STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP671

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEIMONTE ANTONIE WILSON, SR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order Denying Postconviction Relief, Entered in Milwaukee County Circuit Court, the Honorable William S. Pocan, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Wisconsin Chapter 855, which applies to criminal cases, contains several statutes relating to subpoenas. In particular, Wis. Stat. § 855.03 states that service of a subpoena can be accomplished by leaving a copy at a witness's "abode." Was a witness is this case properly served under Wis. Stat. § 855.03 where a subpoena was left at the witness's residence?

Relying on civil procedure subpoena statutes, Wis. Stat. §§ 805.07(5) & 801.11(1), the circuit court answered no and denied trial counsel's request to adjourn a suppression hearing and issue a body attachment for a missing witness who would have testified regarding a "key" issue. The circuit court concluded that Wis. Stat. § 805.07(5) requires that attempts be first made to personally serve a witness before a subpoena can be left at a witness's residence.

2. Was trial counsel ineffective for: (1) failing to argue that the key witness was properly subpoenaed; or in the alternative, (2) failing to properly subpoena the witness?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted because a decision in this case is of substantial and continuing public interest. Undersigned counsel is not aware of any binding case law analyzing whether civil procedure subpoena statutes, Wis. Stat. §§ 805.07(5) & 801.11, supersede the criminal subpoena statute,

Wis. Stat. § 855.03. Oral argument is welcome if it would be helpful to the court.

STATEMENT OF THE CASE AND FACTS

A criminal complaint charged Keimonte Antonie Wilson, Sr., with one count of possession with intent to deliver cocaine, in an amount more than five grams but not more than 15 grams (second offense), contrary to Wis. Stat. §§ 961.41(1m)(cm)2 & 961.48(1)(b). (2:1).

The complaint alleged that officers observed a truck parked in a vacant lot near a "No Trespassing" sign. (2:1). Officers saw Mr. Wilson get out of a truck and walk toward a "known drug house." (*Id.*). Mr. Wilson reappeared "moments later," and began to walk back towards the truck. (2:1-2). Three officers approached Mr. Wilson before he re-entered the truck. (2:2). According to the complaint, Mr. Wilson denied having any drugs or weapons and consented to a search of his person. (*Id.*). Mr. Wilson then began to "shake." Police found a clear plastic baggie with three separate baggies of suspected cocaine base located in his right, inner jacket pocket. (*Id.*). Mr. Wilson was also found in possession of $449. The total weight of the baggies was 10.65 grams and the substance in the baggies tested positive for the presence of cocaine. (*Id.*). Mr. Wilson previously had been convicted of possession with intent to deliver marijuana in Milwaukee County Case No. 10-CF-2202. (*Id.*).

Motion to Suppress

Trial counsel filed a "Motion to Suppress Evidence Gained as a Result of an Improper Stop and Seizure." (5). The motion alleged police had "no basis" to stop Mr. Wilson because he was "merely walking in an alley towards his

vehicle" and was "not engaged in a violation of law or ordinance which officers could be aware of at the time of the stop." (5:5). In addition, the motion alleged that the officers, who were in plain clothes, had their guns drawn and Mr. Wilson did not consent to the search. (5:3, 7).

The State filed a response. (7). The State argued that the "encounter" between police and Mr. Wilson was "consensual." (7:1, 4). The State argued "in the alternative" that police "were justified in a limited intrusion upon Defendant in light of: A) Defendant's trespass to property and B) considering the 'totality of circumstances,' police had 'reasonable suspicion' to stop Defendant." (7:1, 6). In addition, the State asserted that Mr. Wilson consented to the search. (7:1, 10).

At an evidentiary hearing before the Honorable William S. Pocan, Officer William Savagian testified that on May 3, 2013, he went to follow-up on a reckless endangering safety complaint at 1825 West Meinicke to recover a firearm that was used in a shooting. (37:11, 12).

