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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP001944

In re the commitment of Jon F. Winant:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JON F. WINANT,

Respondent-Appellant.

On Appeal of the Judgment of Commitment Under Chapter 980, Honorable David A. Hansher, Presiding, and Order Denying Post-Commitment Motion, Milwaukee County Circuit Court, the Honorable Timothy Witkowiak, Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. Mr. Winant Was Denied the Effective Assistance of Counsel When Counsel Failed to Lodge Proper Objections to the Admission of Prejudicial, Inadmissible Hearsay Evidence.

A. Deficient performance.

1. Exhibit 26: A note from social worker Raymond Konz entered through DOC Agent Mahin.

First, the State appears to concede that the social worker's note was improperly admitted into evidence. (State's Response Brief at 6)("Although the V.A. report itself may have been improperly admitted…). The State recognizes that proper foundation was not laid for the admission of this exhibit: "the State cannot reasonably assert that a proper foundation had been established for the V.A. report's admissibility." (State's Response at 10). The State further "agrees that Winant's statement to the social worker is inadmissible under Wis. Stat. § 908.03(4)," which provides an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment. (State's Response at 10-11); Wis. Stat. § 908.03(4).[1]

[1] The State attempts to suggest that the social worker's note *might* have been admissible as a self-authenticating patient health record under Wisconsin Statute § 908.03(6m); however, the State then concedes that "it is not certain whether the V.A. report had been properly self-authenticated and admissible as a patient health care record." (State's Response at 11). As the State itself acknowledges, the record thus does not reflect that this document would have been admissible under Wis. Stat. § 908.03(6m).

Though the State also agrees that trial counsel failed to object to the social worker's note "on the grounds that the report did not fall within the hearsay exception for statements made for purposes of treatment or diagnosis," the State nevertheless asserts that trial counsel did not perform deficiently because counsel did lodge a foundation objection to this exhibit. (State's Response at 6). Should this Court agree with the State that counsel's foundation objection was sufficient, then the circuit court erred in denying counsel's objection.[2]

But, as the State's response to that foundation objection was that the social worker's note constituted "treatment records," and as the circuit court then overruled counsel's objection, (101:68-69;Winant Initial App.130-31), Mr. Winant asserts that counsel performed deficiently by failing to explain to the court that statements to social workers do *not* fall under the treatment records exception to the hearsay rule. As the State recognizes, it is well-settled law that social worker's statements do not fall under this exception. (State's Response at 10).[3] As such, no apparent strategic reason exists for counsel's failure to explain this to the circuit court.

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[2] The admission of evidence lies within the discretion of the circuit court; however "[i]n considering whether the proper legal standard was applied," "no deference is due." ***State v. Keith***, 216 Wis. 2d 61, 68-69, 573 N.W.2d 888 (internal citations omitted). This Court reviews de novo whether any error in admitting evidence was harmless. ***Id.*** at 69. For the reasons discussed both in Section I.E. of his Initial Brief and Section I.B. of this brief (analyzing prejudice), here the State would not be able to show that the error in the court's admission of this evidence was harmless.

[3] Mr. Winant appreciates the State's citation to ***State v. Domke***, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364, in which the Wisconsin Supreme Court, as the State explains, held that "***Huntington***'s holding is well settled law." (State's Response at 10).

2. Exhibits 27-29: hearsay statements within revocation paperwork.

Mr. Winant further argues that trial counsel should have objected to the hearsay statements contained within Exhibits 27-29 (Notice of Violation and Receipt, Violation Investigation Report, and Revocation Summary). (112:Tr.Exhs.27-29). He recognizes that as these documents were prepared by DOC, they would overcome the first hearsay hurdle under the public records exception. (Winant Initial Brief at 13). He nevertheless asserts that the hearsay statements made within these documents; specifically, the references to Mr. Winant's agent receiving a phone call from the social worker and the discussion of what the social worker told the agent, remained inadmissible hearsay within hearsay. (Winant Initial Brief at 13).

The State responds by arguing that these documents—including the hearsay within hearsay contained within them—fell under the requirements for admissibility of the public records exception set forth in Wisconsin Statute § 908.03(8)(c). (State's Response at 14-17). The State asserts that "if a report or record is the product of an investigation made pursuant to authority granted by law under Wis. Stat. § 908.03(8)(c), factual findings that incorporate hearsay are admissible." (State's Response at 13).

As support for its argument, the State cites to Professor Daniel Blinka's discussion of Wisconsin's public records exception to the hearsay rule. (State's Response at 13). In the excerpt quoted by the State, Professor Blinka notes that "[i]nvestigators commonly interview lay people who may have personal knowledge or hearsay information that is helpful." (State's Response at 13); Daniel D. Blinka, Wisconsin Practice Series, Wisconsin Evidence § 803.8 (3d

ed. 2008). Professor Blinka further explains: "When such third party statements are later incorporated into the investigative report, they represent additional layers of hearsay. If the inquiry was carried out with lawful authority, Wis. Stat. § 908.03(8)(c), encompasses the additional layers of hearsay." (***Id.***). Professor Blinka notes that the "trial judge may exclude them if the sources of information or other circumstances indicate a lack of trustworthiness in such statements." (***Id.***).

Mr. Winant also cited Professor Blinka's discussion of Wisconsin's public records exception to the hearsay rule in support of his argument that the hearsay contained within these documents would *not* be admissible. (Winant Initial Brief at 10-11). In the same discussion, Professor Blinka explains the public records exception rests on the public policy assumption that "public officials and employees carefully and diligently perform their duties and honestly record their activities as required by law;" further, that multiple levels of hearsay are acceptable "provided that *all declarants are members of the agency charged* with the record's preparation and all are under a lawful duty to report the matter" with "personal knowledge of the matters observed." ***Id.*** at 781, 782 (emphasis added). Mr. Winant recognizes the apparent inconsistency of these two excerpts, but nevertheless asserts that his interpretation is correct in this context.

First, the conclusion that hearsay within hearsay in an investigative report will not be admissible absent another exception is supported by the plain language of the statutes. The plain language of Wisconsin Statute § 908.03(8) provides that the *factual findings* may be admissible unless the "sources of information or other circumstances indicate lack of trustworthiness." The plain language does not suggest that

hearsay statements that perhaps provided the basis for factual findings are in turn automatically admissible.[4] Further, Wisconsin Statute § 908.05 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule *if each part of the combined statements conforms with an exception to the hearsay rule* provided in this chapter." Wis. Stat. § 908.05 (emphasis added).

Second, Professor Blinka cites ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2011 WI App 101, ¶ 61, 335 Wis. 2d 151, 801 N.W.2d 781 (Ct. App. 2011) as support for the language that the State in turn uses to support its argument. Blinka, Wisconsin Practice Series, Wisconsin Evidence § 803.8, n.28.1. However, in ***Estate of Kriefall***, this Court concluded that the hearsay statements contained within the investigative report were admissible because they were *statements made by a party opponent*. ***Estate of Kriefall***, 2011 WI App 101, ¶ 61, n.22.

One of the parties contended that a report prepared by the Wisconsin Department of Health and Family Services (containing statements of employees of one of the parties) should be disregarded. ***Id.*** This Court denied this claim, noting that under Wisconsin Statute §908.03(8) allows for the admission of reports setting forth factual findings resulting from an investigation made pursuant to authority granted by law, "unless the sources of the information or other circumstances indicate lack of trustworthiness." Importantly, this Court further explained that the "things that E & B employees told the investigators compiling the Report are

[4] Indeed, just as an expert may rely on hearsay to reach his or her opinion, the fact that the opinion is admissible does not in turn automatically mean that the hearsay that formed the basis for the opinion is admissible absent a hearsay exception. *See* Wis. Stat. § 907.03 (2009-2010).

specifically excluded from the rule against hearsay" under Wisconsin Statute § 908.01(4)(b)1, as statements made by a party opponent. ***Id.*** The same is not true here—the note described the *social worker's* statements about what Mr. Winant purportedly told him; the State failed to provide a hearsay exception for the social worker's statements.

Even further, the State's interpretation conflicts with this Court's analysis of the admissibility of hearsay evidence in Chapter 980 cases in ***State v. Keith***, 216 Wis. 2d 61, 573 N.W.2d 888. In that case, this Court considered a challenge to the admission of a police report, which was used to refresh a detective's recollection during the trial and then admitted into evidence. ***Id.*** at 74-77.[5] This Court first noted that the court erred in allowing the report into evidence because the report had successfully refreshed the detective's recollection, and therefore was not admissible under Wisconsin Statute § 908.03(5)'s exception for failed attempts to refresh recollection. ***Id.*** Second, this Court explained: "Additionally, the document contained the hearsay statements of John, statements not taken under oath, which create additional evidentiary problems." ***Id.*** Under the State's argument, that hearsay would not have created "additional evidentiary problems" because the statements could have been admissible as factual findings from an investigation made pursuant to lawful authority.

The hearsay within hearsay contained within Exhibits 27-29 was inadmissible, and no apparent strategic reason

[5] Though this Court concluded that the circuit court "relied on an erroneous view of the law in regard to the admission of the report," this Court nevertheless concluded that the error was harmless because the report never went to the jury and the hearsay statements were not read in testimony or discussed in closing argument. ***Id.***

existed for counsel not objecting to the admission of these exhibits with this inadmissible hearsay.

B. Prejudice.

The State further argues that trial counsel's failures did not prejudice Mr. Winant because (1) the social worker's note was "merely cumulative;" (2) the experts could reasonably rely on the information within that report to reach their opinions; and (3) Mr. Winant's statement to the social worker "was only one piece of evidence that supported his commitment." (State's Response at 17-26).

First, though Mr. Winant argues that the hearsay statements contained within Exhibits 27-29 were inadmissible, he acknowledges that Exhibit 30 (the revocation decision) was likely admissible, and further that the fact findings contained within Exhibit 30 included that Mr. Winant admitted to having contact with the girl, soliciting prostitutes, and that he needed sex offender treatment. (112:Tr.Exh.30; Winant Initial Brief at 14-15). But the social worker's note was not merely cumulative, because it presented information concerning Mr. Winant's state of mind while on supervision—that he knew that he was struggling with his feelings, knew that he had violated probation, but wished to avoid telling his agent to avoid jail. (*Compare*12:Tr.Exh.30 *with* 112:Tr.Exh.26).

Additionally, though the experts were able to use this evidence to reach their opinions, that did not in turn mean that the underlying hearsay would have also been admitted into evidence. *See* Wis. Stat. § 907.03 (2009-2010); ***Staskal v. Symons Corp***, 2005 WI App 216, ¶ 22, 287 Wis. 2d 511, 706 N.W.2d 311 ("§ 907.03 is not a hearsay exception and does not make admissible inadmissible hearsay"). Even further, though the law presumes that, in a bench trial, the court

disregards matters not relevant to the issue, *see* ***Block v. State***, 41 Wis. 2d 205, 212, 163 N.W.2d (1968), here the circuit court chose to admit the evidence and then emphasized the fact that Mr. Winant "was revoked a third time" "based on his *own report*" when reaching its decision. (104:5;Winant Initial App.106).

This was a close case that boiled down to the circuit court's weighing of Dr. Tyre's conclusions against Dr. Elwood's conclusions. The circuit court concluded that the only real difference between their opinions was the weight Dr. Elwood attributed to recent studies showing the relationship between age, completion of sex offender treatment, and recidivism. (104:5-8;Winant Initial App.106-09). In rejecting the weight Dr. Elwood placed on these factors, the circuit court stressed Mr. Winant's poor history on supervision, including the revocation based on his own report. (104:5;Winant Initial App.106).

Where the State had the burden to prove that Mr. Winant was more likely than not to re-offend, and the court emphasized Mr. Winant's failure on supervisions, including his failure based on his "own report" to conclude that the State had met its burden, there was a reasonable likelihood that the outcome of the case would have been different had defense counsel properly objected to the admission of hearsay evidence reflecting Mr. Winant's state of mind while on supervision. Mr. Winant's post-conviction motion set forth sufficient facts which, if true, would warrant relief; as such, he asks this Court to reverse the circuit court's decision and remand the matter for a ***Machner***[6] hearing.

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[6] ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

CONCLUSION

For the above stated reasons, Mr. Winant respectfully requests that this Court reverse the decision of the Court of Appeals, and remand this matter for a ***Machner*** hearing.

Dated this 30th day of March, 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 2,242 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 30th day of March, 2015.

Signed:

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