STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2018AP000304-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

KIMBERLY C. THOMAS,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from Brown County Circuit Court,
the Honorable Thomas J. Walsh, presiding
Trial Court Case No. 16CM395

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ISSUE FOR REVIEW

Was Ms. Thomas denied effective assistance of counsel where her trial counsel failed to withdraw as counsel where he might have been a material witness to a bail jumping charge.

The Trial Court Answered: No. The trial court properly held that the performance of Thomas' trial counsel was neither deficient nor prejudicial, and therefore denied her claim of ineffective assistance of counsel.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of rather clear case law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

This case commenced with a criminal complaint filed on March 25, 2016, Brown County case number 16 CM 395, wherein Kimberly Thomas was charged with one count of Misdemeanor Bail Jumping in violation of Wis. Stat. § 946.49(1)(a). (R1).

The probable cause for that complaint was based on Thomas' failure to appear at a final pretrial conference in Branch II, before the Honorable Thomas J. Walsh, on March 7, 2016. (R1:2). Thomas had previously appeared before a court commission for her initial appearance in Brown County case number 15 CM 946, and a $1,000 signature bond was ordered, which included the condition that Thomas "make all future court appearances…." (R1:1-2). Thomas then violated that condition by failing to appear at a scheduled hearing on March 7, 2016, and the circuit court issued a bench warrant for her. (R1: 1-2).

The State agrees that Attorney Ryan Reid represented Thomas for both 15 CM 946 and 16 CM 395, including the respective trials in each of these cases. A bench trial was conducted on June 5, 2017, and

a Judgement of Conviction for one count of misdemeanor bail jumping in 16 CM 395 was entered on June 6, 2017. (R20; R22: 1).

A Notice of Intent to Pursue Post-Conviction Relief was timely filed on June 6, 2017 (R23), and it was determined during a motion hearing that Thomas could stay her sentence pending appeal. (R27:1). An Amended Judgement of Conviction was entered on August 3, 2017. (R28).

A post-conviction motion was filed on November 29, 2017, seeking to vacate Thomas' original sentence and seeking a new trial based on an alleged ineffective assistance of counsel during the final pre-trial status conference on March 7, 2016. (R29: 2-3). Thomas alleged that she was unable to contact Attorney Reid before or during her missed status conference because Attorney Reid had been newly assigned to her case. (R29: 2). Thomas claims she called the State Public Defender's office and informed them that she could not make the hearing because she had a job (R29: 2-3). Seemingly apprised of this fact, Attorney Reid stated at the March 7, 2016 pretrial conference:

> Attorney Reid: 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.
> (Exhibit 1: 2).

(R32:8).

Thomas' November 29th motion alleged that a "reasonable attorney . . . would have bolstered his client's situation to the Court and took some blame for the lack of communication," and that Attorney Reid's alleged failure to do so amounted to deficient performance which prejudiced her, thus warranting a finding of ineffective assistance of counsel. (R29: 2-3).

An evidentiary hearing was held on January 4, 2018. (R30: 1-7). During that hearing Attorney Reid testified that he had not directly contacted Thomas prior to the March 7th hearing, but that he believed that Thomas had contacted the State Public Defender's Office and gave a reason for not being at the March 7th hearing which he could not remember. (R46: 6). Attorney Reid also testified that he did not

believe that he was aware of reason Thomas was not at the March 7th hearing. (R46: 7). When Attorney Reid was advised at the evidentiary hearing that he had told the court, "I have had some contact with Miss Thomas. She did call the office this morning, stating that she had a job opportunity . . . ," he corrected himself saying "if that's what I said March 7th, then that's what I said." (R46: 8).

Attorney Reid was also asked at the evidentiary hearing if he ever thought to recuse himself from 16 CM 395. (R30:10). Attorney Reid answered that he had not because he did not think he had necessarily made himself a witness to the fact Thomas had a job opportunity after he correctly informed the court of that fact at the March 7th hearing. (R46: 10).

After the evidentiary hearing, the parties were given an opportunity to provide a supplemental brief to the court. (R46:19-20). Thomas filed a supplemental Brief in Support of Post-Conviction Motion on January 25, 2018. (R32). In that brief, Thomas argued that Attorney Reid was a necessary witness for exploring "what

actually happened between Thomas and Attorney Reid" on March 7th and the days leading up to the hearing that day. (R32: 3). Thomas further argued that if Attorney Reid were in fact a necessary witness that he should have recused himself under SCR R 20:3.7(a) as "a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." (R32: 2). Thomas' conclusion was that if indeed Attorney Reid had violated SCR R 20:3.7(a) then his professional performance was deficient and prejudicial to Thomas, thus entitling her to a new trial. (R32: 4-5).

The circuit court denied Thomas' motion in an oral ruling dated January 29, 2018, and an Order Denying Post-Conviction Relief was filed January 31, 2018. (R33; R34). A Notice of Appeal was filed on February 6, 2018. (R35:1).

STANDARD OF REVIEW

"Whether trial counsel's actions constitute ineffective assistance of counsel presents a mixed question of fact and law." *State v. Floyd*, 2017 WI 78, ¶ 13, 377 Wis.2d 394, 406, 898 N.W.2d 560, 566. An

appellate court "will not reverse a circuit court's findings of fact unless they are clearly erroneous." *Id*. However, an appellate court "will independently review, as a matter of law," whether a court's factual findings demonstrate ineffective assistance of counsel. *Id*.

ARGUMENT

I. THOMAS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE IT WAS NOT LIKELY THAT HER TRIAL COUNSEL WAS A NECESSARY MATERIAL WITNESS TO THOMAS' BAIL JUMPING CHARGE.

The Sixth Amendment right to counsel includes the right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "The benchmark for judging any claim of ineffectiveness must be 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. The Sixth Amendment does not guarantee the right to perfect counsel. *Burt v. Titlow*, 571 U.S. 12, 24 (2013). Indeed, perfect counsel is a far cry from the effective assistance that the Constitution requires. *Maryland*

v. Kulbicki, 136 S.Ct. 2, 5 (2015). Not even a violation of ethical norms constitutes *per se* ineffectiveness. *Titlow*, at 24.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that "counsel made errors so serious" that counsel was deficient, and (2) that the deficient performance prejudiced her defense. *Strickland*, 466 U.S. at 688. A court need not consider both prongs of an ineffective assistance claim if a defendant makes an insufficient showing on one. *Id.* at 697.

A. The performance of Thomas' counsel was not deficient because it he was a necessary witness at Thomas' trial.

"Trial strategy is afforded the presumption of constitutional adequacy" and "[r]eviewing courts should be 'highly deferential' to counsel's strategic decisions." *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis.2d 431, 466-467, 904 N.W.2d 93, 110 (quoting *State v. Domke*, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 289, 805 N.W.2d 364, 374). In determining whether counsel performed deficiently a court must judge counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct with a mind toward his

or her perspective at the time and not in hindsight. *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993). Reviewing courts will not second-guess a trial strategy unless it was based on an irrational trial tactic or based upon caprice rather than judgement. *Breitzman* at 467.

Thomas alleges that Attorney Reid's conduct was deficient when he failed to withdraw as Thomas' counsel after the bail jumping charge. App. Brief at 7-8. That contention rests on a theory that being a witness to a client's bail jumping makes an attorney a "likely" and "necessary" witness and therefore imposes a legal duty to withdraw as counsel. Thomas contends that this is true because SCR R 20:3.7(a) mandates in part that a "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."

If this Court were to accept Thomas' argument, nearly every defense attorney in the State of Wisconsin would have to withdraw as counsel whenever his or her client fails to show up to court and the State issues a new charge of bail jumping. At the very least, that would be the practical effect of such a ruling. That simply cannot be the case, and defense attorneys never have nor should they ever have

to anticipate being a necessary witness to their client's defense of a bail jumping charge.