Officer Savagian, along with two other officers, parked in an unmarked squad car in front of 1825 West Meinicke. (37:11, 30). Officer Savagian was wearing plain clothes and had an ID around his neck and a badge on his belt. (37:20). Officer Savagian testified that he saw a red truck parked in a vacant lot behind 1825 West Meinicke. (37:11, 17). The lot had a "no parking, dumping, or trespassing" sign. (37:14-15). Officer Savagian observed Mr. Wilson exit the truck from the driver's side and walk into the backyard of 2355 North 18th Street, a "known and active drug house."[1] (37:10-11, 33-34). Officer Savagian lost sight of Mr. Wilson and testified that he

[1] According to the officer, this information came from "prostitutes," who had been arrested. (37:11, 35-36, 40).

did not know if Mr. Wilson went into the house. (37:18, 34). Officer Savagian testified that Mr. Wilson was out of sight for about 15, 20 seconds. (37:19, 42). Mr. Wilson then returned to the truck. (37:19-21).

Officer Savagian and Officer James Hunter walked towards the truck. (37:19, 36, 39). Officer Savagian did not know where the third officer, Sonya Griffin, went. (37:20, 36, 39, 43, 44). As soon as Officer Savagian got to the driver's side door, Mr. Wilson opened the door. (37:21, 22, 37). Officer Savagian asked if Mr. Wilson had "[a]ny drugs or guns or firearms." (37:23). Mr. Wilson stated "no" and stepped out of the vehicle. (37:23, 40). Mr. Wilson was "shaking a little bit, his eyes were wide, but [Officer Savagian] was concerned that he obviously might…be armed with a gun." (37:23). Mr. Wilson "raised his arms out kind of like an airplane." (37:23, 38, 40). Officer Savagian testified that he did not know the exact words that Mr. Wilson used, but that Mr. Wilson said "you can search me." (37:24, 40). Officer Savagian asked "[i]f I do search you, am I going to find anything on you, and [Mr. Wilson] again stated no." (37:24). Officer Savagian described his search of Mr. Wilson as follows:

> I actually first just kind of bladed his waistband. Usually an individual carrying a firearm is going to carry it there. I then searched his two front inner jacket pockets and then felt a – went to search his inner pocket of his jacket and felt a large object there, went inside of the inner jacket pocket and originally recovered a pretty large cell phone, a Galaxy SII, and then eventually recovered a plastic sandwich bag containing three like Super Ball size chunks of suspected crack cocaine.

(37:25; *see also*, 37:26). Officer Savagian did not make any promises or threats and did not have his gun drawn. (37:25,

36, 40). At the time of the search, Officer Savagian testified that Mr. Wilson was not under arrest. (37:45).

After Officer Savagian testified, trial counsel informed the court he had subpoenaed a witness, Jacqueline Brown, but she failed to appear. (37:46; App. 102). Trial counsel stated:

> She indicated to me she was at work and she was unable to get someone to cover her shift. The witness who did show up [Ms. Brown's son Darryl Roberts] brought us a letter from [Ms. Brown] indicating that she wasn't going to be able to attend today. My impression is, is that she's a necessary witness since there's some dispute here as to the conditions surrounding the stop. We do have a proper subpoena. I have an affidavit of service. I just am informing the court of this. I can call my one witness now. We may need to address the question of how to proceed.

(*Id.*). The circuit court responded that "[w]e will see" and requested that testimony be taken from the next witness. (37:46-47; App. 102-03).

Darryl Roberts, Ms. Brown's 20-year-old son, testified for the defense. (37:52). Mr. Roberts testified that Mr. Wilson is his sister's boyfriend and that he has been friends with Mr. Wilson for more than five years. (37:47, 52). Mr. Roberts was sitting in the passenger side of the vehicle when the officers approached. (37:52). Mr. Roberts testified that the area where the truck was parked was his family's yard and Mr. Wilson had permission to park there. (37:64). Mr. Roberts and Mr. Wilson had been sitting in the car for about an hour and a half talking. (37:53, 61). Mr. Wilson received a phone call from his dad and left the truck to go to his father's house, which is across the alley. (37:48-49, 53). Mr. Wilson was gone for approximately five minutes. (37:53).

When Mr. Wilson returned to the vehicle, two male "[o]fficers arrived with their guns out." (37:50, 55). A white male officer walked towards the car and "had [the gun] in his hand pointing it, saying get out the car – get out of the truck." (37:56). The black male officer was also holding his gun the same way and saying "step out of the car." (37:57). Both officers were using a conversational tone. (37:56, 57). The black male officer opened the door, grabbed Mr. Roberts' arm, and Mr. Roberts stepped out. (37:58-59). At that time, the officer's gun was back on his hip. (37:59). Mr. Roberts testified he was searched immediately after he was pulled out of the car. (37:51, 59).

After Mr. Roberts testified, trial counsel sought an adjournment to take testimony from Jacqueline Brown. (37:67; App. 107). Trial counsel stated that he anticipated Ms. Brown would testify that she observed the officers "with guns drawn approach the vehicle and take both my client and her son, [Darryl Roberts], out of the vehicle." (*Id.*). Trial counsel requested an adjournment to obtain her testimony and stated he would subpoena her again "'cause I hate asking for a body attachment". (37:67; App. 107). The State indicated that it was not taking a position. (37:67-68; App. 107-08). The court then stated:

> …The issue is, is do we need to give her – do we need to have a body attachment and have her brought to continue this hearing. Because that's what it's going to be is a body attachment….And but the issue is, is that something that we have to do or is that something that given her failure to be here today we can proceed without her?
>
> …
>
> It does seem to be the issue in this case. I don't really see any other issues. At the end of the day, based on the

> testimony I've heard, all this testimony about why they were there and et cetera, who cares. Not relevant. As a matter – they saw what was going on here. They told us that this is a known drug house. They were – they saw this vehicle. It looked suspicious to them. They walk up to the vehicle. If they walked up to the vehicle like this officer indicated, then your side wins, [State]. As a practical matter if they came to the vehicle with guns ablaze, then we have a different issue because then the people in the car could have felt they were under arrest or – and didn't have any choice other than to be searched. So it's a key issue. It would seem to me it's the only key issue of all the testimony I've heard here today, but you tell me. What's your position?

(37:68-69; App. 108-09) (emphasis added). The State responded that "I think a body attachment should be issued." (37:69; App. 109).

As an alternative, trial counsel proposed having Ms. Brown testify by phone, but the State objected. (37:69-70; App. 109-110). Trial counsel then agreed that a body attachment should be ordered. (37:70; App. 110).

Trial counsel noted that "the affidavit of service indicates that [Ms. Brown] was served through her daughter who is a resident of that address on October 22nd at 4:10 p.m." (37:71; App. 111, 128, 129).

The court then looked at the subpoena and concluded that it was not "valid service." The court denied the request for a body attachment. The following exchange occurred:

> THE COURT: It looks like it was only served once and it was served by substituted service, and of course under Wisconsin law, you have to attempt on a couple of occasions and make reasonable efforts before you can serve by substituted service. So it may be a situation

> here where this is not a valid service, and if so, then we have a different issue…
>
> Usually what I'm used to before there's a substituted service is down on the bottom – and on this one it has a place for attempts – it would indicate the other attempts at personal service because of course they couldn't serve her – serve her by substituted unless they did that. So do you have – do you believe I'm wrong on the law?
>
> TRIAL COUNSEL: I don't have any reason to challenge the Court on the law.
>
> THE COURT: [State], do you believe I'm wrong on the law?
>
> THE STATE: No. I believe you are correct, Your Honor.
>
> THE COURT: All right. And so the problem that I have here is that this is not a valid subpoena and I could not issue a body attachment based on this subpoena. So therefore given that your witness isn't here, I think we have to – there's nothing that I can do to assist you today….

(37:71-73; App. 111-113).

Mr. Wilson testified he had been sitting in the car with Mr. Roberts for "a couple of hours." (37:87). Mr. Wilson testified that he left the truck for "less than a minute" and that when he returned three officers were "running up with their guns pointed at – in my direction." (37:96, 77, 87-89). The speed of the officers was a "medium jog." (37:77, 88). The female officer was initially behind the two male officers and then they "spread out." (37:90). At the time, he did not know that they were officers and "I was scared. I thought that, you know, we was, you know, under attack. I was – I didn't know what was going on ..." (37:77-78). Mr. Wilson raised his arms and got out of the car because he thought that "they were

going to shoot." (37:78-80, 91-92). The officers "weren't talking loud, like, you know, it was a robbery or something" and "they wasn't, like, screaming like, you know, police, police, like you see on T.V. It was just more like conversational like, you know." (37:79, 92). Mr. Wilson did not offer to let the officer search him and testified that:

> …[the officer] had his gun and then he just started patting on me. And I'm looking dead at the gun. I'm like – 'cause I'm scared. I'm like, oh, man, what's going on. He patting on me. And then he asked me where was I coming from. I say I was coming from my father's house. And he asked me am I on probation. I said, yes, I'm on probation. And then he asked me for what. I said for drugs. But I was kind of stuttering at the time. And I know when I get scared, I stutter, you know. And I really didn't say anything after that, you know, because the gun was still pointed at me while he was patting me.

(*See, e.g.,* 37:80-82, 94-95). Mr. Wilson felt that he had no choice but to let the officer search him. (37:81). Mr. Wilson had his arms raised "up in the air" at head level and with his palms facing forward. (37:81-82).

Mr. Wilson realized the individuals were officers when he got out of the truck and saw a bullet proof vest and then one of the officers stated "we Milwaukee police." (37:80). Mr. Wilson did not see any ID badges. (37:91).

The State then called Officer James Hunter and Officer Savagian in rebuttal. Officer Hunter testified that Mr. Wilson was gone for "[p]robably no more than 10 minutes." (37:102, 103). Officer Hunter denied having his gun drawn. (37:101). Officer Hunter testified that he was wearing a protective bullet proof vest under his shirt. (37:99). Officer Hunter testified that generally people are not searched for parking in a no parking zone. (37:105).

Officer Savagian testified that he did not draw his gun. (37:106). Officer Savagian testified that he did not have a bullet proof vest on. (*Id*). Officer Savagian testified that he has conducted a search of a person by holding a gun in his hand and searching with the other hand but "only under the most like high intense moments." (*Id.*).

The circuit court denied the motion to suppress, finding that reasonable suspicion existed for the stop and that the search was consensual. (37:126-27). The court found Officer Savagian and Officer Hunter more credible regarding "this gun situation" than Mr. Roberts and Mr. Wilson. (37:124-25). The court stated the following regarding the testimony of Mr. Roberts:

> …Mr. Roberts told us that three officers arrived, told them to get out. He was very specific that only two of the officers had their guns out, the two male officers, and he talked about being searched. He talked about how the officers held their guns. It was – what was perhaps a little bit hard to believe – and I don't necessarily – Mr. Roberts might believe the officers were carrying their guns in the manner that he described, but based on the rest of the situation, that would seem a little bit like overkill. I can understand where a young man like Mr. Roberts probably very intimidated or frightened by the situation might have felt that this is what the officers were doing, but it was a little bit hard to grasp what he was telling me in how they were holding their guns and pointing toward the truck.
>
> Mr. Roberts also talked about getting out of the car. That the officer grabbed him by the arm and pulled him out and that sort of thing. And again just a little bit hard to buy based on the rest of what was occurring during this situation. I'm not indicating that Mr. Roberts was necessarily intentionally telling an untruth, but under this

> pressure situation that he doesn't engage in all the time like the officers, his recollection might be slightly off.

