STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal No. 16AP791-CR
Milwaukee County Case No. 12-CF-1134

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ALPHONSO LAMONT WILLIS,
Defendant-Appellant.

ON APPEAL FROM THE SENTENCE, THE JUDGMENT OF CONVICTION, AND THE ORDERS DENYING POSTCONVICTION RELIEF ENTERED BY THE HONORABLE JEFFREY WAGNER

REPLY BRIEF OF ALPHONSO WILLIS, THE DEFENDANT-APPELLANT

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ARGUMENT

The Court must reverse and remand for a hearing on Willis's postconviction motions because he has alleged sufficient material facts that entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

The State's arguments rely upon fanciful factual interpretations that, if the State truly believes meritorious, are only ripe for consideration at an evidentiary hearing before the circuit court (*see* Resp. Br. at 3-5; 13-15); ***Allen*** at n.6 (even if the facts alleged in Willis's postconviction motions were "questionable in their believability", which they are not, the Court "must" reverse and remand to the circuit court for a hearing); ***citing State v. Leitner***, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207; ***see also State v. Love***, 2005 WI 116, ¶ 41, 284 Wis. 2d 111, 700 N.W.2d 62 (assuming truth of facts alleged). The foundation for this rule is two-fold: first, when credibility is at issue, it is best resolved by live testimony (***Leitner*** at ¶ 34); and second, because "[t]he court of appeals is not a fact-finding court." ***See Harwick v. Black***, 217 Wis. 2d 691, 703, 580 N.W.2d 354 (Ct. App. 1998) (*citation omitted*).

I.
Willis is entitled to a hearing on the improper use at trial of the boots he was wearing when arrested

A.
Willis is entitled to a *Machner* hearing

Willis's supplemental postconviction motion alleged the boots he was wearing when arrested could

not have left a boot impression in the snow outside the victim's apartment (R.55). Willis supported this allegation with the report of an expert forensic analyst, who tested the impression left at the scene against Willis's boots and concluded unequivocally that Willis's boots could not have left the impression (R.55:7 & ex.1). Thus, because Willis's boots could not have left the impression, a powerful inference of his guilt was actually utterly irrelevant to the determination of guilt.

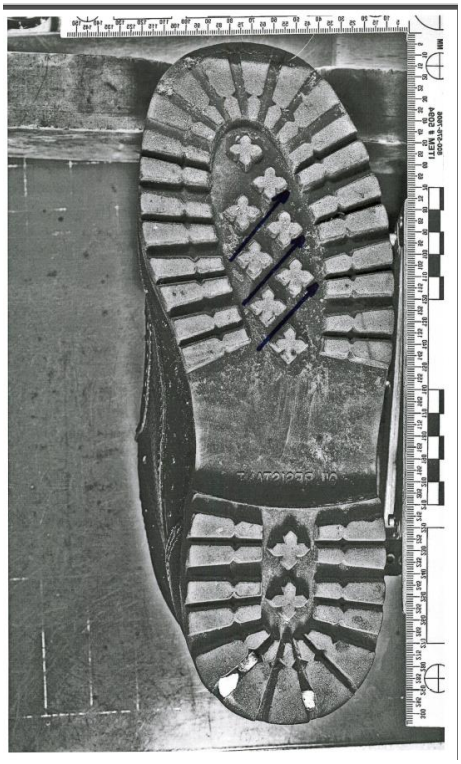
Accordingly, Willis alleged trial counsel was deficient for failing to object to the introduction of his boots into evidence, for failing to object to the false inferences argued by the State linking his boots to the impression, and alternatively for failing to hire an expert to test the claimed link between his boots and the impression. Willis further noted these decisions could not have been strategic (R.55:18). Willis also argued that trial counsel's deficiency was prejudicial because his boots were repetitively shown to the jury and were important to the State's case, which was otherwise weak (R.55:14-18).

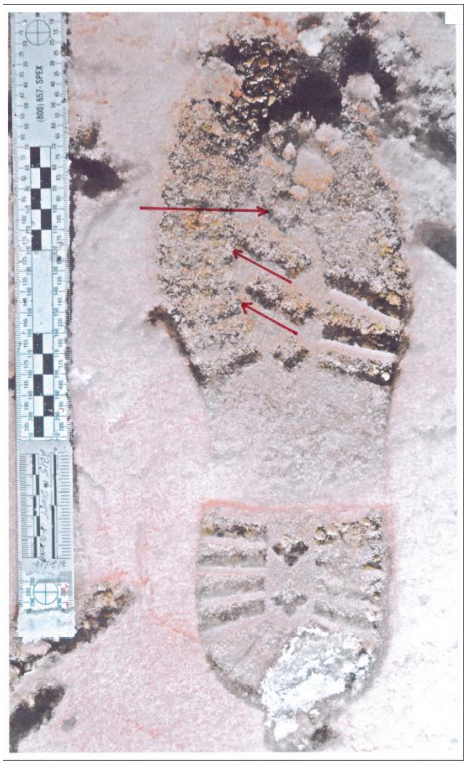
Willis's supplemental postconviction motion therefore alleged sufficient material facts to allow the circuit court to meaningfully assess the merits of his claim that his trial attorney was ineffective for failing to object to the introduction of his boots into evidence and the State's improper arguments therefrom, and for failing to test the State's evidence. ***Allen*** at ¶ 23.

The State's response, however, seeks to have this Court decide the truthfulness of the facts set forth in Willis's supplemental postconviction motion by advancing a novel and fantastic theory about how

Willis's boots *could* have left the impression (Resp. at 3-5). Willis welcomes careful inspection of the evidence he has tendered; however, the State's theory offered in response must be addressed by the circuit court as a fact-finder. ***Allen*** at n. 6.

The State's theory holds that Willis's boot (below, left) *could* have left the impression (below, right) if "the motion of the boot kicked already fallen snow over [the impression]" or if "some still precipitating snow fell onto [the impression] . . ." thereby concealing an extra star in the impression (Resp. at 4).

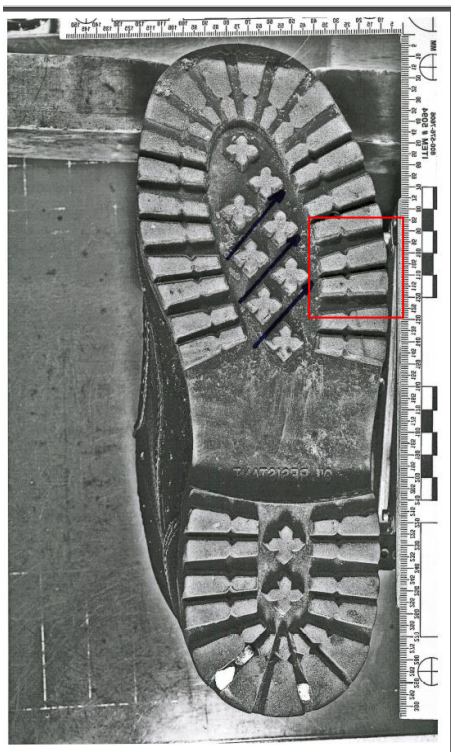




First, the Court of Appeals is the wrong venue to address this factual dispute, ***Allen*** at n.6; second, the State's theory is incredible. ***See Taylor v. State***, 74 Wis. 2d 255, 262, 246 N.W.2d 516 (1976) (evidence is inherently incredible when it is in conflict with the

uniform course of nature). The impression in the snow appears to be a nearly complete impression of a boot, except those parts where melting snow deteriorated the impression (as where asphalt is visible). However, the State would have the Court believe that a perfectly-sized piece of snow somehow appeared to cover up a tiny yet extremely important part of the middle of the impression after the impression was left, whether by falling snow, or by being kicked there. Such a theory is absurd, lacking in common sense, and must be disregarded as inherently incredible.

The State's fantastic theory also fails to acknowledge that the treads on the outer edge of the boot (highlighted below in red) are at a different angle than those seen in the impression:



No snowflake could cause this indisputable distinction.

Lastly, although the State claims that Willis was rightfully denied an evidentiary hearing on this murder appeal because "the record conclusively shows he was not entitled to relief" (at 6 and 15), the State does not explain how or why the record so shows. As such, the State's claim must be disregarded as undeveloped. ***See State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In the interest of completeness, however, Willis will attempt to meaningfully reply by reminding the Court of just how weak the State's case was at trial:

- Other than the false link between his boots and the impression outside the victim's apartment,
- There was no objective physical evidence connecting Willis to the crime scene, like
  - fingerprints
  - D.N.A. or
  - cell phone records
- The murder weapon was never recovered,
- Willis always denied his involvement in the victim's death, even though he was interrogated at least six times,
- Both witnesses who placed Willis inside the victim's apartment were admitted liars,
  - like Earnest Jackson, who
    - Testified he "always [has] memory issues" (R.73:59),
    - Was scared for his brother Antonne. Antonne knew the victim, was in her apartment the night before her death, and ran from the police attempting to arrest him (R.44:ex.8),

- Received a significant break from the prosecution, from 30 years in prison to the lowest-level felony (R.73:49-50),
- Had a significant motive to lie to obtain the benefit of his bargain,
- Repeatedly lied to the police (R.73:45-48),
- Testified he would do whatever it took to get out of jail (*id.*:71),
- Testified he touched myriad things inside the victim's apartment, which could not be confirmed by any of the State's exhaustive tests (R.74:42), and who
- Gave a description of the scene and the victim that was inconsistent with the physical evidence (he said he and Willis walked about 10 blocks after meeting up around 5 or 6 p.m. when the shooting happened near 8 p.m.; he described the victim as wearing glasses when she was not (R.75:9) and explaining that he and Willis never parted ways when Officer Hansen described the impression going separate ways at Jagiello's house (R.72:120)),

- or Steven Williams, who
  - spent the day of the incident smoking crack cocaine and marijuana and drinking alcohol (R.72:34),
  - lied to the police on several occasions (*id.*:59-61);
  - left the victim's apartment after she was shot without calling 911 (*id.*:44);
  - claimed smoking crack made him more perceptive of reality (*id.*:73); and
  - described Willis's co-actor differently than Earnest Jackson described himself that night (*compare* R.72:40, Williams describing Willis's co-

actor as "short and dark skinned with low hair" *with* R.73:69, Earnest Jackson stating he was wearing an afro beneath a hat).

- And, for good measure, the testimony of Trina Jagiello, who the State said had "absolutely no reason to fabricate anything" (R.75:24), would have actually helped Willis, for the reasons stated in his opening brief and below.

Thus, to the extent the State claims, without explication, that the record conclusively shows Willis is not entitled to relief, Willis believes the record shows the exact opposite—that he is entitled to relief. This is so because the amount of confidence a reviewing court should have in the outcome of a case is directly proportional to the strength of the State's case. ***Martindale v. Ripp***, 2001 WI 113, ¶ 32, 246 Wis. 2d 67, 629 N.W.2d 698; ***State v. Dyess***, 124 Wis.2d 525, 544-545, 370 N.W.2d 222 (1985).

B.

The State concedes that if Willis's boots did not leave the impression, the interests of justice require a new trial and that its prosecutor made improper closing arguments

The State argues that because Willis's boot could have left the impression, (1) the interests of justice do not require a retrial and (2) the State's closing arguments were proper (resp. at 6-9). The State does not offer an alternative argument justifying affirmance on these grounds (*see id.*). Accordingly, if Willis's boots could not have left the impression, as was alleged in his motion, then the Court must find that the State has conceded that the interests of justice require a new trial

and that its prosecutor made an improper closing argument. ***See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 108-109, 279 N.W.2d 493 (Ct. App. 1979).

C.
The argument that expert testimony is unnecessary conflates trial testimony with the showing required to earn a postconviction motion hearing

The State argues "anyone"[1] could determine whether Willis's boots left the impression outside the victim's apartment; thus, expert testimony is unnecessary to prove that Willis's boots did not leave the impression outside the victim's apartment (Resp. at 9-11).

The State's argument conflates the evidentiary standards for expert testimony at trial with the showing necessary to earn a hearing on a postconviction motion. In the postconviction setting, a movant "need not demonstrate theories of admissibility for every factual assertion he or she seeks to introduce." ***State v. Love***, 2005 WI 116 at ¶ 36. On the other hand, at trial, the proponent of expert evidence must establish the admissibility of expert testimony pursuant to Wis. Stat. § 907.02. There is little doubt, however, that Willis's expert's testimony would pass muster: he is qualified, his testimony would assist in the jury's determination of

[1] Curiously, the State's argument, which does not distinguish this case from any other footwear identification case, appears to be an acknowledgement that footwear identification never requires expert testimony, which calls into question the continued existence of the Wisconsin State Crime Lab's Footwear Identification Unit. *See* https://wilenet.org/html/crime-lab/analysis/imprint.html.

a fact in issue, would be based on sufficient facts, would be the product of a reliable method, and he would reliably apply and already has reliably applied those methods to the facts.

The need for expert testimony is demonstrated by the outcome in this case, in which a jury convicted Willis based on false evidence. During trial, the prosecutor told the jury they could "look" at Willis's boots and conclude they "matched" the impression (R.71:70-71). The jury must have agreed with the prosecutor's suggested conclusion because they asked for photos of Willis's boots and the impression, then convicted Willis (R.75:35). Willis's expert, on the other hand, would have told the jury how to "look" at the boot and the impression: the scales on the image of the boot and the impression had to be made consistent, then the boot image had to be flipped to be consistent with the impression, then same-scale transparencies of the mirrored boot and the impression had to be made, then placed over one another in order to make a comparison (R.55:ex.1). Only after conducting a methodological comparison between the boot and the impression was Willis's expert able to conclude they do not match. Here, however, no one told the jury *how* to "look" at the boots and the impression and the jury got it wrong!

D.

Willis's expert's opinion is newly-discovered evidence

For clarity's sake, Willis would prefer not to have to introduce the testimony of his expert at a new trial. Instead, he seeks to remove a powerful inference of guilt—his boots "matching" the impression outside the victim's apartment—that is now known to be utterly

false and therefore irrelevant to the determination of guilt. He has thus argued that his expert's opinion is newly-discovered evidence as an alternative means of having his day in court. If this or another Court determines that his trial attorney was negligent by not testing the State's evidence, then his claim is more appropriately considered as one of ineffective assistance of counsel. If, somehow, this or another Court determines that Willis's trial attorney was not negligent in testing the State's evidence, then this Court must find that Willis's expert's opinion meets the standard for newly-discovered evidence.

II.
Willis is entitled to a hearing about whether his trial attorney was ineffective for failing to establish the victim's time of death

Willis alleged in his postconviction motion that his trial attorney was deficient for failing to introduce exculpatory evidence of the victim's time of death as being between 7:55 and 7:58 p.m. on March 2, 2012. (R.44:13-14). Evidence of the victim's time of death, consisting of the time of the 911 call made at 7:58 p.m. and the victim's phone records showing outgoing phone calls at 7:51 and 7:55 p.m., were produced in the course of discovery (*id.*:ex.'s 1&2). Willis explained that trial counsel's deficiency was prejudicial because victim's time of death was consistent with Willis's numerous statements of innocence to law enforcement and undercut the State's theory of prosecution: the State's theory was that Willis shot the victim, then he walked to Trina Jagiello's house. Jagiello, a disinterested and credible witness per the State (R.75:24), testified emphatically that she encountered Willis between 7:40

and 7:45 p.m. Accordingly, if the fact that Willis met with Jagiello *before* the victim was shot had been introduced, then the State's entire theory would fall apart. Such a fact would cast doubt on Earnest Jackson's testimony, further undercut the already-dubious reliability of Williams' identification of Willis, and provide fertile grounds to argue that someone else shot the victim. Because trial counsel failed to introduce this important exculpatory evidence in a case where the State's case was profoundly weak (*see* Section I, A, above).

