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November 8, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1653 State of Wisconsin ex rel. Emon V. Hollins v. William J. Pollard (L.C. # 2014CV2049)

Before Lundsten, Higginbotham and Sherman, JJ.

Emon Hollins appeals an order dismissing his habeas petition due to laches. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We conclude that the respondent warden, William Pollard, did not sufficiently prove the laches defense. Therefore, we reverse and remand for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Hollins filed a habeas corpus petition alleging ineffective assistance of counsel at a probation revocation hearing. The warden moved to dismiss on the ground of laches. The warden's motion was supported with an affidavit by Hollins' attorney, who would be a potential witness in litigating the ineffective assistance claim. The affidavit stated that the attorney has sufficient recollection of the Hollins case to state "without hesitation" that he provided effective and appropriate representation, but that with three years having elapsed, it is "likely" he would have difficulties recalling the details of his representation. It further stated that he now lives in California and will not return voluntarily to Wisconsin to testify in this case. The circuit court granted the motion and dismissed the petition.

The parties agree on the elements of laches: (1) the petitioner unreasonably delayed in bringing the claim; (2) the respondent lacked knowledge that the claim would be brought; and (3) the respondent has been prejudiced by the delay. ***State ex rel. Washington v. State***, 2012 WI App 74, ¶19, 343 Wis. 2d 434, 819 N.W.2d 305. The parties agree that laches is a defense that must be proven by the defendant asserting it, here the warden. ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶2, 290 Wis. 2d 352, 714 N.W.2d 900, *reconsideration denied*, 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424.

As to prejudice, Hollins makes several arguments. One of them is that the circuit court should have held an evidentiary hearing. The warden argues that the warden has demonstrated prejudice two ways. We address them separately. We first discuss the warden's claim that he has demonstrated prejudice because the affidavit of Hollins' former attorney asserts that the attorney does not have sufficient memory about this case to testify about ineffective assistance.

Hollins relies on ***Coleman***. In ***Coleman***, the supreme court reviewed our denial of a habeas petition that alleged ineffective assistance by appellate counsel. ***Id.***, ¶1. The delay in

filing the petition was more than sixteen years. ***Id***., ¶34. On the element of prejudice, we said that this delay "'greatly prejudices the State, under any reasonable view,'" because "'counsel undoubtedly has little or no memory of the circumstances.'" ***Id***., ¶35 (quoting ***State ex rel. Coleman v. McCaughtry***, No. 2004AP548-W, unpublished order at 2-3 (Wis. Ct. App. Dec. 13, 2004)).

The supreme court reversed us on this issue. It described us as having "assumed" that the State was prejudiced. ***Id***. The court wrote that while our assumption may prove true, "it is not the only possible outcome that could result from an inquiry of postconviction counsel. Therefore, it cannot be decided as a matter of law." ***Id***., ¶36. The court concluded that we erred by making that assumption "instead of requiring the State to prove a factual basis for prejudice." ***Id***., ¶37. The court remanded the case to us for "fact-finding to determine whether the State has been prejudiced." ***Id***., ¶38. We could do that by either a special master or remand to circuit court. ***Id***., ¶38.

In our current case, the warden attempted to prove the attorney's diminished memory by submitting an affidavit from the attorney. While this is something more than our assumption in ***Coleman*** that the attorney could not remember, it falls short of the usual standards for what is required to prove a fact. Normally, when a party with the burden of proof offers a witness, the witness must be made available for cross-examination. Here, without an evidentiary hearing, the attorney was never subject to cross-examination during which Hollins could have tried to refresh the attorney's memory or test its precise limits. "Unless the facts are undisputed or the right to a hearing is waived, a party or attorney is entitled to more than a trial by affidavit." ***Johnson Bank v. Brandon Apparel Grp., Inc.***, 2001 WI App 159, ¶16, 246 Wis. 2d 828, 632 N.W.2d 107.

The warden's brief on appeal does not directly address Hollins' argument about the need for an evidentiary hearing, or discuss ***Coleman***. Instead, the warden asks us to decide prejudice "as a matter of law," based on the attorney's "likely" inability to recall, because the attorney's memory would "probably" become less reliable with the passage of time. In light of ***Coleman***, we conclude that whether the attorney has sufficient recollection cannot be decided as a matter of law based on an affidavit. As quoted above, ***Coleman*** expressly rejected the idea of deciding such matters without fact-finding. Given the clear requirement of ***Coleman*** that there be fact-finding to establish prejudice, Hollins has made a compelling argument that an evidentiary hearing was required here.

The warden also claims prejudice from the attorney being unavailable to testify because he now lives in California, cannot be subpoenaed from there, and refuses to return to Wisconsin voluntarily to testify. Although there is reason to question this assertion, we will assume, without deciding, that the warden's legal argument is correct. That is, we assume without deciding that the attorney cannot be subpoenaed to appear personally in Wisconsin, or compelled to testify in any other way.

However, the warden's proof on witness unavailability suffers from the same flaw discussed above on memory loss. The only evidence of unavailability is the affidavit of the attorney himself stating that he will not travel to Wisconsin. If the warden is correct that refusal to travel means the attorney will not testify, that also means the attorney will not appear for cross-examination about his affidavit at any evidentiary hearing held to prove his unavailability. In other words, the warden is again trying to prove prejudice by using an untestable assertions in an affidavit.

Furthermore, even if proof by affidavit were allowed, this affidavit is inadequate because it omits a necessary point: the attorney does not aver that he refuses to testify by telephone. This is a civil habeas proceeding, and therefore the civil telephone rule likely applies. *See* WIS. STAT. § 807.13. Under that statute, the parties may stipulate to telephone testimony, or the court can order it. Hollins argues for telephone testimony, although he couples it with a request that it be compelled by subpoena.

In response, the warden asserts that the parties did not stipulate to telephone testimony. However, that fact is not dispositive, because the court can order telephone testimony without a stipulation. The warden further asserts that certain statutory factors weigh against ordering telephone testimony in this case, like the ability to effectively cross-examine and the court's ability to observe witness demeanor.[2] While the warden is correct that those are proper factors under WIS. STAT. § 807.13, he omits other statutory factors that go in favor of telephone testimony. Those include whether the party has been unable to procure the physical presence of the witness, and whether a physical liberty interest is at stake.

Accordingly, we conclude that the warden has not proven that the attorney will not testify by telephone. And, it appears, the circuit court could reasonably order a telephone appearance, if the attorney is willing to provide testimony that way. Therefore, even if the affidavit by itself could be taken as a sufficient form of proof, the affidavit fails on its face to establish that the witness is unavailable, because it does not state that he refuses to testify by telephone.

[2] This stance is peculiar because the warden appears to be arguing against telephone testimony by a witness that the warden claims to be prejudiced by the absence of. In other words, if the warden is genuinely prejudiced by the absence of this witness's testimony, the warden might be expected to argue in *favor* of telephone testimony, as an improvement over the total absence of the witness.

We also note that the affidavit does not say *when* the attorney left Wisconsin. If the attorney left within the period that would have been reasonable for Hollins to bring his habeas claim, it would be difficult to say that any additional and unreasonable delay by Hollins caused the attorney to become unavailable.

We briefly address the other two elements of laches. As described above, the second element is lack of knowledge that the claim would be brought. Hollins has not made any argument about this element on appeal. Therefore, we conclude that he has conceded this element. The first element is whether there was unreasonable delay in bringing the claim. On appeal, Hollins argues that the delay was reasonable, but the warden disagrees. It is not entirely clear that the parties agree on the underlying facts that relate to the reasonableness of the delay. Therefore, because laches is a defense that a defendant must prove, we conclude that fact-finding will also be necessary on this element before this defense can be granted.

In summary, we conclude that Hollins is correct that an evidentiary hearing is necessary on the elements of unreasonable delay and prejudice before the circuit court can dismiss his claim due to laches. Therefore, we reverse and remand for further proceedings.

IT IS ORDERED that the order appealed from is summarily reversed under WIS. STAT. RULE 809.21 and the cause is remanded.

Diane M. Fremgen
Clerk of Court of Appeals