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COURT OF APPEALS

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DISTRICT IV

Case No. 2010AP2901-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS K. UHDE,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN THE
ADAMS COUNTY CIRCUIT COURT, THE
HONORABLE CHARLES A. POLLEX, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT
STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF FACTS

Uhde's Background Facts section of his brief is full of claims not supported by the record. It does not contain citations to the record. Much of the information presented as fact is purely argument of what Uhde believes happened. The state disputes many of the allegations in this section of Uhde's brief. The state includes its own statement of facts section below.

On March 27, 2006, the Adams County Police Department received information that defendant-appellant Douglas K. Uhde ("Uhde") was wanted by the police (69:223).

On March 31, 2006, someone stole a Ford F-250 truck owned by Easter Seals and driven by Mike Fagan (69:141-42). The Easter Seals was in the Wisconsin Dells (69:141). Fagan had tools, a salt spreader, and personal items in the truck (69:143). Leif Gregerson entered the license plate of the truck in a computer system and reported the vehicle as stolen (69:153). Officers believed there was a connection between Uhde and the stolen truck (69:237).

On April 10, 2006, the Rome Police Department found some keys, the salt spreader, and some miscellaneous items in the woods (69:156). Fagan identified them as coming from his stolen truck (69:144). On April 14, 2006, the Rome Police Department recovered the license plates that had been on the truck when it was stolen (69:157). On April 17, 2006, a man reported that his license plates had been stolen from his 2004 Ford F-150 truck over the weekend near Wisconsin Rapids (69:210).

Police contacted Uhde's former girlfriend Debra Kaehler to let her know that he was wanted by the police (69:177). She was afraid he might come to her home (69:177). On April 15, 2006, Kaehler received two or three phone calls from Uhde (69:178). Uhde told her he

was driving a newer pickup truck (69:180). Police tracked the phone number he called from to a pay phone at Friendship Corners (69:207, 218). A silver Ford F-250 pickup truck was seen on surveillance video at the pay phone at Friendship Corners (69:197-98).

On April 17, 2006, Linda Minigh saw Uhde standing in Kaehler's front yard (69:163).¹ He walked up the front stairs to Kaehler's front door (69:163). Uhde wore a light colored hat, black shirt, blue jeans, and dirty white gym shoes (69:165). Minigh had no doubt that the man she saw was Uhde (69:166). She identified Uhde as the defendant (69:166).

Minigh called Kaehler (69:189). Kaehler called the police and they searched her house (69:190). That night at 6:27 p.m. Kaehler called the police again because she had received a phone call from the hospital that she did not pick up (69:190-91).

At approximately 6:30 that night, Lieutenant David Carlson saw a silver F-250 Ford truck pull out of the Mound View Memorial Hospital parking lot (69:239). The driver had a baseball cap on (69:240, 290). Lieutenant Carlson only saw one person in the truck (69:242). The truck stopped longer than necessary at a stop sign and the driver looked at Kaehler's residence while at the stop sign (69:242).

Lieutenant Carlson had a dispatcher check the license plate and the plates on the truck had been reported stolen out of the Wisconsin Rapids area on April 17, 2006 (69:243). He followed the truck for a while until a marked squad car moved to try to conduct a traffic stop with the driver of the truck (69:246).

¹Uhde alleges that police showed Minigh photos of Uhde prior to asking her what he was wearing. (Uhde's Brief at 2). He made that argument in the circuit court, and the court rejected it finding no evidence to support the claim (67:12-15).

The driver pulled the truck to the side of the road in front of the animal shelter (69:246). Kaehler worked at the animal shelter (69:246). When the squad car got close to the truck, the truck sped away and ran a stop sign (69:246). A high speed chase ensued with speeds around 90 or 95 miles per hour (69:247).

Uhde drove the car into a ditch and into a field (69:278-79). Officers set up a perimeter to contain the truck and driver (69:280-81). The truck careened off a tree and there was a puff of smoke from the engine (69:295). When the truck stopped, the man who had been driving was wearing a dark shirt, dark gloves, and blue jeans (69:296).

Approximately 20 yards behind the truck a fire started and grew rapidly until it started a grass fire (69:297). There was also a small flame from underneath the passenger side of the truck (69:298). Then the truck was on fire and flames engulfed the truck (69:298). The fire destroyed the truck (69:299).²

Investigator Mark Bitsky was on one side of the perimeter and saw a man coming out of the field towards him (69:325). That man was wearing a black t-shirt, blue jeans, a baseball cap, and black gloves (69:325). As he got closer, Bitsky identified the man as Uhde (69:325). Bitsky had known Uhde since August of 2001 (69:222). Bitsky had no doubt that it was Uhde (69:325). Bitsky shouted to Uhde to stop (69:326). Uhde ran away (69:326).

A K-9 handler brought a tracking dog to the scene of the fire to track the driver of the truck (69:308). The dog found the track quickly (69:309). While tracking

²Uhde seems to believe that because the truck looks different in the post-fire pictures than it was originally described, that means the truck is a "phantom counterfeit" truck from a salvage yard. (Uhde's Brief at 1-2). He further claims that someone used a plywood road and a forklift to place the truck in the area. (*Id.* at 1). There is no support for these allegations in the record.

Uhde, police recovered a baseball cap that resembled the hat worn by the driver of the truck (69:253-54, 311). Officers found Uhde lying flat on the ground near a log (69:254, 315). He wore a black t-shirt and blue jeans (69:254-55).

Officers found the knife and gloves when they found Uhde (69:317). Fagan identified his hat, utility knife, and gloves that were in the truck when it was stolen (69:145-46).³

Uhde admitted that he left the Baraboo area and went to Reedsburg (69:257). He stayed in Reedsburg for a week and a half and then went to Wisconsin Rapids (69:257). On April 17, 2006, he came to Adams County to give Kaehler a flower (69:257). Uhde said he tried to call Kaehler from the hospital on April 17 (69:257-58).

STATEMENT OF THE CASE

On February 28, 2007, the state charged Uhde with attempting to flee or elude a traffic officer, operating a motor vehicle without owner's consent as a repeat offender, and obstructing an officer also as a repeat offender (1:1-2).⁴ On March 5, 2007, the circuit court found probable cause that Uhde committed the crimes (1:2).

The court held a preliminary hearing on September 12, 2007, and after that bound Uhde over for trial (43:30).

³Uhde argues that in the police reports Fagan said his "Stanley" brand utility knife was stolen and the knife recovered was a different brand. (Uhde's Brief at 2-3). Again, there is nothing in the record to support this claim.

⁴Uhde alleges that the criminal complaint was filed after the state participated in unlawful acts with the Adams County Sheriff's Department. (Uhde's Brief at 5). There is no evidence supporting this claim.

That day the state filed an information (7) Uhde pled not guilty to all counts (66:2). The court held two motion hearings on the numerous pretrial motions filed (67; 68).

Uhde had a trial on April 10, 2008 (69). At the end of the trial, the jury found him guilty of all three counts (54; 69:370-71).⁵ The court sentenced Uhde to three years and six months for the eluding an officer conviction, to seven years and six months for the operating a motor vehicle without the owner's consent, and to two years for obstructing an officer (63; 70:42-43). The court ran the sentences consecutive to each other (63; 70:44).

Uhde filed a notice of intent to pursue postconviction relief (65). His appellate counsel moved to withdraw (71). The circuit court granted that motion (72).

Uhde filed a motion for postconviction relief asking the circuit court to vacate the judgment of conviction and subsequent sentence and for an evidentiary hearing based on 24 separate grounds (74:1, 8-10). The state opposed that motion for failure to support his claims with a factual basis (75). Uhde amended his motion (76).

The circuit court denied in part and granted in part Uhde's motion and supplemental motion for postconviction relief (77). The court granted an evidentiary hearing on Uhde's claims of ineffective assistance and that his trial attorney turn over Uhde's case file to Uhde (77:2). The court denied all other claims (77:2).

The circuit court held an evidentiary hearing, and Uhde's trial attorney did not appear because Uhde did not realize that he had to secure his attorney's presence (83:2-3). The court denied Uhde's motion for a new trial and

⁵Uhde claims that no witness identified him as the perpetrator of any criminal acts; no circumstancing or physical evidence tied him to the crimes; and no testimony that he took part in criminal acts. (Uhde's Brief at 3). The record contradicts this claim.

granted Uhde's motion that his attorney turn over his file (81). Uhde appealed from that order (84).

The state believed that Uhde could have reasonably believed that his attorney was under court order to appear (87:2). This court reversed and directed the circuit court to hold a second evidentiary hearing on the issue of whether his attorney provided ineffective assistance (87:2-3). This court affirmed the circuit court's conclusion that the state did not commit prosecutorial misconduct (87:2-3).

The circuit court held a hearing and ordered Uhde to amend his motion and include more than summary and conclusory statements (95:13). Uhde amended his postconviction motion (94). In this amendment, he alleges that his attorney was ineffective for failing to read the discovery, investigate, and challenge allegedly fraudulent evidence offered by the state (94:2-7).

The circuit court then held another evidentiary hearing on September 23, 2010 (113). At that hearing, Uhde's trial attorney was the only witness (113:14-88). After hearing the evidence and arguments by the parties, the court noted that the evidence against Uhde, while circumstantial, was "very, very strong" (113:98-99). The court found that some of the testimony could be perceived as error by Uhde's attorney (113:99). However, the court found that Uhde failed to show any prejudice suffered (113:99). Therefore, the court denied Uhde's motion for a new trial (102; 113:99). Uhde appealed (105). This appeal followed.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED UHDE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Uhde alleges that his attorney provided ineffective assistance in two ways. He claims his attorney was ineffective for operating under a conflict of interest and for failing to examine all the physical evidence prior to trial. (Uhde's Brief at 8-23). Uhde's claims must fail.

A. Standard of Review.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the circuit court's conclusions. *Id.*

B. Legal Principles.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were

“outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. To demonstrate 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694; *see Love*, 284 Wis. 2d 111, ¶ 30.

C. Uhde's Counsel Did Not Provide Him With Ineffective Assistance.

Uhde claims that his trial attorney provided him with ineffective assistance. Uhde failed to meet his burden of proof at the evidentiary hearing on his claims. Uhde's attorney's performance was not deficient or prejudicial.

Uhde's first claim is that his attorney had a conflict of interest and, therefore, could not effectively represent him at trial. (Uhde's Brief at 9-11). He bases his claim on a quote from his trial transcript. The state asked the circuit court to order Uhde not to make objections or argument except through his attorney (69:38). Uhde thought he had the right to raise objections (69:38). Uhde's attorney responded to the circuit court that Uhde "has his perceptions of what he ought to be doing. What I think ought to be done isn't necessarily what Mr. Uhde thinks should be done. So sometimes there's a little bit of a conflict" (69:39).

Uhde's attorney admitted to having conflict with Uhde over what ought to be done. He did not admit to having a conflict of interest. A conflict of interest is defined in the rules of professional conduct as existing if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Wis. SCR § 20:1:7(a) (2009-10).

It is hard for the state to ascertain what conflict of interest Uhde believed existed. Instead, it seems that Uhde equates conflict of interest with conflict. These terms are not interchangeable. Conflict between an attorney and a client is not presumed to be prejudicial.

Uhde asked his attorney if there was a conflict of interest between them and the attorney replied "I don't believe so" (113:51). There is absolutely nothing in the record to support Uhde's claimed conflict of interest.

Without a conflict of interest, there is no deficient performance and no prejudice. Uhde makes no allegations under either prong other than his claimed conflict of interest.

Uhde alleges that his attorney failed to read all the discovery material and that he failed to disclose discovery material to Uhde. (Uhde's Brief at 11-12). The record does not support Uhde's assertions. Uhde fails to make any allegations of prejudice associated with these alleged discovery violations.

Uhde's attorney did review all the discovery materials. When asked if he reviewed police reports, Uhde's attorney said he reviewed all of them (113:16). He reviewed photographs and evidence prior to trial (113:20). Uhde's attorney said he had the discovery material and he reviewed the discovery material (113:41). Uhde accused his attorney of not thoroughly investigating the discovery materials and his attorney replied "That's not true" (113:42).

Uhde alleged that his attorney could not have read all the discovery material or else he would have impeached witnesses. (Uhde's Brief at 14). His attorney explained that Uhde did not see the big picture and instead focused on small discrepancies in witness testimony (113:35-36). His attorney did not think the small discrepancies were significant (113:36).

Uhde's attorney may not have provided Uhde with all of the discovery. He said "there was probably discovery material that I did not provide to you, [Uhde]" (113:40). Uhde's attorney explained that he provided information about the essence of the state's case, and did not prove some documents that did not go to the essence of the case (113:41).

The record does not contain information about what discovery material was missing. Uhde does not allege what documents he did not receive. Uhde does not explain how having this missing material would possibly have changed the outcome of the trial. Uhde seems to believe that not providing a copy of every piece of discovery to the defendant in a case leads to prejudice automatically. There is no such requirement.

Uhde's claims are conclusory and without factual support. There is no ineffective assistance of counsel. Uhde does not provide enough facts to prove either prong of the ineffective assistance of counsel test. As the circuit court found, the state's case was very, very strong (113:98-99).

Uhde's attorney complained that he did not have many facts from which to craft a defense. He said that Uhde had no explanation as to why he was in the woods (113:32). Uhde had no reasonable basis that his attorney could have argued to the jury as to a reason why Uhde was in the woods other than that he had driven the truck into the woods during the high-speed chase (113:32-33).

Uhde's apparent defense theory postconviction is that officers fabricated the high-speed chase. Officers then took a forklift to lower a disabled truck into a marsh and framed Uhde. He still offers no explanation for why he was hiding in the woods that night. His proposed defense is absurd.

His attorney summarized the facts. The state had an officer who was chasing Uhde in the truck, other officers are chasing the truck, the truck crashes, Uhde gets out, the officer is able to identify Uhde because he has known Uhde for a lot of years, Uhde ran off into the woods, and the officers track him and find Uhde in the woods (113:35).

The evidence was overwhelming. Whether Uhde's attorney cross-examined witnesses on whether the truck was white, silver or gray, the outcome would not have changed. Whether Uhde's attorney cross-examined witnesses on whether his hat was light-colored, white, or tan, the outcome would not have changed. Uhde did not suffer prejudice. There was no ineffective assistance of counsel. This court should affirm the circuit court's conclusion.

II. THERE IS NO EVIDENCE OF PROSECUTORIAL MISCONDUCT FOR AN ALLEGED DISCOVERY VIOLATION.

This court previously summarily affirmed the circuit court's decision concluding that Uhde did not allege sufficient facts to warrant an evidentiary hearing on the issue of prosecutorial misconduct (87:1-3). This court reversed only on the issue of whether Uhde was deprived his right to effective assistance of counsel (87:3).

Uhde's allegations of prosecutorial misconduct are not properly before this court. He argues that the state had an obligation to present the truck for inspection. (Uhde's

Brief at 18). He asserts that the state withheld the identity of the vehicle. (*Id.* at 19).

The state did not withhold the identity of the vehicle. Each time the state responded to Uhde's discovery demand, it included the sentence "Photos and physical evidence including recorded statements, may be inspected upon an appointment through the District Attorney's Office" (40, 46, 50).

Uhde's attorney did view the physical evidence the state planned to present at trial. After one of the motion hearings, Uhde, Uhde's attorney, the investigator and the district attorney looked at the exhibits (113:50). The state asked if there was anything else Uhde wanted to look at (113:50). Uhde did not ask to look at the truck (113:50).

The record shows the state offered in writing at least three times and in person at least once, to show Uhde physical evidence. Uhde never requested to see the truck. Uhde cannot have it both ways. He cannot fail to request to see the truck and then on appeal claim that the state refused to let him see the truck. Uhde fails to allege facts that support a discovery violation.

III. THE CIRCUIT COURT DID NOT DEPRIVE UHDE OF AN EVIDENTIARY HEARING.

Uhde complains that the circuit court deprived him of an evidentiary hearing. (Uhde's Brief at 23-28). The state cannot figure out what Uhde is arguing in this section of his brief.

He considers the circuit court's conduct "OUTRAGEOUS" because it withheld the evidentiary hearing altogether on September 23, 2010 (Uhde's Brief at 24). Yet, the circuit court held an evidentiary hearing on September 23, 2010 (113:1-100).

Uhde seems to be mad that the circuit court did not bring the physical exhibits that were admitted at trial to the evidentiary hearing and seems to leap from that to allegations that the circuit court denied him due process. The court did not provide exhibits at the hearing because it felt that Uhde had not satisfied the court that they would be relevant to the hearing (113:47).

This court should summarily reject Uhde's claims and inadequately briefed and unsupported by the record.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the circuit court's order denying Uhde's motion for postconviction relief.

Dated this 24th day of August, 2011.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced 3,518 words.

Dated this 24th day of August, 2011.

Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of August, 2011.

Christine A. Remington
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