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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

Case No. 2016AP35CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
JEFFREY S. ROEHLING,
Defendant-Appellant.

On Notice of Appeal to Review Judgment of Conviction and Order Denying Motion for Postconviction Relief Entered in the Circuit Court for Polk County, the Honorable Jeffery Anderson presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUE

I. Whether Roehling is Entitled to a Machner Hearing on his Claim that his Trial Counsel was Ineffective?

The circuit court entered an order denying Roehling's motion for postconviction relief without an evidentiary hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case involves the application of well-settled law; thus, oral argument and publication are not necessary.

STATEMENT OF THE CASE

On July 16, 2014, the State filed a criminal complaint against the Defendant, Jeffrey S. Roehling, charging one count of knowingly violating a domestic abuse temporary restraining order and one count of felony intimidation of a witness, both as a repeat offender. R 1. The focus in this case is on count two, felony intimidation of a witness. To support the felony intimidation of a witness count, charged under Wis. Stat. § 940.43(7), the complaint asserts that Roehling called K.C., while he was in jail, and had a phone conversation with her. *Id.* According to the complaint, Roehling said the following during the phone call:

> . . . 'Don't show up, I promise' and 'Please get the intimidation dropped the next day in Court. I promise it will be good.' *Id.*

Prior to this phone conversation, there were two cases pending against Roehling, for which K.C. was the victim: a restraining order case and a criminal case under 14 CF 235. R 38a, Exh. B, C. The restraining order hearing was scheduled for July 16, 2014, and the hearing on 14 CF 235 was scheduled for the following day, July 17, 2014. *Id.*, Exh B., C at 6. It appears from the complaint that the State asserted Roehling committed felony intimidation of a witness by attempting to dissuade K.C. from appearing at the restraining order hearing, not the hearing on 14 CF 235, as the complaint makes no mention of 14 CF 235, but rather focuses solely on the restraining order. *See* R 1 at 2.

Under Wis. Stat. § 940.43(7), felony intimidation requires that the defendant, who was previously charged with a felony, attempt to dissuade a witness from attending a hearing "*in connection with* a trial, proceeding, or inquiry for *that felony.*" Wis. Stat. § 940.43(7)(2013-14)[1](emphasis added). The act of attempting to dissuade a witness from attending *any* trial, proceeding, or inquiry is only a misdemeanor. Wis. Stat. § 940.42.

On November 17, 2014, Roehling entered into a plea agreement, as follows: Roehling entered a plea to count two, the felony intimidation charge, in 14 CF 257 and counts three, five, and six in case 14 CF 235[2]. R 33 at 4-5. All other counts were dismissed and read-in for sentencing purposes, and the parties were free to argue sentencing. *Id.* The circuit court accepted Roehling's guilty pleas and ultimately sentenced him to eight years

[1] All statutory references are to the 2013-14 version.

[2] The earlier case, 14 CF 235, is not at issue in this case.

confinement followed by four years extended supervision on count two in this case, felony intimidation of a witness. *Id.* at 22-23; R 25.

On September 8, 2015, Roehling filed a motion for postconviction relief, asserting that Roehling is entitled to withdraw his guilty plea based on his trial counsel's ineffective representation because counsel failed to challenge count two, the felony intimidation charge, and failed to advise Roehling that there were insufficient facts to support the felony intimidation charge. R 38a at 2. Specifically, the State's grounds that Roehling attempted to dissuade K.C. from attending the restraining order hearing constitute only a misdemeanor under Wis. Stat. § 940.42 because Roehling was not attempting to dissuade K.C. from attending a hearing "in connection with [proceedings] related to [a] felony[,]" and trial counsel failed to identify this distinction. R 1; Wis. Stat. § 940.43(7); *Id.* at 3.

