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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal Case No. 2021AP002172
Trial Court Case No. 2017CM000288

STATE OF WISCONSIN,

Plaintiff – Respondent.

V

MICHAEL J. VIEZBICKE

Defendant – Appellant.

APPEAL FROM AN ORDER DENYING DEFENDANT-APPELLANT'S POST CONVICTION MOTION IN OZAUKEE COUNTY CIRCUIT COURT
HONORABLE PAUL V. MALLOY PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Adam Y. Gerol
Assistant District Attorney
State Bar No. 1012502

Justice Center
1201 S. Spring Street
Port Washington, Wisconsin 53074
(262) 284-8380

Attorney for Plaintiff-Respondent

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. The briefs of the parties will adequately develop the theories and legal authorities on each side. Publication is not being requested as this matter can be decided using well understood and established legal precedent.

FACTS

Citations to facts of record will be made when necessary in this brief to support the contentions made.

ARGUMENT

1. The defendant had completed his sentence before bringing the underlying motion, depriving the trial court of competency to proceed.

The threshold issue is whether the trial court had competency to even address the defendant's motions when they were filed. The record tells us that the defendant was no longer serving the sentence that he was challenging when he filed them. Because of this, the State contends that neither the trial court nor the appellate courts have competency to hear this challenge. This appeal should be dismissed.

The defendant concedes this essential fact: that the sentence he was complaining about was complete. (R69:11-12). The trial court also found that the defendant had already served his sentence. (R69:8-9). The rest of the record of this case establishes this point as well. The defendant provided a letter response to this question. (R58) With this letter the defendant included a copy of the judgement of

conviction from Ozaukee County Case No 2018CF171, the consecutive sentence he was then serving. (R58). That judgement of conviction tells us that the underlying crimes in that case were committed on May 12, 2018. (R58). It also tells us that the defendant was not given any sentence credit for any of the time he was held in custody up to the point when sentenced in 2018CF171. With this letter the defendant included the sentence computation worksheet from the Department of Corrections as to all the sentences he would then be serving. (R58:3-4). That document revealed that in Case No 2017CM288 the defendant received sentences of 9 months and 3 months, consecutive. (R58:3) (See also, R48:2). The sentences in 2017CM288 began on May 12, 2018. (R58:3). The record reveals that the trial court was advised of this revocation through a 'status change' document received from the Department of Corrections on June 18, 2018. (R17).

When revoked, Mr. Viezbicke was entitled to sentence credit in 2017CM288 in the amount of 38 days. (R14). The Department of Corrections worksheet also states that the defendant was entitled to 38 days sentence credit on 2017CM288 if revoked. (R58:3). From these we can establish these important calendar dates:

December 21, 2017	Sentenced in 2018CM288,38 days sentence credit
May 12, 2018	The crimes underlying 2018CM171 were committed. The sentence in 2017CM288, a county jail sentence, begins to accrue.

Every inmate serving a county jail sentence is entitled to 'good time', which reduces the sentence served by 25 percent. Wis. Stats § 302.43. Here, the defendant was entitled to that reduction of his jail sentence in 2017CM288. In that case he had been sentenced to a total of12 months in jail, obligating him to serve 9 months, or 274 days. Subtracting the 38 days sentence credit, the defendant would have to serve 236 days beginning May 12, 2018. That sentence would have been satisfied on January 3rd, 2019. Here, the defendant

didn't file his first motion that pertains to this appeal until January 15, 2019. (R19). At that point he was no longer serving 2017CM288, as that case was entirely complete. By then, the defendant was only serving the consecutive prison sentence in 2017CM171.

In his letter to the trial court on this point the defendant cited to State v. Theoharopoulos, 72 Wis.2d 327, 334, 240 N.W.2d 635, 638 (1976). (R58). He argued that because he had been continuously in custody, the fact that he was now serving a consecutive sentence allowed him to seek post-conviction relief under Wis. Stats § 974.06. (R69:10). However, this interpretation conflicts with the subsequent interpretation of Theoharopoulos in State v. Bell, 122 Wis.2d 427, 362 N.W.2d 443 (Ct. App. 1984). Bell explicitly rejects this argument. Wis. Stats §974.06(1) exclusively reserves the ability to bring such motion to "a prisoner in custody under sentence of a court." Bell, at 430; Wis. Stats § 974.06 (1). When the statute refers to "sentence of a court", it means that the defendant must actually be serving the sentence that they wish to attack in their motion.

> " …Theoharopoulos impliedly rejects Banks by instead turning to the Blair requirement that the petitioner must be in custody under the sentence he desires to attack." Ibid. 'Blair' holds that a post-conviction challenge of this nature can only be brought when " … the petitioner is in custody under the sentence he desires to attack." Theoharopoulus, 72 Wis.2d at 334. (Emphasis in the original.)

Ibid. Here, the defendant was almost two weeks into another sentence -- 2018CF171 -- when he filed his motion in 2017CM288. This may not be a great deal of time, but it is determinative of this issue. As stated in Bell:

> The result we reach here is admittedly pursuant to a rigid jurisdictional requirement, but it is one imposed upon the courts by the legislature. For jurisdiction, the prisoner must be in custody under the sentence of a state court.

Bell, 122 Wis. 2d at 429.

The language that the defendant relied upon in Theoharopoulos was actually a discussion of a related topic, mootness. (R58) Theoharopoulos, at 332-4. Mootness and competency are two different things. When a defendant cannot demonstrate the custodial prerequisites of Wis. Stat. § 974.06, a trial court lacks competency to actually hear the motion which has been brought and it must be dismissed. Theoharopoulos, 72 Wis.2d at 330; State v. One 2000 Lincoln Navigator, 2007 WI App 127, ¶ 3 n. 5, 301 Wis.2d 714, 731 N.W.2d 375. Any judgment entered by a court without competency to entertain a matter is invalid. Village of Trempealeau v. Mikrut, 2004 WI 79, ¶ 14, 273 Wis.2d 76, 681 N.W.2d 190.

While the trial court seemingly indulged the defendant's arguments anyway, the historical record of this case – together with the defendant's concessions – demonstrate that the defendant's motion should have been dismissed at the outset. The trial court acknowledged as much as a matter of historical fact and in light of the defendant's concessions. Here, there were no findings of fact by the trial court. In the absence of findings of fact, an appellate court is permitted to search the record. See generally, State v. Sulla, 2016 WI 46, ¶23, 369 Wis.2d 225, 880 N.W.2d 659; Olivarez v. Unitrin Prop. & Cas. Ins. Co., 2006 WI App 189, ¶ 17, 296 Wis.2d 337, 723 N.W.2d 131. While the record of this case isn't particularly focused on the subject of competency, nor is it particularly detailed, it does support this conclusion.

The State's objection to proceeding was asserted at the trial court level at the outset and was not waived. See generally State v. Agnello, 226 Wis.2d 164, 593 N.W.2d 427 (1999). The State's objection was inartful, but the challenge that was made was correct -- that the sentence for the conviction being complained of was complete. (R69: 3- 4). The State supported that objection by referring generally to State v. Escalona-Naranjo, 185 Wis.2d 168, 517 N.W.2d 157 (1994). The correct objection should have been that the defendant lacked standing to bring the motion, and the trial court was without competency to hear it. While the objection was

misshaped, the substance of the matter was adequately presented to the court and the defendant was able to respond intelligently to what was being objected to. The objection to the trial court's competency to proceed was asserted, not waived.

2. Deficiencies in the trial court record.

The record of the post-conviction motion is challenging. The defendant was representing himself and clearly didn't understand the correct procedure or his role. (R71:22-23) Pro se defendants are obligated to know and follow the rules and procedures that control the proceedings and no special deference must be given to them because of their status[1]. See generally, Waushara County v. Graf, 166 Wis.2d 442, 452, 480 N.W.2d 16, 20, cert. denied, 506 U.S. 894, 113 S. Ct. 269, 121 L.Ed.2d 198 (1992). Here, when given the opportunity to make a record, he never testified to any of the facts that he had recited in his various motions. The defendant's approach seemed to assume that what he had written in his motions was already part of the record rather than his offer of proof of what some future motion hearing might reveal. This error is also reflected throughout his appellate brief where he frequently argues facts that were never admitted into evidence at the motion nor offered through

[1] The mode of questioning by the trial court arguably was different that the ordinary presentation of testimony in most post-conviction motions. After the trial court began the questioning, the defendant was given an opportunity to question his trial attorney. (R71:10-11). However, the trial court then took over the questioning again before the defendant had apparently concluded. (R71:14). The defendant, testifying by video, was unable to use documents that he had sent to the trial court earlier to help him examine the witness. (R71:13-15). When the documents were ultimately located, the defendant was unable to show them to his former attorney.(R71:15-16).

Here, the State doesn't believe the defendant's intended version of the events is credible. If subject to cross examination, it wouldn't survive scrutiny. However, it's clear that the defendant had things he wanted to put into the record. While a defendant proceeding pro se is held to the same standards as an attorney, the transcripts of the hearings support an argument that the defendant probably didn't understand when he was supposed to make his record as this hearing progressed. Therefore, if the Court of Appeals doesn't find the issues of jurisdiction and competency I've raised above to be dispositive, the State believes this case should be remanded to the trial court for a more robust fact finding hearing.

testimony subject to cross examination. Throughout the brief he refers to facts that are not of record and exhibits that were never received.

These motions had originally been set for a Machner hearing on July 20, 2021. However, when the case was called, the trial court indicated that it wanted to set the motion over to another date so the judge could research the issue and significance of the fact that the defendant had completed his sentence in the case he was now complaining of. (R69:11). When the case was called on September 21, 2021, the trial court didn't address that legal concern but seemed to proceed directly to testimony on an ineffective assistance of counsel claim. (R71:2) The defendant was placed under oath, but rather than testify as to facts, he seemed instead to engage in a legal argument with the court. (R71:3-7). The person who brings a motion is obligated to present the facts that they believe entitle them to the relief requested. The defendant had taken great care to recite in his motions his own version of what he believed transpired on the day he was arrested. (R45). However, when given the chance to testify he never made any of these claims nor offered any detail. The record suggests that the defendant didn't understand that he had such an obligation. (R71:25).

The only substantive facts demonstrated at the motion hearing attest to the following: On the day of Mr. Viebicke's arrest, the police were called by two citizen witnesses who reported that he was in the street, yelling, and knocking over traffic barriers. (R71:30). By the time the police arrived, Mr. Viezbicke was sitting inside the enclosed porch of his home. (R71:30). The police spoke with him through the screen porch, and asked him to come out to speak with them. (R71:30). When he refused, the police wrote up a citation and stuffed it into the door before walking back to their squad cars. (R71:30). Mr. Viezbicke then followed them, leaving his porch and then walking into the street. (R71:30). Mr. Viezbicke was intoxicated. (R71:33). While in the street he continued to yell at the officers, used a great deal of profanity, then tore up the citation he had just been

given and threw it to the ground. (R71:30-32). At this point the police attempted to arrest him. This then devolved into a large struggle culminating in Mr. Viezbicke getting stunned with a Taser. (R71:31).

The defendant's trial counsel was asked questions about whether she believed there had been a basis for an entrapment defense. (R71:9,29). Counsel replied that she had discussed the defense of entrapment with Mr. Viezbicke, but saw no basis on which to raise it. (R71:8,18). She apparently thought that there may have been police conduct demonstrated on the body camera footage that could form the basis for a civil suit, but not as a defense to the crimes charged. (R71:9-10, 33-34). (R71:14) The trial counsel viewed the exchange between the defendant and the officers objectively painted this picture:

> … my memory of the incident was really that the police gave you several opportunities to resolve this with a ticket, and were very clear that they were going to arrest you if you didn't just stop swearing at them and stop, you know, the conduct that you were engaged in. Did leave the ticket for you. You exited the house, ripped it up, and then they followed through with their statement that they would arrest you. So I did not feel that there was enough for an entrapment defense.
>
> Q Okay. So then was my side of the story of what happened consistent with theirs? Does that make sense?
>
> A Yeah, it makes sense. I would say there were parts that were consistent.

(R71:18). Trial counsel didn't see any significant inconsistencies between the officers' body camera footage and the police reports. (R71:19). If trial counsel had seen any basis to consider a spoliation defense regarding body camera footage, she would have looked into it. (R71:31). Trial counsel didn't recall the defendant raising the claim of outrageous government conduct, but independently she didn't see any basis for it. (R71:33). If the defendant had wished to go to trial, she would have tried the case. (R71:32). However, the

case was resolved by plea because that was Mr. Viezbicke's choice. (R71:32).

3. Substantive Claims.

a. Outrageous Government Conduct.

The origins of the defense of Outrageous Governmental Conduct were discussed in State v. Albrecht,184 Wis.2d 287, 516 N.W.2d 776 (Ct. App. 1994). Outrageous governmental conduct may arise where the government's conduct is so enmeshed in the criminal activity that prosecution of the defendant would be repugnant to the American criminal justice system. State v. Steadman, 152 Wis.2d 293, 301, 448 N.W.2d 267 (Ct.App.1989). To successfully assert the defense of outrageous governmental conduct, "the defendant must show that 'the prosecution ... violate[s] fundamental fairness [and is] shocking to the universal sense of justice [ ] mandated by [due process].' " State v. Albrecht, 184 Wis.2d 287, 297, 516 N.W.2d 776 (citation omitted). Here, the post-conviction motion never revealed any facts on which such a defense could be based.

b. Entrapment

"Entrapment" is a defense that is available to defendants when a law enforcement officer has used improper methods to induce them to commit a crime that they were not otherwise inclined to commit. Wis. JI Criminal 780 Entrapment; State v. Saternus, 127 Wis.2d 460, 381 N.W.2d 290 (1986); State v. Hillesheim, 172 Wis.2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992). To induce is to persuade or influence someone to do something. Ibid.

