STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2016AP1540-CR

Outagamie County Case No. 13-CT-214

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LONNIE L. SORENSON,

Defendant-Appellant.

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

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. SORENSON'S CLAIMS OF ERROR ARE NOT MOOT IN LIGHT OF THE JURY VERDICT AND HE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS POSTCONVICTION MOTIONS.

The State argues here that even a prejudicial error should be found harmless in the context of the case as a whole because Sorenson was convicted at trial. This defies logic. Conviction does not make the appellate process moot. The State argues backwards here, asserting that because a jury found Sorenson guilty, then errors that occurred before and during trial are moot. However, one of the purposes of the appellate process is to examine the trial process for potential errors. Fairness demands that a trial must follow rules established in statutes and caselaw.

Following his trial, Sorenson appropriately filed his Notice of Intent to Seek Postconviction Relief because of these errors; through counsel he appropriately filed post conviction motions in which he asserted certain errors, and he is entitled to an evidentiary hearing, at which he is present and represented, on his post conviction motions. The errors

that Sorenson alleges cannot be satisfactorily resolved by merely amending the Judgment of Conviction, as the State suggests.

Sorenson should be granted an evidentiary hearing addressing his post conviction motions.

A. SORENSON IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS POSTCONVICTION MOTION FOR A NEW TRIAL.

During the time after his post conviction motion was filed, Sorenson found himself caught, through no fault of his own, between the withdrawal of his original appellate attorney and the appointment of successor counsel. In that period, during which Sorenson desired to be represented but before successor counsel had been appointed, the trial court received the State's response to the post conviction motion, held a non-evidentiary hearing at which only the district attorney was present, and denied the motion.

In the usual course of an appellate case, in a situation like Sorenson's, the State Appellate Division would have appointed successor counsel more quickly. That appointment

of successor counsel was delayed is a bureaucratic issue that cannot, in any fairness, be attributed to Sorenson. Had successor counsel been timely appointed, a reply to the State's response would certainly have been prepared and filed. Counsel would have been present at the hearing, and argument could have ensued. The court may still have denied Sorenson's motion, but he should have had an opportunity at least to be present and to be heard. By addressing Sorenson's motion as it did, the trial court made its decision without further and appropriate input from Sorenson. Sorenson was effectively shut out of the process at the point where the court made its decision as it did, without Sorenson or his attorney present.

B. SORENSON IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS POST CONVICTION MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE OFFERED FACTS THAT DEMONSTRATED BOTH DEFICIENT PERFORMANCE AND PREJUDICE.

In his post conviction motion, Sorenson asserted that his trial counsel was ineffective on several grounds. First, Attorney Mroczkowski made several important errors when she failed to object to the testimony of the State's expert witness. Attorney Mroczkowski did not object to speculation, conclusions drawn by the State's witness, or to testimony beyond experience when Ms. Kalscheur testified to the results of tests she did not perform herself.

In addition, and perhaps even more importantly, Attorney Mroczkowski failed to present alternate expert testimony to rebut the State's assertions regarding the results of Sorenson's blood tests. Testimony from an expert witness with knowledge of retrograde analysis may well have created reasonable doubt in the minds of some jurors such that the outcome of the trial may well have been very different. This represents undeniable prejudice to Sorenson.

In his post conviction motion, Sorenson pled sufficient facts to show both deficient performance by his trial counsel and resulting prejudice, and consequently he should have

been granted an evidentiary hearing on the allegation of ineffective assistance of counsel.

II. THE STATE VIOLATED ITS DISCOVERY OBLIGATION WHEN IT DID NOT PROVIDE PROPER NOTICE OF EXPERT OPINION.

In his post conviction motion, Sorenson pled facts regarding the State's failure to provide statutorily required disclosures about their expert and their expert's potential testimony, as set forth in Wis. Stats. §971.23(1)(e).[1] Sorenson asserted that the State failed to provide these disclosures in spite of his attorney's requests. While this *alone* is probably not a sufficient basis for granting Sorenson's post conviction motion, nevertheless it represents an additional error that contributes to the overall strength of Sorenson's argument in support of his motion.

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[1] "…The District Attorney shall, 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).[1]

III. THE STATE VIOLATED SORENSON'S RIGHT TO CONFRONT A WITNESS WHO TESTIFIED AGAINST HIM WHEN THE STATE'S EXPERT WITNESS TESTIFIED TO TESTS AND TEST RESULTS PERFORMED BY OTHER PERSONS.

Wisconsin case law is clear that that "One expert cannot act as a mere conduit for the opinion of another." ***State v. Williams***, 253 Wis.2d 99, 113-114. "A highly qualified witness who is familiar with the procedures at hand, ***supervises or reviews*** (emphasis added) the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation." ***Id.***

The State is correct in its assertion that Ms. Kalscheur has expertise and supervisory experience and responsibility with regard to alcohol and THC blood testing. However, in Sorenson's case, she testified that she only tested Sorenson's blood for THC, and that she did not perform any alcohol tests, nor did she ***supervise*** (emphasis added) the alcohol testing. With regard to the alcohol testing, Ms. Kalscheur merely provided a conduit for the work of another analyst, who actually performed the alcohol tests on Sorenson's blood, and whose work she testified that she did not supervise. It

follows, then, that according to ***State v. Williams***, Sorenson's right to confrontation was not protected and was in fact violated when Ms. Kalscheur testified to the results of alcohol testing. Ms. Kalscheur's testimony regarding the alcohol testing should have been stricken, and Sorenson should be granted a new trial on his post conviction motion asserting violation of his right to confront the individuals who testify against him.

CONCLUSION

For all the reasons stated above, the Order denying Sorenson's post conviction motion should be reversed and he should be granted an evidentiary hearing on the merits of the issues raised in that post conviction motion.

Dated this 28th day of April, 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 1,515 words.

Dated this 28th day of April, 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 28th day of April, 2017.

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