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DISTRICT II

March 27, 2013

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

2012AP1005-CR State of Wisconsin v. Kenneth R. Peitzmeier (L.C. # 2008CF291)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Kenneth R. Peitzmeier appeals a nonfinal order denying his motion for funding to obtain an expert for his postconviction proceedings. Based on 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 (2011-12).¹ We reverse the order and remand for the circuit court to properly exercise its discretion.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Peitzmeier was convicted following a jury trial of physical abuse of a child, recklessly causing bodily harm, as a repeater. The charge stemmed from an allegation that Peitzmeier had forcibly placed his daughter, TMP, down in her crib, hitting her head on a hard plastic mobile toy.

Following his conviction, Peitzmeier's appointed counsel filed a no-merit report, which this court rejected. *See State v. Peitzmeier*, No. 2010AP270-CRNM, unpublished op. and order (WI App Apr. 8, 2011). One of the issues we identified as having arguable merit was trial counsel's failure to present a medical expert at trial. We noted that there were factual questions about what counsel and Peitzmeier agreed to do about expert testimony and about counsel's efforts to locate a medical expert. Accordingly, we dismissed the appeal and reinstated the WIS. STAT. RULE 809.30 postconviction motion deadlines.

On remand, Peitzmeier sought funding for an expert witness named Dr. Richard Tovar to review TMP's medical records to assist Peitzmeier in evaluating his claim that his trial counsel was ineffective for not retaining an expert witness to testify that TMP's injuries were accidental. The circuit court denied Peitzmeier's request, stating that "there is no indication that a review of the evidence by a defense expert would [be] more than cumulative."

Peitzmeier subsequently petitioned for leave to appeal the circuit court's nonfinal order. In its response, the State acknowledged that, "[t]he record would benefit from a more detailed explanation by the circuit court of its reasoning." Noting that no defense expert had ever reviewed TMP's medical records, the State observed, "it is not clear how Dr. Tovar's postconviction review of the records could ever be deemed 'cumulative.'" The State also indicated "the circuit court did not explain how Peitzmeier could satisfactorily demonstrate the

relevancy and probative value of Tovar’s prospective expert testimony without hiring him first and having him review the child-victim’s medical records to determine whether they support a viable, alternative theory of accidental injury.” This court granted Peitzmeier’s petition.

On appeal, Peitzmeier contends that the circuit court erroneously exercised its discretion when it denied his motion for funding to obtain an expert. Specifically, he complains that the court failed to consider relevant factors or engage in a rational process in its decision.²

This court reviews a circuit court’s decision not to provide witness funds for an indigent defendant for an erroneous exercise of discretion. *See State ex rel. Dressler v. Cir. Ct. for Racine Cnty.*, 163 Wis. 2d 622, 640-41, 472 N.W.2d 532 (Ct. App. 1991). A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

Reviewing the decision of the circuit court, we conclude that it failed to exercise its discretion in denying Peitzmeier’s motion for funding to obtain an expert. Like the State, it is unclear to us what the court meant when it dismissed Tovar’s postconviction review of the records as “cumulative.” Accordingly, we reverse the order and remand for the circuit court to properly exercise its discretion in addressing Peitzmeier’s motion. Because Peitzmeier’s motion is designed to assist him in evaluating his claim that his trial counsel was ineffective, the court

² Peitzmeier also contends that the circuit court’s order denying his motion for funding to obtain an expert denied him his due process right to present a fair defense and proceed with his postconviction motion. Because we agree with Peitzmeier that the circuit court erroneously exercised its discretion, we do not address this argument.

may also consider whether trial counsel's performance was deficient to begin with, as Tovar's report will likely address the issue of prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause remanded with directions, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the time for filing a notice of appeal or postconviction motion is extended to ninety days following the circuit court's decision on Peitzmeier's motion for funding to obtain an expert. *See* WIS. STAT. RULE 809.82(2)(a).

Diane M. Fremgen
Clerk of Court of Appeals