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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

CASE NO. 2020AP1750-CR

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CLERK OF COURT OF APPEALS
OF WISCONSIN

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STATE OF WISCONSIN,

Plaintiff-Respondent,

V.

RONALD HENRY GRIFFIN,

Defendant-Appellant

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

REPLY BRIEF OF THE APPELLANT

RONALD HENRY GRIFFIN, PRO SE #420720
N.L.C.I.
P.O. BOX 2000
NEW LISBON WI, 53950

RESPECTFULLY SUBMITTED

Ronald Griffin

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CASES CITED

ARGUMENT 1

A EVIDENTIARY HEARING WAS DUE GRIFFIN ON HIS BRADY VIOLATION CLAIM AND THE POST CONVICTION COURT SHOULD HAVE HELD ONE

Griffin re-asserts that a evidentiary hearing was due him to properly develop and support his Brady violation claim and to develop a full record for appeal. Nothing in the response refutes this.

The State claims that Griffin makes insufficient allegations to earn him a evidentiary hearing. (Respondents Br.12-15). In reply Griffin renews his previously stated arguments and notes that the State offers no valid arguments against granting a hearing on this issue. Indeed the States allegations make a hearing required here so that Griffin may develop and substantiate such allegations.

Griffin replies that a hearing is needed on this issue to develop the following points:

1. To question officer Kozlowski as to whether he collected the photo from Tina when she brought it into the police station as is alluded by officer Kozlowski's sworn affidavit.

2. To question officer Kozlowski as to whether he had Tina circle,sign and date the photo from the website that Tina allegedly brought into the police station.

3. To question officer Kozlowski on the photo array procedures that he employed and whether he used the same photo that Tina brought into the police station in the array.

4. To question Grace Knutson (App.19 of Griffins Br.) so that she can provide clarification as to whether a person in 2013 could have used a "name search" using a zip code.

Griffin submits that he deserves the opportunity to develop a record on these issues for appeal. A hearing would provide this Court with sufficient evidence to meaningfully assess Griffin's claims. Griffin attached exhibits B and C to his brief (App.16-17). These exhibits provide sufficient evidence which show that Tina could not have obtained a photo from the website. The Respondent did not deny or rebut Griffin's argument in this regard. Therefore they should be deemed admitted. See **CHAROLAIS BREEDING RANCHES LTD V. FPC SECS CORP.,90 Wis.2d 97,108-109,279N.W.2d 493(Ct.App.1979).**

Likewise, a hearing is also required to develop the record on whether Tina's ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion. It is important to take notice that a valid question would arise as to whether officer Kozlowski suggested Griffin's identity to Tina. Especially if it is determined at a hearing that the photo could never have been obtained as is shown by exhibits B and C (App.16-17), attached to Griffin's brief.

Griffin rebuts the following claims made by the Respondent which make a hearing required:

A. The State claims that Griffin does not explain how the photo could be used to challenge the photo array procedures.(Respondents Br.12)

This claim made by the State is incorrect. Griffin did in fact develop a argument in this regard.(97:9) (Griffin's Br.13). Specifically, Griffin argued that the photo from the website may have been used to emphasize unduly the out-of-Court photo array procedures. It is also important to take notice that Griffin also argued that Wis.Stat.910.02 mandates that the original photo is required to prove the photograph's contents.Id.

The Respondent did not deny or rebut Griffins argument in those regards. These unrefuted claims by the Respondent should be admitted.

B. The State claims that Griffin argued that the photo was necessary to undermine Tina's credibility.(Respondents Br.12)

This claim made by the Respondent misrepresents Griffin's argument. Griffin never argued that the photo was necessary to undermine Tina's credibility. To the contrary, Griffin argued that the photograph could not have been obtained from the website as is shown by (App.16-17), attached to Griffin's brief.

C. The State claims that Griffin explicitly waived any challenge to the array procedures because he did not challenge the array at or before trial.

This claim made by the respondent should hold no weight. Griffin submits that waiver of the issue should not apply when the State violated it's discovery obligations under Brady and it's progeny. Griffin argued that there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. Griffin cited to **U.S. V. AGURS,427 U.S. at 110** for this proposition. The State failed to rebut this argument.

D. The State claims that the police did not collect the photo as evidence. (Respondents Br.13)

This claim made by the State makes a hearing required. Especially since officer Kozlowski is the only person who could anwser this question.

E. The State claims that the photo was never suppressed by the State because it was never possessed by the State.(Respondent Br.13)

The Respondent claims that the State did not have an obligation to collect the photo and therefore the State did not suppress the evidence. Griffin submits that he argued in his brief at page 11 that the State had a duty to determine whether the photo was in possession of the police. Griffin cited

to Kyles v. Whitley,514 U.S. at 437 for this proposition. The Supreme Court in Kyles has concluded that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the Governments behalf in the case, including the police. This Court should find that the prosecution violated it's duty recognized by Kyles, supra.

F. The State claims that Griffin did not provide evidence that the photo was ever in the possession of the police department (Respondents Br.14)

This claim made by the Respondent is incorrect. Griffin submits that he attached a sworn affidavit of officer Kozlowski as evidence. In the affidavit at paragraph 13, officer Kozlowski swears that Tina came into the police department with a photo of a person she thought to be Griffin. The affidavit of Kozlowski is evidence that the photo was in the possession of the police department.

The Respondent also asserts that officer Stratton did not conduct the photo array and that officer Kozlowski did. Respondents Br. at 13. This is correct. However, Griffin only argued that officer Stratton could not say for certain whether the photo from the website was used in the array. Griffin argued this to merely show the Court that officer Stratton and Kozlowski were working together investigating the case and that it is reasonable to conclude that officer Stratton would have knowledge of whether the photo was used in the array.

G. The State claims that the search only led Tina to find Griffin's last name and that the search was independent of her identification at the police station and at trial. (Respondents Br.14)

This claim made by the State misrepresents Griffin's argument. Griffin argued that Tina'a search led her to discover a photo of a person who she

thought to be Griffin from the website and that she brought the photo into the police station as is alluded to by officer Kozlowski's sworn affidavit.

Likewise, Tina's search was not independent of her identification at the police station and at trial. Tina's search flowed directly with her search of Griffin on the website because directly on the heels of Tina's search she reported to the police station where a photo array was assembled and that phtot array was used as evidence by the prosecutor at Griffin's trial. Therefore the photo was material evidence.

Lastly, the State claims that Griffin expressly waived the claim of the photo being evidence that the photo array was unduly suggestive.(Respondents Br.14).

The State claims that because Griffin did not raise this claim within the framework of ineffective assistance that it is expressly waived. Griffin argues that the State cannot have it two ways. First, The State should not be able to violate it's duty recognized by Kyles v. Whitley, supra. And second, the State should not be able to argue that Griffin waived this claim due to the State failing to pursue such evidence. This Court should find that Griffin alleged sufficient facts to demonstrate that the State violated its discovery obligations and that the trial Court improperly denied this claim without a hearing.

ARGUMENT 2

A MACHNER HEARING WAS DUE GRIFFIN ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND THE POST CONVICTION COURT SHOULD HAVE HELD ONE

First, it is worth noting that it would be premature for this Court to analyze Attorney Meetz' action's in this case until the facts concerning his decisions about failing to obtain and make use of the weather data are

are developed at a Machner hearing.

Griffin submits that his post conviction motion alleges, specific, and substantial allegations that are sufficient to require a Machner hearing. Griffin alleges that:

1. He asked Attorney Meetz to pursue and obtain the weather data attached to his motion as (exhibits K and L) (App.23-24) attached to Griffins brief.

2. Attorney Meetz informed Griffin that he would pursue and obtain the weather data to undermine Flores' credibility. Attorney Meetz also informed Griffin that the weather data would further support his theory of defense. See(97:15), Griffin's Br. App.20-22.

3. That Griffin would testify at a hearing about his conversation that he had with Attorney Meetz on this issue. (App.20-22) of Griffins Brief.

Because the defense theory argued at trial was that Tina was lying to get Griffin in trouble, the weather data would have been highly significant to the credibility of Tina. This Court should find that without any opportunity for Attorney Meetz to testify as to why he abandoned obtaining the weather data, that it would not be possible for this Court to assess whether such conduct was deficient. Further, Griffin submits that without Attorney Meetz' explanation, this Court would not be able to independently conclude that failure to obtain and make use of the weather data for impeachment was not prejudicial.

Griffin alleges that the credibility of Tina was essential to the case and that given the specific factual allegations in Griffin's post conviction motion, the trial Court should have conducted a Machner hearing in order to assess whether Attorney Meetz' conduct was deficient and if so, whether the deficient conduct was prejudicial. This Court should find that the allegations of Attorney Meetz' ineffectiveness that Griffin advanced are supported by

factual assertions. i.e.- the weather data and Griffin's affidavit attached to his post conviction motion.

The response states nothing that would refute that Attorney Meetz was deficient in non-investigating/ non discovery/ non-use of reasonably available impeaching evidence in the form of the weather data attached to Griffin's Br ass (App.23-24). Nor has the response argued against Griffin's affidavit attached to Griffin's post conviction motion or his brief. The State does not deny or rebut that the weather data is reliable; or that any reasonable Attorney would discover and obtain such evidence, then present it to rebut the States case which hinged on the credibility of the witnesses. Especially since Attornet Meetz himself indicated to Griffin that he would do so.

GRIFFIN REBUTS THE FOLLOWING CLAIMS MADE BY THE RESPONDENT

1. The State claims that the weather data would not have been admissible because it was hearsay and that Attorney Meetz would have needed to find a witness to authenticate any weather data. (Resp. Br.15).

Griffin submits that the State is incorrect in this regard. Griffin argued that the weather data would have been admissible under the Wisconsin rules of evidence. (Griffins Br.30). It is important to take notice that the Respondent acknowledges that Griffin argued that the Court could have taken judicial notice of the historical weather data without requiring Attorney Meetz to locate a witness to testify about the weather. However, the Respondent claims that would have been a decision for the Circuit Court if Attorney Meetz had chosen to pursue this line of impeachment. (Resp.Br.17).

First, Griffin submits that Attorney Meetz informed Griffin that he intended to pursue this line of impeachment but to no avail. Second, it is important to take notice that the Circuit Court was never given the oppo opportunity to decide whether the Court would have taken judicial notice of

the historical weather data because Attorney Meetz failed to pursue, obtain and attempt to introduce the weather data for impeachment purposes during trial proceedings.

Griffin submits that the Circuit Court could decide whether or not it would have taken judicial notice of the weather data once the Machner hearing is held on this issue.

A. The State claims that Tina still could have taken off her boots even without snow on the ground, and even if she had not taken off her boots Griffin could have done so when he removed her pants. (RESP. Br.16).

Griffin submits that these claims made by the State are for the jury to assess. First, it is important to take notice that Tina testified that the reason she took her boots off was because she did not want to track snow through the house. See trial Transcripts 175:12-17 - first day of trial. And as to the State claiming that even if Tina had not taken off her boots, Griffin could have done so when he removed her pants is inaccurate. This is because Tina's testimony is clear. Tina testified that she took off her own boots and that the reason for doing so was because she did not want to track the snow through the house.

B. The State claims that any failure to impeach Tina about whether it had been snowing was not deficient. And Griffin did not suffer prejudice. (Resp. Br.17).

Griffin submits that a Machner hearing is required so that the deficiency and prejudice prong of Strickland can be assessed by the trial Court. Griffin further submits that the Respondent fails to refute his argument relating to the weather data could have been used to undermine the critical element number three of count three reflected on the judgment of conviction. See Griffin's Br.28). This Court should find that the States failure to refute this proposition constitutes a concession. **CHAROLAIS BREEDING RANCHES**, supra.

ANY ERROR ADMITTING THE LETTER EVIDENCE WAS NOT HARMLESS

Griffin submits that the Circuit Court erred in allowing the letter evidence. This Court should find that it is clear that the jury would not have found Griffin guilty absent the error and that a new trial is warranted.

The Respondent claims that the letters did not make Taylor's testimony more credible and that Griffin failed to explain any such link. (Resp. Br.21). Griffin submits that the State is incorrect in this regard. Griffin did in fact explain such a link. Griffin argued that the two letters were able to be used to bolster Taylor's testimony and that it is reasonable to conclude that if the jury had reason to doubt Taylor's version of events because of his plea deal to testify against Griffin then the introduction of the two letters as part of Taylor's testimony could reasonably give the jury a reason to believe his testimony as being truthful. (Griffin's Br. at 36 and 37).

A. The trial Court erred in allowing the letter evidence at trial.

The Respondent claims that the letters were relevant evidence to Griffin's guilt. (Resp.Br.18). The Respondent further claims that relevancy is the tendency to make a fact of consequence more probable than without the evidence Wis.Stat.904.01 (Resp.Br.18). Griffin submits that the trial Court never applied the legal standards of Wis.Stat.904.01 to determine whether the letters were relevant evidence to Griffin's guilt. Therefore, this Court should find that the trial Court failed to apply a proper legal standard in allowing the letter evidence at trial.

Likewise, Griffin submits that the trial Court never made an implicit ruling on the authentication of the letters. The trial Court did not make a finding that authentication conforming with statutory requirements. The trial Court only made a ruling on the authentication of the letter evidence after

Griffin advanced this issue on appeal. (Griffin's Br.35). The Respondent did not refute this argument. Therefore it should be deemed admitted.

B. The Respondent failed to refute Griffin's argument relating to the trial Court conducting its own independent investigation of the letter evidence. (Griffin's Br.34-35)

Griffin argued that the Trial Court conducted it's own independent investigation (two months after the trial Court allowed the admission of the two letters into evidence during trial proceedings) as to whether Griffin wrote the two letters, should be read in the context of the trial Court possessing self knowledge that the State never offered the Court with sufficient evidence to establish that Griffin wrote the two letters. The Respondent did not deny or rebut Griffin's argument in this regard. This Court should find that the Respondents failure to refute this proposition constitute a concession. See **Charolais breeding ranches,** supra.

C. The Respondent claims that the jury never heard thatGriffin and Taylor were in jail when the letter exchange happened.(Resp.Br.19)

Griffin submits that the State is correct in this regard. However, Griffin argued that the danger of unfair prejudice of the letters being passed inside the jail should have outweighed the probative value of the two letters in question.

This Court should find that the trial Court erred by ruling that Taylor could be asked how he came to be in reciept of the letters and from whom he received the letters, so long as the jury was not made aware that the men were in custody at the time the letters were passed. This Court should also find that the Trial Court never made a ruling that the letters could be read by either Taylor or the State. The trial Court only made reference to the passing of the letters and not to the contents or reading of the letters.

Lastly the Respondent claims that Taylor's explanation that he got the letters from Griffin is Strong circumstantial evidence that Griffin also wrote the letters.(Resp.Br.19). The State cites to State v. Giacomantonio,2016 Wi App 62, P.21 for the proposition that authentivation can be established through circumstantial evidence.

Griffin submits that the case of Giacomantonio renders no support to the facts of this case. This is because in Giacomantonio a dtective testified that he saw the text messages when the victim's mother brought the phone to him and that he took screen shots of the messages and that the screen shots accurately depicted that the text message he viewed.

. Next, the victim testified that Giacomantonio was the author. The victim testified that to the phone number that was associated with Giacomantonio's phone, and that the messages had come from him and that the messages used in the exhibits at trial were typical messages she would recieve from him.

Here, in contrast, Taylor was the only proponent testifying to the letter evidence. The text messages in Giacomantonio were corroborated by other witnesses. Taylor never testified that Griffin was the author of the two letters. Nor did Taylor testify that the letters used in exhibits at trial were typical letters he would recieve from Griffin. And just because Taylor explained that he got the letters from Griffin does not imply that Griffin wrote the letters. These key differences make Giacomantonio inapposite. The jury should never have been able to consider the letter evidence. Nor should the jury have been allowed to consider the circumstantial evidence of the letters. Why? because the trial Court should have excluded the letter evidence.

This Court should grant a new trial by finding that the trial Court erred by allowing the letter evidence at trial and that the letter evidence was not harmless.

CONCLUSION

Griffin asks this Court to find that he should be entitled to a evidentiary hearing on his Brady claim. And that he should be entitled to a machner hearing on his ineffective assistance of counsel claim to preserve counsel's testimony for purposes of appeal. This Court should also find that Griffin is entitled to a new trial based on the erroneous admission of the letter evidence.

CERTIFICATION AS TO FORM/LENGTH

I certify that this Brief meets the form and length requirements of Rule 809.19(8)(b)and (c). The length of this Brief is 13 pages and 2,714 words.

Ronald H. Griffin # 420720
N.L.C.I.
P.O. BOX 2000
New Lisbon Wi, 53950

RESPECTFULLY SUBMITTED

Ronald Griffin