STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2019AP548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

Trial Court Case
No. 16-CF-1401

KEITH C. HENYARD,

Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON THE 13TH DAY OF OCTOBER, 2017 IN THE CIRCUIT COURT OF KENOSHA COUNTY, WISCONSIN, JUDGE BRUCE E. SCHROEDER PRESIDING, AND DENYING MOTION FOR POST-CONVICTION RELIEF ENTERED ON THE 4TH DAY OF MARCH, 2019 IN THE CIRCUIT COURT OF KENOSHA COUNTY, WISCONSIN, THE HONORABLE BRUCE E. SCHROEDER PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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This constitutes a reply to the brief of the Plaintiff-Respondent, State of Wisconsin in the Keith C. Henyard matter. This brief only responds to those arguments in the brief-in-chief of the State of Wisconsin and nothing contained herein should operate as a waiver to any of those arguments previously made in Mr. Henyard's brief-in-chief.

The State claims that, as court commissioner, Commissioner Parise had not "pre-judged" Mr. Henyard's case. (State Brief at 14). Additionally, that Mr. Henyard points not to specific defect in Parise's strategy, tactics, or decision making that his role in acting as both attorney and ordering a "bind-over" adversely affected the later representation of Mr. Henyard. Additionally, the State quotes from the trial court's determination that Commissioner Parise heard no evidence and found no facts at the preliminary hearing, performing what was most likely understood by the parties and in fact amounted to little more than a "ministerial act". (54:3); (State Brief at 14-15). If this is the case, acting as court commissioner making a probable cause finding is in no way just a "ministerial act". The fact of the matter is Commissioner Parise made a probable cause finding and bound the matter over for trial. But/for the probable cause finding, the case would have been dismissed,

Attorney Parise never would have been hired as counsel, and the case would not have proceeded thereon. Thus, this is not just a mere "ministerial" act as the court and the State contend.

A ministerial act is one in which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise his own judgment upon the propriety to the act being done. (Black's Law Dictionary, 3d Ed., 1991). A ministerial act is not one which a government official exercises any type of discretion. Id. A court commissioner, when making a bind-over decision, must use an exercise of discretion, as he has to make a decision on probable cause. It is not a mere "ministerial" act therefore. The state thus is wrong in this regard.

"Probable cause" exists when there is any believable account of the defendant's commission of a felony. State v. Sorensen, 152 Wis. 2d 471 (1989). The judge need not weight the defendant's evidence against the State's evidence in this analysis. State v. Fry, 129 Wis. 2d 301, 305-306 (1985). A bind over is warranted where the judge finds any plausible account that the defendant committed a felony. Id. Probable cause findings may rest entirely upon circumstantial evidence

and the reasonable inferences drawn from that evidence. State v. Hoover, 101 Wis. 2d 517 (1981). The judge (commissioner) is guided by the practical and non-technical probabilities of everyday life in making this determination. This is but another way of saying that the judge is expected to exercise common sense (discretion) as well as learning in the law. State v. Dunn, 121 Wis. 2d 389 (1984). Finally, pursuant to W.S.A. 970.03(7), a judge (or court commissioner) must find that the defendant probably committed "a" felony in order to bind a defendant over for trial. State ex. rel. Hanna v. Blessinger, 52 Wis. 2d 448 (1971). A preliminary hearing court therefore is not restricted to the charges set forth in the complaint or argued by counsel during the preliminary hearing. Wittke v. State ex. rel. Smith, 80 Wis. 2d 332 (1977). A preliminary hearing thus is a discretionary act and not merely a ministerial duty as a court commissioner has to make a determination that a plausible account exists for the binding over of a defendant for trial. This is not simply a rubber stamp or a "ministerial" act where a commissioner exercises no discretion. He or she must make a probable cause finding, reviewing the criminal complaint to determine if probable case exists that a felony was committed. If no

probable cause finding is made, then the matter is dismissed at the preliminary hearing.

How can it seriously be argued that this did not adversely affect the representation of Mr. Henyard? Ordering a bind-over did adversely affect Mr. Henyard's representation. If there wasn't a bind-over, there wouldn't be a case. As Mr. Henyard argued in his brief-in-chief, when Attorney Parise advised Mr. Henyard that he should take a plea, this was after he made a probable cause finding as court commissioner. (Emphasis added). (69:20; 58:4-5). Commissioner Parise determined there was enough evidence for the case to proceed to trial and made a probable case finding. (58:4-5).

It is also clear that there is also an actual conflict of interest in this case. See S.C.R. 20:1.12(a). The only question in this case therefore is not whether there is an actual conflict of interest, but whether or not there was a *knowing waiver* of that conflict. Under Wisconsin law, this is not a waivable conflict. Wisconsin Committee Comment S.C.R. 20:1.12. In the case of In re Autumn H-R, 344 Wis. 2d 520 (2012), although it did not hold whether a violation of S.C.R. 20:1.12 constituted an actual conflict of interest, that causes counsel to automatically be deemed ineffective, it remained an open question given S.C.R. 20:1.12 provisions.

Further, this is a matter of first impression in the State of Wisconsin as the In re Autumn H-R case was decided well after the Mickens v. Taylor decision of 2002. *Compare* Mickens v. Taylor, 535 U.S. 162 (2002), 152 L. Ed. 2d 291, 122 S. Ct. 1237. Additionally, in Mickens v. Taylor, 535 U.S. 162, 173, the Supreme Court of the United States stated as follows:

> In those cases where the potential conflict is in fact an actual one, only inquiry will enable the judge to avoid all possibility of reversal by either seeking waiver or replacing a conflicted attorney. Id at 173.

The only question presented in the Mickens v. Taylor case was the effect of the trial court's failure to inquire into a potential conflict upon the Sullivan rule that deficient performance must be shown. Id at 174. Thus, the difference between the Mickens case and Mr. Henyard's case is that in Mr. Henyard's case, the potential conflict was ***in fact*** an ***actual one*** pursuant to S.C.R. 1.12. Actual conflict equates to an adverse effect in Wisconsin. (See committee comments S.C.R. 1.12., as it is not subject to waiver). Given that there was no inquiry into this matter, this was a situation where either there should have been a waiver of the conflict, or counsel should have been replaced, neither of which occurred. See Mickens v. Taylor, at 173.

Finally, even if Mr. Henyard's case is one in which an adverse effect has to be shown, it has been shown as argued above; namely, that there was an *actual conflict* of interest as Commissioner Parise made a probable cause finding binding Mr. Henyard's matter over for trial, and in the same case, represented Mr. Henyard and advised him to enter a plea, which could not have been entered but/for the probable cause finding, which was a discretionary act as court commissioner in Henyard's case. Thus, Mr. Henyard requests that his motion to withdraw his plea be reversed and remanded back to the trial court.

Additionally, the State argues that there wasn't a judicial bias in Henyard. Contrary to the State's conclusion, Mr. Henyard does present evidence of actual bias and the appearance of bias in his specific case. At a pre-trial hearing, Judge Schroeder explained clearly his position about drug dealing in general:

> I think breaking a couple of bones, and so I'm very uncomfortable with that, given the severity of the charges, and there *has been some recent publicity about my thoughts about dealing heroin*, too, so that-that would give the defendant an additional incentive to fail to appear so give them a new date for the pre-trial. (65:8).

As stated in Mr. Henyard's brief-in-chief, the court's recent thoughts on heroin have been publicized in the news, and as the Court noted at Mr. Henyard's hearing and in his specific case, the Court believes only long prison sentences can deter others from selling heroin. Thus, it was eminently clear in Mr. Henyard's the court's position on the delivery of drugs.

The Court's statements in Henyard's case, which specifically were made at the hearing held on August 7, 2017, indicated that given recent publicity about the Court's thoughts about heroin dealing, that it would give the defendant an additional incentive to fail to appear, gave the appearance of bias, in addition to actual bias as argued previously. See State v. Herrmann, 364 Wis. 2d 336, ¶46. Again, the publicity that the Court was talking about, which was noted earlier at the hearing, was that giving out stiff prison sentences to those who deal in heroin/drugs was what the court felt was appropriate to deter delivering. Thus, the Court was pre-judging Mr. Henyard's case which was noted at the August 7, 2017 hearing; namely, that a lengthy prison sentence is appropriate in Henyard's case, not unlike those that were publicized. Thus, Mr. Henyard has shown both the appearance of, and actual bias pursuant to the cases cited

herein and pursuant to the trial court's statements. See State v. Goodson, 320 Wis. 2d 166; Herrmann, 364 Wis. 2d 336.

CONCLUSION

For the reasons cited herein, and for the reasons cited in the Defendant-Appellant, Keith C. Henyard's brief-in-chief, requests the trial court's decision and order denying his motion for post-conviction relief be reversed and remanded, allowing Mr. Henyard: 1) Withdraw his plea due to an actual conflict of interest with his former trial attorney who acted as court commissioner in the same case; 2) in the alternative, a re-sentencing before a different trial court.

Respectfully submitted,

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CERTIFICATION

I certify that this brief of appellant meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

> Typewritten (pica, 10 spaces per inch, mono font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides).
>
> The length of the Brief is 9 pages.

Dated this 10th day of October, 2019.

Signed,

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS. §(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 Wis. States. §(RULE) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of this 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 10th day of October, 2019.

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