STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1501-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL W. BRYZEK,

Defendant-Respondent.

ON APPEAL FROM ORDERS GRANTING POSTCONVICTION RELIEF ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. BEFORE THE ENACTMENT OF WIS. STAT. § 244.14, A GIFTING PROVISION IN A DURABLE POWER OF ATTORNEY DID NOT ALLOW AN AGENT TO MAKE UNLIMITED GIFTS TO HIMSELF, UNFETTERED BY ANY FIDUCIARY DUTY TO THE PRINCIPAL.

Bryzek's brief concisely summarizes his view of the law prior to the enactment of Wis. Stat. § 244.14. He says that the gifting provision of the durable power of attorney allowed him to make unlimited gifts to himself, no matter the effect on his

mother. "He had the power to gift, including gifts to himself," Bryzek writes, and "[t]hat power had no limitation." Bryzek's brief at 11. The gifting provision, in other words, trumped any fiduciary duty he had to his principal. He could spend every last penny of his mother's money on himself, without no obligation to protect or even consider his mother's interests.

Bryzek correctly observes that three cases decided before the enactment of Wis. Stat. § 244.14 – *Russ v. Russ*, 2007 WI 83, 302 Wis. 2d 264, 734 N.W.2d 874, *Praefke v. American Enterprise Life Ins. Co.*, 2002 WI App 235, 257 Wis. 2d 637, 655 N.W.2d 456, and *Alexopoulos v. Dakouras*, 48 Wis. 2d 32, 179 N.W.2d 836 (1970) – established a default rule that precludes gifting or self-dealing by an agent unless the power of attorney specifically allowed that conduct. *See* Bryzek's brief at 9-10. He then argues that "[w]here, as here, the Power of Attorney granted the right to gift and self-deal, there was no default rule. Rather, the Power of Attorney's grant of authority controlled." *Id*. at 10. But Bryzek does not identify any language in those cases that remotely suggests that a grant in the power of attorney of the power to self-gift relieves the agent of all fiduciary obligations to the principal.

In its brief-in-chief, the State argued *Russ* established that when an agent under a power of attorney is authorized to engage in self-dealing, the standard for evaluating the agent's exercise of the power of self-dealing is the intent of the principal. *See* State's brief at 15-16. Bryzek correctly notes – and the State did not suggest otherwise – that the agent's power to self-deal in *Russ* derived not from the

power of attorney document but from a pre-existing joint account owned by the agent and the principal. But the issue addressed by *Russ* – how to resolve the conflict between an agent's fiduciary duty to the principal and the agent's express authority to engage in self-dealing using the principal's assets – is the same regardless of whether the conflict arises from a single document or two documents.

Bryzek cites a number of secondary sources to support his contention that Wis. Stat. § 244.24 established "new law." *See* Bryzek's brief at 13-15. The State acknowledged in its brief-in-chief that the statute created duties not contained in the prior version of the durable power of attorney statute. *See* State's brief-in-chief at 14. The dispositive question in this case is whether the new statute codified common law principles. The answer to that question, as the State has argued, is "yes." *See id.* at 14-21.

Bryzek does not argue that he cannot be held criminally liable if the common law standards in effect before the enactment of Wis. Stat. § 244.14 were comparable to those in the statute. Because the statute and the jury instruction based upon it did not impose any duties on Bryzek or restrict his authority as his mother's agent beyond what was required of him under the common law, the circuit court erred when it granted a new trial based on its conclusion that the jury instruction reflected "new law."

II. THE TRIAL COURT'S GRANT OF A NEW TRIAL WAS AN ERRONEOUS EXERCISE OF ITS DISCRETION BECAUSE IT WAS BASED ON AN ERROR OF LAW.

Bryzek argues that "[t]here can be little doubt based upon the record that the trial court concluded that Wis. Stat. § 244.1[4](1) as applied in this case was an *ex post facto* law." Bryzek's brief at 7. But he argues in the alternative that "[t]he trial court may have granted the new trial in this case not because of a constitutional finding regarding the statute as an *ex post facto* law, but rather, finding that the jury instruction that incorporated the provisions of the 'new' law did not fully inform the jury of the law applicable to the charges being tried." *Id*. at 16. He contends that "[i]f the State is correct in its assertion that the trial court was not actually ruling that the statute as applied was *ex post facto* but rather 'new' law that did not exist during a portion of the charging period, then the trial court's grant of a new trial is not an erroneous exercise of discretion." *Id*. at 15-16.

It is not the State's contention that the trial court's ruling was based on something other than *ex post facto* grounds. The State noted in its brief-in-chief that the circuit court had not used the term "*ex post facto*" in its ruling, but argued that the court's determination that Bryzek is entitled to a new trial because the statute represented "new law" strongly suggested that that was the basis for the court's decision. *See* State's brief at 11-12.

Bryzek argues that because some of his conduct occurred after the new statute was enacted, the court properly exercised its discretion because

the court "struck the appropriate balancing of interests, those of the state, and those of the defendant in granting a new trial." Bryzek's brief at 17. But a trial court erroneously exercises its discretion when it has exercised discretion on the basis of an error of law. *See Tina B. v. Richard H.*, 2014 WI App 123, ¶45, 359 Wis. 2d 204, 857 N.W.2d 432. If, as the State contends, the trial court was incorrect when it held that the statute established "new law" (105:2; A-Ap. 105), then it erroneously exercised its discretion because it based its decision to grant a new trial on an error of law.

CONCLUSION

For the reasons stated above and in the State's opening brief, the court should reverse the circuit court's orders granting postconviction relief.

Dated this 14th day of December, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 1,026 words.

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Jeffrey J. Kassel
Assistant Attorney General

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 14th day of December, 2015.

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Jeffrey J. Kassel
Assistant Attorney General