STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT II

State of Wisconsin,
Plaintiff-Respondent,

Case No. 2014AP002626 CR
2014AP002138 CR

V.

Kendra E. Manlick,
Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON NOTICE OF APPEAL FROM THE ORDER DENYING POSTCONVICTION RELIEF ON AUGUST 25, 2014
FOND DU LAC COUNTY CIRCUIT COURT
THE HONORABLE GARY R.SHARPE, PRESIDING

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STATUTES & CONSTITUTIONAL PROVISIONS CITED

CASES CITED

I. Issues presented for review

a) Whether the August 18, 2012 search of Ms. Kendra Manlick's vehicle was unlawful?

b) Whether trial counsel's failure to argue Wisconsin Statute § 961.571(1)(b) prejudiced Ms. Manlick's case?

II. Statement on Oral Argument and Publication

The Defendant-Appellant is neither requesting the publication of nor the opportunity to orally argue this matter.

III. Statement of the Case

On August 18, 2012, Officer Rucker, of the City of Fond du Lac Police Department, was on patrol when he came upon a vehicle containing two individuals. He recognized one of the individuals, Justin Norton, as possessing an active warrant for his arrest. Officer Rucker made contact with the two occupants within said vehicle, positively identifying Justin Norton as well as the Defendant-Appellant, Kendra Manlick. The officer subsequently informed Mr. Norton of the warrant and took him into custody. A (Appendix) 92.

Officer Rucker previously encountered both of these same individuals in May of 2012, wherein he found heroin

and paraphernalia on Ms. Manlick.[1] Moreover, he recalled the vehicle involved in the immediate case as the same one belonging to Ms. Manlick during the previous encounter. *Id.* Following Norton's arrest, the officer re-approached Ms. Manlick and her vehicle. While doing so, he observed two syringes situated within the vehicle in the center shifter compartment. *Id.*

Based upon his observations and previous encounter, Officer Rucker conducted a search of Ms. Manlick's vehicle. Therein he located several more needles, bottle caps, cotton, a roll of aluminum foil, and half of a Suboxone pill. *Id.* Ms. Manlick was consequently arrested and charged with possession of paraphernalia, possession of a controlled substance, and two additional counts of felony bail jumping.

On August 13, 2013, the Honorable Gary Sharpe presided over Ms. Manlick's motion seeking suppression of evidence obtained via an illegal search. A21-54. That motion was ultimately denied, and Ms. Manlick eventually pled no contest and was sentenced on one count of possession of a controlled substance and two (amended) counts of

[1] That search led to the charges brought in Fond du Lac Case No. 12CF277. Ultimately, that case was dismissed on the State's motion after a motion seeking suppression was brought by Ms. Manlick.

misdemeanor bail jumping. A94-96.

On June 20, 2014, Ms. Manlick filed a motion seeking postconviction relief on the basis that trial counsel was ineffective by failing to argue Wisconsin Statute § 961.571(1)(b) during the suppression motion hearing. A97-99. On August 25, 2014, the Honorable Gary Sharpe conducted the postconviction hearing. A55-A90. Following oral argument and testimony by trial counsel, Mary Wolfe, the court found: 1) trial counsel's failure to address WI Stat. § 961.571(1)(b)was deficient; however, 2) the deficiency did not prejudice the defendant's case because probable cause existed to support the search, even without referencing the statute. A100.

The Defendant timely appeals.

IV. Argument

a. <u>The search of Kendra Manlick's vehicle, on August 18, 2012, was unlawful.</u>

At a motion to suppress hearing held on August 13, 2013, the State cited <u>Bies v. State</u>, 76 Wis.2d 457 (1977), wherein the Wisconsin Supreme Court laid out the four criteria for properly invoking the "plain view" exception. Those four criteria are:

"(1) The officer must have a prior justification for being in the position from which the "plain view" discovery was made;(2) The evidence must be in plain view of the discovering officer; (3) The discovery of the evidence must be inadvertent; and (4) The item seized, in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity." Bies, 76 Wis.2d 457,464.

In the immediate case, it appears the fourth prong of the "plain view" test requires the closest attention. Wisconsin Statute § 961.571(1)(b)1 states, " 'Drug paraphernalia' excludes: Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body." Based upon that reading, probable cause could only be found, if at all, following an examination of the observed needles in conjunction with the facts known to Officer Rucker at the time of the seizure.

At a preliminary hearing held on November 2, 2012 and while under cross-examination, Officer Rucker was asked whether he believed "that syringes and needles are paraphernalia?" A13. The officer responded "Yes." *Id.* Several months later, at the previously mentioned suppression hearing of August 13, 2013, the State asked the officer whether he recognized the syringes in question as being the same as others he had previously observed in situations involving opiate usage. A30. He responded by

stating that "[Y]es, those specific (needles) that I saw in the vehicle was every opiate addict or heroin addict that I have encountered that has had hypodermic (needles)....Those hypodermic are exchanged in local clinics in Milwaukee." *Id.*

The State continued by asking Officer Rucker, "[A]t the time that you saw the syringes or needles inside the vehicle, with your knowledge of Miss Manlick and your training and experience, did you believe that there was probable cause that a crime was being committed?" *Id.* Officer Rucker responded, "Yes." *Id.*

At the postconviction relief hearing held on August 25, 2014, the State again asserted that Officer Rucker possessed probable cause to search Ms. Manlick's vehicle, mainly relying upon findings made in Carroll v. U.S., 267 U.S. 132 (1925), wherein the United States Supreme Court ruled that a vehicle could be searched without a search warrant if probable cause existed supporting that the vehicle contained evidence. A68.

Officer Rucker's testimony illustrates his misunderstanding that syringes and needles constitute drug paraphernalia, which is directly refuted by the language in

WI Stat. § 961.571(1)(b). Furthermore, his testimony reveals that once he recognized the needles in question as being similar to others he had witnessed to be used by heroin addicts, he believed he possessed the probable cause necessary to search Ms. Manlick's vehicle.

Having established that needles alone are not drug paraphernalia, the discussion shifts to an examination of what facts the officer knew about Ms. Manlick. Officer Rucker testified to a single, previous encounter with Ms. Manlick, which preceded the incident in question by over three months. A26. Furthermore, the officer recognized the needles in Ms. Manlick's vehicle as being similar to others he had previously observed amongst heroin users. A30. No testimony was received regarding Officer Rucker's knowledge of whether Ms. Manlick possessed any medical conditions necessitating the use of hypodermic needles. Officer Rucker also did not testify to any observations of Ms. Manlick herself suggesting whether she appeared under the influence of any drugs.

Ms. Manlick believes that the mere presence of needles and an isolated encounter several months prior (which

itself was also unlawful) does not form the probable cause that was required to have searched her vehicle on August 18, 2012. For these reasons, Ms. Manlick respectfully requests that this court reverse the ruling of the lower court by suppressing the illegally seized evidence collected from her vehicle.

b. Trial counsel's failure to argue Wisconsin Statute § 961.571 (1)(b) at the suppression hearing prejudiced Ms. Manlick's case.

In State v. Johnson, 153 Wis. 2d 121; 449 N.W.2d 845 (1990), the Wisconsin Supreme Court referred to earlier findings made by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) when it examined a claim of ineffective assistance of counsel. Citing *Strickland*, the court stated that ineffective assistance of counsel occurs where a defendant can demonstrate: 1) "that his counsel's performance was deficient…," and 2) "that the deficiency prejudiced his defense....requiring a showing that counsel's errors were so serious as to deprive the defendant of a fair trial…" Johnson, 153 Wis. 2d 121,127.

In the instant case, the trial court agreed with Ms.

Manlick's claim that trial counsel's representation was deficient by failing to address WI Stat. § 961.571(1)(b) at the suppression hearing. A89,100. Therefore, Ms. Manlick is not requesting that this court disturb that portion of the court's decision. Rather, the trial court further indicated that, despite the deficiency, "there was enough here to support probable cause for the search....So I'm still going to deny the motion." A89. The court's ruling is problematic, particularly considering that immediately prior to making this ruling, the court stated,

"I think had Ms. Wolfe raised the argument, the court wouldn't have made the finding that it made as it relates to probable cause for arrest. So Mary Wolfe did testify that she just made a mistake....I think the court may very well have considered this differently at the time had it been raised." A88-89.

In the immediate case, the court indicated that trial counsel's representation was deficient and that had the statute been raised at the original suppression hearing, it wouldn't have made the finding it made as it related to probable cause for arrest. With Mr. Norton having already been apprehended on the warrant, Officer Rucker utilized his misguided belief that syringes constituted drug paraphernalia to arrest Kendra Manlick and subsequently search her vehicle. In hindsight, the court admitted "that it was in error in making its determination that the

officer, based upon the observations of the syringes or hypodermic needles, had a basis to arrest for possession of drug paraphernalia." A65-66.

Ms. Manlick believes the trial court's own admissions illustrate the prejudice her case suffered due to trial counsel's failure to raise WI Stat. § 961.571(1)(b). Had it been, the court would not have found probable cause for Officer Rucker to arrest Ms. Manlick and, furthermore, would have suppressed the items discovered in Ms. Manlick's vehicle as being the products of an illegal search. These factors combine to create significant doubt in the confidence of the outcome of this case to this point.

V. Conclusion

For the reasons expressed above, Ms. Manlick respectfully requests that this court find that the search of her vehicle on August 18, 2012 was unlawful. She also asks that this court find that her trial counsel's deficiencies in representation prejudiced her case and that the appropriate remedy in this matter is to set aside the sentence, vacate the conviction, and suppress the items seized from her vehicle following the illegal search.

Dated at Oshkosh, Wisconsin, this _____day of January, 2015.

_____
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 10 pages.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, ***other than the appendix material is not included in the electronic version.***

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Dated this _____ day of January, 2015 at Oshkosh, Wisconsin by:

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APPENDIX

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