlike in ***Winters***, the circuit court never specifically confirmed at any point that Mr. Lagrone understood that he was waiving his right to testify in the second phase.

II. The Harmless Error Doctrine Does Not Apply When a Circuit Court Fails to Conduct a Personal, On-the-Record Colloquy Regarding the Waiver of the Right to Testify.

The State also argues that ***Garcia*** does not apply because it predates ***State v. Nelson***, 2014 WI 70, 355 Wis. 2d 722, 849 N.W.2d 317, which held that a denial of the right to testify was subject to harmless error review.[1]

However, as discussed in Mr. Lagrone's initial brief (at 25-26), at issue in ***Nelson*** was the denial of a defendant's *assertion* of the right to testify. ***Id.***, ¶¶ 15-16. ***Nelson*** did not address a circuit court's failure to conduct a colloquy. Thus, ***Nelson*** did not overrule Wisconsin cases requiring an evidentiary hearing when a colloquy is absent or invalid. *See* ***Garcia***, 323 Wis. 2d 531, ¶ 4; ***Denson***, 335 Wis. 2d 681, ¶¶ 68-70.

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[1] The State notes in a footnote that "most courts that have considered this issue have reached the same conclusion." (State's Br. at 16 n.13 (citations omitted)). However, as the dissent noted in ***Nelson***, some courts refuse to follow this principle and instead hold that the denial of the right to testify is not subject to harmless error analysis. ***Nelson***, 355 Wis. 2d 722, ¶ 65 (Abrahamson, C.J., dissenting) (noting ***State v. Rivera***, 402 S.C. 225, 741 S.E.2d 694 (2013); ***State v. Dauzart***, 769 So.2d 1206, 1210 (La. 2000); ***State v. Rosillo***, 281 N.W.2d 877, 879 (Minn. 1979)).

Moreover, in ***Nelson***, the defendant informed the circuit court what she planned to say on the stand, thus, there was some basis to make a harmless error determination. ***Id.***, ¶ 15; *contrast also with* ***Magett***, 355 Wis. 2d 617, ¶¶ 10, 23-24 n.7 (applying the harmless error doctrine to a circuit court's refusal to hold the second phase of a trial when the content of the only evidence—the defendant's testimony—was already known as the defendant had testified in the first phase). By requiring Mr. Lagrone to provide an offer of proof regarding the content of his testimony, the burden of proving harmlessness is erroneously shifted from the State to Mr. Lagrone.

Lastly, the State indicates that it agrees that harmless error review is different from the test for the sufficiency of evidence. (State's Br. at 22). Nonetheless, the State then appears to reference the wrong standard:

> Lagrone points out that harmless error harmless error [sic] review is different from the test for the sufficiency of the evidence and the State agrees. And although the burden is on the State in harmless error context, Lagrone ignores that the burden was on him to show that he was not responsible for the crime. Even in viewing the evidence in the light most favorable to Lagrone, there is no reasonable probability of a different result at the responsibility phase of the trial.

(State's Br. at 22) (emphasis added). In order for an error to be harmless, the State, as the party benefiting from the error, must prove that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Nelson***, 355 Wis. 2d 722, ¶ 44 (quotations omitted).

Therefore, because the circuit court in this case failed to conduct a colloquy regarding the waiver of the right to testify, and Mr. Lagrone properly alleged that he did not

understand that he had a right to testify at the second phase, this case is properly analyzed under ***Garcia***, and Mr. Lagrone is entitled to an evidentiary hearing.

CONCLUSION

For the reasons stated, Mr. Lagrone respectfully requests that this Court reverse the court of appeals' decision and remand this case to the circuit court with directions to hold an evidentiary hearing regarding the waiver of his right to testify at the second phase.

Dated this 2nd day of December, 2015.

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 2,146 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 2nd day of December, 2015.

Signed:

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