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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP001464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. The circuit court chose to conduct a contested restitution hearing as a "hybrid" procedure: Mr. Grady, the mentally ill criminal defendant, appeared via Zoom from prison. His lawyer, the assistant district attorney, and the judge all appeared in-person. During the hearing, Mr. Grady asked to speak to his lawyer. The court went "off the record" to facilitate that request, but made no attempt to ensure a confidential line of communication. The State, after listening in on Mr. Grady's conversation with his attorney, used his comments to support its restitution argument.

   Does this procedure necessitate a remand for a new restitution hearing?

The circuit court concluded that because Mr. Grady had been warned "off the record" that his communications were not confidential, reversal was not warranted. The court of appeals affirmed.

2. May an insurance company be awarded restitution equivalent to the deductible paid by an insured when that insured has not filed a request for restitution?

The circuit court inferred the existence of a contractual relationship between the insurance company and its insured that entitled it to request

restitution on the insured's behalf. The court of appeals held that this was a reasonable factual inference and affirmed.

CRITERIA FOR REVIEW

This case provides the Court with an opportunity to address an issue of state-wide impact with important due process implications. Following the COVID-19 pandemic—which forced many courtrooms to innovate with respect to their usage of videoconferencing technology—Zoom hearings are a commonplace feature in proceedings across the State. On the whole, it is undisputed that Zoom has the potential to make legal proceedings more accessible and convenient.

Yet, as this case demonstrates, system actors must be cautious when relying on such technologies of convenience. Basic principles of our adversarial system—including the sacrosanct nature of the attorney-client relationship—require that judges scrupulously ensure that "convenience" does not override important due process protections afforded to litigants.

Here, the way in which videoconferencing technology was used made Mr. Grady's restitution hearing fundamentally unfair. Mr. Grady was never given a meaningful opportunity to have a truly confidential line of communication with his appointed lawyer. Moreover, the State was permitted to use his comments to his lawyer against him.

As Judge Maria Lazar points out in her dissent to the summary disposition issued by the court of appeals, this fact pattern is problematic in many respects. Moreover, there were alternatives that could have been used by the circuit court which would have eliminated any due process concerns. Judge Lazar's dissent summarizes a number of foreign cases to support her analysis, which is instructive with respect to future cases inevitably presenting some variant of the same problem. Judge Lazar's dissent, however, appears within an uncitable summary disposition, meaning that its astute analysis of the pitfalls of Zoom hearings—and its concrete suggestions for ensuring such hearings are conducted in conformity with due process concerns—will have little impact on statewide practice. That is a regrettable development.

This case is one of first impression, without any Wisconsin authority directly on point. Litigants in Wisconsin would therefore benefit from this Court's review, which will illuminate the ways in which Zoom hearings must be conducted in order to honor constitutional rights, including the right to due process of law. Accordingly, review is warranted under Wis. Stat. § 809.62(1r)(a) § 809.62(1r)(c)2-3.

If this Court accepts review, Mr. Grady also asks this Court to consider his ineffectiveness of counsel claim, which concerns a failure to object to the cost of a deductible (paid by an insured) to be reimbursed to an insurance company. As Mr. Grady argued below, Wisconsin law only permits actors to be reimbursed for "actual pecuniary losses." *State v. Holmgren*, 229 Wis.

2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). Here, the insurance company was therefore being reimbursed for money it did not "lose" and which it was not entitled to under controlling law. This Court should accept review and determine whether there is an implied exception for insurance companies requesting restitution on behalf of their insured—an issue that will doubtless recur in future restitution cases.

STATEMENT OF FACTS

Kordell Grady is a severely mentally ill young man who has been diagnosed with "[u]nspecified schizophrenia spectrum and other psychotic disorder." (110:8). He was found not competent to proceed during postconviction proceedings. (110:27).

In 2021, while undergoing a mental health crisis, Mr. Grady stole a parking enforcement vehicle owned by the City of Milwaukee, traveled to Waukesha County, and engaged in a series of chases before crashing the car. (5; 50:22). According to defense counsel's argument at sentencing, Mr. Grady's intention was to commit suicide during this incident. (50:22).

Mr. Grady resolved his case with a plea agreement, (41), and was ultimately sentenced to prison. (47); (App. 18).

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). Specifically, 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).

Appointed counsel for Mr. Grady requested a hearing with respect to his ability to pay. (50:16). However, 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. 26). Mr. Grady, however, appeared via video from Dodge Correctional Institution. (65:2); (App. 26). 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. 27). 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. 27). Mr. Grady had "no assets or income." (65:3); (App. 27). He was also responsible for supporting a six-month old child. (65:3); (App. 27).

Midway through the hearing, Mr. Grady interjected and responded in the affirmative when asked by the court if he wished to consult with his attorney. (65:4); (App. 28). The court went "off the record" to allow him to do so. (65:4); (App. 28). After the parties went back "on the record," the State informed the court, "I mean, it sounds like there's

some ability to pay." (65:4); (App. 28). According to the State, "it sounds like Mr. Grady is saying that he can work while out on extended supervision." (65:5); (App. 29). 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, based in part on Mr. Grady's comments to his attorney, asked the court to reject Mr. Grady's arguments about an inability to pay. (65:5); (App. 29).

In response to the State's comments about what Mr. Grady had 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. 29).

The court then granted the request for restitution. (65:7); (App. 31).

Mr. Grady ultimately filed a Rule 809.30 postconviction motion arguing that he was entitled to a new restitution hearing due to ineffective assistance of counsel. (74:7). Relevant to this petition, Mr. Grady argued that his lawyer performed deficiently by stipulating to a legally problematic restitution amount, as he did not believe the insurance company should be reimbursed for a monetary loss accrued by another party. (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. 24). As to Mr. Grady's argument regarding his conversation with his lawyer during the restitution hearing, the circuit court denied relief because it could not find that Mr. Grady intended his comments to be confidential. (111:21); (App. 54). As to the ineffectiveness claim, the circuit court concluded Mr. Grady was not prejudiced as there was no dispute that the total monetary loss was correct. (111:25); (App. 58). It believed it was proper to infer the existence of a contractual relationship between insured and the insurance company which permitted the insurance company to seek restitution on the insured's behalf. (111:25); (App. 58).

The court of appeals affirmed in a summary disposition. As to Mr. Grady's argument that the hearing was fundamentally unfair given that he was not given a meaningful opportunity to have a confidential conference with his attorney, the court of appeals held that "[n]othing in the record suggests that Grady asked to speak privately with his attorney." (Summary Dispo at 4). (App. 6). Moreover, the court also relied on the fact that Mr. Grady was "warned" that others could hear him while off the record. (*Id.*). Likewise, the court of appeals concluded there was no improper use by the State of Mr. Grady's

communications to his attorney as, under these facts, there was no intent that those statements not be disclosed to others. (Summary Dispo at 5.). (App. 7).

Finally, as to the ineffectiveness claim, the court agreed that Mr. Grady had not been prejudiced given that the total dollar amount was correct. (Summary Dispo at 6). (App. 8). Moreover, it also concluded that the circuit court reasonably inferred the existence of a contractual relationship between insured and insurance company allowing the insurance company to seek restitution on the insured's behalf. (*Id*.).

Judge Maria Lazar dissented, asserting that, "While confidential communication between a lawyer and client is not a constitutional right per se, denying it to one side is fundamentally unfair and undermines the constitutional right to a fair hearing. (Summary Dispo at 7). (App. 9). In Judge Lazar's reading, the majority had misconstrued the legal question at issue: "It is not whether Grady continued to communicate with his attorney in an effort to obtain legal advice despite being told that others in the courtroom could also hear their conversation, but whether the court appropriately facilitated a means by which Grady could exercise his statutory and due process rights to communicate with his attorney in private." (Summary Dispo. at 8). (App. 10).

Here, Mr. Grady was "placed in the untenable position of not being able to communicate confidentially with his attorney at any point during the restitution hearing at issue." (Summary Dispo. at

9). (App. 11). Despite the existence of alternative options—like a Zoom "breakout room"—the circuit court merely warned Mr. Grady, off the record, that others could hear him. According to Judge Lazar, this was insufficient; here, the decision to go "off the record" means "[t]here is no evidence as to what the court actually told Grady, whether the court's statement about the ability of the entire courtroom to hear was given before or after Grady divulged information, whether Grady heard the court's comment, or whether Grady understood that he was forfeiting his statutory right to engage in confidential communication with his attorney." (Summary Dispo. at 10-11). (App. 12-13).

Analyzing several persuasive cases from outside our jurisdiction, Judge Lazar concluded that the circuit court's choice of procedure rendered Mr. Grady's rights "excessively flimsy, if not entirely meaningless." (Summary Dispo. at 13). (App. 15).

This petition follows.

ARGUMENT

I. This Court should accept review and reverse given the circuit court's failure to protect Mr. Grady's ability to speak confidentially with his lawyer.

A. Mr. Grady's due process rights were violated.

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 US 778, 790 (1973).

As Judge Lazar correctly recognizes in her dissent, this hearing was fundamentally unfair given the circuit court's problematic reliance on a "hybrid" procedure which did not adequately enable Mr. Grady to reap the benefits of being represented counsel, as it did not safeguard his ability to have a truly confidential line of communication with that advocate.

Instead, the circuit court placed Mr. Grady in a fundamentally "untenable position"—as he was forced to choose between either speaking to his lawyer with the judge and prosecutor listening in or, in the alternative, foregoing the opportunity to consult with counsel at all. There was no effort to facilitate alternative means of communication, although the court was certainly aware of those options based on its postconviction commentary. (111:19); (App. 52).

All the court did was "warn" Mr. Grady—a severely mentally ill person—that his communications could be heard by others. However, as Judge Lazar also points out, that warning was given off the record and there is no way to evaluate whether this warning was in any way sufficient; coupled with the lack of any evidence that other options were considered, the only reasonable reading is that it was not.

As Judge Lazar points out, other courts have recognized the unique need to safeguard the integrity of the attorney-client relationship when dealing with nontraditional appearances, such as the hybrid Zoom/in-person mechanism utilized here. (Summary Dispo. at 12). (App. 14). In this case, the circuit court was the master of the courtroom dynamics. It had power over Mr. Grady in structuring the hearing such that Mr. Grady's important ability to speak freely and confidentially to his lawyer was not encumbered. However, despite having options available to effectuate that important goal, the court did not meaningfully safeguard Mr. Grady's attorney-client

privilege—a serious and concerning failure, as Judge Lazar observes. (Summary Dispo. at 14). (App. 16).

This Court must ensure that similarly situated defendants do not face the same fate—having their right to counsel impeded in the name of the "convenience" that arises from conducting an adversary hearing on a screen. Because the court of appeals' analysis fails to sufficiently protect the due process rights of Wisconsinites appearing via Zoom in courtrooms across our state—and because Judge Lazar's cogent analysis deserves something other than being buried within an uncitable summary disposition—this Court should accept review and reverse.

B. Reversal is also warranted because the court of appeals failed to abide by this Court's holding in *State v. Meeks,* which recognized that violations of the attorney-client privilege necessitate reversal.

It is well-settled in Wisconsin law that communications with an attorney are privileged and inadmissible in court. Wis. Stat. § 905.03. And, as this Court has also 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.

Here, the court of appeals skirted the holding of *Meeks* by adopting the circuit court's finding that Mr. Grady's communications were not intended to be confidential. (Summary Dispo. at 5). (App. 7). Concerningly, the court reaches that conclusion despite the fact that there is actually no evidence in the record as to the communication at issue, precisely because the circuit court went "off the record" while Mr. Grady was consulting with counsel (and, in fact, the mere fact that the court went "off the record" is proof to the contrary as far as evaluating the subjective expectations of the persons involved in that conversation).

More problematically, the court of appeals' reasoning rests entirely on the sufficiency of the alleged warning given to Mr. Grady—an off the record warning that, given the dynamics at issue in this hearing, was insufficient to prompt a knowing, intelligent, and voluntary waiver.

Accordingly, this Court should accept review and hold that the State improperly incorporated communications made to counsel into its argument and, for that reason, reverse.

II. This Court should accept review and hold that Mr. Grady was entitled to an evidentiary hearing on his claim of ineffective assistance, as it was improper for counsel to permit a party to recover restitution which did not correspond to an actual pecuniary loss.

Finally, if this Court accepts review, it should also analyze Mr. Grady's ineffective assistance of counsel claim, which requires this Court to clarify the application of *Holmgren* to this fact pattern, which is likely to recur in future restitution hearings. Under Wisconsin law, aggrieved individuals may seek to recoup their "actual pecuniary losses" within a restitution hearing. *Holmgren*, 229 Wis. 2d at 365.

Here, the insurance company asked for—and was awarded—$1,000 that does not represent a loss that it actually incurred. Instead, that loss was incurred by a different potential claimant altogether. It may well be true that the insurance company has a contractual relationship with the insured such that it has agreed to seek restitution on the insured's behalf. However, there is scant proof of that relationship in this record and, moreover, this does not resolve the tension with fundamental restitution principles. Simply put, Mr. Grady is at a loss as to why he is now required to forward $1,000 to corporate entity that, in fact, did not lose $1,000.

Accordingly, this Court should accept review, hold that counsel erroneously stipulated to restitution that could not have been lawfully ordered and reverse.

CONCLUSION

For the reasons set forth herein, Mr. Grady asks this Court to accept review.

Dated this 31st day of July, 2024.

Respectfully submitted,

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

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,061 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 31st day of July, 2024.

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