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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV
Case No. 2019AP1977-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY F. ATWATER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief, Both
Entered in the Dodge County Circuit Court,
the Honorable Martin J. De Vries, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

- I. This court should remand for a *Machner* hearing with remote testimony.
 - A. The circuit court found that the allegations in the postconviction motion were sufficient to warrant an evidentiary hearing. The circuit court then denied the postconviction motion because the court believed Mr. Atwater could not meet his burden of proof under *Machner* unless trial counsel testified in person.

The state in its brief misunderstands or misconstrues the postconviction proceedings and this led to the state's erroneous conclusion about the circuit court's order. (State's Brief at 7-8). A more careful review of the postconviction timeline clarifies that the circuit court denied the postconviction motion solely because trial counsel would not testify in person.

Mr. Atwater filed a postconviction motion alleging ineffective assistance of counsel. (60). The circuit court ordered the parties to file briefs arguing whether the motion stated sufficient allegations to warrant an evidentiary hearing. The state conceded that an evidentiary hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), should be scheduled. (68:1).¹ The case proceeded to a scheduling hearing. The sole purpose

¹ Indeed, the state in its appellate brief conceded that the motion "included detailed allegations supporting his claim." (State's Brief at 3).

of the scheduling hearing was to choose a date and time for the evidentiary hearing that all agreed was necessary based on the allegations set forth in the postconviction motion.

After the determination that the motion was sufficient to warrant an evidentiary hearing and during the scheduling hearing for the motion, Mr. Atwater asked the circuit court to permit trial counsel to testify remotely.² This timing is critical as it undermines the state's new claim on appeal that the circuit court denied the postconviction motion because the motion didn't raise facts sufficient to support a hearing. (State's Brief at 7-9).

The circuit court issued an order denying the postconviction motion not because the motion was insufficient but because trial counsel would not appear in person to testify. The circuit court's order reflects this. The order stated: "The Machner motion is denied without a hearing because defendant will not bring trial counsel to the hearing." (emphasis added). The order added: "The Nelson/Bentley motion is denied because it is essentially a Machner hearing and the motion does not allege sufficient nonconclusory facts, that if true, would entitle the defendant to relief." (83; App. 105).

The first part of the order is clear. The motion was denied without a hearing "because" trial counsel would not testify in person.

The state misreads the second part of the order. The state believes the circuit court ruled that the

² For a record of the request for remote testimony made at the scheduling, Mr. Atwater put the request in writing. (71).

motion was insufficient to warrant a hearing. (State's Brief at 7). The state is wrong. After briefing, the circuit court determined that the motion warranted a hearing and proceeded to scheduling that hearing. Therefore, the second part of the order simply means that without testimony from trial counsel, the written motion standing alone could not result in relief. The circuit court's order reflects the law: if the trial attorney does not testify the defendant cannot prevail on an ineffectiveness claim, *State v. Machner*, 92 Wis. 2d at 804. The only logical interpretation of the order is the circuit court concluded that without trial counsel's testimony at a *Machner* hearing, Mr. Atwater could not prevail on his plea withdrawal claim.

For the same reason, the state's argument of forfeiture or abandonment fails. (State's Brief at 12). The circuit court did not deny the motion because the motion failed to state sufficient facts. Mr. Atwater did not need to raise an argument on the sufficiency of the motion in this court because that issue was already decided in Mr. Atwater's favor. It was not the sufficiency of the motion that resulted in the denial; it was the circuit court's belief that without in-person testimony Mr. Atwater could not satisfy *Machner*.

- B. The state concedes that the circuit court has the authority to allow remote testimony at postconviction hearings.

As argued in his brief-in-chief, Mr. Atwater asserts that Wis. Stat. § 807.13(2) applies to witness testimony at postconviction proceedings and disagrees with the state's claim that Wis. Stat. § 807.13 does not apply. (State's Brief at 9-12).

The state argues that Wis. Stat. § 807.13 “does not confer authority” for circuit courts in criminal cases to take remote witness testimony. (State’s Brief at 10). While Wis. Stat. § 807.13 is a civil statute, civil rules “shall be applied in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.” Wis. Stat. § 972.11. As Mr. Atwater explained in his brief-in-chief, because Wis. Stat. § 967.08 fails to address the issue of the remote testimony of an individual witness in a postconviction proceeding, Wis. Stat. § 807.13 “shall be applied.” This application does not render Wis. Stat. § 807.13(2) meaningless, as the state suggests. (State’s Brief at 12). To the contrary, Wis. Stat. § 807.13 is still limited to civil proceedings but can also be applied in postconviction proceedings consistent with the language in Wis. Stat. § 972.11.

The state concedes that Wis. Stat. § 885.60(1) permits witnesses to testify remotely at a postconviction hearing. (State’s Brief at 13-15). Mr. Atwater agrees with the state, and asks this court to order the circuit court to allow remote testimony either under Wis. Stat. § 807.13 or Wis. Stat. § 885.60(1).

The criteria in Wis. Stat. § 885.56 closely mirrors the criteria in Wis. Stat. § 807.13(2)(c). The state acknowledged that Mr. Atwater addressed and applied the criteria in his brief-in-chief “while Atwater relied on the factors listed in sec. 807.13 to advance his argument, these factors are identical in many respects to sec. 885.56(1)’s criteria.” (State’s Brief at 16-17; Defendant’s Brief at 16-19). For that reason, Mr. Atwater will not repeat his analysis of

the criteria in Wis. Stat. § 807.13(2)(c) from the brief-in-chief as the same analysis applies to the criteria in Wis. Stat. § 885.56.

In response to Mr. Atwater's analysis of the relevant statutory factors, the state responds by arguing: trial counsel's testimony at a *Machner* hearing is important; the prosecutor might have difficulty effectively cross-examining trial counsel if she is not sitting in the same room because there might be documents involved; Mr. Atwater's liberty interest is at stake; Mr. Atwater's "desire not to pay the trial counsel's expenses" wasn't compelling and it is important for the court to observe a witness for her demeanor and to impress on the witness the need to testify truthfully. (State's Brief at 17-18).

First, the state's claim that Mr. Atwater does not "desire" to pay trial counsel's expenses is disingenuous. The State Public Defender will not reimburse the time, mileage, meals or overnight accommodations. Mr. Atwater is an indigent, incarcerated man. "Desire" has nothing to do with his inability to pay trial counsel.

As for the difficulty in cross-examination, the state acknowledged that the postconviction motion "included detailed allegations supporting his claim." (State's Brief at 3). The motion included as an attachment the relevant document from trial counsel's file. (60). If testifying remotely, trial counsel could not refer to anything in her file because she does not possess the file. (82:1; App. 106).

The evaluation of demeanor and impressing on the witness the need to testify truthfully also can be fully addressed with remote testimony. Trial counsel

is an attorney. She practiced in Dodge County. Her ethical obligations require her to testify truthfully. Under these circumstances, it is difficult to imagine that the judge could only assess credibility if trial counsel was sitting a few feet away from him.

Finally, it is a bit absurd for the state to invoke Mr. Atwater's liberty interest in having all witnesses testify in person when Mr. Atwater is the party proposing remote testimony. Mr. Atwater's interest is in receiving a hearing on his motion. He did not get that hearing simply because the circuit court refused to allow remote testimony.

The state's analysis of whether a denial under sec. 885 is appealable is misplaced. (State's Brief at 18). This is not an appeal from a ruling under sec. 885. Mr. Atwater is pursuing a direct appeal under Wis. Stat. Rule § 809.30 from the judgment of conviction and the September 25, 2019, order denying postconviction relief. (83; 85). His postconviction motion was denied solely because without trial counsel's testimony he could not prevail at a *Machner* hearing. On direct appeal, Mr. Atwater challenges the denial of his postconviction motion. The state confuses the reasoning behind the circuit court's order with the procedural posture of the direct appeal.

The state in its brief went to great lengths to contort and complicate a very simple and direct issue. This court should reject the state's red herrings and squarely review the real question presented in this case: was it clearly erroneous for the circuit court to deny the postconviction motion solely because the

circuit court refused to allow remote testimony at this postconviction hearing?

Common sense need not be discarded in reaching the answer to this question. During the ongoing and possibly recurring COVID pandemic, courts adapted to technology and embraced the reality that out of necessity, safety and practicality some court proceedings can include remote testimony. This is one of those proceedings. Mr. Atwater articulated sufficient need for remote testimony and this court should remand for a *Machner* hearing where remote testimony is permitted.

CONCLUSION

For these reasons, as well as those set forth in the brief-in-chief, Mr. Atwater respectfully requests that this court reverse the circuit court's order denying his postconviction motion and remand for a *Machner* hearing where trial counsel can testify remotely.

Dated and filed by U.S. Mail this 15th day of June, 2020.

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 1,631 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 15th day of June, 2020.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender