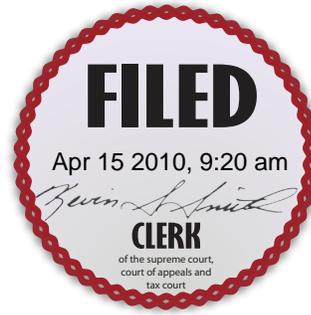


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES WILSON, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. )  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

No. 56A04-0909-PC-550

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APPEAL FROM THE NEWTON SUPERIOR COURT  
The Honorable Daniel J. Molter, Judge  
Cause No. 56D01-0708-FC-15

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**April 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

During James Wilson's direct appeal of his conviction for reckless homicide, he filed a Davis/Hatton petition, which this Court granted. Wilson then filed a petition for post-conviction relief which the post-conviction court denied. Wilson now appeals from the post-conviction court's denial of his petition for post-conviction relief and reinstates his direct appeal from his conviction for Reckless Homicide<sup>1</sup> as a class C felony. Wilson presents the following restated issues for our review:

1. Was there sufficient evidence to sustain Wilson's conviction for reckless homicide?
2. Did Wilson receive the effective assistance of trial counsel?
3. Is Wilson's conviction void because the elected prosecutor did not have an active law license at the time charges against Wilson were filed through the time of his sentencing?

We affirm.

In the early morning hours of March 21, 2007, John Bartels, Thomas Cavitt, and Wilson were driving westbound on State Road 10 in Newton County. State Road 10 is a two-lane highway with narrow berms and is used by commercial traffic as an alternate route from I-94. Bartels, who had been driving commercially off and on since 1980, was driving a box van on that morning. Cavitt, who had been driving a truck for over thirty years, immediately followed Bartels in his Kenworth semi-tractor hauling livestock. Wilson, who had about thirty years of experience driving, was in his Freightliner semi-tractor towing an empty trailer. At that time, roughly 6:00 a.m., it was still dark and there was intermittent

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<sup>1</sup> See Ind. Code Ann. § 35-42-1-5 (West, Westlaw current through 2009 1<sup>st</sup> Special Sess.).

drizzling rain making the road wet. Bartels set his cruise control at somewhere between fifty and fifty-five miles per hour, and Cavitt maintained the same speed staying between three and four hundred feet behind Bartels's box van to avoid spray that could obscure his windshield.

Wilson drove up behind Cavitt and attempted to pass on the left in the eastbound lane but abandoned that effort due to oncoming traffic. Wilson pulled out into the eastbound lane again, in a second, successful attempt to pass Cavitt's truck. Instead of moving his semi into place between Cavitt's and Bartels's vehicles, Wilson attempted to pass Bartels's vehicle as well. The vehicles were approaching a hill that was in a no-passing zone marked by a sign and a solid yellow line in the middle of the road. At the crest of the hill, Wilson's and Bartels's vehicles were neck-and-neck, Wilson's truck slowed, and Bartels saw headlights from a vehicle approaching from the opposite direction. Bartels applied his brakes and Wilson's truck came "right into" Bartels and shoved his box van off the road into a utility pole. *Transcript* at 130, 133-34.

Cavitt, who was still at the bottom of the hill, saw Wilson go "hard right into the straight truck at the top of the hill." *Id.* at 110. Cavitt started to brake as Wilson forced Bartels's box van off the road and into the ditch on the north side of the highway. The approaching vehicle, which was driven by Megan Nelson, struck the rear drive axle of Wilson's vehicle. Nelson's vehicle left the highway stopping in a ditch on the south side of the highway. Cavitt stopped his vehicle approximately thirty feet behind the two trucks, leaving black marks on the road from braking on the wet pavement.

Cavitt exited his vehicle to check to see if anyone was injured. Bartels had left his vehicle to stand on the other side of the road, as his vehicle had hit a utility pole supporting power lines. Wilson asked Bartels if he was alright, and Bartels nodded in the affirmative. Wilson apologized saying, "I'm sorry, but it was my fault." *Transcript* at 130.

Steam or smoke was rolling off of Nelson's car when Cavitt approached it. Nelson was still seated in the driver's seat, but her body was contorted to the back seat. Cavitt, who had training as a volunteer fireman, determined that Nelson was unconscious, and after ascertaining that her car was not going to explode, waited with her for emergency responders. Wilson approached Nelson's vehicle and asked if everyone was alright. When Cavitt answered that Nelson was unresponsive and "it doesn't look good," Wilson, who was visibly distressed, said, "Oh my God, oh my God." *Id.* at 113.

When the emergency personnel arrived, they found Nelson was dead. She suffered massive blunt force injuries throughout her body. Dr. John Cavanaugh, Chief Forensic Pathologist for the Lake County Coroner's Office opined that Nelson's cause of death was multiple blunt force injuries consistent with an auto accident. No intoxicants were found in her body, and intoxicants did not play a part in the collision. Indiana State Trooper Richard Strong arrived at the crash scene to investigate and complete an accident reconstruction. Based on Trooper Strong's experience and training, he believed the primary cause of the accident was Wilson's attempt to pass in a no-passing zone. Further, a federal motor carrier report indicated violations that might have contributed to the crash, including the lack of a

record of duty status for Wilson's driving shown for the seven days prior to the collision. That record would have included information relevant to whether Wilson had adequate rest.

On August 15, 2007, the State charged Wilson with reckless homicide as a class C felony. At the conclusion of Wilson's jury trial he was found guilty as charged. The trial court sentenced Wilson to an aggregate sentence of four years imprisonment, with one year executed and three years on home detention. Wilson initiated a direct appeal, but was allowed to dismiss his appeal without prejudice in order to develop an additional evidentiary record in post-conviction proceedings via the Davis/Hatton procedure.<sup>2</sup> The trial court denied Wilson's petition for post-conviction relief. Wilson then filed a motion to correct error challenging his conviction on the basis that the Newton County Prosecutor did not have an active law license during the period of time encompassing the filing of charges against Wilson until the time of Wilson's sentencing. The trial court denied Wilson's motion to correct error without a hearing. Wilson now appeals.

1.

As for his direct appeal, Wilson contends that the evidence is insufficient to support his conviction for reckless homicide arguing that his conduct rose to the level of only negligence and not recklessness. Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When reviewing the sufficiency of the evidence to support a

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<sup>2</sup> The Davis/Hatton procedure involves a termination or suspension of a direct appeal already initiated, upon motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. In addition to issues initially raised in the direct appeal, the issues litigated in the post-conviction relief proceeding can also be raised. *See* Ind. Appellate Rule 37; *Hatton v. State*, 626 N.E.2d 442, 443 (Ind. 1993); *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149, 1151 (1977).

conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Boyd v. State*, 889 N.E.2d 321 (Ind. Ct. App. 2008). We do not assess witness credibility or reweigh the evidence. *Id.* We consider conflicting evidence most favorably to the trial court’s ruling. *Id.* We affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.* at 325. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Boyd v. State*, 889 N.E.2d 321. The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Id.*

In order to convict Wilson of reckless homicide, the State had to prove beyond a reasonable doubt that Wilson recklessly killed Nelson. Ind. Code Ann. § 35-42-1-5 (West, Westlaw through 2009 1<sup>st</sup> Special Sess.). Ind. Code Ann. § 35-41-2-2(c) (West, Westlaw through 2009 1<sup>st</sup> Special Sess.) defines reckless conduct as follows:

A person engages in conduct “recklessly” if he engages in conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

The jury was instructed that the State was required to prove the elements of reckless homicide beyond a reasonable doubt, on the lesser-included offense of reckless driving, and on Wilson’s defense of accident.

The following is a summary of the holdings of cases from this Court deciding whether conduct rises to the level of reckless homicide in the context of vehicular crashes.

[R]elatively slight deviations from the traffic code, even if they technically rise to the level of “reckless driving,” do not necessarily support a reckless homicide conviction if someone is subsequently killed. Some gross deviations

from the traffic code, however, may under certain circumstances be such a substantial departure from acceptable standards of conduct that they will support a reckless homicide conviction, such as ignoring traffic signals at a high rate of speed, driving on a dark road at night without headlights, or intentionally crossing the centerline without a legitimate reason for doing so. Speed may support a reckless homicide conviction, but only greatly excessive speeds, such as twenty or more miles per hour over the posted speed limit, or where inclement weather and poor road conditions render higher speeds greatly unreasonable.

*Whitaker v. State*, 778 N.E.2d 423, 426 (Ind. Ct. App. 2002).

The evidence most favorable to Wilson's conviction reveals that at approximately 6:00 a.m. on March 21, 2007, Wilson attempted to pass two trucks on the hill of a two-lane highway with narrow berms that is used by commercial traffic. Nelson's death was the result of injuries sustained in the collision between her car and Wilson's truck. At the time there was intermittent rain and it was still dark outside. Wilson's first attempt to pass one of the trucks was unsuccessful due to oncoming traffic. Wilson, who had traveled on that highway many times before, later passed Cavitt's truck and could have pulled in between the two trucks when they approached a no-passing zone. Instead, Wilson, who had thirty years of experience driving a semi, continued up the hill attempting to pass Bartels's truck in a no-passing zone. Wilson had to swerve into Bartels's truck, forcing it off the road and into a utility pole, in an attempt to avoid Nelson's vehicle, which was approaching from the other direction.

Wilson had the opportunity to present his version of the events to the jury, i.e., that the other truck drivers sped up or slowed down prohibiting him from placing his semi between the other trucks and forcing him to attempt to pass the second truck on the hill. The jury,

however, which was in the best position to weigh the evidence and judge the credibility of the witnesses, chose to disbelieve Wilson's version. The record supports the jury's conclusion that Wilson, who had thirty years of experience driving a semi truck, and who had traveled that highway numerous times in the past, consciously and unreasonably disregarded the knowledge gained from that experience, and attempted to pass two trucks in the dark on wet pavement on a hill, when a prior attempt to pass had to be abandoned due to oncoming traffic. We find that the evidence is sufficient to support the jury's verdict as Wilson's conduct amounted to a substantial departure from acceptable standards of conduct.

2.

Turning to Wilson's post-conviction relief issue, Wilson next argues that he received ineffective assistance of trial counsel in two ways. First, he claims that trial counsel was ineffective by opening the door to admission of evidence that Nelson was pregnant at the time of the collision resulting in her death. Second, he contends that counsel was ineffective for agreeing to let the jury view the scene of the collision.

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679 (Ind. Ct App. 2006), *trans. denied, cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl v. State*, 738

N.E.2d 253. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *Fisher v. State*, 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied*. The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher v. State*, 878 N.E.2d 457.

We review ineffective assistance of trial counsel claims under the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher v. State*, 878 N.E.2d 457. First, the petitioner must demonstrate that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by counsel's deficient performance. *Id.* To show prejudice, a petitioner must show that there is a reasonable

probability that the outcome of the trial would have been different if counsel had not made the errors. *Id.* A probability is reasonable if it undermines confidence in the outcome. *Id.*

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* at 585. "If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance." *Fisher v. State*, 878 N.E.2d at 463-64.

Prior to trial, Wilson's trial counsel filed a motion in limine to prevent any mention that Nelson's unborn child perished in the collision. The trial court granted that motion and a motion to redact the mention of Nelson's pregnancy from her death certificate. During voir dire, two of the members of the jury pool expressed their awareness that Nelson was pregnant at the time of the collision. On cross-examination, Trooper Strong, who investigated the collision, was asked what recommendations he made to the prosecutor on the issue of filing charges. Trooper Strong testified that he recommended that charges should be filed because a young pregnant lady was killed. Counsel did not object to this testimony. Then, on direct examination of the forensic pathologist, the State elicited testimony that Nelson was pregnant at the time of her death. Defense counsel objected, but the trial court found that the door had been opened by Trooper Strong's testimony. The trial court then allowed the State to introduce, over objection, an un-redacted copy of Nelson's death certificate. Wilson testified

on direct examination that he did not know Nelson and was not aware that Nelson was pregnant at the time of the collision.

During the hearing on Wilson's petition for post-conviction relief, the post-conviction court found that neither the State nor the defense had warning that Trooper Strong would violate the order in limine during cross-examination. The post-conviction court also found that although defense counsel could have objected, sought an admonishment, or a mistrial, the fact that defense counsel did not pursue any of those options could be explained as a tactical decision not to emphasize to the jury those particular facts, *i.e.*, that Nelson was pregnant at the time of her death. Further, by allowing the evidence of Nelson's pregnancy, Wilson tacitly could advance his argument that charges were brought against him, not because his actions constituted a criminal offense, but because the person who died was pregnant.

We agree with the post-conviction court's conclusion that once the jury as a whole became aware of Nelson's pregnancy, Wilson's trial counsel made the tactical decision both to de-emphasize the evidence and utilize it to proffer an explanation why charges were brought against Wilson. Although the trial court found that Trooper Strong's testimony opened the door to additional evidence of Nelson's pregnancy, the post-conviction court's finding that Wilson's counsel did not open the door to that evidence is not inconsistent with that finding. Wilson's counsel did not elicit that testimony from Trooper Strong on cross-examination, and, thus, he did not open the door. Because the evidence was already before the jury, additional evidence of her pregnancy was cumulative. Wilson has failed to

demonstrate that counsel's performance was deficient or a reasonable probability that the outcome of his trial would have been different absent the alleged errors.

Wilson also challenged his trial counsel's decision to agree to allow the jury to view the scene of the collision. In particular, Wilson argues that he and trial counsel visited the scene seven to ten days prior to trial and found two crosses, one bearing the name "Megan," among other items at the accident scene. Wilson argues that the crosses, a pink bench, a teddy bear, and flowers at the scene had a prejudicial impact on the jury.

By the time the jury viewed the scene of the accident, they had already heard Trooper Strong's testimony that Nelson was pregnant at the time of the collision. In fact, prior to the admission of any evidence, potential jurors mentioned during voir dire that they were aware of Nelson's pregnancy. Wilson's trial counsel testified that he did not recall seeing the memorials when he and Wilson went to view the scene of the accident prior to trial.

Wilson's trial counsel testified at the post-conviction relief hearing that he wanted the jurors to view the scene of the crime, because, in his opinion, the terrain was flat. Wilson argued throughout the trial that his conduct might have been negligent, but was not reckless. His strategy was to argue that given the nature of the hill on which Wilson attempted to pass the trucks, and consideration of speed and distance, Nelson should have been able to see the approaching trucks and avoid the accident. This strategy is reasonable given the facts of this case. Memorials of the nature described are common at the scene of vehicular crashes resulting in fatalities. Wilson has not demonstrated how this memorial in particular inflamed the passions of the jury. Wilson has failed to demonstrate that his defense was prejudiced by

his counsel's strategy, or that there was a reasonable probability that the outcome of the trial would have been different absent the alleged errors.

3.

On direct appeal, Wilson contends that his conviction is void or voidable because the elected prosecutor did not have an active law license at the time charges against Wilson were filed through the time of his sentencing, citing *Simmons v. Carter*, 576 N.E.2d 1278 (Ind. Ct. App. 1991). Wilson argues that when a person not licensed to practice law pursues an action in the name of another and the matter proceeds to judgment, the judgment is void. More specifically, Wilson claims that the charging information against him was brought by the elected prosecutor of Newton County who, at the time of filing of the charges through Wilson's sentencing, did not have an active law license, thus rendering his conviction void.

First, *Simmons* is distinguishable from the case at bar. In *Simmons*, a person who held a power of attorney of another, but who was not licensed to practice law, instituted a small claims action against Simmons. Ultimately, a default judgment was obtained against Simmons. Simmons, by counsel, then filed a motion to set aside the default judgment, challenging the validity of the judgment because it was obtained for another by a non-attorney. The trial court denied the motion and reduced the amount of the judgment. On appeal, we held that a person may not appear in court by one who is not a lawyer and any judgment obtained is a nullity. *Id.* The situation here is different.

All criminal prosecutions in Indiana are brought in the name of the State by indictment or by information. Ind. Code Ann. § 35-34-1-1(a) (West, Westlaw current through 2009 1<sup>st</sup>

Special Sess.). The prosecuting attorney is responsible for filing the indictment or information in a court with competent jurisdiction. I. C. § 35-34-1-1(b). By statute, a prosecuting attorney must be a resident of the judicial circuit that the person serves and a candidate for prosecuting attorney must be admitted to the practice of law in the state before the election. Ind. Code Ann. § § 33-39-1-2; 3-8-1-19 (West, Westlaw current through 2009 1<sup>st</sup> Special Sess.).

The record reveals that, while the deputy prosecuting attorney who tried the case had an active law license, J. Edward Barce, the Newton County Prosecutor, registered his law license as “inactive” during the pendency of Wilson’s case. In situations such as this, the prosecutor is a *de facto* prosecutor. “One who holds office under the color of an election or an appointment and discharges the purported duties of office in full view of the public without being an intruder or usurper, is at least a *de facto* official.” *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981). Because Wilson’s claim amounts to an attack on Prosecutor Barce’s authority as a *de facto* prosecutor it requires a showing of prejudice to reverse Wilson’s conviction. *Anderson v. State*, 699 N.E.2d 257 (Ind. 1998). Furthermore, Prosecutor Barce’s authority cannot be collaterally attacked. *See Cox v. State*, 493 N.E.2d 151 (Ind. 1986) (authority of *de facto* public official appointed as special prosecutor could not be collaterally attacked in murder prosecution itself).

Here, to the extent we consider his attack on the prosecutor’s authority, Wilson has shown us no evidence of wrongdoing, harm, or prejudice from Prosecutor Barce’s participation in the case that would support a reversal of Wilson’s conviction. Consequently,

we find no reversible error here requiring us to grant post-conviction relief, or the need to remand the matter for further proceedings.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.