14AP2672

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP002672

(Milwaukee County Case No. 2009CF002728)

STATE OF WISCONSIN,
Plaintiff-Respondent,

V.

LARRY D. WRIGHT,
Defendant-Appellant.

Appeal From The Final Order Entered In The Circuit Court For Milwaukee County, The Honorable Jeffrey A. Wagner Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Brief Submitted By:
Larry D. Wright,
Pro Se Litigant.

Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970

TABLE OF CONTENTS

CASES CITED

STATUES CITED

United States Constitution:

Wisconsin Constitution

Wisconsin Statutes:

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. Publication is not necessary as the questions presented by this case have already been decided by published cases within this state.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2014AP002672
(Milwaukee County Case No. 2009CF002728)

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs.

LARRY D. WRIGHT,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

The case against Mr. Wright commenced with the filing of a Criminal Complaint on May 28, 2009 alleging three counts of Second Degree Sexual Assault of a Child (under 16 years of age) pursuant to §948.02(2) Wis. Stat. (R. 3).

On October 12, 2009 a preliminary hearing was held (R. 42). The Court heard testimony from the alleged victim S.F. Id. Wright objected to the State's request for bind over. The Court denied Wright's motion to dismiss and then found that probable cause existed that a felony was committed and bound the matter over for trial. Id.

On July 1, 2010 the final pretrial hearing was held (R. 47). On this date, the state filed an Amended Information and two additional counts of child enticement, Class D felonies (R. 11).

Wright objected to the filing of the Amended Information, the court determined that Wright was not prejudiced and therefore allowed the state to file the Amended Information (R.47). Wright entered not guilty pleas to the charges in the Amended Information Id.

On July 19, 2010 Wright's jury trial commenced (R. 49). The jury heard testimony from, inter alios, the alleged victim S.F.,[1] Detective Lucretia Thomas ("Det. Thomas"), Kitty Brown ("Brown"), Marilyn Goudy, and Demetrius Wright (no relation to the defendant-appellant) (R. 49-21).

On July 22, 2010 the jury heard closing arguments and the jury was charged to deliberate (R. 54). The jury returned a verdict thereafter Id. The jury found Wright not guilty in Count One, not guilty in Count Two, guilty in Count Three, guilty in Count Four and Count Five (R. 18-22). The jury was polled. Wright moved for an acquittal as to Count One and Two (R. 54). The Court entered a judgment on the verdicts Id.

On July 29, 2010 the Court held a hearing on Wright's motion to grant an acquittal notwithstanding the verdict on Count 3, 4 and 5 (R. 55). At the conclusion of arguments on the matter the Court denied Wright's motion Id.

On September 30, 2010 Wright appeared for sentencing (R. 56). The Court sentenced Wright to Nine years initial confinement and Seven years extended supervision on Count Three; Nine years initial confinement and Seven years extended supervision on Count

---

1/ Because the alleged victim in this matter was a juvenile at the time of the alleged commission of the crimes, Wright has only identified her by initials consistent with Wisconsin State. §809.19(1)(g)(2011-12).

Four to run concurrent with Count Three and concurrent with Count Five; Five years initial confinement and Five years extended supervision on Count Five to run concurrent to Count Three and Four (R. 56).

Mr Wright timely submitted notice of intent to pursue post-conviction relief on October 14, 2010 (R. 30). Attorney Carl W. Chesshir was appointed to represent Wright on appeal.

On Appeal Attorney Chesshir argued that the trial court erred by granting the state's request to give jury instruction Wis. JI-Criminal 172 Circumstantial Evidence: Flight, Escape, Concealment; and, that the trial court erred by denying Wright's request to give jury instruction Wis. JI-Criminal 330 Impeachment of Witness: Character For Truthfulness (R. 59).

On May 7, 2013 this court issued its decision, which affirmed Wright's judgment of conviction (R. 59).

Wright, still represented by Attorney Chessir, sought review before the Wisconsin Supreme Court. That court denied review without cost on October 21, 2013 (R. 21).

On September 2, 2014 Wright filed a motion for postconviction relief pursuant to Wis. Stat. §974.06 (R. 65). Therein Wright presented the arguments which are now the subject of this appeal Id. The circuit court, Hon. Jeffrey A. Wagner presiding, denied Wright's motion without a hearing (R. 68).

Wright timely filed his notice of appeal (R. 70), and the appeal record was filed in this Court on January 7, 2015. This court has jurisdiction to hear this matter as it is now properly docketed before the court.

STATEMENT OF FACTS

According to the Criminal Complaint and Amended Information, the alleged victim (S.F.) knew Wright as an employee of the Metro Quick Mart, located at 5011 West Fond du Lac Avenue. The Metro Quick Mart was a convenience store owned by Wright and his fiance and frequented by S.F. According to the Complaint, on May 15, 2009, Wright picked S.F. up from her home, took her to the Quick Mart, and led her to the basement of the store. It was further alleged therein that Wright then removed S.F.'s clothing and they engaged in sexual intercourse (R. 3).

