Appeal No. 2008AP697-CR **Cir. Ct. No. 1998CF486**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DIMITRI HENLEY,

DEFENDANT-RESPONDENT.

FILED

Jan 08, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Lundsten and Bridge, JJ.

The circuit court in this case vacated a conviction and granted a new trial in the interest of justice, long after expiration of the time for direct postconviction proceedings under WIS. STAT. RULE 809.30.[1] We certify the following issues: (1) whether the circuit court is permitted to grant a new trial in the interest of justice under WIS. STAT. § 805.15(1) without time limit; (2) if it is not, whether the circuit court has inherent authority to grant this relief; (3) if it does not, whether this court may use its power of discretionary reversal under WIS. STAT. § 752.35 to reach back to the original judgment of conviction and grant the same relief; (4) if it does not, whether this court has inherent authority to grant

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

such relief; and (5) if it does not, whether the supreme court should exercise its inherent authority to grant relief in this case.

This case is significant because the circuit court has granted a form of relief that does not appear to have been recognized previously in Wisconsin law. There is no authority cited by the parties, and none that we know of, that expressly permits a circuit court to grant a new trial in the interest of justice after the time for direct appeal under WIS. STAT. RULE 809.30 has passed. If such a remedy is available, it has implications for finality of criminal convictions and for the interplay with other forms of postconviction relief, such as WIS. STAT. § 974.06. However, availability of this remedy would also improve the ability of courts to consider unusual circumstances and do what justice requires in individual cases. These competing concerns are implicated in the entire series of legal issues discussed in this certification.

The history of this case and the companion cases is lengthy, and so we provide only the essential outline here. In 1998, the State charged three men with sexual assault in connection with an incident in a college dormitory: Rovaughn Hill, Jarrett Adams, and Dimitri Henley. A joint trial ended in a mistrial because of an information amendment issue. Thereafter, Hill was tried separately twice, with the first trial resulting in a hung jury, and the second in a mistrial due to the State's failure to disclose a police report. The State then dismissed the charges against Hill.

Adams and Henley were tried together and convicted. Both pursued state postconviction proceedings under WIS. STAT. RULE 809.30 that did not produce relief. In particular, in Henley's appeal, we rejected his argument that his

trial counsel was ineffective because counsel failed to investigate and call at trial a witness whose testimony may have undercut the victim's version of events.

Henley filed a pro se federal habeas corpus petition that was denied in district court, and he did not appeal. Adams, by counsel, sought federal habeas relief and eventually prevailed in the Seventh Circuit. ***Adams v. Bertrand***, 453 F.3d 428 (7th Cir. 2006). The Seventh Circuit, albeit in the context of Adams's case, effectively disagreed with the ineffective assistance conclusion we reached in Henley's state appeal. *See* ***id.*** at 436-38. The Seventh Circuit held that it was ineffective to fail to investigate and call at trial the witness whose proffered testimony would undercut the victim's account. ***Id.*** This same witness testified at a separate trial of the third man, Hill, and that trial ended in a hung jury. ***Id.*** at 438.

According to the parties, Henley is procedurally barred from further attempts at federal habeas review. Therefore, after the Seventh Circuit decision, and now represented by counsel, Henley filed in state circuit court a "motion for new trial in the interest of justice." The ground was that the testimony of this same witness was not presented at Henley's trial, but would be "critical to a full and fair trial" of Henley. The circuit court granted the motion, and the State appeals. To the extent this appeal may not be from a final order, we have granted leave to appeal under WIS. STAT. § 808.03(2).

As described below, we question whether the circuit court or we have the authority to grant a new trial. What makes this case a good vehicle to address the legal questions presented is the fact that there is merit to Henley's argument that this court erroneously analyzed the ineffective assistance issue, as evidenced by the Seventh Circuit's opinion in Adams's federal habeas action, and

the circuit court's decision to grant Henley a new trial. Thus, the questions we present are not academic—if resolved in Henley's favor, the result may be a reversal of his conviction.

