

**RECEIVED**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

**07-31-2012**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

Circuit Court Case No.  
2008CF4994

v.

STEPHEN M. LEHMAN,

Court of Appeals Case No.  
2011AP2821

Defendant-Appellant.

---

**REPLY BRIEF OF DEFENDANT-APPELLANT**

---

Appeal from Decisions of the Circuit Court for Milwaukee County, the  
Honorable Dennis R. Cimpl Presiding, dated September 30, 2009; March 1, 2010;  
December 16, 2010; February 17, 2011; and November 14, 2011.

---

Karyn T. Missimer  
State Bar Number: 1061255

Missimer Law, S.C.  
P.O. Box 2077  
Janesville, WI 53547  
Phone: 262/565-8201  
Fax: 866/314-2392

## **TABLE OF CONTENTS**

REASSERTION OF PREVIOUS ARGUMENTS .....	1
ARGUMENT.....	1-5
I.    IF NOTHING ELSE, LEHMAN IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. .....	1-3
A.    Attorney Moon’s Advice to Lehman was not Based on an Investigation of the Facts and, Therefore, Deficient. ....	1-2
B.    Moreover, Attorney Moon’s Deficient Performance Prejudiced Lehman. .....	2-3
II.    THE FACTS IN LEHMAN’S SUPPORTING AFFIDAVIT ARE NOT MERELY CONCLUSORY. ....	3-5
CONCLUSION.....	5
CERTIFICATION OF BRIEF .....	6
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) .....	7

## **TABLE OF AUTHORITIES**

### **Wisconsin Cases**

<i>State v. Allen</i> , 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433. ....	1, 3
<i>State v. Bentley</i> , 201 Wis. 2d 303, 548 N.W.2d 50 (1996). ....	3
<i>State v. Biastock</i> , 42 Wis. 2d 525, 167 N.W.2d 231 (1969). ....	1
<i>State v. Curtis</i> , 218 Wis. 2d 550, 582 N.W.2d 409 (Ct. App. 1998). ....	5
<i>State v. Felton</i> , 110 Wis. 2d 485, 329 N.W.2d 161 (1983). ....	1
<i>State v. Mayo</i> , 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115. ....	2

### **United States Supreme Court Cases**

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ....	1
<i>Hill v. Lockhart</i> , 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). ....	2, 5

### **Wisconsin Statutes**

943.10(1m)(a) .....	12
---------------------	----

## **REASSERTION OF PREVIOUS ARGUMENTS**

Mr. Stephen M. Lehman reasserts all arguments previously made in his initial brief.

### **ARGUMENT**

Nothing in the State's response changes the facts: (1) at the very least, Lehman is entitled to an evidentiary hearing on his ineffective assistance of counsel motion; and (2) Lehman's affidavit supporting his ineffective assistance of counsel motion is not merely conclusory.

#### **I. IF NOTHING ELSE, LEHMAN IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.**

For a court to hold an evidentiary hearing on an ineffective assistance of counsel claim, the defendant must allege facts that, if true, would entitle him to relief. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Even if the alleged facts are unbelievable, a defendant is still entitled to an evidentiary hearing, *see id.* at ¶ 6; especially considering a defendant does not have to assert his innocence to withdraw his pleas, *State v. Biastock*, 42 Wis. 2d 525, 530, 167 N.W.2d 231, 233 (1969). To succeed on an ineffective assistance of counsel claim, the defendant's trial attorney must have been, in fact, ineffective, and that ineffectiveness must have prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

##### **A. Attorney Moon's Advice to Lehman was not Based on an Investigation of the Facts and, Therefore, Deficient.**

When determining if trial counsel was ineffective, a court considers whether the attorney made a strategic decision based on fact and law. *State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161, 169 (1983). Trial counsel must fully investigate a case's facts. *Id.* at 506. A

complete failure to investigate a case's facts is deficient performance. *State v. Mayo*, 2007 WI 78, ¶¶ 59-62, 301 Wis. 2d 642, 673-75, 734 N.W.2d 115, 130-31.

If it is true Attorney Moon completely failed to investigate the facts of Lehman's case, his performance was deficient, pure and simple. Attorney Moon advised Lehman that his proposed witnesses were worthless, and Lehman would lose at trial. (Amended Aff. at 3, 5.) Yet, Attorney Moon did not speak to any of the proposed witnesses or hire an investigator to do so. (*Id.* at 4-5.) Attorney Moon's advice to Lehman had no basis in the facts because Attorney Moon failed to investigate the facts.

**B. Moreover, Attorney Moon's Deficient Performance Prejudiced Lehman.**

Attorney Moon's failure to investigate clearly prejudiced Lehman. Lehman's proposed witnesses could have provided defenses and evidence of lesser charges than burglary. (Amended Aff.) Attorney Moon did not investigate any of these witnesses; and now, almost 4 years have passed. Certainly, these witnesses would have been more available with clearer testimony back when Attorney Moon was handling the case.

Even with the passage of time, Mr. Adam Laux will testify Lehman purchased goods similar to the goods Lehman is accused of taking in one of the burglary charges. (Amended Aff. at 5-6). Thus, Lehman may be guilty of receiving stolen property, a lesser offense than burglary. (*Id.*). If Attorney Moon had investigated Laux's testimony and presented it to Lehman, Lehman would have requested a jury trial. (*Id.* at 3.) Therefore, the facts in Lehman's ineffective assistance of counsel motion and supporting affidavit, if true, show Attorney Moon's deficient performance and how that deficient performance prejudiced Lehman. These facts, if true, entitle Lehman to relief and, necessarily, require a hearing.

## **II. THE FACTS IN LEHMAN'S SUPPORTING AFFIDAVIT ARE NOT MERELY CONCLUSORY.**

The State and the trial court believe just because an affidavit is sworn to by the defendant's attorney means it is conclusory. (*See* Resp. Br. at 12-13.) A statement is not merely conclusory unless it contains a conclusion only. *See State v. Bentley*, 201 Wis. 2d 303, 313-17, 548 N.W.2d 50, 54-56 (1996). An affidavit that does not discuss "who, what, where, when, why, and how" would be conclusory. *Allen*, 2004 WI 106, ¶¶ 23, 30. Also, a defendant's affidavit may be merely conclusory if he fails to explain the reasons he would have requested a trial instead of pleading. *See id.*; *see also, Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203 (1985).

In *State v. Allen*, 2004 WI 106, ¶¶ 23, 30, for instance, Allen was not entitled to an evidentiary hearing on his ineffective assistance of counsel claim because his references to trial counsel's failure to investigate were too vague. *Id.* Allen's affidavit did not include "who the witnesses were, what the witnesses would say, how they knew it, or why it was relevant to his defense." *Id.* at ¶ 30.

Lehman's supporting affidavit is not merely conclusory because, unlike Allen, Lehman discusses who, what, why, and how. With respect to who, Lehman names the potential witnesses and his trial counsel. (Amended Aff. at 2-3.)

With respect to what Attorney Moon failed to do, the supporting affidavit states Attorney Moon did not speak to Lehman's proposed witnesses; Attorney Moon did not hire an investigator; Attorney Moon advised Lehman that he would lose at trial; etc. (Amended Aff.) If Lehman's supporting affidavit was merely conclusory it would contain conclusions only: "Attorney Moon was ineffective," or "Lehman was prejudiced by Attorney Moon's representation". To be merely conclusory, Lehman's supporting affidavit could not elaborate

any further than conclusions. Lehman's supporting affidavit does not do this, but rather Lehman's supporting affidavit explains how Attorney Moon was ineffective and why Lehman was prejudiced by Attorney Moon's ineffectiveness.

Further, Lehman's supporting affidavit discusses what the proposed witnesses would say and how their testimony could assist in his defense. Russell St. Jean could have testified he observed Lehman purchase the stolen goods. (Amended Aff. at 2.) If St. Jean had so testified, Lehman would be guilty of a lesser offense than burglary such as, receiving stolen property. (*Id.* at 3.) Amber Bossahart was a potential alibi witness for one of the burglary charges. (*Id.* at 2.) Krista Smith could testify the stolen property related to one of the burglary charges was actually outside the residence. (*Id.* at 3.) One element of burglary is entering a dwelling, Wis. Stat. § 943.10(1m)(a); hence, Ms. Smith's testimony could have negated an element of one of the burglary charges, *see id.* The fact Lehman's supporting affidavit does not confirm the testimony of these witnesses now, almost 4 years later, should not be held against him at this stage. These potential witnesses were likely to be more available closer in time to when the offense occurred than they are now. Perhaps, if Attorney Moon had investigated these witnesses back when Lehman named them, then these witnesses might be available now.

In fact, Lehman's supporting affidavit shows a witness who would assist the defense. Again, Adam Laux would testify Lehman purchased goods similar to the goods Lehman is accused of taking in one of the burglary charges. (Amended Aff. at 5-6). Hence, Lehman may be guilty of a lesser offense than burglary. (*Id.*).

Finally, Lehman's supporting affidavit explains why he would have asked for a jury trial if any of the proposed witnesses had testified as expected: "Having any one of these witnesses

testify would have improved Lehman's chances of beating the charges or having the charges amended to lesser ones." (Amended Aff. at 3.)

In a circumstance like this, an evidentiary hearing must be held to give Attorney Moon an opportunity to explain whether his analysis would have changed if he had known about Laux or if any of the other proposed witnesses would have testified as expected. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409, 410 (Ct. App. 1998); *see Lockhart*, 474 U.S. at 59-60. Considering Lehman's supporting affidavit does not solely contain conclusions; explains who, what, why, and how; and explains why he would have demanded a jury trial if any of the witnesses had testified as anticipated; Lehman's supporting affidavit is not merely conclusory.

### **CONCLUSION**

At the very least, an evidentiary hearing must be held on Lehman's ineffective assistance of counsel motion. The need for an evidentiary hearing is clear given Lehman's affidavit is not solely conclusory.

Dated at Beloit, Wisconsin this \_\_\_\_\_ day of July, 2012.

Respectfully submitted,

---

Karyn T. Missimer, Esq.  
State Bar No. 1061255



### **CERTIFICATION OF BRIEF**

I certify that this brief conforms to the rules contained in Sections 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 1,353 words.

Dated at Beloit, Wisconsin this \_\_\_\_ day of July, 2012.

Respectfully submitted,

---

Karyn T. Missimer, Esq.  
State Bar No. 1061255

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12) of the Wisconsin Statutes.

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of July 31, 2012, except for the page numbering, which has been removed due to technical difficulties.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Beloit, Wisconsin this \_\_\_\_ day of July, 2012.

Respectfully submitted,

---

Karyn T. Missimer, Esq.  
State Bar No. 1061255