STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case Nos. 2017AP002221-CR, 2017AP002222-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANTHONY DONTE DIXON,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT ENTERED ON FEBRUARY 16, 2017 AND AN ORDER DENYING POSTCONVICTION RELIEF, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. Did the circuit court properly exercise its discretion when it denied Mr. Dixon's request to fire his appointed attorney on the day of trial after it inquired into why Mr. Dixon wanted a new attorney, found Mr. Dixon's reasons lacking basis,

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[1] The State notes at the outset that Mr. Dixon does not refer to either his postconviction motion, or the circuit court's denial thereof. The State believes that Mr. Dixon more properly should have appealed from the judgment of conviction and the circuit court's denial of his postconviction motion, but does not believe this error causes the State any prejudice.

and found that the primary purpose of the request was dilatory?

The circuit court concluded that it did not erroneously exercise its discretion.

II. Did Mr. Dixon allege sufficient facts in his postconviction motion to entitle him to relief on his claim of ineffective assistance of counsel? Finding that he did not, did the circuit court properly exercise its discretion in denying the motion without an evidentiary hearing?

The circuit court concluded that Mr. Dixon had not alleged facts sufficient to entitle him to relied, making only conclusory claims. The circuit court therefore exercised its discretion and denied Mr. Dixon's motion for postconviction relief for ineffective assistance of counsel without an evidentiary hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On June 27, 2016, the State charged Mr. Dixon with Knowingly Violating a Domestic Abuse Injunction and Disorderly Conduct, both as a Domestic Abuse Repeater and with Domestic Abuse surcharges.[2] (21R2:1). Then, on August 19, 2016, the State charged Mr. Dixon in another case, with Knowingly Violating a Domestic Abuse Injunction, Criminal Damage to Property, and Disorderly Conduct, all as a Domestic

[2] This brief cites almost exclusively to the record contained in 2017AP2222. Accordingly, such citations are referenced as "R__". Any citations to the record contained in 2017AP2221, such as here, are instead referenced as "21R__".

Abuse Repeater and with Domestic Abuse Assessments. (R2:1). Mr. Dixon made his initial appearance on both cases on November 25, 2016, and the case was assigned to Branch 36, the Honorable Judge Kremers. (R40:1).

The circuit court presided over a Final Pretrial Hearing, with Attorney Patrick Wait appearing on behalf of Mr. Dixon. (R43:1). At this hearing, Attorney Wait advised the circuit court that he had not had any contact with his client before the hearing, because he did not have a working phone number. (R43:2). The circuit court inquired into why Mr. Dixon had not called Attorney Wait, and he claimed that he worked long hours in a factory. (R43:2). When the court asked why he did not attempt to call when he was not working, Mr. Dixon replied that he was tired. (R43:3). The circuit court expressed its belief that Mr. Dixon was not taking his cases seriously. (R43:4). The circuit court warned Mr. Dixon that:

> If he's [Attorney Wait] not ready to go to trial on the15th [February 15, 2017] -- because you won't talk to him, or you're not available, we're going to trial on the 15th.
>
> And I don't have a record that he's not able to do a good job for you because you haven't done your job. You better take this seriously, sir. These are serious charges.
>
> And if you think it's a joke, show up on the 15th, sit there looking like you're looking now, acting like this is a joke, and see what the jury does.

(R43:4).

Attorney Wait then advised the court that Mr. Dixon was claiming that he had alibi witnesses, but Attorney Wait stated had no information. (R43:5). The court cautioned that it was "just about too late to file an alibi." (R43:5).

On February 15, 2017, the cases were set for jury trial, and the State announced that it was prepared to proceed. (R44:2). Attorney Wait informed the court that his client wanted to proceed with his witnesses, being the alibi witnesses mentioned on the record at the Final Pretrial. (R44:2). He stated that Mr. Dixon gave him three names and numbers, which he called; however, only one person called him back, but "simply gave me her information." (R44:2). He stated that he had called

Mr. Dixon and advised him to reach out and have his witnesses call him. (R44:2-3). Attorney Wait then advised the court that Mr. Dixon wanted to fire him. (R44:3).

The circuit court then asked Mr. Dixon what the problem was, and Mr. Dixon replied that he did not feel that Attorney Wait had done his job. (R44:3). The circuit court stated that,

> [a]ll he can do is try and Mr. Wait, I've never had a problem with Mr. Wait being less than truthful in this court or less than competent or less than prepared to the extent he can be prepared, but he can't make up witnesses. He can't make people contact him back. So, today is your trial date.

(R44:3). Mr. Dixon again stated that Attorney Wait should have tried harder, and the court told Mr. Dixon that he should have made sure. (R44:3). The circuit court told Mr. Dixon that he believed Attorney Wait when he said he tried to reach the witnesses. (R44:3). When the court, again, told Mr. Dixon that they would be proceeding to trial, Mr. Dixon stated that he wanted to fire Attorney Wait. (R44:4).

The circuit court told Mr. Dixon that it would not allow him to fire his attorney on the day of trial. (R44:4). The circuit court further explained some situations where a defendant can fire their attorney, such as having another attorney ready to go, and Mr. Dixon then stated that he had another attorney ready to go. (R44:4). When the court asked who it was, Mr. Dixon, instead of giving a name, stated that he would "have to call him." (R44:4). When pressed as to whether this attorney would be ready to go to trial that day, Mr. Dixon stated he was not sure. (R44:5). The circuit court denied Mr. Dixon's request to substitute his attorney, stating that the trial would proceed that day. (R44:5). Mr. Dixon again stated that Attorney Wait did not try hard enough to procure his witnesses, and the circuit court reminded him that Attorney Wait had stated that he had called Mr. Dixon and told him to have his witnesses get in touch with Attorney Wait. (R44:5). Mr. Dixon then claimed that Attorney Wait "didn't say that." (R44:5). When Mr. Dixon claimed that the judge was automatically taking Attorney Wait at his word over him, the circuit court explained that it had:

> never had a problem with Mr. Wait telling me he is, as far as this court's experience with Mr. Wait over many years, he's a man of his word. He's always prepared, Mr. Dixon and what I'm seeing and feeling here is that because the State is ready to go to trial today, suddenly you don't want to go to trial and you want to find a way to have another, to get another date to see if maybe the witnesses won't come back that day. We are not doing that. We are not going to let you play that game with this court.

(R44:6).

After a brief break, the circuit court proceeded, asking Attorney Wait whether Mr. Dixon was agreeing to a stipulation, and Attorney Wait did not answer, stating that Mr. Dixon said he had fired him. (R44:8). The circuit court told Mr. Dixon that he did not "get to fire him." (R44:8). Mr. Dixon repeated that Attorney Wait did not procure his witnessed, and the court stated, "[w]e already had this hearing. Mr. Wait is your lawyer, unless you want to represent yourself." (R44:8). Mr. Dixon claimed that he could get a paid attorney, but the circuit court denied the request, saying:

> You don't have that option today. You don't get to come in on the day of trial when the State's ready to proceed and you find out that the State's witnesses are here. Now you want to fire your lawyer and hire a lawyer. Which means we would have to adjourn the case. We are not doing that on the day of trial. You have had plenty of time to do that if you didn't like job Mr. Wait was doing.

(R44:8-9).

Mr. Dixon again claimed that Attorney Wait had not contacted him, but the circuit court told him: "I made a finding he did contact you and tell you to get your witnesses in here and you didn't do it…" (R44:9). Mr. Dixon then claimed that he did talk to his witnesses and two of them said Attorney Wait had called them. (R44:9). The circuit court then asked him why he did not have his witnesses contact Attorney Wait, if he had contacted them, but in response, Mr. Dixon said, "So, if he subpoenaed them like he was supposed to –" (R44:9). The circuit court cut Mr. Dixon off and informed him again that he could proceed with Attorney Wait or represent himself. (R44:9-10).

Mr. Dixon again objected to the circuit court taking Attorney Wait at his word, and the circuit court responded that, "I'm making a finding that Mr. Wait was truthful with this court when he described his efforts to contact your witnesses. So, I made that finding. We are not going to re-try that, Mr. Dixon." (R44:13). At that point, Mr. Dixon elected to proceed representing himself, and the circuit court conducted a colloquy. (R44:13).

Based on the lack of alibi notice, the circuit court cautioned Mr. Dixon that he would not be allowed to testify as to where he was on August 13, 2016, the date of the charged incident in the second case. (R44:17). Attorney Wait interjected that he had stated on the record at the Final Pretrial that his client was claiming an alibi, so the circuit court clarified that Mr. Dixon could claim that he was not at the incident location, but he could not positively claim where he was. (R44:18-19).

Mr. Dixon gave an opening statement at the start of trial, stating that he was not present for either charged incident. (R 45:20-21). Mr. Dixon took the stand in his own defense, stating that, for the August 13, 2016 incident, he was coming home from work and went to sleep. (R46:5-6).

