

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.

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF DATED
OCTOBER 23, 2014, OF THE CIRCUIT COURT OF MILWAUKEE
COUNTY, THE HONORABLE JEFFREY A. WAGNER, CIRCUIT COURT
JUDGE, PRESIDING

LARRY D. WRIGHT,
PRO SE LITIGANT.

REDGRANITE CORR. INST.
P.O. BOX 925
REDGRANITE, WI 54970-0925

ARGUMENT

A. Wright sufficiently demonstrated trial counsel's ineffectiveness in failing to investigate.

The State declares that Mr. Wright's legal arguments are inadequate and failed to make even a minimal showing that his trial attorney was ineffective for failing to investigate. (State's Br. at 49). However, the State fundamentally misunderstands the facts of Wright's case and the arguments presented to the circuit court, and this court within Wright's brief in chief. The State misses the significance of Det. Thomas' report and the statements of Mrs. Prpa made therein.

The State attempts to minimize the importance of Det. Thomas' police report and the crucial role Mrs. Prpa's identification of Wright and the time for which she places him at the Oakwood motel. Wright asserts that in a case, such as this, which relies solely upon a "swearing match" between the defendant and alleged victim there is little room for defense counsel to forgo crucial areas of investigation which may reveal impeachment evidence. Cf., State v. Jenkins, 2014 WI 59 (2014).

The Court in Jenkins held that the failure to call a potential witness may constitute deficient performance. The Court relied on the Seventh Circuits holding in Toliver v. Pollard, 688 F.3d 853, 862 (7th Cir. 2012), which held "in a 'swearing match' between two sides, counsel's failure to call two useful, corroborating witnesses, despite [potential bias as a result of] the family relationship, constitutes deficient performance.

While Wright's counsel was not faced with the need to investigate or call a particular witness, in this instance, Wright contends that Det. Thomas' notes and/or memo book was just

as significant an area of investigation, in light of the fact counsel was warned prior to trial that Det. Thomas had previously changed her testimony during Wright's parole revocation hearing.

Det. Thomas' conflicting versions of which night Mrs. Prpa identified Wright as being at the Oakwood motel was crucial to the jury's ultimate verdict. Det. Thomas had no explanation as to why her testimony so dramatically changed as to the night Mrs. Prpa originally identified Wright as being at the motel. Thus, it is obvious why a review of her original notes, written on the night of Det. Thomas' interview of Mrs. Prpa would have had a significant impact on Wright's trial.

Wright's attorney was made aware that Det. Thomas had not previously confirmed the facts contained within her supplemental report as to when Mrs. Prpa checked Wright into the motel, counsel's case would have only been strengthened by a review of Det. Thomas' original notes as Det. Thomas later confirmed that such notes are ordinarily used to reference while writing reports.

It is the State's position that there is nothing to demonstrate that Det. Thomas had any memos or notes about this case in addition to her report. (State's Br. at 6). Det. Thomas acknowledge, during Wright's trial, that when she was in the sexual assault unit doing investigations, it was necessary for her to take notes (Appendix at A006). Det. Thomas further acknowledged, therein, that the purpose of her note taking while in the sexual assault unit was so that she could reference the notes while writing reports. Id.

In light of Det. Thomas' admission that while with the sexual assault division (she had since moved to a different division) she had regularly taken notes during investigations, which were later used to reference when writing reports there can be little doubt she would decided to abandon such a practice in Wright's case.

Likewise, it is apparent what Wright contends would have been found within Det. Thomas' notes. After all, she herself confirmed that her notes were used to reference during the police report writing process. Therefore, it is reasonable that Det. Thomas' report, written a year earlier (with references from her notes), would have been more reliable than that of her bald recollection as to which night Mrs. Prpa indicated Wright was checked into the motel by herself.

Obviously had counsel subpoenaed Det. Thomas' notes and discovered (consistent with Det. Thomas' testimony) that the date written within the notes for when Mrs. prpa checked Wright into the motel was in fact May 18, it would have served to demonstrate that Wright could not have possibly been accompanied by the alleged victim, as Mrs. Prpa observed Wright accompanied by a thin woman (Kitty Brown).

As previously noted, Det. Thomas had no rational explanation for why she would quote Mrs. Prpa, in the police report as checking Wright into the motel on the night of May 18, if in fact she really meant that she checked him in on May 17, and that her husband had checked him in on the 18th.

Ultimately Wright adequately set forth within his motion

before the circuit court adequate facts to warrant an evidentiary hearing. Therefore, the circuit court erred in not requiring an evidentiary hearing be held to determine why counsel decided to forgo subpoenaing Det. Thomas' notes.

The State's next argument is that Wright failed to establish what Mr. Prpa would have testified to had he been called to do so. (State's Br. at 7). The State further asserts that had counsel investigated Mr. Prpa, i.e., interviewed him that he would not have had any additional information to provide counsel. Id.

The State's factual assertions, within it's brief, complicates Wright's argument as to the significance of investigating and calling Mr. Prpa to testify during his trial. More particularly Wright maintains that trial counsel was informed of the inconsistent testimony given by Det. Thomas, during Wright's revocation hearing, and that that testimony included a version that Det. Thomas' report was not correct in stating Mrs. Prpa checked Wright into the motel on May 18, but instead that she had actually checked him in on May 17, and that it was Mr. Prpa who checked Wright in on May 18. The obvious significance of this change of dates is that if Mrs. Prpa checked Wright into the motel on May 17, then it would have been that night she observed Wright with the thin white woman, not May 18, the night of the alleged assault. Therefore, Wright's alibi defense, which had been corroborated by Det. Thomas' police report became contradicted by Det. Thomas' assertion that she had been mistaken in the days she listed

Mrs. Prpa as checking Wright into the motel.

Wright contends that the jury not only heard a different version of what Mrs. Prpa informed Det. Thomas as to which of the two nights she checked Wright into the motel, but that even Mrs. Prpa's recollection had become diminished by the time of Wright's trial. More particularly Mrs. Prpa could not recall whether she in fact checked Wright in on both nights, or whether her husband had checked him in on one of the nights.

Ultimately, the significance of the conflicting versions loss on the jury as Wright was found not guilty of the first count and the charges surrounding that alleged incident, however the jury convicted Wright of the charges surrounding the Oakwood motel incident. What's more, prior to rendering it's verdict, the only exhibit the jury requested was Det. Thomas' police report.

Wright maintains that had counsel interviewed and called Mr. Prpa to testify as to whether he in fact checked Wright into the Oakwood motel on either night, Wright's alibi defense would have been aided by the fact that Mr. Prpa had not in fact checkd Wright in on either night, therefore leaving Mrs. Prpa original statement, i.e., that she checked Wright in on the night of May 18, and that he was accompanied by a thin white woman antiseptic. After all, Det. Thomas had to believe the matter significant, otherwise why change the date Mrs. Prpa checked Wright into the motel from the original date listed in the report?

Wright contends that his brief in chief adequately articulates his position with respects to the significance of Mr. Prpa's

testimony and therefore Wright was entitled to an evidentiary hearing on the matter.

Finally, the State contends that had Wright's counsel obtain a handwriting specialist, to confirm that it was Mrs. Prpa that checked Wright into the Oakwood motel on both nights, such would have served to only prove that Mrs. Prpa "could" have observed Wright with the white woman on May 17, rather than May 18. (State's Br. at 10). The State's position misses it's mark in this regard.

The State appears to take a circular position in it's brief with respects to Wright's arguments. Wright originally argued the significance of his attorney obtaining Det. Thomas' notes and memo book so as to determine the more reliable date Mrs. Prpa informed Det. Thomas she checked Wright into the motel on. The state seems to have down-played any significance Det. thomas' notes could have provided. However, the State now does an about-face and indicates that a handwriting expert would only serve to prove that Mrs. prpa could have checked wright into the motel on May 17, with the thin white girl. Id. The obvious significance to this is that Det. thomas' original put to rest any doubts as to what Mrs. Prpa was intending by informing her that Wright was accompanied by the thin white woman on May 18, instead of May 17.

Wright's position on this matter was clear before the circuit court and thus Wright maintains that any confusion now interjected by the State, at this point, did not exist at the time the circuit court denied Wright a hearing.

Wright maintains he was entitled to a evidentiary hearing with respects to this claim and that counsel's performance prejudiced his defense.

B. Wright adequately showed counsel was in fact ineffective in failing to adequately preserve Wright's claim with respects to the ex parte communication.

The State appears to again misstate the facts as to the Court's standing order with respects to notes from the jury during deliberations in Wright's case. The Court, prior to deliberations determined that "each time we receive a note, the clerk will call counsel, advise you that we received a note, and what the note indicates." (Transcript, July 22, 2010, Pg. 12) The purpose of the court determining that the parties would be contacted should the jury request exhibits was that there was a fear that some of the exhibits needed to have information redacted should it be provided to the jury.

the State appears to dismiss the court's order, and instead focus on what it believes to be the harmless nature of the baliff's contact. In doing so the State tacitly dismisses the concerns of both the Court and the parties prior to deliberation in which exhibits should be provided to the jury and which should not.

It must be remembered that the trial court structured a ruling that would reserve judgment on which exhibits would be sent to the jury until such time as they made a formal request for a particular exhibit. The Court determined that it would be at that time that it would determine which exhibits could

be presented, as is, and which needed to be redacted. However, the bailiff's failure to notify the Court, upon receipt of the jury's note, deprived both parties of determining whether Det. Thomas' report should have been presented as is, or had some material redacted. In fact, neither the Court, defense, or the State was ever notified that the jury had requested an exhibit until Wright's counsel informed the Court and State of the note.

Whether Wright had an inherent right to be present or not is irrelevant in light of the fact the Court clearly determined all parties would be consulted upon the jury sending a note requesting any exhibits during deliberations.

Because Wright had a right to be present during any ex parte communication with the jury, and because the bailiff's contact, prior to consultation with the Court and both parties clearly violated the Court's previous order, a hearing should have been held to determine whether the jury received Det. Thomas' statement, and whether any improprieties took place. As it now stands the record is completely void of any record as to whether the exhibit was received and what impact the failure to provide the exhibit had on the jury.

Because Wright adequately pleaded his ex parte claim, and because the Court did not dispute Wright's factual assertion, a hearing was required to determine whether the exhibit was ever received by Wright's jury.

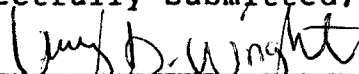
CONCLUSION

CONCLUSION

For the reasons outlined above, Mr. Wright asks this Court remand this matter back to the circuit court for additional proceedings consistent with an evidentiary hearing.

Dated this 17th day of June, 2015.

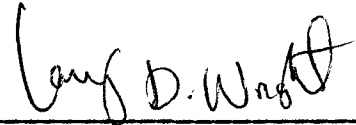
Respectfully submitted,



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a brief produced with a proportional serif font. The length of those portions of the brief referenced in Wis. Stat. § 809.19(8)(c) is 10 pages in length.



LARRY D. WRIGHT, PRO SE