STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

Appeal of a Judgment of Conviction and an Order Denying Postconviction Relief in Chippewa County Circuit Court, the Hon. James M. Isaacson, Presiding

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF REGARDING POSTCONVICTION DISCOVERY

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ARGUMENT

I. If Hoyle is not granted a new trial, the case should be remanded for a new evidentiary hearing on Hoyle's newly discovered evidence claim so Hoyle may subpoena Hannah and her counseling records to the hearing.

A. Hoyle requests a remand for an evidentiary hearing regarding Hannah's actual treatment history if the court denies Hoyle's newly discovered evidence claim on the grounds that the PSI report insufficiently establishes that Hannah falsely claimed at trial that she received treatment for the assault.

Before addressing the State's specific arguments, Hoyle wishes to clarify the circumstances in which remand for a new evidentiary hearing on Hoyle's newly discovered evidence claim is appropriate. Hoyle has argued that Hannah's statement to the PSI writer disclaiming any treatment for her sexual assault, contrary to her trial testimony, satisfies the four criteria for newly discovered evidence. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42. The State has conceded this point. (State Br. at 12) The State instead argues that Hoyle has failed to meet the prejudice standard, *i.e.* that there is a "reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to [Hoyle's] guilt." *Plude*, 2008 WI 58, ¶ 33 (quotation marks, citations, and brackets omitted).

Hoyle's postconviction discovery request for Hannah's treatment records anticipated a prejudice

argument that the State ultimately has not made: That the PSI report of Hannah's inconsistent statement regarding treatment is not enough to create a reasonable probability that a jury would have a reasonable doubt as to Hoyle's guilt, because the PSI statement could be the result of sort of miscommunication between Hannah and the PSI writer, and not because Hannah did not actually receive the treatment she claimed at trial. Hence Hoyle's postconviction discovery request, under the *Shiffra*/*Robertson*[1] framework, for treatment records establishing whether or not Hannah received the sex assault treatment that she claimed at trial was the basis for her calm demeanor.

Although the State has not advanced this argument, Hoyle cannot ignore the possibility that this Court will adopt it *sua sponte*. (Hoyle Reply Br. at 5). And if it does, Hoyle requests a remand for an evidentiary hearing where Hoyle can litigate the treatment history issue the way it must be litigated after the Wisconsin Supreme Court reversed *Shiffra* and *Robertson* in *State v. Johnson*, 2023 WI 39, ¶ 1, 407 Wis. 2d 195, 990 N.W.2d 174: by subpoenaing Hannah and her treatment records to a hearing to get to the bottom of her treatment history. However, Hoyle concedes that if the court denies Hoyle's newly discovered evidence claim on some other ground that nonetheless assumes a jury would find that Hannah's trial testimony regarding her treatment was untrue, then a remand would be unnecessary.

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[1] *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113.

B. Hoyle was required to file a postconviction motion that raised both his discovery claim and his newly discovered evidence claim as it then existed.

Turning to the State's first argument – that Hannah's treatment records are not "needed" for Hoyle's newly discovered evidence claim – the State misunderstands how postconviction discovery operates in Wisconsin, and how that affected Hoyle's litigation strategy. (State Supp. Br. at 8). In short, while Hannah's treatment records would strengthen the newly discovered claim based on Hannah's inconsistent statements about her treatment, Hoyle could not file a motion for postconviction discovery first, and then file the newly discovered evidence motion with any evidence provided as a result of the discovery motion. Instead, Hoyle was required to include both requests in the same motion, and then file a supplemental motion with the result of any discovery ordered by the court.

A convicted defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994). This court has held that "[t]here is no provision in the relevant statutes or case law that exempts postconviction discovery motions from [the *Escalona*] rule." *State v. Kletzien*, 2011 WI App 22, ¶ 13, 331 Wis. 2d 640, 646, 794 N.W.2d 920, 923. Thus, a defendant cannot file a standalone motion for postconviction discovery if the defendant has other claims for postconviction relief. Instead "defendants bringing postconviction discovery motions must, pursuant to

Escalona–Naranjo, include all bases for appeal when filing such motions." *Id*. at ¶ 11.

This rule promotes judicial economy in several ways. The request for discovery may be moot if a new trial is granted on an alternative ground. Granting discovery may not only allow for an amended motion that gives rise to new claims for relief, but also would allow a supplemental motion that provides for a fuller context for an existing claim. If discovery and all other forms of postconviction discovery is denied, then the appellate courts can consider all the issues in one proceeding.

Here, Hannah's flip-flopping on the nature of her treatment is enough to win Hoyle a new trial on his newly discovered claim. Accordingly, Hoyle included it in his postconviction motion and is pursuing it on appeal. But certainly, treatment records verifying what Hannah later told the PSI writer – that contrary to her trial testimony, she did not receive any treatment for the alleged assault – would only strengthen Hoyle's case. Hoyle thus included in his postconviction motion a request for those records through the only procedure authorized at the time, the *Shiffra*/*Robertson* framework. And Hoyle's motion clearly indicated that if the documents produced supported a claim for postconviction relief, he would file a supplemental or amended motion.

In the end, Hannah's treatment records are not "needed" only if the court grants Hoyle a new trial on the newly discovered evidence claim. If the court denies the claim because the PSI report of Hannah's inconsistent statement is insufficient to establish that

Hannah did not receive the treatment she claimed at trial, then the treatment records are indeed necessary.

C. It is conceivable that the court would deny a newly discovered evidence claim based only on Hannah's statement to the PSI writer that she did not receive treatment for the assault, but would grant the claim if Hannah's statement were corroborated by the actual treatment records.

The State's second argument is based on an assumption that Hoyle cannot afford to make: that when assessing the newly discovered evidence claim, this court will presume that Hannah did in fact lie at trial when she testified that she received therapy for the alleged assault. (State Supp. Br. at 8-9). According to the State, because Hannah's statement to the PSI writer and any relevant treatment records would go to the same point – that Hannah did not receive the sexual assault treatment she claimed at the trial – if this court holds that the statement to the PSI writer is not enough to create the reasonable probability of reasonable doubt necessary for Hoyle's newly discovered evidence claim, then neither will any treatment records showing that she did not receive the claimed treatment.

As explained in Hoyle's initial reply brief, while it is true that the circuit court assumed that Hannah was lying at trial, this court is not obliged to follow suit. (Hoyle Reply Br. at 4-5; State Br. at 18, n. 4 (quoting R. 94:23, 32)). It is certainly conceivable for this court to hold that the PSI report of Hannah's inconsistent statement is not enough to create a reasonable probability that a jury would find a reasonable doubt as to Hoyle's guilt, due to the

possibility that Hannah misspoke or the PSI writer misheard Hannah. However, treatment records corroborating her statement to the PSI writer would remove any doubt that she did not receive the treatment that she claimed at trial was the basis for her calm demeanor.

The State has not argued that the statement to the PSI writer is inadequate to show that Hannah did not receive the claimed treatment, and so has tacitly conceded it. However, this Court is not obliged to accept a party's concession. Accordingly, Hoyle argued in his original reply brief that:

> if this Court does *sua sponte* decide that Hoyle is not entitled to a new trial because of the nature of [Hannah's] statement to the PSI writer, then Hoyle is entitled to discover [under the *Shiffra*/*Robertson* framework] whether more reliable evidence, in the form of her actual treatment records, corroborate her statement to the PSI writer.

(Hoyle Reply Br. at 5).

The State does not deny that prior to *Johnson*, the exclusive method for establishing the corroborating evidence was through the *Shiffra*/*Robertson* frame work that Hoyle invoked in his postconviction motion. After *Johnson*, the only method is by simply subpoenaing Hannah, and any treatment records, to a postconviction hearing to examine Hannah about her inconsistent statement.

Certainly, if Hannah had made these inconsistent statements about her treatment history before trial, Hoyle could subpoena responsive documents and cross-examine Hannah about her inconsistent statements. Whether Hannah is able to

quash such a subpoena or refuse to answer questions based on privilege or some other ground would be a matter for the circuit court, not this court.

D. Hannah's rights as a victim do not supersede Hoyle's rights as a criminal defendant.

The State's third argument begins with a lengthy discussion of how Johnson overruled the *Shiffra*/*Robertson* framework for postconviction discovery of victim treatment records, which Hoyle readily concedes. (State Supp. Br. at 10-12).

The State also quibbles with Hoyle's citation to *Kenyon v. Kenyon*, 2004 WI 147, ¶ 36, 277 Wis. 2d 47, 72, 690 N.W.2d 251, 263, as an example of a case being remanded to apply a new rule, because "*Johnson* did not clarify the standard a court should use when granting relief on a specific claim, as was the case in *Kenyon*. Rather, *Johnson* did away with the claim altogether." (State Spp. Br. at 12). This is a distinction without any difference. The fact remains that prior to *Johnson*, the exclusive means for Hoyle to determine whether Hannah's treatment records supported her trial testimony or her statements to the PSI writer was through the *Shiffra*/*Robertson* framework, and that after *Johnson* the courts are to simply apply the rules of privilege. This is a change in the standard the courts are to apply in this situation.

Finally, the State makes a vague victim rights argument, asserting that "[t]o allow Hoyle to return to circuit court, subpoena her for her records, and then argue that she waived her privilege in light of recent legal developments, would seriously undermine this victim's statutory and constitutional rights, including

her right to assert privilege of these documents and her right to privacy. *Johnson*, 407 Wis. 2d 195, ¶ 47 (citing, e.g., Wis. Const. art. I, § 9m; Wis. Stat. § 950.04)."

Victim are important rights. But none of the rights enumerated in Wis. Stat. § 950.04 can be construed as some sort of super-privilege that extends beyond the statutorily defined health care privilege or the waiver rule that applies to all privileges. Wis. Stat. § 950.04. Nor do they override a defendant's constitutional rights, Wis. Const. art. I, § 9m(6), such as a defendant's rights to confrontation, to compulsory process, to due process, and to a meaningful appeal. *State v. Raflik*, 2001 WI 129, ¶ 40, 248 Wis. 2d 593, 619, 636 N.W.2d 690, 700; Wis. Const. art. I, § 21.

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In sum, if this court holds that Hannah's statement to the PSI writer alone is insufficient to create a reasonable probability that a jury would find reasonable doubt, then the case should be remanded to the circuit court so Hoyle may pursue the litigation strategy not available at the time he filed his motion: by issuing Hannah a subpoena duces tecum to address her inconsistent statements and any treatment records

CONCLUSION

For the reasons stated above and in his prior submissions to the court, Hoyle is entitled to a new trial, or in the alternative, a remand for a rehearing on his newly discovered evidence claim with an opportunity to subpoena Hannah and her counseling records.

Dated this 18th day of September, 2023.

Respectfully submitted,

Electronically signed by Thomas B. Aquino

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