STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

State of WISCONSIN,
Plaintiff-Respondent,

v. Case No. 2010AP000425

Tramell E. STARKS,
Defendant-Appellant.

APPEAL FROM CIRCUIT COURT OF MILWAUKEE COUNTY
FROM THE DENIAL OF POSTCONVICTION MOTION

APPELLANT'S REPLY BRIEF

Tramell E. STARKS,
Appellant-Defendant,
pro se.

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I. THIS IS STARKS' FIRST NOT THIRD POSTCONVICTION MOTION SUBSEQUENT TO HIS DIRECT APPEAL

In the "Supplemental Statement of Facts" section of their brief-in-chief, pp. 2-6, the Respondent points the finger at two previous pro se filings by STARKS as postconviction motions in an attempt to label the motion that is the subject of this appeal as his "third" postconviction motion subsequent to his direct appeal. STARKS opposes the argument of fact that this is his third postconviction motion. Based on a reasonable understanding of the procedural background of this case, this court should conclude that this is STARKS' first postconviction motion subsequent to his direct appeal.

MOTION FOR RECONSIDERATION--

On the heels of this court's decision on his direct appeal, STARKS chose to continue his appeal without the aide of counsel then filed a pro se "motion for reconsideration" (R. 114). The Respondent argues--with no supporting authority--that this pro se *motion for reconsideration* counts as a first and separate postconviction motion. To the extent that a direct appeal constitutes as a first postconviction action, see State v. Escalona-Naranjo, 185 Wis.2d 168, 517 N.w.2d 157 (1994) and State ex rel. Rothering v. McCaughtry, 205 Wis.2d 675, 556 N.W.2d 136 (Ct.App.1996), STARKS concedes that his *motion for reconsideration* was a "component" of his first postconviction motion/direct appeal and was not a separate postconviction motion. This court should agree and not construe the *motion for reconsideration* as a separate and first postconviction motion.

DECEMBER 17 POSTCONVICTION MOTION--

On December 17, 2009 STARKS filed a pro se 974.06 postconviction motion (R. 121) that was not accepted for review of the merits due to non-compliance with Local Court Rules on January 4, 2010 (R. 122). The circuit court informed STARKS that he may re-file his motion in accordance with Local Rules. Coincidentally at the same time the circuit court was drafting its January 4 Order, STARKS mailed a *motion to vacate DNA surcharge* as a "supplement" to his December 17 motion. Consequently the circuit denied the motion to vacate DNA surcharge in a separate order since it had already ruled on the December 17 motion. The respondent labels the *motion to vacate DNA surcharge* as STARKS' "second" postconviction motion.

STARKS had no idea when he mailed the motion to vacate DNA surcharge that the court had already ruled on his December 17 motion. It can and should be reasonably concluded, based on the timeline of the circuit court's January 4 Order and when the motion to vacate DNA surcharge was filed (Jan. 6), that the latter was intended to supplement the December 17 motion. For that reason, STARKS' motion to vacate DNA surcharge, like the December 17 motion, should not be included as a previous postconviction motion. See Respondent's Brief, p. 6 note 3.

Even assuming that the motion to vacate DNA surcharge was a separate filing to the December 17 motion, the Respondent does not cite any authority to support the conclusion that a motion to vacate DNA surcharge is one for postconviction relief. In fact, State v. Wynn, 2009 Wis. App. LEXIS 824--which weighed in on a motion to quash DNA surcharge--concluded that even if such a motion is

liberally construed it cannot be labeled as a 974.06 postconviction motion. Id. ¶9.

Furthermore, STARKS was precluded from challenging the DNA surcharge due to the timelines set forth under 809.30 Wis. Stats., wherefore the court found that a motion pursuant to Cherry was not applicable.

CONCLUSION (Issue I)--

The Respondent's conclusion that this appeal is the subject of STARKS' "third" postconviction motion is unsupported by the procedural facts of this case. This court should conclude, as a procedural fact, that this appeal is the result of STARKS' "first" pro se postconviction motion *subsequent* to his direct appeal.

Last, but not least, based on Black's Law Dictionary, 7th Ed., the definition of postconviction relief proceeding is "a state or federal procedure for a prisoner to request a court to vacate or correct a conviction or sentence." Neither a motion to vacate DNA surcharge nor a motion for reconsideration classify as a postconviction motion as defined by Black's Law Dictionary.

II. NONE OF STARKS' CLAIMS ARE PROCEDURALLY BARRED BY ISSUE PRECLUSION

The preliminary question to be answered by this court, before it reaches the merits of STARKS' claim, is: Are any of his claims barred by issue preclusion?

The Respondent asserts the procedural defense of issue preclusion against all of STARKS' ineffective trial counsel claims that are the subject of this appeal, on the grounds that they were previously litigated on direct appeal. See Respondent's Brief, pp. 6-16. STARKS asserts that none of the claims on this appeal are

barred by issue preclusion because the facts and law related to each claim are factually distinguishable from the claims raised on his direct appeal.

"Issue preclusion prevents re-litigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action and reduced to judgment." Flooring Brokers, Inc. v. Florstar Sales, Inc., 2010 WI App. 40, ¶6, 324 Wis.2d 196, 781 N.W.2d 248, 2010 Wisc. App. LEXIS 117. Put another way issue preclusion is the legal landfill where previously litigated claims are disposed of like trash. Claims that are sought to be excluded under the doctrine of issue preclusion must have been previously litigated on law or fact necessary to the judgment rendered in the prior action. See Michelle T. v. Crozier, 173 Wis.2d 681, 687-89, 495 N.W.2d 327 (1993).

"To determine whether or not the doctrine of issue preclusion bars a litigant's claim, courts apply a two-step analysis: (1) [they] ask whether issue preclusion can, as a matter of law, be applied and, if so, (2) whether the application of issue preclusion would be fundamentally unfair." Flooring Brokers Inc., Id.

B. The Facts And Law Related To STARKS' Ineffective Trial Counsel Claims Are Distinguishable From Claims Decided On His Direct Appeal

When the five claims on this appeal are viewed side-by-side with the claims that the Respondent relied upon to support the argument of issue preclusion, a better judgment can be made on whether or not the first step of the two-step analysis can be made. In the first step the reviewing court "must determine whether the issue or fact was actually litigated and determined in the prior

proceeding by a valid judgment and whether the determination was essential to the judgment." Flooring Brokers Inc., Id., ¶7. If the first step is not satisfied the doctrine of issue preclusion can not be applied as a matter of law.

1. Lesser Included Offense Instruction Versus Prejudicial Other-Acts Evidence

One of the claims addressed on STARKS' direct appeal, which the Respondent has chosen to support a claim of issue preclusion, was that the trial court failed to give a lesser included offense instruction of second-degree reckless homicide (R. 108:5-8). The Respondent argued that this claim invokes the doctrine of issue preclusion against STARKS' challenge to trial counsel's repeated failure to object, contest, or neutralize "prejudicial other-acts evidence" at trial, which counsel initially sought to have excluded before trial. Cf. Appellant's Brief, pp. 24-31; Respondent's Brief, pp. 9-11.

The obvious distinction between these two issues is apparent in their respective heading. Further evaluation of the facts underlying each claim substantiate this conclusion as well.

The facts underlying the claim raised on direct appeal (Lesser Included Offense Instruction) involve the trial court's decision to grant the State's request for first-degree reckless homicide instructions and deny STARKS' request for a second-degree reckless homicide instructions (R. 108:5). The facts underlying the claim on this appeal (Prejudicial Other-Acts Evidence) involve trial counsel's blunder with "bad acts evidence" that fails the admissibility test under Wis. Stats. §904.04(2).

With not even so much as an objection from trial counsel, Carvius WILLIAMS was allowed to tell the jury that STARKS told him, "If you shoot someone below the waist, it's not attempted homicide." (R. 89:76; Appellant's App. 116). The Respondent holds the mistaken position that this statement was made in reference to the victim Lee WEDDLE (Id. p. 9). However, the transcript of a pre-trial motion hearing reveals that the "when," "where," "why," and under what circumstances this "bad act statement" was allegedly made by STARKS was never discovered (R. 74:49). This "bad act statement" was never objected to or contested by counsel at trial. This "bad act statement" was elicited by the prosecutor in a manner to circumvent the admissibility test for other-acts evidence outlined under Wis. Stats. §904.04(2). This "bad act statement" was not explored by trial counsel during the cross-examination of WILLIAMS. Last, but not least, no cautionary instructions were requested or given to the jury to reduce their possibility of erroneously concluding--like the Respondent--that STARKS made this "bad act statement" at the time WEDDLE was shot or had the propensity to commit the charged offense, when in fact STARKS never made such a statement at all.

It is also worth mentioning that at the pre-trial motion hearing that addressed the "discovery concerns" with this other-acts evidence, the trial judge indicated twice that there were "a variety of other potential prejudicial issues" concerning this bad act statement (R. 75:8,15) and trial counsel ignored them.

The Respondent also argues that trial counsel's decision not to have this bad act statement excluded was a change in trial strategy. To support that argument the Respondent points to a

statement made by trial counsel at the jury instruction conference and suggests that the bad act statement was used to undermine the State's theory of intentional homicide and provide a basis for acquittal. According to the Respondent counsel used the bad act statement as a means to support an instruction on second-degree reckless homicide (Respondent's Brief, p. 10). However, the foundation of the Respondent's argument crumbles like a dry sand castle based on the fact that there is no mention of the bad act statement by trial counsel during opening or closing arguments to the jury. STARKS' request at trial was all or nothing; complete innocence. Even more important is the fact that it is not the role of the Respondent, or anyone else, "to engage in a post hoc rationalization for an attorney's actions by constructing strategic defenses that counsel does not offer." Goodman v. Bertrand, 476 F.3d 1022, 1029 (7th Cir.2006). See also Miller v. Anderson, 255 F.3d 455, 458 (7th Cir.2001)(Tactics are the essence of the conduct of litigation; much scope must be allowed to counsel, but if no reason is or can be given for a tactic, the label "tactic" will not prevent it from being used as evidence of ineffective assistance of counsel).

Add to this the fact that one of the two questions posed to the court by the jury during deliberation was, "Does shooting someone without 'intent to kill,' does that constitute reckless disregard for human life? (sic)" (Supplemental Appendix 151) and there is little room for doubt that the "bad act statement" affected the jury's verdict.

The issues/facts surrounding the prejudicial other-acts evidence were never litigated or determined on STARKS' direct appeal, and the doctrine of issue preclusion can not be applied as a matter of law.

2. Failure to Disclose "Junebug's" Identity Versus Failure to Investigate GILL's Phone Records

Another claim addressed by this court on direct appeal, which the Respondent used to support a claim of issue preclusion, was the State's failure to disclose Junebug's identity prior to trial (R. 108:11-12). It is the position of the Respondent that this claim invokes the doctrine of issue preclusion against STARKS' challenge to trial counsel's failure to investigate the phone records of Willie "Ray" GILL (Junebug). Cf. Appellant's Brief, pp. 32-36; Respondent's Brief, pp. 11-13.

The primary facts underlying the claim raised on direct appeal (Failure to Disclose Junebug's Identity) concern the State's duty to disclose all exculpatory material associated with the name Junebug to the defense (R. 108:11-12). The facts underlying the claim on this appeal (Failure to Investigate GILL's Phone Records) deal with trial counsel's failure to investigate exculpatory evidence provided in the discovery materials (i.e. Junebug's phone number).

Trenton GRAY, STARKS' cousin, claimed that he called STARKS on Junebug's cell phone when STARKS allegedly made some incriminating statements (R. 88:77-82; Appellant's Brief, p. 32). STARKS' challenge to this fabricated testimony was two-fold. First, he had to either discover Junebug's real identity or get his phone number. Second, he needed to obtain a copy of Junebug's phone records during

the time in question. That exculpatory evidence would prove that GRAY never talked to STARKS as he had claimed.

Unfortunately for STARKS Junebug's identity remained a mystery until GRAY revealed at trial that Junebug is Ray GILL (R. 88:78). However, listed on a copy of GRAY's phone directory--which was handed over in the discovery materials--were two phone numbers under the name Junebug. Trial counsel's private investigator did not "look into" the two phone numbers of Ray GILL (App. 126) and trial counsel considered a simple call to two numbers a "fishing expedition." (R. 89:22-32, 35, 36, 45).

The issue or facts surrounding trial counsel's failure to investigate the phone records of GILL were never litigated or determined on STARKS' direct appeal, thus the doctrine of issue preclusion can not be applied as a matter of law.

3. Sufficiency of Evidence Versus Failure to Call Impeachment Witnesses

This court addressed the merits of a sufficiency of evidence claim on STARKS' direct appeal (R. 108:14-15). It is the Respondent's position that a challenge to sufficiency of evidence precludes claims related to witness impeachment (Respondent's Brief, p. 13). The Respondent is "pulling at straws" and on a "wild goose chase" with this argument. No authority is cited to support it. It stands with reason alone that a challenge to sufficiency of evidence does not preclude review of a claim of constitutional dimensions. The Respondent's attempt to slap the label of issue preclusion on this claim must be rejected.

4. Violation of Sequestration Order Versus Failure To Interview A Key Witness

Another claim addressed on direct appeal which the Respondent used to support a claim of issue preclusion was the violation of the trial court's sequestration order (Respondent's Brief, pp. 14-15). The Respondent asserts that this claim invokes the doctrine of issue preclusion against STARKS' claim that trial counsel failed to interview and call Dion ANDERSON as a witness to the court's inquiry into the questionable communications between GRAY and ROGERS.

The facts underlying the claim raised on direct appeal (Violated Sequestration Order) involved the trial court's decision not to grant a motion for mistrial (R. 108:8-11). The facts underlying the claim raised on this appeal (Failure to Interview A Key Witness To That Violation--A witness who was made known to counsel by STARKS) involves trial counsel's failure to interview and call Dion ANDERSON as a key objective witness to GRAY and ROGERS' collusion to get STARKS convicted for a murder he did not commit.

The Respondent mistakenly argues that STARKS is arguing that ANDERSON somehow influenced GRAY and ROGERS. Id. p. 15. STARKS is specifically arguing that ANDERSON has testimony evidence that GRAY and ROGERS did in fact talk about the substance of their testimony in their effort to get STARKS convicted for a crime he did not commit.

The issue or facts surrounding trial counsel's failure to interview and call ANDERSON as a key objective witness during the court's inquiry of the questionable communication between GRAY and ROGERS, were never litigated or determined on STARKS' direct appeal.

The doctrine of issue preclusion can not be applied to this claim as matter of law.

5. Sufficiency of Evidence Versus Failure to Call MILLS As Defense Witness

As noted in the third claim above, the Respondent cites no authority to support the argument that a challenge to sufficiency of evidence precludes claims related to witness impeachment or trial counsel's performance at trial.

The Respondent further argued that trial counsel cannot reasonably be faulted for failing to investigate and prepare MILLS as a witness because he had little if any time to do so. Id., p. 15. However, there are several key factors that the Respondent failed to point out, such as MILLS' plea hearing took place in August (Supplemental Appendix 152) and his sentencing in September (Supplemental Appendix 153). STARKS' trial did not take place until December. Even accepting the Respondent's argument as "testimony" for trial counsel--when counsel has not stated why himself--there was ample time for counsel to investigate and prepare MILLS as a witness.

Last, but not least, the Respondent argued that overwhelming evidence existed to put a gun in STARKS hand to shoot the victim (Id., p. 16), however ROGERS is the only one who claims to have saw a gun. STARKS is not arguing that someone else originally held the gun for him; he is arguing complete and actual innocence. The court must rule against issue preclusion on this claim as well.

CONCLUSION (Issue II)--

None of the ineffective trial counsel claims asserted by STARKS on this appeal can be barred by issue preclusion. The Respondent's procedural default defense must be rejected. This court must reach the merits of STARKS' claims and either grant him a new trial or remand this case back to the circuit court for an evidentiary hearing.

III. INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL CONSTITUTES AS A SUFFICIENT REASON

The Respondent argues that STARKS' direct appeal was his first postconviction motion, but rejects the argument that KAGEN--counsel for STARKS on direct appeal--was ineffective as postconviction counsel (Respondent's Brief, p. 19). The Respondent has mistakenly suggested that STARKS is arguing ineffective assistance of "appellate" counsel which must be presented in a different forum.

Rothering has made it clear that postconviction/appellate counsel (which are one in the same) may constitute as a "sufficient reason" under Escalona, supra. See Appellant's Brief, Issue II p. 20. None of STARKS' claims seek to have his appeal rights reinstated--which would be appropriate for a claim of ineffective assistance of "appellate" counsel. All of his challenges rest on the ineffective assistance of trial counsel which "postconviction" counsel refused to assert against his colleague on direct appeal.

"When a claim of ineffective assistance of counsel is based on failure to raise viable issues, a district court must examine the trial court record to determine whether [postconviction] counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be

compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of ineffective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644 (7th Cir.1985).

CONCLUSION (Issue III)--

The Respondent has argued as to the merits of STARKS' claims under and within the guise of procedural bar and therefore should not be allowed to re-brief the issues presented.

With this courts focus back in the right direction--on the merits of STARKS' claims--the first phase to be determined by this court is whether or not there are sufficient material facts that warrant an evidentiary hearing. In the second phase this court must determine if STARKS claims warrant a new trial. If given the opportunity to do so STARKS will prove, with convincing evidence, that the cumulative effect of trial counsel's errors undermined the outcome of his trial. For this reason, this court should either remand this case back to the circuit court for an evidentiary hearing or grant STARKS a new trial.

Dated this 10th day of December, 2010.

Submitted by:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 13 pages.

Dated this 19th day of December, 2010.

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