

RECEIVED

STATE OF WISCONSIN **07-17-2018**

C O U R T O F A P P E A L S **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018AP000304 CR

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 2, THE
HONORABLE THOMAS J. WALSH PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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

	<u>Page</u>
INTRODUCTION.	1
ARGUMENT.	2
I. THE STATE IS INCORRECT THAT THE CIRCUIT COURT PROPERLY DENIED THOMAS' CLAIM THAT ATTORNEY REID PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO WITHDRAW AS COUNSEL WHEN HE WAS A MATERIAL FACT WITNESS.	2
CONCLUSION	5

CASES CITED

<u>Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.</u> , 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979).	2
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	5

STATUTES CITED

SCR 20:3.7(a)	3,5
-------------------------	-----

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. 2018AP000304 CR

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 REPLY BRIEF

INTRODUCTION

The defendant-appellant, Kimberly C. Thomas (hereinafter, "Thomas"), relies on all the authority and reasoning set forth in her original brief-in-chief and incorporates that submission into this reply brief. In addition, she submits the following responses to the arguments in the brief of the Plaintiff-Respondent.

ARGUMENT

- A. THE STATE IS INCORRECT THAT THE CIRCUIT COURT PROPERLY DENIED THOMAS' CLAIM THAT ATTORNEY REID PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO WITHDRAW AS COUNSEL WHEN HE WAS A MATERIAL FACT WITNESS.

In its brief-in-chief, the plaintiff-respondent (hereinafter, "the State") failed to recognize that the deficient performance by trial counsel, Attorney Ryan Reid (hereinafter, "Reid"), was made because of him not withdrawing as counsel. Not necessarily what led up to the bench trial. The State contends Reid's strategy should be given deference to what he knew at the time of the deficient performance (State's Br. 11). At the time of the deficient performance, Reid did in fact know he was the only one to witness the charge and played a role in the act. Reid could have offered up some sort of reasoning for what happened or testified to what he knew or didn't know at the time of the missed court hearing. The State contends Thomas didn't address this at all (State's Br. 16-17). That argument should, therefore, be deemed conceded. See, Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493

(Ct. App. 1979) (arguments not refuted are deemed conceded).

As Thomas sets forth in her brief-in-chief, the notion of counsel being a necessary witness isn't some theory as the State contends it is (State's Br. 9). It is founded in Supreme Court Rule 20:3.7(a). Thomas makes her argument based on a set of unique circumstances and does not contend that every attorney would have to withdraw if their client was issued a new charge of bail jumping (State's Br. 9). Thomas wholly disagrees with the idea that defense attorneys should have to anticipate being a witness to their client's charge; however, under the facts laid out in Thomas' brief-in-chief, Reid should have withdrawn.

The State argues in its brief that Reid's recollection of what happened "nearly two years after the fact" is irrelevant to determining whether his performance was deficient (Resp. Brief at 11). This is exactly what Thomas is contending is the issue. If Reid had withdrawn, he could have and likely would have testified what had happened when it was fresh in his memory and we wouldn't be here in the appellate process.

Reid did know that Thomas wanted to fight the charge of bail jumping and in doing so, he was a witness to all the facts surrounding the missed court appearance. The outcome if Reid had withdrawn absolutely could have been different.

The State contends that 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" Reid (State's Br. 14). Thomas argues that what Reid told the court that day and thus told the State was inaccurate and did not paint the entire picture. Reid's remarks and lack of communication with Thomas made Thomas not intentionally miss court which is the element that is disputed here. Misunderstandings happen and if Reid had withdrawn and testified to what happened, the outcome absolutely could have been different.

When considering the benchmark inquiry for ineffective assistance of counsel, "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," the State is incorrect that the Circuit Court properly denied Thomas' post-

conviction motion. Strickland, at 686. Here, there was deficient performance on the part of Reid in failing to withdraw from a case that he himself was a witness to and proceeding with Thomas as her trial counsel. This failure was prejudicial as the outcome of trial was undermined by the effect that the Court did not hear from a main witness about what happened on the day of the missed court hearing. Effective counsel would have withdrawn and then been called as a witness to explain what exactly occurred. Further, effective counsel would have advised Thomas not to proceed to trial in lieu of SCR R. 20:3.7(a).

CONCLUSION

Thomas believes that any other arguments made in the State's brief were adequately refuted in Thomas's brief-in-chief, which is incorporated by reference into this brief.

For the reasons stated above and in Thomas's brief-in-chief, Thomas respectfully requests that her conviction be vacated and that she be granted a new trial.

Dated this _____ day of July, 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 July, 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 eight (8) pages.

Dated this _____ day of July, 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 July, 2018.

Brittany R. Running