The Complaint further alleged three days later, on May 18, 2009, Wright again picked S.F. up and drove her to a motel in Oak Creak where they engaged in sexual intercourse twice. S.F., after being confronted about sneaking out of her home, informed her legal guardian about the alleged sexual activity with Wright, prompting the guardian to take the victim to the Quick Mart, where S.F. identified Wright's vehicle (R. 3).

Having plead not guilty to all of the charges Wright proceeded to trial. At trial, S.F. testified that she engaged in sexual intercourse with Wright three times, once in the basement of the Quick Mart and twice at a motel (R.50). S.F. also testified that Wright had twice bribed her to submit recantation letters, stating that she lied about the assaults. S.F. testified that because she wanted the money she submitted letters indicating she lied about having sexual intercourse with Wright Id. The first letter, written by Wright's fiance, Apolonia Jackson (Jackson),

but signed by S.F., stated that S.F. made up the events of May 15, 2009 "for attention". The second letter, written by S.F. herself, stated that she felt "guilty" for what she said to the police, and that she "had never been in the hotel" with Wright. S.F. changed her testimony, from that of the letters, in the presence of the jury and testified she had in fact had sexual intercourse with Wright at the Quick Mart and motel (R. 51).

Demetrius Wright, (no relation to the defendant), a close family friend of S.F. also testified at trial. Demetrius testified that he was with S.F. when she wrote the second letter (R. 53). However, his testimony about the events surrounding the victim's authoring of the second letter disputed S.F.'s testimony. Demetrius told the jury that he was concerned for S.F. because she was "a known liar."

Jackson also testified at trial. She told the jury that she wrote a recantation letter on behalf of the victim because the victim approached her (Jackson) and admitted to lying about the events of May 15, 2009. Jackson testified that she told the victim to write a letter, but because the victim struggled to spell, Jackson wrote the letter for her (R. 21).

Wright was ultimately acquitted of the charges alleged to have transpired on May 15, 2009, at the Quick Mart (R. 18 & 19). However, Wright was found guilty of the events alleged to have taken place on May 18, 2009, at the motel located in Oak Creak (R. 20-22).

Additional facts will be developed below as they become necessary for the understanding and/or clarification of a particular argument.

ARGUMENT [2]

I. WRIGHT ADEQUATELY PLEADED SUFFICIENT FACTS WITHIN HIS POSTCONVICTION MOTION TO ENTITLE HIM TO AN EVIDENTIARY HEARING.

Wright was entitled to an evidentiary hearing on his claims as he adequately pleaded sufficient facts to entitle him to the relief requested.

The issue in this case is whether Wright's Wis. Stat. §974.06 motion is sufficient on its face to entitle him to an evidentiary hearing on his ineffective assistance of postconviction counsel claim. Sufficiency of the motion is a question of law, which this court must review de novo. John Allen, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433. If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. Id. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court. Id. (citing State v. Bently, 201 Wis.2d 303, 310-11, 548 N.W.2d 50 (1996); Nelson v. State, 54 Wis.2d 489, 497-98, 195 N.W.2d 629 (1972)).

Whether counsel was ineffective is a mixed question of fact and law. State ex rel. Flores v. State, 183 Wis.2d 587, 609, 516

---

[2] The court below did not dispute that Mr. Wright showed "sufficient reason" under Wis. Stat. §974.06(4). Any argument that Wright's motion should have been barred must fail as Wright properly alleged ineffective assistance of postconviction counsel. See, e.g., State ex rel Rothering, 205 Wis.2d 675.

N.W.2d 362 (1994). The circuit court's finding of fact will not be disturbed unless shown to be clearly erroneous. State v. McDowell, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. Flores, 183 Wis.2d at 609.

Likewise, a defendant who alleges in a §974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wish to bring are clearly more stronger than the claims postconviction counsel actually brought. See State v. Starks, 2013 WI 69, ¶6, 349 Wis.2d 274, 833 N.W.2d 146. However, in evaluating the comparative strength of the claims, reviewing courts should consider any objectives or preferences that the defendant conveyed to his attorney. State v. Romero-Georgana, 2014 WI 83, P4, 849 N.W.2d 668, 672. A claim's strength may be bolstered if a defendant directed his attorney to pursue it. Id. at P4.

A. Factual Background

Wright presented claims within his §974.06 motion which can be classified in two categories: 1) Ineffective assistance of Postconviction counsel and 2) Ineffective assistance of trial counsel. While Wright argued his claim as ineffective assistance of postconviction counsel, based on that counsel's failure to argue ineffective assistance of trial counsel, the circuit court never dealt with Wright's ineffective assistance of postconviction counsel's claim. Instead, opting to decide the merits of the underlying ineffective assistance of trial counsel claim.

II. WRIGHT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Wright was denied the effective assistance of counsel at trial. U.S. Const. amends. VI & XIV; Wis. Const. art I, §7. There was no legitimate basis for the identified conduct or failure of counsel identified below, such conduct or failure was unreasonable under prevailing professional norms and Wright's defense was prejudiced by it.

A. Standard for Ineffectiveness

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" State v. Johnson, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986), quoting Strickland v. Washington, 466 U.S. 668, 688 (1984). In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; see Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

It is not necessary to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. Kimmelman v. Morrison, 477 U.S. 365, 383 (1986); see United States v. Cronic, 466 U.S. 648, 657 n.20 (1984). The deficiency prong of the Strickland test is met when counsel's errors were the result of oversight rather than a reasoned defense strategy. See Wiggins v. Smith, 539 U.S

510, 534 (2003); Dixon v. Snyder, 266 F.3d 693, 703 (7th Cir. 2001); State v. Moffett, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989). Moreover, "'just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should not construct strategic defenses which counsel does not offer.'" Davis v. Lambert, 388 F.3d 1052, 1064 (7th Cir. 2004), quoting Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990). See also Kimmelman, 477 U.S. at 386-87 (same).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under Strickland] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" Moffett, 147 Wis.2d at 354, quoting Strickland, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." Id. at 357

"Reasonable probability," under this standard, is defined as "probability sufficient to undermine confidence in the outcome.'" Id., quoting Strickland, 466 U.S. at 693. If this test is satisfied, relief is required; no supplemental abstract inquiry into the "fairness" of the proceedings is permissible. Williams v. Taylor, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must assess the totality of the circumstances, and thus the cumulative effect of **all** errors. E.g., Strickland, 466 U.S. at 695; Alvarez v. Boyd,

255 F.3d 820, 824 (7th Cir. 2000); State v. Thiel, 2003 WI 111, ¶¶59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel).

Once the facts are established, each prong of the analysis is reviewed de novo. State v. Cummings, 199 Wis.2d 721, 747-48, 546 N.W.2d 406 (1996).

B. Trial counsel's performance was deficient.

As Wright argued before the circuit court, Det. Thomas was the lead detective investigating the alleged sexual assault of S.F. . Det. Thomas was also the court officer on behalf of the state. Det. Thomas testified during two separate proceedings involving Wright. First, Det. Thomas testified on May 25, 2010 and July 7, 2010, during Wright's revocation proceedings. Det. Thomas's next testified during Wright's trial on July 20 and July 21, of 2010. Det. Thomas's testimony during both hearing contradicted the previous facts set forth within an incident report prepared by Det. Thomas, shortly after the alleged assaults in May of 2009. More particularly Det. Thomas, in the incident report, indicated that Rada Prpa ("Mrs. Prpa") stated she checked Wright in on May 18, 2009, and that her husband, Rade Prpa ("Mr. Prpa") checked Wright in the night before (May 17, 2009)(Appendix A001). Det. Thomas's report also indicated that Mrs. Prpa said Wright was with a white girl, who brought in his ID for him. Id. During Wright's revocation hearing, and later during Wright's trial, Det. Thomas testified contrary to the facts contained in her own incident report. Det. Thomas's now claimed that Mr. Prpa checked Wright in on May 18, 2009 and that Mrs. Prpa actually checked

Wright in the night before (R. 52 at 7). Obviously Det. Thomas's testimony and report could not both be correct, but despite these conflicts counsel never properly impeached Det. Thomas's testimony.

a. Failure to investigate.

As previously noted, Det. Thomas prepared an incident report on May 27, 2009, in which she notes that during the investigation of the alleged sexual assault of S.F. she interviewed Mrs. Prpa, the manager of the Oakwood Motel, as to whether she recalled Mr. Wright being at the motel within the previous few days. Det. Thomas indicates that at one point Mrs. Prpa recalls Mr. Wright staying at the motel and that she had seen a thin white girl bring in his ID for him. Det. Thomas notes that Mrs. Prpa said that she checked Wright in on the second night there (5-18-09) and that her husband said to her that he (Wright) was there the night before too (Appendix A001). Which of the two Prpas checked Wright in on the night of May 18, 2009, would later become a major point of contention as S.F. claimed to have been assaulted, by Mr. Wright, on the night of May 18, 2009, at the Oakwood Motel. But, obviously if Mrs. Prpa checked Wright in on that night S.F. could not have possibly been with Mr. Wright as Mrs. Prpa recalled seeing a thin white girl (Kitty Brown) with Mr. Wright at the time she checked him in; incidentally, S.F. is African-American (Appendix A001).

