COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0965-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICIA K.S.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE SCHROEDER, Judge. *Order reversed and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Patricia K.S. appeals from a judgment of conviction for failing to act to prevent bodily harm to a child and from an order denying her motion for postconviction relief.[1] On appeal, Patricia primarily

[1] The merits of the underlying conviction are not before this court on appeal.

challenges the circuit court's denial on procedural grounds of her motion for postconviction relief. We agree that the motion should not have been denied without the court's reaching the merits. Accordingly, we reverse the order and remand the cause to the circuit court with directions.

This case has had a long and tortuous history. In August 1993, Patricia and her husband Philip were jointly tried and convicted–he for causing bodily harm to their son, and she for failing to take action to prevent it. On October 7, 1993, Reserve Judge Robert Cannon sentenced her to four years imprisonment. That sentence was stayed, and she was placed on probation for the same term. On that date, she filled out an appellate rights form; she indicated that she was undecided about pursuing postconviction relief. Her conviction was amended on October 20, 1993, and her term of probation was shortened to two years.

From October 1993 through August 1995, Patricia, through a variety of attorneys, sought relief from various visitation terms of her probation. At that point, the case was taken over by Judge Bruce Schroeder. At a status conference on both Patricia's and Philip's case, conducted on August 7, 1995,[2] Patricia's newly-appointed counsel stated that "I don't believe there is any [postconviction] motion ... actually ever ... filed on Patricia's behalf. I think that in and of itself may be subject to some ineffective assistance of counsel motion here in the future." Later, when Philip's counsel informed the court that his time limits were "all gone," the court told him, "You have to get an extension from the Court of Appeals." Additionally, the court stated, "And then would you do me the favor,

[2] Given the record before us, we can only glean limited information about Philip's status. It appears that he was out on bond pending appeal.

one or both, I guess both of you or somebody, and seek an extension from the Court of Appeals until the 31st of October just in case for some reason I want to reserve a judgment after the hearing."

On August 21, 1995, Patricia's attorney moved this court for an extension of time for the trial court to hear and decide her postconviction motion. As grounds for the extension, counsel pointed out that Patricia's prior attorney who had filed the notice of intent to pursue postconviction relief in 1993 had been disbarred. A further reason was that trial transcripts were not prepared and filed until July 1994. Other grounds were also alleged. Copies of this motion apparently were sent to the district attorney's office and Judge Schroeder. By order of August 24, 1995, this court granted Patricia's motion because that motion "states that the delay is attributable to previously retained counsel" and extended the time to file postconviction motions to October 18, 1995.

At the end of a motion hearing on August 31 concerning a possible extension of Patricia's probation, her counsel brought up the possibility of having to raise an ineffective assistance of appellate counsel claim. The court told him, "That wouldn't be available at this time. It certainly might be a legitimate issue at a later point, I don't know."

Patricia's attorney filed a motion for postconviction relief on October 18, 1995, challenging various aspects of the trial, including the effectiveness of trial counsel. On that same day, at a status conference, the court set a date for a ***Machner*** hearing in Patricia's case. At that hearing, which took place over three days, testimony was taken on ***Machner*** issues for both Patricia and Philip. Later, both Patricia's attorney and the district attorney submitted additional memoranda on the merits of the postconviction motion.

On April 3, 1996, the circuit court denied Patricia's motion "[b]ecause I have concluded that her motion has been rendered moot, is constitutionally flawed, and is barred by the doctrine of laches ...." Patricia now appeals this decision.

In essence, the circuit court's decision never reaches the merits of Patricia's motion. We are persuaded by none of the circuit court's articulated reasons for not reaching the merits; accordingly, we reverse the order and remand to that court for a decision on the merits.

We first address the court's contention that Patricia's claim is moot. We cannot agree. The circuit court relied in part on ***Roby v. State,*** 96 Wis. 667, 670, 71 N.W. 1046, 1047 (1897), where our supreme court stated that "[a] person convicted of crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous." The circuit court here stated that Patricia's "case has been rendered moot by the completion of her probationary period on October 7, 1995." However, on August 21, 1995, Patricia sought from this court an enlargement of time for the circuit court to hear and decide her postconviction motion. Her attempt to invoke her rights to appeal predates the expiration of her probation, therefore.[3] Rather than supporting the circuit court's position, then, ***Roby*** refutes it, in that it goes on to state that "the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus

[3] We note in passing that at a motion hearing more than a month later, the court conditionally granted the State's request to extend Patricia's probation. That grant was rescinded when it was discovered that she had never been ordered to pay the cost of care of her children as restitution.

removing the stigma which wrongly rests on his name and reputation."[4] *See* ***id.*** The court's reliance upon ***Yingling v. State,*** 73 Wis.2d 438, 439, 243 N.W.2d 420, 421 (1976), is similarly misplaced. There the defendant's claim was that he was twice punished for the same offense. To that claim, the supreme court responded that "because Yingling has now been fully discharged from any custody or control ... this court would be unable to afford him any relief in these proceedings." ***Id.*** Here, however, Patricia's claim for relief extends beyond the mere sentence imposed. We conclude that the circuit court erred in denying Patricia's motion on the grounds of mootness.[5]

We turn next to the court's conclusion that Patricia's motion was barred on double jeopardy grounds.[6] The circuit court acknowledged the rule of ***Day v. State,*** 76 Wis.2d 588, 592, 251 N.W.2d 811, 813 (1977), that "'[i]mplicit in the request for a new trial must of necessity be a waiver of the objection to the new trial on the ground of double jeopardy.'" (Quoted source omitted.) However, the circuit court went on to add that because of "the unusual circumstances of this case, reference must also be made to the vital principle of our law that the waiver of a constitutional right cannot be inferred from a silent record." While we agree with the circuit court that this case has unusual circumstances, we cannot agree that the record is silent on this point. Patricia's motion for postconviction relief sought "an order vacating her judgment of conviction herein and dismissing this

[4] We note that at a status conference held on the day that Patricia filed her motion for postconviction relief, October 18, 1995, the circuit court commented that "I am not disputing her right to want to come to court and get this eradicated from her record."

[5] We note that none of the mootness cases cited in the State's brief-in-chief concern challenges to the underlying conviction, as does Patricia's challenge. They are, therefore, distinguishable.

[6] We note that the State, on appeal, presents no argument on this point.

action or, in the alternative, granting a new trial." On appeal, Patricia herself argues from the ***Day*** rule.[7] She also points out that even if she were required to expressly waive her double jeopardy claim, "she has never been given the opportunity to do so after the Court raised the issue." We cannot, therefore, agree with the circuit court's excepting this case from the rule of ***Day*.**

Finally, we address the question of laches. We are unpersuaded that laches ought to be applied here. The circuit court concluded that Patricia's "inaction prejudiced the state ...." As we stated in ***Lohr v. Viney,*** 174 Wis.2d 468, 477, 497 N.W.2d 730, 733 (Ct. App.1993), the elements of the equitable doctrine of laches are (1) unreasonable delay, (2) knowledge of and acquiescence in the course of events and (3) prejudice to the party asserting laches. To our knowledge, the State never asserted a laches argument in the circuit court.[8] More importantly, when Patricia sought from this court an enlargement of time for the circuit court to hear and decide her postconviction motion,[9] the State did not respond to the motion, seek reconsideration of it or object to it. As a result, we are unconvinced that laches should lie here against Patricia.

[7] We need not and do not address the circuit court's gratuitous comment on whether Patricia's appellate counsel might find himself faced with an ineffective assistance of appellate counsel claim for making such an argument.

[8] We note that the State, on appeal, now somewhat disingenuously champions laches for, to our knowledge, the first time.

[9] We note that at a status conference on August 7, 1995, the circuit court itself asked "one or both" of defense counsel to "seek an extension from the Court of Appeals ...."

The circuit court is evidently under the mistaken impression that this procedural motion was "made without notice to and an opportunity to be heard by the district attorney ...." In his letter accompanying this motion, Patricia's counsel indicated that copies were served on "opposing counsel and other interested parties," which included the district attorney and the circuit court. *See* RULES 809.14 and 809.80, STATS.

In its memorandum decision, the circuit court also states that "[p]erhaps the grant of the extension was purely jurisdictional, to allow me to hear and determine those issues, and I so assume, concluding, therefore, that the extension does not conclusively establish the ineffectiveness of [Patricia's] post-conviction counsel." In some respects, the circuit court is correct—our order of August 24, 1995, did not conclusively establish ineffectiveness of postconviction counsel. However, the record reveals that the circuit court has not yet given Patricia the opportunity to be heard on that question. After our order was granted, at a motion hearing held on August 31, 1995, Patricia's counsel noted, "It's my understanding that [Patricia's] initial appellate counsel, an attorney who has now been disbarred, I can't even track him down to ask him any questions, Mr. LeRose. I have not been able to find him.... I would have to be raising an ineffective assistance of counsel claim and incorporate that—" The court interrupted him and stated, "That wouldn't be available at this time. It certainly might be a legitimate issue at a later point, I don't know." We cannot agree, therefore, that laches applies to any challenge Patricia might make to ineffective assistance of postconviction counsel.

We further note that the issues which our extension allowed the circuit court to hear and determine are those issues which Patricia raised in her motion for postconviction relief. Some of those issues have already been addressed (but not ruled on) in the circuit court, namely, ineffective assistance of trial counsel. We therefore reverse the circuit court's order denying Patricia's motion, and we remand the cause to the circuit court with directions to address the merits of Patricia's motion for postconviction relief.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.