In his closing argument, Mr. Dixon stated that he worked late shift until 7:00 am and could not have committed the August 13, 2016 offense. (R46:41). The State objected, and the circuit court sustained the objection. (R46:41). Mr. Dixon again stated that he was at work. (R46:42). After the jury went to deliberate, the circuit court put a sidebar on the record, noting that:

> We had a sidebar because district attorney asked to be heard regarding Mr. Dixon's argument. Mr. Dixon, both on testifying, he testified to things he wasn't supposed to testify about as to where else he was in violation of this court's clear instructions yesterday about his inability to present an alibi, since he never gave the state the appropriate notice.
>
> I did say he could testify and indicate that he wasn't at the scene of the alleged incident, but not put in evidence about where he was, since he didn't give the state the ability to check that out. And frankly, if I understood the attempt at

> an alibi from yesterday, that was referred to, out of the people he was with including one of the prospective jurors who indicated he was with you one of the nights of one of the incidents, there was nothing about these being co-workers of yours and you being at work. So, that is a totally different alibi than what was suggested yesterday. Nonetheless, you did testify to that, as to both instances, that you were at work.
>
> So, that's a problem. We let it go.

(R46:48-49).

The jury convicted Mr. Dixon of Knowingly Violate a Domestic Abuse Injunction and Disorderly Conduct for the first incident, and Knowingly Violate a Domestic Abuse Injunction for the August 13, 2016, incident, but the jury did not find that these were acts of domestic abuse. (R47:7-9).

On March 28, 2017, Mr. Dixon filed a handwritten motion to suppress the charges. (R26).

The circuit court sentenced Dixon on April 11, 2017 to eighteen months in the House of Correction. (R49:11).[3]

Mr. Dixon filed a motion for postconviction relief, arguing that the circuit court had improperly failed to inquire into Mr. Dixon's request for new counsel and that prior counsel had denied Mr. Dixon effective assistance of counsel by failing to adequately investigate and call alibi witnesses. (R33). As part of that motion, Mr. Dixon submitted an affidavit stating that Attorney Wait said he would call him if there were problems getting witnesses, and claiming he tried to call Attorney Wait. (R34). The circuit court denied that motion without an evidentiary hearing. (R35).

STANDARD OF REVIEW

> Whether trial counsel should be relieved and a new attorney appointed is a matter within the circuit court's discretion. Absent an erroneous exercise of discretion, the

[3] Mr. Dixon, in his brief states that he was sentenced to twenty-one months in the House of Correction. (Dixon, App. Brief, Pg. 3). However, the circuit court sentenced him, on the disorderly conduct charge, to three months running concurrently. (R49:11).

> circuit court's judgment will not be disturbed. This court will sustain the circuit court's decision if the court '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.'

State v. Jones, 2010 WI 72, 326 Wis. 2d 380, 797 N.W.2d 378 (internal citations omitted). *See also United States v. Volpentesta*, 727 F.3d 666, 672-73 (7th Cir. 2013).

A motion for a new trial based on ineffective assistance of counsel must state sufficient facts to "allow the reviewing court to meaningfully assess [the defendant's] claim." *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that [this Court] review[s] de novo." *Bentley*, 201 Wis. 2d at 310. If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *Id.* at 309–10.

> [R]eview of this discretionary determination is limited to whether the court erroneously exercised its discretion in making this determination. A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process.

Id. at 318.

An ineffective assistance of counsel claim presents this court with a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* What counsel did or did not do is a factual issue for the circuit court. *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The ultimate issue of whether counsel was ineffective based on these facts is subject to independent appellate review. *State v. Balliette*, 2011 WI 79, ¶¶18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

ARGUMENT

I. The trial court properly exercised its discretion when it denied Mr. Dixon's request to fire his appointed attorney on the day of trial, because the trial court inquired into why Mr. Dixon wanted a new attorney, found Mr. Dixon's reasons lacking basis, found that granting his request would require a continuance, found that the request was dilatory, and therefore denied the request.

This court should uphold the circuit court's decision, because the record demonstrates that the court properly exercised its discretion: the court conducted an adequate inquiry into the relevant facts, applied the proper standard, used a rational process, and reached a conclusion that a reasonable judge could reach.

A) The circuit court made an inquiry and considered relevant, appropriate factors in denying Mr. Dixon's request for substitute appointed counsel

As articulated in *State v. Lomax*, the factors for this court to consider when reviewing a trial court's decision to grant or deny a request for substitution of counsel are: 1) the adequacy of the circuit court's inquiry into the defendant's request; 2) the timeliness of the defendant's request; and 3) whether the alleged conflict between the defendant and attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case. *Jones*¸ 2010 WI ¶ 25, 326 Wis. 2d at 387-88; *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W. 2d 89 (1988).

When granting a defendant's request for new appointed counsel would require a continuance of the trial, the trial court must additionally balance the defendant's right and desire for new counsel with society's interest in the prompt and efficient administration of justice. *State v. Darby*, 2009 WI App 50, ¶ 30, 317 Wis.2d 478, 766 N.W.2d 770. The factors for trial courts to consider in this balance are:

> 1) the length of the delay requested; 2) whether the 'lead' counsel has associates prepared to try the case in his absence or whether there is competent counsel presently available to try the case; 3) whether other continuances have been requested and received by the defendant; 4) the convenience or inconvenience to the parties, witnesses and the court; 5) whether the delay seems to be for legitimate reasons, or whether its purpose is dilatory; and 6) other relevant factors.

Phifer v. State, 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974).

In this case, the circuit court conducted an adequate inquiry into Mr. Dixon's request. Attorney Wait informed the court of Mr. Dixon's intent to fire him at the very beginning of the day of trial. (R44:3). He advised the court of the essential disagreement: that Mr. Dixon felt he should have done more the secure his alleged alibi witnesses for trial. (R44:2). He stated the steps he had undertaken: he called three people his client gave him—two never called him back and one simply gave him her information. (R44:2). He told the court that he told Mr. Dixon two weeks prior to the trial date to get the other potential witnesses to contact him, but no one did. (R44:2-3).

The court inquired with Mr. Dixon what the problem was. (R44:3). The court accepted Attorney Wait's description of his efforts to contact the people Mr. Dixon asked him to contact, and noted that Attorney Wait had always been truthful with the court. (R44:3). When Mr. Dixon claimed to have another attorney ready to go, the court further inquired, but Mr. Dixon did not name this attorney, and further conceded that he was not sure this attorney would be ready to try the case that day. (R44:4). The court then told Mr. Dixon that it was the day of his trial and the trial would be proceeding. (R44:5). When Mr. Dixon continued to voice his belief that this was unfair, he claimed the Attorney Wait had not, in fact, called him and told him to make sure his witnesses would come to trial. (R44:5). The court reiterated its belief that Attorney Wait had been truthful—based on years of experience with Attorney Wait—and further found,

> what I'm seeing and feeling here is that because the State is ready to go to trial today, suddenly you don't want to go to trial and you want to find a way to have another, get another date to see if maybe the witnesses won't come

> back that day. We are not doing that. We are not going to let you play that game with the court.

(R44:6).

The trial court was not obligated to conduct a lengthy inquiry into Mr. Dixon's request. It determined that Mr. Dixon wanted his witnesses here and he believed that Attorney Wait should have done more to secure their appearance. (*See* R44:3). It found that Attorney Wait was not obligated to make extraordinary efforts to do so. (R44:3). It accepted Attorney Wait's representation of what he did. (R44:10; R44:12; R44:13). The trial court did not state that it believed Mr. Dixon was lying, only that Attorney Wait was competent, professional, and honest with the court in the past. (R44:6). Though not stated by the circuit court, it would be reasonable for a trial court to find an attorney's statements to the court on the record truthful because attorneys are officers of the court and have duties of candor and honesty with the court. (SCR 20:3.3). A probing search into Attorney Wait's phone records or billing records, as suggested by Mr. Dixon, is unreasonable. What Attorney Wait and Mr. Dixon disagree on is whether Attorney Wait told Mr. Dixon to reach out to his witnesses and have them call him. For a defendant such as Mr. Dixon, who objected to the unfairness of having to proceed to trial without his witnesses, touching base with them before the day of trial should have been obvious.

If this court concludes that the circuit court conducted an inadequate inquiry, then Mr. Dixon's remedy is a retrospective hearing into Mr. Dixon's reasons for wanting a substitute attorney, not automatic new trial. The court in *Lomax* held,

> [w]hen a trial court has not made an adequate inquiry into a defendant's last-minute request to discharge appointed counsel, a retrospective hearing, at which the defendant may present whatever he deems necessary to fully articulate his reasons for wanting counsel discharged, strikes a proper balance between the constitutional rights of defendants and the efficient administration of justice.

146 Wis. 2d at 365, 432 N.W.2d at 93.

Mr. Dixon overstates the timeliness of his request. The issue of alibi witnesses and Mr. Dixon's contact with his attorney had come up before on the record. (R43:1-3). At the Final Pretrial hearing, Attorney Wait informed the circuit court that he had not met with Mr. Dixon and did not have a working phone number for him. (R43:1-3). The court made an inquiry with Mr. Dixon, whose reason for not being in contact with his attorney was that he was busy working in a factory and then tired on his days off. (R43:2). The trial court did not believe Mr. Dixon was taking the case against him seriously, warning Attorney Wait and Mr. Dixon that

> "[i]f he's not ready to go to trial on the 15th – because you won't talk to him, or you're not available, we're going to trial on the 15th. […] And if you think it's a joke, show up on the 15th, sit there looking like you're looking now acting like this is a joke, and see what the jury does."

(R43:4). Attorney Wait then informed the court that Mr. Dixon told him of his alibi witnesses, but also noted that he did not know who they were or have their contact information. (R43:5). The court responded by warning that it was almost too late to file a notice of alibi. The court stated,

> …if your client doesn't cooperate with you – He's not going to be able to file an alibi notice. [] I don't know what it's going to take for you to take this seriously, sir. You, apparently, take this as a joke. So, okay. We'll see who's laughing on the 15th. We'll see you then.

(R43:5). As of January 12, 2017, the issue of alibi witnesses was discussed on the record, and claiming that the communication issue between Attorney Wait and Mr. Dixon came up on the morning of trial ignores this history.

As to whether the conflict between Attorney Wait and Mr. Dixon resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the evidence, the State submits that there is not enough evidence in the record to second guess the trial court on this determination. When communication issues were brought up at the Final Pretrial hearing, the circuit court urged Mr. Dixon to work with Attorney Wait. (R43:3-5). On the day of trial, after initially denying Mr. Dixon's request, the circuit court

suggested that Mr. Dixon to go into the hallway with Attorney Wait to prepare for trial. (R44:6). Mr. Dixon, however, elected to proceed representing himself; the circuit court conducted a colloquy and determined that Mr. Dixon was waiving his right to counsel knowingly, intelligently, and voluntarily. (R44:13). The record shows the circuit court attempted to encourage Mr. Dixon to work with Attorney Wait. The State submits that Mr. Dixon must point to some fact beyond his own subjective feeling that he could not work with Attorney Wait in order to show a total breakdown in communication. A defendant should not be able to be the cause of a "total lack of communication" and then use that breakdown to his benefit.

The prompt and efficient administration of justice weighed heavily toward denying Mr. Dixon's request. Granting Mr. Dixon's request would have entailed adjourning the trial. (R44:6; 8). The circuit court noted that the State was prepared to proceed and the alleged victim was present. (R44:11). Adjourning would necessarily mean the victim would have to return to court another date.

Apart from Attorney Wait, there was not competent counsel present to try Mr. Dixon's case on February 15, 2017. Even if Mr. Dixon had another attorney available, he was unable to state that that person was ready to try the case. (R44:4). However, the State submits that this factor should not weigh heavily. Attorney Wait was present, and the circuit court found that he was competent. (R44:3). However, Mr. Dixon elected to proceed representing himself. (R44:13).

No other continuances had been requested by either party. (*See* R41; R42; R43). However, it is clear that, even if Attorney Wait had remained as counsel, the trial court would not have entertained a motion to adjourn in order to obtain alibi witnesses. (R44:8). Especially given the noted lack of communication before the Final Pretrial hearing, where Mr. Dixon had not yet given any names to Attorney Wait, the court would reasonably have denied a motion to adjourn when the fault lay entirely with Mr. Dixon.

Adjourning the trial would have caused significant inconvenience to the parties, witnesses, and the court. (R44:8). The circuit court found that Mr. Dixon obtaining a new

attorney would necessitate an adjournment, forcing the victim to return on another date, further finding that to be unfair. (R44:12). In domestic violence cases, the State is never sure that a victim or witness will come back.[4] The State, therefore, has a large interest in proceeding to trial on scheduled trial days when the victim appears.

The record is replete with the circuit court's belief that Mr. Dixon's request was dilatory. Several times, the court accused Mr. Dixon of playing games. (R44:6, 9, 11, 12, 15). Mr. Dixon's attitude that day further supports the conclusion that his request was dilatory. The court further stated, "I'm offering you his assistance. If you don't want it, you want to play games with the court, that's fine. But I have about had it with your attitude and what you are trying to do." (R44:16). The trial court found ample evidence to support the conclusion that Mr. Dixon's request was dilatory and he was playing games with the court.

The circuit court inquired into Mr. Dixon's request, and found it wanting. Attorney Wait made reasonable efforts to investigate Mr. Dixon's alibi, so his failure to take extraordinary measures is not a valid reason for firing him on the day of trial. Against the backdrop of Mr. Dixon's failure to communicate with Attorney Wait until the Final Pretrial hearing, the request was not timely. These issues were known and on the record; this did not spontaneously develop the morning of trial. The record is clear that Mr. Dixon bears much of the responsibility for failing to notice an alibi—his own attorney did not know about it until mere days before the deadline to notice an alibi. Moreover, granting Mr. Dixon's request would have resulted in a delay of months for a new attorney to come up to speed, thereby inconveniencing the victim and other witnesses along with the State. The circuit court gave this great weight when balancing it against Mr. Dixon's request and his rights. It also considered his attitude and held repeatedly that Mr. Dixon was play games with the court. The court clearly found these reasons very compelling

[4] The victim in this case, ML, expressed that she did not want to be there. (R45:22). During her cross-examination by Mr. Dixon, she stated, "Why are we here? I'm fitting to leave." (R.45:46). The State submits that this shows how exactly how the State has an interest in going to trial when its witnesses are present.

and denied Mr. Dixon's request. Doing so was not an abuse of its discretion.

B) Assuming that Mr. Dixon did have counsel of choice he was prepared and able to pay, the circuit court properly exercised its discretion in denying Mr. Dixon request to replace his appointed counsel with counsel of choice.

Where a defendant can afford counsel, the Sixth Amendment right to counsel imputes a presumption in favor of a defendant's counsel of choice; a defendant who can afford an attorney has a right to select and be represented by his preferred attorney. *State v. Prineas*, 2009 WI App 28, ¶ 15, 316 Wis. 2d 414, 427-28, 766 N.W.2d 206. However, this is not an unlimited right, and a court making a decision on whether to allow a defendant's counsel of choice to participate, must balance the defendant's right to counsel and the public's interest in prompt and efficient administration of justice. *State v. McMorris*, 2007 WI App 231, ¶ 18, 306 Wis. 2d 79, 742 N.W.2d 322. An indigent defendant does not have a right to an attorney of his own choice. *State v. Suriano*, 2017 WI 42, ¶ 21, 374 Wis. 2d 683, 701, 893 N.W.2d 543.

Whether a defendant should be allowed to replace present counsel with counsel of choice is a discretionary decision. *Prineas*, 2009 WI App 28, ¶ 13, 316 Wis. 2d 414, 426, 766 N.W.2d 206. And when a trial court denies a continuance, probing appellate scrutiny is not warranted. *State v. Leighton*, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 725, 616 N.W.2d 126.

When considering a request to replace appointed counsel with counsel of choice that would necessitate a continuance, there are a number of factors for a court to consider: 1) the length of the delay requested; 2) whether there is competent counsel presently available to try the case; 3) whether other continuances have been requested and received by the defendant; 4) the convenience or inconvenience to the parties, witnesses and the court; 5) whether the delay seems to be for

legitimate reasons, or whether its purpose is dilatory;[5] *Prineas*, 2009 WI App at ¶¶ 13, 24, 316 Wis. 2d at 426-27, 432-33. Other factors may include: 6) any alleged communication breakdown between the defendant and his present attorney; 7) the ability of the defendant to fund his defense; and 8) whether the defendant offered any reason for the requested substitution and accompanying delay. *See State v. Suriano*, 2017 WI at ¶ 21.

Mr. Dixon claimed that he had "another attorney ready to go. He's not here". (R44:4). The circuit court asked him who this was, and Mr. Dixon responded, "I have to call him." (R.44:4). The State submits that the circuit court could reasonably have concluded, given this *non sequitur* answer, that Mr. Dixon did not, in fact, have another attorney, an attorney of choice. Mr. Dixon's affidavit for his postconviction motion does not state whether he had another attorney ready to go, let alone name who this may have been. (*See* R34).

The State has already addressed the first five factors, how the circuit court addressed them, and how the court properly exercised its discretion.

There are legitimate concerns over whether Mr. Dixon could fund his defense. Attorney Wait was appointed to defend Mr. Dixon by the Public Defender's office. (R44:11). So, the trial court might reasonably have been concerned about further delays if counsel of choice would have taken over only to move to withdraw for not being paid thereafter.

Mr. Dixon's reason for wanting another attorney is solely based on his complaint that Attorney Wait did not do enough to secure his alibi witnesses for trial. (*See e.g.*, R44:4). However, the circuit court held that Attorney Wait "did his part […]. [H]e tried to reach the witnesses." (R44:3). The trial court found this to be an insufficient reason to request another attorney. Given how the trial court determined that Mr. Dixon was playing games, its decision to deny his request was not an abuse of its discretion.

[5] These first five factors are the same as those enumerated in *Phifer*, for a request for new appointed counsel that would require a continuance.

II. The circuit court properly denied Mr. Dixon's postconviction motion based on ineffective assistance of counsel without a hearing because he did not state facts sufficient to entitle him to relief.

In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must show that counsel was deficient and that the deficiency prejudiced his defense. *State v. Mayo*, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115. Because a defendant must prove both prongs, the court need not consider one prong if a defendant has failed to establish the other. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Before a defendant can succeed on an ineffective assistance of counsel claim, the circuit court must hold an evidentiary hearing to preserve counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

But a defendant is not automatically entitled to an evidentiary hearing. To obtain one, the defendant must allege facts in his postconviction motion that "allow the reviewing court to meaningfully assess [the defendant's] claim." *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)). A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen*, 274 Wis. 2d 568, ¶23.

If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *Bentley*, 201 Wis.2d at 309–10.

A) Mr. Dixon's postconviction motion did not state sufficient facts to entitle him to an evidentiary motion, because he merely made conclusory claims with no other support.

In order to obtain an evidentiary hearing on a motion, a defendant "should provide facts that allow the reviewing court

to meaningfully assess his or her claim". *Bentley*, 201 Wis. 2d at 314, 548 N.W.2d at 55. Supporting facts "must be alleged in the petition and the defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing." *Id.* at 313.

The circuit court properly examined the facts alleged by Mr. Dixon. It found that Mr. Dixon did "not name or otherwise describe who his purported alibi witnesses were, nor does he state what they would have purportedly testified to." (R35:2). Further, it found that Mr. Dixon had "not provided any affidavits from these witnesses that would indicate that they were available, willing, and able to testify and what they would have said." (R35:2-3).

Apart from the motion, the only supporting document was Mr. Dixon's affidavit. (R34). Mr. Dixon's affidavit concerns his communication with Attorney Wait. (R34:1-2). It does not name any of the purported witnesses, nor state which charged incident they would have testified about, nor indicate what they would have testified to, nor affirm that they were willing and able to testify for Mr. Dixon on February 15, 2017. (*See* R34). Without any of this information, the circuit court could not consider how the purported alibi witnesses might have affected his confidence in the outcome of the trial. Merely stating that there were witnesses does not enable a circuit court to meaningfully assess whether there was any prejudice.

The circuit court applied the proper legal standard when it held that Mr. Dixon's allegations were conclusory, insufficient to obtain an evidentiary hearing, and do not demonstrate that his witnesses would have been reasonable probable to produce a different outcome. (R35:3).

Without any information on who the witnesses were and what they would have testified to, the circuit court, reasonably denied Mr. Dixon's motion. There were no facts in the record for the circuit court to meaningfully assess Mr. Dixon's claim, and his conclusory statements do not entitle him to an evidentiary hearing.

B) Attorney Wait's performance was not deficient because he made a reasonable attempt to contact alleged alibi witnesses when he did not have any idea that his client had an alibi until shortly before the alibi notice deadline ran.

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687(1984).

Mr. Dixon must point to specific acts or omissions of trial counsel that are "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 697.

The degree of deference to be given to counsel's decision is important in determining whether an attorney was functioning as constitutionally guaranteed counsel, and the reviewing court is to afford counsel's behavior a high degree of deference. *Strickland*, 466 U.S. at 698; *State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). Professionally competent assistance encompasses a "wide range" of behaviors and

> [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. at 698. *Cf. Weatherall v. State*, 73 Wis. 2d 22, 26, 242 N.W. 2d 220, (Cert. denied), 429 U.S. 923 (1976).

Thus, a reviewing court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct; a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's

function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 590.

> With regard to the choice of trial strategy, the Supreme Court stated,[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, apply a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

Finally, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by Defendant's own statements or actions." *Id*. at 691. The reasonableness of investigation decisions is critically dependent upon such decisions. *Id*.

All of Attorney Wait's actions should be viewed in light of Mr. Dixon's actions up to and through the start of trial. Mr. Dixon had no contact with Attorney Wait until the Final Pretrial. (R43:2). When the circuit court inquired into why Mr. Dixon had not contacted his attorney, Mr. Dixon gave an answer so poor the circuit court, on the record, wondered whether Mr. Dixon was taking the cases against him seriously. (R43:4). Attorney Wait had little over one month from the Final Pretrial until the trial date. (*See* R43; R44). Furthermore, the circuit court warned Attorney Wait, and Mr. Dixon, that time was nearly out to file a notice of alibi. (R43:5). Therefore, whether Attorney Wait's actions were deficient or reasonable must take this timeframe into account—a timeframe of Mr. Dixon's making.

