STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent

vs.

Appeal No. 2016AP002201

Case No. 2012CF006098

LARRY L. GARNER,
Defendant- Appellant

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. DAVID L. BOROWSKI, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. DAVID L. BOROWSKI, PRESIDING

REPLY BRIEF OF DEFENDANT- APPELLANT

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POINT I

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE CIRCUIT COURT RULED, OVER OBJECTION, THAT THE TESTIMONY OF A WITNESS WHO HAD TESTIFIED AT DEFENDANT'S FIRST TRIAL COULD BE READ TO THE JURY AT THE SECOND TRIAL EVEN THOUGH THE WITNESS HAD NOT BEEN PROPERLY HELD TO BE UNAVAILABLE TO TESTIFY AT THE SECOND TRIAL.

The first issue in this case deals with the receipt into evidence of a witness' prior testimony after the Court had found the witness to be unavailable to testify in person at the jury trial. As the Appellant's Brief discussed in detail, the Wisconsin Supreme Court had long ago shown its distain for the use of the prior testimony of an absent witness and it, therefore, set forth strict rules as to when such testimony would be allowed to be received at the trial.

According to *Philbrook v. State*, 216 Wis. 206, 214 ,256 N.W. 779, the Court, in 1934, held that before the prior testimony of an absent witness may be received in evidence and read to the jury, it must be shown that there were "sufficient facts to warrant" the conclusion that the witness is unavailable. The Court further held that these facts must "consist of positive evidence of the absence of the witness from the state, or positive evidence that a thorough official search for the witness in the state has been made." Id. at 214.

There were also two other factors in *Philbrook* that helped to establish unavailability. The first factor was that the witness had been served with a subpoena. The second factor was that there had been an evidentiary hearing held at which the people who had attempted to find the witness had testified as to their efforts in that regard.

Since *Philbrook* had been decided in 1934, a more recent case, *State v. King,* 2005 WI App 224, 287 Wis. 2d 756, 707 N.W.2d 181, has only strengthened those rules, not diminished them, and the United States Supreme Court has mightily strengthened them even further in

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford,* the Court held that "a bedrock" rule of law is required by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Id. at 42. The Court in *Crawford* specifically held that testimonial hearsay includes the prior testimony of a witness at a previous proceeding or trial. Id. at 51. And Article I, §7 of the Constitution of the State of Wisconsin also guarantees accused persons of the right of confrontation.

After *Crawford*, these rules were again emphasized in *State v. King,* 2005 WI App 224, 287 Wis. 2d 756, 707 N.W.2d 181. In *King,* the Court held that the state had not shown that the witness was constitutionally unavailable" and that, therefore, her prior testimony at a preliminary hearing could not be received in evidence and read to the jury. In making that ruling, the Court once again emphasized that there must be positive evidence that a thorough search for the witness had been made. Id. at 769.

The Court also clarified that a subpoena should have been served on the witness when the state had had the opportunity to do so. Id. at 767. Finally, the Court clarified that an evidentiary hearing should have been held at which the people who had searched for the witness could testify as to their efforts. Id. at 768. In making that finding, it should be noted, the Court did not mention anything about the defense having to request such an evidentiary hearing before one is held. The fact that defense counsel had objected to the admission of the prior testimony was sufficient to preserve the issue. Id. at 771 (f. 2).

By failing to follow these rules, the Court held that the "State has not demonstrated that Shelia J. was constitutionally unavailable, and the trial court erred in permitting the jury to hear her preliminary examination testimony." Id. at 769.

In the Respondent's Brief, none of the Wisconsin cases cited by the state stood for the proposition that the rules set forth in *King*, which had been based on the rules set forth in *Philbrook*, did not have to be fulfilled in order to declare an absent witness unavailable.

The state cited *State v. Zellmer*, 100 Wis. 2d 136, 301 N.W.2d 209 (1981), as standing for the proposition that a subpoena was not required, even though the state had had the opportunity to serve one on the witness, in order to have the witness declared unavailable. In fact, however, *Zellmer* dealt with the issue as to whether the state should be required not merely to issue a subpoena to a witness but to extradite him from another state if the state knew his whereabouts and if the witness refused to appear in court voluntarily.

The Court in *Zellmer* held that the state was, in fact, required to extradite him and if the trial court allowed the witness' prior testimony to be read to the jury even though no effort had been made to extradite him, that constituted an abuse of the trial court's discretion. Id. at 150. The only saving grace for the state in that case was that the Court then held that the use of the absent witness's prior testimony at the trial (the witness had been a doctor) had been harmless error because it was cumulative to the testimony of other doctors who actually testified at the trial and because there had been strong evidence of the defendant's guilt. Id. at 151.

The state also cited *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W. 2d 919 as standing for the proposition that the state must make a good faith effort and use due diligence in their attempt to locate and produce the witness. In this case, the state argued, the state had made the following efforts: it had brought in the Milwaukee homicide detectives to search for her, it had brought in members of the police department's warrant squad to search for her (because a bench warrant had been issued by the Court once it had become clear that she was not going to appear in court to testify), and the police had searched ten houses. The state noted that the

prosecutor had told the Court that, "detectives and the warrant squad have been hitting this hard. Your Honor, they have been spending a lot of time and resources attempting to find her."

However, that statement by the prosecutor was no substitute for an evidentiary hearing at which the various officers who had searched for her could testify as to their efforts and their findings. And no subpoena had been served on the witness even though the state had had more than a sufficient opportunity to do so both before she had been released from custody in her own case and while she was reporting to Justice Point.

Indeed, the only case the state could find to argue that no subpoena and no evidentiary hearing were necessary for a finding of unavailability of a witness was a 1997 case in the state of Maryland – *Commercial Union Ins. Co. v, Porter Hayden Co.*, 698 A.2d 1167 (Md. App. 1997). Not only was that case from the state of Maryland and not only was it decided in 1997, before *King* and before *Crawford*, it was a civil case in which the importance of a person's liberty was not at stake. Indeed, instead of dealing with a person's liberty, it dealt with the issue as to whether a declaratory judgment for an insured person had been proper in a trial dealing with coverage for asbestos issues. That case certainly has no authority in a 2014 criminal trial in Wisconsin.

Finally, the state argued that the facts relating to the witness herself, that she was a drug addict and used drugs every day, that she suffered from untreated mental health issues, that her conduct throughout the proceedings in this case and her own case had been "atrocious" and "abominable" as the Court noted, including numerous tantrums in court, and that she had been arrested for disorderly conduct, domestic violence during the pendency of this case, were not relevant to the issue of unavailability. That is certainly not the case. By the Court ruling that she was unavailable and by allowing her prior testimony at the first trial to be read to the jury at the

second trial, the defendant had been denied his right of confrontation in the most fundamental way because the defense had not been allowed to cross-examine the witness and to impeach her testimony by the use of these facts, which had all come to light during the period between the two trials.

For all of these reasons, the defendant is entitled to have this Court reverse the finding of the Circuit Court which denied the Postconviction Motion and to reverse the defendant's convictions, thereby ordering a new trial.

POINT II

THE CIRCUIT COURT SHOULD NOT HAVE ALLOWED THE STATE TO FILE THE AMENDED INFORMATION BECAUSE THE STATE HAD NOT FIRST OBTAINED THE CONSENT OF THE COURT TO FILE IT, AND BECAUSE THE EVIDENCE HAD NOT SUPPORTED THE NEW CHARGE.

The second issue raised in the appeal of this matter dealt with the fact that the Court had allowed the state to file an Amended Information, adding a new charge of Armed Robbery, involving a different victim, even though the state had failed to file a motion requesting permission to file the Amended Information and failed to obtain the Court's express consent to file it before doing so.

It was argued that §971.29(2) Wis. Stats. provides that, "A complaint or information may be amended at any time *prior* to arraignment without leave of the court." And it was further argued that once the defendant had been arraigned on the Information, the state is required to seek and obtain leave of the Court before amending it by adding a new charge to it. *State v. Conger*, 2010 Wis. 56, 323 Wis. 2d 664, 797 N.W. 2d 341. It was noted that in the cases that have dealt with this issue, the state had sought leave of the Court to amend the Information by filing a motion with the court, requesting permission to file the Amended Information.

In the Respondent's Brief, the state argued that since the defendant knew about the new charge during the first trial, it would not have come as any surprise to him by the time of the second trial and, therefore, he was not prejudiced by the amendment during the second trial. The state, however, completely misses the point of the defense's argument.

In Milwaukee County, the District Attorney's office has taken the position that it has the absolute authority to file amended informations at any time prior to the trial to either add new charges or to change the nature of existing charges. And that office has not seen the need to seek

or obtain leave of the Court before doing so, even after the defendant had been arraigned on the original Information. The way it is done in Milwaukee County is to present the Court, as it did in this case, with the Amended Information, as a *fait accompli* and the courts, without making any ruling on its propriety, have merely accepted it for filing. At least in this case, defense counsel made an objection to the new charge being filed.

While the defendant knew about the facts of the new Armed Robbery charge by the time of the second trial, he did not know of them at the time that the Amended Information had been filed before the first trial. And once the Amended Information had been filed before the first trial and the new charge had been added, there was no going back to the original Information.

In the Respondent's Brief, the state did not deny the fundamental errors that had been made in this case regarding the filing of the Amended Information: first, that the state had not sought or obtained leave of the Court before filing it; second, that the original Criminal Complaint had not stated that the defendant had been guilty of the crime of Armed Robbery against Tycer L.; and third, that the state did not have any authority to add new charges against a defendant once he had been arraigned on the original Information for the purpose of pressuring him into pleading guilty in the case.

The state cited *State v. Flakes*, 140 Wis. 2d 411, 410 N.W. 2d 614 (Ct. App. 1987) for the proposition that the defendant had to prove that he had been prejudiced by the state's actions. *Flakes*, however, did not deal with the amending of an Information after the defendant had been arraigned on it, it dealt with amending the Information during the trial to conform to the proof. That is an entirely different matter and has nothing to do with §971.29(2) Wis. Stats.

The defendant in this case was, in fact, deeply prejudiced by the filing of the Amended Information before the first trial. As a result of the filing of it, he was required to defend himself

against a charge for which he had not originally been charged, simply because he had refused to plead guilty in the case.

For all of these reasons, the defendant is entitled to have the Decision of the Circuit Court, denying the Postconviction Motion on this ground, reversed and the defendant ‘s conviction for Armed Robbery in regard to Tycer L. reversed and the charge dismissed.

POINT III

THE DEFENDANT'S SENTENCE OF A TOTAL OF 40 YEARS WAS BASED ON INACCURATE INFORMATION REGARDING HIS ROLE IN THE SHOOTING OF THE VICTIM AND, THEREFORE, HE IS ENTITLED TO BE RESENTENCED.

The third issue that was raised in this case dealt with the defendant's total sentence of 40 years, with 28 years of initial confinement and 12 years of extended supervision. It was argued that the sentencing determination by the Court had been based on inaccurate information relating to the testimony at the trial of John Eggers and Vanetta Gholson- Wells that the defendant had been the shooter of the victim.

The Appellant's Brief spelled out specifically why their testimony had been totally unreliable to base the conclusion that the defendant had been the shooter.

The most important thing was that the Court itself believed that the defendant had been the shooter, which he stated during the sentencing of Wells. As a result of that finding by the Court, it only sentenced Brown to 15 years, with 9 years of initial confinement and 6 years of extended supervision, the same sentence it had imposed on Eggers. The 40 year sentence of the defendant was 25 years more than he had been offered if he had pled guilty in the matter.

It was argued in the Appellant's Brief that in *State v. Tiepleman*, 2006 WI 66, 291 Wis. 2d 179, 181, 717 N. W. 2d 1, the Court held that a defendant is entitled to be sentenced on the basis of accurate information. And it further held the defendant merely needs to establish by clear and convincing evidence, not evidence beyond a reasonable doubt, that the information had been inaccurate. Id. at 184. In this case, the facts showing that the testimony of Eggers and Wells at the defendant's trial had been inaccurate are set forth in detail in the Appellant's Brief.

In the Respondent's Brief, the state argued that the defendant had to show that the information had been inaccurate and that the Court had relied on it in making its sentencing

determination. The state argued that a disagreement between the defense and the Court as to the credibility of the witnesses who had provided the information did not render the information inaccurate. It argued that "Nothing prevented the court from concluding, on the strength of the evidence before it- that Garner fired the fatal shot."

That simply does not comport with the facts of this case. When Eggers told the agent who had prepared his presentence report that it had been Brown who had shot the victim, Ronald C., and when Wells told the police on four different occasions , and when she told her mother shortly after the incident, that it had been Brown who had shot the victim, the Court could not have come to the definitive decision that it had not been Brown who had shot the victim but that, instead, the defendant had shot him. And given the statement that the Court had made at Wells' sentencing, there is no doubt that the Court had relied on the information from the trial testimony of Eggers and Wells in making its sentencing determination.

The fact of the matter is that the Court was not the fact-finder in this case- the jury was. The defendant had shown by clear and convincing evidence that the information from Eggers and Wells had been totally unreliable and had not been accurate.

The Court stated, in denying the Postconviction Motion, that it had been the Court's "opinion" that the defendant, and not Brown, had been the shooter. It constituted a denial of the defendant's Due Process rights to be sentenced on the basis of the completely untrustworthy testimony of Eggers and Wells, which had been the basis for the Court's "opinion" as to who the shooter had been, and therefore the defendant's total sentence of 40 years had been improper. Further, it had been unduly harsh and excessive and constituted an erroneous exercise of the Court's sentencing discretion.

For these reasons, the defendant is entitled to have the denial of the Postconviction Motion on this ground reversed and the defendant's total sentence of 40 years reversed and then to be resentenced.

Dated: July 19, 2017
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The Reply Brief contains 2,980 words.

Dated: July 19, 2017

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Esther Cohen Lee
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CERTIFICATION AS TO 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) Wis. Stats. 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 paper copies of this brief filed with the court and served on all opposing parties.

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