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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP002016-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCUS DEMOND ANDERSON, SR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an
Order Denying a Postconviction Motion, Entered in
Milwaukee County Circuit Court, the Honorable
Timothy Witkowiak and the Honorable Janet
Protasiewicz, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

At the beginning of his sentencing hearing, Mr. Anderson complained that his lawyer failed to communicate with him and was “ineffective.” The court did not address Mr. Anderson’s complaints and, instead, moved forward with the sentencing hearing. In a postconviction motion, Mr. Anderson alleged that his substantial complaints about his lawyer were an implicit request for a new attorney and the court abused its discretion when it did not address them. He asked the court to hold a retrospective hearing at which he could explain the reasons he wanted a new lawyer and allow the court to exercise its discretion and decide if substitution of counsel was appropriate. The court denied Mr. Anderson a hearing.

Did the circuit court err in denying Mr. Anderson a retrospective hearing at which he could present the reasons he wanted a new attorney appointed to his case for his sentencing hearing?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Publication is not likely warranted because this case applies well-established law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Anderson with two counts of delivery of heroin, contrary to Wis. Stat. §961.41(1)(d)1. (1:2). As probable cause for the underlying offenses, the complaint alleged that on April 24, 2015 and April 30, 2015, Mr. Anderson sold heroin to an undercover police officer. (1:2-4).

On November 30, 2015, Mr. Anderson pleaded guilty to both counts. (11:1). As part of a plea agreement, the State agreed to make a global recommendation of 5 years initial confinement and 5 years extended supervision. (44:2).

At the outset of his sentencing hearing on February 6, 2016, Mr. Anderson complained about his lawyer's performance:

The State: ...The State's recommendation is five years initial confinement, five years extended supervision. Defense is free to argue. We'd still be asking for restitution.

The Court: Okay. Counsel, is that your understanding of the negotiations?

Defense Counsel: That's what – Mr. Sitzberger sent a text on the day of the sentencing, or the – I'm sorry – the day of the plea.

The Court: All right. Sir, is that your understanding of what the negotiations were in this case?

Mr. Anderson: No. Not on this matter. Man, I want to say my lawyer ain't come and see me, man, and I want – He ain't been coming to talk to me at all. I want to be honest. I pled out to something I really don't know anything about, man. I want to call it – I want to call it ineffective counsel, man.

The Court: All right. All right. The State's argument as to sentencing?

(45:4-5; App. 104-105).

Thereafter, the court heard statements from the State, defense counsel, and Mr. Anderson without further addressing Mr. Anderson's complaints about his attorney. (45:5-14; App. 105). The court, the Honorable Timothy Witkowiak presiding, sentenced Mr. Anderson to 3 years initial confinement and 3 years extended supervision on Count 1 and a concurrent 3.5 years initial confinement and 3.5 years extended supervision on Count 2. (11:1).

Mr. Anderson filed a postconviction motion in which he alleged that his substantial complaints about his lawyer at the beginning of his sentencing hearing were an implicit request for a new lawyer. (34:3-6; App. 108-111). He argued that the court failed to exercise its discretion and make a meaningful inquiry into Mr. Anderson's complaints about his attorney so that it could determine whether a new lawyer should be appointed to his case. (34:4-6; App. 109-111). Based on the court's failure to exercise its discretion, Mr. Anderson requested a hearing at

which he could explain the reasons he wanted a new lawyer for sentencing. (34:6; App. 111).

In a written decision, the court, the Honorable Janet Protasiewicz presiding, denied Mr. Anderson's request for a hearing. (35:1-4; App. 112-115). It determined that Mr. Anderson had not presented a substantial complaint about his lawyer at his sentencing hearing that could be interpreted as a request for a new lawyer. (35:3-4; App. 114-115). The court stated, "These complaints cannot reasonably be interpreted as an implicit request for another attorney; these are merely the complaints of a defendant who was only accusing his attorney of failing to communicate with him." (35:3; App. 114).

Mr. Anderson now appeals the court's denial of his postconviction motion.

ARGUMENT

I. The circuit court erred in denying Mr. Anderson's request for a hearing at which he could explain the reasons he wanted a new attorney appointed to his case for his sentencing hearing.

A. Legal principles.

Whether trial counsel should be relieved and a new attorney appointed in his place is a matter within the trial court's discretion. *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Id.* (internal quotes and citation omitted).

"In situations involving appointment of new counsel, a circuit court's exercise of discretion is triggered by a defendant's presentation of a substantial complaint that could be interpreted as a request for new counsel." *State v. McDowell*, 2004 WI 70, ¶66, 272 Wis. 2d 488, 681 N.W.2d 500. "When a substantial complaint is made, the trial judge should inquire whether there are proper reasons for substitution" of counsel. *Id.* "A defendant's right to representation must be protected and, even absent an explicit request for new counsel, courts should inquire into what they may reasonably infer is a

problem potentially undermining that right.” *Id.* at ¶71.

Accordingly, when a defendant has made substantial complaints about his lawyer that the court should reasonably interpret as a request for a new lawyer, the court “is required to inquire into the defendant’s complaints.” *See Lomax*, 146 Wis. 2d 356 at 361. A court should take the time to allow the defendant to explain all of his complaints about his lawyer so that it can properly exercise its discretion in deciding whether or not to grant the request for a new attorney. *Id.* at 362. When a defendant requests a new lawyer, the “trial court must...make sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible; mere conclusions unless adequately explained will not fly.” *State v. Jones*, 2007 WI App 248, ¶13, 306 Wis. 2d 340, 742 N.W.2d 341. If the court fails to make sufficient inquiry into a defendant’s request for a new lawyer before denying that request, it abuses its discretion. *See Lomax*, 146 Wis. 2d 356 at 361-362.

When a court fails to properly exercise its discretion in determining whether a new attorney should be appointed in a case, a defendant is entitled to a retrospective evidentiary hearing at which he can present to the court the reasons he wanted a new lawyer. *Id.* at 365; *Jones*, 306 Wis. 2d 340 at ¶19. At that hearing, the court is required to determine if new counsel should have been appointed in the defendant’s case. *Jones*, 306 Wis. 2d 340 at ¶19. If the

court determines that new counsel should have been appointed, the defendant's case is returned to the point in the case when the request for new counsel was made. *See id.*

B. The trial court abused its discretion when it failed to address Mr. Anderson's implicit request for a new lawyer.

Here, at the beginning of his sentencing hearing, Mr. Anderson complained about his attorney's performance:

Man, I want to say my lawyer ain't come and see me, man, and I want – He ain't been coming to talk to me at all. I want to be honest. I pled out to something I really don't know anything about, man. I want to call it – I want to call it ineffective counsel, man.

(45:4-5; App. 104-105).

In its denial of Mr. Anderson's postconviction motion, the circuit court found that Mr. Anderson had not made a substantial complaint that could be reasonably interpreted as a request for a new attorney. (35:3-4; App. 114-115). However, Mr. Anderson's complaint regarding the lack of communication with his attorney and that his attorney was "ineffective counsel" could only be interpreted as a request for new counsel.

Mr. Anderson stated that his lawyer had not come to speak with him. (45:4; App. 104). Communication is the essence of the attorney-client

relationship. And a defendant should not be cemented to a lawyer with whom full and fair communication is impossible. *Jones*, 306 Wis. 2d 340 at ¶13. If Mr. Anderson’s lawyer was not coming to speak with him, he would not have been able to communicate with his lawyer about his case. Prior to sentencing, Mr. Anderson and his lawyer would have potentially needed to meet and communicate about the defense’s sentencing recommendation, Mr. Anderson’s right to allocution, and important information Mr. Anderson wanted his lawyer to convey to the court. Thus, when Mr. Anderson told the court that his lawyer was not communicating with him, the court should have interpreted that as an implicit request for a new lawyer and inquired further into Mr. Anderson’s complaints about his lawyer.

Moreover, Mr. Anderson told the court that he thought his lawyer was “ineffective.” (45:5, App. 105). Certainly, it is reasonable to conclude that a defendant would not want to continue with his case with a lawyer he felt was ineffective. Again, the court should have interpreted this statement as a request for a new lawyer and questioned Mr. Anderson further about his complaints concerning his lawyer.

Instead of inquiring into Mr. Anderson’s complaints about his attorney, the court simply moved on with the sentencing hearing after Mr. Anderson made his substantial complaint about his lawyer and stated, “All right. All right. The State’s argument as to sentencing.” (45:105; App. 105). The

court did not actually address Mr. Anderson and ask him about his complaints regarding his lawyer or why he wanted a new lawyer. As part of its exercise of discretion, the court was required to make a meaningful inquiry into Mr. Anderson's complaints about his attorney so that it could determine whether new counsel should be appointed to the case. Additionally, as part of its exercise of discretion, the court was required to explain the reasons it was not appointing a new lawyer to Mr. Anderson's case, which it also failed to do here. *See Lomax*, 146 Wis. 2d 356 at 359-360, 362.

In *Lomax*, on the morning of trial, Mr. Lomax told the court that he felt like he was not being properly represented and he wanted a new lawyer. *Id.* at 358. The court summarily dismissed Mr. Lomax's request for a new lawyer because the request was made on the day of trial and the court believed his attorney was zealously representing him. *Id.* The Wisconsin Supreme Court determined that the court's inquiry into the defendant's reasons for requesting a new attorney was inadequate and, therefore, it could not determine if the trial court's decision to deny Mr. Lomax's request for a new attorney was a proper exercise of the court's discretion. *Id.* at 359-362.

Like the trial court in *Lomax*, the court in this case failed to exercise its discretion when it did not ask Mr. Anderson to explain the problems he was having with his attorney or why he wanted a new attorney. In fact, the court in this case did less than

the trial court in *Lomax*. Here, the court did not place any explanation on the record why it was denying Mr. Anderson's implicit request for a new lawyer and simply moved forward with the sentencing hearing.

Because the court did not properly exercise its discretion in determining whether a new attorney should be appointed to Mr. Anderson's case, he is entitled to a hearing at which he can present to the court the reasons he wanted a new lawyer. *Id.* at 365; *Jones*, 306 Wis. 2d 340 at ¶19. If, at that hearing, the trial court finds that Mr. Anderson was entitled to a new lawyer, the court should hold a new sentencing hearing. *See Jones*, 306 Wis. 2d 340 at ¶19.

CONCLUSION

For the reasons stated above, this Court should reverse the denial of Mr. Anderson's postconviction motion, and remand the case to the circuit court for an evidentiary hearing at which the court must exercise its discretion and determine whether Mr. Anderson was entitled to a new lawyer. If the circuit court determines he was entitled to a new lawyer for his sentencing hearing, the circuit court should hold a new sentencing hearing in this case with new counsel.

Dated this 7th day of January, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,931 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of January, 2019.

Signed:

CHRISTOPHER D. SOBIC
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of 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 7th day of January, 2019.

Signed:

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