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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II
Case No. 2014AP2515-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMY LEE BRANCH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order
Denying in Part a Postconviction Motion, Entered in Kenosha
County Circuit Court, the Honorable Faye Flancher,
Presiding.

REPLY BRIEF

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
Telephone: (414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. Mr. Branch Is Entitled to a Return of the \$583 in Cash.....	1
CONCLUSION	3
CERTIFICATION AS TO FORM/LENGTH.....	4
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)	4

CASES CITED

<i>Black v. Whitewater Comm. & Sav. Bank</i> , 188 Wis. 2d, 205 N.W.2d 404 (1925)	2
<i>Citizens Bank of Maryland v. Strumpf</i> , 516 U.S. 16 (1995)	1
<i>Zweck v. D.P. Way Corp.</i> , 70 Wis. 2d 426, 234 N.W.2d 921 (1975)	1

STATUTES CITED

§ 814.12	1
§ 968.20	1

ARGUMENT

I. Mr. Branch Is Entitled to a Return of the \$583 in Cash.

At the time of Mr. Branch's arrest, police seized \$583 in cash that Mr. Branch had on his person. (14, 17; Def. Initial Br. App. 101-102). Mr. Branch asserts that he is entitled to a return of his money from the Racine County Sheriff's Department because the State failed to establish that the money was contraband or needed for evidence or further investigation. (Def. Initial Br. at 6-8).

The State concedes that Mr. Branch is entitled to a return of his property from the Sheriff's Department under Wis. Stat. § 968.20. (State's Br. at 3).

Nonetheless, the State contends that the money the Sheriff's Department owes Mr. Branch was properly "set off" against money Mr. Branch owes to the Clerk of Courts. (State's Br. at 3-4). However, the State fails to cite any statute or case allowing a circuit court to grant a set off when there are two judgments or debts involving different parties.

The United States Supreme Court has stated "[t]he right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (quotation omitted); *see also, Zweck v. D.P. Way Corp.*, 70 Wis. 2d 426, 433, 234 N.W.2d 921 (1975) (stating a "set off is a demand which the defendant has against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action"); Wis. Stat. § 814.12 ("If, in any action, a recovery be had by one party and costs be awarded to the other [party] the court may set off one against the other and render judgment for the balance.").

In *Black v. Whitewater Comm. & Sav. Bank*, 188 Wis. 2d, 205 N.W.2d 404 (1925)—the only case cited by the State—at issue was whether a circuit court properly exercised its discretion in declining to grant a set off between two parties. In *Black*, T.H. Black employed a bank to cashier an auction sale of farm property. *Id.* at 404. On January 1924, upon accounting, it was found that the bank had in its possession the proceeds of the sale, \$1,150, belonging to Black. *Id.* At that time, the bank was in possession of a judgment note against C.W. Patrick, as principal, and Black, as an accommodation maker, for \$2,000 that was not due until May 6, 1924. *Id.* Black was advised that the bank proposed to hold the \$1,150 until the Patrick note became due and apply it if the note was not paid. *Id.* Black sought to recover the \$1,150 from the bank. *Id.* On November 5, 1924, Black received a judgment in his favor. *Id.* On the same day, the bank applied entered a cognovit judgment on the judgment note against Patrick and Black. *Id.* The bank then applied to the circuit court “to offset against the judgment which it had recovered against Patrick and Black the amount of the judgment which Black recovered against the bank.” *Id.* The circuit court denied a set off. *Id.* On appeal, the Wisconsin Supreme Court held that the bank’s abhorrent conduct in breaching its duty to act as Black’s agent justified the circuit court’s refusal to grant a set off. *Id.* at 406-07.

Unlike in *Black*, in which a set off was sought, in this case there are not two parties that owe each other money. Mr. Branch is entitled to a return of property from the Sheriff’s Department. Mr. Branch does not owe the Sheriff’s Department money. Mr. Branch owes money to a different party, the Clerk of Court. Therefore, a set off is not proper in this case, and Mr. Branch is entitled to a return of \$583.

CONCLUSION

For the reasons stated, Tommy Lee Branch respectfully requests that this Court reverse the order denying in part his postconviction motion and direct the circuit court to enter an order returning the money to Mr. Branch and vacating the order releasing Mr. Branch's money to the Racine County Clerk of Court's office.

Dated this 19th day of March, 2015.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

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 707 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 19th day of March, 2015.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
Telephone: (414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant