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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

If at any time during a proceeding “a defendant makes a substantial complaint that could reasonably be interpreted as a request for new counsel, the trial judge should inquire whether there are proper reasons for substitution.” *State v. Kazee*, 146 Wis. 2d 366, 371, 432 N.W.2d 93 (1988). “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.” *State v. McDowell*, 2004 WI 70, ¶71, 272 Wis. 2d 488, 681 N.W.2d 500 (internal quotes and citation omitted) (emphasis added).

The State argues that Mr. Anderson failed to make a substantial complaint that could be interpreted as a request for new counsel at his sentencing hearing. (State's Br. at 5-7). Mr. Anderson disagrees.

In *Kazee*, the defendant interrupted his attorney at a hearing and stated, “I don't want him.” *Kazee*, 146 Wis. 2d 366 at 369. The Wisconsin Supreme Court found that the defendant's statement

could be interpreted as a request for a new attorney. *Id.* at 371. As the State conceded, the defendant in *Kazee* “did not make an explicit request for a new attorney but made a statement that indicated that was his desire.” (State’s Br. at 6).

Similar to the defendant in *Kazee*, Mr. Anderson made substantial complaints that indicated that he wanted a new attorney. Mr. Anderson complained to the the court that his attorney was not communicating with him at all and was “ineffective¹.” (45:4-5; Appellant’s Br. App. at 104-105). It is unreasonable to believe that a defendant in a criminal case would want to continue with an attorney who has failed to communicate with him and who he feels is ineffective. Therefore, the only reasonable inference from Mr. Anderson’s comments at sentencing was that he wanted a new lawyer.

The State faults Mr. Anderson for not further discussing his complaints about his lawyer during his allocution at sentencing. (State’s Br. at 5-6). This criticism is misguided. When Mr. Anderson complained about his lawyer to the court at the beginning of the sentencing hearing, the court said, “All right. All right. The State’s arguments as to

¹ The State argues that the word “ineffective” only implies a desire for postconviction relief. (State’s Br. at 7). However, the common meaning of the word “ineffective” is “not producing an intended effect” or “not capable of performing efficiently or as expected.” Available at <https://www.merriam-webster.com/dictionary/ineffective>.

sentencing.” (45:105; Appellant’s Br. App. 105). The court’s statement in response to Mr. Anderson’s complaints about his attorney was a clear indication that it was not interested in what Mr. Anderson had to say about his lawyer and the court was moving forward with sentencing. Accordingly, it is unreasonable to then expect Mr. Anderson to continue with his complaints later on in the hearing.

The State also faults Mr. Anderson for not originally complaining about his attorney at his plea hearing, which was held just under three months before the sentencing hearing. (State’s Br. at 5). 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, even though Mr. Anderson did not complain about his lawyer at his plea hearing, the court was still required to inquire into the reasons he was complaining about his attorney at his sentencing hearing.

Because Mr. Anderson made a substantial complaint about his lawyer that should have been interpreted as a request for new counsel, the court was obligated to inquire into whether there were proper reasons for substitution of counsel. *McDowell*, 272 Wis. 2d 488 at ¶66. And since the court in this case 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. *State v. Lomax*, 146 Wis. 2d 356, 365, 432 N.W.2d 89 (1988); *State v. Jones*, 2007 WI App 248, ¶19, 306 Wis. 2d 340, 742 N.W.2d 341. 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 and in Mr. Anderson's brief-in-chief, 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 23rd day of April, 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 847 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 23rd day of April, 2019.

Signed:

CHRISTOPHER D. SOBIC
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