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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP0671-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEIMONTE ANTONIE WILSON, SR.,

Defendant-Appellant-Petitioner.

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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

There are several statutes in Wisconsin that address the service of a subpoena. In particular, Wis. Stat. § 885.03, which expressly applies to criminal cases, provides that a subpoena can be served by simply "leaving such copy at a witness's abode."

In this case, in preparation for a suppression hearing, trial counsel requested that his investigator subpoena a witness. Trial counsel's investigator went to the witness's home and left a copy of the subpoena with the witness's daughter.

On the day of the suppression hearing, the witness sent a letter stating that she was not able to attend the hearing, as she was unable to get someone to cover her shift at work. Consequently, trial counsel requested an adjournment. The State initially did not take a position, and then requested a body attachment. Trial counsel subsequently agreed.

The circuit court denied the parties' request for a body attachment. Although characterizing the absent witness as a "key witness," the circuit court concluded that the subpoena was improperly served. The circuit court found that civil trial statutes, Wis. Stat. §§ 805.07(5) and 801.11(1)(b), require "reasonable diligence" before a subpoena is left at a witness's abode in criminal cases.

At issue in this case is the proper procedure to subpoena a witness in a criminal case. The resolution of this issue will impact the criminal justice system—courts, prosecutors, and defense attorneys across the state.

ISSUES PRESENTED

1. In a criminal case, is a witness properly served when a subpoena is left at the witness's home pursuant to Wis. Stat. § 885.03?

The circuit court answered no, concluding that civil trial statutes, Wis. Stat. §§ 805.07(5) & 801.11(1)(b), apply to criminal cases and require "reasonable diligence" before a subpoena is left at a witness's home. The court of appeals affirmed.

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

The circuit court answered no, and the court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

Mr. Wilson was charged with one count of possession with intent to deliver cocaine, second offense,[1] contrary to Wis. Stat. §§ 961.41(1m)(cm)2 & 961.48(1)(b). (2:1).

[1] Mr. Wilson was previously convicted of possession with intent to deliver marijuana in Milwaukee County Case No. 10-CF-2202. (2:1).

According to the complaint, officers observed a truck parked in a vacant lot near a "No Trespassing" sign. (*Id.*). Officers saw Mr. Wilson get out of the truck and walk toward a "known drug house." Mr. Wilson reappeared "moments later" and walked back towards the truck. (2:1-2). Three officers approached the truck. (2:2). Mr. Wilson allegedly consented to a search of his person. (*Id.*). Police found cocaine and cash on him. (*Id.*).

Motion to Suppress

Trial counsel filed a suppression motion arguing that there was no basis for the stop, and Mr. Wilson did not give consent to search. (5). In response, the State argued that the officers' initial contact with Mr. Wilson was consensual, reasonable suspicion existed to stop him, and he gave consent to search. (7).

A hearing was held before the Honorable William S. Pocan. (37). Officer William Savagian testified in pertinent part that he did not have his gun drawn when approaching the truck and Mr. Wilson consented to a search. (*See, e.g.*, 37:24, 36; App. 138, 150).

After Officer Savagian testified, trial counsel informed the court he had subpoenaed a witness, Jacqueline Brown, but she failed to appear. (37:46; App. 160). 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 testimony be taken from the next witness, Darryl Roberts, Ms. Brown's son, who was also sitting in the truck. (37:46-47, 52; App. 160-61, 166). Mr. Roberts testified that two male "[o]fficers arrive[d] with their guns out." (37:50, 55-57; App. 164, 169-71). The black male officer opened the door, grabbed Mr. Roberts' arm, and pulled him out of the truck. (37:58-59; App. 172-73). Mr. Roberts testified he was searched immediately. (37:59; App. 173).

After Mr. Roberts testified, trial counsel sought an adjournment to take testimony from Ms. Brown. (37:67; App. 181). Trial counsel stated that Ms. Brown "was at the residence at the time that the police came to what is essentially the back of her residence." (37:66; App. 180). Trial counsel anticipated Ms. Brown would testify that she observed the officers "with guns drawn approach the vehicle and take both [Mr. Wilson] and [Mr. Roberts] out of the vehicle." (*Id.*). Trial counsel further stated that:

> When she hadn't shown up . . . I called the number I had for her. I got through to her. She indicated to me she was at work, that she couldn't find anybody to cover her shift, and that she wasn't able to get here today. I did – I would note I was handed a letter by Mr. Roberts, the gentleman who just testified, from his mom . . . . she's indicating that she had – it sounded like it was more a difficulty of getting here because of work.

(37:66-67; App. 180-81). The State initially did not take a position. (37:67-68; App. 181-82). The court responded:

> 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. I'm not going to – if I'm going to set another date, she's going to be picked up with a warrant because it's just the way it is. I'm not going to set another date and then hope that this time she decides to come. 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. 182-83) (emphasis added). The State then requested a body attachment. (37:69; App. 183).

As an alternative to a body attachment, trial counsel proposed having Ms. Brown testify by phone, but the State objected. (37:69-70; App. 183-84). Trial counsel then agreed with the State that a body attachment should be ordered. (37:70; App. 184). 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."[2] (37:71; 20:13, 14; App. 185, 247, 248). Thus, Ms. Brown received notice of the hearing approximately 42 days in advance.

The court looked at the subpoena and concluded that there 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

[2] The affidavit of service also indicates that the investigator verified Ms. Brown's daughter "was of legal age to receive this document and resides at the same address." (20:14; App. 248).

> have to – there's nothing that I can do to assist you today. . . .

(37:71-73; App. 185-87).

Subsequently, Mr. Wilson opted to exercise his right to testify. He testified in pertinent part that three officers ran up with their guns drawn. (*See, e.g.,* 37:77; App. 191). At the time, he did not know they were officers and "was scared. I thought that, you know, we was, you know, under attack." (37:77-78; App. 191-92). He raised his arms and got out of the car because he thought that "they were going to shoot." (*See, e.g.*, 37:78-80, 82; App. 192-94, 196). Mr. Wilson felt that he had no choice but to let the officer search him. (37:81; App. 195). Mr. Wilson testified that:

> [The officer] had his gun and then he just start 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.*, 37:80-81; App. 194-95).

In rebuttal, the State called Officer James Hunter and Officer Savagian. Both officers denied having guns out. (37:101, 106; App. 215, 220).

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; App. 240-41). The court found Officer Savagian and Officer Hunter more

credible regarding the "gun situation" than Mr. Roberts and Mr. Wilson. (37:124-25; App. 238-39). The court noted that Mr. Roberts testified there were three officers, but only two male officers had their guns out. (37:121; App. 235). In comparison, Mr. Wilson testified that all three officers had their guns out. (37:122; App. 236). The circuit court also questioned some of the testimony, such as Mr. Wilson's assertion that the officer searched him while pointing a gun at him. (37:123-24; App. 237-38). In addition, the court noted that Mr. Wilson had a prior record and a "vested interest" in the case. (37:126-27; App. 240-41). 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. 239).

Plea and Sentencing

Mr. Wilson entered a guilty plea to possession with intent to deliver cocaine without the second or subsequent

enhancer.[3] (38:5, 9). The Honorable William S. Pocan imposed a five-year prison sentence (three years of initial confinement and two years of extended supervision) consecutive to any other sentence. (38:44).

Appeal

Mr. Wilson filed a postconviction motion asserting that the circuit court erred when it denied trial counsel's requests 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; or in the alternative, (2) failing to properly subpoena Ms. Brown. (20:8-11). After briefing, the Honorable William S. Pocan denied the postconviction motion without a hearing. (30; App. 111-114).

The court of appeals affirmed, concluding that Wis. Stat. §§ 805.07(5) and 801.11(1)(b) apply to criminal cases and require reasonable diligence before a subpoena can be left at a witness's home. ***State v. Keimonte Antonie Wilson, Sr.***, No. 2015AP0671-CR, slip op., ¶¶ 9, 11 (July 6, 2016) (unpublished) (App. 101-110). The court of appeals assumed that trial counsel was deficient for failing to properly subpoena Ms. Brown; however, it found that there was no prejudice. ***Id.***, ¶¶ 14, 24-25 (App. 107, 109-10).

In a footnote, the court of appeals acknowledged that "[t]here is perhaps an inherent conflict" between Wis. Stat. § 885.03, which "seemingly allows service of a subpoena simply by 'leaving [a] copy at the witness's abode'" and "imposing the stricter Wis. Stat. § 801.11 requirement of reasonable diligence . . ." ***Wilson***, slip op., ¶ 9 n. 2 (App. 105). The court of appeals then stated:

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[3] The judgment of conviction incorrectly lists the enhancer. (12).

> However, it is arguable that, given § 801.11(1)(b)1.-1m., to leave a copy of a subpoena means leaving it with another person—i.e., substitute service. However, we need not resolve this discrepancy because Wilson did not simply leave the subpoena at Brown's home; he served a substitute.

Id.

Mr. Wilson filed a petition for review of the decision of the court of appeals, which this Court granted on October 11, 2016.

ARGUMENT

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

A. Principles of Statutory Interpretation.

The purpose of statutory interpretation is to "determine what a statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. When interpreting a statute, the language of the statute is examined first. ***Id***. ¶ 45 (citations omitted). The language of a statute should be given its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***Id***. In addition, statutory language is examined in the context it is used, not in isolation. ***Id***. ¶ 46.

If the words chosen by the legislature demonstrate a "plain, clear statutory meaning," no further analysis is undertaken. ***Id***. However, statutory language is ambiguous if it can be understood "by reasonably well-informed persons in

two or more senses." ***Id***. ¶ 47. If a statute is ambiguous, extrinsic sources, such as legislative history, may be applied to the statutory text. ***Id***. ¶¶ 48-51.

Statutory interpretation, or the application of a statute to a known set of facts, presents a question of law that appellate courts review without deference to the circuit courts. ***State v. Parent***, 2006 WI 132, ¶ 15, 298 Wis. 2d 63, 725 N.W.2d 915.

B. Wis. Stat. § 885.03 governs the service of a witness subpoena in a criminal case.

1. Wis. Stat. § 885.03 expressly applies to criminal cases.

Wis. Stat. § 972.11(1) explicitly states that Wisconsin Chapter 885 "*shall* apply in all criminal proceedings." (emphasis added). Wis. Stat. § 972.11(1) provides:

> 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 . . . . Chapters 885 to 895 and 995, except ss. 804.02 to 804.07[4] and 887.23 to 887.26[5], shall apply in all criminal proceedings.

Wis. Stat. § 972.11(1) (emphases added).

[4] Wisconsin Chapter 804 is titled "Civil Procedure—Depositions and Discovery." Wis. Stat. §§ 804.02 to 804.07 address depositions.

[5] Wisconsin Chapter 887 is titled "Depositions, Oaths and Affidavits." Wis. Stat. §§ 887.23 to 887.26 address depositions and witnesses sent to other states.

Chapter 885 regulates subpoena practice, including who may issue a subpoena and the form of a subpoena. Wis. Stat. §§ 885.01-02. If a witness fails to attend a proceeding, the witness may be responsible for damages, costs, punished by fine, or the court may issue an "attachment."[6] Wis. Stat. § 885.11.

Additionally, Wis. Stat. § 885.03 provides several different ways to serve a witness[7] with a subpoena:

> Chapter 885
> Witness and Oral Testimony
>
> 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.

Wis. Stat. § 885.03 (emphases added). Thus, a subpoena can be served by: (1) exhibiting and reading it to the witness; (2) giving the witness a copy; *or* (3) leaving a copy at the witness's abode.

Consequently, in this case, it was proper for trial counsel's investigator to leave a subpoena at Ms. Brown's residence with her daughter pursuant to Wis. Stat. § 885.03.

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[6] In a criminal case, courts have the additional power to compel attendance by the issuance of a bench warrant for the failure to appear. Wis. Stat. § 968.09. And, in a felony case, if a witness's testimony is "material," and it is "impracticable" to secure the witness's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness. Wis. Stat. § 969.01(3). If the witness is not in court, a warrant for the person's arrest may be issued. *Id.*

[7] There is a specific criminal statute that compels or commands a criminal defendant to come to court. Wis. Stat. § 968.04 discusses "warrants" and "summons on a complaint."

Wis. Stat. § 972.11(1) states that Chapter 885 applies to "all criminal proceedings" and Wis. Stat. § 885.03 plainly states that a copy of a subpoena can be left at a witness's abode, such as Ms. Brown's home. *See generally*, ***State v. King***, 2005 WI App 224, ¶ 16, 287 Wis. 2d 756, 706 N.W.2d 181 (concluding that a subpoena should have been served in a criminal case and citing Wis. Stat. § 885.03).

2. If statutes conflict, the more specific statute, in this case Wis. Stat. § 885.03, governs.

Despite the specific application of Wis. Stat. § 885.03 to criminal cases, the court of appeals in this case concluded two different statutes—Wis. Stat. §§ 805.07(5) & 801.11(1)(b)—apply. ***Wilson***, slip op., ¶¶ 9, 11 (App. 105-06). Wis. Stat. § 805.07(5) provides:

> Chapter 805
> Civil Procedure—Trials
>
> 805.07 Subpoena.
>
> (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).

(Emphasis added).

Wis. Stat. § 801.11(1)(b), which is incorporated by reference in Wis. Stat. § 805.07(5), requires a party to exercise "reasonable diligence" before leaving a summons at a witness's abode. Wis. Stat. § 801.11(1)(b) provides:

> 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:
>
> 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.

(Emphasis added).

The case law discussing "reasonable diligence" deals primarily with the court's exercise of personal jurisdiction after insufficient service of summons on a defendant rather than service of a subpoena on a witness. The level of diligence required before foregoing personal service of a

summons depends on the facts of each case and requires that a plaintiff exhaust information or leads reasonably calculated to effectuate personal service before relying on an alternate form of service. ***Haselow v. Gauthier***, 212 Wis. 2d 580, 587-88, 569 N.W.2d 97 (Ct. App. 1997). The serving party must follow viable leads and not stop short when a lead might reasonably be expected to uncover an address of the person on whom service is sought. ***Loppnow v. Bielik***, 2010 WI App 66, ¶ 15, 324 Wis. 2d 803, 783 N.W.2d 450 (citation omitted).

As the court of appeals' decision acknowledged, an "inherent conflict" exists between Wis. Stat. § 885.03 and Wis. Stat. §§ 805.07(5) & 801.11(1)(b). As discussed above, Wis. Stat. § 885.03 allows a subpoena to be left at a witness's abode. Conversely, Wis. Stat. §§ 805.07(5) & 801.11(1)(b) impose a more stringent standard, requiring a party to exercise "reasonable diligence" before leaving a subpoena at a witness's abode. Additionally, Wis. Stat. § 801.11(1)(b) does not allow a subpoena simply to be left at a witness's abode, but requires that the subpoena be left with a family member 14 years of age or in the presence of a competent adult currently residing in the abode.

The court of appeals' decision that Wis. Stat. §§ 805.07(5) & 801.11(1)(b) applies to criminal cases ignores that 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; ***Marder v. Bd. Of Regents of Univ. of Wis.***, 2005 WI 159, ¶ 23, 286 Wis. 2d 252, 706 N.W.2d 110. ("[G]enerally where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls.").

For example, in ***State v. Schaefer***, 2008 WI 25, ¶ 48, 308 Wis. 2d 279, 746 N.W.2d 457, the defendant argued that the general power to subpoena documents allowed him to obtain discovery prior to a preliminary hearing. The Court concluded that "if we permitted the general subpoena authority to effect discovery in a criminal case before the preliminary examination, there would be nothing left of the limiting conditions in [the discovery statutes] Wis. Stat. §§ 971.23(1) and 971.31(5)(b)." ***Id.*** ¶ 56. Thus, ***Schaefer*** held the more specific criminal discovery statutes superseded the general subpoena statutes.

Here, like in ***Schaefer***, Wis. Stat. § 885.03 controls because it is the more specific statute. Wis. Stat. § 885.03 expressly applies in criminal cases pursuant to Wis. Stat. § 972.11(1) (stating that Chapter 885 applies to "all criminal proceedings").

Moreover, it makes sense to apply a less stringent standard for subpoena service in a criminal case than in a civil case.[8] In a criminal case, numerous constitutional rights apply

[8] Other states also appear to allow substitute service in criminal cases without first requiring "reasonable diligence" to personally serve a witness. *See* Minn. Stat. Ann., R. Crim. Proc., R. 22.03 (stating that a subpoena may be served "by delivering a copy to the person or by leaving a copy at the person's usual place of abode with a person of suitable age and discretion who resides there") (App. 254); La. Code Crim. Proc. art. 735 (stating a subpoena shall be served by domiciliary service, which is made when the sheriff leaves the subpoena "at the dwelling house or usual abode of the witness with a person of suitable age and discretion residing therein . . . ," personal service, or mail) (App. 255-56); S.C. R. Crim. Proc., R. 13 (stating that service of a subpoena may be made by "delivering a copy to him personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . .") (App. 257).

to the defendant, including the right to effective assistance of counsel, the right to confront and cross-examine witnesses, and the right to present evidence.[9] Proceeding without a key witness undermines these constitutional rights. Consequently, there should be more leeway in a criminal case when evaluating whether the service of a subpoena was proper, especially in a case such as this in which a "key" witness clearly received notice of the hearing, but did not come.

3. Civil rules, such as Wis. Stat. § 805.07(5), do not apply to criminal proceedings when their context manifestly requires a different construction.

While some civil rules are applicable in criminal cases, not all are. Wis. Stat. § 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." Thus, for example, some courts have found civil rules inapplicable to criminal proceedings when the language or context of the rule is civil in nature, rather than criminal. *See generally*, ***State v. Hyndman***, 170 Wis. 2d 198, 206-07, 488 N.W.2d 11 (Ct.

[9] *See generally*, ***State v. Thiel***, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305 ("Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution."); ***State v. Hale***, 2005 WI 7, ¶ 43, 277 Wis. 2d 593, 691 N.W.2d 637 ("The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them."); ***Washington v. Texas***, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.").

App. 1992) (finding that Wis. Stat. § 802.08(1), which allows a party to move for summary judgment, does not apply to a criminal case); ***State v. Henley***, 2010 WI 97, ¶¶ 39-66, 328 Wis. 2d 544, 787 N.W.2d 350 (finding that a criminal defendant cannot use Wis. § 805.15(1) to seek a new trial in the interest of justice untethered from the normal postconviction and appeals process).

There are two reasons why the context of Wis. Stat. § 805.07(5) manifestly requires a different construction than found by the court of appeals. *See* Wis. Stat. § 972.11(1).

First, an examination of the language *within* Wis. Stat. § 805.07 reflects that it is civil in nature. Wis. Stat. § 805.07(1) provides that:

> 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.

(emphasis added); *see* ***Schaefer***, 2008 WI 25, ¶ 42 (adding emphasis to the word "civil action" when quoting Wis. Stat. § 805.07(1)).

Likewise, Wis. Stat. § 805.07(2)(b) also references a "deposition" and "discovery":

> Notice of a 3rd-party subpoena issue for discovery purposes shall be provided to all parties at least 10 days before the scheduled deposition in order to preserve their right to object. If a 3rd-party subpoena requests the production of books, papers, documents, electronically stored information, or tangible things that are within the scope of discovery . . .

(emphases added).

In addition, Wis. Stat. § 805.07(5) references parties unlikely to be involved in a criminal case:

> 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).

(emphasis added).

Second, an examination of the surrounding statutes also reflect that Wis. Stat. § 805.07(5) is civil in nature. As the State asserted in its brief in ***Schaefer***:

> [T]he subpoena power provided in Wis. Stat. § 805.07 is itself directed to producing evidence for civil trials, as its context plainly shows. Chapter 805 is entitled "Civil Procedure-Trials." Every other section in Chapter 805 focuses on civil trial procedures only. *See, e.g.*, Wis. Stat. § 805.01 ("Jury trial of right."); § 805.08 ("Jurors."); § 805.09 ("Juries of fewer than 12; five-sixths verdict."); § 805.13 ("Jury instructions; note taking; form of verdict."). So, if § 805.07 were to apply to criminal cases, it would only apply to subpoenas in preparation for trial, as it now does in civil cases.

(State's Response Br. at 18 in ***Schaefer***, 2008 WI 25).[10] Thus, the context of Wis. Stat. § 805.07(5) reflects that it is limited to civil cases. And, assuming for the sake of argument, but not conceding that the statute applies to

[10] The State's response brief is available online at http://library.law.wisc.edu/eresources/wibriefs/. A different assistant attorney general represented the State than in this case.

criminal trials, there is no indication that it applies to a pre-trial suppression hearing as in this case.

As Justice Ziegler wrote in ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611,[11] in an opinion concurring in part and dissenting in part:

> The State may not circumvent the criminal process by using civil subpoena statutes. The criminal law has its own subpoena statutes, which the State was required to use.
>
> The Wisconsin criminal code specifically provides that chapter 885, Witnesses and Oral Testimony, "shall apply in all criminal proceedings. Wis. Stat. § 972.11(1). As a result, any attorney, including the district attorney, may secure a witness to testify at a hearing. Wis. Stat. § 885.01. By virtue of Wis. Stat. §§ 885.01 and 885.02, an attorney, including a district attorney, may require a witness to bring documents with him or her to a scheduled hearing.
>
> The district attorney possesses additional subpoena power by virtue of Wis. Stat. § 968.135 . . . .
>
> The State, in this case, should have used Wis. Stat. § 968.135 rather than Wis. Stat. § 805.07—a civil subpoena statute meant for civil litigants . . . .

Id. ¶¶ 138-41.

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[11] In ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, the State sought to subpoena a defendant's bank records. ***Id.*** ¶ 7. The subpoenas were issued in a form substantially similar to the forms set forth in Wis. Stat. §§ 805.07(4) & 885.02. ***Id***. ¶¶ 8-9. The parties agreed that the prosecutor should have used Wis. Stat. § 968.135, which addresses subpoenas for documents***. Id***. ¶ 10. The sole issue raised for review was whether the suppression of evidence is a remedy when Wis. Stat. § 968.135 is violated. ***Id.*** ¶¶ 12-13.

4. The Judicial Council Committee or the legislature could have repealed Wis. Stat. § 885.03 or the altered statutory language if it wanted "reasonable diligence" to apply in criminal cases.

Early versions of Wis. Stat. § 885.03 (service of subpoena) and Wis. Stat. § 801.11 (service of summons) can be traced back to the mid-1800's.

Wis. Stat. § 805.07(5), which requires "reasonable diligence" before substitute service can be used to serve a subpoena on a witness, came into existence more recently in the 1970's as part of a massive revision of Wisconsin's civil procedure code. *See* Wis. Stat. § 805.07(5) (1975-76) (effective Jan. 1, 1976); Rules of Civil Procedure Committee 1970-1978. According to the Judicial Council Committee's 1974 Note, subsection (5) was "designed to make the service provisions respecting summonses and subpoenas more nearly identical."

Significantly, however, when Wis. Stat. § 805.07(5) was created, Wis. Stat. § 885.03 was *not* repealed. In fact, the members of the drafting committee appear to have been aware of the existence of Wis. Stat. § 885.03. *See* "Resume of Judicial Council-State Bar Civil Rules Revision Committee, May 4, 1973," Rules of Civil Procedure Committee Folder 2, #47 (noting that "[t]here was agreement that the Committee should not propose amendment of the provisions of Ch. 885. To the extent changes are to be made, they should be made by supplementing the provisions of Ch. 885 in Ch. 805") (App. 249); "Commentary on Proposed Rules of Civil Procedure by Charles D. Clausen," Rules of Civil Procedure Committee Folder 2, #141 (noting that Wis. Stat. § 805.07 supplements "the provisions of ss. 885.01-.03 by providing special rules

respecting subpoenas in civil actions. The general subpoena rules in Ch. 885 govern appearance of witnesses before county boards, coroners, et alia, as well as the appearance of witnesses in civil actions. Rather than tamper with the general rules, the revision committee chose simply to suppement [sic] them with special provisions for civil actions.").

Wis. Stat. § 885.03 remains in existence and was last amended in the 1990's.[12] If the drafting committee, or subsequently the legislature, wished Wis. Stat. § 805.07(5) to apply to *all* cases, including criminal cases, Wis. Stat. § 885.03 could have been repealed or amended to include a "reasonable diligence" requirement or a reference to Wis. Stat. §§ 801.11 or 805.07. For example, Chapter 968, titled "Commencement of Criminal Proceedings," includes a statute that specifically references Wis. Stat. § 801.11. Wis. Stat. § 968.375(5), titled "Subpoenas and warrants for records or communications of customers of an electronic communication service or remote computing service provider," provides:

> (5) MANNER OF SERVICE. A subpoena or warrant issued under this section may be served in the manner provided for serving a summons under s. 801.11 (5) or, if delivery can reasonably be proved, by United States mail, delivery service, telephone facsimile, or electronic transmission.

Wis. § 968.375(5). If Wis. Stat. § 801.11 automatically applied to criminal cases, it would be unnecessary to specifically reference the statute in Wis. Stat. § 968.375(5).

Thus, in this case, leaving a copy of the subpoena at Ms. Brown's abode was proper and the circuit court should

[12] "Him" was changed to "the witness" and "his" was changed to "the witness's" in Wis. Stat. § 885.03. *See* 1993 Act 486.

have granted an adjournment or a body attachment. Ms. Brown was a "key" witness, was properly served, and had notice of the hearing, but did not appear. *See* ***State v. Elam***, 50 Wis. 2d 383, 389, 184 N.W.2d 176 (1971) (stating that when deciding a motion for a continuance "[g]enerally, the court may consider whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located."). Consequently, this Court should remand for 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.*** (citation 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. at 694).

