STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1720-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT JAMES POPE, JR.,

Defendant-Respondent-Petitioner.

On Review of a Decision of the Court of Appeals Reversing a Postconviction Order for a New Trial Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Conen Presiding

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REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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ARGUMENT

I. The record is insufficient to determine whether potentially meritorious issues exist, depriving Mr. Pope of a meaningful appeal of his convictions.

A. Neither transcript unavailability nor lack of record reconstruction is attributable to Mr. Pope.

The State faults Mr. Pope for the trial transcript unavailability, and insists that he must proceed with his appeal without them because he is responsible for the content of the appellate record. (State's brief at 26). The State is wrong.

While the State suggests that Mr. Pope engaged in "foot-dragging" by not ordering the trial transcripts prior to the reinstatement of his direct appeal in 2016 (State's brief at 25,26), it cites no authority for the proposition that he was required to do so outside of the procedures of Wis. Stat. §809.30 in order to preserve his direct appeal rights. Had trial counsel properly discharged his duty in filing the notice of intent following sentencing as directed by Mr. Pope (25; 80:40), appellate counsel

would have been appointed and transcripts timely ordered pursuant to Wis. Stat. §809.30(2)(e).[1]

Further, in 1997, the circuit court denied Mr. Pope a transcript fee waiver for appeal of its order denying his Wis. Stat. §974.06 motion for reinstatement of his direct appeal rights, on the flawed grounds that he had failed to "set forth an arguably meritorious claim for relief and is not entitled to free transcripts for purposes of appeal." (28; 29; 30; 31:1; 33).

And, while an appellant is responsible for ensuring that available documents are made part of the appellate record, *State v. (Curtis) Smith*, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972), this general rule fails to support the State's claim that Mr. Pope must litigate his direct appeal with a record that lacks transcripts unavailable due to the passage of time. The State's proposition is also contradicted by this Court's decisions in *Perry* and *Raflik*, which considered the impact of transcript deficiencies on the right to a meaningful appeal, and in no way suggested that this right must suffer if transcripts

[1] Wis. Stat. §809.30(2) sets forth the procedure for filing the notice of intent and the subsequent direct appeal process, including the appointment of counsel and the ordering of the transcripts. *See* Wis. Stat. §809.30(2)(e). While the State cites Wis. Stat. §809.11(4)(a) as establishing that Mr. Pope had the "responsibility to timely order the trial transcripts" (State's brief at 26), that statute merely requires an appellant to request and arrange payment for a transcript copy for other parties to an appeal.

are unavailable. *State v. Perry*, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987); *State v. Raflik*, 2001 WI 129, ¶54, 248 Wis. 2d 593, 636 N.W.2d 690. As this Court has noted, where "'a portion of the record is lost through no fault of the aggrieved party, that party should not be made to bear the burden of the loss.'" *Perry*, 136 Wis. 2d at 111 (quoting *State v. DeLeon*, 127 Wis. 2d 74, 77, 377 N.W.2d 635 (Ct. App. 1985)).

Moreover, Mr. Pope had no duty, as the State also suggests, to attempt reconstruction of the trial record in order to determine claims of error in compliance with *Perry*. (State's brief at 15-17). The State's reliance on civil cases from other states and federal rules ignores that Wisconsin's procedure requires the *circuit court*, not the defendant, to determine whether missing portions of the record can be reconstructed, given factors such as length of missing portion, time lapse, and availability of witnesses and counsel to reconstruct the record. *Perry*, 136 Wis. 2d at 102; *DeLeon*, 127 Wis. 2d at 81.

Here, the circuit court's conclusion that "not having the transcript and not being able to really proceed today in a meaningful way on a motion for a new trial," implicitly determined that the record could not be reconstructed. (81:23; Pet-App.137). Nor did the State suggest below that it believed record reconstruction could occur.

B. Meaningful appellate review cannot occur on the available record.

The State claims that there is "available information from inside and outside the existing record" that would enable counsel and the appellate court to assess what occurred at Mr. Pope's trial to determine whether error occurred, or engage in the no-merit review process under Wis. Stat. §809.32. (State's brief at 17-22,28,30). However, the State's recitation of record "information" references only the criminal complaint and preliminary hearing transcript, not any actual testimony or evidence from Mr. Pope's *trial*. (*Id*. at 17-22).

In addition, the State fails to explain how the complaint, trial docket entries, preliminary hearing and sentencing transcripts, *Knight* proceedings, and newspaper articles provide a basis for either appellate counsel to determine whether error occurred *at the trial*, or for the appellate court to verify or disprove it. (State's brief at 30). As this Court has held, "There is no way appellate counsel can determine if there is arguable merit for the appeal without either having been the trial attorney or reading the transcript." *In the Interest of J.D.*, 106 Wis. 2d 126, 132, 315 N.W. 365 (1982). *Perry* also recognized the importance of the transcript to the reviewing court: "An appellate court cannot function if it has no way to determine whether error has been committed." *Perry,* 136 Wis. 2d at 105.

The State further suggests that appellate counsel can utilize trial counsel, trial witnesses, the prosecutor and the judge, and Mr. Pope as "other readily available sources of information outside the record for counsel to realistically assess what happened and whether arguably reversible error occurred." (State's brief at 28,30). The State ignores, however, that trial counsel has no memory of the case and that he destroyed his file many years ago. (47:1; 79:8,12,15,17-18,29-30). Nor does the State explain how the retired prosecutor, the retired judge, or the State's 20 trial witnesses are "accessible" to appellate counsel, or how they would provide any basis for appellate counsel to be able to meaningful assess, or for an appellate court to determine, what actually occurred at Mr. Pope's 1996 trial. And, while counsel has "access" to Mr. Pope, he is not a lawyer, and any memory he may have of his trial would be woefully insufficient for appellate counsel to meaningfully review and determine whether arguable legal error occurred at trial.

Additionally, the State's assertion that, "One does not need a transcript" to determine whether sufficient evidence exists to support the jury verdicts (State's brief at 18) turns appellate review on its head, as a sufficiency determination rests entirely upon *the evidence presented at trial. State v. (Roshawn) Smith*, 2012 WI 91, ¶¶28-45, 342 Wis. 2d 710, 817 N.W.2d 410. Without a single transcript from the trial, the sufficiency of the evidence to support the convictions simply cannot be assessed.

Finally, the State's claim that the preliminary hearing and sentencing could be challenged, as those transcripts were previously prepared (78; 80) is specious, as a challenge to the preliminary hearing is precluded by *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) (a defendant claiming error at his preliminary hearing may obtain relief only prior to trial). And, while Mr. Pope could potentially utilize the sentencing transcript to challenge the trial court's denial of parole eligibility on his life sentences, development of such a challenge on legal grounds such as inaccurate information at sentencing or a harsh and excessive sentence could be thwarted by unavailability of the trial evidence. Moreover, a sentencing challenge would not affect the deprivation of any meaningful review of Mr. Pope's *convictions*.

C. Previous *pro se* efforts to reinstate direct appeal rights forfeited by ineffective counsel cannot support denial of relief on direct appeal.

The State asserts that the Court of Appeals was correct in concluding that, "'Pope has not done everything that reasonably could be expected in order to perfect his appeal.'" (State's brief at 17) (quoting *State v. Pope*, 2018 WL 5920615, ¶35). The State and the Court of Appeals maintain this is because Mr. Pope didn't assert in his earlier *pro se* efforts for reinstatement what arguably meritorious issues exist in his case, and instead "twice filed statements on transcript in which he advised the court of appeals that all transcripts necessary for the appeal were

already on file (the preliminary hearing and sentencing transcripts)." (State's brief at 14-15,n.6,17; *Pope*, ¶¶33-37).

As argued in his opening brief (at 26-28), under Wis. Stat. §809.11(4)(b), Mr. Pope correctly asserted that no additional transcripts were needed in that appeal, which addressed only the denial of his motion for reinstatement of his direct appeal rights.

Moreover, it is well-established that an appellate court cannot "condition the restoration of a defendant's appellate rights forfeited by ineffective counsel on proof that defendant's appeal had merit." *Garza v. Idaho*, 139 S. Ct. 738, 748 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *United States v. Rodriguez*, 395 U.S. 327, 330 (1969). "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, *Id.*

Mr. Pope repeatedly sought reinstatement of his direct appeal rights, which the circuit court and Court of Appeals repeatedly denied (27; 29; 36; 40; 42), in part based upon the erroneous insistence that Mr. Pope was required to assert "what issues he believes should be or could be raised in Rule 809.30 proceedings," (40:2; A-App. 125). This Court denied review. (42:2)

Further, because Mr. Pope had the right to the effective assistance of counsel on direct appeal, *Douglas v. California*, 372 U.S. 353, 355-358 (1963); *Evitts v. Lucey*. 469 U.S. 387, 396-397 (1985), to the

extent that any procedural shortcomings existed in his *pro se* filings, it is the State that bears the cost: "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State.'" *Coleman v. Thompson*, 501 U.S. 722, 724 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). As the Seventh Circuit has noted:

> Yet one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit. The Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel.

Betts v. Litscher, 241 F.3d 594 (7th Cir. 2001).

D. The loss of an entire trial transcript increases the impossibility of meaningful appellate review of a conviction, justifying presumption of prejudice without a showing of specific error.

The State imagines that failure to apply the "colorable need" requirement of Perry to Mr. Pope's rare situation will create a "slippery slope" that could be used to "get around *Perry* when only some of the transcripts are missing." (State's brief at 29).

However, a finding of prejudice without identification of specific error in cases in which the

transcript is so deficient that such error cannot be determined would not require automatic reversal where the transcript of a recent, short trial is missing but the record can be reconstructed, or the record lacks only one day of a three-week trial, as the State posits. In such circumstances, it is highly probable that trial counsel would be a resource for appellate counsel, and could provide his trial file and recall the recent trial in some detail in order to assist in identification of an arguable issue sufficient to satisfy the *Perry* burden.

In addition, it would be reasonable for the circuit court to determine that, in those circumstances, record reconstruction was possible, with the attorneys' assistance and recalling of witnesses, as in *DeLeon*, such that the appeal could proceed.

And, in situations where the transcript of either a sentencing or suppression hearing is missing, it is certainly possible that a new hearing may be required, if the record cannot be reconstructed such that meaningful appellate review could occur. For, without a transcript of a suppression hearing or a sufficient reconstruction, there would be no basis to determine, e.g., whether probable cause for a vehicle search existed. *See Raflik*, 2001 WI 129, ¶40. Similarly, without a sentencing transcript, meaningful appellate review of the circuit court's exercise of sentencing discretion cannot occur. *State v. Gallion*, 2004 WI 42, ¶¶38-51, 270 Wis. 2d 535, 678 N.W.2d 197 (requiring that a

circuit court's exercise of sentencing discretion be set forth on the record to facilitate meaningful appellate review); *State v. Alexander*, 2015 WI 6, ¶¶29-35, 360 Wis. 2d 292, 858 N.W.2d 662 (emphasizing reviewing court's consideration of the "entire sentencing transcript" in determining proper exercise of sentencing discretion).

In contrast, here the transcripts of every stage of Mr. Pope's four-day trial, from voir dire through verdict, is unavailable, including the testimony of 20 State's witnesses and Mr. Pope, a jury scene view, the admission of more than 50 exhibits, and the court's response to two jury questions. (1:4-10; 16; 17). Moreover, the trial occurred 23 years ago, trial counsel has no recollection of the case, and his file has been destroyed. (47:1; 79:8,12,15,17-18,29-30). Given the utter deficiency of this record, meaningful appellate review of Mr. Pope's trial cannot occur, denying the constitutional right to appeal his convictions. In these unique circumstances, prejudice should be presumed.

II. This Court should reject the State's request that, if relief is granted, the stipulation should be vacated so that it can belatedly assert a laches defense.

The State argues that if this Court reverses the Court of Appeals, it should then be relieved of its stipulation to reinstatement of Mr. Pope's direct appeal. (State's brief at 30-37). This Court should reject this claim, as the State failed to raise it below.

State v. Dowdy, 2012 WI 12, ¶5, 338 Wis. 2d 565, 808 N.W.2d 691; *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (issues not raised or considered in the circuit court will not be considered for the first time on appeal).

In both the circuit court and on appeal, rather than argue that the stipulation should be vacated, the State directly argued laches, claiming that the stipulation had not forfeited its ability to assert this defense in the direct appeal. (68:2-3; 81:12; Pet-App.126; State's opening brief in Court of Appeals at 24-33; State's reply brief in Court of Appeals at 3-10). The Court of Appeals did not address the State's laches claim because it reversed the circuit court's grant of a new trial based on the "colorable need" burden of *Perry*. *Pope*, 2018 WL 5920615, ¶5, n.9 (Pet-App. 103).

And, on its merits, the State's request for relief from the stipulation fails, as the stipulation was not conditioned upon transcript availability or the application of *Perry*, but was instead predicated upon the circuit court's factual findings regarding trial counsel's failure to file the notice of intent. (60:2; A-App. 136). *See Huml v. Vlazny,* 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807; *Stone v. Acuity*, 2008 WI 30, ¶67, 308 Wis. 2d 558, 747 N.W.2d 149 (contract or stipulation terms should be given their "plain or ordinary meaning" and if unambiguous, determination of the parties' intent "ends with the four corners of the contract, without consideration of extrinsic evidence.").

While the State argues that it should be relieved of its stipulation because "the parties…operated under mutual misunderstandings of a material fact and the controlling law," (State's brief at 31), a "mistake of fact" warranting contract rescission requires "[a]n unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract." *Kowalke v. Milwaukee Elec. Ry & Light Co.*, 103 Wis. 472, 476, 79 N.W. 762 (1899).

Here, trial transcript availability and the application of the "colorable need" standard of *Perry* were not "intrinsic to the transaction" nor "one of the things actually contracted about" in the stipulation. *Kowalke*, 79 N.W. at 764. Instead, at the time of the stipulation, the trial transcripts themselves, having not yet been ordered, and any modification of *Perry,* were "future facts" that "rest[ed] in conjecture, and the contingency thereof to have been assumed by both parties." *Id.* Thus, contrary to the State's assertion, the unavailability of the transcripts and existing law were not "material" facts intrinsic to the stipulation to reinstate Mr. Pope's direct appeal.

Further, the State's lament that it would not have agreed to reinstatement of Mr. Pope's direct appeal had it known that the trial transcripts would not be available rings hollow, for such reasoning could apply to virtually any claim that results in relief for the defendant. Indeed, the circuit court questioned this rationalization below, noting:

> … In other words, I mean, if there's enough there to reinstate the appellate rights, there should be enough there whether you know there's a transcript available or you know there's a transcript that's not available. It's a little disingenuous to say that, I mean, if we were going to lose, we would never have agreed to this.

(81:21-22; Pet-App. 135-136).

If this Court grants the relief that Mr. Pope is seeking and reverses the Court of Appeals, it should reject the State's disingenuous attempt to undo the proceedings by then vacating its stipulation, dismissing the direct appeal, and reinstating the *Knight* petition so that the State can belatedly attempt to assert laches.

CONCLUSION

This Court should hold that in cases in which the transcript is so deficient that determination of potential merit cannot occur, prejudice results because meaningful appellate review is denied, and a new trial should be ordered without the need to identify a specific error that might be contained in the missing transcript. Mr. Pope therefore requests that this Court reverse the Court of Appeals and affirm the circuit court's grant of a new trial.

In addition, this Court should reject the State's request to vacate its stipulation to reinstate Mr. Pope's direct appeal and to remand to the Court of Appeals so that the State can belatedly assert a laches defense to Mr. Pope's dismissed *Knight* habeas petition.

Dated this 6th day of August, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

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 August, 2019.

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