

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2010AP1090
(Milwaukee County Case No. 2008CF81)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEMETRIUS M. BOYD,

Defendant-Appellant.

**Appeal from the Judgment and the Final Order
Entered in the Circuit Court for Milwaukee County,
The Honorable Jeffrey T. Conen and Jeffrey Wagner, Circuit
Judges, Presiding**

**REPLY BRIEF OF
DEFENDANT-APPELLANT**

REBECCA R. LAWNICKI
State Bar No. 1052416
HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

ARGUMENT..... 1

I. THE CIRCUIT COURT SHOULD HAVE GRANTED BOYD A NEW ATTORNEY. 1

 A. The Trial Court Applied the Wrong Legal Standard..... 1

 B. Boyd Was Denied Due Process Under *Lomax/Phifer*. 2

 C. Boyd’s Request Was Timely. 4

II. INEFFECTIVE ASSISTANCE OF COUNSEL. 4

 A. Violation of Attorney-Client Privilege 4

 B. Interrupting Boyd’s Testimony to Research Perjury/Failure to Advise. 5

 C. Failure to Request a Hearing Under *Lomax/Phifer*. 6

 D. Failure to Request Admission of Washington’s Prior Conduct..... 6

 E. Boyd is Entitled to a Hearing..... 7

CONCLUSION..... 7

RULE 809.19(8)(d) CERTIFICATION..... 8

RULE 809.19(12)(f) CERTIFICATION..... 8

TABLE OF AUTHORITIES

Cases

Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis.2d 97, 279 N.W.2d 493 (Ct. App. 1979) 1

<i>Phifer v. State</i> , 64 Wis. 2d 24, 218 N.W.2d 354 (1974).....	2, 5, 6, 7
<i>State v. Bentley</i> , 201 Wis.2d 303, 548 N.W.2d 50 (1996)	2
<i>State v. Boehm</i> , 127 Wis.2d 351, 379 N.W.2d 874 (Ct. App. 1985)..	6
<i>State v. Flores</i> , 170 Wis.2d 272 (Ct. App. 1992).	4, 5
<i>State v. Jones</i> , 2007 WI App. 248, 306 Wis.2d 340, 742 N.W.2d 341	1
<i>State v. Jones</i> , 2010 WI 72, __Wis.2d__, __N.W.2d__	2
<i>State v. Leitner</i> , 2001 WI App 172, 247 Wis.2d 195, 633 N.W.2d 207.	7
<i>State v. Lomax</i> , 146 Wis.2d 356, 432 N.W.2d 89 (1988).	2, 5, 6, 7
<i>State v. McDowell</i> , 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500.	5
<i>State v. Meeks</i> , 2003 WI 104, 263 Wis.2d 794, 666 N.W. 2d 859.	5
<i>State v. Simpson</i> , 200 Wis.2d 798, 548 N.W.2d 105 (Ct. App.1996).	4

Constitutions, Rules and Statutes

Wis. Stat. § 967.04.	1
Wis. Stat. §905.03(4).	1

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2010AP1090
(Milwaukee County Case No. 2008CF81)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEMETRIUS M. BOYD,

Defendant-Appellant.

**REPLY BRIEF OF
DEFENDANT-APPELLANT**

ARGUMENT

I.

**THE CIRCUIT COURT SHOULD HAVE
GRANTED BOYD A NEW ATTORNEY**

A. The Trial Court Applied the Wrong Legal Standard

The state fails to rebut and therefore concedes that the trial court applied an improper, ineffective assistance or *Machner* standard when Boyd requested new counsel. *E.g., Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979) (that which is not disputed is deemed conceded). Accordingly, Boyd is entitled to a *nunc pro tunc* hearing under the proper standard to establish whether he would have been entitled to new counsel as of the time he first requested a new lawyer. *State v. Jones*, 2007 WI App.

