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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.

REPLY BRIEF

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ARGUMENT

It is undisputed that witness Jacqueline Brown received notice of the suppression hearing in this case. Nonetheless, trial counsel's requests for an adjournment and a body attachment were denied on the basis that Ms. Brown was not properly subpoenaed.

Mr. Wilson asks that this Court find that Ms. Brown was properly subpoenaed pursuant to Wisconsin law and remand the case for an evidentiary hearing to take testimony from Ms. Brown. Additionally, if necessary, Mr. Wilson requests an evidentiary hearing to determine whether he was deprived of effective assistance of counsel.

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.

Wis. Stat. § 885.03 provides three means by which a witness may be served by a subpoena, including "by leaving such copy at the witness's abode."

As the State acknowledges, Wisconsin Chapter 885 "shall" apply in "all" criminal proceedings. (State's Br. at 9). Wis. Stat. § 972.11(1) states:

> (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. § 972.11(1) (emphases added). Thus, as set forth in Mr. Wilson's initial brief (at 10-23), leaving a copy of the subpoena at Ms. Brown's house was proper pursuant to Wis. Stat. § 885.03 and the circuit court should have granted an adjournment or a body attachment.

First, the State argues that "the rules of evidence and practice in civil actions" and "Chapter 885" apply equally to criminal cases. (*See, e.g.,* State's Br. at 12). Mr. Wilson disagrees. "The rules of evidence and practice in civil actions" are subject to an additional qualifying condition—they are applicable *only* if the "context of a section or rule manifestly requires a different construction." *See* Wis. Stat. § 972.11(1). Thus, unlike the statutes in Chapter 885, civil statutes, such as §§ 805.07 and 801.11, are subject to that additional requirement when determining their applicability.

Turning then to the specific issue here—the service of a subpoena on a witness in a criminal case—there are two potential statutes that apply—Wis. Stat. § 885.03 and Wis. Stat. § 805.07. As noted above, Chapter 885, which includes Wis. Stat. § 885.03, expressly applies to criminal cases. Whether § 805.07 applies hinges on whether the context of a section or rule manifestly requires a different a construction. And, as discussed in detail in Mr. Wilson's brief (at 17-20), context supports that Wis. Stat. § 805.07 does not apply. Both the language within and the surrounding statutes support that § 805.07 is civil in nature.

In response, the State argues that Wis. Stat. § 805.07 contemplates the application to proceedings outside the context of a civil case based on the language that "[s]ubpoenas shall be issued and served in accordance with ch. 885." (State's Br. at 13-14). The State emphasizes that Wis. Stat. § 885.01, which discusses who may *issue* a

subpoena, includes the "attorney general" and "any district attorney." Such language, however, would seem to be more reflective of the nature of the statute it is within, Wis. Stat. § 885.01, rather than Wis. Stat. § 805.07. Moreover, a reference to an "attorney general" or a "district attorney" is not necessarily synonymous with a criminal matter. For example, Chapter 48 termination of parental rights cases, which are civil in nature, can be handled by a district attorney,[1] and Chapter 980 civil commitment appeals normally are handled by an attorney general.[2]

The State also notes that Wis. Stat. § 885.01(2) authorizes the issuance of a subpoena "by any judge or clerk of a court or court commissioner or municipal judge . . ." Once again, there is not any language that specifically applies to a criminal case that would support the State's argument that Wis. Stat. § 805.07 expands beyond civil cases to include criminal cases.

Second, the State appears to argue that there is *not* a conflict between the statutes because Wis. Stat. § 801.11 imposes a stricter requirement for serving a witness subpoena and deals with the requirements of substituted service. (State's Br. at 19-20). However, these different requirements seem to support the existence of a conflict between the statutes. And, assuming for the sake of argument that the State is correct that the statutes do not conflict, the State does not detail or explain how the statutes work together.

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[1] *See* Wis. Stat. § 48.417(1) (stating that a district attorney can file a petition for termination of parental rights).

[2] *See* ***State v. Parent***, 2006 WI 132, ¶ 49 n. 15, 298 Wis. 2d 63, 725 N.W.2d 915 (noting in a footnote that "[t]he attorney general normally handles all felony and Chapter 980 cases . . . ").

Third, the State argues that ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, makes "clear" that Wis. Stat. §§ 805.07 and 801.11(1)(b) apply. (State's Br. at 10). However, the State fails to provide any follow-up analysis or explanation for that assertion. In fact, later on, the State seems to suggest that ***Popenhagen*** is distinguishable. (*See* State's Br. at 18) (noting that ***Popenhagen*** concerned a subpoena for documents, not a subpoena for a witness).

The State also references several other cases, including ***State v. Schaefer***, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, ***State v. Hyndman***, 170 Wis. 2d 198, 488 N.W.2d 11 (Ct. App. 1992), and ***State v. Henley***, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350, and argues that Mr. Wilson's "reliance" on these cases is not helpful. (*See* State's Br. at 14-18). To be clear, Mr. Wilson does not "rely" on these cases in his brief. He agrees that the cases do not involve the statutes at issue in this case. Rather, he simply referred to the cases as examples of instances where civil rules have been found inapplicable to criminal proceedings. (*See* Wilson's Br. at 17-19).

Fourth, the State argues that "the legislative history shows the fallacy of Wilson's argument: none of the history deals with the relationship of section 972.11(1) to the sections at issue in this case." (State's Br. at 20). The State, however, does not provide any history for this statute or explain why the history matters.

The State also states that the legislative notes reflect a concern about the inadequacy of the general subpoena rules in Chapter 885. However, as noted in Mr. Wilson's initial brief (at 16-17), it makes sense to apply a less stringent standard for service in criminal cases than in civil cases. In a criminal case, numerous constitutional rights apply 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. Proceeding without a key witness undermines these constitutional rights. Thus, more leeway should exist in a criminal case when evaluating the service of a subpoena, especially in a case such as this in which a key witness clearly received notice of the hearing, but did not appear.

Lastly, if this Court determines that the reasonable diligence requirement applies, Mr. Wilson concedes the service of the subpoena was improper, and, as discussed below in Part II, asserts that trial counsel was ineffective.

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.

The State asserts that trial counsel was not deficient for failing to argue that Ms. Brown was properly subpoenaed because "any argument . . . would have proved futile." (State's Br. at 25). The State, however, concedes that trial counsel was deficient for failing to properly subpoena Ms. Brown, but argues that Mr. Wilson was not prejudiced. (State's Br. at 25-26).

First, as discussed above in Part I, Mr. Wilson disagrees that the subpoena was improperly served. Thus, as set forth in his initial brief (at 25), trial counsel should have argued that service was proper.

Second, if the subpoena was improper, then as the State concedes, trial counsel was deficient for failing to properly subpoena Ms. Brown.

Third, contrary to the State's argument, Mr. Wilson was prejudiced. According to the circuit court, the "key issue" at the suppression hearing was whether officers had their guns drawn when approaching Mr. Wilson's truck. (37:68-69; Wilson 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. 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.

The State argues that Brown's testimony "would not have changed anything." (State's Br. at 29). However, prejudice does not require a defendant to prove that the result of a proceeding would have been different. Rather, prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of a proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 275-76, 558 N.W.2d 379 (1997). Given that the gun issue was a "key issue" and that trial counsel clearly felt it was important to have Ms. Brown testify at the suppression hearing, trial counsel's failure to properly subpoena Ms. Brown undermines confidence in the outcome of the proceeding. Instead of having only two witnesses testify that the officers had their guns out, there would have been three witnesses testifying that the officers had their guns out.

The State also argues Ms. Brown's testimony might only support the testimony of one person (Mr. Wilson or Mr. Roberts) or create a third account. (State's Br. at 28). However, variations would make sense given that each witness had a different vantage point.

Lastly, the State argues that Ms. 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." (State's Br. at 28-29). However, without having a hearing at which the circuit court could assess Ms. Brown's demeanor and the overall persuasiveness of her testimony, it is speculation to conclude that her testimony would not have created a "reasonable probability . . . that the result of [the] proceeding would have been different." ***Smith***, 207 Wis. 2d at 275-76.

While a witness's relationship to the defendant and other witnesses is a permissible consideration when assessing credibility, such testimony should not automatically be discredited. Automatically discrediting a witness's proposed testimony simply based on his or her relationship to a party without actually hearing the testimony subverts due process and the importance this Court has placed on the reason for deference to the circuit court's determination of credibility when acting as a fact-finder. ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 238 N.W.2d 714 (1976) ("The reason for such deference is the superior opportunity of the trial court to observe the demeanor of the witnesses and to gauge the persuasiveness of their testimony."). A hearing would allow the circuit court the opportunity to assess Ms. Brown's conduct, appearance, demeanor, recollection, reasonableness, and intelligence. *See* Wis JI—Criminal 300 ("Credibility of Witnesses").

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 January, 2017.

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 2,001 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 January, 2017.

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