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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

2019AP2383-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAIMON VON JACKSON JR.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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PETITION FOR REVIEW

Daimon Von Jackson Jr. petitions the supreme court to review the decision of the court of appeals in State. v. Daimon Von Jackson Jr., no. 2019AP2383-CR (Ct. App. December 29, 2021). That decision affirmed the judgments convicting Jackson and an order denying Jackson's motion for post conviction relief.

ISSUES PRESENTED FOR REVIEW

Statement Of The Issues

1. Is a defendant prejudiced when trial counsel does not communicate with the defendant in advance of a homicide trial.

2. Should a defendant be allowed to obtain new counsel when that defendant's counsel is deficient.

How the Issues Were Raised in the Court Of Appeals

1. In his brief-in-chief in the court of appeals, defendant-appellant Jackson argued that the circuit court erred when it found trial counsel's deficient performance did not prejudice Jackson when Jackson plead to a crime that he did not commit. *See* Jackson's court of appeals' brief at 8-11. The State argued that even if Jackson would not have admitted to being the principal actor in open court during the plea colloquy, his participation in the crime still would have been sufficient for the court to accept his no contest plea to second-degree reckless homicide. *See* State's court of appeals response brief at 13.

2. In his brief-in-chief in the court of appeals, defendant-appellant Jackson argued that the circuit court erroneously denied his request for new counsel on inaccurate facts. *See* Jackson's court of appeals' brief at 11-14. The State argued that circuit court properly exercised its discretion in denying Jackson's request for new counsel.

How the Court of Appeals

Decided the Issues

1. The court of appeals found that Jackson failed to allege specific facts that would support his assertion that he would have proceeded to trial but for trial counsel's limited communication and failure to meet as requested by the circuit court. Op. at ¶28.

2. The court of appeals concluded that the circuit court did not erroneously exercise its discretion in denying Jackson's motion to replace trial counsel. Op. at ¶56.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

This petition for review presents the above two issues, which both deal with when a defendant is prejudiced by trial counsel's lack of communication.

There is no case establishing the number of times counsel and client must meet prior to trial, but common sense dictates that if trial counsel does not communicate with their client, then ipso facto the client is adversely affected and prejudiced, which would satisfy the prejudice prong of an ineffective assistance of counsel claim. This case will allow the Court to examine and provide guidance as to the minimum level of competency that defense counsel must provide in anticipation of trial and at a plea hearing to avoid prejudicing their client.

Granting review will help clarify the law of what is the minimal standard of assistance owed by counsel to their client to protect the client's fundamental rights. This is a question of law not fact that is likely to recur unless resolved by the supreme court. *See* Wis. Stat. (Rule) § 809.62(1r)(c)3.

STATEMENT OF THE CASE

Jackson filed a notice of appeal on December 12, 2019. (53).

Post-conviction, the trial court conducted a *Machner* hearing and found that trial counsel performed deficiently, thus Jackson satisfied the performance prong his ineffective assistance claim. The circuit court found, "I cannot imagine a situation where an attorney only meeting with the client twice over the seven months leading up to the day of a murder trial is not deficient." Jackson and trial counsel last met ten weeks before the trial.

This Court suspended trial counsel's license to practice law for his deficient/unprofessional representation of Jackson in this case. Office of Lawyer Regulation v. Anderson, 2020 WI 82, ¶1, 394 Wis. 2d 190, 950 N.W.2d 191.

The trial court did not find that the deficient performance prejudiced Jackson, though. As a result, in his appeal, Jackson claimed that trial counsel's deficient performance was prejudicial.

During the pendency of the trial case Jackson filed a pro se motion requesting that trial counsel be removed because of trial counsel's failure to provide information and a failure to maintain a relationship with Jackson. Jackson's motion was the result of trial counsel's complete failure to meet or communicate with Jackson. Jackson repeatedly requested that trial counsel contact him, and trial counsel was aware of Jackson's efforts to communicate with trial counsel; yet trial counsel ignored Jackson.

The trial court denied Jackson's motion for new counsel and instructed trial counsel to meet with Jackson prior to the next court date two weeks later, which was the jury trial date. Trial counsel next met with Jackson the morning of trial.

The court of appeals held that Jackson did not satisfy the prejudice prong because Jackson cannot establish that he was prejudiced by trial counsel's failure to communicate or meet with him more often. Op. at ¶50. The court stated, "it is insufficient to say only that counsel's lack of communication or failure to meet more often prejudiced him, and absent greater specificity, we cannot conclude that limited communication or failure to meet before trial caused Jackson prejudice." Op. at ¶44

The facts of this case resulted from the shooting death of M.C. The State charged Jackson and two others - Travenn Webster ("Webster") and Booby Henderson ("Henderson") - in connection with the shooting.

The physical evidence of this case directly tied Webster and Henderson to being physically present at the shooting of M.C. The physical evidence consists of fingerprints, DNA and an eyewitness statement. Jackson, Webster and Henderson were all seen together at a casino hours after the shooting.

Webster and Henderson were taken into custody first and blamed Jackson for the shooting. Jackson was later arrested and admitted to acting as a lookout.

On the day of trial Jackson entered a plea of no contest to second degree second-degree reckless homicide as a repeater with the use of a dangerous weapon contrary to WIS. STAT. §§ 940.06(1). This was after Jackson had limited communication with his trial counsel, three meetings and no phone conferences in the seven months leading up to trial, and the last meeting on the day of trial.

The trial court sentenced Jackson to 20 years' initial confinement and ten years' extended supervision. Whereas Webster pled to robbery as party to a crime and received ten years' initial confinement and five years' extended supervision. Henderson pled to second-degree reckless

homicide as party to a crime and received twelve years' initial confinement and eight years' extended supervision.

The court of appeals held that, "it is insufficient to say only that counsel's lack of communication or failure to meet more often prejudiced him, and absent greater specificity, we cannot conclude that limited communication or failure to meet before trial caused Jackson prejudice." Op. at ¶ 44.

ARGUMENT

1. Granting review will allow the Court to develop guidance for the minimal assistance owed by counsel to their client to protect a defendant's fundamental rights.

During the seven month period leading up to Jackson's murder trial, trial counsel met with Jackson twice. The last meeting being 10 weeks before the trial.

On the day of trial, Jackson met with trial counsel for the third time. The two had no phone conferences. With the lack of communication between the two, Jackson could not reasonably know whether trial counsel was properly prepared to represent him at trial nor could anyone in Jackson's position.

The lack of communication prejudiced Jackson due to Jackson's uncertainty in his trial attorney's preparedness. This prejudice further manifested itself in Jackson being sentenced as a principal to a homicide charge where he was not the principal and Jackson receiving a sentence far in excess of the two people directly responsible for the shooting.

"To prove prejudice, a defendant must establish that 'particular errors of counsel were unreasonable' and 'that they

actually had an adverse effect on the defense.'" State v. Sholar, 2018 WI 53 ¶33, 912 N.W.2d 89 (quoting Strickland v. Washington, 466 U.S. 668 at 693, 104 S.Ct. 2052).

Trial counsel's errors in this case appear to facially satisfy the prejudice prong and granting review of this case will allow the Court to provide further guidance on what "adverse effect on the defense" is necessary to satisfy the prejudice prong.

For these reasons, this case presents the Court an opportunity to develop the prejudice prong of an ineffective assistance of counsel claim.

2. Granting review will allow the Court to develop the standard for the trial court's duty in assessing whether new counsel is warranted.

Whether the facts amount to prejudice requiring a new trial is a matter of law. State v. Broomfield, 223 Wis.2d 465, 481, 589 N.W.2d 225 (1999).

It is not uncommon for trial courts to take up motions for new counsel and in doing so the trial court must finds facts to make its determination.

Here the court conducted a curt colloquy with Jackson. Jackson complained that his trial counsel was not keeping in contact with him. Had the trial court had done a simple follow up with Jackson and trial counsel, the trial court would have discovered that trial counsel's lack of communication was stunning and meritorious of being removed from Jackson's case prior to trial.

Trial counsel's errors in this case appear to facially satisfy the prejudice prong and granting review of this case will

allow the Court to provide further guidance on what "adverse effect on the defense" is necessary to satisfy the prejudice prong.

For these reasons, this case presents the Court an opportunity to develop the prejudice prong of an ineffective assistance of counsel claim.

CONCLUSION

Daimon Von Jackson Jr. respectfully requests that the Court grant this petition to review the court of appeals' decision in this case.

Dated this 28th day of January, 2022.

Respectfully submitted,

Electronically signed by
Parker C. Mathers

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4)(b) for a petition produced with a proportional serif font. The length of this petition is 1,625 words.

Electronically signed by
Parker C. Mathers

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that I have submitted an electronic copy of this petition for review, excluding the appendix.

I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 28th day of January, 2022.

Electronically signed by
Parker C. Mathers

APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains

(1) the decision and opinion of the court of appeals;

(2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; and

(3) any other portions of the record necessary for an understanding of the petition. 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 - 2 - 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 28th day of January, 2022.

Electronically signed by
Parker C. Mathers

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T O
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