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DISTRICT I

February 13, 2018

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

2017AP387-CR State of Wisconsin v. Daniel Anderson, Jr.
(L.C. #2013CF2632)

Before Brennan, P.J., Kessler and Brash, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Daniel Anderson, Jr., appeals his convictions for eight counts of failing to pay child support, contrary to WIS. STAT. § 948.22(2) (2013-14).[1] Anderson filed a postconviction motion

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that was granted in part and denied in part.[2] On appeal, Anderson challenges only two of the trial court's rulings. First, Anderson opposes the imposition of a single DNA surcharge. Second, he argues that he is entitled to a ***Machner*** hearing on his claim that his trial counsel provided ineffective assistance by failing to take steps to ensure that Anderson would ultimately receive 157 days of sentence credit. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Specifically, he argues that once he was taken into custody on another case, trial counsel should have "take[n] basic steps to make sure Mr. Anderson's custodial status was connected to both cases, such that he would have been entitled to sentence credit in this case." Anderson asserts that such steps could have included seeking to have Anderson's "signature bond revoked or a nominal cash bail imposed."

In its response brief, the State suggests that because the Wisconsin Supreme Court is considering two DNA surcharge cases that may impact the resolution of Anderson's DNA surcharge issue, this court should hold the appeal in abeyance pending the Wisconsin Supreme Court's resolution of those cases.

As for Anderson's allegation that trial counsel provided ineffective assistance with respect to Anderson's bail, the State agrees that he is entitled to a ***Machner*** hearing because, in the State's words, Anderson "adequately alleged that his lawyer performed deficiently with respect to his release on the signature bond and that he was prejudiced by that deficient performance." The State further explains:

[2] The trial court held a ***Machner*** hearing on Anderson's claim that his trial counsel provided ineffective assistance with respect to the viability of raising paternity issues at trial. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). After the hearing, the trial court rejected that ineffective assistance claim and Anderson has not pursued it on appeal.

> The remedy that Anderson seeks is a remand for a ***Machner*** hearing to determine whether his trial counsel had a strategic reason for failing to ensure that Anderson was in custody in connection with this case while he was in custody in connection with the other case. That is the correct remedy when a defendant adequately alleges that counsel was ineffective. At that hearing, Anderson will have the burden of proving that his lawyer performed deficiently and that the alleged deficient performance did, in fact, cause him to lose the number of days of sentence credit that he claims.

(Footnote and one case citation omitted; bolding added.) The State also addresses the need for fact-finding on the number of days of sentence credit Anderson could receive, stating:

> Anderson asks this [c]ourt to find that in the absence of a reasonable explanation by his attorney, he "is entitled to 157 days of sentence credit." But the documents that Anderson submitted in support of his postconviction motion, which show the dates on which he was booked and released from jail, do not indicate the case with which the custody was associated. The number of days that Anderson would have spent in custody in connection with this case had his lawyer not performed deficiently is a factual question that the [trial] court has not addressed. Because this [c]ourt is "not a fact-finding court," ***Rand v. Rand***, 2010 WI App 98, ¶23, 327 Wis. 2d 778, 787 N.W.2d 445, the [trial] court must make that finding on remand.

(Record citations and footnote omitted; bolding added.)

On December 4, 2017, Anderson filed a motion with this court seeking to: (1) voluntarily dismiss his claim to vacate the DNA surcharge and "waive[] any further challenge to that surcharge";[3] and (2) summarily reverse the order denying his postconviction motion, based on the State's concession that he is entitled to an evidentiary hearing. *See* WIS. STAT. RULES 809.14 and 809.21. On December 12, 2017, the State filed a statement indicating that it

[3] Anderson's appellate counsel noted in the motion that he had consulted with Anderson on the decision to dismiss the DNA surcharge claim.

did not oppose Anderson's motion. Having considered this case at conference, we conclude that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1).

First, we grant Anderson's motion to voluntarily dismiss his DNA surcharge claim; any challenge to the DNA surcharge is waived.

Second, we agree with the parties that Anderson is entitled to an evidentiary hearing on his ineffective assistance claim. We also agree with the State that if the trial court determines that trial counsel's performance was deficient, the trial court will need to make factual findings as to the number of days of credit that Anderson lost as a result of trial counsel's deficient performance. Accordingly, the postconviction order is summarily affirmed in part and reversed in part, and the cause is remanded for a ***Machner*** hearing on Anderson's claim that his trial counsel provided ineffective assistance with respect to Anderson's bail. *See* WIS. STAT. RULE 809.21.

For the foregoing reasons,

IT IS ORDERED that Daniel Anderson, Jr.'s motion to voluntarily dismiss his challenge to the imposition of a single DNA surcharge is granted; any challenge to the DNA surcharge is waived.

IT IS FURTHER ORDERED that the postconviction order is summarily affirmed in part and reversed in part, and the cause is remanded for an evidentiary hearing concerning Daniel Anderson Jr.'s bail-related ineffective-assistance-of-counsel claim, consistent with this order. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals