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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2019AP000567-W

STATE OF WISCONSIN, ex rel.
MILTON EUGENE WARREN,

Plaintiff-Petitioner-Petitioner,

Lower Case No. 14-CF-2123

v.

MICHAEL MEISNER,

Defendant-Respondent.

FIRST BRIEF TO THE SUPREME COURT

**APPEALS FROM THE DECISION OF THE
WISCONSIN COURT OF APPEALS DATED
APRIL 8, 2019 AND FROM THE DECISION OF THE
WISCONSIN COURT OF APPEALS ON THE MOTION
FOR RECONSIDERATION DATED MAY 10, 2019**

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ISSUES PRESENTED FOR REVIEW

1. Where the circuit court denied a motion for postconviction relief pursuant to Wis. Stat. § 974.06 because counsel, on direct appeal, filed no postconviction motions in the circuit court, but only filed a notice of appeal and a brief and appendix in the Court of Appeals, the circuit court, pursuant to *State v. Starks*, 213 WI 69, 349 Wis.2d 274, 833 N.W.2d 146, determined that the case should be filed in the Court of Appeals and not the circuit court. Further, when Warren then filed a petition for a writ of habeas corpus in the Court of Appeals, the Court of Appeals denied the petition for writ of habeas corpus because the Court of Appeals found that Warren's remedy for a denial in the circuit court was an appeal from the decision in the circuit court rather than a petition for a writ of habeas corpus. The issue is whether Warren's postconviction claims should be heard in the circuit court or the Court of Appeals and further, how is the decision in this matter to be explained under the ruling of *State v. Starks*.

The circuit court found that this case belonged in the Court of Appeals by means of a petition for writ of habeas corpus, pursuant to *State v. Starks*. The Court of Appeals found that the petition for writ of habeas corpus should be denied because the ruling of the circuit court should have been appealed.

STATEMENT OF THE CASE

On February 24, 2015, Warren was convicted of three offenses and sentenced on June 17, 2015. Warren then obtained counsel to conduct postconviction proceedings. Counsel filed no motions in the circuit court, but filed, in 2016, a direct appeal, appeal number 2016AP936-CR. On appeal, Warren argued that the evidence at trial was insufficient to support his convictions of possession of heroin with intent to deliver as party to a crime and contributing to the delinquency of a child. He further argued that he was entitled to a new trial because the circuit court erroneously denied his motion to admit evidence about the facts of an informant's conviction for robbery. On July 20, 2017, the Court of Appeals denied the appeal. Warren's petition for review by this court was denied on October 9, 2017.

On October 11, 2018, Warren filed a motion for postconviction relief pursuant to Wis. Stat. 974.06 in the circuit court of Rock County, alleging ineffectiveness of trial counsel. In its decision and order denying the motion for postconviction relief, the circuit court of Rock County acknowledged that in a subsequent brief, Warren's newly retained attorney argued that Warren's appellate counsel was ineffective for not raising a claim for the ineffective assistance of trial counsel (Pet.-App. 105). In its decision dated February 4, 2019, the circuit court of Rock County stated that pursuant to *Starks*, the proper forum for Warren's request

for relief was the Court of Appeals by means of a petition for a writ of habeas corpus. The Rock County Court explained that, on direct appeal, Warren's postconviction attorney brought no motions in the circuit court. The court further explained that this case was similar to *Starks* where the Supreme Court stated that the attorney for Starks handling the appeal was not a postconviction attorney but was an appellant attorney, and errors by the appellate attorney were to be submitted to the Court of Appeals and not the circuit court.

Warren then, through his attorney, submitted a petition for writ of habeas corpus to the Court of Appeals in March of 2019. In a decision dated April 8, 2019, the Court of Appeals denied the petition for writ of habeas corpus on the basis that relief from an adverse ruling in the circuit court should be handled by appeal rather than by a petition for writ of habeas corpus (Pet.-App. 102-103). Warren then made a motion for reconsideration dated April 23, 2019 in which Warren explained that the petition for writ of habeas corpus was being filed pursuant to a correct interpretation of *State v. Starks* by the circuit court of Rock County. Warren further explained in his motion for reconsideration that rather than appealing a correct interpretation of *State v. Starks*, Warren was submitting a petition for writ of habeas corpus to the Court of Appeals pursuant to *State v. Starks*. On May 10, 2019, the Court of Appeals denied the motion for reconsideration (Pet. App. 101).

FACTS OF THE CASE

In 2014, the state charged Warren with possession of heroin with intent to deliver (more than 50 grams) as a party to a crime (PTAC), contributing to the delinquency of a child by act or omission, and possession of THC (second and subsequent offense). The state later amended the second count to intentionally contributing to the delinquency of a child. According to the complaint, Warren was alleged to have provided 321 grams of heroin to a juvenile, L.J., who then attempted to transport the heroin on a bus from Chicago to Madison.

Prior to trial, Warren filed a motion in limine to admit evidence at trial about the facts of a robbery committed by one of the state's witnesses, Zachary Schmidlkofer, to challenge his credibility. The circuit court denied Warren's motion.

Warren had a jury trial in February of 2015. After the state rested, Warren moved for dismissal based on insufficiency of evidence. The circuit court denied his motion. The jury found Warren guilty of all three counts. Warren appealed his judgment of conviction.

On appeal, Warren argued that the evidence at trial was insufficient to support his convictions for possession of heroin with intent to deliver as PTAC and contributing to the delinquency of a child. He further argued that he was incorrectly denied his motion to admit evidence about the facts of the robbery committed by the

state's witness, Zachary Schmidlkofer. Neither issue on appeal required a postconviction motion to be filed in the circuit court and no such motion was filed. Warren's postconviction counsel simply filed a notice of appeal and went directly to the Court of Appeals.

On July 20, 2017, the Court of Appeals affirmed Warren's judgment of conviction and sentence. Warren sought review in the Wisconsin Supreme Court and this court denied review, without cost, on October 9, 2017. Warren had not sought any additional relief until he filed his 974.06 motion in the circuit court of Rock County on October 11, 2018.

ARGUMENT

- I. WARREN MUST HAVE A REMEDY EITHER IN THE CIRCUIT COURT OR IN THE COURT OF APPEALS. THE SUPREME COURT MUST DECIDE WHERE WARREN'S REMEDY LIES, PURSUANT TO *STATE V. STARKS*, 2013 WI 69, 349 Wis.2d 274, 833 N.W.2d 146, DECISION ON MOTIONS FOR RECONSIDERATION, 2014 WI 91, 357 Wis.2d 142, 849 N.W.2d 724. IT IS WARREN'S POSITION THAT HIS PROPER FORUM FOR FILING HIS MOTION FOR POST-CONVICTION RELIEF WAS THE CIRCUIT COURT OF ROCK COUNTY.

In *State v. Starks*, 2014 WI 91, 357 Wis.2d, 849 N.W.2d 724, both the state and the defendant filed motions for reconsideration on the issue of which forum was appropriate, on appeal, when no postconviction motions are filed in the circuit court.

The state first asked for clarification as to whether *State v. Starks*, 2013 WI 69 overruled *Rothering* and modified *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992). The state acknowledged that the two principle aspects of appellate counsel's performance are the brief and the oral argument. However, the state argued under *Rothering* that claims of ineffective assistance of postconviction counsel because of failure to file a postconviction motion in the circuit court alleging ineffective assistance of trial counsel is properly brought in the circuit court under 974.06.

When an allegation is made that postconviction counsel was ineffective for not alleging ineffectiveness of trial counsel, the defendant is not asking for a new appeal, but is asking for a new trial. Under *Rothering*, therefore, the appropriate forum for a claim that postconviction counsel failed to allege ineffectiveness of trial counsel was the circuit court. Keeping such a claim in the circuit court keeps the claim in the court best suited to hold the *Machner* hearing.

In his motion for reconsideration, Starks argued that the Supreme Court should clarify whether it was overruling *Rothering* which held that ineffectiveness claims challenging failure to file postconviction motions must be raised in the circuit court under Wis. Stats. § 974.06.

Starks further argued that the ruling that the failure to file a postconviction motion alleged an error of "appellate counsel" rather than "postconviction counsel"

directly conflicts with the holding and rationale of *Rothering* which guided litigants in courts for 17 years.

Starks alleges that confusion arises from this court's choice to denominate counsel's failure to file a postconviction motion in the circuit court as the error of "appellate counsel."

Starks points out that an error of either commission or omission is addressed by that court in which the error is made. The failure to file a petition for review must be addressed by the Supreme Court. An error for failure to file a no merit report or a motion to extend deadlines in the Court of Appeals must be addressed by the Court of Appeals. *Rothering* applied a similar common sense standard, holding that counsel's unreasonable failure to file a postconviction motion in the circuit court challenging the effectiveness of trial counsel is an error of "postconviction counsel" that must be raised under Wis. Stats. § 974.06 in the circuit court rather than in the Court of Appeals. If the claim of ineffective assistance of trial counsel is not raised by postconviction counsel, appellate counsel cannot be ineffective for failing to raise an unpreserved claim. Therefore, the error is on the part of postconviction counsel which must be heard in the circuit court.

This area of the law needs clarification. The confusion is heightened when there is no acknowledgment of the radical changes and no explanation as to why

change is necessary. Most of those impacted are pro se inmates with rudimentary understanding of the law and procedure, and the change is recipe for confusion. The case at bar illustrates the confusion as Warren filed a § 974.06 motion in the circuit court alleging the ineffectiveness of postconviction counsel for failure to bring certain postconviction motions in the circuit court. The circuit court dismissed the case pursuant to the 2013 *Starks* ruling stating that the motion should have been made in the Court of Appeals under a *Knight* petition. A *Knight* petition was brought in the Court of Appeals and that petition was denied, stating that the decision of the circuit court should have been appealed to the Court of Appeals rather than bringing a *Knight* petition in the Court of Appeals. Now Warren is left without a forum in either the circuit court or the Court of Appeals.

It is Warren's position that the proper forum for filing his motion alleging ineffective assistance of trial counsel was the circuit court of Rock County. In the concurring opinion of David T. Prosser, J. in *State v Starks*, 357 Wis.2d 142, 167-171, the interaction between *Knight*, *Rothering* and *Starks* is explained. In *Knight*, the Supreme Court ruled that an attack on the effectiveness of *appellate* counsel should be by petition to the appellate court for a writ of habeas corpus. In *Knight*, there was not claim that Knight's trial counsel had been ineffective.

In *Rothering*, the defendant petitioned the Court of Appeals for a writ of

habeas corpus claiming that his *appellate* counsel was constitutionally deficient in failing to seek withdrawal of his guilty plea. The Court of Appeals refused to grant the writ of habeas corpus on the grounds that the defendant was really challenging his postconviction counsel for failing to file postconviction motions in the circuit court alleging the ineffectiveness of trial counsel.

The concurring opinion (pp. 168-169) states that *Starks* does not dispute the correctness of either *Knight* or *Rothering*. The concurring opinion then cites *State v. Balliette*, 336 Wis.2d 358, ¶ 32 which states that the failure to highlight some deficiency of trial counsel is a failure by the postconviction attorney which requires a Wis. Stat. § 974.06 motion in the circuit court or a petition for habeas corpus.

The concurring opinion then acknowledges that the initial *Starks* opinion was misleading in stating that *Starks* should be decided as *Knight* was decided. The concurring opinion then points out that the difference is that *Starks*, unlike *Knight*, claimed in his § 974.06 motion that his postconviction counsel was ineffective because of the failure to accuse his trial counsel of ineffectiveness.

The concurring opinion concludes by saying that the holdings in both *Knight*, and most importantly, in *Rothering*, are correct. The concurring opinion concludes by saying that where postconviction counsel fails to allege the ineffectiveness of trial counsel in the circuit court, it is proper to bring a motion alleging ineffectiveness of

postconviction counsel in the circuit court under § 974.06.

CONCLUSION

The Wisconsin Supreme Court should either reverse its 2013 ruling in *Starks* and reinstate the *Warren* case in the circuit court, or, affirm its ruling in the 2013 *Starks* case and reinstate the *Warren* case in the Court of Appeals. In either event, Warren should be given a forum in which to argue the merits of his case. It is Warren's position that the proper forum for filing is the circuit court of Rock County.

Respectfully submitted this 10th day of December, 2019.

ROBERT N. MEYEROFF S.C.

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CERTIFICATION 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 as of this date.

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

Dated: December 10, 2019

s/Robert N. Meyeroff

ROBERT N. MEYEROFF

BRIEF APPENDIX 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 § 809.19(2)(a), and that contains, at 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 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 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 10th day of December, 2019.

s/Robert N. Meyeroff

ROBERT N. MEYEROFF

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 829.62(4), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 2,261 words.

Dated: December 10, 2019

s/Robert N. Meyeroff

ROBERT N. MEYEROFF