STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIMBERLY C. THOMAS,

Defendant-Appellant.

Appeal No. 18AP000304CR

Brown County Case
No. 16CM395

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH II, THE HONORABLE THOMAS J. WALSH PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

PETIT & DOMMERSHAUSEN, S.C.
By: Brittany R. Running
State Bar No. 1105870
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

Attorneys for the
Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 18AP000304CR

v.

KIMBERLY C. THOMAS,

Brown County Case No. 16 CM 395

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH II, THE HONORABLE THOMAS J. WALSH PRESIDING

DEFENDANT-APPELLANT'S BRIEF

ISSUES PRESENTED

I. WAS THE DEFENDANT-APPELLANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER SIXTH AMENDMENT RIGHT TO COUNSEL WHERE TRIAL COUNSEL FAILED TO WITHDRAW AS COUNSEL EVEN THOUGH HE WAS A MATERIAL WITNESS.

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-appellant (hereinafter "Thomas") anticipates that the

briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE CASE

The instant case commenced on March 25, 2016, with a probable cause determination and the filing of a criminal complaint, in which Thomas was charged with one count of Misdemeanor Bail Jumping contrary to Wis. Stat. §§ 946.49(1)(a). (R1:1-2).

According to the criminal complaint, on March 7, 2016, a status conference was held for case number 15 CM 946. (R1:1-2). Attorney Ryan Reid ("hereinafter Attorney Reid") was present and Thomas was not. The following exchange took place between the Court, the State and Attorney Reid:

The Court: Mr. Reid, your client?

Attorney Reid: Yes, Your Honor. I did take this case over from Attorney Manthe, who left the office. I have had some contact with Ms. Thomas. She did call the office this morning stating that she had a job

opportunity, and it started today and that she couldn't miss that job. I did inform her that she needs to be in court today. So I guess I would request another court date.

The Court: Mr. Enli?

Mr. Enli on behalf of the State: Your Honor, I guess I would ask for a bench warrant, but I guess I would ask that perhaps we just hold it open for some days that the Court's comfortable with to have her get in here. I'm always especially concerned when there is a change in counsel as well that the person understands that the case is still proceeding.

(R32:8, App. 101-105).

Thomas ultimately received a Misdemeanor Bail Jumping charge for missing this court date on March 7, 2016. The case was eventually scheduled for trial on June 5, 2017. Attorney Reid represented Thomas in both 15 CM 946 and 16 CM 395 trials.

A Notice of Intent to Pursue Post-Conviction Relief was timely filed on June 7, 2017 (R23:1). A motion hearing was then held on August 3, 2017, and it was ordered that Thomas could stay her sentence pending

appeal. (R27:1). The Post-Conviction Motion was filed on November 29, 2017. (R29:1-3).

Thomas's Post-Conviction Motion requested that the Judgment of Conviction be vacated and a new trial granted. (R29:1-3). This request was based on the main foundation of ineffective assistance by her trial attorney. Thomas contended that her trial attorney had provided ineffective assistance of counsel by failing to withdraw when he realized this case, 16 CM 395, and 15 CM 946 were both going to trial. Thomas also premised this request on trial counsel being a material witness to 16 CM 395.

An evidentiary hearing was held on January 4, 2018(R30:1-7). After evidence was presented, the parties were given the opportunity to provide a supplemental brief to the court due January 25, 2018. (R32:1-5). In an oral ruling, the circuit court denied Thomas's motion. (R33:1). An Order Denying Post-Conviction Relief was filed January 31, 2018 (R34:1-2). A Notice of Appeal was filed on February 6, 2018 (R35:1).

STANDARD OF REVIEW

Whether the assistance rendered to a defendant by trial counsel was ineffective presents a mixed question of law and fact. State v. Sanchez, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The court will uphold findings of historical fact unless clearly erroneous, while the court will determine whether counsel's performance was deficient or prejudicial *de novo*. Id., at 236-7.

Whether a trial court erred in refusing to hold an evidentiary hearing on a Post-Conviction Motion is evaluated under a mixed standard of appellate review. State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (2004). First, the court determines if the motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." Ibid. This is a question of law, which is determined *de novo*. Ibid. If the motion does not meet that standard, the trial court's decision not to hold an evidentiary hearing is evaluated for en erroneous exercise of discretion. Ibid.

ARGUMENT

I. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER SIXTH AMENDMENT RIGHT TO COUNSEL WHEN TRIAL COUNSEL FAILED TO WITHDRAW DESPITE BEING A MATERIAL WITNESS TO THE CHARGE.

The Sixth Amendment right to counsel does more than merely guarantee that an attorney be present with the defendant; it mandates that the defendant receive counsel's effective assistance. Strickland v. Washington, 466 U.S. 668, 685 (1984). When a defendant claims that trial counsel's assistance was ineffective, the benchmark of the inquiry is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., at 686. Analysis of this issue proceeds via the application of a two-prong test. Id., at 687. First, the defendant must demonstrate that trial counsel's performance was deficient. Id. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. Id. The court may consider the two prongs in any particular order, as failure to meet one prong is fatal to the claim. Id., at 697.

To demonstrate that trial counsel's performance was deficient, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." Id., at 688. The court measures counsel's performance against prevailing professional norms, though no set list of standards exists. Id., at 688-9. Judicial scrutiny is to be deferential and must include a strong presumption, which the defendant must overcome, that counsel's actions fall within the realm of sound trial strategy. Id., at 689.

On the day of the missed hearing, March 7, 2016, Thomas tried calling the State Public Defendender's Office to obtain the number of her newly appointed counsel. (R.32:2-3). She left messages and even called into the court and indicated that she had a new job and couldn't get ahold of her new attorney and was not going to be at the hearing. (R.32:2-3). Trial counsel, inexplicably, made an error with respect to the representation of Thomas. Attorney Reid failed to withdraw as counsel from a case where he, himself, was a fact witness to the crime.

Supreme Court Rule 20:3.7, Lawyer as witness, provides guidance here. SCR R 20:3.7. Lawyer as witness:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Under Wisconsin rule, when a lawyer is necessary as a witness at trial, he should disqualify himself as an advocate. *See* Wisc. Sup.Ct. R. 20:3.7; *see also* *State v. Foy*, 206 Wis. 2d 629, 646 (Ct. App. 1996); *In re Elvers' Estate*, 48 Wis. 2d 17, 23 (1970). This is because the roles of lawyer and witness are incompatible. "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others." Wis. Sup.Ct. R. 20:3.7, cmt. [2].

Combining the role of advocate and witness may cause a conflict of interest between the lawyer and client. When determining if it is possible to play both roles, the lawyer should ask himself if there is likely to be substantial conflict between the testimony of the client and that of the lawyer. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. SCR 20:3.7.

Shortly before the March 7, 2016 hearing, Thomas had a change in counsel which resulted in her inability to contact the new attorney on the day of the status conference as she would normally do when a situation arose. Instead of speaking to her new attorney, the only thing Thomas knew to do was call the State Public Defender's office and inform them that she was unable to make it to the hearing. This recollection of events differs from Attorney Reid's reiteration on March 7, 2016 and differs again from his reiteration on January 4, 2018. (R32:3-4).

The following discussion took place between the Court, trial counsel, and appellate counsel:

Attorney Running, Appellate Counsel: And had you contacted Miss Thomas prior to that March 7th hearing?

Attorney Reid: I had not. I believe my -- I recall that I did review the CCAP record, I saw that the court hearing was, I believe, March 7th, and I believe that -- I was told that Miss Thomas was aware of the court hearing, and I showed up for said hearing.

Appellate Counsel: Do you recall receiving messages from the secretary of the State Public Defender's Office that Miss Thomas was trying to get in contact with her attorney?

Attorney Reid: Do I recall that? I believe that Miss Thomas has previously contacted our office saying she could or could not appear at a certain hearing. I believe at the hearing in question, the March 7th hearing, I believe she did contact the office. I believe -- I can't remember the exact reason why she gave that she was unavailable, I think I learned that after the hearing, but I think that is correct.

