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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP2626 CR & 14 AP 2138 CR
Fond du Lac County Circuit Court Case No. 12 CF 416

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENDRA E. MANLICK

Defendant-Appellant.

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

THE BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT, STATE OF WISCONSIN

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TABLE OF AUTHORITIES

Statutes & Constitutional Provisions Cited

Cases Cited

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

Trial Court Answered: No.

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

Trial Court Answered: No.

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent is requesting neither publication nor oral argument, as this matter involves only the application of well-settled law to the facts of the case**.**

III. STATEMENT OF THE CASE

The State of Wisconsin, Respondent, concurs with the Statement of the Case presented by Appellant, (hereinafter Ms. Manlick) and offers no further information.

IV. ARGUMENT

1) OFFICER RUCKER HAD PROBABLE CAUSE TO SEARCH THE VEHICLE

The testimony produced at the August 13, 2013 motion hearing was sufficient to confirm that Officer Rucker had probable cause to search the vehicle in question. The facts known to Officer Rucker prior to the search of the vehicle which supported the basis of probable cause for the search included: a) the officer's knowledge of the use of hypodermic needles for individuals using opiates b) the fact the hypodermic needles were not maintained in a sterile environment and c) the fact that Officer Rucker had knowledge of Ms. Manlick's recent history of drug use. (A.App. 50). Ms. Manlick has correctly argued that hypodermic needles are explicitly excluded as drug paraphernalia for criminal penalties to apply pursuant to Wis. Stat. § 961.571(1)b; however in this case, the trial court correctly articulated sufficient facts to support the basis of probable cause to search the vehicle stemming from the plain view exception to the warrant requirement.

The plain view exception to the warrant requirement is a well-settled rule that notes that "objects such as weapons or contraband found in a

public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton v. New York*, 445 U.S. 573, 587 (1980). Probable cause is a flexible, common-sense standard that requires that the facts available to an officer would "warrant a man of reasonable caution in the belief," *Carroll v. United States*, 267 U.S. 132, 162 (1925), that certain items may be contraband or stolen property or useful of evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. See *Texas v. Brown* 460 US 730,742 (1983). All that is required is a "practical, nontechnical" probability that incriminating evidence is involved. See Id. (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Moreover, in *Texas v. Brown*, the United States Supreme Court has added that "particularized suspicion", is equally applicable to the probable cause requirement, noting:

> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected but be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." See Id. Citing *United States v. Cortez*, 449 U.S. 411, 418 (1981).

The facts underlying *Texas v. Brown* are uniquely similar to the facts of this case. In *Texas v. Brown*, the United States Supreme Court found that a search precipitated by an officer's observation of a driver in a vehicle remove a green balloon from his pocket while in the driver's seat, and drop the balloon to the vehicle's floor, combined with the observation of a loose white powder, and small plastic vials, and the officer's knowledge of methods of drug trafficking was sufficient to warrant a search of the vehicle. 460 U.S. 730, (1983). In this case, the type of hypodermic needle, location of hypodermic needle, and Officer Rucker's prior knowledge of Ms. Manlick's drug involvement all weigh in favor of supporting probable cause to search the vehicle. Also important, is the hypodermic needle in this case, like the balloon, powder, and vials in *Texas v. Brown*, is in and of itself not contraband, but is reflective of possible drug-related activity. Like the officer in *Texas v. Brown*, Officer Rucker's knowledge of drug-related practices does not operated in a vacuum. That is to say, that Officer Rucker would not adequately be performing his duties as law enforcement if he were to essentially ignore his knowledge of Ms. Manlick's prior drug affiliation and the observations, such as the type of hypodermic needle, location/storage of

the hypodermic needle, which are suggestive of ongoing drug-related activity. For the aforementioned reasons, and those reasons noted by the State at motion hearing, probable cause existed for Officer Rucker to search the vehicle, and the trial court's decision should be affirmed on this issue. (See. R47; 22-24/ A. App. 42-44).

2) THE FAILURE OF TRIAL COUNSEL TO ARGUE. § 961.571(1)b DID NOT PREJUDICE THE DEEFENDANT.

Trial defense counsel not arguing that hypodermic needles in and of themselves are not drug paraphernalia pursuant Wis. Stat. § 961.571(1)b would not have prejudiced the defendant because this fact had already been identified by the State, and defense, despite their intention to note this as well, merely failed to reiterate what is the law. (See R. 47;24/ R.51;27/ A. App. 44,81). At the time of defense questioning, the State had already elicited the facts and observations of Officer Rucker, to support the observation of the hypodermic needles, so to reexamine this point would have been cumulative presentation of evidence. (See R.47;10,11/ A. App 29,30). At motion hearing the defense placed emphasis in questioning Officer Rucker as to where he was at the time he observed the hypodermic needles, but omitted questioning pertaining to hypodermic needles not

qualifying as drug paraphernalia. (R. 47:13-19/ A.App 33-39). This line of questioning, was aimed at addressing the requirements for car searches from *Arizona v. Gant*, 556 U.S. 332 (2009) and also whether Officer Rucker was in a lawful location to observe the hypodermic needles, one of the requirements for the plain view exception to apply. (R.47;25-27/ A.App. 45-47). See also *State v. Bies*, 76 Wis. 2d 457, 251 N.W.2d 461, (Wis. 1977).

