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DISTRICT I

February 6, 2024

To:

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Circuit Court Judge
Electronic Notice

Michael C. Sanders
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Christopher D. Sobic
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You are hereby notified that the Court has entered the following opinion and order:

2022AP987-CR

State of Wisconsin v. Joseph L. Howard (L.C. # 2015CF2561)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Joseph L. Howard appeals from a judgment of conviction and from an order that denied his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1) (2021-22).¹

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Background

This matter comes before us for a second time. In our previous decision we detailed the facts of Howard’s case. See *State v. Howard*, No. 2019AP1384-CR, unpublished slip op. ¶¶3-23 (WI App Dec. 15, 2020). For purposes of this appeal, it suffices to state that Howard’s convictions stem from an incident that occurred in June 2015: “Milwaukee Police Officers were dispatched to a residence on South 9th Street in Milwaukee, where they discovered a man—later identified as Vincent Howard, Howard’s nephew—with multiple stab wounds lying on the living room floor. Vincent died from his injuries.” *Id.*, ¶3.

Howard eventually made a custodial statement to police in which he admitted to stabbing Vincent. Howard said that he entered the apartment while Vincent was beating J.W.[, Howard’s girlfriend.] Howard stated that he jumped on Vincent to get him to stop beating J.W. Vincent pushed Howard off of him, at which time Howard grabbed a knife and stabbed Vincent twice. Howard also admitted to leaving the residence after the stabbing, and then returning with a man named Tom who told Howard he should clean up the blood, which Howard did.

The State subsequently amended the homicide charge against Howard to first-degree intentional homicide, as a party to a crime.

Id., ¶¶7-8.

The case proceeded to trial. The jury convicted Howard of second-degree intentional homicide, as a party to a crime, as well as felony bail jumping.²

Howard filed a postconviction motion, which the trial court denied without an evidentiary hearing.³ He appealed and argued that his trial counsel improperly conceded his guilt in the

² The Honorable Ellen R. Brostrom presided over the trial and sentencing.

homicide over Howard’s insistence that he was not present when the victim was killed, which is a structural error according to *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). *Howard*, No. 2019AP1384-CR, ¶1. Additionally, Howard argued that the trial court erred in denying his request for new counsel during the trial. *Id.* We concluded:

Howard has pled sufficient facts in his postconviction motion to warrant an evidentiary hearing with regard to both whether his trial counsel’s performance violated the principles set forth in *McCoy* and whether the trial court erred in its denial of his request for new counsel, specifically with regard to the disagreement between Howard and his trial counsel regarding the theory of defense as it relates to the principles of *McCoy*. We therefore reverse the order denying Howard’s postconviction motion, and remand this case for further proceedings consistent with this decision.

Id., ¶2. The Wisconsin Supreme Court denied the State’s petition for review.

At the hearing on remand, Howard and his trial counsel testified.⁴ Counsel testified that during his conversations with Howard leading up to trial, Howard told him “I didn’t do shit, and they tricked me on the confession,” which counsel took to mean that Howard did not kill Vincent. As such, counsel planned to pursue a defense of Howard “didn’t do it” and somebody else committed the murder at trial. According to counsel, the only defense that he considered pursuing before trial was that Howard did not commit the murder.

Counsel testified that Howard continued to maintain that he did not commit the murder throughout the trial. Counsel admitted that he and Howard disagreed with each other, as Howard told his attorney he did not commit the murder, and counsel thought he should pursue self-

³ The Honorable Jeffrey A. Wagner denied the original postconviction motion.

⁴ During the hearing, Howard abandoned his claim that the trial court erred in denying his request for new counsel during the trial.

defense or defense of others. Counsel could not point to a conversation during the trial in which Howard told him he could admit to the jury that he killed Vincent. Instead, counsel described seeing “a resignation in [Howard] after watching [his] confession, after watching his girlfriend, that he was of a different approach, that he was somewhat defeated and less defiant about someone else did it, and agreeing that this might be a better angle, and he might have a chance here.”

According to counsel, Howard did not say, “I give you permission to tell the jury that I stabbed and killed Vincent.” Instead, counsel testified Howard said, “‘yeah, man, go ahead’ or something like that.” Counsel continued: “[T]hat’s why I came back out after the break that was allowed by the court, and we agreed, as he did, that self-defense and defense of others would be requested.”

Howard testified that prior to trial he told counsel that he did not commit the murder. Then, during the trial, counsel told him that “defense of others” would be his best defense. In response, Howard told counsel that he was not present for the murder and did not want him to pursue that defense. Howard said counsel informed him that the decision to pursue self-defense and defense of others was counsel’s decision. Howard testified he eventually agreed that the court could read the instructions on self-defense and defense of others to the jury because counsel said “he was going to do it anyway.” However, Howard testified that he never told counsel he could inform the jury that he killed Vincent.

On cross-examination, Howard acknowledged that prior to closing arguments, he and counsel discussed self-defense and defense of others. Howard additionally acknowledged that leading up to that discussion, he saw his confession played to the jury, heard his nephew

Emanuel tell the jury Howard killed Vincent, and was aware J.W.’s initial statements that Howard was present at the crime scene were admitted as evidence. Howard said he knew that his counsel’s opinion was that self-defense or defense of others would be his best way of not going to prison for life. Howard testified that he agreed to the defense.

The postconviction court denied Howard’s motion.⁵ The court found that trial counsel “generally testified credibly” and credited counsel’s testimony about Howard agreeing to instruct the jury on self-defense and defense of others. The court further found that Howard’s testimony was “generally not credible ... was evasive and at times, [he] feigned confusion.” The court determined that Howard “expressly asserted that the objective of his defense was to maintain innocence at the beginning and throughout most of his trial[.]” The court, however, found that Howard’s “eventual agreement to the inclusion of the jury instructions on self-defense and defense of others meant that he chose an alternative defense objective in the face of the strong evidence against him presented by the State.”⁶ This appeal follows.

Discussion

The sole issue on appeal is whether Howard was denied his Sixth Amendment right to choose the objective of his defense when counsel conceded to the jury that Howard killed Vincent but argued Howard was not guilty of any crime because he was acting in self-defense or

⁵ The Honorable David L. Borowski conducted the evidentiary hearing on remand and denied the postconviction motion.

⁶ The circuit court referred to its findings about Howard initially wanting to “maintain innocence” but then choosing “an alternative defense objective” as “conclusions of law.” As noted by the State, however, “the underlying findings of what happened” are findings of fact. *State v. Mayo*, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted).

defense of others. Howard argues counsel overrode his desire “to maintain his innocence—that is, he did not kill [Vincent]”—in violation of the principles set forth in *McCoy*. He contends that counsel unreasonably assumed his acquiescence to the jury instructions on self-defense and defense of others meant counsel was free to concede to the jury that Howard killed Vincent even though Howard never gave counsel verbal permission to make this admission.

We independently review whether deprivation of a constitutional right has occurred. *State v. Chambers*, 2021 WI 13, ¶13, 395 Wis. 2d 770, 955 N.W.2d 144 (citation omitted). In analyzing *McCoy*, our supreme court explained:

In *McCoy*, the Court held that trial counsel cannot concede a client’s guilt when a client expressly asserts that the objective of the defense is to maintain innocence and the client objects to the concession of guilt. The Court also held that this error is structural, and one for which a new trial is required.

Chambers, 395 Wis. 2d 770, ¶2. “[T]o succeed on a *McCoy* claim, the defendant must show that he or she expressly assert[ed] that the objective of ‘his defence’ is to maintain innocence of the charged criminal acts and the lawyer did not abide by that objective and [overrode] it by conceding guilt.” *Chambers*, 395 Wis. 2d 770, ¶20 (two sets of quotations and citations omitted).⁷

With these principles in mind, we conclude that Howard’s argument under *McCoy* fails for two reasons. First, counsel did not concede that Howard was guilty of a crime. Counsel argued that although Howard killed Vincent, he was *not* guilty of any crime insofar as Howard’s

⁷ In our previous decision, we provided a comprehensive recitation of the background and holding in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). See *State v. Howard*, No. 2019AP1384-CR, unpublished slip op. ¶¶24-28 (WI App Dec. 15, 2020).

actions were privileged because he was acting in self-defense or in defense of his girlfriend, J.W. Without a concession that Howard was guilty of a crime, *McCoy* is inapplicable.

Second, even if *McCoy* is applicable, Howard’s claim fails because he has not shown that counsel overrode his objective to maintain his innocence as to Vincent’s murder. As found by the postconviction court, Howard agreed to instruct the jury on self-defense and defense of others and to pursue those defenses, which reflected an alternative defense objective. While Howard’s initial objective was acquittal because he “didn’t do shit,” that objective later shifted to simply an acquittal, or at worst, a conviction under which he could walk out someday and not be in prison for the rest of his life.⁸

The State sums up the context:

Once Howard said that he wanted the jury to be instructed on self-defense and defense of others, counsel had every reason to believe that Howard had no “intransigent objection” to an admission that he killed Vincent, coupled with an argument that he was not guilty of any crime because he was acting in self-defense or defense of J.W.

See *McCoy*, 138 S. Ct. at 1510. Counsel’s strategic decision to concede that Howard killed Vincent in self-defense or defense of others was consistent with Howard’s objective of not being found guilty of first-degree intentional homicide. See *id.* at 1508 (Stating that counsel gets to

⁸ Perfect self-defense or defense of others is a privilege to conduct that is otherwise criminal. See WIS. STAT. §§ 939.45 & 939.48. Imperfect self-defense or defense of others, on which the jury was also instructed, gave the jury the opportunity to find Howard not guilty of first-degree intentional homicide, but guilty of second-degree intentional homicide, which reduced Howard’s prison exposure from life to a maximum of sixty years. See *State v. Head*, 2002 WI 99, ¶69, 255 Wis. 2d 194, 648 N.W.2d 413; see also WIS. STAT. §§ 940.01(2)(b), 939.50(3)(a)-(b).

decide ““what arguments to pursue”” and “how best to *achieve* a client’s objectives[.]” (Citation omitted.)). The postconviction court properly concluded there was no *McCoy* violation.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals