STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP001464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Waukesha County Circuit Court, the Honorable Paul Bugenhagen, Jr., Presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED[1]

1. During Mr. Grady's restitution hearing, Mr. Grady—who was appearing via video—asked to consult with appointed counsel. Although the court went "off the record" to facilitate his request, the record shows that Mr. Grady's conversation with counsel occurred in open court and the State was not only permitted to listen in, but also to use Mr. Grady's remarks against him later in the hearing.

Did this procedure deprive Mr. Grady of due process such that he is entitled to a new hearing? In the alternative, is the usage of otherwise privileged and confidential communications another basis for reversal?

The circuit court answered no.

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[1] Mr. Grady was found incompetent during postconviction proceedings. Consistent with the Wisconsin Supreme Court's directive in *State v. Debra A.E.,* 188 Wis. 2d 111, 134, 523 N.W.2d 727 (1994), counsel is "continu[ing] postconviction relief on a defendant's behalf when any issues rest on the circuit court record, do not necessitate the defendant's assistance or decisionmaking, and involve no risk to the defendant." Should Mr. Grady regain competency in the future, he will "be allowed to raise issues at a later proceeding that could not have been raised earlier because of incompetency." *Id*.

2. The only request for restitution at issue was filed by an insurance company, which requested that it be reimbursed not only for its own losses, but also for the amount paid out by the insured as a deductible. Was Mr. Grady entitled to a hearing as to whether trial counsel was ineffective for stipulating to that legally deficient proposed restitution?

   The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The legal issues related to restitution are novel, so publication is justified. Oral argument, however, is not requested.

STATEMENT OF THE CASE AND FACTS

The underlying facts are undisputed: Mr. Grady, while undergoing a mental health crisis, stole a City of Milwaukee vehicle, absconded to Waukesha County, and engaged in a series of chases resulting in an eventual crash. (5; 50:22). Mr. Grady was initially found competent during pretrial proceedings before being ultimately found incompetent at the postconviction stage. (62:3; 110:27).

A police car was damaged in the underlying incident. (36:3). Accordingly, the insurance company for the City of Muskego requested $19,071.28 in restitution. (36:3). The insurance company was

requesting to be reimbursed $18,071.28 for "auto damages paid" and an additional $1,000 representing the City of Muskego's insurance deductible. (36:3).

At Mr. Grady's plea and sentencing hearing, counsel for Mr. Grady requested a hearing with respect to his ability to pay. (50:16). Defense counsel specifically informed the court she was not objecting to "the dollar amount." (50:16-17).

At the restitution hearing, the attorneys appeared in person. (65:2); (App. 11). Mr. Grady, however, appeared via video from Dodge Correctional Institution. (65:2); (App. 11). Counsel indicated that she would not be presenting any evidence, and instead would just be "making arguments" in support of the asserted inability to pay. (65:3); (App. 12). The court was informed that Mr. Grady was determined to be indigent by the Public Defender's Office, hence counsel was representing him as a public defender appointment. (65:3); (App. 12). Mr. Grady had "no assets or income." (65:3); (App. 12). He was also responsible for supporting a six-month old child. (65:3); (App. 12).

Midway through the hearing, Mr. Grady interjected and responded in the affirmative when asked by the court if he wished to consult with counsel. (65:4); (App. 13). The court went off the record. (65:4); (App. 13). Immediately thereafter, the State informed the court, "I mean, it sounds like there's some ability to pay." (65:4); (App. 13). According to the State, "it sounds like Mr. Grady is saying that he can work while

out on extended supervision." (65:5); (App. 14). The State also referenced another off-the-record comment that Mr. Grady had allegedly made about previously repaying "over $3,000 in tickets in his past" and therefore asked the court to reject Mr. Grady's arguments about an inability to pay. (65:5); (App. 14).

In response to the State's comments about what Mr. Grady had apparently told his attorney while "off the record," the court made the following remarks:

> And for the record, we had gone off the record when he was speaking with his attorney. I warned him -- or told him that everybody could hear him obviously. And that is what Attorney Sitzberger was referring to. But what he was referring to obviously is not going to show up in the transcript.

(65:5); (App. 14).

The court then granted the request for restitution. (65:7); (App. 16).

Mr. Grady ultimately filed a Rule 809.30 postconviction motion arguing that he was entitled to a hearing regarding his ability to pay due to ineffective assistance of counsel. (74:7). Mr. Grady argued that his lawyer performed deficiently by stipulating to a legally problematic restitution amount, by not presenting actual evidence in support of the ability to pay arguments and for not presenting an interest of justice argument under Wis. Stat. § 973.20(5)(d). (74:7). Mr. Grady also argued that the circumstances of the restitution hearing—during which time Mr. Grady was not given a meaningful opportunity to

consult with counsel and actually had his privileged communications used against him—merited a new hearing. (74:9). The court denied relief, without an evidentiary hearing. (96); (App. 9).

This appeal follows.

ARGUMENT

I. Mr. Grady is entitled to a new hearing on his ability to pay as a result of his inability to meaningfully consult with counsel at the original hearing and because his otherwise privileged communications with counsel were used against him.

A. The procedure in this case violated Mr. Grady's right to procedural due process.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. V. "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987). "This requirement has traditionally been referred to as 'procedural' due process." *Id*. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property" *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "[F]undamental fairness" is therefore the "touchstone

of due process." *Gagnon v. Scarapelli,* 411 U.S. 778, 790 (1973).

In this case, Mr. Grady's restitution hearing was fundamentally unfair. Although he had the assistance of a lawyer at that hearing, the procedure utilized by the court prevented Mr. Grady from fully realizing the benefits of being represented by counsel and, in fact, materially impeded his ability to have a privileged and protected line of communication with his attorney. Not only was his attorney-client relationship actively impeded by this procedure, but his communications with his attorney were also made available to adversary counsel, who was able to incorporate them into his arguments against Mr. Grady's claim of an inability to pay.

Thus, it would appear from the record that Mr. Grady began the hearing at a disadvantage—while the lawyers and the judge were together in-person, Mr. Grady was appearing via video from a correctional institution. (65:2); (App. 11). The circumstances as to why Mr. Grady was not produced in-person are not in this record, contrary to the State's assertions during postconviction proceedings that Mr. Grady—an incarcerated and severely mentally ill person with no freedom of movement—"chose" not to be present for the restitution hearing. (111:15); (App. 33).

When Mr. Grady had an issue to discuss with his lawyer, the court attempted to facilitate that request by going off the record. (65:4); (App. 13). However, as the court made clear at the postconviction proceedings,

it did not actually give Mr. Grady an opportunity to confidentially consult with his attorney, as his communication with counsel occurred in an "open courtroom" with the judge and the district attorney present. (111:20); (App. 38). Mr. Grady's voice was "broadcast into the courtroom and everybody that was on cameras." (111:20); (App. 38). As the record shows, the State was therefore able to eavesdrop on that communication and then used Mr. Grady's comments to counsel to rebut his argument that he was unable to pay restitution. (65:5); (App. 14).

Under these circumstances, it is simply irrelevant that Mr. Grady may have been "warned" that others could hear him. (65:5); (App. 14). The issue is that Mr. Grady—the incarcerated person appearing via video—was not given a fair choice. Option A was to have access to his attorney, while accepting that others could hear him; Option B was to heed the court's warning and to not discuss confidential legal matters with counsel. From a due process perspective, this is not a defensible "choice"; imposing those options is what renders this hearing fundamentally unfair. The record therefore does not reflect that the court ever attempted to meaningfully facilitate a confidential conference, by clearing the courtroom or by placing Mr. Grady in a secure setting to speak with his attorney.

Accordingly, this Court must reverse and remand for a new hearing.

B. To the extent the State relied on privileged attorney-client communications, that error also necessitates reversal.

It is well-settled in Wisconsin law that communications with an attorney are privileged and inadmissible in court. Wis. Stat. § 905.03. As the Wisconsin Supreme Court has recognized, there are strong public policy goals motivating a broad reading of that privilege:

> Policy considerations play a fundamental role in protecting the very important relationship between attorney and client. The attorney-client privilege provides sanctuary to protect a relationship based upon trust and confidence.

State v. Meeks, 2003 WI 104, ¶ 59, 263 Wis. 2d 794, 666 N.W.2d 859. Accordingly, Wisconsin law recognizes that when there has been an improper admission of privileged communications, the remedy must be a re-do of the underlying proceeding. *Id*., ¶ 61.

Although Wisconsin law also recognizes that restitution hearings do not require "strict adherence to the rules of evidence," *State v. Johnson*, 2005 WI App 201, ¶ 14, 287 Wis.2d 381, 704 N.W.2d 625, the attorney-client privilege is not strictly an evidentiary rule. It also derives from fundamental rules governing the ethical conduct of lawyers, SCR 20:1.6, and—as articulated by the Wisconsin Supreme Court in *Meeks*—plays an important role in assuring the integrity and overall functioning of adversary

proceedings in our judicial system. Thus, as the circuit court impliedly recognized in this case, the privilege still has a place in restitution proceedings. (111:21); (App. 39). After all, a contrary holding would result in an implausible and unworkable scenario, wherein the State would be free to subpoena appointed counsel and compel that attorney to testify as to their client's financial status, to name just one example. Although the rules of evidence may be relaxed at a restitution hearing, surely they cannot be nonexistent.

In this case, Mr. Grady attempted to consult with counsel and apparently conveyed numerous pieces of information about his finances and ability to work. The State then used those same communications to argue against Mr. Grady's request. As that procedure violated the prohibition against admissibility of privileged communications, this Court is duty-bound to order a new hearing. *Meeks*, 2003 WI 104, ¶ 59.

Importantly, the circuit court in this case appeared to accept the viability of Mr. Grady's argument, but rejected it solely because it could not "find that this was intended to be confidential." (111:20); (App. 38). The court therefore appeared to conclude that because Mr. Grady had spoken in a volume that allowed the prosecutor to overhear, there was no intent to convey anything confidential to counsel. (111:19-20); (App. 37-38).

As outlined above, however, one problem with that analysis is that the circuit court was actually

responsible for structuring the hearing in such a way that Mr. Grady had little choice but to have his communications with counsel overheard. Moreover, it ignores the most crucial factual considerations. Contrary to the court's ruling, Mr. Grady in this case: (1) manifested a desire to speak with his attorney about the underlying facts at issue in the restitution hearing; (2) accepted the court's invitation to discuss the matter with counsel; and (3) went "off the record" in order to do so. Under these circumstances, any contrary "finding" that Mr. Grady did not intend his ensuing communications to be confidential is clearly erroneous and cannot support the circuit court's denial of the postconviction motion.

And, while the court appeared to find that Mr. Grady continuing to talk to his attorney after having been warned that others could hear him somehow constituted a waiver of any claim of privilege, that analysis fails to recognize that a waiver must be "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) and not merely the product of a defendant's misunderstanding of courtroom procedure.

Accordingly, this Court should reverse and remand for a new hearing.

II. This Court must remand for an evidentiary hearing on Mr. Grady's claim that his attorney was ineffective for stipulating to a legally problematic restitution amount.

A. Legal standard.

Both the state and federal constitutions guarantee criminal defendants a right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). This right is significant, as it is the defendant's access to an effective lawyer which functions to ensure the overall fairness of the criminal justice system. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

A defendant claiming his constitutional right to the effective assistance of counsel has been violated must first prove that counsel performed "deficiently." *Strickland*, 466 U.S. at 688. This requires the reviewing court to independently examine whether counsel's conduct fell below "an objective standard of reasonableness." *Id*.

Counsel's deficient performance entitles the defendant to a new hearing when he can prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Smith*, 207 Wis. 2d 259, 276, 558 N.W.2d 379 (1997) (quoting *Strickland*, 466 U.S. at 694). Importantly, in assessing prejudice, the

reviewing court must do more than simply inquire as to whether there was sufficient evidence to uphold the result below. "The focus of this inquiry is not on the outcome[…], but on the 'reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 267 Wis. 2d 571, 665 N.W.2d 305 (quoting *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

In Wisconsin, a defendant can only prevail on an ineffective assistance of counsel claim after presenting the testimony of defense counsel at a postconviction hearing. *State v. Machner*, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979). In order to obtain such a hearing, the postconviction motion must allege, on its face, "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

Whether the defendant's motion is sufficient to obtain a hearing is a question of law, which this Court reviews de novo. *Id.* "However, if the motion does not raise facts sufficient to entitle the movant to Case relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing," which this Court reviews under the deferential erroneous exercise of discretion standard. *Id.*

B. Counsel unreasonably stipulated to a clearly erroneous proposed restitution request.

In this case, the insurance company— Statewide Services Inc.—requested $19,071.28 in restitution as a result of damage to a squad car during the police chase. (36:2). That total includes both the amount that Statewide paid out to the City of Muskego for repairs, (36:16), as well as the City of Muskego's insurance deductible. (36:2).

Thus, it would appear that the Insurance Company was "out" $18,071.28 and the City lost $1,000 as a result of Mr. Grady's conduct. Yet, the ultimate restitution order stipulated to by counsel provides that the entire repair cost—$19,071.28—is to be paid as restitution to the insurance company, despite the insurance company's actual losses only being $18,071.28. This is what is reflected on the JOC. (57:2); (App. 7).

Restitution, however, is limited to the victim's "actual pecuniary losses." *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). Here, the insurance company obviously did not "lose" the money paid out by the City as an insurance deductible. Instead, the evidence submitted by the insurance company shows that they had cut a check to the City for the $18,071.28 to cover the claimed damages. (36:16). Under these circumstances, awarding the insurance company an additional $1,000 to cover a loss sustained by some other actor is, in fact, unjust enrichment.

Although the circuit court speculated that there was some kind of contractual relationship under which

the insurance company was entitled to collect and then disburse the deductible (111:26); (App. 44), the paperwork submitted by the insurance company does not clearly support that inference. Simply put, the insurance company had no right to request it be repaid for losses it did not actually suffer and reasonably competent counsel should have spotted that error.

And, while the court also speculated there could be no prejudice as there was actually $19,071.28 in losses (111:26); (App. 44), the court's comments are speculative. Unless a victim claims a loss at a restitution hearing then, legally speaking, that loss does not exist. If counsel had objected, Mr. Grady would not have been ordered to pay the insurance company $1,000 more than they were owed.

Accordingly, because it is clear that counsel stipulated to an erroneous restitution request—and Mr. Grady alleged the grounds for ineffective assistance of counsel in his motion—this Court must reverse and remand for an evidentiary hearing.

CONCLUSION

For the reasons set forth herein, Mr. Grady asks the Court to grant the requested relief.

Dated this 30th day of October, 2023.

Respectfully submitted,

Electronically signed by Christopher P. August
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,746 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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 30th day of October, 2023.

Signed:
Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender