

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-2663-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

KEVIN JONES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. The State of Wisconsin appeals from an order dismissing its criminal prosecution against Kevin Jones for two counts of first-degree intentional homicide. The dismissal is based on the finding that at the time Jones entered into a nonprosecution agreement in exchange for providing truthful information about the homicides, the police detective was aware that Jones

intended to provide inaccurate information regarding the identity of the man who had ordered the homicides. Therefore, Jones's untruthfulness on that point was immaterial and did not constitute a breach of the nonprosecution agreement which entitles the State to file criminal charges against Jones. We affirm the order dismissing the criminal prosecution.

A detailed rendition of the facts of this matter is stated in *State v. Jones*, 217 Wis.2d 57, 59-62, 576 N.W.2d 580, 581-82 (Ct. App. 1998). It is sufficient here to explain that Jones was a participant in the 1992 killings of Charles Toy and Katrina Powell. In 1994, while Jones was being prosecuted for other crimes, he entered into a plea agreement to provide truthful information about the yet unsolved 1992 double homicide in exchange for a reduction of then-pending charges and a nonprosecution agreement for the 1992 homicides.¹ In a July 1, 1994 interview with Detective Jan Soderberg, who was investigating the 1992 homicides and involved in negotiations of the agreement, Jones revealed that he and Tony Hill were hired to kill Toy by a man known as J.B. Money. From a photo array, Jones identified a man named Jimmy Carter as the man he knew as Money. On August 4, 1994, Jones signed a sworn affidavit detailing his knowledge about the homicides.

It turned out that Carter was incarcerated in a Wisconsin state prison at the time of the homicides and therefore could not have been the man who ordered the killings. Contending that Jones had materially breached the

¹ The immunity agreement required Jones to "provide truthful information" about the homicides to the investigating officer. It also limited the use against Jones of information or evidence acquired as a result of information Jones provided. It specified that if Jones provided information that led to the arrest of Tony Hill, who the police suspected to be the shooter, Jones would receive substantial consideration in the reduction of charges and recommended sentence.

nonprosecution agreement because he had falsely identified Carter as the man who had ordered the homicides, the district attorney charged Jones with two counts of first-degree intentional homicide.

Jones moved to dismiss the prosecution on the ground that he had not materially breached the nonprosecution agreement because Soderberg knew that Jones was wrong to identify Carter because Carter was incarcerated at the time of the homicides. Jones's attorney, Domingo S. Cruz, testified that prior to Jones's execution of the August 4, 1994 affidavit, Soderberg indicated an awareness that Carter was incarcerated at the time of the murders. Cruz believed that Soderberg "did not view the veracity of Jones' identification of Carter to be 'critical' to complying with the agreement and that he 'was satisfied that Mr. Jones was present and telling the truth about what he had relayed to him in terms of a detail about the homicides.'" *Id.* at 61, 576 N.W.2d at 582. Cruz understood Soderberg to be concerned only about information regarding Hill's involvement in the killings. *See id.*

The trial court's refusal to recognize the validity of the nonprosecution agreement was reversed on appeal. *See id.* at 66, 576 N.W.2d at 584. On appeal it could not be determined whether Jones's lie was material to the agreement because the trial court had not resolved the conflict in the testimony between Cruz and Soderberg, who maintained that he did not know that Carter was incarcerated until over a year after Jones signed his affidavit. *See id.* at 67, 576 N.W.2d at 584. We explained:

Whether the breach was material and substantial is the critical issue, and Cruz's testimony that Soderberg was aware of the possible error would make Jones' misrepresentation immaterial to the true purpose of the nonprosecution agreement. On the other hand, if Soderberg was never aware of Carter's true status prior to Jones'

execution of the nonprosecution agreement, then the identification of who ordered the killings is a critical and important aspect of the nonprosecution agreement.

Id. We remanded the case to the trial court for a determination of the core issue of the agreement. *See id.* at 67-68, 576 N.W.2d at 584-85.

The trial court found that the “State has failed to prove by clear and convincing evidence that Detective Soderberg was unaware of the inaccurate identification at the time that [Jones’s affidavit] was executed and the agreement entered into.” Thus, the trial court found that Cruz was more credible. “The credibility of a witness is for the trial court to determine, and we will not upset such a finding unless clearly erroneous.” *State v. Lukensmeyer*, 140 Wis.2d 92, 105, 409 N.W.2d 395, 401 (Ct. App. 1987).

The State accepts the factual finding that before Jones’s affidavit was signed, Soderberg advised Jones and Cruz that he doubted the accuracy of the identification of Carter. What the State seeks to avoid is the result that flows from the credibility determination as mandated by our decision in *Jones*, 217 Wis.2d at 67, 576 N.W.2d at 584. We held there that if Soderberg knew in advance that the identification of Carter was false, Jones’s misrepresentation of that fact was immaterial to the true purpose of the nonprosecution agreement. *See id.* As foretold in the *Jones* decision, the determination of what was the core issue of the nonprosecution agreement rests on the credibility determination between Cruz and Soderberg. Because the trial court’s finding that Cruz was credible is not clearly erroneous, we conclude that Jones’s misidentification of Carter was not a material breach of the nonprosecution agreement.

The State argues that despite Soderberg’s lack of concern regarding the inaccuracy of Jones’s identification of Carter, the nonprosecution agreement

required Jones to be truthful on every factual assertion about the homicides.² By employing contract construction, the State contends that Jones's August 4, 1994 affidavit constituted the "final written agreement" between the parties and that the affidavit required truth about everything contained in it.³

² The State explains that the materiality of the false information about Carter is that it seriously undermines Jones's value as a credible witness in the prosecution of Hill when Jones can be impeached with a falsehood in a sworn affidavit.

³ The affidavit included the following paragraphs:

2. I am cooperating with his homicide investigation with the understanding that I will be granted immunity for my involvement with the following conditions.
3. That I tell the truth to the best of my ability and that I was not the person that shot and killed Charles Toy and Katrina Powell. Furthermore I understand that [if] at anytime during this investigation it is determined I am lying about any fact of the homicide investigation the immunity granted to me is no longer in effect and any of these statements can be used against me in my own prosecution of this double homicide.

We reject the State's contention that the affidavit embodied an agreement between the parties. The affidavit was signed only by Jones. The final and complete nonprosecution agreement was signed by all the parties in June 1994. The August affidavit was merely the performance of the prior nonprosecution agreement.⁴

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

⁴ In its reply brief, the State concedes that if the June 1994 document constitutes the final agreement, the agreement did not require Jones to tell investigators the truth about Carter's involvement in the homicide.

