STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No.: 2017AP000868

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

CASEY M. FISHER,
Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

Steven Wright
State Bar No. 1090780
shwright@wisc.edu

Maria de Arteaga
State Bar No. 1095253
dearteaga@wisc.edu

Wisconsin Innocence Project
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-1002

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INTRODUCTION

Fisher's opening brief makes three arguments: (1) Wisconsin law does not prohibit Fisher from filing a §974.06 motion; (2) Fisher deserves a new trial based upon ineffective assistance of trial counsel; and (3) Fisher deserves a new trial in the interest of justice.

The State has filed an incomplete response. The State's response discusses whether Wisconsin law prohibits Fisher from filing a § 974.06 motion. The State, however, elected to ignore

Fisher's second and third arguments. The State's Response, however, offers to address Fisher's arguments only if requested by this Court.[1]

Now, in his Reply, Fisher makes two arguments. First, as Fisher asserts in his opening brief, Fisher lacked awareness of the factual basis of his current claims at the time of his *pro se* appeal; and, therefore, he is not prohibited from filing a §974.06 motion. Second, by failing to respond, the State has conceded Fisher's last two arguments.

For these reasons, this Court should reverse the order of the circuit court and should remand with an instruction to grant Fisher a new trial.

[1] If this Court provides the State an opportunity to file a supplemental brief addressing the merits, Fisher respectfully requests an opportunity to reply.

ARGUMENT

I. Fisher alleges a sufficient reason for failing to bring his current claims in his *pro se* direct appeal.

The State argues Fisher fails to establish a sufficient reason for not including his current claims in his *pro se* direct appeal. Specifically, the State argues Fisher "fails to allege any reason at all." (State's Resp. 8.) Fisher has not only alleged a reason, he has demonstrated a "sufficient reason" consistent with Wis. Stat. section 974.06(4) and *State v. Escalona-Naranjo,* 185 Wis. 2d 168, 182, 517 N.W.2d 157 (1994).

The rule articulated by the Wisconsin Supreme Court is that "[C]laims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason." *State v. Lo*, 2003 WI 107, ¶ 44, 264 Wis. 2d 1, 665 N.W.2d 756 (*citing Escalona-Naranjo*, 185 Wis. 2d 168). Therefore, as the Wisconsin Supreme Court explained, "[a] defendant should raise the constitutional issues of which he or she *is aware* as part of the original postconviction proceedings." *Escalona-Naranjo*, 185 Wis. 2d at 185 (emphasis added).

What constitutes a "sufficient reason" pursuant to Wis. Stat. section 974.06(4) is largely determined on a case-by-case basis. However, the Wisconsin Supreme Court has held that ineffective assistance of postconviction counsel may constitute a sufficient

reason. [2] *State v. Romero-Georgana*, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668; *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). The Wisconsin Supreme Court has also evaluated a claim of "sufficient reason" based on the movant's lack of factual awareness of the claim. *State v. Allen*, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124.

Contrary to the State's assertion (State's Br. 6), the current ineffective assistance claim and interest of justice claim could not have been raised by Fisher in his previous postconviction motion. One cannot raise an issue of which he or she is not aware. As Fisher explains in his opening brief, the combination of (1) erroneous advice from Fisher's post-conviction counsel (*see* Fisher's Br. 10-11, 29-30.), (2) Fisher's possession of an incomplete discovery file at the time of his direct appeal (*see* Fisher's Br. 11, 30.), and (3) Fisher's inability to read and write at the time of his direct appeal (see Fisher's Br. 11, 30.), created the perfect storm that prevented him from discovering the factual basis of his current claims. Because Fisher was not aware of the factual basis

[2] To be clear, Fisher is not asserting an ineffective assistance of postconviction counsel claim against himself in order to show he had a sufficient reason for failing to bring his current claims in his *pro se* appeal. (*see* State's Br. 6.) Rather, Fisher points to Wisconsin law indicating ineffectiveness of postconviction counsel as one of many possible set of facts that can amount to a "sufficient reason." Further, Fisher asserted in his opening brief that he meets the "clearly stronger" requirement articulated in *Romero-Georgana* in case such standard applies. (*see* Fisher's Br. 33.) However, if such standard does not apply, as both the Circuit Court and State agree, then Fisher must only show a sufficient reason pursuant to Wis. Stat. section 974.06(4) for failing to bring his current claims previously. As argued, Fisher has asserted a sufficient reason.

of his current claims at the time of his direct appeal, he has a "sufficient reason," consistent with *Escalona-Naranjo*, for failing to include his current claims on direct appeal. *See Escalona-Naranjo,* 185 Wis. 2d at 182; *Romero-Georgana*, 2014 WI at ¶ 48.

The State argues that Fisher chose to proceed *pro se* and that "[a] defendant who elects to represent himself cannot thereafter complain that the quality of his own representation amounted to ineffective assistance of counsel." (State's Br. 6) While it is true that Fisher was given the choice between being represented by the State Public Defender, proceeding *pro se*, or securing private representation, that choice was a façade. Fisher's appointed post-conviction counsel did not even take the time to request or read Fisher's discovery before giving Fisher his false choice. (*see* Fisher's Br. 11, 30.) Therefore, choice number one: be represented by a State Public Defender who would, as he put it, "basically argue against you, and inform the court of appeals why there is nothing wrong with your case." (34:9) (A-Ap. 170). Choice number two: hire a private attorney. Choice number three: try to appeal *pro se*. Fisher, an indigent defendant proclaiming innocence, had no real choice.

Fisher, relying on the assistance of a jailhouse lawyer, raised only issues discussed on the record at trial to make his *pro se* claims. The State misstates Fisher's factual assertions in his current appeal and makes unsubstantiated assumptions when stating, "Thus, Fisher's motion itself corroborates that he had access to and considered the police reports of the investigation of

Mousa's slaying." (State's Br. 6.) Fisher specifically stated that his appointed post-conviction counsel only requested and reviewed transcripts and court records in evaluating Fisher's case, and after Fisher decided to proceed *pro se*, counsel stated "I gave you the court records and transcripts which I had." (*see* Fisher's Br. 11, 30) (*see also* R. 34:10, 7.) By giving Fisher the "case file," Fisher received only transcripts and court records from postconviction counsel. (Fisher's Br. 30.) The discovery file was never entered into evidence or became part of the court record. The fact that Fisher's postconviction motion refers to a police incident report (see State's Br. 6.), the basis of which is discussed at length on the record at trial (R. 49:3-5, 129-44.), only means that he received an incident report that his trial attorney *did* rely on at trial.

Fisher maintains that he never learned of the alternative suspects until the Wisconsin Innocence Project investigated his claims. (Fisher's Br. 31.) Therefore, unlike in *Allen*, Fisher's allegations *do not* "involve events in which [Fisher] was personally involved and had personal knowledge." *State v. Allen*, 2010 WI 89, ¶ 48, 328 Wis. 2d 1, 786 N.W. 2d 124. Fisher has consistently maintained innocence of the crimes against Mr. Mousa. Fisher has also consistently maintained that he was dropped off at a gas station by Mr. Mousa, and when Mr. Mousa drove away, Mr. Mousa was alive and well. Fisher has never claimed he witnessed the shooting. He would therefore not have personal knowledge of the alternate suspects. Fisher was also illiterate at the time of his trial and relied on his trial counsel to tell him what evidence

existed. Neither Fisher's trial counsel nor appointed post-conviction counsel ever said anything about the alternative suspects to Fisher. Therefore, unlike Allen, Fisher both alleged he was unaware of the factual basis, and supported such with factual assertions and supporting documentation. (Fisher's Br. and App.)

Fisher's lack of factual awareness of his current claims at the time of his direct appeal, demonstrated through allegations and documentation of (1) Fisher's illiteracy, (2) the inadequacy of assigned postconviction counsel, and (3) ownership of an incomplete discovery file when attempting to appeal *pro se,* must constitute a sufficient reason under Wisconsin law. At a minimum, Fisher asserts sufficient facts entitling him to an evidentiary hearing on the issue of "sufficient reason." *Romero-Georgana*, 2010 WI at ¶ 30 (*citing State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W. 2d 334; *State v. John Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433).

Finally, the State argues that Fisher must have meant he "lacked the legal acumen to recognize [the] claims." (State's Br. 7.) The issue here is Fisher's lack of awareness of the *factual* basis of his claims. Therefore, the State's reliance on cases such as *Waushara Cty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992), is misdirected. (*see* State's Br. 7.) Even if such law applies, it should be noted that the Wisconsin Supreme Court, specifically recognizing the disadvantages inmates face when litigating *pro se,* said, "While *pro se* litigants in some circumstances deserve some leniency with regard to waiver of rights . . . the rule applies only

to *pro se* prisoners." *Graf*, 166 Wis. 2d at 451–52 (citing *State ex rel. Terry v. Traeger,* 60 Wis.2d 490, 496, 211 N.W.2d 4 (1973)).

II. By failing to respond, the State has conceded Fisher's trial counsel was ineffective and the real controversy has never been tried.

The State only addresses the procedural question. The State explicitly elects not to address two important issues. In its Response, the State does not refute that Fisher received constitutionally ineffective assistance of trail counsel. The State also does not refute that the real controversy in Fisher's case—the identity of Mr. Mousa's killer—has never been fully tried. The State only argues that Fisher could have raised the current ineffective assistance of counsel and interest of justice claims in his prior post-conviction motion.

Arguments left unrefuted in response to an appeal are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979); *State v. Dartez,* 2007 WI App 126, ¶ 6 n. 3, 301 Wis. 2d 499, 731 N.W.2d 340 (*citing Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109) (Failure of a response brief to dispute a proposition in appellant's brief may be taken as implicit concession of the proposition.). While the State requested an opportunity to submit a supplemental brief upon request by this Court (State's Resp. 4), citing *State v. Tillman*, 2005 WI App 71, ¶ 13 n. 4, 281 Wis. 2d 157, 696 N.W.2d 574, appellate rules do not guarantee such right.

Since the State failed to refute the merits of the ineffective assistance of counsel and interest of justice claims, these claims should be deemed conceded by the State.[3]

A. Fisher's trial counsel provided ineffective assistance of counsel.

As Fisher explained in his opening brief, Fisher's trial counsel provided constitutionally ineffective assistance of counsel. (*see* Fisher's Br. 16-28.) The sole issue at trial was the identity of Mr. Mousa's killer. Fisher's counsel did not call any witnesses, and Fisher did not testify. Therefore, trial counsel presented no real defense. No physical evidence ever tied Fisher to the shooting. Nor did anyone testify to witnessing Fisher shoot Mr. Mousa. The evidence implicating the alternate suspects would have exposed the weaknesses in the State's case. Therefore, the failure of Fisher's counsel to present the jury with the strong exculpatory evidence implicating Little Rob and his friends amounted to constitutionally deficient performance, and this deficient performance prejudiced Fisher. There is a reasonable probability the result of the trial would have been different if counsel had presented the evidence of Little Rob's and Little Rob's friends' guilt.

[3] If, however, this Court does provide the State an opportunity to file a supplemental brief addressing the merits, Fisher respectfully requests an opportunity to reply.

B. This Court has inherent authority to grant Mr. Fisher a new trial in the interest of justice.

As Fisher recognized in his opening brief (Fisher's Br. 37), this Court has inherent authority to order a new trial in the interest of justice if it determines the real controversy has not been fully tried. Wis. Stat. § 752.35; *Vollmer v. Luety*, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990). Here, the central issue of Fisher's case—the identity of Mr. Mousa's killer—has never been fully tried.

Fisher's trial counsel, who did not call a single witness, failed to present compelling evidence of an alternate perpetrator's guilt. Fisher was never consulted on the decision to withhold this information from the jury. More importantly, Fisher did not even know the evidence existed. The system failed Fisher yet again when his appointed post-conviction counsel reviewed only Fisher's transcripts and court records to make the determination that Fisher lacked any meritorious reason for postconviction relief. Fisher therefore remained oblivious to the compelling evidence and, desperate to prove his innocence, decided to try to appeal his case *pro se* as opposed to allowing his appointed counsel to "basically argue against [Fisher], and inform the court of appeals why there is nothing wrong with [his] case." (39:9) (A-Ap. 170). Illiterate, uneducated, and supplied with an incomplete discovery file, Fisher relied on a jailhouse lawyer to prove his innocence to no avail. It was not until the Wisconsin Innocence Project

investigated Fisher's claims did the evidence implicating Little Rob and his friends surface.

Fortunately, where important evidence was erroneously excluded at trial and where the exclusion of such evidence prevented the real controversy of the identity of the perpetrator from being fully tried—as has happened in this case—this Court has the inherent authority to order a new trial in the interest of justice. *Luety*, 156 Wis. 2d 1; *State v. Armstrong*, 2005 WI 119, ¶ 115, 283 Wis. 2d 639, 700 N.W.2d 98. Without the opportunity for a jury to hear the compelling evidence of the alternate perpetrators' guilt, we cannot be confident in the outcome of Fisher's trial. Therefore, in order to maintain the integrity of our criminal justice system and to ensure confidence that justice has prevailed, Fisher deserves a new trial in the interest of justice.

CONCLUSION

For these reasons, and for those in his opening brief, Casey Fisher respectfully requests that this Court reverse the Milwaukee County Circuit Court's denial of his Wis. Stat. sec. 974.06 motion and remand with an instruction to grant a new trial, or grant other relief this Court deems appropriate.

Respectfully submitted this 15th day of December 2017.

Steven Wright
State Bar No. 1090780
608.890.3540
shwright@wisc.edu

Maria de Arteaga
State Bar No. 1095253
608.890.3859
dearteaga@wisc.edu

Attorneys for Defendant
Wisconsin Innocence Project
975 Bascom Mall
Madison, WI 53706

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,459 words.

Dated this 15th day of December 2017.

_____

Maria de Arteaga
State Bar No. 1095253

CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 15th day of December 2017.

_____

Maria de Arteaga
State Bar No. 1095253