State of Wisconsin
Court of Appeals
District 1
Appeal No. 2024AP001875-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Nicolas J. Bergner,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Anderson M. Gansner and The Honorable Lena Taylor, presiding

Defendant-Appellant's Reply Brief

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Argument

I. The state apparently misunderstands the deficient performance prong of the ineffective assistance of counsel rubric.

The heading of the state's argument proclaims that, "The Trial Court Properly Denied Mr. Bergner's Post-Conviction Motion without a Hearing Because He Made Only Conclusory Allegations to Support His Claim." [Resp. brief p. 4]

The phrase "conclusory allegations" does not possess the talismanic power that the state supposes it has in this case. Bergner's motion specifically alleged that the court made an order for a numbers only jury selection process, which, under the law, cannot be done in the absence of specific findings by the judge. The motion further alleges that the court did not make any such findings, but Bergner's lawyer did not object to the court's order. That is about as specific (i.e. not conclusory) an allegation as one could make.

Reading on, one is able to identify the source of the state's confusion. The state apparently does not understand the deficient performance prong of the ineffective assistance of counsel rubric. In its brief, the state contends that:

> In his post-conviction motion, Mr. Bergner asserts that because jurors were consistently referred to by their juror numbers during the jury selection process, it is likely that the jurors believed

> that their personal information was not part of the record. (R. 92:2.) *Mr. Bergner claims that the jurors evidently did not want the information to be disclosed in court, and that this procedure impermissibly led the jury to believe that Mr. Bergner is a dangerous person. Bergner offered no evidence in support of this claim.*

(emphasis provided; Resp. brief p.6)

It is not Bergner, alone, who thinks that the use of a numbers-only jury selection procedure violates due process. The Wisconsin Supreme Court thinks so too. As the court explained, “Serious concerns regarding a defendant's presumption of innocence are raised when juror information is restricted, as in this case. As observed by the Supreme Judicial Court of Massachusetts, ‘the empanelment of an anonymous jury triggers due process scrutiny because this practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence." *State v. Tucker,* 2003 WI 12, P18, 259 Wis. 2d 484, 497, 657 N.W.2d 374, 380, 2003 Wisc. LEXIS 12, *14

So Bergner is not required to “offer evidence in support of this claim.” [Resp. brief p. 6] He is required only to allege facts which, if true, would establish that defense counsel’s performance was deficient. The Supreme Court has already expressed a “serious concern” about the use of a numbers-only jury selection procedure. Consequently, before the circuit court may use a numbers-only procedure, the court

must make an individualized determination that the jury needs protection. "[W]e hold that when a circuit court restricts any juror information, the court must: (1) make an individualized determination that the jury needs protection; and (2) take reasonable precautions to minimize any prejudicial effect to the defendant, which includes making a precautionary statement to the jury so that the restriction does not negatively reflect on the defendant's guilt or character. The circuit court in this case failed to satisfy this two-prong test;" *Tucker*, 2003 WI 12, P27, 259 Wis. 2d at 501-502.

Thus, contrary to what the state seems to believe, it does not matter that during the course of voir dire some of the jurors revealed bits of personal information. *As a matter of law*, the circuit court cannot restrict juror information without making the findings set forth above. The findings were not made here, and defense counsel did not object. That is, by definition, deficient performance.

II. Counsel's deficient performance in this case was prejudicial because the evidence of Bergner's guilt was hardly "overwhelming."

According to the state, "Bergner offers no viable theory as to how the use of a numbers-only jury caused them to find him guilty of PAC charge or why the jury believed his expert had not demonstrated that the Intoximeter was not operating properly."

[Resp. brief p. 7]

There are a number of reasons that the state is wrong.

First off, Bergner is not required to show that "the use of a numbers-only jury *caused them to find* [Bergner] *guilty.*" Rather, "The prejudice inquiry asks whether '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. Romero-Georgana*, 2014 WI 83, 41, 360 Wis. 2d 522, 544, 849 N.W.2d 668, 678

Secondly, unlike in *Tucker* where the error was found to be harmless due to overwhelming evidence of Tucker's guilt, the evidence of Bergner's guilt was hardly overwhelming.

Here is how the Supreme Court summarized the evidence against Tucker: "Tucker admitted to police after she was given a *Miranda* warning that the cocaine belonged to her and that she had been selling cocaine for about a month. Tucker told police that she had purchased an "eight-ball" of cocaine and sold it in amounts of $ 20, $ 30, and $ 50 for a $ 150-$ 200 profit. In addition, the cocaine found in Tucker and McCray's apartment was in a plastic bag marked Shiree Tucker." *Tucker*, 2003 WI 12, P26, 259 Wis. 2d at 501.

Compare that with the evidence in Bergner's case. The jury found him not guilty of operating under the influence of alcohol. Bergner's blood-alcohol concentration was right at the

legal limit of .08 gms/210 liters of breath. [R:88-153; R:63-38] If Bergner's actual blood alcohol concentration was a hundredth of a gram lower (i.e. .079), then there was no prohibited alcohol concentration violation. And, finally, according to Bergner's expert, Mr. Henson, given the margin of error for the Intoximeter machine, Bergner's actual blood-alcohol concentration was between .075 and .085. [R:63-53]

This is hardly the sort of overwhelming evidence of guilt that existed in *Tucker*.

Conclusion

For these reasons, it is respectfully requested that the court reverse the order of the circuit court denying Bergner's postconviction motion. The matter should be remanded to the circuit court with orders to conduct an evidentiary hearing into whether defense counsel had a legitimate reason for failing to object to the numbers-only jury selection procedure.

Dated at Milwaukee, Wisconsin, this 10th day of March, 2025.

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Certification as to Length and E-Filing

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 1311 words.

Dated at Milwaukee, Wisconsin, this 10th day of March, 2025.

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