Attorney Reid did not think to recuse himself after Thomas proceeded to trial because he believed during the time leading up to trial that Thomas had knowledge of the hearing on March 7, 2016. (R46: 10). Attorney Reid stated during the post-conviction motion hearing on January 4, 2018, "If I told the Court that I had information that day that she had a job opportunity, I don't necessarily think I made myself a fact witness." (R.46:10). Indeed, at all times leading up to and during trial, Attorney Reid had no reason to think that anything he said was contradicted by the record, by anyone else's testimony or by discussions with his own client.

Thomas seems to suggest that Attorney Reid's conduct was deficient at all times prior to the Bench Trial on June 5, 2017, but if the Court were to look at what Attorney Reid knew about Thomas' missed status conference and the subsequent bail jumping charge at all times prior to that trial, no one would think that he was "likely to be a necessary witness." SCR R 20:3.7. Certainly Attorney Reid never

thought he was likely to be a necessary witness, and reasonably so. (R46: 10). He correctly relayed to the Court during the March 7, 2016 status hearing that Thomas missed her appearance because she had a job and "it started today and . . . couldn't miss that job." (R32: 8). Everything that Thomas told the State Public Defender's office was relayed to Attorney Reid and adequately conveyed to the circuit court on March 7th. Nobody disputed this fact until the Thomas' post-conviction motion on November 29, 2017, and it certainly was not disputed at the bench trial held on June 5, 2017. (*See,* R45).

What Attorney Reid recalled conveying to the circuit court nearly two years after the fact is irrelevant to determining whether his performance was deficient. This Court is supposed to give deference to Attorney Reid's trial strategy and is to be highly deferential to his trial strategies with a mind toward what he knew *at the time* of his alleged deficient performance. *Breitzman*, 2017 WI 100, ¶ 65. Accordingly, whatever Attorney Reid said during the January 4, 2018 motion hearing hardly creates a "factually important inconsistency"

that would make him a "likely . . . necessary witness," nor would it make sense to relate back that inconsistency nearly two years.[1]

Further, Attorney Reid was never factually inconsistent. He recalled that Thomas had previously contact the State Public Defender's office saying that she could not appear at a certain hearing. (R30: 6). He *thought* that he learned that after the March 7, 2016 hearing, but when he was shown the transcript of the March 7th hearing, he said he did not recall saying what he said during the March 7th hearing, but he ultimately stood by what was contained in the transcript. (R30: 7-8). If Attorney Reid had adamantly stood by what he said during the post-conviction motion hearing, then there would have been a factual inconsistency. But Attorney Reid indicated that he was not sure what happened during the March 7th hearing, and his spotty memory close to two years after a pretrial conference hearing certainly does not contradict what is clearly on record on March 7, 2016.

[1] Giving the benefit of doubt to Thomas, it similarly would not make sense to relate back what Attorney Reid thought he knew to the Bench Trial on June 5, 2017, nearly seven months prior to the evidentiary hearing.

In summary, Attorney Reid's conduct leading up to the bench trial on June 5, 2017, did not amount to deficient performance. He never made any inconsistent statements. The statements Attorney Reid made during the hearing on March 7, 2016 would not have alerted any reasonable attorney to the likelihood of being a necessary witness. Accordingly, Attorney Reid never needed to withdraw under SCR R 20:3.7. Therefore, his conduct was not deficient.

B. The absence of her counsel's testimony at Thomas' trial was not prejudicial because it would not have altered the outcome of her case.

Attorney Reid's performance certainly was not prejudicial to the point where it would undermine a court's confidence in the outcome. To show prejudice, a defendant needs to not only overcome a strong presumption of adequate performance but also needs to show that, but for those errors, the result of the proceedings would have been different. *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 17, 369

Wis.2d 75, 87, 879 N.W.2d 772, 778. Mere speculation will not suffice. *Id*.

Quite simply, Attorney Reid was not a material witness to this bail jumping charge and the State's case for bail jumping in no way part relied on any statement by Attorney Reid. Nor would Attorney Reid's testimony have been exculpatory or a valid defense for Thomas. Thomas was accused of intentionally failing to comply with the terms of her bond having been charged with a misdemeanor in violation of Wis. Stat. § 946.49(1)(a)—to wit, failing to attend all future court appearances--when she failed to appear in court at the March 7, 2016 final pre-trial conference in 15 CM 946. (R1). As the trial court noted in its oral ruling on January 29, 2018, the evidence showed that Thomas was out on bond and had violated the terms of her bond, with or without Attorney Reid's testimony. (R54:5-6).

Attorney Reid's testimony certainly would not have been relevant to the element of Wis. Stat. § 946.49(1)(a) that the defendant was charged with a misdemeanor. Nor would his testimony have been relevant to whether she was out on bond. The only remaining element

was whether she did missed court intentionally, and the issue would be whether Attorney Reid's testimony was necessarily decisive on this element. It was not.

At the March 7, 2016 final pretrial conference, Attorney Reid stated advised the court that Thomas had contacted him or his office, and that she started a new job and couldn't miss it. None of this would be a defense to Thomas' intention not to attend to court appearance that day. And as the trial court noted, "No one in this case, not Ms. Thomas nor Mr. Reid nor the court record suggests that Mr. Reid came into court and said, Judge, I told her not to come." (R54: 5). The trial court went on to note that therefore the *best* case scenario for Thomas would have been that she *never* got through to Attorney Reid or the Public Defender's office—either she got through to Attorney Reid and he told her to show up, or she never got through to him, and she still failed to appear knowing that she had a court hearing and needed to be there. (R54: 5-6).

At the bench trial the court denied a motion to dismiss and found Thomas' intent to not comply with the terms of her bond when it stated:

> We've heard testimony about these exhibits, or this one exhibit, particularly the reference that's made on the March 10 – March 7, rather, 2016 minute sheet, and the minute sheet indicates "Defendant started new job today." I don't have the transcript in front of me, I have the minute sheets in front of me, but what I glean from that is someone was offering information, probably her attorney, maybe Mr. Reid at the time, someone was offering information the defendant started a new job that day. And again, I'm not sure if that was being offered to suggest that that may be where she is, that that is where she is, that they knew that's where she was. It doesn't say. But what it does is suggest that the defendant decided that her new job was where she needed to be that day instead of in court, and I think that goes to intent. This doesn't indicate here that when it says the defendant intentionally failed to comply with the terms of bond there's an exception if the reason he didn't comply is because he had to go to work, it doesn't say that at all, *so what goes to intent here is that the defendant was (intentionally) somewhere else instead of here.*

(R45: 17-18) (emphasis added). In light of that statement by the trial court, it is doubtful that Thomas could make out exactly how Attorney Reid's testimony would have helped her case—which is perhaps why she has not done so. The court found intent because people who miss

court generally do so as a conscious decision, illuminated by the fact that they are somewhere other than court.

Further, in its oral decision rendered January 29, 2016, the circuit court could not see how Attorney Reid's testimony would have helped Thomas' case. The Court stated, "If his statements to the court from . . . March 7 are that he had a conversation with her and told her to come to court, if those are indeed completely accurate, then . . . she knew she needed to be in court" and therefore found that Mr. Reid's decision to withdraw "had no impact on this case." (R54: 5, 6).

Since she has not shown how Attorney Reid's testimony would have altered the outcome of her trial, Thomas has not overcome the high bar of showing that the result of her trial would have been different. And Mr. Reid's decision not to withdraw was therefore not prejudicial.

CONCLUSION

Because Attorney Reid's performance was not deficient and because the lack of his testimony was not prejudicial to Thomas, the

State respectfully requests that this Court uphold her conviction so that the stay on her sentence be lifted.

Respectfully submitted this 26th day of June, 2018.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3240 words, including footnotes.

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 copes of this brief filed with the court and served on all opposing parties.

Dated this _____ day of June, 2018.

Signed:

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