Attorney Wait had just over one month until trial, but, in reality, just days until it would be too late to file a notice of alibi. So, Mr. Dixon's position is, therefore, that Attorney Wait's performance was deficient for failing to spend these few days contacting his witnesses, determining their evidence, deciding on whether an alibi is the appropriate trial strategy, and filing a notice of alibi.

By the time of the next hearing—the trial—Attorney Wait stated he had received three names from Mr. Dixon, he had called those people, but only one of them called him back, and only with her information. (R44:2). Attorney Wait also stated on the record that he had called Mr. Dixon and told him to get his witnesses in touch. (R44:2-3). Mr. Dixon claimed this was a lie, and maintains that he would have done more if Attorney Wait had been in contact and told him to get his witnesses there. (*See* R34).

Naturally, if Attorney Wait had been afforded several months to investigate Mr. Dixon's alibi, then these efforts may not be sufficient. But where Mr. Dixon was knowingly out of contact with his attorney, and gives limited information a few days before alibi notice could no longer be given, then Attorney Wait's actions were reasonable, and therefore not deficient.

This is not like the situation Mr. Dixon suggests, where counsel is deficient for failing to call a known witness at trial. The State submits that this is not a logical argument. If Attorney Wait was deficient in failing to investigate and secure these witnesses, then this argument is redundant. But if Attorney Wait's actions were reasonable, then they were not known witnesses. Their testimony was—and remains—unknown. There is no indication that they were willing and available to testify at trial and, therefore, it cannot be deficient performance on Attorney Wait's part not to call them.

Furthermore, Attorney Wait's performance is not deficient for failing to maintain contact with his client. Initially, it was Mr. Dixon who was not in contact with his attorney. They did not meet until the Final Pretrial hearing. (R43:2). The circuit court cautioned Mr. Dixon to be in contact with Attorney Wait, and warned them both that time to file a notice of alibi had almost run. (R43:4-5). After that, Attorney Wait

stated he did call Mr. Dixon, and the circuit court found that Attorney Wait did contact Mr. Dixon. (R44:3, 5, 6). Therefore, the facts in the record demonstrate that Attorney Wait at least attempted to maintain contact with Mr. Dixon. Given the backdrop of Mr. Dixon's failure to communicate with Attorney Wait and the limited time to investigate and notice an alibi, Attorney Wait's actions were reasonable and not deficient performance.

Given Mr. Dixon's behavior in this case, Attorney Wait performed well within reasonable standards of his profession, and Mr. Dixon's motion should fail for that reason alone.

C) Mr. Dixon has shown no prejudice resulting from his lack of alibi witnesses.

To satisfy the prejudice prong, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 446 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 687.

In order to prevail on a claim of ineffective assistance, prejudice must result to the defendant as a result of his counsel's deficient performance. But there is no basis to conclude that a different outcome would have resulted, because there is no indication as to what the alibi witness would have testified to.

Mr. Dixon's brief concedes that he has no idea what these witnesses would have testified to, let alone which incident. (Dixon, App. Brief, pg. 15). The circuit court, denying Mr. Dixon's postconviction motion, made note of the fact that Mr. Dixon "does not name or otherwise describe who his purported alibi witnesses were, nor does he state what they would have purportedly testified to. Moreover, he does not articulate when, where, or how any of this information was communicated to his trial attorney, and he has not provided any affidavits from theses [sic] witnesses that would indicate that they were available, willing, and able to testify and what they would have said." (R35:2-3). These are findings of fact by the

circuit court that are not clearly in error, and this Court should therefore accept them.

Given the lack of information on these alibi witnesses and Mr. Dixon's inconsistent assertion of alibi, there is no basis to assert that any of these witnesses would have significantly corroborated Mr. Dixon's testimony. If any of them had testified inconsistently with each other or Mr. Dixon, then, instead, it is very likely that having them would have hurt Mr. Dixon's case. With nothing on the record, this Court cannot determine that having those witnesses would, with reasonable probability, have affected the outcome of the trial. The court should therefore find that Mr. Dixon has not shown any prejudice, and therefore, deny his motion for a new trial based on ineffective assistance of counsel.

CONCLUSION

The State respectfully requests that this court, for the foregoing reasons, affirm the circuit court's judgment of conviction and order denying Mr. Dixon's postconviction motion.

Dated this _____ day of February, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 7,729.

_____ _____

Date John Flynn
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, 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.

_____ _____

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