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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2019AP787

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUANNE D. TOWNSEND,

Defendant-Appellant.

On Appeal from a Decision and Order Denying Motion for Postconviction Relief and Motion for Postconviction Discovery Entered by the Milwaukee County Circuit Court, Hon. Joseph Wall Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF FACTS

The State asserts that Duanne filed a 284-page §974.06 motion. (Response Br. 2, 5,). He filed a 20-page motion. (R.227). He could have just cited to the record and required the court find the relevant testimony for this complex case. To be helpful, he assembled the relevant portions of record into an appendix.

The State neglects to respond to significant facts that are dispositive of this appeal. Thus, the following facts are undisputed[1]:

- In his opening statement, Mitchell (trial counsel) told the jury that Duanne shot Brandon, Latisha, and Jamal in self-defense.
- Before heading toward Duanne's home, Brandon called for a gun because "those niggas just upped on me" and "I'm going to go over there and fuck someone up" and I'm "going to kill someone, kids and all." And Latisha replied "C'mon let's go over there." (R.227:244; App.164).
- Police reported that Latisha was shot twice in the chest. Latisha testified under oath that she was shot 4 times—3 in the back.
- During closing statements, the prosecutor repeatedly told the jury that Duanne's decision

[1] *See* Initial Brief at 3-13.

to shoot Latisha in the back proved that he did not shoot in self-defense.

- Simone was the only witness who testified that Jamal said he had a gun and lifted his shirt to indicate that he had one. Mitchell told the jury that Simone was a liar.

- Duanne told Mitchell that he wanted to argue self-defense. He did not take Ecstasy before the shooting and did not want a voluntary intoxication defense. Mitchell violated the law governing voluntary intoxication defenses, defied Duanne's instructions, and conceded Duanne's guilt.

- During closing statements, Mitchell never asked the jury to find self-defense.

- Mitchell admitted on the record that he conceded guilt over Duanne's objection.

- Loeb (postconviction counsel) failed to argue that Mitchell was ineffective for: (1) breaking a promise to the jury, (2) failing to obtain Latisha's medical records and impeaching her with them; (3) calling Simone, the person whose testimony warranted a self-defense instruction, a liar; (4) presenting a voluntary intoxication defense in violation of the facts, the law, and Duanne's instructions, (5) conceding guilt over Duanne's objection.

- Loeb violated a court order regarding the submission of affidavits in support of his postconviction motion, and the circuit court denied relief due to this violation.

- Loeb failed to move for postconviction discovery of Latisha's medical records and use them in support of his ineffective assistance of trial counsel and new trial in the interests of justice claims.

- Loeb never argued that Mitchell's deficient performance prejudiced Duanne, a requirement for an ineffective assistance of counsel claim.

- Loeb's postconviction brief was so bad that the circuit court—adopting the State's arguments—held that it had "no clue" as to the basis of one claim and found the others "completely conclusory and without the requisite support to obtain a *Machner* hearing." (R.194:2; App.160).

ARGUMENT

I. The court of appeals should summarily reverse due to the State's violation of the rules of appellate procedure.

The State asks the court of appeals to hold that all of Duanne's claims are barred. If it loses that point, then it will roll up its sleeves and file "a supplemental brief addressing the merits of [Duanne's] barred claims. *See State v. Tillman*, 2005 WI App 71, ¶13, 281 Wis. 2d 157, 696 N.W.2d 574 (approving this briefing procedure)." (Response Br. 7).

Rule 809.19, Wis. Stats., authorizes the filing of an initial brief, a response brief, and a reply brief. It does not permit the parties to unilaterally bifurcate briefing. The appellant cannot file an initial brief addressing only his first issue, and if he loses, a

supplemental brief on his second issue. Nor can a respondent file a response brief asserting just one of its defenses, and if he loses, a supplemental brief arguing his other defenses. Like piecemeal appeals, piecemeal briefing protracts the appeal and undermines judicial economy. *State v. Wolfe*, 2019 WI App 32, ¶9, 388 Wis. 2d 45, 931 N.W.2d 298. It also prevents the court of appeals from seeing the landscape of arguments and choosing whether to address the merits of an issue or impose the bar.

Furthermore, *Tillman* did not establish a special procedure for §974.06 appeals. *Tillman* involved a defendant who filed a direct, no-merit appeal, a second appeal, and third appeal. On the third one he was *pro se*. The State asked the court of appeals to hold that his claims were barred. If they weren't, then it would file a supplemental brief on the merits. The court of appeals said: "We approve this procedure ***in this case.***" *Id.*, ¶13. (Emphasis supplied). Duanne is represented by counsel and this is an appeal from the denial of his first §974.06 motion. *Tillman* does not apply.

If a party does not want to follow the rules of appellate procedure, it must move the court of appeals for relief from them, pursuant to §809.14. This provides its opponent and the court of appeals an opportunity to address whether altering the rules makes sense. The State did not file a motion for leave to bifurcate briefing.

When a party violates a rule of appellate procedure without permission, the court of appeals may dismiss the appeal, summarily reverse, or grant

other appropriate relief. Wis. Stat. §809.82(3).[2] The State has violated Rule 809.19's briefing procedure without first seeking leave from the court of appeals. Accordingly, the court of appeals should summarily reverse the circuit court's decision. Alternatively, because the State has deliberately chosen not to address the merits of the issues for review, the court of appeals should apply this well-established rule: when a respondent fails to refute an appellant's arguments, they are deemed to have conceded them. *Charolais Breeding v. FPC Securities Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

II. The court of appeals should reverse and order a new trial based on *McCoy*.

There are two ways that the court of appeals may order a new trial based on *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). One is that a structural error occurred in this case because Mitchell violated Duanne's 6th Amendment right to determine his own defense. The other is that Mitchell performed deficiently in conceding Duanne's guilt, and in this situation prejudice is presumed. (Initial Br. 19-23). The State addresses the former but not the latter. Regardless of how the claim is framed, the important point is this: the State does ***not dispute*** that Mitchell conceded Duanne's guilt over his express objection.

The State argues that Duanne's structural error claim is barred by the non-retroactivity doctrine

[2]Also, the State's Response Brief at 8, 9, and 16 cites unpublished decisions without including copies in an appendix in violation of Rule 809.23(3)(c).

in *Teague v. Lane*, 489 U.S. 288 (1989). It concedes that doctrine applies only to "new rules of criminal procedure." (Response Br. 7). In proceedings below, neither the State nor the circuit court claimed that *McCoy* announced a new rule of criminal procedure. (R.242; R.525, App.101). Duanne does not claim otherwise. The non-retroactivity doctrine does not apply.

It is well-settled that the 6th Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." *Faretta v, California*, 422 U.S. 806, 818 (1975). This does not require the defendant to surrender control of his defense to counsel. The right to defend is personal. The defendant's exercise of that right "must be honored out of that respect for the individual which is the lifeblood of the law." *Id* at 834 (quoted source omitted). Trial counsel makes "trial management" decisions regarding arguments, objections, and evidence, but the defendant has the right to determine the objective of his defense—including the right to insist on his innocence or to plead guilty. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008); *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

The United States Supreme Court granted review in *McCoy* because some state courts were not following the precedent above. But the State is wrong to suggest that it implicitly abrogated Wisconsin law. (Response Br. 11)(citing *State v. Gordon*, 2003 WI 69, ¶¶22-30, 262 Wis. 2d 380, 663 N.W.2d 765; *State v. Silva*, 2003 WI App. 191, ¶¶14-20, 266 Wis. 2d 906, 670 N.W.2d 385. *Gordon* held that in a multi-count case where the defendant testifies and ***concedes the***

facts that establish his guilt on a lesser count, in that unique situation counsel may concede guilt to that one count in an effort to gain credibility and win acquittal on the other charges. *Gordon*, ¶¶25-27. In *Silva*, counsel stumbled and said the case "technically" involved 1st degree sexual assault while explaining that the State had overcharged it. But counsel immediately argued that the State had not carried its burden of proof. *Silva*, ¶15.

