

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

01-27-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin
Plaintiff-Respondent

Appeal No. 2014AP002299

v.
Frank D. Roseti
Defendant-Appellant

ON APPEAL TO REVIEW AN ORDER DENYING THE
DEFENDANT'S MOTION FOR A NEW TRIAL ENTERED IN THE
CIRCUIT COURT FOR MANITOWOC COUNTY, THE HONORABLE
JEROME L. FOX PRESIDING

APPELLANT'S BRIEF

Matthew A. Lynch
State Bar No. 1063871
PO Box 135
Thiensville, WI 53092
Phone (262) 353-6501
Fax (262) 238-1901

Attorney for Defendant-Appellant

TABLE OF CONTENTS	<u>PAGE</u>
TABLE OF AUTHORITIES	3
CASES	3
STATUTES	4
ISSUES PRESENTED	5
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	6
STATEMENT OF THE CASE	7
ARGUMENTS	8
CONCLUSION	13
CERTIFICATIONS.....	13

TABLE OF AUTHORITIES

CASES	<u>PAGE</u>
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	9
<i>State v. Allen</i> , 2004 WI 106, 274 Wis.2d 568, 682 N.W.2d 433.....	8, 10
<i>State v. Bentley</i> , 201 Wis.2d 303, 314, 548 N.W.2d 50 (1996).....	10
<i>State v. Thiel</i> , 2003 WI 111, ¶ 37.....	9
<i>Strickland v. Washington</i> , 466 U.S. 668, 690 (1984).....	11, 12
<i>Vollmer v. Luety</i> , 156 Wis.2d 1, 17, 456 N.W.2d 797 (1990).....	12

STATUTES

PAGE

Wis Stat. § 971.23(1)(b).....	11
-------------------------------	----

ISSUES PRESENTED

1. Whether the trial court erred when it denied the defendant's motion for a new trial based on an ineffective assistance claim without holding a *Machner* hearing.
2. Whether a new trial is warranted in the interest of justice based on the discovery violation.

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Roseti does not request oral argument or publication.

STATEMENT OF THE CASE

This is an appeal of the circuit court's Decision and Order summarily denying defendant's motion for a new trial based on ineffective assistance of trial and in the interest of justice.

Frank Roseti was charged with one count of disorderly conduct and one count of criminal damage to property. (1). The complaint alleged Mr. Roseti was in a bar when he broke a mirror with a beer bottle and was otherwise disorderly. (1). At Mr. Roseti's jury trial the State called three witnesses for their case in chief and Officer Scott Hodek as a rebuttal witness. (47). The defense called one rebuttal witness in a private investigator and only one substantive witness in Mr. Roseti. Mr. Roseti testified in considerable detail what happened at the bar the night of the incident, adamantly denying he was the one to throw the beer bottle at the mirror or otherwise cause a disturbance. The State then called Officer Scott Hodek to rebut Mr. Roseti's testimony. Officer Hodek testified he spoke to Mr. Roseti on April 15, 2011, just two days after the incident in question. "I asked him for his side of the story...giving him an opportunity to clarify what happened, at which time he stated he didn't remember." (Record 47, page 120, lines 10-14; Appendix 117). Only during the cross-examination portion of Officer Hodek's testimony did trial counsel learn he had not received an April 15, 2011 police report upon which Officer Hodek based his testimony that Mr. Roseti did not recall the incident. (47, 123; lines 6-

21; App: 120). Frank Roseti was convicted of both counts as alleged and sentenced to twenty days in jail with restitution and costs. (32). Mr. Roseti filed a notice of intent and the undersigned was appointed through the State Public Defender's Office. On June 23, 2014, the undersigned filed a Motion for New Trial. (53; Appendix: 101). This Motion was summarily denied. (57; Appendix: 104). The undersigned then filed a notice of appeal. (61). The undersigned also filed a motion to supplement the record with the Court of Appeals which was also denied.

ARGUMENTS

- I.** Whether the trial court erred when it denied the defendant's motion for a new trial based on an ineffective assistance claim without holding a *Machner* hearing.

- A. Standard of Review**

Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law the Court reviews *de novo*. *State v. Allen*, 2004 WI 106, 274 Wis.2d 568, 682 N.W.2d 433.

B. Argument

The defendant's motion for a new trial identified trial counsel's inability to review the April 15, 2011 police report because of a discovery violation. The motion alleged trial counsel should have moved to remedy the discovery violation. A discovery violation implicates due process. *Brady v. Maryland*, 373 U.S. 83 (1963). The Wisconsin Supreme Court has held trial counsel's failure to review portions of discovery can be deficient performance as a matter of law. *State v. Thiel*, 2003 WI 111, ¶ 37. It seems clear that the effect of not reviewing discovery is the same whether the cause is the trial attorney's neglect or the State's failure to disclose same. It then stands to reason that trial counsel had a duty to remedy their unpreparedness even if that unpreparedness was not trial counsel's fault. The undisclosed police report had already been used to impeach Mr. Roseti on the stand.

“Q. Did you ever tell him [Officer Hodek] that you did not really remember what happened on April 13, 2011 at the Waverly; do you recall saying that to him? A. No, sir. Q. So if he would have put that in his report that would not be accurate either? A. That would absolutely be not accurate.” (47, p.116 lines 6-13; Appendix: 113). It was also used by Officer Hodek in rebuttal “I asked him for his side of the story in regard to what had happened, and he said so that's where you want to go. I said yes – giving him an opportunity to clarify what happened, at which time he

stated he didn't remember.” (47, p.120, 10-14; Appendix: 117). It was also one of the last points used by the prosecutor in their closing argument in discussing the defendant's credibility “Second, the defendant was asked by me on cross examination – did you tell the officer on April 13th, that you did not remember what took place. He said no – never said that. The officer got on the stand on rebuttal and said that's exactly what occurred. Again, what's the motivation of this officer not to tell the truth? There is nothing in this record to show otherwise.” (47, p.158, 7-15).

The Decision and Order of the trial court determined that “nothing alleged by the defendant in his motion suggests that trial counsel's performance constituted deficient conduct.” (57: p.4; Appendix 104). The Decision found that the undersigned's motion was no more than a series of conclusory allegations that did not warrant an evidentiary hearing. To be entitled to an evidentiary hearing a motion must include facts that allow the reviewing court to meaningfully assess [the defendant's] claim. *State v. Bentley*, 201 Wis.2d 303, 314, 548 N.W.2d 50 (1996). The Supreme Court in *Allen* held that to secure a hearing on a postconviction motion, a defendant must provide sufficient material facts – e.g. who, what where, when, why and how—that if true would entitle him to the relief he seeks. *Allen*, 274 Wis. 2d 568 at ¶ 2.

Roseti's motion for a new trial alleged trial counsel was ineffective for not objecting to testimony based on a police report not given to trial

counsel despite trial counsel's demand for discovery that requested a summary of all oral statements made by the defendant pursuant to Wis. Stat. 971.23(1)(b). (Rec. 3). It was deficient because the testimony was damaging to Mr. Roseti's credibility which was the nature of the defense. Mr. Roseti provided a detailed account of the events at the bar in his direct testimony. The Officer's rebuttal testimony concerning Mr. Roseti's alleged lack of memory of the events clearly impeached Mr. Roseti's credibility. To prove deficient representation, a defendant must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The trial court does not offer any reason as to why the Officer's testimony concerning Mr. Roseti's lack of memory would not warrant an objection. Similarly trial counsel should have moved the court for an order prohibiting the prosecutor from using Mr. Roseti's alleged lack of memory in the closing argument. The Decision does not offer any strategic reason for trial counsel's omissions.

The Decision does detail other evidence of the defendant's guilt through other witness testimony. This evidence would seemingly go to the element of prejudice which the Decision officially finds unnecessary to address. The second element of an ineffective assistance claim requires the defendant demonstrate that counsel's deficient performance was prejudicial to his defense. *Id.* At 687. This requires a showing that counsel's errors

were “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* At 687. Mr. Roseti was the only witness called by the defense who testified to the events in the bar. He testified in considerable detail as to what happened that night. Mr. Roseti is a veteran with no prior convictions. His defense was his credibility. Officer Hodek then testified that in a conversation just two days after the incident in question Mr. Roseti “didn’t remember” what happened. Officer Hodek’s credibility was not called into question. The only reasonable conclusion a jury could draw is that Mr. Roseti was not telling the truth on the stand. The end of the prosecutor’s closing argument was exactly this point.

II. Whether the defendant is entitled to a new trial in the interest of justice.

A. Standard of Review

This is a question of law the Court reviews *de novo*.

B. Argument

The court has the discretionary power to reverse a judgment when the real controversy was not fully tried or justice has for any reason miscarried. *Vollmer v. Luety*, 156 Wis.2d 1, 17, 456 N.W.2d 797 (1990). The ability to review police reports is an important part of any defense. It’s self-evident that the content of any police report, particularly concerning a defendant’s statements, would influence any trial attorney’s strategy.

Without the benefit of the police report trial counsel could not adequately prepare Mr. Roseti to testify or provide informed advice as to whether to testify at all. This failure to disclose occurred in the context of previous discovery violations by the State resulting in the exclusion of photographs (47, p.10). Mr. Roseti deserves a new trial without ambush.

CONCLUSION

Because Mr. Roseti was denied the effective assistance of counsel and because justice has been miscarried, the convictions should be vacated in favor of a new trial.

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a 13 point proportional serif font. The length of this brief is 1492 words.

Dated this _____ day of January, 2015 at Milwaukee, Wisconsin.

Matthew A. Lynch
State Bar No. 1063871
PO Box 135
Thiensville, WI 53092
Phone (262) 353-6501
Fax (262) 238-1901

Attorney for Defendant-Appellant

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of the brief in case number 2014-AP-2299, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. 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 this _____ day of January, 2015 at Milwaukee, Wisconsin.

Matthew A. Lynch
State Bar No. 1063871
PO Box 135
Thiensville, WI 53092
Phone (262) 353-6501
Fax (262) 238-1901

Attorney for Defendant-Appellant