Wright previously supplied an authentic copy of the audio recording of the revocation hearing to the circuit court. That recording was considered by the circuit court.

Wright was represented by Attorney Andrew J. Golden ("Golden") throughout the revocation proceedings. Both Attorney Golden, and Wright's trial counsel, Attorney Thomas Marola ("Marola"); according to Golden, "traded" information between themselves throughout the proceedings in Wright's case (See Attorney Golden's April 21, 2014 letter in the appendix). Attorney Golden informed Wright that he (Golden) did in fact inform Attorney Marola of Det. Thomas's testimony at the revocation hearing and how it did not match the report she had originally written. Id.

It is Wright's contention that counsel had three separate areas of investigation he could have pursued in preparation for cross-examining Det. Thomas. This is especially true in light of the fact that Attorney Golden cautioned Attorney Marola that Det. Thomas had provided contradicting testimony during Wright's revocation proceedings. First Attorney Marola should have subpoenaed Det. Thomas' Memo book/notes, or in the alternative sought to compel their production after the state failed to provide them in response to Attorney Marola's discovery demand. Next counsel should have interviewed and/or subpoenaed Mr. Prpa so as to determine what his recollection was of the date that he allegedly checked Wright into the Oakwood motel. Finally, Attorney Marola should have sought the opinion of a handwriting expert so as to determine whether in fact the writing on both cards matched, thus demonstrating, and supporting, Wright's contention that Mrs. Prpa checked him into the motel on both nights and that S.F. was not with him on the night she claimed to have been assaulted.

Attorney Marola asserted that per his discovery demand, Det. Thomas's memo book/notes should have been provided (see Attorney Marola's May 29, 2014 letter in the appendix). However, Attorney Marola's response does not clarify why he did not subpoena Det. Thomas's memo book/notes; or, motion the court to compel the state to provide the contents of the memo book and notes so that a proper cross-examination could be conducted. It is inexplicable that counsel would abdicate his duty to adequately cross-examine Det. Thomas, especially in light of the fact Attorney Golden had warned him that Det. Thomas had provided testimony during Wright's revocation hearing that conflicted with statements contained within her incident report. Attorney Marola's May 29, 2014 correspondence confirms that his failure to obtain Det. Thomas's memo book/notes was unintentional, i.e., he believed they would be provided in response to the discovery demand (Maroloa's May 29, 2014 letter (appendix)). Deficient performance is shown where, as here, counsel's errors are the result of oversight rather than a reasoned defense strategy. See, E.g., Wiggins, 539 U.S. at 534; Dixon, 266 F.3d at 703; Moffett, 147 Wis.2d at 353.

Likewise, counsel's rationale for failing to investigate or subpoena Mr. Prpa to testify as to whether or not he checked Wright into the Oakwood Motel on the night of May 18, 2009, is irrational. Attorney Marola contends, in the May 29, 2014 correspondence, that based on Wright's assertion that Mrs. Prpa checked him in on both nights he made a strategic decision not to investigate or subpoena Mr. Prpa to testify, so that he could then highlight the fact that the state did not call him to

testified to having checked Wright in on May 18, 2009. However, counsel's position is flawed in that despite Wright informing him that Mrs. Prpa checked him into the motel on both nights, counsel failed to even interview Mr. Prpa to determine whether Wright in fact was correct. Obviously had counsel interviewed Mr. Prpa and discovered that he had not checked Wright in, on either night, Mr. Prpa's testimony would have clearly refuted Det. Thomas's conflicting testimony and supported Wright's, alibi defense, that he was at the motel on May 18, 2009 with a "thin white girl" (Kitty Brown) when S.F. claimed to have been there with Wright. As to any strategy claim Attorney Marola may make, that his decision to forgo interviewing Mr. Prpa and subpoenaing him to testify, such strategy must be deemed irrational given that unless or until Attorney Marola actually interview Mr. Prpa to determine whether he in fact checked Wright in on either night, he could not determine the benefit; or lack thereof, of any potential testimony provided by Mr. Prpa. See, e.g., Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)(even tactics "must stand the scrutiny of common sense."); see also State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161, 169 (1983).

Finally, Attorney Marola's failure to interview (investigate) Mr. Prpa was further aggravated by Attorney Marola's failure to secure a handwriting expert to compare the handwriting on both of the motel registration cards to determine whether they in fact matched; which would have then confirmed Wright's assertion that it was Mrs. Prpa that checked Wright in on both nights. Attorney Marola offers two explanations for his failures in this regard.

First, Attorney Marola claims to not have been aware of whether or not the original records were available (Marola's May 29, 2014 correspondence (appendix)); and Second, that he did not believe that "the check in was determinative". Id. As to counsel's first contention Wis. Stat. §910.01(4) allows for the use of duplicates. See also Wis. Stat. 910.04(3). Secondly, neither of Attorney Marola's explanations can be deemed rational. Especially in light of the fact the state used the photographs of the very same registration cards in it's case-in-chief during Wright's trial. Furthermore, there is no indication counsel even sought to find out whether or not the originals were available for examination. Finally, counsel was clearly made aware, prior to trial, that Det. Thomas had provided testimony that Mr. Prpa checked Wright in on May 18, 2009; and, that Mrs. Prpa actually checked him in on May 17, 2009. Attorney Marola was aware that such an about-face by Det. Thomas was significant in that S.F. claimed to have accompanied Wright to the motel on May 18, 2009, where she claimed to have later been assaulted. However, Det. Thomas noted, within her original incident report, that Mrs. Prpa checked Wright into the Oakwood motel on the night of May 18, 2009, and that a skinny white girl (Kitty Brown) was with him and brought in his ID card. Attorney Marola was further aware that Wright was relying on kitty Brown as his alibi for the night S.F. claimed Wright assaulted her, i.e. May 18, 2009. Thus, most rational attorneys would want to bolster their clients alibi with as much supportive evidence as one may be capable of mustering.

The relationship of effective investigation by a lawyer to competent representation at trial is obvious, for without adequate investigation counsel is not in a position to make the best use of such mechanisms as cross-examination, impeachment, and pre-trial motions... State v. Harper, 57 Wis.2d 543, 205 N.W.2d 1, 7 (1973). Here, Attorney Marola appears to claim that he made a strategic decision not to investigate. Id. However, it is the unusual case where an attorney can make a rational decision that investigation is unnecessary, but as a general rule an attorney must investigate a case in order to provide minimally competent representation. See, E.g., Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984). In the present case counsel indicates he was "not aware" of whether the original registration cards were available; and, that he did not "believe" that the check in was determinative. Again, Attorney Marola's failure, according to his own assumptions, were neither intentional nor based on some defense strategy or tactic. Rather, Attorney Marola simply did not take the time to inquire or investigate whether the original registration cards were available and therefore his failure constitutes deficient performance. E.g., Wiggins, 539 U.S. at 534; Moffett, 147 Wis.2d at 353.

Finally, contrary to the circuit courts finding. Under Strickland, Attorney Marola had "a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91. If counsel's failure to look into certain leads or

evidence is based on a failure to fully investigate, or to obtain and review discovery, the deficiency determination turns on whether the failure to investigate was itself unreasonable, not on what the investigations would have discovered. Wiggins, 539 U.S. at 522-523. That failure to complete a reasonable investigation makes a fully informed strategic decision impossible.

Likewise, the failure to investigate is unreasonable if it was due to oversight rather than an intentional, reasoned strategy, id. at 534, or if counsel intended to investigate but simply forgot to do so. This is the case with respects to the motel registration cards. Attorney Marola does not contend that he would not have hired a handwriting expert, or looked deeper into the matter had he possessed the cards; but instead he claims to not have done so because they were not provided to him, and, that he was not aware whether the original cards were available. This cannot be considered sound strategy.

B. Trial Counsel's Deficient Performance Prejudiced Wright's Defense at Trial

There can be no reasonable dispute that trial counsel's errors prejudiced Wright's defense and that, but for those errors, there exists a reasonable probability of a different result. Because it is the cumulative effect of those errors and the other issues raised here that controls, e.g., Alvarez, 225 F.3d at 824, Wright addresses the cumulative prejudice in Section III, infra.

III. THE CIRCUIT COURT SHOULD HAVE HELD A HEARING ON WRIGHT'S CLAIM OF EX PARTE COMMUNICATION WITH JURY OUTSIDE OF HIS AND HIS ATTORNEY'S PRESENCE

Prior to deliberations the Court, Hon. Kevin E. Martens presiding, issued the following ruling: "...each time we get a note, the clerk will call counsel, advise you that we received a note, and what the note indicates." (R. 54, at Pg. 12). despite the Court's clear ruling that the parties were to be contacted should there be any request for exhibits, a request for det. Thomas' report was made and neither the court, or the parties were notified of this. Instead, the court's bailiffs, unknown to the court or the parties, had contact with the jury (R. 55, at Pg. 8).

On July 29, 2010 the Court held a hearing on Attorney Marola's motion for judgment notwithstanding the verdict. At that time, the Court was informed for the first time that the jury had requested Det. Thomas' police report and that it wasn't provided to the jury (R. 55, Pg. 8). While it was Attorney Marola that addressed the issue to the court, he never objected to Wright's absence during the bailiffs contact with the jurors; or, to the clear violation of the court's order that both parties would be contacted if the jurors requested specific exhibits. Id. Attorney Marola, incorrectly informed the Court that Mr. Wright had informed him that the exhibit was provided to the jury, however there is no indication that Det. Thomas' report was in fact provided to the jurors. Mr. Wright has always maintained that he

did not inform Attorney Marola that he spoke with a female bailiff and she informed him that the document had been provided; and, the circuit court presumed in its' order that the jury never received the requested documents (R. 68, Pg. 8), to this date it remains unknown whether the jurors received Det. Thomas' report, despite it's obvious significance to a major disputed issue at Wright's trial. The trial court, despite the significance of the violation of it's previous order, failed to either seek to reconstruct the record, or inquire of the bailiffs charged with overseeing the deliberations, whether in fact the jurors received Det. Thomas' report (R. 55, Pg. 8).

While it was Attorney Marola that addressed the issue to the court, he never formally objected to Wright's absence during the bailiffs contact with the jurors; or, to the clear violation of the court's order that both parties be contacted if the jurors requested specific exhibits. Id. Attorney Marola, incorrectly informed the Court that Mr. Wright had informed him that the exhibits were provided to the jurors, however there is no indication that Det. Thomas' report was in fact provided. Mr. Wright has always maintained that he did not inform Attorney Marola that he spoke with a female bailiff, and that she informed him that the report was provided to the jurors (Wright's Affidavit at ¶7). In fact, Mr. Wright maintains that there was never a female bailiff charged with overseeing deliberations, or participating in Wright's trial (a fact that was easily verifiable by the trial court), but instead that those task were assigned to two male bailiffs, those bailiffs being James Ford and OT Latavong (Appendix 2). Wright maintains that he remains unaware, till this day, whether or not the jury ever received

Det. Thomas' report.

Ultimately the Court's instruction that all parties be informed of any notes, by the jurors, requesting specific documents was violated. Furthermore, Wright did not give up his right to be present, and/or have counsel present via phone should such a request be made. What's more is the Court's failure to either attempt to reconstruct the record, or inquire of the bailiffs whether in fact the jurors received Det. Thomas' report. Obviously this point was and remains significant in light of the fact the testimony provided at trial by Det. Thomas and the dates noted in her report contradicted one another and were significant in relation to the counts Wright was later convicted of. See Supra at 2.

The circuit court, in deciding Wright's ineffective assistance of counsel claim determined that Wright had failed to demonstrate prejudice "because no hearing was held on the note" that "the defendant's claim...must fail" (R. 68, at Pg. 8). The Court also found Wright's claim to be harmless. In doing so the court concluded that the jurors heard a plethora of testimony concerning Thomas' incident report and were obviously able to rely on their collective memory of this testimony in reaching a verdict. Id. The Court's finding, in this regard, is contradicted by the fact that the jury, having heard a "plethora" of testimony about the incident report, requested it during deliberations. Obviously if the jurors were able to rely on their collective memories, without the report, they would have never requested they be provided with a copy of it during their deliberations.

Wright had a right to be present whenever any substantive step

was taken in his case. See Williams v. State, 40 Wis.2d 154, 160, 151 N.W.2d 218 (1968). An accused's statutory right to be present at the criminal trial derives from Wis. Stat. §971.04. In relevant part §971.14 states that "the defendant shall be present:...[a]t trial..." A trial runs from the commencement of jury selection through the final discharge of the jury and any time an action is taken affecting the accused. Williams, 40 Wis.2d at 160.

In the present case, despite the court's order to the contrary, a note was sent from the jurors (Appendix 3) requesting Det. Thomas' police report and neither the court, state, or defense were notified or consulted on whether or not the report should be provided to the jurors (R. 55, at Pg. 8). Likewise, Attorney Marola never objected to these shortcomings, nor sought to reconstruct the record so as to determine whether the jurors ever actually received Det. Thomas' report. Counsel's assertion that Wright informed him that the jurors had received the report is ludicrous as Wright was locked away in the courthouse holding cell, without access to the deliberation room. Likewise, for the sake of this appeal the circuit court presumed the jurors never received Det. Thomas' report. supra. Finally, during the motion hearing itself the state remained unaware of whether the jurors ever received Det. Thomas' report, even after Attorney Marola's fanciful tale of Wright having been informed by some mysterious female bailiff that the report had been provided. Id. at 15. Further frustrating the ultimate question of whether or not the

jurors received the requested report is the fact that jurors were not allowed to take notes during Wright's trial. Moore v. Knight, 368 F.3d 936, 941 (7th Cir. 2004)("Moor's argument is especially persuasive given the conditions of the trial, namely, that the jurors were not allowed to take notes").

The post-conviction court's finding that there was no prejudice is unreasonable due to the fact that a presumption of prejudice applies in situations where ex parte communications were made to the jury by a third party. The Supreme Court has stated, "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during the trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ... the burden rest heavily upon the government to establish...that such contact with the juror was harmless to the defendant." Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450 (1954). Although the Seventh Circuit has distinguished Remmer from cases where the contact with the juror was made by the judg, instances involving a judge's use of the bailiff to verbally communicate with the jury remains under the purview of Remmer. See, United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 (7th Cir. 1974)(applying Remmer framework when judge communicated to jury via bailiff); cf., DeGrave v. United States, 820 F.2d 870, 872 (7th Cir. 1987)(applying Remmer framework when court reporter had ex parte communication with jury during deliberations).

Further aggravating Wright's claim is the fact that not even

the judge was notified of the jury's note. The record demonstrates the court was just as shock as both parties that a note had been submitted by the jury and that the court and parties had not been notified of it. Ultimately the post-cnviction court's failure to consider the role of the bailiff raises a second, and more worrisome problem: that court's factual findings never actually addressed what the jury was told during the ex parte communications as this half of the inquiry is a necessary component of any determination of prejudice. Moore, 368 F.3d 936, 943.

This Court, on the record before it is left to determine whether the bailiff provided the jury with the requested incident report, and, if the bailiff did not provided the jury with the report what was his (the bailiff's) explanation for not doing so and how did he word the rejection to the jury. Wright cannot be faulted for the lack of an adequate record as he has presented the issue adequately to the post-conviction court, as that court did not find otherwise, instead the post-conviction court failed to presume prejudice and require the "state" to demonstrate such contact with the jury was harmless.

Because Wright did not waive his right to be present when a determination was made whether to provide Det. Thomas' report to the jury, and, because counsel failed to object or seek to reconstruct that portion of the record, counsel's inactions were deficient. There could not have been any strategic advantage during the hearing for Attorney Marola not to seek the reconstruction of the record, and/or a new trial based on Wright's absence from a vital stage of the process and thus

Attorney Marola's performance was deficient. E.g., Wiggins, 539 U.S. at 534; Moffett, 147 Wis.2d at 353.

IV. THE COMBINED EFFECTS OF THE IDENTIFIED ERRORS PREJUDICED WRIGHT'S DEFENSE

Whether in terms of harmless error or prejudice, assessment of the effect of errors on the defendant's trial must be made based on the totality of the circumstances. In other words, it is the cumulative effect of all the errors that matter, not the effect of each in artificial isolation. E.g., Alverez, 225 F.3d at 824; Thiel, 2003 WI 111, ¶¶59-60. Wright, moreover, need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors. Kyles, 514 U.S. at 434-45. Rather, he need only show a reasonable probability of a different result. Id.

Wright's trial was essentially reduced to a swearing match between the alleged victim S.F. and himself, with the central issue being whether S.F. was telling the truth when she alleged Wright sexually assaulted her on two separate occasions. The jury heard testimony strikingly similar in relation to both assaults, e.g., that Wright picked S.F. up, took her to a particular location, had sexual intercourse with her, dropped her off, and having had the sexual encounters found out, bribed S.F. to write recantation letters. However, despite these similarities in S.F.'s allegations, the jury reached two separate conclusions, thus arriving at different verdicts

based on allegations of the same alleged victim. One can only assume, when reviewing the jury's actions objectively, that their rendering of the verdict on the second allegation rested upon their having placed value on the testimony of Det. Thomas, not necessarily S.F.'s credibility. The second allegation was said to have taken place at the Oakwood motel on May 18, 2009. The states evidence in this regard was S.F.'s testimony, which the jury obviously did not find credible with respects to the first alleged incident; and, Det. Thomas' contradicting testimony, which itself was contradicting and contrary to her own documenting of the facts within her incident report prepared shortly after her investigation of the allegations of S.F. began. Wright submits that the identified errors contained herein undermined both pillars of the state's case.

As Wright has pointed out numerous times herein. The jury obviously did not believe S.F.'s testimony standing alone. This, again, is demonstrated by their acquittal of Mr. Wright on the initial alleged assault. Thus, Det. Thomas' testimony became the fulcrum of the state's case and the determining factor for their guilty verdict. But, this conclusion presents even more of a problem for the state's case then it helps.

Prior to the jury's verdict a note was sent requesting Det. Thomas' incident report. As the record now stands none of the parties involved, nor this Court, can say with any level of certainty that the jury actually received the report. Which raises the question of whether they simply got frustrated and

and split the verdict? Yet there remains an additional question. Was their verdict somehow influenced by the ex parte contact between the jury and the bailiff? At this stage of the proceedings these questions remain a mystery because neither Wright's trial attorney Mr. Marola, the state, or the court took the time to question the jury or bailiffs as to what actually transpired in the absence of the parties and the court.

Because the record remains inadequately to answer the touch questions presented by this case, and, because Attorney Marola failed to take the necessary steps to assure that Wright recived a fair trial, a trial comporting with the constitutional standards set forth by the U.S. Const. amends. VI & XIV and Wis. Const. art. I, §7 Wright's attorney's deficient performance prejudiced Wright's defense.

Ultimately because each of the identified errors substantially undermines at least one of the two pillars on which Wright's conviction was based, and because the combination of those errors undermines both, the conviction cannot stand.

V. WRIGHT WAS DENIED THE EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

Wright was denied the effective assistance of post-conviction counsel. See State ex rel. Rothering v. McCaughtry, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996)(ineffectiveness of postconviction counsel properly raised under Wis. §974.06). Specifically, Wright's postconviction counsel, Carl Chesshir, unreasonably failed to raise trial ineffectiveness claims in his motion, despite the fact that these claims were clearly more stronger than the ones he actually raised on direct appeal.

More specifically, Attorney Chesshir unreasonably failed to raise the trial ineffectiveness claims identified in Wright's §974.06 motion and now present here on appeal.

Although postconviction counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, see Smith v. Robbins, 528 U.S. 259, 287-88 (2000), counsel's decision in choosing among issues cannot be isolated from review. E.g., id.; Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). The same Strickland, standard for ineffectiveness applies, with appropriate modifications, to assess the constitutional effectiveness of postconviction or appellate counsel. Smith, supra; see State v. Zeibart, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

The Seventh Circuit has summarized the standard as follows:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient...and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial, "we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996)(state appellate attorney's failure to raise preserved hearsay issue ineffective assistance of counsel, mandating federal habeas relief).

A. Failure to Raise Trial Ineffectiveness.

Wright presented the claims contained herein to Attorney Chesshir prior to his briefing of Wright's direct appeal. In July of 2012, Attorney Chesshir rejected Wright's suggestion that the issues presented here possessed merit and were worthy of exploring, or even presenting under the guise of ineffectiveness of trial counsel (July 20, 2012 correspondence, A004). Attorney

Chesshir was of the belief that Attorney Marola's conducting of Wright's case was unassailable. Id. However, there is no evidence that Attorney Chesshir identified the significance or relation of the ineffectiveness claims contained herein. For instance, Attorney Chesshir, in his July 20, 2012 correspondence, only addressed two of Wright's concerns, i.e., counsel's failure to introduce recordings made by Wright himself and S.F.; and, Attorney Marola's failure to introduce additional evidence to impeach S.F.'s credibility. Id. Wright's complaints about Attorney Marola's conduct was not exclusive to these two issues, however Attorney Chesshir limited his response to these two claims only.

Wright sought to obtain a reasoning or justification for Attorney Chessir's omission of the claims contained herein, however counsel failed to respond to Wright's inquires (Wright's correspondence, A005).

Attorney Chesshir's failure to raise such obvious ineffectiveness is, of course, deficient performance, resulting as it does from oversight rather than any reasoned appellate strategy. Wiggins, supra. What's even more is that Attorney Chesshir out-of-hand rejected Wright's request that he present these claims during the direct appeal. Even if Attorney Chesshir did not find cause to present ineffectiveness claims again Attorney Marola based on Marola's failure to investigate, there can be no doubt the record clearly reflects the ex parte communication issue as well as the surrounding questions as to whether the jury ever received the requested incident report.

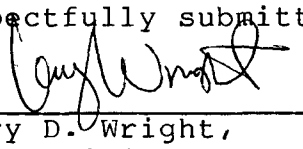
Attorney Chesshir was aware that the jury had acquitted Wright of counts 1 and 2, and further, that the state's case with respects to counts 3, 4 and 5 hinged on the jury finding Det. Thomas' recollection at trial more reliable than at the time of the original report. However, despite this knowledge Attorney Chessire took no steps to challenge the omissions by Attorney Marola. Thus, Attorney Chesshire's performance was deficient and resulted in his presenting claims that were inferior to the claims presented in Wright's §974.06 motion, and now on appeal.

CONCLUSION

For these reasons, Larry D. Wright respectfully asks that the Court reverse the order denying his postconviction motion, vacate the judgment of conviction, and remand with directions to enter an order granting him a new trial.

Dated at Redgranite, Wisconsin, March 10, 2015.

Respectfully submitted,



Larry D. Wright,
Pro Se Litigant.

Redgranite Corr. Inst.
Post Office Box 925
Redgranite, WI 54970

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of those portions of the brief referenced in Wis. Stat. §809.19(8)(c) is 28 pages.

Larry D. Wright,
Pro Se Litigant.