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OF WISCONSIN**

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

District I

Case No. 2018AP001115-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

RONDALE TENNER,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON OCTOBER 29, 2015, THE HONORABLE STEPHANIE
ROTHSTEIN PRESIDING, AND THE ORDER DENYING MOTIONS
FOR POSTCONVICTION RELIEF, ENTERED ON JUNE 11, 2018,
THE HONORABLE MARK SANDERS PRESIDING, BOTH ENTERED IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE RESPONDENT'S BRIEF MISINTERPRETS AND MISSTATES THE

CIRCUMSTANCES CONCERNING TRIAL COUNSEL'S PREJUDICIAL
INEFFECTIVENESS. CONTRARY TO THE RESPONDENT, TRIAL COUNSEL HAD BEEN
PREJUDICIALLY INEFFECTIVE FOR FAILING TO IMPEACH MISTY BEILKE WITH
HER PRIOR CRIMINAL RECORD.

Respondent's Brief has materially misinterpreted trial counsel's performance with respect to his failure to impeach Misty Beilke with her prior criminal convictions. Contrary to this Brief, trial counsel had been prejudicially ineffective.

Respondent has indicated both that: (1) trial counsel's performance had not been prejudicially ineffective; and (2) no prejudice had occurred with respect to the matter. Respondent has materially erred on both of these elements.

Respondent has provided citations of the relevant case law concerning prejudicial ineffectiveness of counsel. (Resp.Brf, page 15). However, Defendant had provided relevant case law in his Appellant's Brief. Notwithstanding Respondent's assertions, trial counsel's conduct must still have been reasonable. Reasonableness is based upon an objective standard. State vs. Machner, 92 Wis.2d 797; 282 N.W.2d 905 (Ct.App. 1979). The Court will not approve an "irrational trial tactic." State vs. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

Respondent has failed to indicate that Beilke's testimony had been crucial to the State's case. Here, the State itself, and not the Defendant, had called Beilke as a witness. True, she had no direct knowledge or information about the homicide. However, as

argued in Appellant's Brief, the State had argued in its Closing Argument that her testimony had provided strong circumstantial evidence supporting guilt. (App.Brff, pges 10, 31). Furthermore, as also argued in Appellant's Brief, trial counsel had never argued her testimony during Defendant's Closing Argument. (App. Brf, page 31). Clearly, had trial counsel utilized her as helpfully as Respondent has argued, then counsel would have argued that her testimony had been helpful. The absence of such argument bolsters the Defendant's case that her testimony had not been helpful to him. This absence materially rebuts counsel's, and Respondent's, contentions that her testimony had been helpful to the Defendant.

Contrary to the Respondent, trial counsel's position that he did not impeach Beilke with her prior criminal convictions because it would hurt Defendant's credibility is irrational. She had testified at trial against the Defendant. Her testimony, as argued by Appellant in his Brief, and as also presented by the Respondent, had materially hurt his case. Accordingly, contrary to Respondent, her testimony had required impeachment of her credibility. Further contrary to Respondent, impeachment by prior criminal convictions is devastating to a witness's credibility. Appellant's Brief has provided such case law. (App. Brf, page 27). Hence, Respondent's statement that proof of her eight criminal convictions would have done little to diminish her credibility is materially and legally erroneous.

Furthermore, contrary to the Respondent, the evidence in this case had been far from overwhelming. Her testimony had been material towards conviction. As argued in Appellant's Brief, the case had rested on the testimony of Derrel Jenkins. There had been scant else, except for the credibility of the witnesses. (App.Brif, page 29). Respondent has ignored that the first jury trial had been hung, whereas the jury in the second trial had deliberated for six hours. Clearly, two separate juries had concluded that the evidence had been far from overwhelming. Interestingly and importantly, Beilke had testified at the second trial, but not the first. Arguably, her testimony had been the "tipping point" that had led the second jury to convict the Defendant. Hence, Respondent has materially erred in indicating that the evidence had been "overwhelming."

Based upon the foregoing, as well as the arguments in Appellant's Brief, this Court must reverse the trial court's Decision and Order denying Defendant's Postconviction Motion. Trial counsel had been prejudicially ineffective for failing to impeach Misty Beilke with her prior criminal record.

II. CONTRARY TO THE RESPONDENT, THE TRIAL COURT HAD ABUSED ITS DISCRETION IN DENYING DEFENDANT'S POSTCONVICTION MOTION THAT HAD ARGUED THAT IVAN BOYD'S TESTIMONY HAD WARRANTED A NEW JURY TRIAL.

