State of Wisconsin

Court of Appeals

District II

Case No. 2024AP2239

State of Wisconsin,

Plaintiff-Respondent

v.

Jennifer R. Smart,

Defendant-Appellant

On a Notice of Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief
Entered in the Circuit Court for Waukesha County,
the Honorable Ralph M. Ramirez, Presiding.

Reply Brief of Defendant-Appellant

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I. Pursuant to American Bar Standards 22-2.4 (a), (b), and (c)(iii). Smart filed an appeal for review from a denial of a motion for postconviction relief.

In contrast to the time-bars in the State's arguments, Appellant filed her motion for post-conviction relief pursuant to American Bar Association (ABA) Standards § 22-2.4. In this case, the ABA Standard § 22-2.4.(a) removes the unreasonable finality imposed by Wis, Stat. 974.06 to challenge a wrongful conviction. ABA Standard 22-2.4.(a) states:

> A specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound.

The standard is reasonable when a questionable conviction is placed under scrutiny and factual errors are disclosed. Smart believes her three fact-based arguments prove that she was wrongfully convicted.

Smart has not petitioned for a writ of habeas corpus but her circumstances are similar to what happened with *Wilson v. Flaherty,* 689 F.3d 332, 340 (4th Cir. 2012) (Wynn J., dissenting) where the criminal investigation was "rife with gross police misconduct," and the plaintiff had a "compelling claim of actual innocence," but the court denied a habeas corpus petition because the court majority thought the "deprivations on liberty incident to [] sexual offender registration requirements are too trivial and too collateral to satisfy the requirement that a habeas petitioner be in custody," *Wilson v. Flaherty*, 689 F.3d 332 at 345.

The State should not be blocking Smart if it will not directly address her arguments.

ABA Standard § 22-2.4.(b) states:

> A person with a tenable or meritorious claim for postconviction relief who deliberately or inexcusably withholds

> presentation of that claim until occurrence of an event that he or she believes prevents successful reprosecution or correction of the vitiating error commits an abuse of process. Abuse of process ought to be an affirmative defense to be specifically pleaded and proved by the state. An applicant who commits an abuse of process may be denied relief.

It has not been in Smart's interest, or to her advantage, to delay the issues she discovered starting in September of 2021. Had Smart discovered them twenty-six years ago, she would have sought post-conviction relief, immediately.

The State posits the notion that, as soon as Smart found out that she was required to register—three years after she was convicted—she should have sought post-conviction relief then. The State appears not to comprehend that Smart was living in a bubble of shame thinking that she had been rightfully convicted.

The State asserts that it would be "substantially prejudiced if it had to address [Appellant's] substance" (RB:4, ¶ 4). That, simply, is not true. Smart has been giving the State the evidence it needs to address the case

since September of 2021: Counsel's failure to cross-examine State's victim/witness (SD), at the preliminary hearing is on the record (R5:121); SD's threats of domestic violence were in the district attorney files immediately after JD was taken into custody at Lac du Flambeau on October 7, 1998 (R5:4); Counsel filed with the circuit court defendant's Sentencing Memorandum (DSM)[1] and eight attachments filled with exculpatory evidence on July 26, 1999, six weeks after Smart was convicted and more than two weeks before she was sentenced;[2] And the defective plea colloquy is in the preliminary hearing transcript (R2). Smart believes that the compilation of evidence in Appellant's Brief makes it an easy task for the State and for this Court to see the truth.

Smart's case is unlike *United States v. Everett Ray Darnell*, 716 F.2d 479, 481 (7th Cir. 1983) because Smart "exercised reasonable diligence in ascertaining and presenting the asserted grounds for relief."

1 DSM was filed under the 98CF762 case—the case that was dismissed (R3:16)

2 If it was not for the presentence investigator's vacation delay, the sentencing judge would have had only four days to review the DSM (R5:86).

Smart started petitioning the circuit court for relief in September of 2021. The circuit court denied her relief for three years. Then, Smart filed a motion for post-conviction relief in the circuit court, pursuant to American Bar Association Criminal Justice Standard § 22-2.4 (R45). A hearing was scheduled (R47). When the motion was denied, Smart immediately filed the notice of intention to appeal (R50). On November 11, 2024, the notice of appeal was filed with the circuit court (R53). On January 16, 2025, Smart filed with court of appeals her brief (AB) and appendix.

ABA Standard § 22-2.4(c) states:

> "Where an applicant has completed service of a challenged sentence and belatedly seeks relief, … A sufficient postconviction showing of present need is made where: (iii) an applicant is under a civil disability resulting from the challenged conviction and preventing the applicant from a desired and otherwise feasible action or activity."

See, *Smith v. Doe,* 538 U.S. 84, 115-16 (2003) (Ginsburg, J., dissenting).

The double curse of a twice convicted sex offender locks Smart out of employment opportunity, community

engagement, freedom of movement, and just trying to live as a normal person.

The State believes that it is a mere "inconvenience" for Smart to have to register for the rest of her life as a sex offender. That is not true. In *Wilson v. Flaherty,* 689 F.3d 332, 348-49 (4th Cir. 2012) (Wynn J., dissenting), the Supreme Court stated:

> I am deeply troubled that our legal system would be construed to prevent a person with compelling evidence of [her] actual innocence and wrongful conviction from accessing a forum in which to clear [her] name, while, at the same time, restrain the liberty of such a person under a regime created to surveil society's most disdained criminal offenders.

U. S. CONST. amend. XIII, Section 1 states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The exception shows that a conviction can lead to a form of slavery or involuntary servitude. By the words "duly convicted," the inference arises that not all convictions are valid.

The State has made it impossible for Smart to move on with her life. The circuit court judge told Smart at sentencing, "The law provides for one chance. This is it, and there is only one."[3] Smart took advantage of that chance and was gainfully employed when, three years post-conviction, a probation officer told her to start registering as a sex offender. Twenty years later, Wisconsin Department of Corrections informed Smart that she is a sex offender for life. What the circuit court judge had given to Smart, the State took away.

II. The circuit court abused its discretion by not considering threats of domestic violence without calling a mistrial.

As the Appellant's Brief - Statement of Case and Facts shows (AB:10 ¶ 1), one of the real controversies was never tried (Wis. Stat § 752.35). Argument in

3 This reference is quoting Eric Decker, *Muskego Sun* (shortly after sentencing on August 19, 1999). This record is not part of the record on appeal. Appellant will make it available upon request.

Appellant's Brief raises questions, e. g., Is the defendant guilty of two counts of child abduction when the State and circuit court failed to admit its victim/witness SD's threats of domestic violence prior to the defendant shielding the other victim/witness JD by allowing him to go with her away from the premises where the threats of domestic violence were uttered? And—Can threats of domestic violence made by state's victim/witness SD, that did not enter the court record until after the defendant pled no contest to two counts of child abduction, be "passed upon" (RB:4 ¶ 3) by the circuit court before sentencing?

On July 26, 1999, six weeks after Smart was convicted, counsel delivered the DSM to the sentencing judge (R3:16).[4] The DSM contained exculpatory evidence that could have been used before trial to defend Smart against the charges of child abduction. The evidence was both relevant and admissible under Wis. Stats. §§ 904.01 and 904.02:

1. SD uttered threats of domestic violence shortly before JD left his home with Smart (first alleged child abduction);

4 Case 98CF762.

2. JD reported SD's threats to the Lac du Flambeau police when he was taken into custody the next day;
3. SD had a gun;
4. Smart had disarmed SD on one occasion;
5. SD assaulted Smart on another occasion;
6. JD and Smart were in fear of SD.

Upon being given this evidence, the court abused its discretion by proceeding to sentencing without calling for a mistrial. By ignoring the evidence—by excluding SD's threats of domestic violence—Smart was prejudiced.

The circuit court should have called a mistrial as soon as counsel provided the DSM and the eight attachments—all of which contained exculpatory evidence. The circuit court failed to consider the evidence, and proceeded to sentencing. Since September of 2021 Smart has been unraveling the strategies leading to the convictions.

The scarcity of records simplifies the case. The record is sufficient for Smart to present and substantiate her three issues. In the five months of Smart's incarceration, between the preliminary hearing and the plea hearing, counsel made overtures for college

admission, and collected critical exculpatory evidence that he did not present to the circuit court or file with the clerk until after Smart was convicted (AB:13-27). Repetition for emphasis: counsel . . . collected critical exculpatory evidence that he did not present to the circuit court or file with the clerk until after Smart was convicted.

Berger v. United States, 295 U.S. 78, 88 (1935). sets forth an ideal that all court officials involved with criminal defendants are wont to uphold:

> [a] representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor ☐ indeed, he should do so. But, while he may strike hard blows, he is not at

> liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The circuit court abused its discretion when it failed to call for a mistrial after being apprised of exculpatory evidence that was favorable to Smart's defense against multiple convictions for child abduction.

Conclusion

Wherefore, on the basis of the record on appeal, as it relates to the procedures and laws to be followed, and this defendant-appellant's affirmative showing of a manifest injustice, I, Jennifer R. Smart, pray this Court vacate all convictions and expunge all records in Waukesha County case number 98CF761 so that I may be afforded due process of law.

Dated at Confluence PA, March 20, 2025

Respectfully Submitted

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