B. Standard of review.

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; ***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 at 310.

A circuit court may, in its discretion, deny a motion without a hearing if the motion does not raise facts sufficient to entitle the movant to relief, 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 a rational decision process. ***Bentley***, 201 Wis. 2d at 318.

An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Thiel***, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's findings of fact are upheld unless clearly erroneous. ***Id.*** Whether counsel was ineffective is a question of law that is reviewed *de novo*. ***Id.***

C. Trial counsel's performance was deficient.

If this Court finds that the argument that Ms. Brown was properly subpoenaed is forfeited, Mr. Wilson asserts that trial counsel performed deficiently. Trial counsel should have argued that the service on Ms. Brown was proper pursuant to Wis. Stat. § 885.03. *See generally*, ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (stating that an attorney must be "skilled and versed" in criminal law). 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 argue that the service on Ms. Brown was proper. (*See*, *e.g.,* 37:46-47, 66, 70-71; App. 116-117, 120, 124-125).

Alternatively, trial counsel performed deficiently by failing to properly subpoena Ms. Brown. *See generally*, ***Felton***, 110 Wis. 2d at 502, 506; ***State v. Jenkins***, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786 (finding that an attorney was deficient for failing to call an eyewitness at trial). As stated above, it is clear from the record that trial counsel wanted Ms. Brown to testify and viewed her as a necessary witness. Thus, there can be no reasonable strategic reason for failing to properly subpoena Ms. Brown in order to obtain testimony.

D. Trial counsel's performance was prejudicial.

The circuit court's decision emphasized that whether officers had guns drawn when approaching the truck was a "key issue" at the suppression hearing. (37:68-69; App. 182-83). Ms. Brown's testimony would have corroborated Mr. Wilson's and Mr. Roberts's testimony that the officers approached the truck with their guns drawn. This testimony would have bolstered the defense's position that the search was not consensual, resulting in suppression. Thus, trial counsel's failure to argue that Ms. Brown was properly subpoenaed, or in the alternative, to properly subpoena her, deprived Mr. Wilson of the opportunity to call a necessary and material witness in support of his suppression motion. Counsel's failure deprived the circuit court of the full story, and this Court should remand for a hearing to take testimony from Ms. Brown and hold a ***Machner*** hearing. *See* ***State v. Alexander***, 2015 WI 6, ¶ 37, 360 Wis. 2d 292, 858 N.W.2d 662 (stating that "[w]hen a claim of ineffective assistance of counsel is made, the circuit court often holds a ***Machner*** hearing.").

In finding that there was no prejudice, the court of appeals stated that "Brown's testimony does not quite match up with Wilson's or Roberts' testimony," thus, "Brown's proposed testimony would not have improved the plausibility of the things the circuit court questioned . . . ." ***Wilson***, slip op., ¶ 25 (App. 110). The court of appeals noted that:

> The proposed testimony "corroborates" Wilson's testimony that all three officers approached with their guns out, but contradicts Roberts' testimony that only the two male officers had weapons drawn. The proposed testimony also "corroborates" Roberts' testimony to the extent that he claims he was removed from the truck by

> an officer, but contradicts Wilson's own testimony that he stepped out of the truck himself.

Id.

This misses the point. The significance of Ms. Brown's testimony in this case centered on her corroboration of Mr. Wilson's and Mr. Robert's testimony that the officers approached with their guns drawn, or as the circuit court put it, whether the officers "came to the vehicle with guns ablaze." (37:68-69; App. 182-83).

Moreover, to the extent that the testimony of the defense witnesses may have slight variations, this would make sense given that each witness observed the officers from different vantage points. It is logical that Mr. Wilson, who was in the driver's seat, Mr. Roberts, who was in the passenger's seat, and Ms. Brown, who was not in the car, would not have identical testimony.

Lastly, Ms. Brown's testimony should not be simply discounted without a hearing at which the court can hear and observe her testimony and make a determination regarding her credibility. "The general rule is that credibility determinations are resolved by live testimony." ***State v. Love***, 2005 WI 116, ¶ 42, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). A hearing would allow the circuit court the opportunity to assess Ms. Brown's demeanor, mannerisms, and the overall persuasiveness of her testimony.

Therefore, this Court should remand to take testimony from Ms. Brown and hold a ***Machner*** hearing.

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 30th day of November 2016.

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 7,391 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 30th day of November, 2016.

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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.

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