(37:121-22; App. 116-17). Regarding Mr. Wilson's testimony, the circuit court stated:

> …Interestingly Mr. Wilson told us that all three officers came to the vehicle in this medium jog. Two – the two male officers first and then the female officer. And as [the State] pointed out, a little hard to believe that that was the actual formation….But furthermore, Mr. Wilson's recollection was different from Mr. Roberts.
>
> Then Mr. Wilson – if my memory serves me, Mr. Wilson initially talked about the officers being very intimidating. He didn't know they were officers. But not only were they all three of them coming at him with their guns pointed, but also they were talking loudly.[2] Later on he then said that they were talking in a more conversational tone. So it was somewhat inconsistent and that concerned me.
>
> He indicated that he realized – first realized that they were police officers when they pulled him out of the truck. I find that somewhat hard to believe because from my experience hearing a lot of this very similar testimony in the last 4 months since being assigned to the gun court, officers generally very clearly identify themselves for a variety of reasons, and to believe that he first realized they were officers when they were pulling him out of the truck, was a little bit hard to believe.
>
> He also indicated – which was somewhat inconsistent, he said that he thought they were going to shoot at him. Which I could understand with his original testimony regarding they all had their guns drawn and then he

[2] There is no indication in the record that Mr. Wilson testified that the officers were talking "loudly." (37:79, 92).

> talked about them being loud, but then he talked about talking with conversational voices and telling them to get out which would be a little less consistent with going to shoot at him.
>
> Then I really found it hard to envision…when I thought of the officer patting him down with his left hand, the gun pointed at some strange angle. It just seems so not safe, not natural. It just seemed like something that I find hard to believe the officer would have done. I find what Mr. Roberts indicated that Officer did to be much more believable and, that is, that he – even if he had his gun out, he would have put his gun away at the time of the search. But in any event, there was more inconsistencies there.

(37:122-24; App. 117-19).

The court also stated it believed Officer Savagian "regarding the offer by Mr. Wilson to allow him to search him." (37:126-27; App. 121-22). The court noted that "…there was no testimony really other than Mr. Wilson who unfortunately has been convicted of a crime three times, so his credibility is somewhat at issue. Plus he has a vested interest in this case." (37:126; App. 121).

Regarding the absence of Ms. Brown, the court stated:

> And also I couldn't help but wonder at this point that even if Ms. Brown – even if we – she had appeared or even if there had been a valid subpoena that I could take some action on, whether her testimony would really help. Because it would be one thing if both Mr. Roberts and Mr. Wilson had testified totally consistently, but they didn't. So it – either she would be backing one or the other or maybe providing yet an additional explanation. So I don't see at the end of the day how that would have assisted the court or assisted Mr. Wilson with his motion. It's unfortunate that she chose not be

> here, but – because we know she got the subpoena, but because there's not proper service, I couldn't enforce it.
>
> So at the end of the day, as I indicated, the gun issue was the most significant to the Court…

(37:125; App. 122).

Plea and Sentencing

Mr. Wilson subsequently pled guilty to possession with intent to deliver cocaine without the second or subsequent enhancer.[3] (38:2, 5, 9).

Judge Pocan sentenced Mr. Wilson to five years in prison (three years initial confinement and two years extended supervision) consecutive to any other sentence. (38:44).

Postconviction Motion

Mr. Wilson filed a postconviction motion. (20). The motion asserted that Ms. Brown was properly subpoenaed and the circuit court erred in denying trial counsel's request to adjourn the hearing and issue a body attachment. (20:7-8). The motion also asserted that trial counsel was ineffective for: (1) failing to argue that Ms. Brown was properly subpoenaed (20:8-10); or in the alternative, (2) failing to properly subpoena Ms. Brown. (20:11). The motion asserted that undersigned counsel's investigator confirmed that Ms. Brown would testify that she observed the officers "with guns drawn approach the vehicle." (20:3 n.1).

[3] Note: the Judgment of Conviction incorrectly lists the enhancer. (12:1).

The circuit court ordered briefing. (21). The State argued that Ms. Brown was not properly subpoenaed, and even if trial counsel was ineffective, the outcome would have been the same, as Ms. Brown would have only corroborated evidence that the judge had already found incredible. (24:3-4, 5-7).