Appellate Counsel: Okay. So just to clarify, you recall Miss Thomas contacting the State Public Defender's office regarding the March 7th hearing date?

Attorney Reid: I recall that I learned of that situation after the hearing in question, so I don't believe, going into the hearing, that I was aware of that. I believe after the hearing, I believe, I had a conversation with Miss Thomas regarding the hearing, but that happened post or after the hearing. Now, I can say if she left a voicemail or if she talked to someone else in my office, I believe February and March of this time period was pretty busy for me so I may not have actually received those messages, but that's what I recall.

Appellate Counsel: Do you recall that?

Attorney Reid: As I testify, I don't recall that by my own recollection, but if that's what I said March 7th, then that's what I said.

Appellate Counsel: When did you realize that both files, 15 CM 946 and 16 CM 395, were both moving forward with separate trials?

Attorney Reid: At what point did I realize this?

Appellate Counsel: Yes.

Attorney Reid: I guess I always knew they would proceed as separate trials.

Appellate Counsel: Did you ever think about recusing yourself from one of the files?

Attorney Reid: I did not.
(R. 30:6-10).

With these factually important inconsistences, it should have been explored what actually happened between Thomas and Attorney Reid not only on March 7, 2016 but leading up to that day. Attorney Reid would be a necessary witness to provide further information regarding the March 7, 2016, status conference. If Thomas had different counsel, this communication, or lack thereof, would have been investigated during trial.

Attorney Reid was a necessary witness to the bail jumping. "When an attorney is *likely* to be a *necessary* witness on a contested issue not related to legal services, the attorney should disqualify himself or herself as an advocate." State v. Foy, 206 Wis. 2d 629, 646 (Ct. App. 1996). His testimony would have

differed from Thomas' and was inconsistent from March 7, 2016, to January 4, 2018. If Attorney Reid's testimony had been adverse to that of Thomas's, then he had a conflict of interest under SCR 20:3.7. Even if Attorney Reid still did not see a conflict and had elected to testify at the court trial, "there is a long-standing ethical prohibition against an attorney testifying for his or her client in most cases." Foy, 206 Wis. 2d 628.

A reasonable attorney, acting under prevailing professional norms and recognizing the inherently problematic fact that he was a witness to the charge and thus could not effectively represent his client, would have withdrawn as counsel.

Based on the record and trial counsel's inaccurate recollection from the day of the hearing and at the Post Conviction hearing, it is clear the trial counsel performed deficiently. By failing to withdraw and give Thomas a fair court trial, this inaction by Attorney Reid was prejudicial. Attorney Reid failed to withdraw as counsel from a case where he was a fact witness. He should have withdrawn as soon as he realized both cases, 15 CM 946 and 16 CM 395, were going forward with trial.

According to Attorney Reid's own testimony, when asked when he realized both cases were moving forward with trial, his response was, "I guess I always knew they would proceed as separate trials" (R30: 9). With Thomas being represented by another attorney, Attorney Reid likely would have been called as a witness creating a much different outcome at trial. Accordingly, factual and legal grounds were stated with particularity that could reasonably be deemed sufficient to entitle Thomas to relief based on a good faith argument.

CONCLUSION

Thomas's trial counsel was ineffective for failing to withdraw when he realized both cases that he represented her on were moving forward with trial and he was a material witness in one of them. Accordingly, a new trial should be ordered.

Dated this _____ day of April, 2018.

PETIT & DOMMERSHAUSEN, S.C.
By: Brittany R. Running
Attorneys for the Defendant-Appellant
State Bar No. 1105870
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

CERTIFICATION

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve

confidentiality and with appropriate references to the record.

Dated this _____ day of April, 2018.

_____
Brittany R. Running

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has sixteen (16) pages.

Dated this _____ day of April, 2018.

_____
Brittany R. Running

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 _____ day of April, 2018.

Brittany R. Running