STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I
Case No. 2016AP1371-CR

---

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICAH NATHANIEL RENO,

Defendant-Respondent.

---

ON APPEAL FROM AN ORDER GRANTING A
POSTCONVICTION MOTION FOR A NEW TRIAL
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE J.D. WATTS, PRESIDING

---

# BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

---

ANGELA C. KACHELSKI
State Bar No. 01020860
Attorney for Defendant-
Respondent

THE KACHELSKI LAW FIRM, S.C.
7101 N. Green Bay Ave.
Suite 6A
Milwaukee, Wisconsin 53209
(414) 352-330

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

**Case Law cite** Page

**United States Constitution cited**



**Supreme Court Rule Cited**

## ISSUE PRESENTED FOR REVIEW

1. The circuit court found that trial counsel's performance was deficient as he failed to subpoena or call a key witness at trial. The court also found that this deficient performance prejudiced the defendant-respondent as the jury never heard the testimony of an eye witness to the events whose testimony would have impacted the credibility of the complaining witness. Did the circuit court properly grant the motion for a new trial?

After a *Machner* hearing, the court granted the motion for new trial.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not warranted as this case involves well-established legal principles.

## STATEMENT OF THE CASE/FACTS

Any additional facts will be cited in the Argument portion of this brief.

## ARGUMENT

## I. THE TRIAL COURT'S DECISION GRANTING THE MOTION FOR NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL IS BASED ON THE LAW AND SHOULD BE UPHELD.

### A. THE STANDARD OF REVIEW

Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. Denied*, 543 U.S. 928 (2004). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* The ultimate determination of whether the attorney's performance falls below the constitutional minimum, however, is a question of law subject to independent review. *Id.*

### B. THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) established a two-prong test of ineffective assistance of counsel.

> A convicted defendant's claim that counsel's assistance was so defective as to require

> reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. . . Second, the defendant must show that the deficient performance prejudiced the defense.

*Id.* at 687. In order for the deficient performance to rise to the level of a constitutional violation, "the deficient performance must undermine our confidence in the fairness of the trial and the reliability of the result." *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985).

### C. TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AS HE FAILED TO CALL AN EYEWITNESS.

The circuit court found that trial counsel's performance was deficient as he failed to call Abby Anderson, the only other eyewitness to the events, at trial. The court found that Attorney Eichenlaub's decision not to call Abby Anderson as a witness was not a strategic decision. (R. 43:8, R.App. 108). The court reasoned that first, it was not a "decision" not to call Abby as Mr. Eichenlaub felt constrained by Attorney Valdez's denial of access to her and second, that his failure to act was based on a misapplication of SCR 20:4.2. (R.43:8, R.App. 108).

The court then found that:

> This case presents the same issues and should be decided the same was as those discussed in *State v. Jenkins*, 355 Wis. 2d 180, ¶42 (2014). In Jenkins, the Wisconsin Supreme Court found that the failure to call a witness constituted deficient performance because the witness was an eyewitness to the crime and counsel knew the witness's testimony would impeach a key prosecution witness. The record also showed no reasonable trial strategy for not calling the witness. (R.43:8, R.App. 108).

Attorney Eichenlaub knew Abby Anderson was an eyewitness to many of the allegations against Reno and he wanted her testimony at trial. (R.59:42-43, 62). He believed Anderson would impeach the testimony of N.B. and impact her credibility. (R. 59:62,66). Anderson testified that she wanted to testify at trial, was available to testify and would have testified if she had been subpoenaed. (R.59: 19). All of these factors were important to the circuit court's decision that trial counsel's performance was deficient.

## D. THE LAW IN WISCONSIN REGARDING SCR 20:4.2 IS NOT UNSETTLED.

The state argues that the law in Wisconsin regarding SCR 20:4.2 is unsettled as it applies to pre-trial investigations and relies on *State v. Maloney*, 2005 WI 74,

281 Wis. 2d, 595, 698 N.W.2d 583 as supporting authority.

The law in Wisconsin regarding SCR 20:4.2 is not unsettled. SCR 20:4.2 states that a lawyer "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The circuit court in applying this Rule found that Attorney Valdez represented Abby Anderson on a separate and distinct matter then the matter on which Mr. Eichenlaub represented Mr. Reno. (R.43:5, R.App. 105). Specifically, that Anderson was charged with misdemeanor counts of prostitution and cocaine possession which were separated by different dates, locations and subject matters from Reno's case. Additionally, Anderson was not a codefendant and as the state asserted at the motion hearing it was unlikely she would be prosecuted.

The facts of *Maloney* are distinguishable from the facts in this case. The state claims that the law regarding the applicability of SCR 20:4.2 to **the pre-charging criminal investigative setting** is unsettled and the court in *Maloney* did not make a decision regarding that question. So, the state argues Mr. Eichenlaub cannot be

ineffective for failing to know unsettled principles of law. However, in this case, the issue is not the applicability of SCR 20:4.2 to pre-charging criminal investigations but rather to the ability of an attorney to interview an eyewitness in a criminal proceeding. The law is clear and has not evolved regarding whether or not the subject matter in which a person is represented is the same. The law is also clear that Attorney Eichenlaub could have subpoenaed Anderson and then asked the circuit court for a ruling regarding any Fifth Amendment rights she might have. He did not do so which also constitutes deficient performance.

As the circuit court pointed out in its decision, even if Abby Anderson was a potential codefendant, the reasoning in *Grievance Committee for Southern District of New York v. Simels,* 48 F.3d 640 (2nd Cir. 1995) supports the conclusion that Eichenlaub had a duty to pursue Anderson as a witness and that the "overriding concern of a defendant's Sixth Amendment right to effective assistance of counsel and a lawyer's duty of advocacy outweighs the disciplinary rule." (R.43:7, R.App. 107).

The state argues that Abby Anderson was a represented "person" and that she did not need to be a "party" in

Reno's case to receive the no-contact rule's protection. (See Brief at p. 29). The state argues that Attorney Eichenlaub's decision not to pursue Abby Anderson was reasonable as she was a represented "person". This argument fails. Abby Anderson was not a party and was a "person" represented in a different matter. So the distinction does not make a difference in this case. The state also ignores the fact that Abby Anderson *wanted* to testify. Mr. Eichenlaub was told she wanted to testify by Mrs. Reno who was in contact with Ms. Anderson during the months prior to trial. (R. 59:31, 46). Despite knowing that this material witness wanted to testify, he failed to subpoena her or pursue a court ruling.

**E. ABBY ANDERSON WAS NOT A VULNERABLE WITNESS**

The state argues that the no-contact rule applies whenever "vulnerable witnesses" need to be protected from disclosing privileged information adverse to their interests. (State's Brief at p. 30). The state relies on *In re Disciplinary Proceedings Against Kinast*, 192 Wis. 2d 36, 530 N.W.2d 387 (1995) and *In re Guardianship of Jennifer M.*, 2010 WI App 8, 323 Wis. 2d 126, 779 N.W.2d 436. Both *Kinast* and *Jennifer M.* are distinguishable from

this case. In *Kinast*, the attorney interviewed children of a women he represented in divorce proceedings without the consent of the Guardian ad litem. In *Jennifer M.*, the issue surrounded the rights of the adult ward and whether or not she could be interviewed by the guardian ad litem without an attorney present after a court ordered her to do so. In both of these cases there were vulnerable witnesses – children and an adult ward of the state. In *Jennifer M.*, the court had issued an order stating she could be interviewed.

Abby Anderson was not a "vulnerable witness". She wanted to testify at trial. She came to the sentencing and told the court that she had wanted to testify and that she would have supported Mr. Reno. She testified at the post-conviction motion hearing and was very clear that she understood her rights and that she wanted to testify. This was not a "vulnerable" witness.

The state claims that the circuit court erred by not applying *Kinast* and *Jennifer M.*, as "those cases represent the prevailing professional norms in Wisconsin, and also support the no-contact rule's application here." (State's brief at p. 32). That assertion is incredulous. The circuit court did not address these cases because they do

not apply to this situation. Moreover, the state argues "although Abby claimed she would have testified in Reno's favor, Abby's expressly stated interest in helping Reno was not necessarily in Abby's best interest." (State's brief at p. 36). There is nothing in this record to support that conclusion. In fact, the state at the post-conviction motion hearing stated that he did not think the state would have charged Abby. (R.59:7-8). Abby was a competent adult who wanted to testify at trial. There is no indication that she fits into the "vulnerable" witness as described in *Kinast* or *Jennifer M.*

Another difference between the *Kinast* and *Jennifer M.* cases is that they both dealt with attorney's interviewing the vulnerable witness prior to any court proceeding. In this case, the adult competent witness wanted to testify and actually spoke with family members telling them she wanted to testify and then came to sentencing and made statements about her desire to testify. She testified at the post-conviction hearing that she was a willing and available witness for trial. (R.59:19-20).

Even if this court determines that Abby Anderson was a vulnerable witness, it does not mean that trial counsel's failure to subpoena Abby or bring her to court was not

deficient. It was. Trial counsel could have subpoenaed Abby and had the court make a ruling as to whether she had any Fifth Amendment issues prior to her testimony. This would have addressed any concern that she was a vulnerable witness.

The circuit court applied the correct law and found that trial counsel's performance was deficient. That decision was properly based on the law and should be upheld.

## II. THE DEFICIENT PERFORMANCE OF TRIAL COUNSEL DID PREJUDICE MR. RENO.

In determining whether or not Mr. Reno was prejudiced by trial counsel's deficient performance, the court looked to the decision in *State v. Jenkins*, 2014 WI 59, 355 Wis. 180, 848 N.W.2d 786. "To demonstrate prejudice, the defendant must show that, absent defense trial counsel's errors, there was a reasonable probability of a different result. Our prejudice analysis is necessarily fact-dependent. Whether counsel's deficient performance satisfies the prejudice prong of Strickland depends upon the totality of the circumstances at trial." *Jenkins* at ¶¶ 49-50.

At the post-conviction motion hearing, Attorney Eichenlaub testified that the theory of defense was that N.B.'s actions were not consistent with the allegations. (R.59:47). The goal of the defense was to attack the credibility of N.B. This case rested completely on the testimony of N.B. as did the defense in *Jenkins*.

As the Wisconsin Supreme Court found in *Jenkins*, the failure of trial counsel to call an eye witness constituted deficient performance, even when there could be bias, as the eyewitness testimony goes to the core of the defense. *Id.* at ¶ 41. *See also, Toliver v. Pollard,* 688 F.3d 853, 862 (7th Cir, 2012), *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) and *State v. White*, 2004 WI App 78, 271 Wis. 2d 742, 680 N.W.2d 362. Abby Anderson's testimony goes to the "core of the defense." In order for the deficient performance to rise to the level of a constitutional violation, "the deficient performance must undermine our confidence in the fairness of the trial and the reliability of the result." *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711, 714 (1985). That is clearly the case here.

The state argues that the failure of counsel to further impeach an already impeached witness does not

render ineffective assistance of counsel. (State's brief at p. 37). This assertion completely ignores the fact that Abby Anderson was an eyewitness to almost all of the events and ignores the decision in *Jenkins, supra*.

Additionally the state argues that "under the prevailing professional norms in Wisconsin, . . .Attorney Eichenlaub's obligation to zealously defend Reno did not obligate him to litigate Abby's Fifth Amendment privilege." Pursuant to SCR 20:1.3, Attorney Eichenlaub had a duty to "act with reasonable diligence and promptness in representing" his client. That included pursuing the only other eyewitness to these events who was willing to testify.

The state calls the circuit court's finding that Abby Anderson would not have incriminated herself or invoked her Fifth Amendment privilege at trial illogical. (State's brief at p. 40). The circuit court made findings of fact and those findings included that "Abby Anderson did not believe she had a Fifth Amendment privilege regarding her testimony about the Reno case. She declined the court's opportunity to have an attorney appointed to represent her at Reno's post-conviction hearing. (R.43:5, R.App. 105). The trial court's findings of fact will not be disturbed

unless they are clearly erroneous. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. Denied*, 543 U.S. 928 (2004). The trial court's findings are based on the record and the state's argument that Abby Anderson would have asserted her Fifth Amendment rights is speculation and not supported.

Finally, the state argues that there is no reasonable probability that Abby Anderson's testimony would have changed the result of Reno's trial. (State's brief at 41). There were only three people who knew what happened during the month that N.B. stayed at the motel with Abby Anderson. The jury heard from N.B., but never got to hear from Abby. This testimony was highly relevant and the fact that it was not presented to the jury calls into question the fairness of the trial and the reliability of the result.

As the circuit court pointed out, the court in *Jenkins* held that when an eyewitness, who would corroborate the defendant's theory was not presented to the jury due to trial counsel's error, it is prejudicial to the defendant. *See Jenkins, supra*, 355 Wis. 2d at ¶¶ 53 & 61. Abby Anderson was really the only other person who could testify regarding the events with which Mr. Reno was charged. Her testimony would have supported his defense. The failure to

call her absolutely prejudiced the defendant.

The circuit court held: "Based upon the totality of the circumstances, this court finds that Attorney Eichenlaub's failure to call Abby Anderson prejudiced the defendant and deprived the defendant of a fair trial, a trial whose result was reliable." (R.43:9, R.App. 109). The defendant-respondent agrees with the circuit court's findings.

## CONCLUSION

For the foregoing reasons, the Defendant-Respondent restfully requests that this Court affirm the decision of the circuit court.

DATED this 26th day of January, 2017.

Respectfully submitted,

/s/Angela C. Kachelski
Angela C. Kachelski
State Bar No. 01020860
The Kachelski Law Firm, S.C.
7101 N. Green Bay Ave.
Suite 6A
Milwaukee, WI 53209
Ph: (414) 352-3300
Fax: (414) 352-3316

**LENGTH AND FORM CERTIFICATION**

This brief meets the form and length requirements of Rule 809.19(b) and (c), in that it is:

_14__ pages long.

Typewritten (10 spaces per inch, non-proportional font, double spaced, 1½ inch margin on the left and 1 inch margin on other three sides.

Dated this 26th day of January, 2017.

/s/Angela C. Kachelski
Angela C. Kachelski

**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 s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 26th day of January, 2017.

/s/Angela Kachelski
Angela Kachelski

**STATEMENT OF SERVICE AND MAILING**

Counsel hereby certifies that she has sent an original and nine copies of this Defendant-Respondent's Brief-in-Chief and appendix to this court via the United States Post Office. Counsel also certifies that she has served three copies of this brief on the Attorney General's Office via the United States Post Office this 26th day of January, 2017.

/s/ Angela C. Kachelski
Angela C. Kachelski

**Appendix Table of Contents**