Here, Respondent has indicated that Ivan Boyd's sworn

Affidavit "had all of the earmarks of fraud." (Resp.Brf, page 20). However, this conclusion has been based solely upon speculation and is thoroughly unsubstantiated. Furthermore, the basis of the trial court's Decision to deny the Postconviction Motion had been based not upon the Affidavit, but upon Boyd's testimony at the postconviction hearing.

Interestingly, Respondent has taken steps to outline how Boyd had "supernatural powers of recall" with respect to his Affidavit. (Resp.Brf, page 25). However, Jenkins confession to Boyd had been a stunning development in Boyd's life. Boyd had testified as to such an effect. He had testified that Jenkins' confession "blew his mind." (203:28). Jenkins had confessed to a murder. There is no reason to believe that Boyd, or anyone else, would not remember such an important or stunning situation.

Also, Respondent's own argument concerning Boyd's Affidavit is self defeating concerning the credibility of the Affidavit. Respondent has outlined the similarities of the Affidavit to the facts of the case. (Resp. Brf, pges 25-28). This, to argue how the Affidavit could not have occurred legitimately because no one has "supernatural powers of recall." However, Respondent then subsequently has argued how one should find the Affidavit incredible because of the differences between the facts in the Affidavit and the facts of the case. (Resp.Brf, pges 29-30). Respondent cannot "have its cake and eat it too." Clearly, and

logically, over time, Boyd had remembered the majority of Jenkins' confession. This, due to its overwhelming importance. However, also clearly and logically, Boyd could not remember all of the minutiae of the confession. This, due to the lapse of time. Accordingly, contrary to Respondent, an analysis of the Affidavit, as discussed here, confirms its credibility. Respondent has materially erred in arguing otherwise.

The State itself at the trial level, in its Reply Brief to the Postconviction Motion, had argued that an evidentiary hearing would be necessary to test Boyd's credibility. (152:4-5). There had been no evidence adduced, either prior to that hearing or at the hearing itself, that Defendant had either told Boyd what to write in the Affidavit or that Boyd had referred to material in preparing that Affidavit. The Affidavit had required supporting testimony. Even the State at the trial level had so concluded.

Respondent has materially omitted facts that tend to support the credibility of Boyd's testimony and the Affidavit. Such facts include: (1) absolutely no evidence that Boyd had received anything of value in exchange for his cooperation; (2) a search had been conducted of Boyd's cell in prison yielding no material referring to the case; and (3) the jail movement testimony around the time that Jenkins had confessed to Boyd had corroborated Boyd's testimony that he and Jenkins had met; (4) Boyd had picked out Jenkins in a photo array. Defendant had argued all of these points,

and more, in his Appellant's Brief. (App.Brif, pges 41-43). Interestingly, Respondent's Brief has failed to mention any of these corroborating facts, except for Boyd's testimony that he had not received anything of value in exchange for his testimony.

True, Boyd had received money in exchange for federal testimony. However, the State had not elicited any evidence that such an exchange had occurred in the present situation. Also true, the State had elicited some testimony from Boyd concerning his being a bishop in Arizona. However, he had testified that his eventual plan was to relocate to Arizona. He had agreed that he was not in Arizona. (203:26-27; 31-32). Furthermore, none of this testimony had any relevance to the present situation. As discussed, the State had not presented any evidence whatsoever at the postconviction hearing that Boyd had received anything of value from Defendant or his family in exchange for his testimony or the Affidavit. Respondent would like for this Court to find such an exchange. This, clearly in order to impeach Boyd's testimony. However, Respondent has not found, and cannot find, proof of any such exchange. Without such proof, there is no basis for Boyd to have provided such testimony or the Affidavit. This, except to free an innocent person, as he had testified at the postconviction hearing. (203:21). Without such proof, Respondent's argument must fail. Boyd had been credible.

Furthermore, contrary to the Respondent, the trial court's

determination that Boyd had no credibility also must fail. As argued herein and in Appellant's Brief, the trial court's determination had been clearly erroneous. The trial court had never pointed out a single factual reason why it had chosen not to believe Boyd. A "gut feeling" is not sufficient. Instead, Boyd's testimony had been consistent, corroborated, and lacking any motive to fabricate. The trial court's determination must be reversed for being clearly erroneous.

