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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2015AP671-CR
(Milwaukee County Cir. Ct. Case No. 2013CF2103)

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 OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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TABLE OF CONTENTS

Page

Questions Presented ... 1

Position on Oral Argument and Publication of the Court's Opinion ... 3

Statutes Involved ... 3

Statement of the Case: Facts and Procedural History ... 5

Standards of Review ... 5

A. Credibility ... 5

B. Ineffective Assistance Of Counsel ... 7

C. Statutory Interpretation ... 10

Argument ... 12

I. In Reconciling Three Statutes Governing The Service Of Subpoenas On Witnesses In A Criminal Case, The Circuit Court Correctly Concluded That Wilson Did Not Properly Subpoena A Witness For The Evidentiary Hearing On His Suppression Motion. ... 12

II. Defense Counsel Did Not Provide Ineffective Assistance In Connection With The Subpoena Of A Witness To Testify At The Evidentiary Hearing On Wilson's Suppression Motion. ... 16

A. Because Arguing For The Validity Of The Subpoena Would Have Proved Futile, Defense Counsel Did Not Provide Ineffective Assistance When He Did Not Make That Argument ... 17

B. Because The Failure To Properly Serve The Subpoena On Jacqueline Brown Did Not Result In Prejudice To Wilson, Defense Counsel Did Not Provide Ineffective Assistance. 18

Conclusion 22

Certificate of Compliance with Wis. Stat. § (Rule) 809.19(8): Form and Length Requirements 24

Certificate of Compliance with Wis. Stat. § (Rule) 809.19(12): Electronic Brief.................... 25

TABLE OF AUTHORITIES CITED

CASES

Dietrich v. Elliott,
190 Wis. 2d 816, 528 N.W.2d 17
(Ct. App. 1995) 15

Loppnow v. Bielik,
2010 WI App 66, 324 Wis. 2d 803,
783 N.W.2d 450 15

State ex rel. Kalal v. Circuit Court for Dane Cty.,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110 11

State v. Allen,
2004 WI 106, 274 Wis. 2d 568,
682 N.W.2d 433 16

State v. Anderson,
2005 WI App 238, 288 Wis. 2d 83,
707 N.W.2d 159, *rev'd on other grounds*,
2006 WI 77, 291 Wis. 2d 673,
717 N.W.2d 74 .... 10, 17

Page

State v. Anthony D.B.,
2000 WI 94, 237 Wis. 2d 1,
614 N.W.2d 435 .... 11, 13

State v. Arredondo,
2004 WI App 7, 269 Wis. 2d 369,
674 N.W.2d 647 8

State v. Balliette,
2011 WI 79, 336 Wis. 2d 358,
805 N.W.2d 334 9

State v. Benton,
2001 WI App 81, 243 Wis. 2d 54,
625 N.W.2d 923 16

State v. Berggren,
2009 WI App 82, 320 Wis. 2d 209,
769 N.W.2d 110 17

State v. Buchanan,
2013 WI 31, 346 Wis. 2d 735,
828 N.W.2d 847 .... 10, 11

State v. Byrge,
225 Wis. 2d 702, 594 N.W.2d 388
(Ct. App. 1999), *aff'd*, 2000 WI 101,
237 Wis. 2d 197, 614 N.W.2d 477 8

State v. Domke,
2011 WI 95, 337 Wis. 2d 268,
805 N.W.2d 364 7

State v. Erickson,
227 Wis. 2d 758, 596 N.W.2d 749 (1999) 9

State v. Flynn,
92 Wis. 2d 427, 285 N.W.2d 710 (1979) 6

State v. Harbor,
2011 WI 28, 333 Wis. 2d 53,
797 N.W.2d 828 7

State v. Herro,
53 Wis. 2d 211, 191 N.W.2d 889 (1971) 6

State v. Holt,
128 Wis. 2d 110, 382 N.W.2d 679
(Ct. App. 1985) 16

State v. Hughes,
2000 WI 24, 233 Wis. 2d 280,
607 N.W.2d 621 6

State v. Jenkins,
2007 WI 96, 303 Wis. 2d 157,
736 N.W.2d 24 6

State v. Kimbrough,
2001 WI App 138, 246 Wis. 2d 648,
630 N.W.2d 752 8

State v. Koller,
2001 WI App 253, 248 Wis. 2d 259,
635 N.W.2d 838 8

State v. McMahon,
186 Wis. 2d 68, 519 N.W.2d 621
(Ct. App. 1994) 8

State v. O'Brien,
2014 WI 54, 354 Wis. 2d 753,
850 N.W.2d 8 .... 11, 13

State v. Pires,
55 Wis. 2d 597, 201 N.W.2d 153 (1972) 6

State v. Trecroci,
2001 WI App 126, 246 Wis. 2d 261,
630 N.W.2d 555 16

Page

State v. Westmoreland,
2008 WI App 15, 307 Wis. 2d 429,
744 N.W.2d 919 9

State v. Wheat,
2002 WI App 153, 256 Wis. 2d 270,
647 N.W.2d 441 10

State v. Wirts,
176 Wis. 2d 174, 500 N.W.2d 317
(Ct. App. 1993) 9

State v. Ziegler,
2012 WI 73, 342 Wis. 2d 256,
816 N.W.2d 238 11

Stone v. Farley,
86 F.3d 712 (7th Cir. 1996)........................ 10, 17

Strickland v. Washington,
466 U.S. 668 (1984)............................ 3, 7, 10, 18

United States v. Trevino,
60 F.3d 333 (7th Cir. 1995)................................ 8

STATUTES

Wis. Stat. § 801.11 3

Wis. Stat. § 801.11(1)....................................... 1, 12

Wis. Stat. § 801.11(1)(b)................................. 13, 14

Wis. Stat. § 805.07 .... 1, 4-5, 12, 13

Wis. Stat. § 805.07(5) 13

Wis. Stat. § 805.17(2) 6

Wis. Stat. § (Rule) 809.19(3)(a)2 5

Wis. Stat. § 885.03 .... 1, 5, 12, 13, 14

Wis. Stat. § 972.11 3
Wis. Stat. § 972.11(1) 1, 12

STATE OF WISCONSIN

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STATE OF WISCONSIN,

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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 OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

QUESTIONS PRESENTED

1. Section 972.11(1) provides that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction." Three statutes dealing with serving subpoenas therefore "shall" apply equally in "all" criminal cases: Wis. Stat. §§ 801.11(1), 805.07, and 885.03. In applying those three statutes, did the circuit court cor-

[1] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

rectly conclude that defendant-appellant Keimonte Antonie Wilson, Sr., failed to properly subpoena a witness for an evidentiary hearing on his suppression motion?

- By its decision, the circuit court necessarily answered "Yes."
- This court should answer "Yes."

2. Did defense counsel provide ineffective assistance by failing to argue that he properly subpoenaed a witness to attend the evidentiary hearing on Wilson's suppression motion?

   - The circuit court did not explicitly address this issue but implicitly answered "No."
   - Because any argument on this issue by defense counsel would have proved futile, counsel did not provide ineffective assistance by refraining from making that argument. This court should, therefore, answer "No."

3. Did defense counsel provide ineffective assistance by failing to properly subpoena a witness to attend the evidentiary hearing on Wilson's suppression motion?

   - The circuit court did not explicitly address this issue but implicitly answered "No."
   - Because the absence of the witness did not affect the circuit court's decision on Wilson's suppression motion, defense counsel's failure to properly subpoena the witness did not cause Wilson prejudice under the second

component of ***Strickland***'s[2] two-part test for assessing a claim of ineffective assistance of counsel. This court should, therefore, answer "No."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATUTES INVOLVED[3]

WIS. STAT. § 972.11 EVIDENCE AND PRACTICE; CIVIL RULES APPLICABLE.

972.11 Evidence and practice; civil rules applicable. **(1)** Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895 and 995, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

WIS. STAT. § 801.11 PERSONAL JURISDICTION; MANNER OF SERVING SUMMONS FOR.

801.11 Personal jurisdiction; manner of serving summons for. A court of this state having jurisdic-

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[2] ***Strickland v. Washington***, 466 U.S. 668 (1984).

[3] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

tion of the subject matter and grounds for personal jurisdiction as provided in s. 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:

1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;

1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons; or

2. Pursuant to the law for the substituted service of summons or like process upon defendants in actions brought in courts of general jurisdiction of the state in which service is made.

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

(d) In any case, by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

WIS. STAT. § 805.07 SUBPOENA.

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).

WIS. STAT. § 885.03 SERVICE OF SUBPOENA.

885.03 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.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State opts not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

STANDARDS OF REVIEW

A. Credibility.

It is the function of the trier of fact, and not [an appellate] court, to resolve questions as to the weight of testimony and the credibility of witnesses. This principle recognizes the trial court's ability to assess each witness's demeanor and the overall persuasiveness of his or her testimony in a way that an appellate court, relying solely on a written transcript, cannot. Thus, we consider the trial judge to be the "ultimate arbiter of the credibility of a witness,"

> and will uphold a trial court's determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence.

State v. Hughes, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (citations omitted). *See also* ***State v. Jenkins***, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24 ("On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. The standard also applies to credibility determinations." (citation omitted)); ***State v. Herro***, 53 Wis. 2d 211, 215, 191 N.W.2d 889 (1971) ("when the trial court makes findings of fact as to the credibility of witnesses and the weight of testimony, even in cases involving constitutional principles, this court will not upset those findings unless they are against the great weight and clear preponderance of the evidence, assuming the trial court adopted adequate procedures, as here, to try the issues").

When reviewing a suppression motion, an appellate court defers to the circuit court's credibility determinations and upholds its findings of fact unless the circuit court clearly erred in making those findings. *See* ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979); ***State v. Pires***, 55 Wis. 2d 597, 602-03, 201 N.W.2d 153 (1972); *cf.* Wis. Stat. § 805.17(2) ("In all actions tried upon the facts without a jury or with an advisory jury, . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

B. Ineffective Assistance Of Counsel.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To prove ineffective assistance of trial counsel, a defendant bears the burden of proving that trial counsel performed deficiently and that counsel's deficient performance caused prejudice to the defendant.

> To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance." *Strickland,* 466 U.S. at 687-88. Reviewing courts should be "highly deferential" to counsel's strategic decisions and make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Carter,* 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland,* 466 U.S. at 689). There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland,* 466 U.S. at 689).

State v. Domke, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364.[4] "To prove deficient performance, a defendant must show *specific acts or omissions* of counsel that are 'outside the wide range of professionally competent assistance.'"

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[4] The supreme court has rejected "any substantive difference" between "tactical" and "strategic" decisions. ***State v. Harbor***, 2011 WI 28, ¶ 71 n.14, 333 Wis. 2d 53, 797 N.W.2d 828.

State v. Arredondo, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (emphasis added) (citation omitted) (quoting *Strickland*, 466 U.S. at 690). *See also, e.g.*, ***United States v. Trevino***, 60 F.3d 333, 338 (7th Cir. 1995) ("With regard to the performance prong, defendant must direct us to the specific acts or omissions which form the basis of his claim." (citing *Strickland*, 466 U.S. at 690)); ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding."), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (defendant must identify the specific acts or omissions that form the basis of the claim of ineffective assistance of counsel).

An appellate court strongly presumes that counsel acts reasonably within professional norms. ***Arredondo***, 269 Wis. 2d 369, ¶ 24.

> The function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable. In making this determination, the court may rely on reasoning which trial counsel overlooked or even disavowed. Courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." Professionally competent assistance encompasses a "wide range" of behaviors.

State v. Koller, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838 (citations omitted). *See also* ***State v. Kimbrough***, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752 ("[O]ur

function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms.").

"Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694; *Johnson*, 153 Wis. 2d at 129." ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999). "A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). *See also* ***Erickson***, 227 Wis. 2d at 774 (speculation does not satisfy the prejudice prong of *Strickland*).

> Whether counsel was ineffective is a mixed question of fact and law. The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law.

State v. Balliette, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334 (citations omitted). *See also* ***id.*** ¶¶ 21-27; ***State v. Westmoreland***, 2008 WI App 15, ¶ 18, 307 Wis. 2d 429, 744 N.W.2d 919 ("Conclusions by the trial court whether the lawyer's performance was deficient and, if so, prejudicial, present questions of law that we review *de novo*.").

