

Handing a Case Over: Appellate Duties of Trial Counsel

I. Introduction

All defendants have the right to a direct appeal from a judgment of conviction. Wisconsin Stat. § 809.30 is the principle statute governing the appellate procedure. The appellate process begins with the filing of the Notice of Intent to Pursue Postconviction Relief, which will be discussed in further detail below. The notice of intent is filed within twenty days of sentencing in a criminal case, or at the time of final adjudication in other cases. It is important to be aware that the issues that may be appealed will depend on the timing of the filing of the notice of intent to pursue postconviction relief. Here are some examples:

- For a notice of intent filed from an original judgment of conviction, your case includes the underlying conviction and sentence, as well as any matters (motions to suppress, other motions, etc.) related to the conviction and/or sentence.
- For a notice of intent filed from a judgment of conviction following sentencing after revocation of probation (and filed more than twenty days after the original sentencing hearing), your case does not include the underlying conviction or the underlying administrative revocation decision. It includes only the sentencing after revocation of probation and matters directly related to that.
- For a notice of intent filed from an order denying sentence credit or deciding restitution (and filed more than twenty days after the original sentencing hearing), your case includes only the credit or restitution decision and matters directly related to that.
- For a notice of intent filed from an amended judgment of conviction (and filed more than twenty days after the original sentencing hearing), your case includes only the matters changed by the amendment and directly related to that.

SPD Appellate Handbook, at 5.

The SPD appellate division handles appeals in misdemeanors, felonies, termination of parental rights, juvenile cases, Chapter 980 (sexually violent commitments), Chapter 51 (mental health commitments), and guardianships under Chapter 55. The division can also appoint counsel in discretionary appeals under Chapter 974.06. The vast majority of cases are direct appeals under Chapter 809.30.

The Wisconsin Court of Appeals is divided into four districts, though considered a single court, making each district bound by the decisions in other districts. District I handles only Milwaukee County cases. A map of all of the districts can be found on CCAP. <http://www.wicourts.gov/courts/appeals/map.htm>

Misdemeanor cases are ineligible for publication and are decided by a one judge panel. See Wis. Stat. §§ 753.31(2) and (3); Wis. Stat. § 809.23(4)(b). The court, however, can, on its own, convert a misdemeanor case to a three-judge panel and publish a decision in a misdemeanor case.

II. To Appeal or To Not Appeal?

- A. Trial Counsel has a statutory, [Wis. Stat. Rule 809.30(2)], and ethical duty [SCR 20:1.16] to advise clients of their postconviction/appellate rights. It is ultimately the client's decision to file the Notice of Intent to Appeal.

Advise client of his or her right to appeal-form CR233-Notice of Intent of Right to Seek Postconviction Relief. The form is the CR-233. It is available online in both English and Spanish

https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&FormNumber=&beg_date=&end_date=&StatuteCite=&Category=8&SubCat=All

1.) How to advise about the merits of an appeal

- Preserved issues-law vs. findings of fact and credibility
- Appellate counsel will ultimately determine the merits of an appeal.
- Different appellate issues have different remedies-an appeal does not “overturn” a case.
- Pleas waive most issues
- Pleas are binding, and only in exceptional circumstances are pleas able to be withdrawn

2.) What your client can expect procedurally

- The SPD has 30 days to appointment counsel, and 50 days to order the court record and transcripts.
- Court reporters then have 60 days to prepare the transcripts.
- Counsel has 60 days to file postconviction motion or notice of appeal-often take more time than this.
- The bottom line is that appeals take time! This is particularly important for misdemeanor clients to know.

- B. Filing the Notice of Intent (NOI)-Wis. Stat. § 809.30(2)

- 1.) Starts the process for an appeal
 - Needs to be filed within 20 days after date of sentencing- Wis. Stat. 809.30(2). **See example**
 - File the NOI in the circuit court. It must be served on the prosecutor or any other party.
 - Send a copy of a file stamped NOI to the SPD Appellate Intake Unit
 - Complete the SPD Appellate Questionnaire
 - Send a copy of any transcripts you obtained
 - Copy of the motion for release pending appeal or stay of sentence pending appeal if applicable.
 - Please include any information about upcoming court dates re: a stay or restitution
 - Please include all contact information for clients
 - The deadline for the NOI can be extended upon a showing of good cause- Wis. Stat. § 809.82
 - The motion to extend the time for filing the NOI is filed in the Court of Appeals in the district where your circuit court is.
 - The motion must contain: the correct COA district, the case information, and an explanation why an extension is necessary. **See example**
 - The original and 4 copies to the COA and a copy must be served on the DA and the clerk of circuit court
 - You should file the NOI with the clerk of circuit court at the same time, or prior to filing the motion to extend.
 - You can fax your motion, and 4 copies to the COA or mail. It will be considered filed the day or mailing.

III. Release Pending Appeal

A. Trial counsel's responsibilities

- 1.) Trial counsel, particularly in misdemeanor cases, should file a motion for a stay pending appeal. **see example**
- 2.) The trial court has the discretion to grant release pending appeal in both misdemeanor and felony cases, though much more likely in misdemeanor cases.
- 3.) The statutes that govern release pending appeal are: Wis. Stats. § 809.31, 969.01, 969.08, and 969.09
 - 809.31 requires the circuit court to hold a prompt hearing
 - 809.31(3) allows the court to grant release if it makes the following findings:

- There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of the postconviction proceedings;
 - The defendant is not likely to commit a serious crime, intimidate a witness, or otherwise interfere with the administration of justice;
 - The defendant will promptly prosecute postconviction proceedings;
 - And the postconviction proceedings are not take for the purposes of delay
- 809.31(4) lists what the court must consider in exercising its discretion
 - Consider stays in cases with short sentences, probation with condition time, low level felony or enhanced misdemeanor cases, when there is a preserved issue.
 - You MUST serve the District Attorney
- 4.) Provide copies of the motion and order deciding the motion to the Appellate Intake Unit
- If the court grants the motion and schedules a review date, as for a date at least 120 days out. This is the time needed to appoint appellate counsel, order transcripts, receive and review the transcripts.
 - Make sure the client is aware of the next court date and that Appellate has all contact information

IV. Sentence Credit

It is trial counsel's responsibility to accurately calculate sentence credit at sentencing. Sentence credit, however, cannot be waived.

- A. Pursuant to Wis. Stat. § 973.155(1)(a)-Credit should be given "for all days spent in custody in connection with the court of conduct for which sentence was imposed." Dual credit will not be given in consecutive sentences.
- 1.) Research any sentencing credit issue before sentencing. On Point and the SPD website are good resources.
 - 2.) Be prepared before sentencing
 - Talk to your client about all periods of time in custody. Credit can get complicated when there are multiple cases, VOP holds and revocations.
 - Verify the dates of incarceration at all institutions/jails
 - Check the judgment of conviction to ensure that client was given all credit due.

- V. Restitution
- A. It is trial counsel's responsibility to object to restitution if there is not a stipulation. A stipulation waives the issue.
 - B. Restitution is important because probation can be extended if client's don't make a good faith effort to pay it. Clients in state institutions must pay a percentage of their wages toward restitution
 - C. The statute governing restitution is Wis. Stat. § 973.20
 - 1.) There must be a causal nexus between the crime and the damage
 - 2.) The burden is on the victim
 - 3.) Ask for verification prior to sentencing. Any disputes you **MUST** ask for a hearing or the issue is waived.
 - 4.) On Point is a good place to start researching any issues
- VI. Other Issues
- A. Sentence Modification under Wis. Stat. § 973.19 waives a client's direct appeal under 809.30.
 - 1.) Consult with the client before filing this motion
 - B. Revocation Cases/Reconfinement after revocation of E.S.
 - 1.) The trial attorney is responsible for the administrative appeal and writ of certiorari to the circuit court
 - 2.) If a writ is denied, the rules of civil procedure govern the appeal. [a NOI will not perfect a civil appeal]. A NOA must be filed within 90 days of entry of the final written order (unless written notice of entry of final judgment is entered within 21 days, then the NOA deadline is 45 days). This **CANNOT** be extended
 - 3.) Any hand-off to the Appellate Division occurs after certiorari. However, there is not right to counsel, so do not file a Notice of Appeal until the Appellate Division Directs you to, or you are handling the appeal yourself.
See "Perfecting Appeals in WI Public Defender Cases" on the SPD website
 - C. Plea Withdrawal Pre-Sentencing
 - 1.) Do not ignore your client if he/she indicates that they want to withdraw their plea prior to the case going to sentencing.
 - 2.) It is a much easier standard/burden to meet than plea withdrawal postconviction.
 - ***State v. Bolling***, 232 Wis. 2d 561, 605 N.W.2d 199 sets forth the standard for a pre-sentence plea withdrawal. Whether to allow plea withdrawal prior to sentencing is in the discretion of the circuit court. "However, a circuit court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution will be substantially prejudiced."

- Consult our office if you have questions about pre-sentence plea withdrawal