Willis's supplemental postconviction motion therefore provided sufficient material facts to allow the circuit court to meaningfully assess the merits of his claim that his trial attorney was ineffective for failing to introduce the exculpatory timing of the victim's death. ***Allen*** at ¶ 23.

The State claims Willis did not explain how the victim's phone records and the 911 call would have established when she died (Resp. at 13). The answer is simple: she was dead when the 911 caller said she was at 7:58 p.m. (R.44:ex.1) and she was not dead when she placed an outgoing phone call from her cell phone at 7:55 p.m. (*id.*:ex.2). Thus, whoever fired the single bullet that severed her spinal cord and both carotid arteries did so between 7:55 and 7:58 p.m. (*see* R:74:9).

The State's response also seeks to have this Court decide the truthfulness of the facts set forth in Willis's postconviction motion. The State does so by advancing a novel and outlandish theory that Willis "possibl[y]" shot the victim "around" 7:36 p.m. and she then placed two phone calls over the next 19 minutes due to

cadaveric spasms, even though a bullet severed her spinal cord and both carotid arteries (Resp. at 13-15). This theory, if it is to be considered, must be considered by a fact-finder, ***Allen*** at n. 6, but, in the interest of completeness, Willis will address it:

To postulate this theory, the State takes significant liberties with Doctor Peterson's testimony. At trial, when asked how long the victim would have been alive after having been shot, Doctor Peterson testified:

> I can't say specifically. What I can say anatomically is that she had a substantial amount of blood in the lower lung lobes; that takes several breaths to move that much blood into the lungs, but whether that would take 30 seconds, 45 seconds, 60 seconds, there's no way to say scientifically.

(R.74:16). Although Doctor Peterson's testimony intimates the victim likely died in less than a minute, the State seizes on his inability to provide an exact time of death to theorize she made two phone calls and was alive for nearly 20 minutes after having been shot by a bullet that cut her spinal cord in half and severed both of her carotid arteries (R.74:9; Resp. at 14).

The State's theory relies upon a debated forensic phenomenon called "cadaveric spasm", which Doctor Peterson opined *may* have caused the victim to hold onto a cell phone upon her death (R.74:17). Doctor Peterson could not be sure because he did not inspect the victim's body at the scene (*see id.*:18).

However, the State's theory falls apart because there are no such things as cadaveric spasms. A cadaveric spasm, if it occurs, is a stiffening of the

muscles immediately after death. ***See, e.g.***, Guide to Forensic Medicine and Toxicology, A. Kumar *et al.*, 2004 edition at 55-57; ***Ellison v. State***, 266 Ga. 750, 751, 470 S.E.2d 872 (1996) (describing cadaveric spasm as "where the hand almost instantaneously closes and grips the object it was intensely gripping at death"); ***People v. Garrett***, 62 Ill. 2d 151, 169-170, 339 N.E.2d 753 (1975) (same). Thus, even if the victim suffered a cadaveric spasm, there is absolutely no basis in nature or in this record to conclude that she suffered multiple cadaveric spasms. As such, the State's far-fetched theory about the victim's time of death is inherently incredible and must be rejected. ***See Taylor v. State***, 74 Wis. 2d at 262.

III.
Failure to explain sentence and failure to bifurcate felon-in-possession charge

As for the State's response to Willis's arguments regarding sentencing and instructing the jury that Willis is a felon, Willis relies upon his opening brief in reply.

CONCLUSION

For the reasons stated, Willis respectfully requests that this Court reverse the circuit court and order a new trial. At the very least, because Willis has met his burden under ***Allen***, the matter must be remanded for a hearing on his postconviction arguments.

Dated this 27th day of October, 2016.

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FORM AND LENGTH CERTIFICATION

This brief conforms to the rules contained in WIS. STAT. (Rule) § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,992 words.

Dated this 27th day of October, 2016.

/s/ Geoffrey R. Misfeldt
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(12)

I have submitted an electronic copy of this brief, which complies with the requirements of WIS. STAT. (Rule) § 809.19(12). This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 27th day of October, 2016.

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