COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1064-CR

Cir. Ct. Nos. 1999CM9244
2000CM1282
2000CF1698
2000CF4426
2000CF4966

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEMENTE LAMONT ALEXANDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Reversed and remanded for further proceedings.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Clemente Lamont Alexander appeals from a judgment convicting him of multiple offenses and from an order denying his

motion for postconviction relief. We conclude, as a matter of law, that Anderson's trial counsel provided ineffective assistance of counsel when he failed to attempt to interview two material witnesses to the charged offense to determine if they should be called at trial. In a prior appeal, we concluded that Alexander had made a prima facie showing of prejudice and remanded for a ***Machner***[1] hearing. Because Alexander has established both deficient performance and prejudice, he is entitled to a new trial on the specific charges involved in this appeal. We reverse the judgment and order and remand for further proceedings.

BACKGROUND

¶2 Alexander was charged with multiple crimes based on conduct that occurred on three separate dates. The jury found him guilty of seven offenses. Only four are at issue in this appeal: carrying a concealed weapon, possession of cocaine, possession of marijuana with intent to deliver, and bail jumping.[2] These four crimes, charged in cases 2000CM1282 and 2000CF1698, relate to an incident that occurred on February 9, 2000.[3]

¶3 It is undisputed that on February 9, 2000, Alexander was riding in the front passenger seat of a car driven by a woman named Peggy Brown. A man named Bryan Winters was in the backseat. The police stopped the vehicle for running a red light. In the course of the stop, the police found a gun, cocaine and

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] Alexander has not challenged his convictions for crimes charged in 1999CM9244, 2000CF4426 and 2000CF4966, and we will not address them.

[3] The Honorable Patricia D. McMahon presided over the jury trial. The first postconviction motion was decided by the Honorable Jacqueline D. Schellinger. The second postconviction motion was decided by the Honorable Victor Manian.

marijuana in the glove compartment. Alexander was charged based on his alleged possession of these items.

¶4 A jury found Alexander guilty of all four counts at issue in this appeal. The trial court sentenced Alexander. Alexander filed a motion for postconviction relief, arguing that his trial counsel was ineffective for failing to interview Brown and Winters and for his failure to call them as witnesses at trial. His motion included affidavits from both Brown and Winters stating that no one in the vehicle had accessed the glove compartment. Both Brown and Winters also noted that they had never been contacted to testify at Alexander's trial.

¶5 The trial court denied Alexander's motion without a hearing. Alexander appealed. We reversed by summary order, concluding that

> [t]he circuit court's determination that the trial jury would have judged Winters' and Brown's credibility in a manner adverse to Alexander's interests amounted to improper speculation. We hold, therefore, that the court erroneously concluded that the statements offered in support of the motion did not create a reasonable probability of a different outcome at trial.

State v. Alexander, No. 2002AP2669-CR, unpublished slip op. at 6 (WI App Sept. 22, 2003) (citation omitted). We reversed the trial court's order and remanded for an evidentiary hearing on Alexander's postconviction claim that he was denied the effective assistance of trial counsel. ***Id.***

¶6 On remand, the trial court conducted a ***Machner*** hearing. Alexander's trial counsel and Alexander testified. At the conclusion of the hearing, the trial court found that trial counsel had made reasonable strategic decisions with respect to not interviewing or calling Winters and Brown as witnesses at trial. The trial court concluded that Alexander was not entitled to

relief, having failed to prove the performance prong of the test for ineffective assistance of counsel. This appeal followed.

DISCUSSION

I. Legal standards

¶7 Alexander argues that he is entitled to a new trial because his trial counsel provided ineffective assistance. In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney's error, there is a reasonable probability that the result of the trial would have been different. ***Id.***

¶8 An attorney's performance is deficient if the attorney "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Stated differently, performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***id.***; ***Strickland***, 466 U.S. at 688. We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637.

¶9 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

II. Performance prong

¶10 At the ***Machner*** hearing, trial counsel testified that he was retained to represent Alexander a scant two weeks before the trial. When he was retained, he reviewed the police reports containing statements by Winters and Brown. In response to questioning by the State, trial counsel acknowledged the following facts: the police reports indicated that Brown had possession of the car before Winters and Alexander entered it; Winters had known Alexander and smoked marijuana with him on prior occasions; and Winters was arrested at the same time as Alexander because he (Winters) had cocaine on his person. Trial counsel was then asked for his professional opinion, based on his experience, of the credibility of witnesses. He responded:

> [A]s it relates to Mr. Winters, I was concerned about his credibility. I was also concerned about Miss Brown's credibility. I thought Mr. Winters posed problems for the reasons you just listed.
>
> Also, from what I remember, there … [was] at least one inconsistency between Mr. Winters' statement to the police and the statement Mr. Alexander gave to the police. In Mr. Winters' statement, I believe he says that Mr. Alexander … came to him. In Mr. Alexander's statement, he says that [Bryan] Winters came to his house. So that's one example of an inconsistency I was concerned about.

¶11 Trial counsel also acknowledged that he was concerned about references to drugs in Winters' statement. He explained:

> I already thought we had difficult cases. I was concerned about the type of person who would be in a witness stand testifying on behalf of Clemente Alexander. And based on my review of the police report … I was concerned that [Mr. Winters] would appear to be a less than credible person to a jury.
>
> I had the same concerns for Miss Brown, and I thought it would be much more effective … for me to be able to argue all of the facts surrounding the arrest, the fact that Miss Brown was in the car, the fact that Miss Brown was the driver, the fact that Mr. Winters was also in the car, and I would be able to … argue that they were not charged for the same things for which Mr. Alexander was charged….
>
> [The trial court] would not allow me to argue the fact that they were not charged; however, all of the circumstances surrounding the arrest of Mr. Alexander were allowed to be discussed by me, and I made as much of those as I possibly could….
>
> Also, practically speaking, I did not think it was very likely that Miss Brown and Mr. Winters would come into court and admit to possessing the gun or possessing the drugs. And even if they had agreed to testify in that way, I would have been very concerned about how they would have testified once they were seated in this seat talking to a jury.
>
> In the past, I have done a number of trials where witnesses have indicated a willingness to testify one way and then when you get them on the stand, they testify another way. So those were, in a nutshell, all of my concerns.

¶12 Trial counsel further stated that although he had never spoken with Brown or Winters, he made a deliberate strategic decision not to call Brown, in part so he could argue that the drugs and gun in the glove compartment were hers. In addition, trial counsel agreed that he made a deliberate strategic decision not to call Winters. Under adverse examination, trial counsel acknowledged that he

made those decisions without talking to Brown or Winters and with knowledge that some portions of the statements from Brown and Winters were exculpatory to Alexander.[4]

¶13 Trial counsel was also asked whether he discussed his trial strategy with Alexander. Trial counsel replied:

> Yes. I am certain – I can't remember the details of the discussions, but it is my practice to discuss strategy with the client especially in a case like this where the charges are so serious and the maximum sentence is so serious.
>
> And also I found Mr. Alexander to be … a very bright person, and he … has been one of the most involved clients I have represented in criminal cases; he's very involved in the defense of the case.

Counsel testified that Alexander agreed with the strategy employed, explaining, "I would not have proceeded if he had not–if he had any objections. And if he had any objections, especially strong objections to anything I did, I would have put that on the record as I have done in the past."

¶14 When asked whether he specifically discussed with Alexander whether to call Brown and Winters as witnesses, trial counsel stated:

> I can't remember the specifics of the conversation, but I am certain that we talked about that because … that's an important strategy. And that was the key. At least as it relates to those charges, it was key to me to be able to argue to the jury you have these absent witnesses who were in the car who were not charged.

[4] The Dissent reads more into trial counsel's testimony than appears in the transcript *See* Dissent, ¶¶3, 5-6. The Dissent creates a strategic analysis that, had it appeared in the record as the thought process of trial counsel, might have had much to recommend it. However, our role is not to create a strategy which trial counsel did not. We are unable to find *any* testimony by trial counsel that he made a strategic decision *not to interview* these material witnesses. All of trial counsel's testimony reflects only a decision not to have these witnesses *testify*.

¶15 Alexander also testified at the ***Machner*** hearing. He contradicted trial counsel's testimony in several respects. Alexander said he specifically discussed Winters and Brown with trial counsel, and he asked trial counsel to "contact those two witnesses and call them to trial for me because both of them [were] going to let the jury know that I had no prior knowledge of what was in the glove box until after the stop of the vehicle."

¶16 Alexander further testified that discussions about a plea agreement also included Winters and Brown. He stated, "I believe [trial counsel] was focused on the plea agreement and the plea negotiations, but I tried to make it perfectly clear that I didn't want to take the plea under the conditions of Miss Peggy Brown or Mr. [Bryan] Winters not being able to speak up for me regarding the incident with the car."

¶17 Alexander testified that he specifically asked trial counsel to subpoena Winters and Brown, and that trial counsel's response "was that their testimony wouldn't have been any good." Alexander said that trial counsel did not discuss the credibility of witnesses with him. However, he acknowledged that trial counsel told him the testimony "wouldn't be no good" and that trial counsel "didn't go into any details of why [the witnesses'] testimony wouldn't have been any good."

¶18 The trial court concluded that trial counsel had not performed deficiently. In doing so, the trial court found that trial counsel "thoroughly discussed each aspect of the case with Mr. Alexander, and they discussed together the question of whether those witnesses should be called; that Mr. Alexander agreed that strategically that would not be a good idea." The trial court continued:

> [Trial counsel] went through the discovery very carefully with Mr. Alexander and apparently he did because they knew what the witnesses were going to say and what their background was and what their problem was, and as an experienced trial attorney decided that their … lack of credibility would so prejudice the case that all it would do is add weight to what the officers were testifying.
>
> And now in hindsight, in looking back, you can say, well, maybe you should have used a different strategy. But that's not the test. The test is ["]was that a reasonable way to proceed at the time[?"].
>
> And it seems to me that given the testimony of [trial counsel], which I believe was credible and which I do believe, that he acted reasonably and appropriately, that it was a matter of strategy the way the evidence was presented….

¶19 Having reviewed the transcript, we conclude that the trial court's findings of historical fact are not clearly erroneous. *See* ***O'Brien***, 223 Wis. 2d at 324-25. Although Alexander and trial counsel gave conflicting testimony about the extent of their discussion concerning the decision not to call Winters and Brown, and whether Alexander agreed with that decision, the trial court found trial counsel's testimony to be credible. The trial court's findings are based on the evidence and are not clearly erroneous. However, whether those findings of fact support the trial court's legal conclusion that trial counsel did not perform deficiently is an issue that we must review *de novo*. *See* ***id.***

¶20 "An attorney's strategic decision based upon a reasonable view of the facts not to call a witness is within the realm of an independent professional judgment." ***Whitmore v. State***, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973). Consequently, it is difficult to imagine a case where this court would conclude, as a matter of law, that a trial counsel's strategic decision not to call a witness that trial counsel or counsel's agent has interviewed and determined to be incredible, is outside professional norms. The more challenging question, relevant to this case,

is whether trial counsel acted outside professional norms when he made this strategic decision based solely on the police reports recounting the statements of material witnesses to the charged offense, as opposed to based on interviews conducted by trial counsel's investigator or trial counsel himself.

¶21 While we indulge in a strong presumption that counsel acted reasonably within professional norms, ***Pitsch***, 124 Wis. 2d at 637, we nonetheless conclude that in this case, trial counsel provided deficient performance because he failed to even attempt to interview, personally or through an investigator, the two fact witnesses present in the car with Alexander at the time of the alleged offense.[5] The basis for the arresting officer's belief that there may be contraband in the glove compartment was sparked when he saw Alexander and Winters look back at the squad car. Then, according to the officer, Winters leaned forward as if he were handing something or retrieving something from Alexander, while Alexander made a movement consistent with his retrieving something from Winters or giving something to Winters. Brown was present at the time and within arm's reach of these alleged activities. Given the direct involvement of both Winters and Brown in this activity, we conclude that trial counsel acted outside professional norms when he declined to even attempt to interview these witnesses.[6] We acknowledge

[5] The Dissent mischaracterizes this holding. Dissent, ¶1. Trial counsel never testified that he made a strategic decision *not to contact* the two witnesses. Trial counsel testified that he made the decision *not to call them to testify* because he believed them to be incredible, without even having attempted to contact them. The problem we address here is making an important strategic decision as to the credibility of two material witnesses to the charged offense without even attempting to contact them.

[6] The Dissent sets up the hypothetical testimony the witnesses might have supplied, then concludes that none of the hypotheticals would have been helpful to the defendant, thereby justifying a strategic decision not to contact the witnesses. *See* Dissent, ¶¶4-6. The problem we see with that analysis is that it, like trial counsel's decision, is based on theory and supposition—not on what a witness actually said, or what trial counsel testified to at the ***Machner*** hearing.

that trial counsel accepted this case with a short window of preparation before trial and with charges of multiple offenses on different dates. This factual and logistical complexity does not, however, excuse the failure to even attempt to contact obviously material witnesses.

III. Prejudice prong

¶22 There was some debate at the ***Machner*** hearing, and in this appeal, whether the issue of prejudice already had been decided definitively by the Court of Appeals, *see* ***Alexander***, No. 2002AP2669-CR, unpublished slip op. at 6, or whether that issue was again before the trial court. The State argues that this court's decision to remand the case was intended to allow the trial court to evaluate the testimony of trial counsel, Alexander, Brown, and Winters. The State cites numerous cases in support of its assertion that it is legitimate for the trial court to evaluate the credibility of witnesses who testify in support of a postconviction motion, *see, e.g.*, ***State v. Carnemolla***, 229 Wis. 2d 648, 600 N.W.2d 236 (Ct. App. 1999); ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), and that this court's intention was to have the trial court evaluate the testimony of Brown and Winters and then determine whether Alexander had been prejudiced.

¶23 We do not dispute the State's assertion that a trial court can evaluate the credibility of witnesses who testify in support of a postconviction motion. In this case, however, such testimony was not necessary. In Alexander's first appeal, we concluded that he had been prejudiced, stating, "the [trial] court erroneously concluded that the statements offered in support of the motion did not create a reasonable probability of a different outcome at trial." ***Alexander***, No. 2002AP2669-CR, unpublished slip op. at 6. In doing so, we decided the

prejudice issue. That decision, which the State did not appeal, remains the law of the case.

CONCLUSION

¶24 Alexander has established that his trial counsel was deficient and that Alexander was prejudiced. Therefore, he is entitled to a new trial.

By the Court.—Judgment and order reversed and remanded for further proceedings.

Recommended for publication in the official reports.

¶25 FINE, J. (*dissenting*). The Majority concludes that the strategic decision made by Clemente Lamont Alexander's lawyer to not talk to Peggy Brown and Bryan Winters before deciding not to call them as witnesses was deficient performance as a matter of law.[7] I respectfully disagree because neither Alexander nor the Majority has shown that talking to Brown or Winters would have produced directly material admissible testimony that would not have outweighed the trial lawyer's reasonably perceived strategic concerns that, based

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[7] In footnote five, the Majority says:

> Trial counsel never testified that he made a strategic decision *not to contact* the two witnesses. Trial counsel testified that he made the decision *not to call them to testify* because he believed them to be incredible, without even having attempted to contact them. The problem we address here is making an important strategic decision as to the credibility of two material witnesses to the charged offense without even attempting to contact them.

(Emphasis by Majority.) I do not understand the distinction between "strategic decision made by Clemente Lamont Alexander's lawyer to not talk to Peggy Brown and Bryan Winters before deciding not to call them as witnesses," as asserted in the sentence to which this footnote is attached, and to which the Majority's footnote five is addressed, and not making "a strategic decision *not to contact* the two witnesses" before deciding to not call them to testify on Alexander's behalf. (Emphasis by Majority.)

Simply put, Alexander's lawyer: (1) decided to not call Brown and Winters, and (2) made that decision having first decided to not speak to them—relying on what they had told the police. Nowhere in the record is there any inkling that this latter decision (the decision to not talk to Brown and Winters before making the decision to not call them as witnesses) was either inadvertent or the result of a coin flip; that decision was, perforce, a *strategic* decision; that is, a volitional decision following analysis. That the Majority disagrees with that analysis or the result of that analysis (that is, to not talk to Brown and Winters before concluding that their testimony would hurt Alexander more than it could help him), the Majority, as I explain below, ignores the standard by which we must review what trial counsel has or has not done. In my view, the Majority's footnote five, and its footnote four, misses the thrust of my analysis.

on what they had *already told the police*, their testimony would have hurt Alexander significantly more than it would have helped him. Accordingly, his strategic decision to not talk to either Brown or Winters did not make the "result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993).

¶26 Three persons were in the car where officers discovered the contraband: Alexander, Brown, and Winters. Thus, the contraband belonged to one or more of the following:

- Alexander;
- Brown;
- Winters;
- some other person.

Alexander claimed that the stuff was not his. There are three ways that the testimony of Brown or Winters could have been material: (1) if they testified that the contraband belonged to them; (2) if they testified that it belonged to someone other than Alexander; or, as Brown asserts in her pre-remand affidavit, (3) that she did not see Alexander put anything in the glove box. In my view, the strategic decision of Alexander's lawyer to not pursue these chimeric threads was well within the realm of reasonableness.

¶27 First, neither Alexander nor the Majority indicates why it would have been reasonable for Alexander's lawyer to believe that either Brown or Winters would have incriminated themselves at the trial. Indeed, they have not done so yet and both their statements to the police and their pre-remand affidavits denied knowing anything about the contraband. As I explain in paragraphs twenty-nine and thirty, this was lethal to Alexander's theory of defense, and is the

reason why the strategic decision by Alexander's lawyer to not talk to Brown and Winters was well within the realm of reasonable representation.

¶28 Second, none of Alexander's submissions and nothing adduced at the post-remand evidentiary hearing indicate that either Brown or Winters could testify from their personal knowledge that the contraband belonged to some unknown third person. All we have is Brown's assertion in her pre-remand affidavit that no one opened the glove box when they were in the car. That means one of four things: (1) Brown put the contraband in the glove box before she picked up Alexander and Winters; (2) somehow Winters put the contraband in the glove box when he got into the car even though he sat in the back; (3) Alexander put the stuff in the glove box and Brown was either lying when she said in her pre-remand affidavit that she did not see him do so, or she was not paying sufficient attention; or (4) another person put the contraband in the glove box sometime before Alexander, Brown, and Winters were stopped by the police. Significantly, neither Brown nor Winters testified at the post-remand evidentiary hearing even though Alexander had the burden to show what his lawyer's investigation would have turned up. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who claims that lawyer was ineffective for not doing a proper investigation must show what the lawyer would have discovered). Thus, we are limited to what Brown and Winters said in their pre-remand affidavits.

¶29 Winters said in his pre-remand affidavit: he was only in Brown's car for a few minutes ("[w]e rode about 5 blocks") when the police stopped the car; "[t]he police said they saw me moving in the car and I was not"; he had "never seen [Alexander] with a gun that day or any day." Brown's affidavit said: she picked up Alexander and Winters; Alexander got into the front passenger seat

and Winters sat in the back; she "did not see anyone put anything in the glove box"; the car belonged to her mother; she "had no idea that that stuff was in the glove box;" she "did not see anyone put it there"; she "didn't know anything about the gun or drugs in the glove box."

¶30 The Majority does not dispute that the trial lawyer's decision to not speak to Brown and Winters was part of his strategy to try to shift blame for the contraband to them. The Majority also does not dispute that the strategy to blame Winters or Brown was reasonable—indeed, based on this record it was the only viable strategy the lawyer had. By not talking to Brown or Winters, Alexander's trial lawyer thus avoided being confronted with something that might have gutted his blame-the-others defense, *see* SCR 20:3.3(a) ("A lawyer shall not knowingly: (1) make a false statement of fact … to a tribunal; … or (4) offer evidence that the lawyer knows to be false."), in return for a potential upside, as the lawyer testified at the post-remand evidentiary hearing, of dubious vitality at best. Critically, testimony by Brown and Winters that *they* had nothing to do with the contraband found in the glove box immediately in front of where Alexander was sitting, would have pointed big, bold arrows of guilt in his direction. Thus, in my view, his decision to not talk to Brown and Winters was the very kernel of a reasonable strategy, especially because Alexander told the police—in response to their false representation to him that the gun found in the glove box had his fingerprints on it—that he had previously seen and touched it.

¶31 As the Majority recognizes, we apply independently the legal aspects of the criteria established by ***Strickland v. Washington***, 466 U.S. 668 (1984). Our task as appellate judges is to affirm if the representation of a defendant passes ***Strickland*** muster. Under ***Strickland***, a trial lawyer "has wide latitude in deciding how best to represent a client." ***Yarborough v. Gentry***, 540

U.S. 1, 5–6 (2003) (per curiam). The Majority gives lip-service to this required deference, but, in my view, its opinion drastically truncates the scope of that deference, akin to the old Frank Sinatra tune *Your Lips Tell Me No But There's Yes In Your Eyes*. *See* http://www.sinatraarchive.com/radio/LUT.htm. I see the bottom line to the Majority's decision as forcing lawyers to climb a bubbling volcano ready to erupt with theme-burning lava even though an empty-handed descent is the *only possible* benefit. Thus, in my view, lawyers will now have to commit malpractice in order to avoid the retrospective *appearance* of having given ineffective assistance. The result will be "papering of files" with unnecessary and potentially deadly explorations, just as some physicians in our litigious world run unnecessary and, on balance, potentially harmful tests merely to avoid being faulted by post-hoc searches for blame. I respectfully dissent.[8]

[8] I also disagree with the Majority's holding that our earlier summary remand is the "law of the case" on the "prejudice" aspect of the two-fold showing that a defendant must make to succeed on an ineffective-assistance-of-counsel claim. The point of our earlier reversal was that the record as it stood at the time was unclear and required further development but that Alexander had satisfied the threshold showing needed to get an evidentiary hearing. ***State v. Alexander***, No. 2002AP2669-CR, unpublished slip op. at 3–6 (WI App Sept. 22, 2003); *see* ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996). Indeed, the Majority recognizes this when it notes that "we concluded that Alexander had made a prima facie showing of prejudice and remanded for a ***Machner*** hearing." Majority, ¶1 (footnote omitted). Thus, as we explained in ***Alexander***, the trial court's error was its conclusion that Winters and Brown were not credible without hearing what they might say or seeing them say it:

> The circuit court's determination that the trial jury would have judged Winters' [*sic*] and Brown's credibility in a manner adverse to Alexander's interests amounted to improper speculation. [Case citation omitted.] We hold, therefore, that the court erroneously concluded that the statements offered in support of the motion did not create a reasonable probability of a different result at trial. It follows that the circuit court erred in summarily denying Alexander's motion.

(continued)

Alexander, No. 2002AP2669-CR, unpublished slip op. at 6. Our comment about "a reasonable probability of a different result at trial" was, therefore, limited to our discussion of the trial court's assessment of Brown and Winters's credibility *in abstentia*, *not* our determination that having them not testify consistent with their affidavits was ***Strickland*** prejudice as a matter of law. For the reasons I have set out in the main body of this dissent, I believe that Alexander has not established that his lawyer's strategic decision to not talk to Brown and Winters before deciding to not call them as witnesses prejudiced his right to a fair trial.