If the defendant fails on either prong — deficient performance or prejudice — the ineffective-assistance-of-counsel claim fails. ***Strickland***, 466 U.S. at 697. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ***Id.*** "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." ***Id.***

Ineffective assistance of counsel does not result when an attorney refrains from pursuing a futile course of action or from raising a meritless issue or argument. ***Stone v. Farley***, 86 F.3d 712, 717 (7th Cir. 1996) ("[f]ailure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel"); ***State v. Anderson***, 2005 WI App 238, ¶ 29, 288 Wis. 2d 83, 707 N.W.2d 159 ("[H]ad Anderson's attorney objected to this testimony, the objection would have been overruled. Anderson's attorney cannot be faulted for failing to make a meritless objection."), *rev'd on other grounds*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74; ***State v. Wheat***, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

C. Statutory Interpretation.

"Interpretation of a statute is a question of law that [an appellate] court reviews de novo while benefitting from the analyses of the lower courts." ***State v. Buchanan***, 2013 WI 31, ¶ 12, 346

Wis. 2d 735, 828 N.W.2d 847. "'The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.'" ***State v. Ziegler***, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (quoted source omitted).

Statutory interpretation "'begins with the language of the statute.'" ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. An appellate court "must construe statutory language reasonably; an unreasonable interpretation is one that yields absurd results or one that contravenes the statute's manifest purpose." ***Buchanan***, 346 Wis. 2d 735, ¶ 23; *see also* ***Ziegler***, 342 Wis. 2d 256, ¶ 43. "In interpreting multiple statutes, a court interprets them together and harmonizes them to avoid conflict if at all possible. [An appellate] court attempts to harmonize statutes in a way that will give effect to the legislature's intent in enacting both statutes." ***State v. O'Brien***, 2014 WI 54, ¶ 70, 354 Wis. 2d 753, 850 N.W.2d 8 (footnotes omitted).

> When construing several statutes that deal with the same subject, it is [an appellate court's] duty to give each provision full force and effect. If two statutes that apply to the same subject are in conflict, the more specific controls. Conflicts between statutes are not favored and will not be held to exist if the statute may be reasonably interpreted otherwise.

State v. Anthony D.B., 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435 (citations omitted).

ARGUMENT

I. IN RECONCILING THREE STATUTES GOVERNING THE SERVICE OF SUBPOENAS ON WITNESSES IN A CRIMINAL CASE, THE CIRCUIT COURT CORRECTLY CONCLUDED THAT WILSON DID NOT PROPERLY SUBPOENA A WITNESS FOR THE EVIDENTIARY HEARING ON HIS SUPPRESSION MOTION.

Wilson disputes the circuit court's decision that he did not properly subpoena a witness for the evidentiary hearing on his suppression motion. Wilson's Brief at 15-18. Because the circuit court correctly reconciled three applicable statutes, this court should affirm the circuit court's decision.

"[T]he rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. . . . Chapter[ ] 885 . . . shall apply in all criminal proceedings." Wis. Stat. § 972.11(1). Accordingly, three statutes dealing with serving subpoenas "shall" apply equally in "all" criminal cases: Wis. Stat. §§ 801.11(1), 805.07, and 885.03. Thus, Wilson's argument rests on a fundamentally flawed foundation: that only section 885.03 applies to this case. Wilson's Brief at 18 ("Wis. Stat. § 885.03 controls in criminal cases, not the civil procedure statutes, Wis. Stat. §§ 805.07(5) & 801.11(1).").

> When construing several statutes that deal with the same subject, it is our duty to give each provision full force and effect. If two statutes that apply to the same subject are in conflict, the more specific controls. Conflicts between statutes are not favored and will not be held to exist if the statute may be reasonably interpreted otherwise.

Anthony D.B., 237 Wis. 2d 1, ¶ 11 (citations omitted). So, "[i]n interpreting multiple statutes, a court interprets them together and harmonizes them to avoid conflict if at all possible. [An appellate] court attempts to harmonize statutes in a way that will give effect to the legislature's intent in enacting both statutes." ***O'Brien***, 354 Wis. 2d 753, ¶ 70 (footnotes omitted).

Section 885.03 sets out the most general methods of service, including merely "leaving such copy [of a subpoena] at the witness's abode." This section neither requires that the person serving the subpoena make contact with anyone "at the witness's abode" nor specifies any manner of leaving the copy at the abode.

Section 805.07 sets out a more specific standard for serving a subpoena when the person serving the subpoena effects substituted personal service, as occurred in this case. Section 805.07(5) specifies that "[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)." Because two of the three service procedures set out in section 885.03 concern personal contact with the witness, the third procedure — "leaving such copy [of a subpoena] at the witness's abode" — functions as substituted personal service.

Section 801.11(1)(b) allows substituted personal service, but requires "reasonable diligence" to effect personal service on the person named in the subpoena before the server effects substituted personal service.

Thus, in a criminal case, before simply leaving a subpoena at the witness's abode (per the general provision of section 885.03), the server must first make reasonably diligent efforts to effect personal service on the witness (the more specific provision of section 801.11(1)(b)).

In this case, the circuit court correctly determined that Wilson did not properly serve the subpoena on his witness (Jacqueline A. Brown, the mother of Wilson's girlfriend (36:4; 37:47) and of Darryl Roberts (36:4; 37:66-67), Wilson's companion at the time of Wilson's arrest (37:48)). Substituted personal service occurred via Laquita A. Brown, Jacqueline Brown's daughter and Roberts's half-sister (20:14; 36:4; 37:71). The affidavit of service, however, indicated only one attempt to serve the subpoena: the attempt that resulted in service on Laquita Brown. The affidavit included spaces for indicating other service attempts, but those spaces remained blank (20:14; *see also* 37:72 (circuit court noting the spaces on the affidavit)). The court said that "[i]t 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" (37:71). When asked by the court whether they disagreed with the court's understanding of the law, both defense counsel and the prosecutor replied that they did not disagree (37:72). The court concluded that because the affidavit did not indicate more than one effort to serve Jacqueline Brown before the server made substituted personal service, "this is not a valid subpoena" (37:72).

"In the face of a challenge to the sufficiency of service of process, the party serving the process has the burden to show that process was sufficient." ***Dietrich v. Elliott***, 190 Wis. 2d 816, 826, 528 N.W.2d 17 (Ct. App. 1995). Here, Wilson did not bear his burden: he failed to show that whoever handed the subpoena to Laquita Brown exercised reasonable diligence to serve Jacqueline Brown personally before attempting substituted personal service. *Cf.* ***Loppnow v. Bielik***, 2010 WI App 66, ¶ 10, 324 Wis. 2d 803, 783 N.W.2d 450 (explaining "reasonable diligence").[5] Wilson could have provided information allowing the server to exercise reasonable diligence (36:4), but Wilson evidently did not do so (or else the server did not make use of any information Wilson did provide).

In short, the circuit court correctly decided that Wilson did not effect valid service of the subpoena on Jacqueline Brown. This court should affirm that decision.

II. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE IN CONNECTION WITH THE SUBPOENA OF A WITNESS TO TESTIFY AT THE EVIDENTIARY HEARING ON WILSON'S SUPPRESSION MOTION.

In his postconviction motion, Wilson contended that, for two reasons, trial counsel provided ineffective assistance: counsel failed to argue that he

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[5] The record reveals other evidence of a lack of reasonable diligence. On August 26, 2013, the court issued the subpoena (20:13). The server did not attempt service until October 22, 2013 (20:14) — nearly two months later. The suppression hearing occurred on December 3, 2013 (37:1).

properly subpoenaed Jacqueline Brown (20:8-10), and counsel did not properly subpoena Brown (20:11). On appeal, he reiterates those contentions. *See* Wilson's Brief at 20-23.

At the outset, the State agrees with Wilson that the circuit court erred in holding that by failing to include an affidavit from Brown, Wilson "ha[d] not shown that [Brown] was available to testify or what her testimony would have been at the suppression hearing" (30:4). The State does not know of any authority that a postconviction motion must include a supporting affidavit. A postconviction motion need only make its allegations "within the four corners of the document itself." ***State v. Allen,*** 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433. The State acknowledges that the postconviction motion contained the allegations the circuit court sought from an affidavit.

Nonetheless, the circuit court reached an appropriate result, if for an erroneous reason. This court should affirm the circuit court's decision. *See, e.g.*, ***State v. Trecroci***, 2001 WI App 126, ¶ 45, 246 Wis. 2d 261, 630 N.W.2d 555 ("we are entitled to affirm a trial court's ruling on different grounds if the effect of our holding is to uphold the trial court's ruling"); ***State v. Benton***, 2001 WI App 81, ¶ 11 n.2, 243 Wis. 2d 54, 625 N.W.2d 923 ("We may, of course, affirm the trial court for any reason."); ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) ("It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed."), *superseded on other grounds by* Wis. Stat. § 940.225(7), *as recognized in State v. Grunke*, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137.

A. Because Arguing For The Validity Of The Subpoena Would Have Proved Futile, Defense Counsel Did Not Provide Ineffective Assistance When He Did Not Make That Argument.

Wilson's lawyer did not provide ineffective assistance by failing to argue that he properly subpoenaed Jacqueline Brown. The circuit court summarized the law regarding substituted service of a subpoena (37:71),[6] and Wilson's counsel and the prosecutor said they did not disagree with that summary (37:72). Because the affidavit of service of the subpoena did not indicate more than one effort to serve Brown before the server made substituted personal service, the court correctly characterized the subpoena as "not a valid subpoena" (37:72).

A lawyer does not provide ineffective assistance by refraining from pursuing a futile course of action. *See, e.g.*, ***Stone***, 86 F.3d at 717 ("[f]ailure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel"); ***State v. Berggren***, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110 (attorney not ineffective for not bringing a motion the court would have denied); ***Anderson***, 288 Wis. 2d 83, ¶ 29 ("[H]ad Anderson's attorney objected to this testimony, the objection would have been overruled. Anderson's attorney cannot be faulted for failing to make a meritless objection.").

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[6] *See supra* pp. 23-25 (reviewing applicable statutes).

Here, even assuming defense counsel's request for a body attachment (37:70) did not amount to an implicit argument for the validity of the subpoena, the court's reasoning and the applicable statutes show that any argument by defense counsel would have proved futile. Consequently, defense counsel did not provide ineffective assistance by refraining from making an argument for the validity of the subpoena.

B. Because The Failure To Properly Serve The Subpoena On Jacqueline Brown Did Not Result In Prejudice To Wilson, Defense Counsel Did Not Provide Ineffective Assistance.

For purposes of this appeal, the State does not dispute that the failure to properly serve the subpoena on Jacqueline Brown amounted to deficient performance under ***Strickland***'s two-part test for proving ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687-91 (discussing deficient-performance component). This deficiency, however, did not result in prejudice to Wilson. *See* ***id.*** at 691-96 (discussing prejudice component).

At the suppression hearing, the circuit court heard four witnesses: Milwaukee Police Officer William Savagian (37:6-45, 105-08); Milwaukee Police Officer James Hunter (37:98-105); Darryl Roberts (37:47-64); and Wilson (37:75-97). The court identified "a key issue" as whether the officers had their guns drawn when approaching the vehicle occupied by Wilson and Roberts (37:69; *see also* 37:125 ("the gun issue was the most significant to the Court")).

Roberts testified that two of the three officers[7] who approached the vehicle had their guns drawn (37:50). He said that "[o]ne of the officers was on the driver's side pointing the gun at Keimonte Wilson. The other male officer was coming to the passenger side with his gun drawn telling me to get out of the car" (37:50-51).

Wilson testified that "[w]hen I returned to the vehicle, I seen three officers running up with their guns pointed at -- in my direction" (37:77). He said all three officers had their guns drawn (37:89, 90). He also said the white male officer wore a bullet-proof vest (37:80, 90, 93).

Officer Savagian denied that he or the other officers had guns drawn as they approached Roberts and Wilson (37:36, 40, 105-06).

Officer Hunter denied that he or the other officers had guns drawn as they approached Roberts and Wilson (37:102). He also testified that he wore a bullet-proof vest during the encounter and that "I normally wear a vest under my shirt" (37:99).

During the discussion of Jacqueline Brown's failure to appear at the hearing, defense counsel summarized the testimony he expected Brown to give:

> It's my understanding that she would testify that she observed them with guns drawn approach the vehicle and take both my client and her son, Darryl,

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[7] Roberts described the officers as "two male officers" and a "lady officer" (37:50): a black male, a white male, and a black female (37:55, 57). Wilson agreed (37:88-89).

out of the vehicle. And I don't want to presume too much on the testimony, but it's my understanding that that is very clearly what she would be testifying to.

(37:66.)

