STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT III

Appellate Case No: 2016AP1540CR
Outagamie County Case No: 13-CT-214

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

Lonnie L. Sorenson,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT AND FROM THE ORDER DENYING DEFENDANT-APPELLANT'S POST CONVICTION MOTION, THE HONORABLE MICHAEL W. GAGE PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

DID THE TRIAL COURT EXERCISE ERRONEOUS DISCRETION WHEN IT DENIED SORENSON'S POST CONVICTION MOTION FOR A NEW TRIAL WITHOUT HOLDING AN EVIDENTIARY HEARING?

- Did the trial court err when it denied Sorenson's post conviction motion alleging ineffective assistance of counsel without first holding an evidentiary hearing?

- Did the trial court err when it permitted the state to violate Wisconsin's Discovery Statute by not providing Sorenson with reports, statements, or a written summary of expert findings prior to that expert's testimony?

- Did the trial court err when it allowed the state to violate Sorenson's right to confront witnesses who testified against him when it allowed the state to call a witness who testified to tests and test results performed by other persons?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this appeal are controlled by settled state and federal law and, therefore, the appellant does not recommend oral argument or publication.

SUMMARY OF THE ARGUMENT

The trial court erred when it denied Sorenson's postconviction motion for a new trial without holding an evidentiary hearing. When the court denied the motion, Sorenson's first appellate attorney had left his practice and withdrawn from Sorenson's case, but new appellate counsel had not yet been appointed. The motion was denied on the basis of the motion as filed and the State's response to the motion. There was no opportunity for appellate counsel to present evidence and argument on any of the several issues raised in the postconviction motion.

Sorenson raises several troubling issues in his postconviction motion that can be grouped under three points:

- Violation of Wisconsin's discovery statute;
- Violation of Sorenson's right to confront and cross examine the persons who present evidence against him;

- Denial of Sorenson's allegation of ineffective assistance of trial counsel without first holding an evidentiary hearing.

Because the trial court denied Sorenson's post conviction Motion for a New Trial that asserted these errors without an evidentiary hearing, Sorenson asks this court to reverse his conviction, vacate his judgment of conviction, and grant his postconviction motion for a new trial.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In the evening of December 14, 2012, Lonnie L. Sorenson exercised his interest in music and music production as he produced a show at The Dixie Clubhouse, a club in Outagamie County, Wisconsin. (R. 161:278-279). Sorenson arrived at The Dixie Clubhouse at about 8:00 pm and left at about 11:00 pm. (R. 161:280). During that time, Sorenson set up the show and the stage for Scott Meyer, the musician who performed that evening at The Dixie Clubhouse. (R. 161: 280). Upon leaving The Dixie

Clubhouse, Sorenson obtained permission from Meyer to use the band's van to go to another club, the Cold Shot Bar, to see Chris Aaron play. (R. 161:280).

Sorenson arrived at the Cold Shot Bar around 11:00 pm, and stayed there approximately two and a half hours, during which he consumed three beers. (R. 161:281). Later that evening, Sorenson testified that he also consumed two shots of Sambuca. (R. 161:282).

At approximately 1:45 am on December 15, 2012, Officer Vanderheiden of the City of Appleton Police Department stopped Sorenson because the headlights on the van were not turned on. (R. 161:109). Officer Vanderheiden testified that she noticed an odor of burnt, not fresh or burning, marijuana. (R. 161:117). As part of this stop, Officer Duven, a canine officer with the City of Appleton Police Department brought Syrt, her canine, to the scene. (R. 161:128). Syrt eventually indicated the presence of an illegal drug odor. (R. 161:130, 134).

Another City of Appleton Police Officer, Officer VanZeeland, also attended the traffic stop, performing various field sobriety tests on Sorenson. (R:161:175-184). Ultimately, Officer VanZeeland determined that Sorenson had failed the field sobriety tests and advised him that he would be arrested for operating a motor vehicle while intoxicated, and Sorenson was taken into custody. (R. 161:184). At 3:06 that morning, December 15, 2012, a blood sample was drawn from Sorenson at St. Elizabeth Hospital, Appleton, Wisconsin. (R. 161:163).

The State filed a criminal complaint on February 18, 2013, charging in Count 1, Operating a Motor Vehicle While Intoxicated – 2nd Offense; Count 2, Operating With Prohibited Alcohol Concentration – 2nd Offense; and Count 3, Operate Motor Vehicle While Revoked. (R. 2). A number of hearings followed, and the complaint was amended several times. (R: 37, 44, 58, 67, 78, 82). As of the trial date on July 24, 2013, Sorenson faced four counts: Count 1, Operating a Motor Vehicle While Intoxicated (including controlled

substance) – 2nd Offense; Count 2, Operating with Prohibited Alcohol Concentration – 2nd Offense; Count 3, Operating with Restricted Controlled Substance in Blood – 2nd Offense; and Count 4, Possession of Drug Paraphernalia. (R. 82).

Also during the pendency of this case, Sorenson's attorneys filed a number of unsuccessful substantive motions, including, among others, a Motion to Suppress (R. 12), a Motion for Discovery (R. 18), a Motion to Suppress Evidence Gathered Without Warrant (R. 21), a Motion to Dismiss Charge (R. 35), a Motion for Suppression of Evidence Due to Warrantless Detention (R. 56), a Motion for Witness Discovery (R. 69), a Motion to Use a Learned Treatise (R. 72), and a Motion to Exclude Testimony and Compel a Written Opinion (Decision and Order at R. 95). Sorenson's attorneys filed numerous discovery demands and motions in preparation for trial. (R. 5, 9, 11, 18, 69, 84, 103).

Initially, this matter came for trial on January 29, 2014. (R. 156). On that date, Attorney Pitsch, for Sorenson, asserted to the court that he had just received notice of a

situation with the analysts at the State Laboratory of Hygiene regarding their testimony and presence at Sorenson's trial. (R. 156:21). Attorney Pitsch raised the confrontation issue at this hearing, pointing out to the court that a person who signs off on results cannot testify to those results unless he or she did those things. (R. 156:19). After significant discussion on the record, Judge Gage ultimately decided to adjourn the trial and reschedule it so that the proper experts would be present to testify. (R. 156:36).

Eventually, the matter came to trial on July 24, 2014 in the Circuit Court for Outagamie County, the Honorable Michael W. Gage presiding. (R. 161). As part of the state's case, Ms. Kalscheur from the Wisconsin State Laboratory of Hygiene was called and testified to the process used in testing Sorenson's blood for THC and alcohol. (R. 161: 237 et seq.). She testified that although she tested the blood for THC, another analyst had performed the alcohol testing and Ms. Kalscheur only reviewed the results later. (R. 161:241, 243). Sorenson was ultimately convicted on all counts. (R.

161:357). Sentencing was scheduled for September 11, 2014. (R. 161:367).

The court imposed sentence on Sorenson on September 11, 2014 on Counts 2 and 5 of the First Amended Complaint. (R. 162:5). Both sides presented sentencing arguments. (R. 162:5-8). The court imposed a sentence of 20 days of straight jail time with the first two days in lock-up and Huber for the remainder; a fine plus costs; and license revocation and ignition interlock requirements. R. 162:12).

Sorenson filed his Notice of Intent to Pursue Post Conviction Relief, and this appeal ensues. (R. 121). Sorenson has had several appellate attorneys appointed by the State Public Defender: Attorney Peter Heyne, who had to withdraw due to a change in employment (R. 130); Attorney Steve Ryder, who had to withdraw due to military service (R. 135), and the undersigned, Attorney Linda Schaefer (R. 138), who submits this brief.

On January 4, 2016, prior to his withdrawal, Attorney Ryder filed a (postconviction) Motion for a New Trial, which

included several grounds for granting a new trial. (R. 132, App. 1). The state responded to this Motion on March 4, 2016, arguing against all grounds presented in Sorenson's Motion. (R. 134). The court permitted Attorney Ryder to withdraw, by signed order, on March 18, 2016. (R. 135). Then, on March 31, 2016, the court held a hearing and denied Sorenson's Motion, even though neither Sorenson nor any representative was present. (R. 164, R. 137, App. 2). Finally, current appellate counsel, Attorney Linda Schaefer was appointed on April 19, 2016. (R. 138).

STANDARD OF REVIEW

A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Industrial Roofing v. Marquardt***, 299 Wis.2d 81, 726 N.W.2d 898, 906, ¶41 (2007). (Additional citations omitted).

When ineffective assistance of counsel is alleged, the question of whether a motion alleges facts, that, if true, would

entitle a defendant to relief is a question of law that the appellate court reviews independently. ***State v. Bentley***, 201 Wis.2d 303, 310m 548 N.W.2d 50 (1996). When the factual allegations are insufficient or conclusory, then the appellate court will apply the deferential erroneous exercise of discretion standard. ***Id.*** at 310-311.

Although a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review. ***State v. Williams***, 253 Wis.2d 99, 109, citing ***State v. Ballos,*** 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

ARGUMENT

Introduction

Sorenson asserts that he is entitled to a new trial on several fundamental grounds, namely, discovery violations, confrontation violation, and ineffective assistance of counsel. Before these grounds can be reached, however, there is an

even more basic issue: Sorenson's postconviction motion was denied without his presence or the presence of counsel, but with the presence of the district attorney. Attorney Ryder, who filed Sorenson's postconviction motion, had to withdraw from representation due to impending military service. Before new counsel could be appointed to argue the motion, the court held a hearing and denied the motion. The district attorney was present and participated in that hearing, however, making the hearing something akin to an *ex parte* proceeding.

Within Sorenson's Motion For a New Trial are several meaningful assertions of error that should be addressed at an evidentiary hearing. By its action, the court denied Sorenson a fair opportunity to be heard on his motion.

Sorenson appeals from his judgment of conviction and from the order denying his Motion for a New Trial.

I. THE TRIAL COURT EXERCISED ERRONEOUS DISCRETION WHEN IT DENIED SORENSON'S POST CONVICTION MOTION FOR A NEW TRIAL WITHOUT HOLDING AN EVIDENTIARY HEARING.

In Wisconsin, the state public defender is charged with representing individuals who qualify for representation: "the state public defender shall prosecute a postconviction … remedy on behalf of the person before any court, if the state public defender determines the case should be pursued." Wis. Stats. §977.05(4)(j). "It would be absurd to suggest that a person has a right to counsel at trial and on appeal, but no right to counsel at a postconviction proceeding in the circuit court, which is often the precursor to an appeal. ***State v. Peterson,*** 2008 WI App 33, 308 Wis.2d 374, 746 N.W.2d 590, 07-0933.

Whether or not an evidentiary hearing is held as a result of a post conviction motion is a question left to the discretion of the trial court. *See* ***State v. Balliette***, 2011 WI 79, ¶ 18, 335 Wis.2d 358, 805 N.W.2d 334, cert. denied, 132 S.Ct. 825 (2011).

Here, Sorenson's Motion for a New Trial raises at least three errors which, separately or together, provide a sufficient basis for the trial court to have held an evidentiary hearing on the motion. Sorenson's appellate counsel, Attorney Ryder, who was appointed by the state public defender, filed the motion for a new trial, but soon after was called to military service and had to withdraw from representing Sorenson any further. The state public defender determined that Sorenson was still eligible for representation by their office; however, a period of time passed before the undersigned appellate attorney was appointed to continue Sorenson's appeal. There was no error or fault by Sorenson that led to his being without representation during this period. After Attorney Ryder withdrew and before Attorney Schaefer was appointed, the trial court received the state's response to Attorney Ryder's motion, held a non-evidentiary hearing with only the district attorney present, and denied the motion.

Sorenson had no opportunity to respond to the state's reply brief. He was not present at the hearing, and of course no attorney was present on his behalf either, as successor

counsel had not yet been appointed. Sorenson was denied the opportunity to make any argument in support of his motion for a new trial; the district attorney was present, however, and participated in the hearing.

It is patently unfair that argument was taken when only one party to the motion was present. The state public defender was making efforts to appoint new appellate counsel for Sorenson, and that new appellate attorney should have been provided an opportunity to respond to the state's reply to Sorenson's motion. Sorenson had made clear his intention to pursue an appeal, and denying this motion during the period between two appellate attorneys represents erroneous discretion.

A. The Trial Court Erred When It Denied Sorenson's Post Conviction Motion Alleging Ineffective Assistance Of Counsel Without An Evidentiary Hearing.

Also included in Sorenson's Motion for a New Trial is an allegation of ineffective assistance of trial counsel, which presents another basis upon which an evidentiary hearing

should have been held. When a postconviction motion alleges ineffective assistance of counsel, the court must hold an evidentiary hearing if the defendant shows that his attorney's actions constituted deficient performance, and that the deficiency prejudiced the defendant. ***State v. Love,*** 2005 WI 116, ¶ 30, 284 Wis.2d 111, 700 N.W.2d 62. Further, the United States Supreme Court, in ***Strickland v. Washington***, 466 U.S. 668 (1984), teaches "[that] a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction … requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." ***Id.*** at 669.

Here, Sorenson's motion lays out a strong basis for his assertion that trial counsel was ineffective: Attorney Mroczkowski failed to object to speculation and testimony beyond expertise by the state's expert witness. At points during Ms. Kalscheur's testimony Sorenson's attorney should have objected to Ms. Kalscheur's conclusions and speculation, but she did not. This defective performance

prejudiced the defendant because the expert in question was the state's only expert relative to a critical element of one of the charges, namely the presence and amount of ethanol and THC in Sorenson's blood sample. Admission of Ms. Kalscheur's significant but incompetent testimony "undermines confidence that the right outcome was reached in the trial proceeding." (R. 132:5, App. 1).

In addition, Attorney Mroczkowski failed to present alternate expert testimony to rebut the state's assertions regarding the alleged drug and alcohol readings subscribed to Sorenson by the blood test testified to by Ms. Kalscheur. The testimony of an appropriately qualified expert with knowledge of drug and alcohol retrograde analysis may well have created sufficient reasonable doubt to change the outcome of the trial. Deficient performance by Attorney Mroczkowski prejudiced Sorenson.

Because Sorenson pled sufficient facts regarding the ineffective assistance of his trial counsel to show both deficient performance and prejudice in his Motion for a New Trial, the trial court erred when it denied Sorenson's motion

without an evidentiary hearing. Sorenson should be granted an evidentiary hearing on his Motion For a New Trial.

B. The Trial Court Erred When It Permitted The State To Violate Wisconsin's Discovery Statute By Not Providing Sorenson With Reports, Statements, Or A Written Summary of Expert Findings Prior to That Expert's Testimony.

Wisconsin Statutes provide that "… the District Attorney ***shall*** (emphasis added), within a reasonable time before trial, disclose to the defendant … any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial." Wis. Stats. §971.23(1)(e).

Here, all of Sorenson's trial attorneys made numerous demands on the state for information covered in the statute noted above, with no success. Sorenson was forced to come

to trial unaware of Ms. Kalscheur's conclusions, and therefore he was unable to present appropriate rebuttal expert testimony. This violation contributed to Sorenson's conviction.

Because Sorenson pled sufficient facts regarding the state's discovery violation to support his Motion for a New Trial, the court exercised erroneous discretion when it denied Sorenson's motion without an evidentiary hearing. Sorenson should be granted an evidentiary hearing on his Motion For a New Trial.

C. The Trial Court Erred When It Allowed The State To Violate Sorenson's Right To Confront Witnesses Who Testified Against Him When It Allowed The State To Call A Witness Who Testified To Tests And Test Results Performed By Other Persons.

The Sixth Amendment to the US Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This right applies in state court as well as in federal court through the Fourteenth Amendment to the US Constitution.

In Wisconsin, the right of confrontation is not satisfied when the government produces a witness who does nothing but summarize out-of-court statements and opinions made by others." ***State v. Williams***, 253 Wis.2d 99, 113-14. The Wisconsin Supreme Court further distinguishes between an expert who forms their opinion partially on the basis of others and an expert who only summarizes the work of others. "One expert cannot act as a mere conduit for the opinion of another." ***Id***. at 113-114. A highly qualified witness who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation." ***Id.*** at 113-114.

Here, Ms. Kalscheur of the Wisconsin State Laboratory of Hygiene testified in summary fashion to the results and conclusions of other scientists who had actually tested Sorenson's blood for alcohol. However, at trial, she testified that she only tested Sorenson's blood for THC, and not for alcohol. She did not perform any alcohol tests, nor did she supervise the alcohol testing. She merely performed a

review of the results obtained by another employee. No adequate foundation appears to exist upon which to base Ms. Kalscheur's testimony relative to Sorenson's alcohol testing results. In fact, she acted as a conduit for the work of another, and did not directly supervise that work. Applying State v. Williams, her testimony with regard to the alcohol testing should have been stricken. Sorenson was denied the right to confront the person testifying against him.

Because Sorenson pled sufficient facts regarding the denial of his right to confrontation to support his Motion for a New Trial, the trial court exercised erroneous discretion when it denied that motion without an evidentiary hearing. Sorenson should be granted an evidentiary hearing on his Motion For a New Trial.

CONCLUSION

WHEREFOR, Sorenson respectfully requests that this Court reverse his conviction, vacate his judgment of conviction, and grant him a new trial in Outagamie County Case Number 13-CT-214 because the circuit court erred when it denied Sorenson's post conviction Motion For a New Trial.

Dated this 6th day of January, 2017.

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 4,222 words.

Dated this 6th day of January, 2017.

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 6th day of January, 2017.

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A P P E N D I X

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STATE OF WISCONSIN,

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Defendant-Appellant.

APPENDIX

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CERTIFICATION AS TO APPENDIX

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

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 and with appropriate references to the record.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19 (13)

(ELECTRONIC FILING OF APPENDIX)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19 (13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 12th day of January, 2017.

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