The circuit court, the Honorable William S. Pocan, denied the postconviction motion. (30; App. 124-27). Citing the civil procedure subpoena statutes, Wis. Stat. §§ 805.07(1) and 801.11(1), the court determined it "correctly ruled that the substituted service was invalid and correctly denied the request for a body attachment." (30:3-4; App. 126-27). Thus, the court concluded that trial counsel could not be deemed ineffective for failing to argue that Ms. Brown was properly subpoenaed. (*Id.*). In regards to whether trial counsel was ineffective then for failing to properly subpoena Ms. Brown, the circuit court stated:

> the defendant has not provided an affidavit from Ms. Brown, and therefore, he has not shown that she was available to testify or what her testimony would have been at the suppression hearing. There being no affidavit from Ms. Brown, the court relies on its former rulings in this matter.

(*Id.*).

Mr. Wilson appealed. Additional relevant facts will be referenced below.

ARGUMENT

I. In a Criminal Case, a Witness is Properly Served When a Copy of the Subpoena is Left at the Witness's Residence Pursuant to Wis. Stat. § 885.03.

A. Introduction.

In this case, prior to the suppression hearing, trial counsel's investigator left a subpoena for key witness Jacqueline Brown at her residence with her daughter. (37:71; App. 113). Nonetheless, Ms. Brown failed to appear at the suppression hearing because she had to work and was unable to get someone to cover her shift. (37:46; App. 102). Consequently, trial counsel requested an adjournment and an opportunity to subpoena Ms. Brown again, and subsequently, a body attachment. (37:66, 70; App. 106, 110).

The circuit court denied trial counsel's requests and the postconviction motion based on its belief that Ms. Brown was not validly served pursuant to civil procedure statutes, Wis. Stat. §§ 805.07(5) & 801.11(1). (37:71-73; 30:3-4; App. 111-113, 126-27). Those statutes provide:

Chapter 805
Civil Procedure—Trials

Wis. Stat. § 805.07 Subpoena.

(1) ISSUANCE AND SERVICE. Subpoenas shall be issued and served in accordance with Ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding.

…

(5) SUBSTITUTED SERVICE. A subpoena may be served in the manner provided in s. 885.03 except that substituted personal service may be made only as provided in s. 801.11 (1) (b) and except that officers, directors, and managing agents of public or private corporations or limited liability companies subpoenaed in their official capacity may be served as provided in s. 801.11 (5) (a).

Chapter 801
Civil Procedure—Commencement of Action and Venue

Wis. Stat. § 801.11 Personal jurisdiction, manner of serving summons for. A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

(1) NATURAL PERSON. Except as provided in sub. (2) upon a natural person:

(a) By personally serving the summons upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode...

(Emphasis added).

However, as discussed below, contrary to the circuit court's determination, the civil procedure statutes, Wis. Stat. §§ 805.07(5) & 801.11(1), are inapplicable to this case. Rather, Wis. Stat. § 855.03 applies and the service of the subpoena on Ms. Brown was proper. Wis. Stat. § 855.03 states:

> **Service of subpoena**. Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.

Wis. Stat. § 885.03.

Statutory interpretation is a question of law reviewed de novo. *See* ***Zellner v. Cedarburg Sch. Dist.***, 2007 WI 53, ¶ 16, 300 Wis. 2d 290, 731 N.W.2d 240.

B. Wis. Stat. § 885.03 Governs Service of Subpoenaes in a Criminal Case.

When two statutes relevant to the same subject matter conflict, the more specific statute controls. ***State v. Anthony D.B.***, 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435; *see also,* ***State v. Schaefer***, 2008 WI 25, ¶¶ 41-59, 308 Wis. 2d 279, 746 N.W.2d 457 (finding in a criminal case that several criminal statutes, which specifically limited discovery, superseded civil statutes providing a general subpoena power).

Here, there are specific statutes that address subpoenas in criminal cases. Wis. Stat. § 972.11(1) provides that Wisconsin Chapter 885, "shall apply in all criminal proceedings." Chapter 885 contains several statutes discussing subpoenas. *See* Wis. Stat. §§ 885.01-03. In particular, Wis. Stat. § 885.03 provides several alternative methods of serving a subpoena, including leaving a subpoena at a witness's residence. *See generally*, ***State v. King***, 2005 WI App 224, ¶ 16, 287 Wis. 2d 756, 706 N.W.2d 181 (noting that a subpoena could have and should have been served in a criminal case and citing Wis. Stat. § 885.03).

Thus, because Wis. Stat. § 885.03 applies to "all criminal cases" and specifically provides a procedure for service of subpoenas, Wis. Stat. § 885.03 controls in criminal cases, not the civil procedure statutes, Wis. Stat. §§ 805.07(5) & 801.11(1).

Moreover, significantly, Wis. Stat. § 885.03 discusses service of a "witness," which is at issue here. In contrast, Wis. Stat. § 801.11 plainly discusses service of a "defendant." *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110 (stating that the language of a statute should be given its common, ordinary, and accepted meaning and if the words chosen by the legislature demonstrate a "plain, clear statutory meaning," no further analysis is undertaken).

If the legislature wished to impose a "reasonable diligence" requirement in criminal cases, the legislature could have easily included such language in Wis. Stat. § 885.03, or alternatively referenced Wis. Stat. § 801.11(1)(b) in Wis. Stat. § 885.03. Wis. Stat. § 885.03 was enacted in 1994, well after Wis. Stat. § 801.11(1)(b).

Consequently, it was proper for trial counsel's investigator to leave a subpoena at Ms. Brown's residence, pursuant to Wis. Stat. § 885.03, and the circuit court erred by denying trial counsel's request for an adjournment to subpoena Ms. Brown again and the issuance of a body attachment. Therefore, this Court should remand the case and order that the circuit court hold an evidentiary hearing to take testimony from Ms. Brown.

II. Mr. Wilson Was Deprived of Effective Assistance of Counsel Because: (1) Trial Counsel Failed to Argue that a Key Witness Was Properly Subpoenaed; or in the Alternative, (2) Trial Counsel Failed to Properly Subpoena the Witness.

A. Legal Principles.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d 258 at 273. To establish a deprivation of effective representation, a defendant must demonstrate both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***Id.***

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Smith***, 207 Wis. 2d at 276 (citing ***Strickland***, 466 U.S. 668 at 694). The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result

of the proceeding would have been different. ***Smith***, 207 Wis. 2d at 275.

When a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court *must* hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996) (citations omitted); ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). Whether a postconviction motion meets this standard is a question of law which this Court reviews *de novo*. ***Bentley***, 201 Wis. 2d 303 at 310 (citations omitted).

A circuit court may, in its discretion, deny a motion without a hearing if the motion does not raise a question of fact, presents only conclusory allegations, or if a review of the record conclusively demonstrates that the defendant is not entitled to relief. ***Allen***, 274 Wis. 2d 568, ¶¶ 9, 12. This discretionary decision is subject to deferential review under the erroneous exercise of discretion standard. ***Id.***, ¶ 9. A proper exercise of discretion requires the court to examine relevant facts, apply proper legal standards and engage in rational decision process. ***Bentley***, 201 Wis. 2d 303 at 310.

B. Trial counsel failed to argue that Ms. Brown was properly subpoenaed.

If this Court finds that Mr. Wilson's argument that Ms. Brown was properly subpoenaed is forfeited, Mr. Wilson asserts, as in his postconviction motion, that he was deprived of effective assistance of counsel.

In this case, trial counsel performed deficiently by failing to know the relevant law—that the service on Ms. Brown was in fact valid pursuant to Wis. Stat. § 885.03—and argue accordingly to the circuit court to obtain an

adjournment to take testimony from Ms. Brown and a body attachment. *See* ***State v. Felton***, 110 Wis. 2d 485, 505-06, 329 N.W.2d 161 (1993). Given that trial counsel characterized Ms. Brown as a "necessary witness" and advocated for an adjournment and then a body attachment, there can be no reasonable strategic reason for trial counsel to fail to advise the court of the relevant law. (*See, e.g.,* 37:46-47, 66, 70-71; App. 102-103, 106, 110-111).

Moreover, trial counsel's failure to know the relevant law and inform the circuit court that the subpoena was valid prejudiced Mr. Wilson. Trial counsel stated that Ms. Brown would testify she observed "[the officers] with guns drawn approach the vehicle and take both [Mr. Wilson] and her son [Darryl Roberts] out of the vehicle." (37:66; App. 106). If Ms. Brown testified, this would have corroborated Mr. Wilson's and Mr. Roberts' testimony that the officers had their guns out, bolstering Mr. Wilson's argument that the search was not consensual and resulted in suppression. In the absence of Ms. Brown's testimony, the circuit court was prevented from hearing the full circumstances of the search. The circuit court never heard testimony that would have affected the circuit court's perception of Mr. Wilson's credibility.

While it is possible, as the circuit court stated, that the details of Ms. Brown's testimony could end up being more consistent with either Mr. Wilson's testimony or Mr. Robert's testimony or even provide an "additional explanation," this does not mean that her testimony would have been worthless. It makes sense that Mr. Wilson's testimony, Mr. Robert's testimony, and Ms. Brown's testimony all would have differences given that each person observed the officers from a different vantage point. (37:125; App. 122). In fact it would

seem that the witnesses would be less credible if each recited verbatim the same story.

In addition, had the evidence (cocaine) been suppressed, Mr. Wilson would not have pled and would have gone to trial, as there was no other evidence supporting the possession with intent to deliver cocaine offense. (20:8).

Therefore, because Mr. Wilson raised sufficient material facts in the postconviction motion that, if true, entitle him to relief, this Court should remand for an evidentiary ***Machner*** hearing to resolve this claim of ineffective assistance of counsel. *See* ***State v. Love***, 2005 WI 116, ¶¶ 27-29, 284 Wis. 2d 11, 700 N.W.2d 62.

C. Alternatively, trial counsel was ineffective for failing to properly subpoena Ms. Brown.

Assuming for the sake of argument, but not conceding, that Ms. Brown was not properly subpoenaed, Mr. Wilson was deprived of effective assistance of counsel.

Trial counsel performed deficiently by failing to properly subpoena Ms. Brown. It is clear from the record that trial counsel wanted Ms. Brown to testify. Trial counsel referred to Ms. Brown as a "necessary witness" and attempted to persuade the court to grant an adjournment and a body attachment. (*See, e.g.,* 37:46-47, 66, 70-71). Thus, there can be no reasonable strategic reason for failing to properly subpoena Ms. Brown.

Moreover, trial counsel's failure to properly subpoena Ms. Brown prejudiced Mr. Wilson because, as discussed above, Ms. Brown's anticipated testimony would have corroborated Mr. Wilson's and Mr. Roberts's testimony that the officers had their guns out when approaching, and

bolstered the argument that the search was not consensual, resulting in suppression. Further, had the evidence (cocaine) been suppressed, Mr. Wilson would not have pled and would have gone to trial, as there was no other evidence supporting the possession with intent to deliver cocaine offense. (20:8).

Lastly, contrary to the circuit court's determination (30:4; App. 127), it was unnecessary for Mr. Wilson to attach an affidavit of Ms. Brown to the postconviction motion. First, at the suppression hearing, trial counsel made an offer of proof regarding Ms. Brown's anticipated testimony. (37:66). Second, the postconviction motion, which undersigned counsel signed, noted that counsel's investigator had confirmed Ms. Brown would testify that she observed officers with guns approach the vehicle. (20:3 n.1). *See* Wis. Stat. § 802.05(1) & (2) ("Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."

Therefore, because Mr. Wilson raised sufficient material facts in the postconviction motion that, if true, entitle him to relief, this Court should remand for an evidentiary ***Machner*** hearing to resolve this claim of ineffective assistance of counsel. *See* ***State v. Love***, 2005 WI 116, ¶¶ 27-29, 284 Wis. 2d 11, 700 N.W.2d 62.

CONCLUSION

For the reasons stated, Mr. Wilson respectfully requests that this Court remand for an evidentiary hearing to take testimony from Ms. Brown, and, if necessary, hold a ***Machner*** hearing.

Dated this 27th day of August, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,007 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of August, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of August, 2015.

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