As a procedural basis for Henley's interest-of-justice motion, he cited WIS. STAT. § 805.15(1) and the court's "inherent authority." That statute authorizes motions "to set aside a verdict and for a new trial" for several reasons, including "in the interest of justice." On appeal, the State argues that, as a motion under § 805.15(1), Henley's motion must be denied because it was not filed within the time provided in WIS. STAT. § 805.16(1). That statute states in relevant part: "Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents."

The circuit court rejected the State's argument after concluding that "motions after verdict," as used in the time-limit statute, is a "term of art" that refers only to certain types of motions filed under WIS. STAT. § 805.14. We understand the court to have been saying that only the motions described in § 805.14(5), appearing under the title "motions after verdict," are subject to the time limit in WIS. STAT. § 805.16(1). Accordingly, the court concluded that no time limit applies to the types of motions listed in WIS. STAT. § 805.15(1), including motions for new trials in the interest of justice.

The State disputes this conclusion, but does not directly address the circuit court's analysis on appeal. While the circuit court's analysis has at least some textual support, we believe it also has some infirmities. For example, if WIS. STAT. § 805.16 applies only to the "motions after verdict" found in WIS. STAT.

§ 805.14(5), why does § 805.16(4) exempt motions based on newly discovered evidence from the time limit in § 805.16(1)? If the circuit court's interpretation is correct, this exemption would not be necessary, because motions based on newly discovered evidence are not listed in § 805.14(5), but instead are authorized by WIS. STAT. § 805.15(1), in the same list as motions in the interest of justice.

Perhaps aware of these infirmities, Henley does not defend the circuit court's analysis on appeal. Nor does he otherwise appear to dispute that, in civil cases, a motion for a new trial in the interest of justice is covered by the time limit in WIS. STAT. § 805.16(1). Instead, Henley argues that § 805.16(1) is a rule of civil procedure that should not be applied in this criminal case. He acknowledges that civil practice rules generally apply in criminal cases unless context otherwise requires, *see* WIS. STAT. § 972.11(1), but he asserts that it would be "absurd" to apply that limit here. He argues that it should not apply because "motion after verdict" is a civil concept and in criminal cases the term is "postconviction motion." Postconviction motions are filed either under the time limits of WIS. STAT. RULE 809.30 or under WIS. STAT. § 974.06, which has no time limit at all. In addition, Henley points out the State's failure to cite any cases in which the § 805.16(1) time limit has been applied in a criminal case.

In reply, the State reminds us that it was Henley himself who founded his motion on WIS. STAT. § 805.15(1). It argues that if he wants to rely on that statute as the procedural foundation, then he must also accept the time limit in the companion statute, WIS. STAT. § 805.16.

Henley's suggestion that WIS. STAT. RULE 809.30 and WIS. STAT. § 974.06 provide the correct measure for the timeliness of his motion is problematic. First, it is not clear that the concept of "motion after verdict" is

limited to civil cases. We see no reason why this would not be a proper term for a motion filed in a criminal case after a jury verdict, but before sentencing and entry of a judgment of conviction.

A second and larger problem with Henley's argument is that his motion does not appear to have been filed under either of those postconviction provisions. The time limit for seeking relief under WIS. STAT. RULE 809.30 is long past, and has not been extended by this court. *See* WIS. STAT. RULE 809.82(2). Furthermore, Henley has already had a postconviction motion and appeal under that rule. It is not clear that his motion would be one filed under WIS. STAT. § 974.06, because that statute is limited to motions seeking relief

> upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack.

Section 974.06(1). *See also, e.g.,* ***Vara v. State,*** 56 Wis. 2d 390, 392, 202 N.W.2d 10 (1972) (motion under § 974.06 "is restricted to jurisdictional and constitutional issues"). A motion for a new trial in the interest of justice may not fall within this limit.

Henley's lack of clarity about the procedural basis for his motion is present throughout his appellate brief. Nowhere in the brief does he state that the motion is founded on WIS. STAT. § 805.15(1). Instead, he asserts broadly that Wisconsin courts – "trial courts and appellate courts alike" – may order a new trial in the interest of justice on grounds that the real controversy was not fully tried or justice has miscarried. However, none of the authority he cites for that statement holds that a circuit court may do so on a legal basis other than § 805.15(1).

Henley cites ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). However, that decision simply describes this court's statutory power of reversal under WIS. STAT. § 752.35. It says nothing about a circuit court's authority. Henley also cites ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991) ("***Harp II***"). To properly discuss ***Harp II***, we must provide the context of the prior appeal, ***State v. Harp***, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989) (***"Harp I"***) *overruled by* ***State v. Camacho***, 176 Wis. 2d 860, 501 N.W.2d 380 (1993).[2]

In that criminal case, the circuit court granted a new trial because of an unobjected to jury instruction error. ***Id.*** at 865-67. We held that the court could properly do so under WIS. STAT. § 805.15(1) in the interest of justice. ***Id.*** We remanded for the circuit court to state whether that was the basis for its decision. ***Id.*** We did not address any issue of whether, as a motion under § 805.15(1), the motion was timely under WIS. STAT. § 805.16. The opinion did not state the date the motion was filed, but did note that it was filed under WIS. STAT. RULE 809.30. ***Id.*** at 867. Normally a postconviction motion under that rule would be filed more than twenty days after the verdict. *See* RULE 809.30(2). Therefore, ***Harp I*** might arguably be read as implying that, in a criminal case, a timely postconviction motion under RULE 809.30 can include the ground of new trial in the interest of justice under § 805.15(1), regardless of whether that filing complies with the time limit in § 805.16(1).

[2] ***State v. Camacho***, 176 Wis. 2d 860, 864-65, 881-82, 501 N.W.2d 380 (1993), overruled ***State v. Harp***, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989), only insofar as it concerned the legal standard for the crime formerly termed "imperfect self-defense manslaughter." It did not disturb the holding we cite here.

Harp II was the appeal after the remand in ***Harp I***. The circuit court said that WIS. STAT. § 805.15(1) was the basis for its decision, and on appeal we addressed various issues relating to its decision. In the course of doing so, we described the standard a circuit court is to apply in deciding whether a new trial is in the interest of justice. We held that it is akin to the standards governing our own power of discretionary reversal under WIS. STAT. § 752.35: the real controversy was not fully tried or for any reason justice has miscarried. ***Harp II***, 161 Wis. 2d at 776-79. This is the passage Henley relies on now.

From this summary of the ***Harp*** cases, two important things are apparent. First, to the extent Henley is implying that ***Harp II*** gives a circuit court authority to grant a new trial in the interest of justice based on some legal source other than WIS. STAT. § 805.15(1), that implication finds no support in either of the opinions. Those opinions describe only the authority granted under § 805.15(1). Second, while ***Harp I*** can arguably be read as allowing a circuit court to grant relief under § 805.15(1) beyond the time limit of WIS. STAT. § 805.16, when that relief is sought during the direct postconviction process under WIS. STAT. RULE 809.30, there is nothing in the ***Harp*** cases to support an argument that a circuit court may grant such relief *beyond* that process, at any time whatsoever.

Given that Henley is seeking this relief long after the time for direct appeal is past, if he relies on WIS. STAT. § 805.15(1) as the basis for his motion, his argument has to be that relief under this section is available in criminal cases with essentially no time limit at all. However, he does not expressly assert this position on appeal. Henley cites no cases, and we are not aware of any, that permit a criminal defendant to use § 805.15 to file a motion for a new trial in the interest of justice when the WIS. STAT. RULE 809.30 process is long over. Thus,

when it comes to case law, we have a standoff: while Henley faults the State for its lack of case law holding that the time limit of WIS. STAT. § 805.16(1) applies in a criminal case, Henley himself offers no case law holding that a criminal defendant can obtain relief under § 805.15(1) with no time limit at all.

In summary, even though Henley's appellate brief does not directly acknowledge that the procedural basis for his motion is WIS. STAT. § 805.15(1), he also does not clearly suggest that a different procedural basis is available. He does not appear to dispute that a civil motion for a new trial under § 805.15(1) would be subject to the time limit in WIS. STAT. § 805.16(1), but he argues that a similar motion in a criminal case should not be.