On September 21, 2015, the circuit court held a status conference on Roehling's motion, and the circuit court began the status conference with the comment "I'm assuming, Ms. Babcock, you're going to be requesting of the Court of Appeals an extension of time to work this out[,]" despite the fact that the motion had only been pending for thirteen days. See R 38a; R 54 at 2. Roehling responded that an extension could potentially be necessary and requested that the circuit court first schedule the matter for a *Machner* hearing. *Id.* at 2. The circuit court responded that Roehling would not receive a *Machner* hearing until the court made a determination under both prongs, and requested that the parties brief the issue of prejudice. *Id.* at 3. The court set a briefing schedule and calendared the matter for an evidentiary hearing on November 20,

2015. *Id.* at 6. During the status conference, it was anticipated that if the circuit court granted Roehling a *Machner* hearing, it would be held within the first two weeks of January, several months after Roehling filed his postconviction motion. *Id.* at 6-7; *see* R 38a. Given the calendaring of the matter, Roheling requested that this Court extend the deadline for the circuit court to decide Roheling's motion, and this Court granted the request by extending the deadline to November 27, 2015. R 42. The parties both filed the requested briefs; however, the circuit court cancelled the November 20, 2015 oral ruling and rescheduled the matter to January 7, 2016. R 43-45. The reasons for the adjournment are not identified in the record, as neither party requested an adjournment, and the new notice of hearing indicates only that the matter was "Rescheduled from 11-20-15." R 45. Neither the circuit court, nor the parties, requested that this Court extend the deadline to decide Roehling's motion for postconviction relief; thus, the deadline remained November 27, 2015. *See* R 42.

On December 7, 2015, Roehling requested that the clerk of circuit court enter an order denying Roehling's motion, pursuant to Wis. Stat. § 809.30(2)(i), on the basis that the circuit court did not timely decider Roehling's motion for postconviction relief. The clerk of circuit court signed the order on December 11, 2015 denying Roehling's motion for postconviction relief, pursuant to Wis. Stat. § 809.30(2)(i), and Roehling timely filed a notice of appeal. R 48-49.

ARGUMENT

I. Whether Roehling is Entitled to a *Machner* Hearing on his Claim that his Trial Counsel was Ineffective?

In evaluating whether a defendant is entitled to a *Machner* hearing, this Court will require the circuit court to hold a hearing if the defendant's "motion on its face alleges facts which would entitle the defendant to relief...." ***State v. Bentley,*** 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). This is a question of law that that this Court reviews de novo. *Id.* at 310.

To establish a claim that trial counsel was ineffective, a defendant must prove the following: (1) that counsel's performance was deficient and (2) that such deficiencies prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel was deficient, a defendant must show that counsel's performance fell below an objectively reasonable standard. ***State v. Thiel***, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. To show that counsel's deficient performance was prejudicial, the defendant must show a reasonable probability that but for counsel's errors, the outcome would have been different. *Id.*, ¶ 20. Our supreme court holds that trial counsel's failure to review, absorb, or master discovery are grounds for a deficiency finding. *Id.*, ¶¶ 38, 41, 44.

In this case, Roehling's motion for postconviction relief raises sufficient facts to entitle him to a *Machner* hearing. *See* R 38a. On September 8, 2015, Roehling filed a motion for postconviction relief, asserting that he is entitled to withdraw his plea because his trial counsel was ineffective. R 38a. Specifically, Roehling asserted that trial counsel was ineffective for failing to challenge the criminal complaint with regard to count two, felony intimidation of a witness, and failing to advise Roehling that there were insufficient facts to support the charge or conviction. *Id.* at 2. Roehling argued that attempting

to dissuade a witness from attending a restraining order hearing is a misdemeanor under Wis. Stat. § 940.42 and could not be a basis for *felony* intimidation under Wis. Stat. § 940.43(7). *Id.* at 3. Under Wis. Stat. § 940.43(7), felony intimidation requires that the defendant, who was previously charged with a felony, attempt to dissuade a witness from attending a hearing "*in connection with* a trial, proceeding, or inquiry for *that felony."* Wis. Stat. § 940.43(7)(emphasis added). In this case, the State alleged that Roehling attempted to dissuade K.C. from attending the restraining order hearing, not a felony hearing, and thus Roehling could not be guilty of felony intimidation. R 1 at 2; R 38a at 3.

In his postconviction motion, Roehling asserted that his trial attorney never advised him that there were insufficient facts to support the intimidation charge under 14 CF 257 and that counsel did not advise him that the criminal complaint should be challenged for the same reasons. R 38a at 4. In addition, Roehling maintained his innocence to this charge and asserted that he pled guilty only upon the deficient advice of counsel. *Id.* Further, Roehling attached an email correspondence from trial counsel, which confirmed that Roehling himself raised this issue with his trial attorney and that counsel either did not review the discovery materials or that counsel misunderstood its contents. *See id.,* Exh. E. Specifically, trial counsel believed that in the recording, Roehling said "'You've got to get the intimidation charge dismissed' in the context of whether she was going to show up for court." R 38a, Exh. E. The inference from trial counsel's email is that he believed Roehling told K.C. not to show up for the felony hearing. *See id.* However, the State never asserted that Roehling attempted to dissuade K.C. from attending a

hearing related to the felony; rather, it focused solely on the restraining order hearing in the complaint. R 1 at 2.

To the extent the complaint can be read to imply that Roehling was attempting to dissuade K.C. from attending the felony hearing, the facts directly contradict such a conclusion, as discussed in Roehling's motion. R 38a at 3. Specifically, the telephone call recording from July 15, 2014 shows that Roehling and K.C. were discussing the restraining order hearing that was set for "tomorrow." R 38a, Exh. A, D at timestamp 10:59. In the call, K.C. states, "I don't even know if I can go tomorrow. I can't see him." *Id.* at timestamp 12:06. The hearing scheduled for "tomorrow," July 16, 2014, was the injunction hearing on the restraining order between the parties in 14 CV 242. R 38a, Exh. B. In the phone call, Roehling then states "Don't show up. I promise, I promise, and please get the intimidation dropped. The next day in court. *Come to court the next day* and tell them. *Id.*, Exh. D at timestamp 12:28(emphasis added). The hearing with regard to the felony case in 14 CF 235 was scheduled for a preliminary hearing two days later, on July 17, 2014. *Id.*, Exh. C at 6. Based on this evidence, while Roehling was trying to dissuade K.C. from appearing at the restraining order hearing, Roehling was *encouraging* K.C. to appear the day following the restraining order hearing, which would have been the preliminary hearing on the felony matter. *Id.*, Exh. A-D. Thus, the evidence does not support the conclusion that Roehling attempted to dissuade K.C. from attending the felony proceedings, to the extent the Court believes the complaint asserted such as grounds. *Id.*; R 1.

In addition, trial counsel's recollection of the evidence was patently false, as he believed Roehling said

"'You've got to get the intimidation charge dismissed' in the context of whether she was going to show up for court[,]" that is, for the felony matter. *See* R 38a, Exh. E. As discussed above, this is not what Roehling said. Had counsel absorbed the significance of the discovery materials, he would have realized that Roehling was innocent of felony intimidating a witness, and trial counsel was thus ineffective. *Supra* at 6-7; ***Thiel***, 264 Wis. 2d 571, ¶¶ 38, 41, 44.

The issue of prejudice is simple in this case, as Roehling was convicted and sentenced to a twelve-year prison term for a crime for which he is factually and legally innocent. *Supra* at 6-7; R 25. This is not a typical plea withdrawal case where a defendant maintains his innocence, but there are otherwise sufficient facts and evidence to support a conviction. Rather, there can be no dispute, even under the most liberal reading of the complaint and the evidence, that Roehling committed felony intimidation, under Wis. Stat. § 940.43(7). Thus, Roehling was prejudiced when he was convicted and sentenced to a twelve-year prison term for a crime of which he is innocent. Accordingly, Roehling has set forth facts that, if true, would entitle him to relief, and he is thus entitled to a *Machner* hearing on his ineffective assistance of counsel claim. ***Bentley,*** 201 Wis. 2d at 309-310.

CONCLUSION

Roehling requests that this Court reverse the circuit court's decision denying Roehling's motion for postconviction relief and remand to the circuit court for a *Machner* hearing.

Dated this 11th day of March, 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 2,137 words.

Dated this 11th day of March, 2016

Signed:

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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 11th day of March, 2016

Signed:

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CERTIFICATE AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality.

Dated this 12th day of March, 2016

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APPENDIX

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