The circuit court denied Duanne's claim on the assumptions that (1) *McCoy* only applies to death penalty cases and (2) on collateral review a defendant must present a structural error claim as an ineffective assistance of counsel claim. Duanne explained why both holdings were wrong. (Initial Br. 22-23)(citing *United States v. Read*, 918 F.3d 712 (9th Cir. 2019) and *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017)). The State does not defend the circuit court on either point, so it concedes that the circuit court erred under *Charolais Breeding*.

Duanne further argued that if his *McCoy* claim must be analyzed as an ineffective assistance of counsel claim, he still prevails. Generally, an ineffective assistance of counsel claim requires proof that counsel performed deficiently, and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984). But when defense counsel concedes his client's guilt, he vitiates "meaningful adversarial testing" of the prosecution's charges and fails to "hold the prosecution to its heavy burden of proof beyond a reasonable doubt." *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984). In this situation, prejudice is presumed.

Garza v. Idaho, 139 S.Ct. 738, 744 (2019). The State did not respond to this argument, and thus concedes it.

The State does not dispute that Mitchell conceded guilt over Duanne's express objection in violation of *McCoy* or that this was presumptively prejudicial to Duanne. The court of appeals should therefore order a new trial.

III. The court of appeals should order a new trial or an evidentiary hearing based on Duanne's claim that Loeb provided ineffective assistance of postconviction counsel during his direct appeal.

Echoing the circuit court, the State contends that Duanne's §974.06 claims are barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Allegedly, he "repackaged" claims for ineffective assistance of trial counsel as claims for ineffective assistance of postconviction counsel in violation of *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). (Response Br. 17, 19).

Escalona-Naranjo requires a defendant to consolidate all of his postconviction claims into a single appeal unless he has a sufficient reason for not doing so. Ineffective assistance of postconviction counsel can qualify as a "sufficient reason." *State v. Romero-Georgana*, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 688. Duanne alleged in detail how Loeb's ineffective assistance of postconviction counsel precluded him from raising the ineffective assistance of trial counsel and new trial in the interest of justice claims described in his §974.06 motion. In the

proceedings below, neither the State nor the circuit court addressed Duanne's claims against Loeb. (R.242; 252, App.101).

Furthermore, the State misreads *Witkwoski*. In that case, a defendant on direct appeal argued that there was insufficient evidence to support his conviction. His §974.06 motion presented a different theory as to why there was insufficient evidence to support his conviction. In that context, the court of appeals held: "Witkowski's attempts to rephrase or re-theorize his previously-litigated challenge are of no avail. His sec. 974.06, Stats., motion seeks only to relitigate matters considered on his direct appeal and the trial court properly dismissed it." *Witkowski*, 163 Wis. 2d at 992. *Witkowski* did not involve a claim of ineffective assistance of postconviction counsel.

This is an important distinction. On direct appeal, Duanne raised claims of ineffective assistance of ***trial*** counsel. His §974.06 motion raised claims for ineffective assistance of ***postconviction counsel***. Those are two different types of claims against two different lawyers.

Duanne's trial lawyer, Mitchell, was awful. Thus, his postconviction lawyer, Loeb, was able to identify some viable ineffective assistance of trial counsel claims and a new trial in the interests of justice claim. Unfortunately, Loeb presented those claims ineffectively. His postconviction motion presented cursory allegations, failed to marshal evidence and legal research, violated a court order and failed to address the prejudice requirements for an ineffective assistance of trial counsel claim. His statement of facts was incoherent. (R.185). These

allegations are not a "repackaging" of Duanne's claims against his trial counsel. They are maiden claims against his postconviction counsel, which the State makes no effort to defend. It can't, because the State itself successfully condemned the quality of Loeb's representation at the postconviction stage and on direct appeal.

Loeb also missed claims for ineffective assistance of trial counsel. Among other things, he failed to litigate the claims that Mitchell: (1) broke a promise to the jury, (2) conceded guilt over Duanne's objection; (3) called Simone a liar; and (4) failed to impeach Latisha with police reports (and medical records) showing that she lied on the stand about her wounds. These claims were fully briefed and are supported by the law, the record, and affidavits. (R.227, 229, 233, 249-250). They are clearly stronger than the postconviction claims that Loeb asserted—the claims that both the State and the circuit court called completely conclusory and without any support. They thus satisfy *Romero-Georgana*, ¶4.

Because the State does not deny that Loeb provided ineffective assistance of postconviction counsel, the court of appeals only needs to decide which remedy to grant. One option is to remand the case for a *Machner* hearing to take Loeb's testimony. However, when there is no possible strategic reason for a lawyer's errors, and they are prejudicial, a *Machner* hearing is unnecessary. *State v. Alexander*, 2015 WI 6, ¶¶37-38, 360 Wis. 2d 292, 858 N.W.2d 662. An appellate court may grant the relief on the merits of the ineffective assistance of counsel claim. *Pidgeon v. Smith*, 785 F.3d 1165, 1173 (7th Cir. 2015).

There is no strategic reason for violating a court order, failing to present a coherent statement of facts, failing to do basic legal research, failing to marshal the evidence in support of arguments, failing to apply the law to the facts, failing to address both requirements for ineffective assistance of counsel, and so forth. Accordingly, the court of appeals should order a new trial. Alternatively, it should order a *Machner* hearing.

IV. Duanne is entitled to postconviction discovery.

The State asserts that Duanne's motion for postconviction discovery is barred under *State v. Kletzien*, 2011 WI App 22, 331 Wis. 2d 640, 794 N.W. 920 and *Escalona-Naranjo*. It concedes that ineffective assistance of postconviction counsel may excuse a defendant from bringing a postconviction discovery motion during his direct appeal. (Response Br. 20). Duanne's postconviction discovery motion and reply fully explained how Loeb provided ineffective assistance in this regard. (R.229, 250).

A defendant has a due process right to present a meaningful defense. When the truth is not discovered prior to or during trial, he may seek postconviction discovery of evidence that is consequential to the case. Evidence is "consequential" when there is a reasonable probability the result of the trial would have been different if it had been disclosed. A "reasonable probability" means that there is a reasonable probability the evidence would "undermine confidence in the outcome." *State v. O'Brien*, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999).

Loeb performed deficiently by, among other things, not spotting that Latisha's testimony contradicted police reports and apparently her own medical records. Had Loeb noticed the conflict, he could have claimed on direct appeal that Mitchell was ineffective for not impeaching Latisha with those police reports. The prosecutor's closing argument at trial establishes why Latisha's testimony was "consequential" to its case. The prosecutor told the jury over and over (and over) that the fact that Duanne shot Latisha in the back was proof that he did not act in self-defense. (R.275:16, 23, 25, 26). So the State's current assertion that Latisha's testimony was not consequential is completely disingenuous. (Response Br. 23-24).

Had Loeb (a) moved for postconviction discovery and (b) presented the other postconviction claims that he bungled or missed, then on direct appeal he could have argued the ineffective assistance of trial counsel and new trial in the interest of justice claims described in Duanne's §974.06 motion and Initial Brief. Loeb could have argued that but for Mitchell's ineffective assistance, the State's case would have been significantly harder to prove. The State would have had to explain Latisha's apparent perjury. It would have had to address (a) Rocky's testimony that Brandon, Latisha and Jamal went to Duanne's home with the intent to shoot him and his family, (b) Antonio's testimony that Jamal was holding a gun, and (c) Duanne's testimony that he shot Latisha in the chest by accident as he was trying to shoot Jamal who was holding a gun. And the State would not have received windfall concessions that Simone was a liar and that

Duanne did not act in self-defense. Had Loeb done his job, there is a reasonable probability that Duanne would have, at a minimum, received a hearing on his claims for ineffective assistance of trial counsel and a new trial in the interest of justice.

Latisha's medical records would have undermined confidence both in Duanne's conviction and in the circuit court's decision to deny postconviction relief on direct appeal. The court of appeals should reverse the circuit court's decision denying postconviction discovery.

CONCLUSION

For the reasons stated above, the court of appeals should reverse the circuit court's decisions, order postconviction discovery, and grant either a new trial or a *Machner* hearing.

Dated this 11th day of November, 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 2,997 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 11th day of November, 2019.

Signed:

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Assistant State Public Defender