STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2021AP002172

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. VIEZBICKE,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE FACTS

Facts on the court record will be cited in the brief when necessary to support the points of contention.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested as it is necessary to clarify points made in the brief of appellant which cannot be fully understood in writing. An opportunity to make a physical presentation of the body camera footage would allow the Defendant-Appellant to explain the inconsistencies in the evidence more precisely and give the Court a better understanding of the issues. Publication is requested as this case presents a unique opportunity for this Court to develop precedent regarding the failure by police to preserve body camera footage.

ARGUMENT

I. Procedural Bars are Not Available to the State as the Defendant-Appellant Was Currently Serving an Enhanced Sentence Imposed by a Wisconsin Court

It is undisputed the sentence under attack was completed prior to the filing of the original postconviction motion. Following Wisconsin precedent, the completion of a sentence would usually be fatal to a defendant's postconviction motion. However, in this instance a procedural bar, such as mootness, competency to proceed, or jurisdiction, are not a defense available to the State. This appeal should not be dismissed for any of these reasons.

The twice amended postconviction motion challenging the conviction in Ozaukee County Case No. 17-CM-288 was not moot when it was filed in the circuit court. (R:45) In the response brief, the State misrepresents Viezbicke's argument made in the letter to the Trial Court addressing the mootness question as an assertion that he was serving consecutive sentences. Conversely, citing *State v. Theoharopoulos, 72 Wis. 2d 327, 332-33, 240 N.W.2d 635 (1976)*, Viezbicke wrote, "there is an exception to the rule [of mootness]" as "the confinement portion of the sentence which I am currently serving is as a repeater with an increased penalty for habitual criminality under

Wis. Stat. §939.62(1)(a).” (R:58) In support, the *Judgment of Conviction* in the successor case, Ozaukee County Case No. 18-CF-171, and *Department of Corrections Sentence Computation* were filed as an attachment to the letter. (R:58)

In *Theoharopoulos*, the Wisconsin Supreme Court endorsed *Banks v. United States, (1970, S.D.N.Y.), 319 F.Supp. 649* and created an exception to the mootness of a Wis. Stat. §974.06 motion while the sentence under attack is completed. In *Banks*, such as here, “the petitioner was serving a sentence under a recidivist statute and wished to attack the conviction of the sentence which he had already served.” *Theoharopoulos, 72 Wis. 2d at 332*. The *Theoharopoulos* Court said in its opinion “under those circumstances, the prior conviction could be reached ... because the case was not mooted by the expiration of the first sentence--the defendant was still suffering the collateral consequences of the previous conviction.” *Id.*

In addition, the *Theoharopoulos* Court said “if the defendant is currently serving a *sentence* related to and affected by the prior conviction, it is difficult to conclude that the question is moot, for, on the face of the record, there is a causal relationship between the defendant’s present confinement and the prior conviction he wishes to attack.” (emphasis retained) *Id. at 333*.

By comparison, it is clear from the court record Viezbicke was currently in custody under the enhanced sentence, and thus "still suffering the collateral consequences of the previous conviction." *Id. at 332*. (R:58) (R:71, 2) As stated above, the documents which were attached to the letter to the Trial Court show "the face of the record" is demonstrative of a "causal relationship" between the two sentences. *Id. at 333*. (R:58) Accordingly, the mootness question was adjudicated properly in the Trial Court and appellate review of this issue is unnecessary.

The State argues its mootness objection should be treated as a properly grounded objection to the Trial Court's competency to proceed as it failed to comply with the statutory mandate that a defendant must be "in custody under sentence of a court" within the meaning of Wis. Stat. §974.06(1). However, the Trial Court was correct in proceeding to judgment even if this Court is willing to construe the State's timely mootness objection as one analogous in substance to that of competency to proceed.

In *Theoharopoulous*, a defendant is in custody under sentence of a court when "[t]he custody is the result of a ... process[] ... [within] the control of the state of Wisconsin." *Id. at 331*. An alternative way to view this is when a

"sentence and [] process of the state of Wisconsin mandated his custody." *Id. at 333*. Here, it is apparent the record shows at the time of filing for postconviction relief under Wis. Stat. §974.06 Viezbicke was in custody of the Wisconsin Prison System. (R:45) (R:58) (R:71, 2)

The State's reliance on *State v. Bell, 122 Wis. 2d 427, 362 N.W.2d 443 (1984)* to deprive the Trial Court of competency to proceed is extreme. The State cites *Bell* generously in its response brief interpreting the phrase "in custody under sentence of a court" to mean a defendant must actually be "in custody under the sentence he desires to attack." *Id. at 430*.

The problem with this is the view urging liberalization of the "in custody" requirement. *see ABA Standards Relating to Post-Conviction Remedies, Approved Draft, sec. 2.3 (1968); see also Wisconsin's Post-Conviction Procedure Act—Custody Requirements—What It Takes To Be Part of The "In" Crowd, 1971 Wis. L. Rev. 636.* Here, it would be excessive if the circuit court lost competency to proceed for an eleven day delay in filing of the postconviction motion. The State's untimely objection to the Trial Court's competency to proceed fails for this simple reason.

In *Bell*, the appellant argued he was in custody of a state court albeit the Illinois state

court. The circuit court held the postconviction motion was "untimely since it is eleven years after the fact." *Id. at 428*. The circuit court found it was without subject-matter jurisdiction and dismissed the motion. Accordingly, the decision was affirmed.

By contrast, jurisdiction is proper in this case since Viezbicke was "in custody under sentence of a court," meaning a Wisconsin court, as the legislature intended. Circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over "all matters civil and criminal." Wis. Const. art. VII, §8; *Village of Trempealeau v. Mikrut, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190*. This case and *Bell* are incongruous. The appeal should not be dismissed for a want of jurisdiction.

a. The State waived an objection to the Trial Court's competency to proceed and the admissibility of the evidence as it was not raised in the circuit court

The State waived an objection to the Trial Court's competency to proceed as it was not raised in the circuit court. A challenge to the circuit court's competency is waived if not raised in the circuit court. *Village of Trempealeau v. Mikrut, 2004 WI 79, ¶19, 273 Wis. 2d 76, 681 N.W.2d 190 (2004) (citing In the Interest of G.L.K., 153 Wis.*

2d 245, 248, 450 N.W.2d 498 (Ct. App. 1989)). The "[f]ailure to timely object to the court's competency to proceed constitutes a waiver of that objection." *Id. at ¶21. (quoting Wall v. Department of Revenue, 157 Wis. 2d 1, 7, 458 N.W.2d 814 (1990)) (citing G.L.K, 153 Wis. 2d at 248)*. Here, "there is no evidence in the record that the State challenged the circuit court's competency." *State v. Starks, 2013 WI 69, ¶38, 349 Wis. 2d 274, 833 N.W.2d 146*. (R:69) (R:71) The first objection to the Trial Court's competency to proceed was made in the State's response brief. The State waived an objection to the Trial Court's competency to proceed.

The State also waived an objection to the admissibility of the evidence as it was not raised in the circuit court. (R:69) (R:71) Failure to make a timely objection to the admissibility of evidence waives that objection. Wis. Stat. §901.03(1)(a); *State v. Hoffman, 106 Wis. 2d 185, 214, 316 N.W.2d 143 (Ct. App. 1982)*. Here, the State appears to argue for the first time service of the evidence attached to the motion was not effectuated upon them. However, the State was served the documentary and digital evidence according to the rules of evidence. Therefore, the State waived an objection to the admissibility of the evidence.

II. The Defendant-Appellant Was Not Obligated to Testify and the Court Record Is Sufficient

There is no per se obligation which required Viezbicke to testify at the *Machner* hearing. It is the responsibility of the Trial Court to make a full record. *State v. Harris, 92 Wis. 2d 836, 845, 285 N.W.2d 917 (1975)*. The privilege against self-incrimination is not waived when the person appeals from the conviction arising from the guilty plea. U.S. Const. amend. V*; Id*. Here, the State implies Viezbicke bungled his obligation to testify and conjures negative connotations from his silence, such as, he did not understand his role, or did not follow the rules, depreciating the purpose of the Fifth Amendment. It is suggestions such as these that create turbid seafaring in the ocean of the law.

The State will have us believe Viezbicke did not follow the rules and procedures in the Trial Court, but a criticism of Viezbicke's pro se status is without merit. Further, the State cannot convincingly point to any court rule or procedure in particular which Viezbicke did not follow. During the proceedings Viezbicke did not solicit special treatment or expect leeway because he was pro se. (R:69) (R:71) Neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements

or to point them to the proper substantive law. *Waushara County v. Graf, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992)*. Here, Viezbicke has conducted himself in good faith with professionalism by taking it upon himself to abide by the applicable law to the best of his knowledge and ability.

The record as a whole is adequate. The State has requested this case be remanded to the circuit court for more robust fact finding. In essence, all this would accomplish is further delaying Viezbicke the relief he is entitled to and a probable invocation of his Fifth Amendment right to not testify. The State's interest in a fact-finding hearing is likely espoused by the lack of rebuttal evidence it possesses to refute the claims made. An appellate court's review is confined to those parts of the record made available to it. *State v. Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992)*. This Court does not need a further inquiry into the facts to make a reasoned judgment on the matter.

III. Claims

a. Outrageous governmental conduct

A due process situation may arise where the government itself was so enmeshed in the criminal activity that the prosecution of the defendant was held to be repugnant to the American criminal justice system. *State v. Steadman, 152 Wis. 2d*

293, 301, 448 N.W.2d 267 (Ct. App. 1989) see U.S. v. Russell, 411 U.S. 423, 428 (1973).

Here, the State argues the postconviction motion never revealed any facts on which a defense could be based. However, the pleadings were amended orally at the *Machner* hearing to include the claim of outrageous governmental conduct. (R:45) (R:46) (R:71, 3-7) The facts may have been presented ineloquently at the proceedings with imprecise citations to precedent, but there are facts on this record supporting outrageous governmental conduct.

b. Entrapment

Entrapment is a defense available to a defendant who has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit. *State v. Pence, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989).*

The State argues there are no facts in the record of the post-conviction motion that could conceivably form the basis for an entrapment defense. The State further argues Viezbicke has offered no testimony or proof of entrapment at the motion hearing supporting the facts indicated in his various motions.

In rebuttal, there are ample facts in the postconviction motion supporting an entrapment

defense. (R:45, 2-3, 8, 12) The facts indicate not only excessive inducement by way of instigation and coercion by police, but also a lack of predisposition by Viezbicke to resist arrest – the very touchstones of entrapment.

It is true the absence of evidence is what is important here because the police intentionally turned the body camera off (and then back on afterwards) to obscure the footage which would have shown the tactics police deployed to entrap Viezbicke. (Ex. 3, Body Camera Footage) It would be an "impossible task" if "defendants were required to show that the destroyed tape was exculpatory." *State v. Amundson, 69 Wis. 2d 554, 577, 230 N.W.2d 775 (1975)*. Here, both the facts alleged in the postconviction motion and the gap in the body camera footage on this record support an entrapment defense.

c. Failure by police to preserve potentially exculpatory evidence

The State cites *State v. Hahn, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986)* arguing a defense of spoliation in the criminal context depends on whether the evidence was in possession of the authorities before it was lost or destroyed. However, in this instance *State v. Greenwold, 189 Wis. 2d 59, 525 N.W.2d 294 (1994)* is controlling. Further, *Hahn* has been abrogated

by an unpublished opinion. Further still, *Hahn* does not use the bad faith test as it predates the standard set forth by *Arizona v. Youngblood, 488 U.S. 51 (1988)*. The Trial Court thought there has to be a bad faith element when assessing the claims at the scheduling hearing. (R:69, 6) The claims in this case should not be conflated with overruled precedent.

To be clear, the claim Viezbicke has brought is the police violated his due process rights when they failed to preserve the potentially exculpatory evidence, being the body camera footage, by intentionally turning their body camera off. This is true even though Viezbicke used the title spoliation loosely and misspoke on occasion. The nature of motion is determined from its substance, and not its label. *Buckley v. Park Bldg. Corp., 27 Wis. 2d 425, 431, 134 N.W.2d 666 (1965)*. Here, the postconviction motion cites *Greenwold II* and follows the bad faith test while adducing evidence in support of this theory.

d. Ineffective assistance of counsel

To prevail on a claim of ineffective assistance of counsel a defendant must "show that counsel's performance was deficient and that deficient performance prejudiced him." *State v. Luedtke, 2015 WI 42, ¶63, 362 Wis. 2d 1, 863 N.W.2d 592 (citing Strickland v. Washington, 466*

U.S. 668, 687 (1984)). A reviewing court may find numerous instances of deficient performance establish cumulative prejudice. *State v. Thiel, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305*.

The State argues there is no demonstration of prejudice on all four ineffective assistance claims. At the *Machner* hearing, Ms. Dvoran's memory during direct examination was unreliable. (R:71, 11-22) By contrast, Ms. Dvoran's recollection was keen when cross examined by the State. (R:71, 27-34)

First, with regard to the improper legal advice, when questioned about the alleged advice on direct the witness stated she "might have" said that. (R:71, 18-19) A reasonably competent attorney would not have given the prejudicial advice.

Second, the irrational trial strategy claim is perplexing to the extent Ms. Dvoran encouraged Viezbicke to "pursue something civilly," meaning excessive force, yet still relied on the government's version of the facts to reject an entrapment defense. (R:71, 9, 18-19, 33-34) The irrational trial strategy was prejudicial.

Third, it was prejudicial that a motion to dismiss was not brought on grounds the police failed to secure potentially exculpatory evidence.

Moreover, a request for jury instructions could have been made in light of Viezbicke's account of the incident and the missing body camera footage. (R:45, 18-19) (Ex. 3, Body Camera Footage)

Finally, as for the probative value of the body camera footage being overlooked, the record shows police reporting is inconsistent with the timeline between recordings on the body camera footage. (R:45, 14-15) (R:46, 9) (Ex. 3, Body Camera Footage) Had the evidence been untainted by counsel's errors, a jury would have been suspicious of police misconduct and unable to make a guilty finding beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, the Defendant-Appellant is entitled to the relief requested in his appellant brief.

Dated this 10th day of August, 2022.

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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 3,483 words.

Dated this 10th day of August, 2022

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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 s. 809.12(12).

This electronic brief is identical in content in format to the printed form of the brief filed as of this date.

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

Dated this 10th day of August, 2022

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