248, ¶13, 306 Wis.2d 340, 742 N.W.2d 341 (*Jones I*), *aff'd* 2010 WI 72, ___ Wis.2d ___, ___ N.W.2d ___. The trial court never addressed the proper *Lomax/Phifer* considerations in assessing Boyd's requests for new counsel at either of his requests. *See* Boyd's Brief at 7-16; *State v. Lomax*, 146 Wis.2d 356, 432 N.W.2d 89 (1988); *Phifer v. State*, 64 Wis. 2d 24, 218 N.W.2d 354 (1974). Instead it cut Boyd off at his first request and focused on an ineffective assistance of counsel standard on both occasions. (R99:44-46; App.13-15; R95:14-15; App.51-52; R99:55, 57, 59; App. 24,26,28). A circuit court properly exercises its discretion when it has examined the relevant facts, *applied the proper legal standards*, and engaged in a rational decision-making process. *See State v. Bentley*, 201 Wis.2d 303, 309-310, 548 N.W.2d 50 (1996) (emphasis added). The trial court here did not apply the proper standard and thus could not have engaged in a rational decision making process.

As discussed in his opening brief, Boyd had no meaningful opportunity to explain the communication breakdown. Instead of listening to Boyd's concerns and assessing them under the *Lomax/Phifer* criteria, the court wrote them off as him "trying to be a problem" (R95:13-14). The court should have specifically inquired about the breakdown in communication. Instead, the court repeatedly referenced an ineffective assistance of counsel or *Machner* standard, and Boyd is entitled to a *nunc pro tunc* hearing.

B. Boyd Was Denied Due Process Under *Lomax/Phifer*

The record reveals substantial clues that the conflict between Boyd and his attorney was so great that it resulted in a total breakdown in communication, despite the circuit court's failure to hold a proper hearing on the subject. A full and proper hearing pursuant to *Lomax/Phifer* is necessary for the circuit court to properly assess the communication breakdown.

The state claims the trial court held an adequate hearing; however, the state's examples simply highlight evidence of a communication breakdown between Boyd and Perlick-Molinari. If Boyd and Perlick-Molinari could communicate, the court would not have needed to hold the April 30, 2010 hearing at all. The hearing made clear Perlick-Molinari could not communicate to Boyd why the video

deposition was necessary and proper under Wis. Stat. § 967.04. Instead of confronting the communication problems, the trial court wrote the situation off as Boyd “trying to be a problem.” On several occasions, Perlick-Molinari informed the trial court that he was not sure what Boyd’s opinion was, or that he had explained something to Boyd and Boyd was just not understanding (R95:3-4,8,14;App.40-41,51;R99:40,45-47,50-52,57-58,64-65;App.9,14-16,19-21,26-27,34-35). Again, if the two were communicating, Perlick-Molinari would know whether Boyd had concerns about his representation. At the April 30 hearing the trial court cut Boyd off, went through an ineffective assistance of counsel analysis, and claimed Boyd was trying to delay the trial. The trial court found this despite his speedy trial demand and the fact that Boyd had not previously asked for an adjournment of the trial (R90:49;R94:15-16).

The same held true when Boyd made his second request for new counsel. Had Perlick-Molinari been able to communicate with Boyd, he would have explained to him why the questions about whether Lopez recorded taking his DNA sample and any statements he made to Lopez were not important, because the state “never attempted to introduce into evidence any statements Boyd might have made to Detective Lopez.” State’s Response at 5. The bottom line is that the trial court had no business discussing which motions Boyd thought Perlick-Molinari should have filed, or performing the cost/benefit analysis with Boyd regarding entering a plea. These were discussions for Boyd and his attorney, ones the lack of communication prevented. Communication was so bad that, rather than be cemented to an attorney with whom he could not communicate, Boyd asked to enter a guilty plea (R99:39-67, 45,App.8-36).

The fact that Boyd’s requests for new counsel did not contain the magic words desired by the state or specific examples of communication problems does not support a finding of adequate communication between Boyd and his attorney because the trial court never held a proper hearing. Boyd tried to tell the trial court that he could not communicate with his attorney, but the court ignored what he was really saying and asked the wrong questions. Boyd used every word but communication to try and tell the court that he could not communicate with his attorney. Boyd’s complaints were about communication. Boyd was not an attorney and had no knowledge of the applicable legal

standards for requesting new counsel. He simply knew that there was a problem that he could not resolve on his own.

C. Boyd's Request Was Timely

Boyd made his request in a timely manner. Boyd requested a new attorney prior to trial (R95:14;App.51). He did not have a meaningful opportunity to address the trial court prior to April 30, 2008 because he was not produced for any hearings after the arraignment. Boyd did not correspond with the trial court by any means other than direct communication during hearings.

Although it is fair to say some delay of the trial date might have been necessary because Boyd made the request five days prior to the beginning of trial, there is no indication he waited to make the request, or made it as a delay tactic. Although the trial court stated Boyd tried to delay the case, it never gave a specific reason why it believed so (R95:16; 99:58,61-62,66). The trial court merely speculated Boyd was trying to delay the trial, despite his speedy trial demand and the fact that Boyd had not previously asked for an adjournment of the trial (R91:49).

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Violation of Attorney-Client Privilege

Boyd did not waive his attorney client privilege when he requested a new attorney. Although the trial court mistakenly believed a *Machner* hearing was appropriate when Boyd requested new counsel, Boyd did not allege ineffective assistance of counsel or another breach of duty by the lawyer to the lawyer's client. Wis. Stat. §905.03(4), which provides an exception to the attorney-client privilege in the context of an ineffective assistance of counsel claim when communications are "relevant to an issue of breach of duty by the lawyer to the lawyer's client," see *State v. Flores*, 170 Wis.2d 272, 277-278 (Ct. App. 1992); *State v. Simpson*, 200 Wis.2d 798, 548 N.W.2d 105 (Ct. App.1996) accordingly does not apply here. Boyd did not raise the issue of ineffective assistance of counsel until his post-conviction motion, and has yet to waive attorney-client privilege through a

colloquy with the circuit court because the circuit court did not grant him a hearing on that motion.

Even by criticizing Perlick-Molinari, Boyd did not give a carte blanche waiver of all privileged discussions. Even at a *Machner* hearing the waiver of the attorney-client privilege is limited rather than absolute and applies only to communications that are in fact relevant to the question before the court. *See Flores*, 170 Wis.2d 277-278. Perlick-Molinari violated even what the Wisconsin statutes would have permitted him to testify to at a *Machner* hearing by delving into the specifics of trial strategy and private discussions he had with his client.

The April 30, 2008 hearing and the discussion during Detective Lopez' testimony should have been limited to the issues outlined in *Lomax/Phifer*, but it was not. Had the court properly focused the hearings, the parties would have only answered questions about the breakdown in communication and its balance with the prompt administration of justice. That did not happen, and Perlick-Molinari instead gave the court privileged information including telling the court about the process he and Boyd went through in deciding whether and how to call a witness, and regarding motions they had discussed filing.

Boyd certainly had not waived attorney client privilege when Perlick-Molinari interrupted his cross-examination and informed the trial court he needed to research perjury and the Fifth Amendment (R104:51-51). It only makes sense that these disclosures shattered any trust Boyd had remaining in Perlick-Molinari. Perlick-Molinari essentially called Boyd a liar in open court. Trust is an essential part of the attorney-client relationship. *See, e.g., State v. Meeks*, 2003 WI 104, ¶59, 263 Wis.2d 794, 666 N.W. 2d 859.

B. Interrupting Boyd's Testimony to Research Perjury/Failure to Advise

Based on the record, Perlick-Molinari had no reason or duty to halt Boyd's testimony in order to research perjury. However, because the circuit court denied Boyd a hearing on his post-conviction motion Perlick-Molinari has not elaborated on why he did so. A reasonable attorney in Perlick-Molinari's position would have known the requirements of *State v. McDowell*, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d

500. At very least, Perlick-Molinari should have realized he was not questioning Boyd at the time, and had no duty to interrupt. Had the two been communicating, Perlick-Molinari surely would have been able to explain the risks of perjury to his client before he took the stand. Instead, Perlick-Molinari asked the trial court to take a break during the state's cross-examination of Boyd to "address some legal issues," just after the prosecutor asked Boyd "[a]nd that's totally contrary to everything that you have told this tribunal in the past, isn't that true?" (R104:51). The timing of the interruption was a red light to the jury that Boyd's lawyer believed he was a liar and needed to research what to do about it.

C. Failure to Request a Hearing Under *Lomax/Phifer*

A reasonable attorney in Perlick-Molinari's position should have moved to withdraw and requested a hearing under *Lomax/Phifer*. The circuit court did not hold a proper hearing on Boyd's request for new counsel, so it is impossible to say he had "no good reason for wanting a new attorney." State's Response at 16. The constant disconnect between Boyd and Perlick-Molinari is evidence of a communication breakdown.

D. Failure to Request Admission of Washington's Prior Conduct

Perlick-Molinari never argued that he should be allowed to cross-examine Washington regarding the fact that the prior similar activity *resulted in a conviction*. In *State v. Boehm*, 127 Wis.2d 351, 358, 379 N.W.2d 874 (Ct. App. 1985), the defendant was charged with soliciting first-degree murder and was also under investigation for welfare fraud. The circuit court permitted the state to question Boehm about her failure to report rental income while she received welfare. This Court found the trial court did not err because "specific instances of conduct probative of truthfulness or untruthfulness and not remote in time, may be inquired into on cross-examination[.]" for the purposes of attacking credibility. *Id.*

Like in *Boehm*, Perlick-Molinari should have sought to impeach Washington's credibility by questioning him about the prior conduct involved in his previous car thefts. The state made a point of emphasiz-

ing Washington and Nickelson's youth on more than one occasion.¹ Had the jury learned Washington was an experienced car thief, they would have been able to use the information to assess his credibility and whether he was simply testifying to escape penalty for yet another in a string of car thefts. The prior conduct was consistent with Perlick-Molinari's theory of defense, he questioned Washington about his access to Boyd's clothing and the shotgun and in his closing argument, he argued that Washington framed Boyd (R104: 59-60).

E. Boyd is Entitled to a Hearing

Boyd is entitled to a hearing on his post-conviction motion because, for the reasons explained in his opening brief, he has made an adequate showing that Perlick-Molinari's performance was deficient by violating Boyd's attorney-client privilege, interrupting Boyd's testimony to research perjury, failing to request a hearing under *Lomax* and *Phifer*, and failing to request the admission of Washington's prior conduct. See *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony); Opening Brief at 28 - 30.

CONCLUSION

For these reasons, Boyd respectfully asks that the Court reverse the post-conviction court's order denying his post-conviction motion.

¹ The state questioned both Washington and Nickelson regarding their ages (R102:18,68) and asked Boyd:

Q: How old are you, Mr. Boyd?

A: 26.

Q: 26 years of age. Let me get this straight. Miss Skinner, she's a teenager, right?

A: Right.

Q: Dennis Nickelson, he is a teenager, isn't he?

A: Yes.

Q: Kenyarie Washington, he's a teenager, right?

A: Yes.

Q: You are 26 years of age, correct?

A: Right.

(R104:41).

Dated at Milwaukee, Wisconsin, September 27, 2010.

Respectfully submitted,

DEMETRIUS M. BOYD,
Defendant-Appellant

HENAK LAW OFFICE, S.C.

Rebecca R. Lawnicki
State Bar No. 1052416

P.O. ADDRESS:

316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2189 words.

Rebecca R. Lawnicki

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Rebecca R. Lawnicki

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 27th day of September 2010, I caused 10 copies of the Reply Brief of Defendant-Appellant Boyd to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Rebecca R. Lawnicki

Boyd Reply brief.wpd