Here, there are no facts in the record of the post-conviction motion that could conceivably form the basis for an entrapment defense[2].

[2] The Defendant indicated a number of alternative facts in his various motions. See R51:3-5, R45:2-4. However, he offered no testimony or proof as to any of these at the motion hearing itself.

c. Spoliation:

The record of the motion hearing is confusing as to whether the defendant was claiming that recordings were destroyed, altered, or simply turned off and on by officers when they believed it to be convenient. (R71:19-20). In his motions Mr. Viezbicke took greater care to articulate these claims than he ever did at the motion hearings. (R45:14-16). Essentially, his spoliation argument seems to be that one of the arresting officers turned his recording system off and on when it was to his own advantage, essentially hiding other activity that he was engaging in from the record. Mr. Viezbicke does not argue that the police had a recording and then lost or deleted it.

Spoliation is not available as a defense where the evidence was never held by the government in the first place. Spoliation in a criminal context is discussed in State v. Hahn, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986). In Hahn, a vehicle had been seized following a fatal accident. However, the law enforcement agency then released it to a scrap company before the defense was able to examine it for the existence of a possible mechanical defect that could have been exculpatory. The Court of Appeals held that when the government loses or destroys evidence that was in its possession, and when they should have known that the evidence might have potentially exculpatory value, a sanction against the prosecution may be warranted. Hahn, 132 Wis.2d at 361. However, Hahn – and the defense of spoliation in general – depends on the evidence having been in the government's possession at some point in time. Here, it never was.

What the defendant is really attacking is the conduct of the police and the manner of their investigation. A claim that the police conducted an unfair or crooked investigation is a challenge to the reliability of the investigation itself and a challenge the credibility of the officers. State v. DelReal, 225 Wis. 2d 565, 571, 593 N.W.2d 461 (Ct. App. 1999) (citing Kyles v. Whitley, 514 U.S. 419 (1995).

That said, the record of this post-conviction motion contains no facts that would support either argument.

d. Ineffective Assistance of Counsel

In order to succeed with an ineffective assistance of counsel claim, Mr. Viezbicke must prove that trial counsel's performance was deficient, and that such deficient performance then prejudiced the outcome of the case. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Whether trial counsel's actions constitute ineffective assistance is a mixed question of law and fact. State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" State v. Harvey, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). The burden is on the defendant to show that his counsel's deficient performance prejudiced the defense. State v. Sanchez, 201 Wis.2d 219, 548 N.W.2d 69 (1996). Here, the defendant hasn't demonstrated anything. The place for Mr. Viezbicke to assert these facts – and make this post-conviction record – was the post-conviction motion hearing. He didn't do so.

The defendant makes four claims of deficient performance. They can all be disposed of by the fact that there is no demonstration of prejudice from any of them. Mr. Viezbicke claims that trial counsel provided improper legal advice as to a possible entrapment defense. However, the record only demonstrates that trial counsel didn't believe that this defense was available under the facts of the case. He can't point to anything in the record that demonstrates otherwise. While the defendant attacks the level of trial counsel's experience, he doesn't establish anything that a more experienced attorney might have done differently. While he claims that trial counsel didn't appreciate the value of the body camera evidence, he doesn't demonstrate any other perspective. The only thing this record demonstrates is that the body camera recordings were inculpatory. While the concept of spoliation is misunderstood by the defendant, nothing on this record demonstrates anything sinister about the

manner in which the officers used their body cameras. Here the record doesn't suggest that his attorney did anything wrong at all, let alone something that could have made a difference at trial.

4. CONCLUSION

For all these reasons the State respectfully asks that the defendant's appeal be denied.

Submitted this 25th Day of July, 2022.

Dated this 25th day of July, 2022 .
Electronically signed by:

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No 1012502

CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix. This brief is printed in Times Roman 13 point font for body text, 11 point font for block quotes, margins of 1.25 inches, is 15 pages long and 3,670 words.

Dated this 25th day of July, 2022 .
Electronically signed by:

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No 1012502

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th day of July, 2022 .

Electronically signed by:

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No 1012502