

Framing Ineffective Assistance Claims in Wisconsin Courts



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Ineffective Assistance of Counsel 101



A defendant must show both:

Deficient Performance

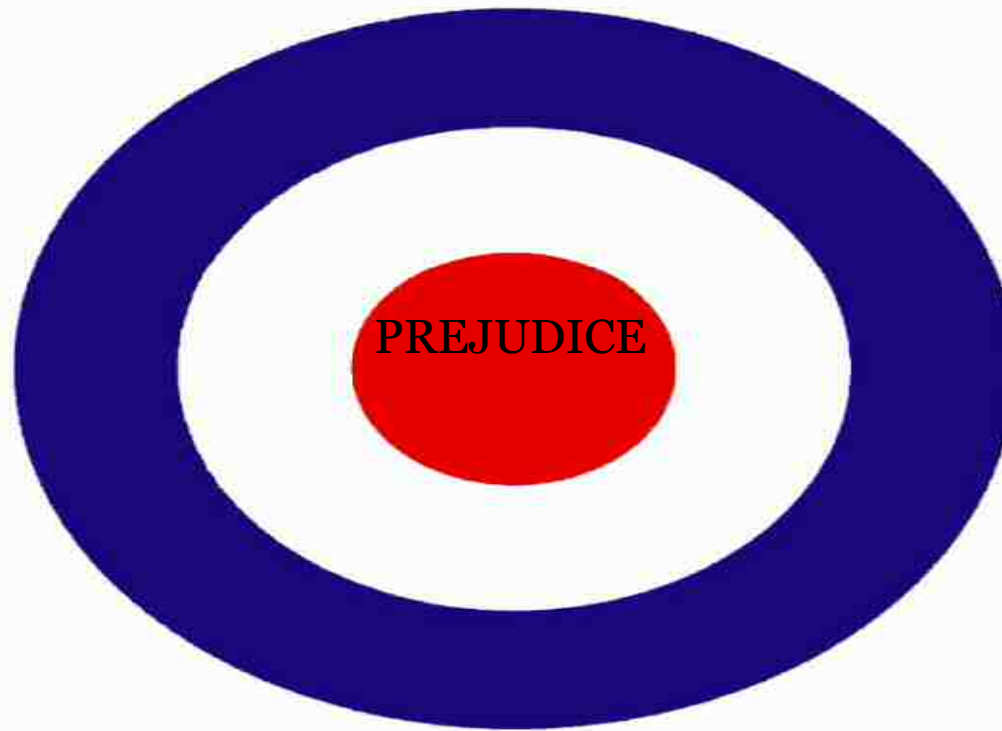
and

Prejudice

Ineffective Assistance of Counsel 101



It is tempting to focus on the error, BUT



Target Prejudice

Ineffective Assistance of Counsel 101



Prejudice

- Not outcome based
- Cumulative
- Can use hindsight
- Assume a rational & impartial decisionmaker

Ineffective Assistance of Counsel 101



Prejudice

- **Trials**—whether “there is *a reasonable probability* that *a jury* viewing the evidence *untainted by counsel’s errors* would *have a reasonable doubt*.”
- **Pleas**—“there is a *reasonable probability* that *but for counsel’s errors* [the defendant] *would not have pleaded guilty* and would have insisted on going to trial”

Ineffective Assistance of Counsel 101



You must be able to articulate and demonstrate:



Determining Your Issues



- What does not “feel right”
- Client complaints
- Family and friend complaints
- Trial counsel’s information
 - Discussions
 - File and investigation
 - Discovery

Determining Your Issues



- Theory of the case
 - Openings and closings of trials
 - Making your own theory if none exists
- Goals of Representation
- The “Why”

Speaking with Prior Counsel



The Wisconsin Supreme Court recently suggested the need to allege counsel's explanation—*State v. Starks*, 2013 WI 69, ¶54

Speaking with Prior Counsel



Other reasons for contacting counsel:

- May provide a reasonable explanation & better to know it upfront
- May be unable or unwilling to provide a reasonable explanation and can be used in the motion as support

Speaking with Prior Counsel



The mechanics:

- Get releases early
- Contact counsel *in writing*
 - With detail
 - Without accusation
- Follow-up with a phone call

Speaking with Prior Counsel



Check reasonableness against
the circuit court record and
other documents

The Devil is in the Details



The Devil is in the Details



Standard for getting a hearing

whether the motion alleges
sufficient material *facts* that, if
true, the defendant would be
entitled to relief

State v. Love, 2005 WI 116, k284 Wis.2d 111, 123, 700 N.W.2d 62

The Devil is in the Details



- The motion must allege “the five ‘w’s’ and one ‘h’”

Who

What

Where

When

Why

How

The Devil is in the Details—Example 1



Ineffective assistance at sentencing—failure to either seek an adjournment or to inform the trial court of reason to believe that there was significant sentence credit on a sentence the client was already serving

The Devil is in the Details—Ex. 1—little detail



1. Although TC contacted D's probation agent before sentencing in this case, TC failed to get all of the information that TC should have gotten. TC did not find out that D had substantial sentence credit on a prior case. TC did not request an adjournment either.
2. This Court's intention at sentencing was to sentence D to an additional year beyond D's sentence in the prior case.
3. D was prejudiced because the sentence that this Court imposed ended up giving D a sentence which was more than two years longer than his sentence in that prior case.

The Devil is in the Details—Ex. 1 with detail



1. Prior to the time D entered his plea and was sentenced, C contacted his probation agent. The agent told C that D had three different ATRs while on probation but did not explain that “one of those ATRs was an institutional ATR which ate up a big chunk of D’s sentence” in XCFX.
2. Although C sought additional information, C did not receive it until after the plea and sentencing in this case. Nor did C seek this information from the prison records office because C did not think of it.
3. Despite the lack of information, C did not seek to adjourn the plea and sentencing nor did C inform this Court that C had some reason to believe that D had significant sentence credit on XCFX.

The Devil is in the Details—Ex. 1 with detail



4. D plead guilty on _____ to one count of operating a motor vehicle while under the influence of an intoxicant (7th). Pursuant to the terms of the plea agreement, the state recommended 4 years in prison and took no position as to whether the sentence should be concurrent or consecutive to XCFX. TC recommended a sentence of 4 years to be served concurrently to XCFX. As part of TC's sentencing argument, TC indicated that D was then serving a 6 year sentence in XCFX.

5. This Court sentenced D to 8 years in prison and explained, "I am going to make it concurrent to your revocation, because I believe the revocation to be based mostly on this case. *But it's an additional year than what you have been revoked on, which is my intent, which is that you actually have some additional consequence.*"

The Devil is in the Details—Ex. 1 with detail



6. After sentencing, the DOC calculated D's release to ES and his discharge dates based on the sentence in this case, which is D's governing sentence. DOC calculated that D would be on ES on _____ and would discharge on _____. DOC calculates that D will serve an additional 2 years, 5 months, and 28 days on his initial confinement, beyond what he would have served on XCFX. D will serve the same additional time on D's total prison sentence in this case.

The Devil is in the Details—Example 2



Ineffective assistance at trial—failure to call a witness in case charging illegal storage of hazardous waste when defense was that a building owner prevented drivers from picking up the waste drums during a ten-day exemption period

The Devil is in the Details—Ex. 2—little detail



1. D told TC about a witness, W, who was a truck driver and went to pick up the waste drums but was turned away.
2. TC did not call W at trial despite TC's knowledge of this witness.
3. TC's failure prejudiced D because W would have shown that D tried to dispose of the drums properly.

The Devil is in the Detail—Ex. 2 with detail



1. W, a truck driver for ___ Co., was not called to testify at trial. Had he been called to testify, he would have testified that, on _____, a date within the time for picking up the drums under the law, he went to XXXX _____ Ave. to pick up waste drums but was unable to do so because the building owner told him, “You’re not getting the drums.”
2. TC was aware of the existence of W because D spoke to TC on _____ in person and told him that W, a truck driver, had gone to pick up drums on _____ but could not do so. After D explained that this truck driver was from Minnesota, TC told her that D could not just subpoena people from all over the country so, if they went to trial, he would tell the court that they had no witnesses. At trial, C did, in fact, inform the court that D had no witnesses other than herself.

The Devil is in the Detail—Ex. 2 with detail



3. On _____, Investigator A spoke with W by telephone. He told her that he was dispatched to _____ Ave. on _____ to pick up waste drums. When he arrived, the door was locked and he telephoned his dispatcher, who told him to wait. He waited approximately one hour before, O, the building owner arrived and told him, “You’re not getting the drums.”

4. As W backed out his truck, he hit an electrical pole. A PA-46, Driver Information Exchange Non-Reportable Accident Form details this accident.

The Devil is in the Detail—Ex. 2 with detail



5. The central dispute in this case turned on the credibility of D and O. The dispute was whether D intended to properly dispose of the wastes within the ten-day exemption period.
6. Calling W as a witness would have bolstered D's credibility in this regard in that W's testimony would have established through a neutral witness that D had attempted to remove the drums.
7. W's testimony would not have been cumulative because no one testified that anyone had been sent to pick up the waste drums for proper disposal during the exemption period.

The Devil is in the Detail—Ex. 2 with detail



8. Moreover, the state's case was weak. It was weak enough to cause the jury to ask five questions and to deliberate for five hours after only a day and a half of testimony. More significantly, the jury asked what would happen if it could not reach a verdict. This question demonstrates that the jury had some difficulty finding that the state had proved its case beyond a reasonable doubt.
9. The failure to call W as a witness prejudiced D because, with his testimony, there is a reasonable probability that a jury would not find D guilty.

Support



- Supported facts are more persuasive.
- Hearsay is acceptable as support and there is no requirement that counsel attach supporting documents with admissible information. *See State v. Hampton*, 2002 WI App 293, 259 Wis. 2d 455, 655 N.W.2d 131 (Ct. App. 2002).
 - Exception—*Knight* petitions must be “verified” and COA has begun rejecting hearsay verifications.

Support



- Other than with *Knight* petitions, a defendant need not submit a sworn affidavit to the court. *State v. Brown*, 2006 WI 100, ¶ 62, 293 Wis. 2d 594, 716 N.W.2d 906.
- Generally it is better to submit an affidavit from you that serves as an offer of proof
- Connect the dots of your support. Do not just attach documents.

Support—Ex. 1 revisited



1. Prior to the time D entered his plea and was sentenced, C contacted his probation agent. The agent told C that D had three different ATS while on probation but did not explain that “one of those ATRs was an institutional ATR which ate up a big chunk of D’s sentence” in XXCFXXX. **See Letter from Agent X to D, dated _____, which is attached as Exhibit A.**
2. Although C sought additional information, C did not receive it until after the plea and sentencing in this case. Nor did C seek this information from the prison records office because C did not think of it. **See Affidavit of C (or Affidavit of Current Counsel).**
3. Despite the lack of information, C did not seek to adjourn the plea and sentencing nor did C inform this Court that C had some reason to believe that D had significant sentence credit on XXCFXXX. **See Tr. _____ at _____.**

Support—Ex. 2 revisited



1. W, a truck driver for ___ Co., was not called to testify at trial. Had he been called to testify, he would have testified that, on _____, a date within the time for picking up the drums under the law, he went to XXXX _____ Ave. to pick up waste drums but was unable to do so because the building owner told him, “You’re not getting the drums.” **See Affidavit of Investigator.**
2. TC was aware of the existence of W because D spoke to TC on _____ in person and told him that W, a truck driver, had gone to pick up drums on _____ but could not do so. After D explained that this truck driver was from Minnesota, TC told her that D could not just subpoena people from all over the country so, if they went to trial, he would tell the court that they had no witnesses. **See Affidavit of Current Counsel.**

Support—Ex. 2



3. On _____, Investigator A spoke with W by telephone. He told her that he was dispatched to _____ Ave. on _____ to pick up waste drums. When he arrived, the door was locked and he telephoned his dispatcher, who told him to wait. He waited approximately one hour before, O, the building owner arrived and told him, “You’re not getting the drums.” **See Affidavit of Investigator A (or Affidavit of W)**

4. As W backed out his truck, he hit an electrical pole. A PA-46, Driver Information Exchange Non-Reportable Accident Form details this accident. **See PA-46**

REMEMBER



- Factual details are your friend in a postconviction motion.
- Connect the dots for the court
- Make sure you have enough that you have a record if you are denied a hearing.

AND

We Cannot Say It Enough



Getting hearings is about setting forth