The circuit court denied Wilson's suppression motion (37:127-28). The court said that it had "the opportunity to hear the testimony and assess the demeanor and I guess believability of the witnesses. And based on the totality of the circumstances and the credible evidence of the witnesses, I'm going to make some findings" (37:119-20). The court found Officer Savagian "to be a very credible witness" (37:120). The court doubted the reliability of Roberts's testimony (37:121-22). Similarly, the court expressed skepticism about Wilson's testimony and found it internally inconsistent as well as inconsistent with some of Roberts's (37:122-24). The court also found Officer Hunter "very believable" (37:124):

> He was very calm as he testified. Not only what he was saying, but basically the way he was saying it led me to believe that he was true -- that he was telling the truth. And he was not in the courtroom when the other witnesses were testifying regarding the guns.

(37:124.) The court summarized its credibility determinations:

> So at the end of the day regarding this gun situation, I find the officers' testimony to be much more credible and believable than Mr. Wilson and Mr. Roberts. Specially given the inconsistencies between the testimony of Mr. Wilson and Mr. Roberts for some of the reasons that I've already indicated.

(37:124-25; *see also* 37:126 ("I found Officer Savagian and Officer Hunter's testimony to be

credible.").) The court also discounted the likelihood that Brown's testimony would have changed anything:

> 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 she chose not to be here, but -- because we know she got the subpoena, but because there's not proper service, I couldn't enforce it.

(37:125.)

Jacqueline Brown's absence did not cause Wilson any prejudice. Wilson has not provided any reason to believe Brown's testimony would have altered the circuit court's assessment of the officers' credibility. And the record does not provide any basis for assuming Brown's testimony would have done so. Moreover, defense counsel's summary of Brown's expected testimony confirmed the court's belief that because of inconsistencies between the testimony of Roberts and Wilson, Brown's testimony would buttress the testimony of one but not the other, or, worse (from Wilson's perspective), would create a third account, thus undermining both Roberts and Wilson.

In addition, as the mother of Roberts and of Wilson's girlfriend, Brown lacked any presumptive indifference to the impact of her testimony, increasing the likelihood that her testimony would

not undermine the court's assessment of the officers' credibility or would have improved the court's view of Roberts's and Wilson's believability. Defense counsel might have provided ineffective assistance if he had improperly served an indifferent witness — for example, a passerby who just happened on the encounter and didn't have any relationship to either Roberts or Wilson, hence had no personal stake of any sort in the impact of his or her testimony. Instead, the missing witness had a close personal relationship to Wilson and a familial relationship to Roberts and, based on defense counsel's proffer (37:66), would not have offered testimony that would have altered the circuit court's assessments of the other witnesses' credibility.

In summary, because testimony from Brown would not have changed anything, her absence did not harm Wilson. Consequently, defense counsel's failure to secure her presence did not cause Wilson any cognizable prejudice. Defense counsel therefore did not provide ineffective assistance in terms of failing to properly serve the subpoena on Brown.

CONCLUSION

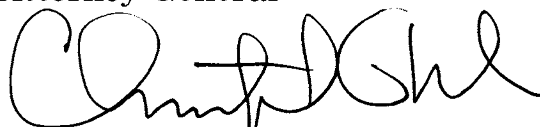
This court should affirm the circuit court's decision denying Wilson's postconviction motion and should affirm the judgment of conviction. The circuit court correctly decided that Wilson failed to properly subpoena a witness to testify at the evidentiary hearing on his suppression motion. Defense counsel did not provide ineffective assistance by refraining from making a futile argument to the circuit court. And because the absence of the improperly subpoenaed witness did not adversely

affect the circuit court's decision denying Wilson's suppression motion, defense counsel's failure to properly subpoena the witness did not cause Wilson any ***Strickland*** prejudice and therefore did not result in defense counsel providing ineffective assistance.

Date: December 7, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



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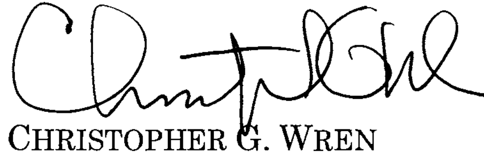
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a 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, maximum of 60 characters per line, and a length of 5,067 words.



CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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

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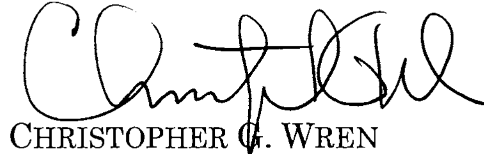

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