Ms. Manlick argues that because defense counsel did not argue that hypodermic needles are not drug paraphernalia at the motion hearing, that the court would have considered this issue differently. (App. Brief 8). Whether the court may have considered the argument different at the time of the motion hearing is immaterial if the same conclusion that the search of the vehicle was proper was reached. For prejudice to apply, the court would have had to have reached a different conclusion, not necessary to have had a different factors to consider in reaching this conclusion. For these reasons, despite the State maintaining that trial counsel was not ineffective, even if they were, no prejudice could apply in this case because the State correctly articulated that hypodermic needles are not drug paraphernalia, and defense counsel elicited a proper range of

questions and argument to explore whether the search was proper within the scope of *Gant* and *Bies,* and the trial court had this information available for their consideration.

Moreover, if trial counsel is to be found ineffective, and the defendant was prejudiced as a result, this case highlights an ongoing concern of the State, pertaining to the ongoing practice of form motions being used to generate evidentiary hearings. The motion filed in this case was conclusory in nature and did not make any reference as to the particular grounds why the evidence should be suppressed, merely that the search was unconstitutional. (See R. 18/ R App.1). Such motions are insufficient per Wis. Stat. § 971.30(2)(c), that requires that a motion must state with particularity the grounds for the motion and the order or relief sought. One implication of a boilerplate motion practice is that these motions on their face may not merit an evidentiary hearing[1]; however common practice and judicial efficiency routinely dictates that courts

[1] See *State v. Velez*, 224 Wis.2d 1, 589 N.W.2d 9, (Wis. 1999) which notes: "However, if the motion does not allege sufficient facts, the circuit court has the discretion to deny the motion without holding an evidentiary hearing if it finds one of the following circumstances: 1) the defendant failed to allege sufficient facts in his or her motion to raise a question of fact; 2) the defendant presented only conclusory allegations; or 3) the record conclusively demonstrates that the defendant is not entitled to relief.", (citing *State v. Bentley*, 201 Wis.2d 303, 310-311, 548 N.W.2d50 (Wis. 1996).; See also *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629 (Wis. 1972).

allow the motion hearings. Another implication, which is present in this case, is that defense counsel could be found to be ineffective where an alternative point of suppression is not raised at the motion hearing, which had not been referenced in the motion. If this were the case, then the potential for defense to be ineffective would be present at the moment a boilerplate suppression motion is filed and each legitimate theory of suppression is not raised in the motion.

The State continues to urge trial courts to uphold the requirements for motions noted in *Nelson* and *Velez*, and to not allow evidentiary motions unless a motion is properly plead, as this method ensures that a motion hearing is tailored to the basis of the suppression, the record is supported with a motion that confirms that the defense has considered grounds for suppression and has chosen a particular grounds to pursue, and the defendant has proper and thorough representation. In the absence of this practice, the circumstance which is present here may arise again and again. That is, where a motion to suppress is pursued, and litigated with a specific approach as to the grounds for suppression, and alternative grounds for suppression is present, but not explicitly raised, there remains

the potential for defense to be found ineffective and the defendant's rights prejudiced as a result.

In this case, because defense counsel explored the issue of the hypodermic needle not being drug paraphernalia at the preliminary hearing, and examined and argued the facts set forth at the motion hearing in accordance with the law of plain view and vehicle searches, this methodology is reflective of an proper diligence of trial counsel, and trial counsel should not be found ineffective. Moreover, the defendant's rights could not have been prejudiced because trial counsel's methodology did not fall below an objective standard of reasonableness within the meaning of *Strickland v. Washington*, 466 U.S. 668, 688 (1984). For these reasons, this court could overturn the trial court's decision that trial counsel was ineffective, or alternatively affirm that even if they were ineffective the defendant's rights were not prejudiced as defense counsel's methodology was reasonable.

V. CONCLUSION

For the reasons set forth above, Officer Rucker had the requisite probable cause to search the vehicle, and if it is found that trial counsel was ineffective, the failure of trial counsel to argue Wis. Statute § 961.571(b)

did not prejudice Ms. Manlick's case, as trial counsel's methodology was reasonable, and the trial court's decision should be affirmed.

Dated at Fond du Lac, Wisconsin this 9th day of February, 2015

By: _____
Douglas R. Edelstein
WSBA No. 1070550
Attorney for the Respondent

VI. 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 proportional serif font. The length of this brief is 10 pages, 1803 words.

I further certify pursuant to Wis. Stat. § 809.19(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; and (3) portions of the record essential to an understanding of the issues raised, including oral or written findings or decision showing the circuit court's reasoning regarding these 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.

I further certify that on the date of signature I routed this brief to our office station for first class US Mail Postage to be affixed and mailed to:

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Dated this 9th day of February, 2015 at Fond du Lac, Wisconsin by:

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VII. APPENDIX

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