Respondent has indicated that Boyd's testimony had been cumulative to the impeachment of Jenkins' credibility at trial. However, this is incorrect. As discussed in Appellant's Brief, Jenkins' credibility had never been attacked with respect to any motive to kill Hagen. As also discussed in Appellant's Brief, Defendant's sole argument during Closing Argument concerning what had occurred in the basement was that "...something happened..." (App.Brf, page 40). Respondent would like for the Court to believe that any presentation of Jenkins motive to murder Hagen for money and marijuana had been thoroughly explored at trial. (Resp.Brf, page 23). However, this argument is materially incorrect, as Defendant had argued in his Appellant's Brief, and as supported by the record. Interestingly, Respondent's Brief has not provided any cite to the record for this argument. Furthermore, as presented by Appellant, and with a specific cite to the record, this motive had not been presented at trial. "...Something happened..." is not a

"full exploration" at trial of Respondent's proffered motive for Jenkins to kill Hagen. Furthermore, Jenkins' cross-examination had not disclosed such a motive. (197:72-108). Hence, contrary to Respondent, and as argued in Appellant's Brief, Boyd's testimony as to Jenkins' confession to him which had provided a full motive for Jenkins' murder of Hagen, had been the first time that such motive had been raised. Hence, contrary to Respondent, the present situation, in addition to the further differences outlined in Appellant's Brief, is materially different to the situation in State vs. McAlister, 380 Wis.2d 684, 911 N.W.2d 77 (2018). McAlister is materially different from the present situation. This case is inapplicable to the present situation.

Respondent has also miscited its case law concerning the applicable standard of review for Courts of Appeal to evaluate claims of newly discovered evidence. Respondent has cited State vs. Plude, 310 Wis.2d 28, 750 N.W.2d 42 (2008) as well as State vs. Boyce, 75 Wis.2d 452, 249 N.W.2d 758 (1977) for the proposition that Court's must give great deference to a trial court's findings of fact and credibility determinations. (Resp.Brf, page 14). In Plude, the Supreme Court had merely stated that the standard for review is erroneous exercise of discretion when it applies an incorrect legal standard to newly discovered evidence. State vs. Plude, 310 Wis.2d 28 at 47, Para. 31. In Boyce, the Supreme Court had stated that a Court of Appeals will reverse for an abuse of

discretion. State vs. Boyce, 75 Wis.2d 452 at 457. Hence, the Respondent's recitation of the applicable law is erroneous.

Interestingly, State vs. Plude works against the Respondent. In that case, the Supreme Court had reversed Plude's case based upon newly discovered evidence. The Court had concluded that the fact that a testifying expert had lied about his credentials had warranted a new jury trial. State vs. Plude, 310 Wis.2d 28 at 56. The Supreme Court had reversed both the Circuit Court as well as the Court of Appeals. Id. at 47. The Court had cited Birdsall vs. Fraenzel, 154 Wis.2d 48, 142 N.W.2d 274 (1913) for the conclusion that impeaching evidence may be enough to warrant a new trial. The Court had indicated that this case had stated that "It may well be that newly discovered evidence impeaching in character might be produced so strong as to constitute ground for a new trial; as for example where it is shown that the verdict is based on perjured evidence. Id. At 52." Id. at 55. After analyzing the facts, the Court had further concluded that, had the jury heard about the expert's false testimony, it would have had reasonable doubt as to Plude's guilt. Id. at 56.

The situation in Plude is clearly analogous to that here. Boyd's testimony would have materially impeached Jenkins' testimony. As previously discussed herein and in Appellant's Brief, the evidence had been far from overwhelming. Respondent has been materially incorrect in arguing otherwise. Furthermore, as also

discussed herein and in Appellant's Brief, State vs. McAlister is materially different from the present situation. Accordingly, contrary to Respondent, this case is inapplicable. Finally, contrary to the trial court and Respondent, Boyd's testimony had been credible and supported by corroborating evidence. The trial court had clearly erred in determining otherwise.

Based upon the arguments raised herein, as well as in Appellant's Brief, the trial court had erred in denying Defendant's Postconviction Motion. The Respondent has materially erred in arguing otherwise. This denial Decision and Order must be reversed.

CONCLUSION

Based upon this present Reply Brief, and the arguments raised in Appellant's Brief, Defendant respectfully requests that this Court reverse the erroneous Decisions and Orders Denying Postconviction Motion. Defendant requests that this Court order a new jury trial for the Defendant for any, or all, of these reasons.

Dated this 18th day of October, 2018.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Rondale Tenner, 2018AP001115 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 18th day of October, 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. Rondale Tenner, Case No. 2018AP001115 CR is identical to the text of the paper brief in this same case.

Dated this 18th day of October, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant