STATE OF WISCONSIN

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

District I

Case No. 2019 AP 000090-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

GEORGE SAVAGE,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED ON MAY 24, 2017, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED ON JANUARY 3, 2019, THE HONORABLE MARK SANDERS PRESIDING ON BOTH MATTERS, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. CONTRARY TO THE RESPONDENT, TRIAL COUNSEL DICK WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO ADVISE THE DEFENDANT PRIOR TO HIS PLEA HEARING THAT GOOD FAITH EFFORTS WHILE BEING HOMELESS TO COMPLY WITH THE SEX OFFENDER SUPERVISION REQUIREMENTS WAS A DEFENSE TO THE CHARGE.

The Respondent has cited the case of State vs. Dinkins, 339 Wis.2d 78, 810 N.W.2d 787 (2012), to support its conclusion that trial counsel had not been prejudicially ineffective with respect to the matter of whether or not homelessness is a defense to sex offender registration. However, this well-settled case law does not assist the Respondent. Interestingly, as presented in Defendant's Appellant's Brief, this case is the same case cited, and relied upon, by the Defendant.

The Respondent is correct in indicating that Dinkins has stated that homelessness is not a defense for failing to comply with sex offender registration. However, the Supreme Court had also clearly stated, in that very same case, that a Defendant is not capable of complying with the statute by listing a park bench or other on-the-street location. State vs. Dinkins, 339 Wis.2d 78 at 82. The Supreme Court had clearly indicated that a Defendant who attempts to comply with the registration requirements, but cannot find housing, cannot be convicted of a felony for failing to notify the DoC of the "address at which" he would "be residing" upon his release from prison. Id. at 89-90.

In the present situation, as indicated in the Appellant's Brief and at the evidentiary hearing, trial counsel Therese Dick had informed the trial court at the plea/sentencing hearing that Defendant had no address. This information had been provided at the sentencing phase. She had also indicated that Defendant had been calling in to the agent, leaving messages with phone numbers and

addresses, emails which he could access at a library, and had been trying to do so. Counsel had noted that Defendant had an intent to be compliant. "He was doing the best that he could, whether it was empty buildings, back of a car, stairwells." Counsel had been referring to the agents notes and reports. (44:23-25). The notes had been introduced at the postconviction evidentiary hearing as Exhibit 1. (35;1-1).

True, the Respondent is correct in indicating that State vs. Dinkins has indicated that homelessness is not a defense to a failure to comply with sex offender supervision requirements. However, simple homelessness is not the issue here, and as indicated in Dinkins. Here, Defendant had been attempting to comply with the sex offender supervision requirements. However, he could not report an address when he did not have one. His homelessness had lead to this situation. Dinkins does clearly indicate that failure to comply with the providing an address, when the only address is an on-the-street location where an individual attempts to sleep, is not a failure to comply with the statutory reporting requirements. Id. at 95. The Supreme Court had further indicated that it is unreasonable to think that the legislature had intended a registrant to be prosecuted for a Class H felony for failing to provide information which the registrant was unable to provide. Id. at 96-97. The Court had concluded that a registrant cannot be convicted of violating the sex offender registration statutory requirements for failing to report the address at which he will be residing when he is unable to provide this information. Such

inability occurs when that information does not exist, despite the registrant's reasonable attempt to provide it. Id. at 97. As indicated in that case, and as cited in Defendant's Appellant's Brief, park benches, transient locations, or other on the street locations do not constitute an address for purposes of registration requirements. Id. at 96.

Here, the Respondent has indicated that Defendant had cut off his GPS monitor. However, the State has failed to indicate that the GPS monitor was discretionary. (20:Exh. 3) (35:1-1). It was not a requirement, either statutorily or as part of any other document. Furthermore, GPS monitoring does not provide an address. Such monitoring does not satisfy the requirement that a Defendant provide an address. Also, GPS monitoring, definitely does not address the relevant and applicable law that Defendant's good faith inability to provide an address constitutes a defense to failure to abide by sex offender supervision requirements.

True, the protocol attached at Respondent's Appendix 101 had occurred subsequent to Dinkins. However, this document had not been part of the record in this matter. Neither side had introduced it, at the evidentiary hearing. Hence, there had not been any evidence that the agent had informed the Defendant of this protocol, and the protocol's indicated steps, outside of the discretionary GPS monitor. True, trial counsel had testified at the hearing that she had informed the Defendant of the Department of Corrections homelessness protocol. (45:13; 23-24). Respondent has indicated such in its Brief. (Resp.Brf, page 15). However, this information

from trial counsel to the Defendant had clearly been "after the fact," and after the State had already charged the Defendant. Hence, this information, at that stage, is irrelevant to the facts relevant in this present appeal. The State, at the evidentiary hearing, could have called the supervising agent to testify concerning the protocol, and the protocol's relevance to this case. This, in relation to a Defendant's understanding of the protocol's requirements. However, the State did not choose to do so. Defendant should not be penalized for this failure by the State. The bottom line is that Defendant had been homeless during his period of supervision; trial counsel had indicated to the trial court at the sentencing hearing that the Defendant had intended to remain compliant during the period of supervision; and that counsel had made this indication based upon the notes from the supervising agent. As the supervising agent had indicated in the notes provided as part of the discovery, Defendant had intended to remain compliant on Sex Offender Registration Program (SORP). These notes do not indicate that the agent had advised the Defendant of the protocol and its requirements. (35:1-1).

Furthermore, the Respondent has indicated that Defendant had only called his agent twice over a two month period. However, Exhibit A 111 to Defendant's Appellant's Brief has indicated that he called his agent twice over an approximately one month period. (35:1-1). He had called his agent on May 16, 2016 and June 17, 2016. Furthermore, the June 17, 2016 entry indicates that he had attempted to call the appropriate number on May 24, 2016 with a new

address. Also, on May 16, 2016, he had provided an address to his agent. During his June 17, 2016 phone call, he had informed the agent of his new address. The May 19, 2016 entry has indicated that the fact that he had provided an address on May 16 indicates that he had apparently intended to remain compliant with the reporting requirements. Also, this entry has indicated that this situation has been occurring quite a bit, especially with the homeless. Furthermore, the fact that he had called on June 17, and had provided an address, clearly indicates that he had intended to remain compliant with the reporting requirements. As indicated, the supervising agent had concluded that the Defendant had intended to remain compliant. (35:1-1).

Here, trial counsel Therese Dick had the information indicated in evidentiary hearing Exhibit 1 at the time of the combined plea/sentencing hearing. She had this Exhibit at that combined plea/sentencing hearing. She had represented to the trial court at that hearing that she had possessed the notes from the agent. She was able to provide the court with the substance of those notes. Hence, she had clearly represented to the trial court at that plea/sentencing hearing that the Defendant had intended to comply with the registration requirement, and that his failure to provide an address was not his fault. This, due to his personal situation and his homelessness. These representations to the trial court had clearly acknowledged that the inability defense to sex offender registration requirements, as outlined in State vs. Dinkins, had applied to the Defendant. Based upon the relevant and applicable

law, her failure to advise the Defendant of this defense prior to the guilty plea had been prejudicially ineffective assistance of counsel. Both this present Brief, as well as Defendant's Appellant's Brief, have materially justified such a conclusion. Her testimony at the postconviction evidentiary hearing does not adequately rebut this conclusion.

The Respondent has also attempted to rebut the Defendant's argument that he had been prejudiced by trial counsel's ineffectiveness. This, by arguing that he did not, in the Respondent's opinion, have a strong trial case. (Resp.Brf, pges 10, 16-17). The Respondent has argued Lee vs. United States, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017) for this proposition. However, this reliance is materially erroneous. On the contrary, the United States Supreme Court had indicated in Lee that a Defendant can show prejudice by demonstrating a "reasonable probability" that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Lee vs. United States, 198 L.Ed.2d 476 at 484-485, citing Hill vs. Lockhart, 474 U.S. 52 at 59 (1985). When a Defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, a court does not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because the court cannot afford any such presumption of reliability to judicial proceedings that never took place. Lee vs. United States, 198 L.Ed.2d 476 at 484, citing Roe vs. Flores-Ortega, 528 U.S. 470 at 482-483 (2000). Hence, contrary to the

Respondent, prejudice does not lie in the relationship between the plea resolution as opposed to the trial consequences. Instead, prejudice lies in the deprivation of the Defendant of his right to proceed to trial. Respondent has materially erred in arguing otherwise.

Based upon the foregoing, and the arguments raised in Appellant's Brief, the Respondent has materially erred in arguing that Therese Dick had not been prejudicially ineffective. This, for failing to advise the Defendant that his homelessness, under his personal circumstances at the relevant time period, had been a defense to the charge of Failure to Register as a Sex Offender. The trial court's oral ruling is also materially erroneous. It must be reversed.

CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the trial court had erred in denying Defendant's Postconviction Motion. Therese Dick had been prejudicially ineffective. Defendant requests that this Court enter all appropriate decision consistent with the issue that Defendant had raised in these Briefs, to include a withdrawal of his guilty plea.

Dated this 13th day of May, 2019.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. George Savage, 2019 AP 000090 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is nine (9) pages.

Dated this 13th day of May, 2019, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. George Savage, Case No. 2019 AP 000090 CR is identical to the text of the paper brief in this same case.

Dated this 13th day of May, 2019, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant