STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 15-AP-2605-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DAVID L. JOHNSON
A/K/A DAVID ALI SHABAZZ,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE JOSEPH M. DONALD, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

ARGUMENT

I. This Court Should Reverse And Remand For A Machner Hearing Because The Circuit Court Abused Its Discretion When It Denied Shabazz A Hearing On His Claims Of Ineffective Assistance Of Counsel.

A. The Circuit Court Abused Its Discretion By Applying An Incorrect Legal Standard.

The State properly concedes—as it must—that a circuit court is required to conduct an evidentiary hearing on a claim of ineffective assistance of counsel when "the defendant alleges sufficient material facts that, if true, entitle him or her to relief." (Resp. Br. at 10). Although the State cites the Supreme Court's decisions in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), it fails to acknowledge that a circuit court must *only* consider those allegations that appear "*within the four corners of the document itself*…." *Allen*, 2004 WI 106, ¶ 23 (emphasis added). Indeed, the proper focus are the allegations contained in "the motion *on its face*…." *Bentley*, 201 Wis. 2d at 310 (emphasis added). *See also Allen*, 2004 WI 106 at ¶ 9 (same).

Nowhere in its brief did the State discuss this "four corners" rule, nor did the State show that the circuit court restricted its analysis *only* to those allegations on the face of Shabazz's motion. The State's omission in this regard is not surprising, because the circuit court's own decision confirms that the lower court failed properly to apply the "four-corners" rule.

Although the *Allen/Bentley* test is in essence a pleading standard requiring the circuit court to accept as true those allegations contained within the four corners of the postconviction motion, *see Allen*, 2004 WI 106 at ¶ 12, the circuit court below faulted Shabazz for "*submit[ing] nothing* other than his own prepared list of phone calls to *factually support* his arguments." (R.77, App. 108) (emphasis added). The circuit court further criticized Shabazz for failing to "provide[] any *objective documentation*" in support of his allegations. (*Id.*, App. 109) (emphasis added).

Thus, rather than assuming Shabazz's allegations to be true as was required under *Allen/Bentley*, the circuit court disregarded his allegations because Shabazz supposedly had not submitted "factual[] support" or "objective documentation" in his motion. Yet, "factual[] support" and "objective documentation," whether in the form of affidavits or other documentary evidence, are precisely the types of items that would *not* be contained within the four corners of the motion.[1]

Because the circuit court applied the wrong legal standard to Shabazz's motion, this court can—and indeed should—reverse the circuit court on this basis alone. *See, e.g., State v. Daniels*, 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991) ("[i]f the circuit court applied the wrong legal standard…[the reviewing court] will reverse the circuit court's decision as an abuse of discretion.").

[1] As explained herein and in Shabazz's opening brief (at 12), he did submit to the circuit court an affidavit documenting the time and content of one of the telephone calls, as well as the content of his recollection of the relevant calls that were placed. (R.76, App. 167-68, 170).

B. Shabazz's Postconviction Motion Sufficiently Alleged Ineffective Assistance Of Counsel Under The Allen/Bentley Standard.

Even had the circuit court applied the correct standard (which it did not), Shabazz satisfied the *Allen/Bentley* test for pleading a postconviction claim of ineffective assistance of counsel. As the State properly concedes (Resp. Br. at 10), a postconviction defendant should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen*, 2004 WI 106, ¶ 23. Nonetheless, the State erroneously suggests that "the only factual allegations [Shabazz] made in his brief were that he received a series of phone calls during the time K.M. claimed that [Shabazz] was assaulting and falsely imprisoning her." (Resp. Br. at 18). The State's argument fails for several reasons.

First, with respect to the phone calls Shabazz addressed in his opening brief (at 20-23), the reason these calls would have been highly relevant to the trial was not—as the State erroneously suggests—simply to show that he received certain calls. To the contrary, they are relevant because they establish a timeline that undermines K.M.'s claims regarding aggravated battery and false imprisonment. Shabazz's motion contained, *inter alia*, the following factual allegations: (1) the call between K.M.'s friend, John, and Shabazz's telephone would have undermined K.M.'s credibility at trial by contradicting her repeated (but inconsistent) denials of his identity and would have supported a defense theory that John was part of a plan to steal from Shabazz; (2) that calls placed between the times of approximately 9:30 p.m. and 11:39 p.m. would have contradicted K.M.'s claims that she was being assaulted and restrained against her will at that time by showing, *inter alia*, that there was actually no assault or false imprisonment

happening at that time; (3) that calls between K.M.'s telephone and Shabazz between approximately 4:21 a.m. and 4:27 a.m. the following morning would undermine K.M.'s credibility and support the defense theory of the case by calling into question why a person who had claimed to be the victim of a brutal assault by Shabazz would call him on the telephone immediately thereafter; and (4) that a call from K.M. to Shabazz placed on September 26, 2012 would undermine K.M.'s denials (also contradicted by her own husband) that she had not visited Shabazz on that date. (R.70, App. 125-29).

Second, although the State faults Shabazz (Resp. Br. at 17) for not identifying K.M.'s friend, John, the State largely ignores Shabazz's argument that the phone record evidence would have "further undermined K.M.'s credibility to the jury by contradicting her denials of his existence at trial." (App. Br. at 21).

Third, although Shabazz contends he was not required to do so for the reasons discussed above, he did submit to the circuit court an affidavit from his former spouse who placed one of the calls at issue. (R.76, App. 167-68). In that affidavit—acknowledgement of which the State relegates to a mere footnote in its brief (Resp. Br. at 14 n.6)—Ms. Johnson details that her testimony would factually support Shabazz's allegations by showing that Shabazz's demeanor was calm, that she did not hear any sounds of a struggle or other sounds in the background, and that she was not aware of anyone else in the apartment at the time. (R.76, App. 167-68). Those facts support the allegations Shabazz made in his postconviction motion and undermine K.M.'s claims that at this very same time a brutal, violent assault was supposedly taking place in Shabazz's apartment.

In sum, Shabazz's postconviction motion satisfied the *Allen/Bentley* standard. The allegations summarized above and in Shabazz's brief (App. Br. at 20-23) are concrete, specific, and answer the key questions of "who, what, where, when, why, and how" the Supreme Court counsels should be alleged. *Allen*, 2004 WI 106 at ¶ 23. Contrary to the State's suggestion and the lower court's conclusion, these allegations are sufficient to require a *Machner* hearing.

II. Both DNA Analysis Surcharges Imposed By The Circuit Court Are Unconstitutional Under The Ex Post Facto Clause.

The State concedes, and the circuit court concluded, that one of the DNA analysis surcharges imposed below was unconstitutional under the *Ex Post Facto* clause, based on this Court's rulings in *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* ___ WI ___, ___ Wis. 2d ___, ___ N.W.2d ___ (Mar. 7, 2016), *State v. Radaj*, 2015 WI App. 50, 363 Wis. 2d 633, 866 N.W.2d 758, and *State v. Elward*, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756.

At issue on appeal is whether the second surcharge should also have been vacated under the facts of this case, where the circuit court expressly imposed the surcharge as "punishment." (R.133, App. 298 at 39:16-17). In its brief, the State suggests that the circuit court's intent in imposing the surcharge "does not render the legislative intent and effect of the statute punitive." (Resp. Br. at 22). Instead, the State contends that the outcome in this case is controlled by *Scruggs*. (*Id.*) The State's argument fails for at least two reasons.

First, the State conflates the two distinct inquiries under the *Ex Post Facto* clause. One inquiry is whether the

legislative intent is punitive. *Scruggs*, 2015 WI App 88 at ¶ 7. A separate inquiry is whether the *effect* of application of the statute is punitive—even if the legislative intent is non-punitive. *Id*. *Scruggs* answered the first question and concluded that the DNA analysis surcharge statute has a non-punitive *intent*. *Id*. at ¶¶ 17-18. Shabazz does not suggest that the Court's imposition of the surcharge as "punishment" renders the *legislative intent* punitive. Rather, Shabazz argues that the *effect* of the statute in this case and as applied to Shabazz is punitive because "punishment" was the circuit court's stated goal in imposing the surcharge. As such, because of the lower court's stated purpose of punishing Shabazz, the sentencing court "transform[ed] what was clearly intended as a civil remedy into a criminal penalty." *Scruggs*, 2015 WI App 88 at ¶ 7.

Second, contrary to the State's suggestion (Resp. Br. at 22), Shabazz's argument is not foreclosed by *Scruggs*. To the contrary, *Scruggs* rejected the argument that the DNA analysis surcharge had a punitive effect *in that case* and applied to *that defendant*, based on the arguments raised by the defendant in *Scruggs*. Those specific arguments were the very same ones the Court previously rejected in finding a non-punitive legislative intent. *Scruggs*, 2015 WI App 88 at ¶¶ 14, 18. Because those arguments are not at issue here, this case is not "on all fours with *Scruggs*" as the State erroneously suggests (Resp. Br. at 22). Both DNA analysis surcharges are unconstitutional in this case.

III. Shabazz Is Entitled To Resentencing Based On Inaccuracies In The Presentence Investigation Report.

The State properly concedes that Shabazz has a due process right to be sentenced based on accurate information.

(Resp. Br. at 23). *See State v. Melton*, 2013 WI 65, ¶ 29, 349 Wis. 2d 48, 834 N.W.2d 345. Nor does the State dispute that the Supreme Court has held that "the defendant is entitled to an evidentiary hearing" to contest factual matters set forth in a PSI. *Id.* at ¶ 65, *citing State v. Suchocki*, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997). Rather, the State contends that Shabazz is not entitled to relief because it cannot be shown that the sentencing court relied on the information. (Resp. Br. at 23). The State's argument fails for at least two reasons.

First, in his opening brief, Shabazz showed that the circuit court observed that it would "start with the things in the '80s and '90s and then this past decade" as part of Shabazz's record. (R.113, App. 294 at 29:7-15). Even the State acknowledged that the sentencing court emphasized Shabazz's record of prior offenses, observing that he had "25 priors, there were many, many additional cases that were dismissed, no processed, other dispositions." (Resp. Br. at 25) (R.113 at 34:3-10). Because the PSI contained inaccurate information relating to Shabazz's criminal history and background, and because the lower court imposed sentence at least in part on Shabazz's history and character, reliance is shown.

Second, while Shabazz acknowledges that his attorney briefly raised some of the discrepancies during the sentencing hearing (App. Br. at 33), a more complete hearing was required to resolve fully the inaccuracies. *See, e.g., State v. Anderson*, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998) (having disputed portions of the PSI on the record, the accuracy of such matters should have been "fully resolved" by a proper hearing).

IV. Shabazz Is Entitled To A New Trial Under This Court's Power Of Discretionary Reversal.

In his opening brief, Shabazz showed that he was entitled to discretionary reversal because the real controversy in this case was not fully tried, given that the jury was prevented from considering critical evidence showing that he was not the source of K.M.'s injuries. (App. Br. at 36-37). Shabazz also showed that justice has miscarried in this case because there is a high probability of a different result on retrial. (*Id*. at 37-38).

In response, the State relies on its same arguments relating to ineffective assistance of counsel in suggesting that Shabazz is not entitled to relief because the evidence against him at trial was supposedly "insurmountable" (Resp. Br. at 27) and "compelling" (*Id.* at 13). The State's argument fails.

The evidence against Shabazz was far from "insurmountable" or "compelling," as the State erroneously opines. To the contrary, the State's case was so weak with respect to the most serious charges of sexual assault and strangulation that the jury unanimously acquitted Shabazz of those charges. (R.48; R.51).

Undaunted, the State makes much of the presence of the DNA analyst's testimony that DNA was found on the blood evidence from Shabazz's left palm. (Resp. Br. at 6; R.107, App. 239 at 40:12-14). Yet, there was nothing in the record to suggest that this supposed evidence was anything other than contamination, particularly given that no blood or other biological evidence was found in Shabazz's apartment where K.M. had alleged that a violent assault had supposedly occurred. (R.110, App. 268 at 24:19-23). Nor were there any injuries documented on Shabazz that would suggest that he

had repeatedly struck K.M., as she claimed at trial. (*Id*., App. 282-83, 89:24-90:6).

Nor does the State contest that (1) the alleged victim's trial testimony was fraught with inconsistencies (*See* App. Br. at 5-6), (2) the alleged victim's own husband contradicted her testimony at trial (*Id*. at 5), (3) Shabazz's neighbor, another key State witness, was shown to have given inconsistent statements regarding what she supposedly observed (*Id*. at 6-7), (4) other trial testimony contradicted the victim's claims (*Id.* at 8-9), (5) no DNA evidence of Shabazz was found in or around K.M.'s mouth, vagina, or anus (*Id.* at 8), and (6) the State's own witness conceded that K.M.'s injuries could not be conclusively shown to be a result of strangulation (*Id.*).

In sum, the record in this case falls well short of containing "compelling" or "insurmountable" evidence against Shabazz. (Resp. Br. at 13, 27). To the contrary, for all the reasons discussed herein and in Shabazz's opening brief, the real controversy in this case has not been fully tried and justice has miscarried.

CONCLUSION

For all of the reasons herein and in Shabazz's opening brief, this Court should reverse and remand this case to the circuit court with instructions to hold a *Machner* hearing on Shabazz's claims of ineffective assistance of counsel. Alternatively, this Court should vacate the remaining DNA analysis surcharge and remand for resentencing following a hearing to address errors in the presentence investigation report.

Dated this 1st day of August, 2016.

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 2,498 words.

Dated this 1st day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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Dated this 1st day of August, 2016.

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