STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2019AP002383 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
DAIMON V. JACKSON,
Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE FAYE M. FLANCHER PRESIDING, AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE MARK F. NIELSEN PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

I. Jackson was denied effective assistance of counsel.

A. Trial counsel performed deficiently because trial counsel failed to properly communicate with Jackson.

Attorney Scott Anderson performed deficiently because he failed to adequately communicate with Jackson.

Jackson agrees with the State that an attorney's failure to abide by the profession's ethical obligations does not ipso facto prove deficient performance. (State's Br. 8), *State v. Cooper*, 2019 WI 73, ¶¶ 21–22, 387 Wis. 2d 439, 929 N.W.2d 192. However, the State and this Court must also recognize that the ethical obligations are based in reason. The reason for attorney communication with clients is to allow the client to effectively participate in the representation. ABA comment. Andersons' actions did not permit Jackson the ability to participate in his own representation and thus, Andersons' actions broke the attorney-client relationship. (pg. 11).

Andersons' disregard for Jackson is spotlighted by the final pretrial hearing. The court told Jackson that the court was not appointing a new attorney and then, in front of Jackson, the court instructed Anderson to meet with Jackson prior to the trial date. (70:3) Anderson ignored the court's instructions. At the postconviction hearing Anderson stated, "it is not like a school teacher telling you." (78:48).

The State argues that because Andersons was prepared Anderson did not perform deficiently. (State's Br. 10). The State argues that the November 1st meeting where Anderson told Jackson that the State's case against him was strong and went through the plea questionnaire with Jackson and explained the elements of offense shows that Anderson provided constitutionally reasonable assistance in advising Jackson. (State's Br. 10).

It is critical to note, that the November 1st meeting was just the third time Anderson met with Jackson during the eight months Anderson represented Jackson. The second time the two met was on August 8, 2016. Anderson's deficient performance up to the trial date made Anderson's continued representation of Jackson untenable and the fact that Anderson went through the plea questionnaire with Jackson does not negate Anderson's deficient performance.

No client, including Jackson, could have a functioning relationship with their attorney after the attorney repeatedly

ignored the client's requests to communicate and then blatantly disregarded the court's instruction to communicate with the client.

The State also argues that Anderson's trial preparation cured the broken relationship. (State's Br. 10). However, even granting the State's position that Anderson was prepared for trial, Anderson's deficient performance up to the trial date made Anderson's continued representation of Jackson untenable.

Jackson has shown that Anderson failed to provide professionally competent assistance, and therefore, this Court should find that Jackson met the first prong of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Anderson's deficient performance prejudiced Jackson into pleading guilty to a crime he did not commit.

The State argues that Anderson's actions did not prejudice Jackson because (i) Jackson's conviction on the original charges – felony murder and armed robbery – were all but certain and (ii) Jackson plead guilty. (State's Br. 12).

However, Jackson's conviction on felony murder and armed robbery charges or a second-degree reckless homicide charge were not inevitable.

The State argues that Jackson's statement that he was acting as a lookout ensured Jackson's conviction. However, Jackson stated to police detectives that, "I was just the lookout man… I was just checking to see if the police come… just watching out". (16).

Jackson testified at the postconviction hearing that, "It was suppose to have been a drug transaction. I gave Webster my money to go get the drugs. I met them back at Webster's house." (78:67). Jackson also told the PSI writer and testified that he was waiting for Henderson and Webster to purchase narcotics. (Jackson's Br. 11; 78:67).

Jackson's statements do not ensure a conviction of armed robbery or of second-degree reckless homicide because Jackson was looking out for a drug transaction and had no intent to steal from M.C. Rather, Jackson's statement taken together with the evidence that Henderson and Webster were the ones directly involved in the shooting and fled on foot after the shooting, (46), makes it so Jackson had a defense to armed robbery or second-degree reckless homicide.

Jackson did not exercise his right to a trial and present his defense because of Anderson's inadequacy as trial counsel. Anderson had not adequately represented Jackson up to the day of trial. Based on Jackson's experience with Anderson, Jackson could not trust in Anderson's representation at trial. (78:71-72)

The State also argues that Jackson was not prejudiced by Anderson's failures based on the plea colloquy. However, the plea colloquy was a product of Anderson's failure to provide professionally competent assistance. Anderson's actions prejudicially infected the whole proceeding against Jackson.

