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STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT III

JUN 07 2019

CLERK OF COURT OF APPEALS
OF WISCONSIN

App. No. 2018AP000152

State of Wisconsin,
Plaintiff-Respondent,

v.

Chase M.A. Boruch,
Defendant Appellant.

On Appeal From An Order Denying Boruch's
Request For Waiver Of Transcript Preparation Fees,
Entered In The Lincoln County Circuit Court,
The Honorable Robert R. Russell, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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Pro Se

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STATEMENT OF ISSUES

1. The Circuit Court erred by using as a basis for denying Boruch's request for fee waiver at the Girouard hearing, the fact that it had already denied Boruch's 974.06 Motion. This issue was briefed fully by Boruch in his brief-in-chief ("Brf"), pgs. 1-2, and this issue was acknowledged by the Respondent ("State") in its brief-in-response ("Resp Brf"), p. 1, which brief was filed in this Court on May 7, 2019.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

2. Boruch continues to request publication (Brf, p. 2), but does not request oral argument (Brf, p. 2), and the State requests the same (Resp Brf, p. 1).

STATEMENT OF THE CASE AND STATEMENT OF FACTS

3. The statement of the case is set forth at Brf, pgs. 2-5, and the State sets forth a succinct statement of the case up to this appeal (Resp Brf, pgs. 2-8).

STANDARD OF REVIEW

4. The purpose of this appeal is to seek clarity on the proper standard of review when assessing a request to waive transcript preparation fees (Brf, pgs. 2-3). Boruch disagrees with the standard of review briefed by the State (Resp Brf, pgs. 8-9). The State asserts that the proper standard of review is "whether Boruch's Wis. Stat. § 974.06 motion states a claim for relief." (Resp Brf, p. 8). The State suggests that Boruch concedes that this is the proper standard of review (Resp Brf, p. 18). Boruch does not. The standard of review, according to this Court, is a question of frivolity

(Appx. 200.1). Boruch asserts that the proper standard of review, for this appeal, is whether, assuming Boruch is indigent (conceded at Resp Brf, p. 9), would an appeal from the Circuit Court's May 4, 2017 Order, denying Boruch's Wis. Stat. § 974.06 Motion ("974.06 Motion"), be frivolous? If the answer to this question is "Yes", Boruch is not entitled to fee waiver; however, if the answer to this question is "No", then Boruch is entitled to fee waiver.

ARGUMENT

5. The State presents a thorough argument why it believes Boruch's 974.06 Motion is doomed to fail (Resp Brf, pgs. 12-19). While Boruch disagrees with the State's characterization of Boruch's 974.06 Motion, Boruch believes that a full assessment of Boruch's 974.06 Motion is not necessary in order to resolve this appeal.

6. This Court has already decided that fee waiver turns on a question of frivolity (Appx. 200.1). The State does not use the word "frivolous", or any of its derivatives, once in its Response Brief. Instead, the State aims to shift the purpose of this appeal to examining the merits of Boruch's 974.06 Motion; Boruch believes that this is probably unnecessary. In Boruch's brief-in-chief, Boruch set forth various possible definitions of "frivolous," for the purposes of this appeal (Brf, pgs. 7-11), and asks that this Court clarify which definition controls (Brf, p. 12, ¶ 34).

7. The State contends, without the benefit of the transcripts which this appeal seeks, that Boruch's 974.06 Motion is legally insufficient (Resp Brf, p. 14). This is putting the

cart before the horse. The scope of this appeal is narrow: whether an appeal from the Circuit Court's May 4, 2017 Order, denying Boruch's 974.06 Motion, is or is not frivolous (Brf, p. 9). This appeal is NOT about whether Boruch's 974.06 Motion will ultimately succeed. It should be noted that the State filed a motion in this Court, on December 20, 2018, moving this Court for an order to produce a transcript of the Girouard¹ hearing in this case. It is difficult to understand how the State can contend that transcripts of the various hearings concerning Boruch's 974.06 Motion are not necessary to properly litigate the denial of that motion on appeal, but contend that a Girouard hearing transcript is necessary to prosecute this appeal. By asserting that a Girouard hearing transcript is necessary to prosecute this appeal, Boruch contends that the State has conceded that a transcript of the various hearings concerning Boruch's 974.06 Motion are necessary to prosecute an appeal of the denial of that motion.

8. The State also concedes that the Circuit Court may not have applied the proper test in resolving Boruch's fee waiver request (Resp Brf, p. 18). The State contends that the Circuit Court reached the correct result, and asserts that a decision which reaches the correct result by an incorrect process may still be upheld (Resp Brf, p. 18), with which Boruch generally agrees. See State v. Holt, 128 Wis. 2d 110, 124, 382 N.W. 2d 679 (Ct. App. 1985). However, the purpose of this appeal is to seek clarity on what the appropriate

1: Girouard v. Circuit Court, 155 Wis. 2d 148 (Sup. Ct. 1990).

process is for assessing fee waiver requests (Brf, pgs. 6-9). Surely the Circuit Court's order denying Boruch's request for fee waiver cannot be upheld if the proper test is not even clarified, let alone applied.

9. The appropriate time for the State's attack on Boruch's 974.06 Motion is in App. No. 2017AP001441, which appeal is currently stayed. On November 30, 2017, this Court ordered: "If the circuit court finds the action [974.06 Motion] is not frivolous and the petitioner is indigent, the court **MUST** waive the transcript fees. Girouard, 155 Wis. 2d at 159." (emphasis added). The question of frivolity was not addressed by the Circuit Court, and has been ignored by the State, and thus this Court's November 30 Order could not have been complied with.

10. With respect to the Amended 974.06 Motion missing from the Record, which the State highlights (Resp Brf, p. 7, fn 3), Boruch notes that the Circuit Court Clerk never notified Boruch that the Record was completed and ready for inspection, as required by Wis. Stat. § 809.15(2) (Appx. 201). Had the Clerk done so, Boruch likely would have noticed the missing motion. However, because Boruch asserts that this appeal should be decided within a narrow scope, Boruch believes that the Amended 974.06 Motion is not necessary to resolve this appeal. However, if this Court decides that the merits of Boruch's 974.06 Motion and other documents need to be assessed to decide this appeal, Boruch would ask that this Court please permit Boruch to supplement the Record with the missing motion.

11. The State also suggests that Boruch did not comply with Wis. Stat. § 814.29(1)(b) in requesting fee waiver (Resp Brf, p. 14, fn 6). This is an objection reserved for the Circuit Court, which the Circuit Court did not make. The Circuit Court FOUND Boruch to be indigent, and the statement of the nature of this appeal, as required by Wis. Stat. § 814.29(1)(c), was set forth in Boruch's Motion For Summary Disposition, filed in this Court on or about January 19, 2018, which was supported by an affidavit (Please see # 114-114.6 in the Appendix filed with Boruch's brief-in-chief). The State contends that Boruch used the wrong form to request fee waiver (Resp Brf, p. 14, fn 6). Boruch used Form GF-152A, but likely should have used form CV-410A, though it is important to note that these two forms are substantially the same.

RELIEF REQUESTED

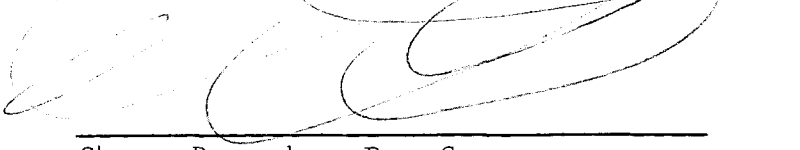
12. Boruch again asks that this Court please grant Boruch the relief requested in Boruch's brief-in-chief, pgs. 12-13. Boruch also asks that this Court please find that the State, by requesting production of a transcript of the Girouard hearing in this case, has conceded that the transcripts which Boruch seeks through this appeal are necessary to adequately prosecute App. No. 2017AP001441.

CONCLUSION

13. The scope of this appeal can be reduced to the definition of "frivolous." Because an appeal from the Circuit Court's May 4, 2017 Order, denying Boruch's 974.06 Motion would NOT be frivolous, Boruch asks that this Court

please remand this case to the Circuit Court, with instructions to provide Boruch a copy of the transcripts requested in Boruch's brief-in-chief, and do so at no cost to Boruch.

Respectfully signed this 4 day of June, 2019.



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Distribution: Clerk, Court of Appeals (5 copies, U.S. Mail)
AAG, Kara Mele (1 copy, U.S. Mail)
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CERTIFICATION AS TO
FORM AND LENGTH

I certify that this brief meets the form and length requirements set forth in § 809.19(1)(a)-(i) and § 809.19(8)(b)-(d), that this brief is produced with a monospaced font having 10 characters per inch, is doubled spaced, has a 1.5 inch left margin, has a 1 inch margin on each other side, and is 9 pages in length, including the table of contents, the table of authorities, the statement of issues, and the statement on oral argument and publication.

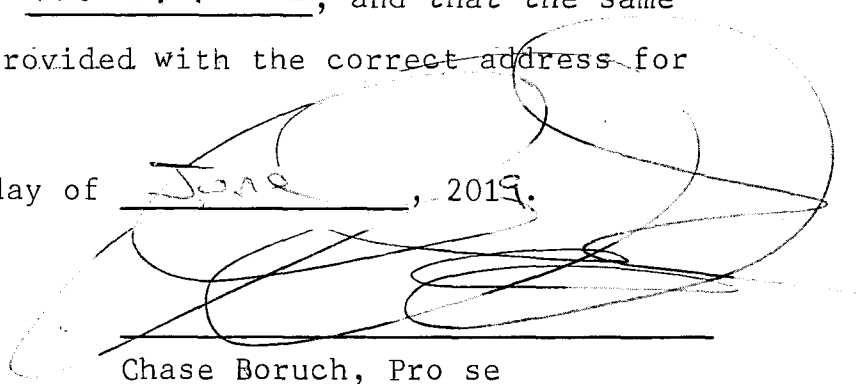
CERTIFICATION AS TO
RULE 809.19(12)

I certify that I am an unrepresented party, and thus, pursuant to § 809.19(8)(a)(4) and § 809.19(12)(a), I have not filed an electronic copy of this brief.

CERTIFICATION OF MAILING

I certify that this brief was delivered to the proper officials within Waupun Correctional Institution on the 4 day of June, 2019, for mailing to the Clerk of the Court of Appeals (5 copies), for mailing to the Wisconsin Department of Justice (1 copies), attention to Assistant Attorney General, Kara Mela, and that the same prison officials were provided with the correct address for each.

Signed this 4 day of June, 2019.



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