

RECEIVED

07-23-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
C O U R T A P P E A L S

District I

Case No. 2018AP000596-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

SADIQ IMANI,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON AUGUST 31, 2015, THE HONORABLE WILLIAM POCAN
PRESIDING, AND THE DECISION AND ORDER DENYING MOTIONS
FOR POSTCONVICTION RELIEF, ENTERED ON MARCH 26, 2018,
THE HONORABLE DAVID HANSHER PRESIDING, BOTH ENTERED IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

MARK S. ROSEN
ROSEN AND HOLZMAN, LTD.

400 W. Moreland #C
Waukesha, WI 53188
1-262-544-5804
Attorney for Defendant-Appellant

TABLE OF CONTENTS

ARGUMENT.....1

I. THE RESPONDENT HAS NOT ADEQUATELY REBUTTED
DEFENDANT'S ARGUMENT THAT TRIAL COUNSEL WAS
PREJUDICIALLY INEFFECTIVE FOR NOT OBJECTING TO
DEFENDANT'S PREJUDICIALLY STALE FELONY CONVICTION.....1

II. THE RESPONDENT HAS NOT ADEQUATELY REBUTTED
DEFENDANT'S ARGUMENT THAT TRIAL COUNSEL WAS
PREJUDICIALLY INEFFECTIVE FOR ADVISING THE
DEFENDANT TO TESTIFY AS TO HIS ALIBI.....5

CONCLUSION.....10

CASES CITED

State vs. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429
(Ct.App. 1995)2-3

State vs. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1990).....2

State vs. Lentowski, 212 Wis.2d 849, 569 N.W.2d 758
(Ct.App. 1997)6-7

State vs. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711
(1985)6-7

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I
2018AP000596-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

SADIQ IMANI,

Defendant-Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON AUGUST 31, 2015, THE HONORABLE WILLIAM POCAN
PRESIDING, AND THE DECISION AND ORDER DENYING MOTIONS
FOR POSTCONVICTION RELIEF, ENTERED ON MARCH 26, 2018,
THE HONORABLE DAVID HANSHER PRESIDING, BOTH ENTERED IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF THE APPELLANT

ARGUMENT

I. THE RESPONDENT HAS NOT ADEQUATELY REBUTTED DEFENDANT'S
ARGUMENT THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR NOT
OBJECTING TO DEFENDANT'S PREJUDICIALLY STALE FELONY CONVICTION.

The Respondent had not provided any relevant and applicable

law, either statutory or case, with respect to the issue of whether or not trial counsel had been prejudicially ineffective for failing to object to the overly prejudicially stale felony conviction. As conceded by the Respondent, both the case law and the statutory law clearly indicate that the number of convictions/adjudications is highly relevant to the credibility of a witness. The Defendant had provided an abundance of such law in his Appellant's Brief. As indicated in that Brief, this law clearly shows that the number of convictions/adjudications has a legal affect upon a witness's credibility. As also indicated in this Brief, the trial court had advised the jury accordingly. (234:22-23; App. Brf, page 16). Hence, this is well established case and statutory law.

The Respondent had indicated that in Wisconsin there is no law that states that a court shall disregard convictions that are old or minor offenses. This indication is essentially true. However, the Respondent had failed to discuss that the relevant and applicable case law clearly indicates that the lapse of time since a conviction and the rehabilitation of the person convicted is clearly relevant to the required balancing test pertaining to the admissibility and use of a prior conviction. Defendant had cited both State vs. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1990) and State vs. Kruzycki, 192 Wis.2d 509, 531 N.W.2d 429 (Ct.App. 1995) for this legal proposition. Defendant had indicated in his Appellant Brief the factual and legal basis for why the felony

conviction at issue in this present matter should not have been allowed. (App. Brf, pges 23-25). This, based upon the relevant and applicable law.

The Respondent had indicated that Defendant's reliance on State vs. Kruzycki is misguided. (Resp. Brf, pges 15-16). However, the Respondent is incorrect in this conclusion. True, this case has indicated that Wisconsin, unlike the federal system, does not have a statutory limit on prior convictions for impeachment purposes. State vs. Kruzycki, 192 Wis.2d 509 at 526, note 4. However, this case had also clearly indicated that the age of a conviction is highly relevant to its admissibility for purposes of impeachment. In that case, the Court had indicated that the trial court had correctly recognized that a reformed defendant's past old convictions may not be probative of the Defendant's credibility, and that admitting such convictions could be unfairly prejudicial. However, the Court had noted with approval that Kruzycki's past convictions had been admissible because he had been confined for lengthy periods and had "not been around to reform." The lack of rehabilitation had been a crucial factor with respect to his old convictions. Id. at 525-526. Hence, this case is highly relevant and applicable to the present situation. Contrary to the Respondent, the age of the Defendant's conviction at issue in this Appeal had been highly relevant.

The Respondent had also argued that the Defendant had failed

to adequately show any probability of a different result by the jury if the jury had not heard the conviction at issue in this present Appeal. This argument pervades the entire Respondent's Brief. However, once again, Defendant had discussed the evidence in this case, and how his credibility was highly relevant to his testimony, and the case in general. Defendant had also discussed how the remainder of the State's evidence was not so overwhelming so as to make his credibility irrelevant. As Defendant had discussed in his Appellant's Brief, this case was far from overwhelming. (Appellant's Brief, pgs 24, 32). Defendant will not presently re-recite this discussion here. However, in addition to that prior discussion, there had been no testimony as to how long the mask had been present outside of the bank prior to its discovery by the police. The Respondent's Brief places undue emphasis on the DNA found inside of the mask. However, as indicated herein and in Appellant's Brief, such emphasis is misplaced. Hence, as the facts in this present case had shown, trial counsel's ineffectiveness in failing to object to the felony conviction at issue here was prejudicially ineffective.

Here, the Respondent's attempt to rebut Defendant's Appellant's Brief concerning his prior record had been merely conclusory. The Respondent had failed to provide any adequate supporting legal or factual basis. The Respondent had provided no case or statutory law rebutting Defendant's abundance of relevant

and applicable law. Furthermore, the Respondent had failed to adequately provide any factual basis to rebut Defendant's argument that trial counsel's failure was prejudicially ineffective.

For the reasons indicated here, as well as in Defendant's Appellant's Brief, this court should reject the Respondent's Brief concerning Defendant's prior criminal record. Contrary to the Respondent, an evidentiary hearing is required for this issue with a new jury trial resulting.

II. THE RESPONDENT HAS NOT ADEQUATELY REBUTTED DEFENDANT'S ARGUMENT THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR ADVISING THE DEFENDANT TO TESTIFY AS TO HIS ALIBI.

The Respondent's Brief's position concerning the issue regarding trial counsel's advice to the Defendant that he should testify as to his alibi is merely conclusory and lacks any relevant argument. These deficiencies are both factual and legal. These deficiencies are similar to the deficiency in the Respondent's prior argument concerning Defendant's prior criminal record. The Brief had omitted materially relevant and significant parts of the record. These parts warrant rejection of the Respondent's argument.

Here, the Respondent had essentially indicated that trial counsel is afforded a great deal of latitude with respect to reasonable strategic decisions. Clearly, this is a true summary of the law. However, the crux of this law is that the decision must

first be reasonable. Furthermore, the law is also clear that a trial counsel who gives improper legal advice may be prejudicially ineffective. State vs. Lentowski, 212 Wis.2d 849, 569 N.W.2d 758 (Ct.App. 1997). Defendant had cited this law in his Appellant's Brief. The Respondent had not provided any law rebutting any of this relevant and applicable law. Furthermore, the Respondent had essentially ignored this argument.

Here, Respondent had merely indicated that there is no law concerning a trial counsel advising his client to testify. (Resp.Brif, page 11). However, as argued herein and in Appellant's Brief, this is not the issue at present. As discussed in Appellant's Brief, the present issue is whether or not a trial counsel has correctly advised a Defendant of the ramifications of his or her testifying, prior to the testimony. Contrary to the Respondent, Appellant's cited case law of State vs. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711 (1985), is precisely on point. In that case, trial counsel had misadvised Pitsch of his prior record. This, due to negligence. Pitsch had subsequently testified based upon this erroneous advice. The Supreme Court had found such negligence to be prejudicially ineffective, under the circumstances. State vs. Pitsch, 124 Wis.2d 628 at 631-632, 638, 644-646.

Here, the present situation is much stronger for a finding of prejudicially ineffective assistance of counsel than that in

Pitsch. In Pitsch, the Supreme Court had found trial counsel prejudicially ineffective for failing to investigate Pitsch's prior record. However, here, trial counsel had actual knowledge that Deckow would destroy the Defendant's alibi. This, prior to Defendant's testimony. Yet, trial counsel had failed to disclose such information to the Defendant prior to his testimony, and had misadvised Defendant to testify. As discussed, Deckow's testimony had destroyed the Defendant's alibi. Defendant's testimony in this matter had been the direct result of trial counsel's prejudicially ineffective providing of improper legal advice. Contrary to the Respondent, Lentowski is relevant and applicable case law that is precisely on point in this present matter.

In the present matter, the Respondent had relied upon the summary conclusion that the Defendant had made a knowing and voluntary decision to testify. True, the trial court had conducted a colloquy with the Defendant. However, the Respondent had failed to rebut, or even discuss, that Defendant had provided a Sworn Affidavit with his Postconviction Motions concerning this decision. (195:Exhb 4). This Affidavit had clearly indicated that his decision was based upon ineffective advice from his trial counsel. Defendant had told his counsel on multiple occasions that he did not want to testify. However, trial counsel had advised him that he should. This, after Defendant could not provide any other alibi witnesses. Furthermore, as indicated in this Affidavit, trial

counsel had never discussed the already provided discovery concerning how Heather Deckow would destroy the Defendant's alibi. Prior to the Defendant's testimony, trial counsel had never discussed this discovery with the Defendant. As the trial court had indicated at the sentencing hearing, and both the Respondent and the Defendant have indicated in their Briefs, her testimony was devastating. (App. Brf, page 17; Resp. Brf, page 18). Hence, Defendant's testimony was based upon ineffective advice from his trial counsel. The Respondent's Brief has completely omitted and ignored this fact. Further, contrary to the Respondent, this advice was prejudicially ineffective.

The Respondent had indicated that Defendant was present when the prosecutor had indicated that Heather Deckow was present and that her discovery had been provided to trial counsel prior to trial. This is a true indication. However, the Respondent had failed to note that, without any prior discussion between Defendant and his counsel concerning this discovery, this indication is meaningless. Defendant had previously believed that Ms. Deckow would support his alibi. This belief was why he had testified that she was his alibi and that she had provided him with a ride during the relevant time period. Hence, the reasonable conclusion is that the prosecutor's indication at trial had not provided any motivation or reason for him not to testify. The Respondent had failed to note that the prosecutor's indication had failed to

provide any oral detail of the contents of this discovery. Accordingly, the Respondent had failed to rebut the conclusion that Defendant would not have testified, much less about his alibi, had trial counsel correctly provided him with the information that counsel already had possessed concerning her testimony. As discussed in Defendant's Appellant's Brief and herein, trial counsel had a legal duty to advise the Defendant about Deckow's anticipated testimony, as counsel had already learned from the State. This, especially because trial counsel had urged the Defendant to testify about this alibi. This failure, and the subsequent encouragement for Defendant to testify, was ineffective.

Here, the Respondent had indicated that Defendant has failed to show that trial counsel's ineffectiveness was prejudicial. The Respondent has essentially indicated that Defendant's brief is based upon speculation. However, this indication is merely conclusory. On the contrary, as discussed in Defendant's Appellant's Brief and previously herein, the State's case was not objectively so strong as to make his alibi testimony "disaster" meaningless and harmless error. As with respect to the prior discussed issue concerning the Defendant's prior conviction, Defendant will not re-recite these arguments. Furthermore, on the contrary, once again, the Respondent has failed to adequately discuss how the State's case was so strong and so overwhelming as

to make trial counsel's ineffectiveness harmless error. Trial counsel's ineffectiveness was prejudicial.

As discussed herein and in Defendant's Appellant's Brief, the Respondent had failed to rebut Defendant's position that trial counsel was prejudicially ineffective for improperly advising the Defendant to testify about his alibi. The Respondent's position that trial counsel's advice was reasonable is not supported by the facts or the law. Furthermore, the Respondent has provided no sufficient factual or legal basis to support this position. An evidentiary hearing is necessary. At such a hearing, trial counsel would need to testify as to his reasoning, if any, concerning this issue. The Respondent has failed to adequately rebut such a conclusion.

CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the trial court had erred in denying Defendant's Postconviction Motion. This denial Decision and Order must be reversed.

For the reasons indicated herein, and as also indicated in Defendant's Appellant's Brief, Defendant requests a new jury trial. Trial counsel's prejudicial ineffectiveness creates a requirement for such a trial and the need for an evidentiary hearing pursuant

to State vs. Machner. This, for either each individual raised issue, or for the cumulative prejudicial effect of the multiple raised issues. Defendant is entitled to a new jury trial.

Dated this _____ day of July, 2018.

Respectfully Submitted,

Mark S. Rosen
Attorney for Defendant-Appellant
State Bar No. 1019297

Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
ATTN: Mark S. Rosen
(262) 544-5804

CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Sadiq Imani, 2018AP000596 CR conforms to the rules contained in Wis. Stats. 809.19 (8) (b) (c) for a Brief with a monospaced font and that the length of the Brief is eleven (11) pages.

Dated this 19th day of July, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Sadiq Imani, Case No. 2018AP000596 CR is identical to the text of the paper brief in this same case.

Dated this 19th day of July, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant