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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REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY ARGUMENT

I. Roehling did not forfeit his right to a *Machner* hearing

The State asserts that Roehling forfeited his right to a *Machner* hearing because he "moved the circuit court to deny his postconviction motion . . . ." State's Brief at 1-2. As an initial matter, the State misquotes the record. Roehling did not move the court to deny his motion; rather, the motion had already been denied by operation of law. Wis. Stat. § 809.30(2)(i); R 47. Roehling simply requested that the clerk *enter* the written order, as it was required to do pursuant to Wis. Stat. § 809.30(2)(i). R 47.

Notably, the State cites no authority for this novel argument. In making this argument, the State suggests that Roehling had a duty to request another extension from this Court for the circuit court to decide the motion. State's Brief at 2. However, Roehling had no grounds to file such a motion. Specifically, Roehling would have been required to show good cause for granting another[1] extension of the time for the court to decide his motion for postconviction relief. ***State v. Harris***, 149 Wis. 2d 943, 947, 440 N.W.2d 364 (1989). However, the record is void of any reason why the circuit court could not decide the motion by the November 27, 2015 deadline; rather, the circuit court simply rescheduled the hearing to January 7, 2016. See R 42; R 45. Because Roehling did not have good cause to request an extension and because there is no duty requiring him to do so, he cannot have forfeited his right to pursue the denial of his postconviction motion. In the event the Court rules that such a duty exists, postconviction/appellate counsel

[1] Roehling previously requested, and the Court granted, one extension of time for the circuit court to decide his motion. R 42.

would have been ineffective for failing to comply with such a duty.

II. Roehling is entitled to an evidentiary hearing on his ineffective assistance of counsel claim

A. The complaint plainly alleges that Roehling attempted to dissuade KC from attending the restraining order hearing

The State argues that counsel could not have been ineffective for failing to challenge the complaint because "[t]he complaint did not expressly specify 'the trial, proceeding or inquiry authorized by law' at which the State alleged Roehling had attempted to dissuade KC from testifying." State's Brief at 5. If the State seriously asserts that the complaint omitted an essential element of the crime — "the trial, proceeding or inquiry authorized by law" for which Roehling attempted to dissuade KC from testifying — then this raises a disturbing due process concern. ***State v. Kempainen***, 2014 WI App 53, 354 Wis. 2d 177, ¶ 11, 848 N.W.2d 320. (holding that "to satisfy due process and double jeopardy concerns, a charge must be pled so the defendant is able to plead and prepare a defense and so conviction or acquittal will bar another prosecution for the same offense." (citing ***Holesome v. State***, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968)). If the complaint indeed alleged that Roehling attempted to dissuade KC from attending a felony matter, the complaint gave no specifics as to what felony proceeding it was referring, as it contained no county of origin, no case number, and no hearing date that would allow Roehling to defend against such a charge or bar prosecution for the same offense. *See id;* R 1 at 2.

There were not, however, any due process concerns with the complaint because it made clear that it was referencing the restraining order matter. The complaint made repeated citations to the temporary restraining order, outlining the county of origin, the case number, the procedure leading up to the effect of the temporary order, the process of serving Roehling with the order, and the hearing date in that matter scheduled for July 16, 2014. R 1 at 2. Thus, the only fair or "common sense" reading of the complaint is that Roehling was alleged to have attempted to prevent or dissuade K.C. from attending the restraining order hearing.

B. The facts presented in Roehling's postconviction motion undermine the State's ability to meet its burden of proof and thus entitle Roehling to a *Machner* hearing

The State makes largely conclusory arguments on this issue. *See* State's Brief at 6. Indeed, the State cites no facts showing *how* it ". . . could prove — that Roehling attempted to dissuade KC from testifying in the other felony intimidation case[,]" whereas Roehling has outlined how he could *disprove* such a charge. State's Brief at 6; Roehling's Opening Brief at 7. The only reasoning advanced by the State is that it was irrelevant whether KC came to court or not, in any event, it could prove that Roehling attempted to prevent her from testifying. *Id.* This argument is a head-scratcher. How could Roehling attempt to dissuade or prevent KC from testifying by asking her *to show up* to court? *See* R 38a, Exh. D at timestamp 12:28. People try to prevent a witness' testimony by persuading a witness to *not appear* in court. Once a witness appears

in court, it is easy to secure testimony by simply calling the witness to the stand.

More importantly, the State ignores the fact that Roehling not only asked KC to come to court but also said "tell them." *Id.* These facts cannot be viewed, in any light, as Roehling trying to dissuade or prevent KC from testifying. To the contrary, Roehling's statement "Come to court the next day and tell them" can be viewed only as Roehling encouraging KC to appear in court and testify. *See id.* Accordingly, the facts showed that Roehling was legally and factually innocent of felony intimidation, and trial counsel was ineffective in his failure to understand the discovery materials, as discussed in Roehling's opening brief. Roehling's Opening Brief at 7-8. Roehling therefore renews his request for an evidentiary hearing.

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 29th day of June, 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 1,011 words.

Dated this 29th day of June, 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 29th day of June, 2016.

Signed:

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