Based on the parties' arguments and our own familiarity with Wisconsin law to date, we believe this is a matter of first impression. This court has seen few, if any, appeals in which defendants have sought postconviction relief using WIS. STAT. § 805.15(1) beyond the context of WIS. STAT. RULE 809.30. Whatever the correct legal answer may now turn out to be, it appears that the practicing bar and pro se litigants, so far, have not recognized this potential use of § 805.15(1), or have concluded that it is unavailable.

The implications of a decision on this issue could be profound. If WIS. STAT. § 805.15(1) is available in this manner, every person currently subject to a Wisconsin criminal sentence could theoretically file such a motion in the interest of justice immediately, without being subject to any apparent procedural bar. In addition, if circuit courts have authority to grant this relief, there are implications for finality of convictions and for the relationship of this relief to the relief available under WIS. STAT. § 974.06. However, if this relief is available, it would also improve the ability of courts to reach a just result in cases with unusual

circumstances, such as this one. While many motions for a new trial would probably be denied, the case before us is one in which the circuit court, in the person of the same judge who heard the original trial conviction, agreed that justice requires a new trial. With these concerns in mind, we certify the issue of whether circuit courts have this authority.

In addition to WIS. STAT. § 805.15(1), Henley's motion relied on the circuit court's inherent authority. The test for deciding whether a circuit court has inherent authority to perform a certain act is well established. *See, e.g.*, ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 747-51, 595 N.W.2d 635 (1999). If circuit courts lack statutory authority under § 805.15 to grant the relief sought in this case, the question then arises whether they have that inherent authority. This question would, again, raise issues about finality and the ability of courts to do justice. This issue has not been discussed on appeal, but we certify it also, in the interest of a complete analysis.

As an alternative to affirming the circuit court's decision, Henley asks us to grant him the same relief using our own discretionary power of reversal under WIS. STAT. § 752.35. We have previously held that, in an appeal from denial of a postconviction motion under WIS. STAT. § 974.06, this court may not use that power to reach back to vacate the original judgment of conviction. ***State v. Allen***, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426 (Ct. App. 1990). "Our power of discretionary reversal under sec. 752.35, Stats., may be exercised only in direct appeals from judgments or orders." ***Id.*** at 55.

While the current appeal is not, on its face, one involving a motion under WIS. STAT. § 974.06 as was ***Allen***, *see* ***id.*** at 54, it does involve a motion that is in a similar posture, having been filed long after the time for direct review

has passed. Therefore, a strong argument could be made that this court is barred from granting Henley a discretionary reversal unless ***Allen*** is overruled. The State's reply brief concedes that we have this authority, but the State does not appear to be aware of ***Allen***, and the case it cites for this proposition addresses only the authority of the supreme court, not the statutory authority of this court. *See* ***State v. Maloney***, 2006 WI 15, ¶14, 288 Wis. 2d 551, 709 N.W.2d 436.

The supreme court has acknowledged our holding in ***Allen***, but declined to decide the issue. ***State v. Armstrong***, 2005 WI 119, ¶¶110-13, 283 Wis. 2d 639, 700 N.W.2d 98. It did describe our conclusion as "strange," however. ***Id.***, ¶113 n.25. As far as we know, the issue remains undecided by the supreme court. Only the supreme court can overrule one of our opinions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Therefore, we certify whether, in a postconviction proceeding after WIS. STAT. RULE 809.30, this court has statutory authority under WIS. STAT. § 752.35 to reach back to the original judgment of conviction and grant a new trial.

In ***Armstrong***, the supreme court held that, while its own statutory power of discretionary reversal might also be constrained for the reasons we relied on in ***Allen***, the supreme court would instead rely on its own inherent authority to reach the same result. ***Armstrong***, 283 Wis. 2d 639, ¶113. Whether this court also has such inherent authority was not addressed. Therefore, we certify whether, if we lack statutory authority, this court has inherent authority to reach back to the original judgment of conviction and grant a new trial in the interest of justice.

Finally, if neither the circuit court nor this court has statutory or inherent authority to grant the relief sought in this case, then the only avenue for Henley to obtain relief in state court may be for the supreme court to exercise its

inherent authority, as it did in ***Armstrong*** and other cases cited there. Only the supreme court can decide whether to do this, and therefore we also certify this issue.