



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

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November 15, 2016

To:

Honorable Jeffrey A. Conen
Circuit Court Judge, Br. 40
901 N. 9th Street
Milwaukee, WI 53233-1425

Charlotte Gibson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Colleen Ball
State Public Defender's Office
Appellate Division
735 North Water St. #912
Milwaukee, WI 53202

Anne Berleman Kearney
Appellate Consulting Group
P.O. Box 2145
Milwaukee, WI 53201-2145

John A. Pray
Legal Assistance Program
975 Bascom Mall
Madison, WI 53706-1399

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Carrie Sperling
Frank J. Remington Center
U.W. Law School
975 Bascom Mall
Madison, WI 53706

You are hereby notified that the Court has entered the following opinion and order:

2011AP1803-CR State of Wisconsin v. General Grant Wilson
(L.C. # 1993CF931541)

Before Curley, P.J., Kessler and Brennan, JJ.

General Grant Wilson was convicted of first-degree intentional homicide and attempted first-degree intentional homicide after a jury trial. On direct appeal, we reversed and remanded for a new trial. *See State v. Wilson*, No. 2011AP1803-CR (WI App Oct. 24, 2014).¹ We

¹ Wilson's right to a direct appeal was reinstated on September 14, 2010, on the grounds that his lawyer, Peter Kovac, provided him with ineffective assistance of appellate counsel.

concluded that Wilson was denied a meaningful opportunity to present a complete defense during his trial because the circuit court did not allow him to introduce evidence that someone else killed the victim, Evania Maric. See *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), and *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984).

The Wisconsin Supreme Court reversed our decision, ruling that the circuit court properly excluded the third-party perpetrator evidence under *Denny*. See *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52. The Wisconsin Supreme Court remitted the case to the circuit court on August 4, 2015. Several months later, Assistant Attorney General Marguerite M. Moeller moved the Wisconsin Supreme Court to vacate its remittitur and remand to this court to allow us to address the other issues raised in Wilson's brief, which we did not reach because we ordered a new trial. The Wisconsin Supreme Court vacated its remittitur on November 4, 2015, and remanded to this court to address the remaining issues pending in this appeal.

The Wisconsin Supreme Court's decision fully sets forth the facts and procedural history of this case. See *id.* To briefly recap, Maric was repeatedly shot with two different guns while seated in a parked car in front of an illegal "after hours" club owned by Larnell Friend around 5:10 a.m. on April 21, 1993. Willie Friend, Larnell's brother, was dating Maric and was with her in the car when she was shot, but fled without being injured. Willie Friend told the police that Wilson, who had also been dating Maric, opened fire on both of them, killing Maric. Willie Friend was the only person linking Wilson directly to the crime. Wilson adamantly denied killing Maric and said that he was at home asleep when the murder occurred. At trial, Wilson's

lawyer, Peter Kovac, attempted to present evidence implicating Willie Friend and/or his brother Larnell Friend, in Maric's murder. The circuit court did not allow the evidence.²

Wilson raised three arguments in his briefs to this court: (1) the circuit court erred by preventing him from presenting a complete defense despite his meeting the requirements of *Denny*; (2) he received ineffective assistance of trial counsel; and (3) the conviction should be reversed because the State improperly introduced prejudicial evidence of gun ownership and other acts. The second and third issues remain pending.

To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). “[T]he purpose of the effective assistance guarantee of the Sixth Amendment ... is simply to ensure that criminal defendants receive a fair trial.” *Id.* at 689. The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations [] unnecessary.” *Strickland*, 466 U.S. at 695. To show prejudice, “the defendant must show that ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’” *Carter*, 324 Wis. 2d 640, ¶37 (quoted source omitted).

A circuit court must hold an evidentiary hearing on a claim of ineffective assistance of counsel if a motion alleges facts which, if true, would entitle the defendant to relief. *See State v.*

² For a recent in-depth discussion of third-party perpetrator evidence, *see* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337.

Bentley, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). “Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.” *Id.*

Turning first to the performance prong of the *Strickland* test, Wilson alleges that Kovac provided him with constitutionally deficient performance by failing to adequately investigate his third-party perpetrator claim prior to trial and by failing to make an adequate offer of proof prior to or at trial that Willie Friend and/or Larnell Friend had the opportunity to kill Maric. Wilson also alleges that Kovac, who repeatedly requested that the trial be postponed because he was not prepared, also failed to clearly explain why the evidence was admissible. Kovac’s alleged failure to adequately investigate and prepare an offer of proof before or at trial regarding the third-party perpetrator evidence, and his failure to clearly explain why the evidence was admissible, if true, meet the deficient performance prong of the *Strickland* test. *Id.*, 466 U.S. at 695 (counsel has the duty to undertake reasonable investigation and provide representation that does not fall below objective standards of reasonableness).³

As for the prejudice prong of the *Strickland* test, Wilson alleges that there is a reasonable probability that the result of the proceeding would have been different if Kovac had properly investigated and made an adequate offer of proof regarding the third-party perpetrator evidence. The Wisconsin Supreme Court held that the circuit court properly excluded the third-party

³ Kovac belatedly made an offer of proof near the close of the defense’s case that two of Maric’s friends, Mary Lee Larson and Barbara Lange, would testify that Willie Friend threatened to kill Maric several weeks before the murder in front of them and was physically violent to Maric in their presence. As it bears on Wilson’s claim that Kovac did not adequately investigate or prepare for trial, we note that other information in the record bearing on Wilson’s third-party perpetrator theory includes a police report in which Maric’s sister, Deja Maric, said that Willie Friend beat Evania Maric with a coat hanger several weeks before the murder, causing extensive bruising to her upper torso, and Maric’s mother, Clara Maric, told the police that Evania Maric had been working as a prostitute, that Larnell Friend was her pimp, that Evania wanted to get out of the business, that Larnell Friend had threatened to kill her for leaving, and that Clara Maric believed Evania Maric had “liberated” herself from Larnell Friend.

perpetrator evidence because Kovac failed to make an adequate offer of proof that Willie Friend or Larnell Friend had the opportunity to kill Maric. See *Wilson*, 362 Wis. 2d 193, ¶¶10, 83, 86. Based on the Wisconsin Supreme Court's decision, Kovac's failure to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in* the proper exclusion of third-party perpetrator evidence pointing to Willie Friend or Larnell Friend. Wilson has thus alleged sufficient facts that, if true, show that he was prejudiced. Wilson was therefore entitled to a hearing on his claim of ineffective assistance of counsel. See *Bentley*, 201 Wis. 2d at 310 (a circuit court must hold an evidentiary hearing on a claim of ineffective assistance of counsel that alleges facts which, if true, would entitle a defendant to relief).

We remand to the circuit court for a hearing on Wilson's claim that he received ineffective assistance of counsel.⁴ Due to the length of time that has passed since Wilson filed his postconviction motion on January 24, 2011, and the subsequent developments in this case, our order is not intended to limit the circuit court's discretion to consider whatever issues it deems appropriate.⁵

⁴ The scope of Wilson's claim is not limited by the issues discussed in this opinion.

⁵ We do not address Wilson's argument that his conviction should be reversed because the State improperly introduced prejudicial evidence of gun ownership and other acts because we remand for a hearing on Wilson's claim of ineffective assistance of trial counsel. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (if a decision on one point disposes of an appeal, we will not decide the other issues raised).

IT IS ORDERED that the circuit court's order denying the postconviction motion is reversed and this case is remanded to the circuit court for a hearing on Wilson's postconviction motion under WIS. STAT. RULE 809.30.

Diane M. Fremgen
Clerk of Court of Appeals