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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.

REPLY 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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I. Argument

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

In its brief, the State argues that Officer Rucker possessed probable cause to search Ms. Manlick's vehicle, primarily based upon testimony offered at the suppression hearing held on August 13, 2013. A (Appendix) 2. The State specifically refers to three points touched upon at that hearing: "a) the officer's knowledge of the use of hypodermic needles for individuals using opiates; b) the fact that 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." *Id.*

Two of those points revolve solely around hypodermic needles, which the State concedes are explicitly excluded from constituting drug paraphernalia under WI Stat. § 961.571 (1)(b). *Id.* Nevertheless, Ms. Manlick recognizes that the officer's observations are not to be considered in a vacuum. Thus, a secondary issue beyond the needles which requires addressing is what Officer Rucker knew of "Ms. Manlick's recent history of drug use." *Id.*

The State's brief does not delve much further into the officer's knowledge of Ms. Manlick's drug history other

than to maintain that he knew she possessed one. Officer Rucker provided a bit more information at the motion hearing of August 13, 2013 stating, "Miss Manlick and Mr. Norton were both found to be in possession of paraphernalia for drug—or opiates. That paraphernalia included hypodermic needles, tourniquet as well as they were also in possession of heroin." A16. The officer further testified that this previous encounter predated the immediate case by "a few months, two, three months." *Id.*

Aside from what was testified to, little more is known about Officer Rucker's previous encounter with Ms. Manlick. The matter was criminally charged in Fond du Lac County Case 12CF277. Following its filing, Ms. Manlick brought a motion to suppress evidence before the State itself requested that the matter be dismissed. Given the rarity with which such cases are dismissed on the State's own motion, it certainly raises questions how Officer Rucker came to know about Ms. Manlick's previous history. However, because there was not a hearing held on the motion in that case, it may never be known whether Officer Rucker legally came to learn of that information. Nevertheless, according to the Wisconsin Circuit Court Access website, the previous encounter between the officer and Ms. Manlick occurred on May 6, 2012, A45, which preceded the immediate

case by approximately three-and-a-half months.

Officer Rucker did not testify to any other prior incidents with or other knowledge of Ms. Manlick. Furthermore, Ms. Manlick does not challenge the manner in which the officer noticed the needles, as the State correctly pointed out that those items were in plain view, and the officer was legally in a position from which he could view them. A2-A3. Ms. Manlick does, however, believe that the immediate case is distinguishable from the circumstances described in Texas v. Brown, 460 U.S. 730 (1983), which the State primarily relied upon in its brief.

In *Brown*, the officer observed the defendant remove a balloon from his pocket and subsequently drop it onto the seat beside his leg. *Brown*, 460 U.S. 730, 733. Additionally, the officer observed loose, white powder along with several small plastic vials. *Id.* at 734. The U.S. Supreme Court ruled that, when viewed collectively, those factors combined with the officer's prior experience provided the requisite probable cause necessary to search the defendant's vehicle. *Id.* at 742-743.

In the immediate case, Officer Rucker testified to attending a variety of drug investigation training, including specific training regarding heroin overdoses. A17-18 Furthermore, he testified that heroin is usually

injected via hypodermic needles, similar to those which he observed. A18. However, that is where the similarities end. In *Brown*, the defendant was stopped at a license checkpoint, where at the officer learned that Brown was operating his vehicle without a driver's license. *Brown* at 733-734. In the immediate case, upon his initial interaction, Officer Rucker neither knew of nor noticed any illegal activities being committed by Ms. Manlick. Furthermore, the record in the immediate case is entirely void of any of the furtive movements described in *Brown*. Lastly, and perhaps most importantly, the officer in *Brown* noticed a variety of concerning items *in addition to* the tied balloon, namely white powder and vials. Conversely, in the immediate case, the officer only noticed the needles. He did not notice any substances or paraphernalia in or around the needles.

By themselves, balloons, like needles, do not constitute drug paraphernalia. However, when viewed in certain contexts, they may contribute to forming a basis for probable cause to search. Ms. Manlick does not believe her situation rose to this level. She also believes that Officer Rucker's prior encounter from three-and-a-half months earlier combined with merely seeing needles did not provide the probable cause necessary to search Ms.

Manlick's vehicle.

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

In its brief, the State asserts that WI Stat. § 961.571(1)(b) "had already been identified by the State" and that the defense "merely failed to reiterate what is law." A5. Ms. Manlick disagrees with this statement. Upon review of the citations provided by the State, the prosecutor indicated that case law existed suggesting that syringes alone are not paraphernalia. A33-A34. No other citations are provided, and, certainly, the statute is never mentioned.

The State also argues "[W]hether 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." A6. That is an obvious conclusion; however, the court itself stated that "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....I think the Court may very well have considered this differently at the time had it been raised." A48-49. Furthermore, the arrest of Ms.

Manlick is exactly what precipitated the search of her vehicle in the instant case. This is revealed at the motion hearing when Officer Rucker is asked, "once you saw those needles, you determined at that point…you had probable cause to arrest Miss Manlick…?" A28-29. The officer responded "Yes." *Id.* He's further questioned, "[A]nd you asked her to step out of the car?" A29. The officer responded "[Y]es, I did." *Id.* He's later asked, "[A]nd then Miss Manlick was put in cuffs and put into the squad…?" *Id.* Officer Rucker responds "Yes." *Id.* Lastly, the officer is asked whether he then searched the car, and he again responded "Yes." *Id.*

II. Conclusion

In the instant case, Ms. Manlick believes that the record demonstrates that Officer Rucker, after seeing needles in her vehicle, believed he had probable cause to arrest her and did so. Furthermore, the officer used the arrest as a basis to search Ms. Manlick's vehicle. Finally, the court conceded that had the statute been raised at the motion hearing, the court would not have ruled the way it did regarding probable cause for arrest.

For those reasons, the others stated above, and those articulated within Ms. Manlick's brief in chief, we respectfully request that this court reverse the circuit

court's rulings denying Ms. Manlick's motion for the suppression of evidence as well as that trial counsel's deficient performance prejudiced her case.

Dated at Oshkosh, Wisconsin, this _____day of February, 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 7 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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