COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP671-CR **Cir. Ct. No. 2013CF2103**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEIMONTE ANTONIE WILSON, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Keimonte Antonie Wilson, Sr., appeals from a judgment of conviction, entered upon his guilty plea, for one count of possession with intent to deliver between five and fifteen grams of cocaine. Wilson also appeals the order denying his motion for postconviction relief. He contends that

the circuit court erred when it concluded Wilson improperly served a subpoena, so the court also erred in refusing to adjourn the hearing for re-service or to issue a body attachment for the witness. Wilson also asserts that trial counsel was ineffective for failing to argue that the service was proper or, alternatively, for failing to properly subpoena the witness. We conclude the circuit court properly interpreted the subpoena rules and that no prejudice has been shown from the failure to obtain the witness's testimony. We therefore affirm the judgment and order.

BACKGROUND

¶2 According to the criminal complaint, Milwaukee police officers observed a truck parked in a vacant lot that had a posted "No Trespassing" sign. They saw Wilson exit the truck and approach a known drug house. Wilson was briefly out of officers' sight before walking back to the truck, and the officers did not see whether Wilson had entered the house. The officers approached Wilson, who denied having drugs or weapons and consented to a search of his person. Police retrieved 10.65 grams of cocaine base and $449 cash from the search. Wilson was charged with one count of possession with intent to deliver between five and fifteen grams of cocaine as a second offense.

¶3 Wilson filed a suppression motion, arguing there was no basis for the stop and that he had not given consent to the search. The circuit court held a hearing on the motion. After Officer William Savagian testified, defense counsel advised that he had subpoenaed Jacqueline Brown for the hearing, but she had failed to appear. The circuit court had defense counsel proceed with the present witness, Brown's son Darryl Roberts. After Roberts' testimony, defense counsel

moved to adjourn in order to re-subpoena Brown. The State suggested a body attachment instead, and it objected to having Brown testify by phone.

¶4 Defense counsel noted that Brown had been served by leaving the subpoena with her daughter at their residence. The circuit court then reviewed the subpoena and concluded that its service—a single attempt that used substitute service—was inadequate, stating, "[Y]ou have to attempt on a couple of occasions and make reasonable efforts before you can serve by substitute service." The circuit court therefore concluded that there was nothing it could do to assist Wilson and it denied both the body attachment and an adjournment.

¶5 The hearing continued with Wilson's testimony and rebuttal from Savagian and Officer James Hunter. The circuit court determined there was reasonable suspicion and consent to search, so it denied the suppression motion. Wilson then pled guilty to one count of possession with intent to deliver between five and fifteen grams of cocaine; the repeater enhancer was dropped. The circuit court imposed five years' imprisonment.

¶6 Wilson filed a postconviction motion, arguing that the circuit court erroneously determined that service of the subpoena was faulty. Wilson also argued he had received ineffective assistance of trial counsel for counsel's failure to make an appropriate legal argument about the subpoena. Alternatively, Wilson claimed counsel was ineffective for failing to serve Brown correctly in the first instance. The circuit court denied the motion without a hearing. Wilson appeals. Additional facts will be discussed herein as necessary.

DISCUSSION

I. Rules for Subpoenaing Witnesses

¶7 We are first called upon to determine the proper statutory procedure for subpoenaing witnesses in a criminal case. Statutory interpretation is a question of law we review *de novo*. *See* ***State v. Cole***, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432. We begin with the language of the statute. *See* ***State ex rel. Kalal v. Cir. Ct. for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. When interpreting multiple statutes, we are to harmonize them in a way to give effect to each statute. *See* ***State v. O'Brien***, 2014 WI 54, ¶70, 354 Wis. 2d 753, 850 N.W.2d 8. If the statutes conflict, the more specific one controls, though we attempt to avoid an interpretation that results in conflict. *See* ***State v. Anthony D.B.***, 2000 WI 94, ¶11, 237 Wis. 2d 1, 614 N.W.2d 435.

¶8 There is no specific criminal procedure statute that describes the subpoena process for witnesses in criminal cases. Instead, WIS. STAT. § 972.11(1) (2013-14)[1] provides:

> Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction…. Chapters 885 to 895 and 995, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

Based on this language, Wilson believes the criminal-witness subpoena process is found exclusively in WIS. STAT. § 885.03, which simply states, "Any subpoena

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode." However, § 885.03 is not the only civil rule of practice regarding subpoenas.