On the day of trial Jackson was forced to decide between pleading guilty in a case where he had a defense or proceeding to trial with Anderson, who had to that point blatantly ignored Jackson. Jackson was also aware that the court was not allowing Anderson to withdraw from Jackson's case. (70:3). Additionally, Anderson failed to meet with Jackson prior to the trial date as directed by the court.

Jackson decided to plead guilty even though he had a defense instead of proceeding to trial with Anderson. Jackson's decision was not because Jackson was guilty, but rather because Anderson failed to provide professionally competent assistance to Jackson. Therefore, this Court should not rely on Jackson's statements at the plea hearing.

Due to Anderson's deficient performance, Jackson chose to plead no contest to a crime he did not commit. Based

on this, the proceeding is unreliable and unfair, and thus, Jackson satisfies the prejudice prong of the *Strickland* test.

Based on the above, this Court should find that Jackson satisfied his ineffective assistance of counsel claim and vacate the Jackson's no contest plea and order a new trial.

II. Anderson's deficient performance prejudiced Jackson.

Jackson agrees with the State that the Sixth Amendment does not guarantee "a friendly and happy attorney-client relationship." (State's Br. 19). However, the Sixth Amendment does guarantee effective assistance of counsel. *State v. Jones*, 326 Wis. 2d 380, ⁋ 45.

The facts here stand in stark contrast to those in *Jones*. Prior to filing the October 26, 2005, motion to withdraw, Jones' trial counsel had a meeting on August 19, 2005, that lasted a between four and five hours, during which Jones and counsel reviewed discovery, and a one-and-a-half hour meeting on October 17, 2005. *Jones*, 326 Wis. 2d 380, ¶ 11. Additionally, trial counsel kept Jones informed by sending Jones detailed letters on the status of the case. Jones, 326 Wis. 2d 380, ¶ 8.

There was no violation of Jones' right to counsel under the Sixth Amendment because it was clear that Jones and trial counsel communicated. *Jones*, 326 Wis. 2d 380, ⁋ 45.

Like the complaint in *Jones*, Jackson complained here that trial counsel "doesn't keep in contact with me." When Jackson attempted to expound on his issues with Anderson the court told Jackson not to interrupt. (70:3). Jackson did not make another statement at the hearing.

Unlike *Jones*, here, if the court conducted a colloquy with Jackson or with Anderson the court would have discovered that Jackson and Anderson had met twice for a total of 2.5 hours, and it was clear that that Jackson and Anderson had not communicated since August 8, 2016. This finding

would have led the court to conclude that Anderson's performance was poor and that Anderson fell well below professional standards in failing to meet and confer with his client, as the court determined postconviction. (52:34).

As shown above, Jackson did not receive effective assistance of counsel and the court erred in denying Jackson's request to have Anderson withdraw. Therefore, this Court should vacate Jackson's no contest plea and order a new trial.

III. The miscarriage of justice in Jackson's case requires the reversal of the judgment of convictions or in the alternate a new sentencing.

Jackson's interest of justice claim is not a zero plus zero equals zero claim. *Mentek v. State*, 71 Wis. 2d 799, 809. This is because the facts of Jackson's case do not support that Jackson shot M.C. Yet, Jackson was convicted and sentenced as though he had.

The State argues that this is an ordinary case and cites the circuit court in doing so. (State's Br. 21). "You sit through stuff, sentencings, you will hear plenty of people say I know I pled guilty but I am not guilty. I didn't want to take the chance… A weekly occurrence." (78:69).

The opposite is true though; at a plea hearing the court must satisfy itself that the defendant in fact committed the crime charged. Wis. Stat. § 971.08(1)(b). If this Court comes to the same conclusion as the circuit court did - that people like Jackson plead guilty to crimes they did not commit on a weekly basis actually – then this court should find that Jackson's due process rights were violated and this Court should vacate Jackson's guilty pleas and vacate the judgments of conviction and order a new trial to cure the constitutional errors.

CONCLUSION

Jackson was denied effective assistance of counsel as guaranteed by the Sixth Amendment; therefore, this Court should vacate Jackson's no contest plea and order a new trial.

Dated this 9th day of February, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,539 words.

Dated this 9th day of February, 2021.

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E-Filing Pilot Program Certification

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 10th day of February, 2021.

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