COURT OF APPEALS OF WISCONSIN

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP000185

KEITH M. KUTSKA,

Defendant-Appellant.

Appeal from a final judgment and order denying post-conviction relief entered in Brown County Circuit Court, Honorable James T. Bayorgeon, presiding

---

APPELLANT'S REPLY BRIEF

Steven Z. Kaplan
John W. Lundquist
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Tel. (612) 492-7000
Fax. (612) 492-7077

John H. Bradley
STRANG BRADLEY, LLC
10 East Doty Street, Suite 621
Madison, WI 53703
Tel. (608) 535-1550
Fax. (608) 406-2602

Marie Wolf
INNOCENCE PROJECT OF MINNESOTA
1536 Hewitt Avenue
MS-C1973
St. Paul, MN 55104
Tel. (651) 523-3152
Fax. (651) 523-3042

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

REPLY.....1

I. The State's "Facts".....1

II. Dr. Sens and Anthony Cicero's Testimony.....6

III. Ineffective Assistance of Counsel.....9

IV. The Perjured Kellner, Wiener, and Gilliam Testimony.....11

CONCLUSION.....13

CERTIFICATION.....15

CERTIFICATE UNDER RULE 809.19(12).....15

AFFIDAVIT OF SERVICE.....15

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Chambers v. Mississippi, 410 U.S. 284 (1973).....12

Giles v. California, 128 St. Ct. 2678 (2008).....1

Jensen v. Clements, 800 F. 3d. 892 (7th Cir. 2015).....1

Rompilla v. Beard, 545 U.S. 374 (2005).....10

Thomas v. Clements, 789 F.3d 760 (7th Cir. 2015,
rehearing denied, 797 F.3d 445 (7th Cir. 2015).....10

Wiggins v. Smith, 539 U.S. 510 (2003).....10

Williams v. Taylor, 529 U.S. 362 (2000).....10

WISCONSIN CASES

State v. Love, 2005 WI 116, 284 Wis. 2d. 111,
700 N.W. 2d 62.....8

State v. Edmunds, 2008 WI App 33, 308 Wis. 2d. 374,
746 N.W. 2d 590.....8

State v. Zimmerman, 2003 WI App 196, 266 N.W. 2d 1003,
669 N.W. 2d 762.....10

STATUTES

Wis. Stat. §908.03(3).....12

Wis. Stat. §908.045(4).....12

Wis. Stat. §974.06.....8

RULES

Wisconsin Code of Professional Conduct,
SCR 20.1: ABA Comment [5].....10

OTHER AUTHORITIES

Criminal Interrogation and Confessions,
Inbau, Reid, et. al. (5th ed. 2013).....3

ABA Criminal Defense Standard 4-4.1.....10

REPLY

I. The State's "Facts"

The State embellishes its theory of the case with a host of unsupported, but particularly revealing allegations, including the following:

A. Kutska was "known to be violent" when Monfils reported him to the police. Kutska's playing of the tape provoked anger that led to the defendants' confrontation with Monfils.

In fact, a criminal background check on Kutska confirmed his non-violent history. The "known-to-be-violent" contention is premised on Monfils' phone calls to police in which he described Kutska as "violent" and a "biker type" in an effort to persuade them not to disclose his identity or a copy of the 911 phone call. (R. 147, Exs. 1-2) Contrary to the protections of the Confrontation Clause, Monfils' descriptions of Kutska as "violent" were played for the jury. *Giles v. California*, 128 S. Ct. 2678 (2008); *Jensen v. Clements*, 800 F. 3d 892 (7th Cir. 2015).

The State's anger-in-the-coop argument was premised on one mill worker who testified that, after listening to the 911 call tape, she became disturbed by the atmosphere in the coop and felt the need to leave it. (R. 238 at 84-85) This witness admitted, however, that she never heard any threat of violence or observed anything there that caused her any concern for Monfils' safety. (*Id.*; R. 237 at 86, 175-176, 188, 190) She did not recall hearing Kutska speak at all, other than to

ask what she thought after she heard the tape of the 911 call. (*Id.* at 188) She recalled hearing some references to the union taking action in response to Monfils' reporting Kutska to the police. (*Id.* at 108, 203) Other witnesses refuted her "anger" description and denied that Kutska had fomented any. (R. 235 at 118-119; R. 237 at 175-176; R. 232 at 28, 153, 276-277; R. 236 at 54, 123-125)

Furthermore, immediately after leaving, she saw Rey Moore whom she told to go to the coop to hear the tape, hardly the act of someone troubled by the allegedly overheated atmosphere in the coop. (*Id.* at 89-90) The inference that one or more workers must have acted in anger flowed solely from the presumption that Monfils was murdered. The inference disappears when the presumption does.

B. Dale Basten called Wiener as a "fuckin' squealer." (R. 261 at 128, 159)

The State offered this statement from its other jailhouse informant, James Charleston, to support Wiener's "repressed memory" story of seeing Basten and Mike Johnson carrying "something." Basten made clear, however, that when he saw Wiener on a television news report, he called Wiener a "fuckin' killer" (and not a "fuckin' squealer") because Wiener had killed his own brother.

C. Dale Basten re-enacted the attack on Monfils and confessed to murder.

During an interrogation session, Winkler asked Basten to speculate about how one person could have beaten Monfils. In response, Basten compliantly demonstrated how that could have been done. (R. 263 at 105; R. 261 at 68) Basten's willingness to so is probative of his innocence for the reason stated in the leading treatise on police interrogation techniques:

> [D]uring the investigative interview the innocent criminal suspect is comfortable discussing possible suspects, speculating about possible motives to commit the crime or how it might have been committed. On the other hand, the guilty suspect does not play mental detective as he already knows who committed the crime. Because of this he is uncomfortable theorizing about possible suspects or motives...even if the questions are posed in a hypothetical sense.

(Criminal Interrogation and Confessions, Inbau, Reid, et. al. (5th ed. 2013)

The genesis of the State's Basten-confessed allegation is Winkler's December 4, 1992 report ("Report") purportedly summarizing his interrogation of Basten. As proven, however, there were **two** versions of that Report, the first of which contained **no** reference to any alleged confession. (R. 263 at 98-99)

Some 22 months later, however, Winkler altered the Report by inserting a reference to Basten's alleged confession. Winkler did so in October 1994, he said, after he then allegedly recalled his failure to include it in the original version. One might have wondered, of course, how, if Basten had confessed in early December

1992, Winkler could possibly have neglected to reference it in the first version of the Report and/or why Basten was not arrested then.

Furthermore, Winkler never documented in any manner that that he had altered the Report. (*Id.*) Because defense counsel obtained both copies of the Report in discovery, however, they were able to expose Winkler's actions and misconduct.

D. Kutska removed Monfils' blood from the bubbler area when he spray-washed the floor around the paper machines. (R. 277 at 80)

The State presented the testimony of a mill worker who had seen Kutska washing the floor near the No. 9 machine—a common task for those working on it—on the afternoon of Monfils' disappearance and again on the following day. Although this witness did not see Kutska at or near the bubbler area on either occasion, the State argued that the pressure from the hose was sufficient to cause water to reach that area and remove the blood.

That argument was patently false. Law enforcement had the ability—using black lights and luminol—to detect blood and/or any attempt to remove it, even months or years after it would have first appeared on the mill floor. Indeed, police used those means to search the mill, including the bubbler and vat areas, but found neither blood nor any attempt to remove it. (R. 147, Ex. 36; R. 284: 7/22/15 at 58)

The argument was so unconvincing even to the prosecution that it offered two other entirely inconsistent theories to "explain" the lack of blood. First, it argued that "naturally wet" floor conditions near the bubbler likely accounted for the absence of blood, although there was no forensic support for that claim. (*Id.* at 213)

Next, it told the jurors that the notion that there had ever been any blood at or near the bubbler was nothing but "smoke" being blown in their faces. (*Id.* at 213-214) Of course, it had been Dr. Young who testified that Monfils would have bled "profusely" from his head injuries. (R. 232 at 224-225)

E. Before Monfils' body was found, Kutska acknowledged Monfils' murder when he boasted that he had gotten his "deer."

Because Kutska was upbeat after Monfils admitted reporting him to the police and it was the opening weekend of deer season, Kutska making a satisfied reference to having gotten his "deer" that morning. He made that statement long before learning of Monfils' death, and it was never a reference to it.

II. Dr. Sens and Anthony Cicero's Testimony

Dr. Young's homicide conclusion rested on her assumption that Monfils, although alive when he entered the vat, would have been "too buoyant" in the "thick oatmeal-like" liquid to suffer any injury in the vat while he was still alive. Because she found that he had suffered certain injuries while still alive, she

concluded that those injuries could only have resulted from a beating before he was placed, unconscious or semi-conscious, in the vat. (R. 147, Exs. 16, 18)

Dr. Sens rejected Dr. Young's homicide conclusion for reasons that were unrelated to and independent of Dr. Young's determination that Monfils had suffered pre-mortem injuries. Rather, Dr. Sens did so because:

A. Monfils was indisputably alive when he entered the vat. There were means by which each of Monfils' injuries, whether sustained before, during, or after death, could have been suffered inside the vat. There was no evidence confirming that any injury could only have been caused by a beating;

B. The condition of Monfils' body made it difficult, if not impossible, for a forensic pathologist to determine the cause of any injury and whether any injury was suffered before, during, or after death. Rather than attempting to determine which injuries occurred before death and which occurred later, Dr. Sens classified all of them as "peri-mortem"—i.e., suffered at or near the time of death; and

C. Dr. Young's beating/homicide conclusion was premised on engineering assumptions regarding the purported consistency of the vat liquid, the buoyancy of Monfils' body with the weight tied to it, and the movements of his body in the vat that were far beyond a forensic pathologist's competence.

Aside from the challenges posed by the body's condition, Dr. Sens testified that forensic pathologists are now less confident in their ability to accurately determine whether an injury was suffered before death or after death than they had been at the time of the autopsy. The State argues that this portion of her testimony proves that Dr. Sens rejected Dr. Young's beating/homicide conclusion based on a post-trial development in forensic pathology. It then concludes that any forensic pathology testimony rejecting Dr. Young's analysis would have been unavailable to Kutska's former lawyers, even if they had consulted with a forensic pathologist.

The State errs because Dr. Sens' rejection of Dr. Young's homicide conclusion had nothing to do with whether or not a particular injury was suffered while Monfils was still alive. Rather, it was based on her findings that all of Monfils' injuries, whenever they occurred, could have been caused inside the vat, and there was no reason to believe that any of them could only have resulted from a beating.

After dismissing Dr. Sens' testimony as the product of a post-trial development in forensic pathology, the State then inconsistently contends that her testimony is not "newly-discovered" evidence that can support this motion.

Linguistics aside, Dr. Sens' testimony cannot be disregarded. Wisconsin post-conviction law permits a defendant to offer evidence that was not previously presented for such reasons as counsel's ineffectiveness, a prior failure to discover

it, its previous non-existence, and/or its concealment. Wis. Stat. § 974.06; *State v. Love*, 2005 WI 116, 284 Wis. 2d 111, 700 N.W. 2d 62; *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W. 2d 590. Such evidence can support either a wholly new post-conviction claim **or** a prior claim that was previously, but inadequately, presented. *Id.*

The State argues that Dr. Sens' testimony did not refute Dr. Young's homicide conclusion because Dr. Sens acknowledged that the death could have been a homicide. The State fails to acknowledge, of course, that Dr. Sens refuted Dr. Young's entire analytical basis for categorically concluding that the death was a homicide and not a suicide. As Dr. Sens testified, a homicide conclusion could never have rested on an autopsy and could have been made, if at all, only after an intensive investigation of all relevant facts and circumstances. Acceptance of Dr. Sens' testimony negates the entire "scientific/medical" basis of the State's case, and leaves it on the shoulders of the Kellner/Wiener/Gilliam triumvirate.

The State's efforts to minimize Anthony Cicero's testimony fail because he directly contradicted Dr. Young's critically wrong "thick oatmeal" and buoyancy assumptions. As he testified:

> If you were to take a [vat] such as this full of four-percent consistency stock and you were to jump into it, the average person would float pretty much the same in this pulp as they float in water because the specific weight of pulp is almost identical to the specific weight of water at this consistency.

(R. 147, Ex. 14 at 84) He further testified that, with the blades rotating and the weight attached to him, Monfils would "almost certainly" have come into contact with the blades. (*Id.* at 40) Indeed, Dr. Young found that the blades had broken Monfils' legs. (R. 147, Ex. 18, Part I, at 45.)

Because the State failed to support Dr. Young's engineering assumptions with any expert testimony or forensic evidence, it now offers its own incompetent speculation to sustain them. The tragic fact remains that Dr. Young's claim to know what she did not know, combined with defense counsel's wholesale disregard of her assumptions, findings, and conclusions, profoundly misled the jury and courts.

III. Ineffective Assistance of Counsel

Defense counsel's failures were not only squarely contrary to the caselaw requiring consultation with an independent forensic pathologist in circumstances such as those here, but also with the bedrock principle that counsel's decision is effective, "strategic," and entitled to "deference" only if and to the extent that it is based on a full knowledge **and** reasonable consideration of all relevant facts. *State v. Zimmerman,* 669 N.W. 2d 762 (Wis. App. 2003); *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015), rehearing denied, 797 F.3d 445 (7th Cir. 2015) *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

The ABA defense function guidelines and the Wisconsin Code of Professional Responsibility impose these same obligations which Mr. Glynn then applied when he explained what defense counsel was required to do in this case. ABA Criminal Defense Standard 4-4-1; SCR 20.1: ABA Comment [5]. The State studiously avoids any reference to the *Clements*, *Williams*, *Wiggins*, or *Rompilla* decisions, the ABA guidelines, or the Wisconsin rule of conduct for defense counsel. Instead, it asks the Court to embrace a watered-down standard that would make Kutska's right to effective counsel illusory.

That other defense lawyers in this case also failed to investigate critical evidence cannot excuse the failures of Kutska's counsel to do so. The standard of effectiveness is not established by group-think. The collective failures of counsel simply confirm the extent of the ineffective assistance that the defendants received. The standard imposed on lawyers in any community is to ascertain all of the relevant and available facts, consider them thoroughly and reasonably, and then devise and present the strongest defense available in light of the facts and what the State itself can and cannot prove.

IV. The Perjured Kellner, Wiener, and Gilliam Testimony

Brian Kellner's admissions to Messrs. Lundquist, Thyes, and Stein and Verna Kellner's admission to Ms. Liegeois are fully consistent with and corroborated by each other. Each of admissions is also fully consistent with and corroborated by:

A. The statements and/or testimony of Messrs. Delvoe, Mineau, Servais, and Boulanger; Char and Ron Salnik; Ardie Kutska; Amanda Williams and Earl Kellner; Cal Monfils; George Jensen; and the defendants;

B. The absence of any eyewitness testimony or trace evidence confirming any beating;

C. The Kellners' numerous attempts, both before and after trial, to modify, re-characterize, or refute key portions of their prior statements and testimony;

D. The testimony and statements of numerous mill workers confirming Winkler's threats and coercion;

D. The prosecution's concession that Winkler had "maybe threatened" witnesses; and

E. The Green Bay Police Department's assessment of Winkler's conduct and statements in support of certain claims that he made. (R. 201)

The State argues that Kellner's statements to Lundquist, Thyes, and Stein were not against his penal interest because Kellner could never have been prosecuted criminally if, as alleged, Winkler had coerced him to lie. Wis. Stat. §908.045(4). Of course, Winkler consistently denied ever coercing Kellner, leaving Kellner fully exposed criminally. That aside, Kellner could never have

known that his lies and perjury, if disclosed, could not have subjected him to criminal investigation or prosecution. Kellner could also assume that his lies, if known, might result in a civil suit for damages and/or other sanctions.

Steve Stein also testified that Kellner feared what people would think if the truth became known. Kellner knew that his lies and perjury, if disclosed in this notorious criminal case, would expose him to disgrace, ridicule, and recrimination, and rumor in the mill and the larger Green Bay communities. *Id.* Such disclosure would have been adverse to his social interests, and his statements are admissible for that additional reason.

The Stein, Thyes, Lundquist, and Liegeois testimony is also admissible under the Wis. Stat. §908.03(3) state-of-mind exception because the Kellners' statements evidenced their fears and the emotional toll that their perjury exacted on each of them. Because this testimony is trustworthy and central to Kutska's defense, it is also admissible under the Due Process Clause. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Wiener offered his "repressed memory" only after he knew that he was a Monfils case suspect and the District Attorney had accused him of perjuring himself to protect Kutska. As Wiener hoped, the story found favor with the prosecution. Because the Monfils investigation lingered into his own prison

sentence for killing his brother, Wiener was able to leverage his testimony to obtain an unopposed sentence reduction and early release from prison.

The documents squarely contradict the claims that the State never raised the issue of a possible benefit with Wiener or considered granting him one for his trial testimony. The State never explains why Kutska's interpretation of these documents is wrong or why they do not strongly contribute to negating Wiener's credibility.

When he testified in 2009, Gilliam admitted lying whenever helpful to him. His inability to keep his lies straight led the trial court to find his post-conviction testimony unbelievable. Nonetheless, the State continues to rely on his trial testimony to support Kutska's conviction.

V. Conclusion

The State absurdly mocks the possibility of suicide by contending that Monfils would have had to beat himself before entering the vat. It argues that the positioning of the knot around Monfils' neck at the time of the autopsy somehow negates suicide. It does so because it refuses to acknowledge that Monfils was fully capable of drowning himself in the vat using his rope and the weight.

Kutska has presented compelling evidence pointing toward suicide. (R. 203 and 206) On retrial, a jury would weigh that evidence in light of Dr. Young's now-refuted testimony, the perjured Kellner, Wiener, and Gilliam testimony, and

Winkler's abuses and lies. The jury would make that assessment, moreover, without the damning inferences that flowed from former defense counsel's concession that Monfils was beaten and murdered by angry thugs.

Because the totality of the evidence establishes, at minimum, a reasonable probability of an acquittal on retrial, Mr. Kutska requests that the Court reverse the decision below and remand the case for further proceedings.

Dated: May 31, 2016

Respectfully submitted,

s/ Steven Z. Kaplan
Steven Z. Kaplan (MN Bar #53739)
John W. Lundquist (WI Bar #1063153)
Fredrikson & Byron, P.A.
Suite 4000, 200 South Sixth Street
Minneapolis, MN 55402
(612) 492-7000

Marie Wolf (MN Bar #013174X)
Innocence Project of Minnesota
1536 Hewitt Avenue
MS-C1973
(651) 523-3152

John H. Bradley (WI Bar #1053124)
STRANG BRADLEY, LLC
10 E. Doty Street, Suite 621
Madison, WI 53701
(608) 535-1550

ATTORNEYS FOR DEFENDANT-APPELLANT KEITH M. KUTSKA

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of the portions of the brief described in Wis. Stat. §§ 809.19(1)(d), (e), and (f) is 2,997 words. See Wis. Stat. § 809.19(8)(c)(1).

s/ Steven Z. Kaplan
Steven Z. Kaplan

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on the opposing party.

s/ Steven Z. Kaplan
Steven Z. Kaplan

AFFIDAVIT OF SERVICE

I hereby certify that I have caused this Reply Brief to be filed with the Clerk of Court, Wisconsin Court of Appeals and further that I have caused the

appropriate number of copies of this Reply Brief to be served on counsel for the Plaintiff-Appellant by United States Mail, postage prepaid, addressed to:

Thomas J. Balistreri
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

s/ Steven Z. Kaplan
Steven Z. Kaplan

Subscribed and sworn to before me
this 31st day of May, 2016.

s/ Alexandra McCullough Winton
Notary Public

58800658_1.docx