¶9 WISCONSIN STAT. § 805.07(1) indicates that "[s]ubpoenas shall be issued and served in accordance with ch. 885." More specifically, "[a] subpoena may be served in the manner provided in s. 885.03 *except that* substituted personal service may be made only as provided in s. 801.11(1)(b)." *See* WIS. STAT. § 805.07(5) (emphasis added). WISCONSIN STAT. § 801.11 provides in part:

> A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> **(1)** NATURAL PERSON. Except as provided in sub. (2) upon a natural person:
>
> (a) By personally serving the summons upon the defendant either within or without this state.
>
> (b) *If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode*:
>
> 1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof; [or]
>
> 1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons[.[2]]

[2] There is perhaps an inherent conflict, in WIS. STAT. § 805.07(5), between permitting service through the WIS. STAT. § 885.03 process that seemingly allows service of a subpoena simply by "leaving [a] copy at the witness's abode" and imposing the stricter WIS. STAT. § 801.11 requirement of reasonable diligence if the subpoena will be left at the abode with another person. However, it is arguable that, given § 801.11(1)(b)1.-1m., to leave a copy of the subpoena under § 885.03 *means* leaving it with another person—*i.e.*, substitute service. However, we need not resolve this discrepancy because Wilson did not simply leave the subpoena at Brown's home; he served a substitute.

(Emphasis added.) "Reasonable diligence" is "'that which is reasonable under the circumstances.'" *See* ***Loppnow v. Bielik***, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450 (citation omitted).

¶10 Wilson contends that WIS. STAT. § 801.11 cannot possibly apply because it refers to serving a defendant, not a witness.[3] We reject this contention: § 801.11 also refers to serving a summons, not a subpoena, but the legislature nevertheless incorporated the procedure by reference.

¶11 In short, it is evident to us that a subpoena for a witness in a criminal case is subject to the reasonable diligence requirement of WIS. STAT. § 801.11(1)(b) before substitute service may be used. It does not appear to be disputed that, if reasonable diligence was required here, the single attempt at service would not suffice, so the circuit court correctly concluded that Brown had not been properly served. Thus, the circuit court did not err in refusing to issue a body attachment, nor did it improperly exercise its discretion in refusing to adjourn the motion hearing.

II. Ineffective Assistance of Trial Counsel

¶12 The requirements for showing ineffective assistance of counsel are well-established. A defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***State v. Balliette***,

[3] Wilson also appears to believe that the last sentence of WIS. STAT. § 972.11(1), which specifies that Chapter 885 "shall apply in all criminal proceedings," is somehow dispositive. His reliance on this language is misplaced. Subsection 972.11(1) provides that the civil rules apply to "all criminal proceedings" except as provided in subsecs. (2)-(4) and unless context manifestly requires otherwise. The last sentence of § 972.11(1), specifying chapters to apply in all criminal proceedings, merely indicates an exception to the exception.

2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "Whether counsel was ineffective is a mixed question of fact and law." ***Id.***, ¶19.

A. Argument on Subpoenas

¶13 Wilson first argues that he was deprived of effective assistance because trial counsel failed to know the relevant law—that service of subpoenas is governed by WIS. STAT. § 885.03—and make a proper argument about that law to the circuit court. However, we have rejected Wilson's interpretation of the law. Trial counsel was not ineffective for failing to pursue a losing argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

B. Failing to Properly Subpoena Brown

¶14 Wilson alternatively argues that trial counsel was ineffective because he failed to properly subpoena Brown. We will assume, without deciding, that trial counsel was deficient in this regard. However, we conclude there was no ineffectiveness because we conclude Wilson has not adequately demonstrated prejudice from the lack of Brown's testimony. *See* ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583 (defendant must show both deficient performance and prejudice to prevail on an ineffective-assistance claim).

¶15 The main issue for which Brown had been subpoenaed was the voluntariness of the police search of Wilson that yielded the cocaine and the cash. The complaint alleged Wilson had consented to the warrantless search; the postconviction motion alleged that Wilson had not consented and the search was not subject to some other exception to the warrant requirement.

¶16 Officer Savagian testified that he and two other officers—Hunter and Sonya Griffin—were on duty together. Savagian testified that he did not have

his gun drawn when approaching Wilson's truck. He said that as he approached, Wilson opened the truck door himself and stepped out of the vehicle. Savagian further said that Wilson raised his arms like an airplane and, although Savagian could not recall the exact words used, Wilson offered to let Savagian search him. Called for the State's rebuttal, Officer Hunter also denied having his gun out.

¶17 Roberts, who was in the truck's passenger seat, testified that two male officers approached the truck with their guns drawn and ordered them to get out of the truck. He testified that Hunter opened the door, grabbed him by the arm, and pulled him out of the truck, immediately searching him. Roberts also testified that Hunter holstered his gun as he was opening the truck door.

¶18 Wilson testified that all three officers ran up to the truck with their guns drawn, and he got out of the truck because he thought they were going to shoot him. He denied that he offered to allow a search of his person, and asserted that Savagian searched him while pointing a gun at him.

¶19 Brown allegedly would have testified that she observed all three officers approach the truck with their guns drawn. She also allegedly observed the officers take both men out of the truck. Wilson argued this would corroborate his and Roberts' testimony that the officers had their guns out, which would have bolstered Wilson's argument that the search was nonconsensual by implying the officers were using a show of force.

¶20 At the suppression hearing, the circuit court noted inconsistencies between Roberts' and Wilson's testimony. Roberts had noted there were three officers but was "very specific" that only the two male officers had their weapons drawn. Wilson testified that all three officers came up to the truck at a medium jog, all three with their guns out. The circuit court thought that some of their

testimony was unbelievable in certain respects—for example, the circuit court disbelieved Wilson's assertion that Savagian searched him while pointing a gun at him, based on the perceived physical difficulty of performing a search with one hand while holding a weapon with the other.

¶21 "So at the end of the day regarding this gun situation," the circuit court found two officers' testimony "to be much more credible and believable" than Wilson's or Roberts' testimony. The circuit court thought that Officer Hunter in particular was "very believable.... Not only what he was saying, but basically the way he was saying it led me to believe that he was … telling the truth."

¶22 The circuit court went on to consider whether Brown's testimony "would really help" had Wilson offered it and concluded, in light of Wilson's and Roberts' inconsistencies, that it would not. The circuit court noted that Brown's testimony would "be backing one or the other or maybe providing yet an additional explanation." Thus, it concluded that Brown's testimony would not have "assisted Mr. Wilson with his motion."

¶23 Ruling on the postconviction motion, the circuit court reiterated its "former rulings," noting that Wilson had failed to present an affidavit from Brown showing she had been available to testify and indicating what her testimony would have been. Although an affidavit was not necessarily required, we nevertheless affirm the circuit court. *See* ***Balliette***, 336 Wis. 2d 358, ¶18 (stating only that postconviction motion must allege sufficient material facts which, if true, entitle movant to relief); ***State v. Trecroci***, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555 (we may affirm circuit court on different grounds).

¶24 Wilson asserts that Brown would have testified that she observed the officers approach the vehicle with guns drawn, and that the officers took both

Wilson and Roberts out of the vehicles. However, this does not convince us that, had Brown been properly subpoenaed, the result of the suppression hearing would have been different. *See* ***Balliette***, 336 Wis. 2d 358, ¶24 (test for prejudice from ineffective attorney requires showing that but for counsel's errors, result of proceeding would have been different).

¶25 As the circuit court noted, Brown's testimony does not quite match up with Wilson's or Roberts' testimony. The proposed testimony "corroborates" Wilson's testimony that all three officers approached with their guns out, but contradicts Roberts' testimony that only the two male officers had weapons drawn. The proposed testimony also "corroborates" Roberts' testimony to the extent that he claims he was removed from the truck by an officer, but contradicts Wilson's own testimony that he stepped out of the truck himself. Aside from finding the officers to be more credible, the circuit court also determined that some aspects of Roberts' and Wilson's testimony just did not make sense. Brown's proposed testimony would not have improved the plausibility of the things the circuit court questioned, so she would not have bolstered either man's credibility. Thus, we discern no prejudice from failing to properly obtain Brown as a witness. The circuit court properly denied the postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.