STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No(s). 2015AP000194-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

CHRISTOPHER E. MASARIK,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND AN ORDER DENYING DEFENDANT'S POSTCONVICTION MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE KEVIN E. MARTENS AND THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT, CHRISTOPHER E. MASARIK

SUBMITTED BY:

Scott A. Szabrowicz
State Bar Number 1029087
Attorney for Defendant-Appellant

P.O. Address:
4227 W. Forest Home Ave.
Milwaukee, WI 53215
Tel: (414)395-6594
Fax: (815)301-3334

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THE CIRCUIT COURT ANSWERED: NO.

II. WHETHER MASARIK'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY RAISE SUPPRESSION OF STATEMENTS MOTION ISSUES.

THE CIRCUIT COURT ANSWERED: NO

III. WHETHER THE CIRCUIT COURT ERRED IN DENYING MASARIK'S SUPPRESSION OF STATEMENTS MOTION

THE CIRCUIT COURT ANSWERED: NO.

IV. WHETHER THE CIRCUIT COURT ERRED IN DENYING SENTENCE MODIFICATION MOTION.

THE CIRCUIT COURT ANSWERED: NO

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not request oral argument or publication in this case because he believes that the issues can be fully described in the parties' briefs and that the issues may be decided using presently established legal precedent.

STATEMENT OF THE CASE

A criminal complaint was filed on August 26, 2009, which alleged that on or about August 7, 2009, the defendant, Christopher E. Masarik (Masarik), committed a felony murder under § 943.03, Wis. Stats., for setting a fire at a residence and ultimately causing the death of M..J.[1]

The case proceeded through the judicial system. On March 22, 2010, at a point just before a jury trial which was subsequently adjourned occurred, the criminal charges were amended now alleging the offenses of first degree reckless homicide under § 940.02(1), Wis. Stats., and arson of a building/dwelling under § 943.02(1)(a), Wis. Stats. (R. 15: 1).

Relevant in part to this appeal, were defense motions for suppression of statements, and also an initial challenge to the warrantless arrest of Masarik by Milwaukee Police. (R. 5: 1, A-Ap. 110). On July 14, 2010, before the later scheduled jury trial began, the Circuit Court held an evidentiary hearing for the suppression of

[1] All references to the deceased victim and victim family members in this brief will be by first and last name initials so as to protect the privacy interests of the victim. See Rule 809.96, Wis. Stats.

statements motion, i.e., a *Miranda-Goodchild*[2] hearing. (R. 113: 1-42). At the conclusion of the hearing the Circuit Court denied Masarik's motion to suppress his statements. (R. 113: 34-39, A-Ap. 125-30).

The case thereafter went to a jury trial, and on August 19, 2010, Masarik was found guilty for the offenses of first degree reckless homicide under § 940.02(1), Wis. Stats., and for arson of a building or dwelling under § 943.02(1)(a), Wis. Stats. On November 4, 2010, the Circuit Court sentenced Masarik to serve combined total bifurcated sentence of forty-eight years of imprisonment, consisting of thirty-two years of initial prison confinement and sixteen years of extended supervision, for the offenses.

On October 27, 2014, Masarik filed a postconviction motion seeking to vacate the judgment of conviction and order the suppression of the statements and any derivative evidence, or, in the alternative, for a sentence modification, and further requesting that the circuit court order a hearing, including a ***Machner*** hearing,

[2] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602 (1966), ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

to be held. (R. 94: 1-20). The parties filed further briefs, and on January 6, 2015, the circuit court entered a decision denying Masarik's postconviction motion without a hearing. (R. 102: 1-4; A-Ap. 120-23).

This case is before this Court pursuant to Masarik's notice of appeal filed on January 23, 2015. (R. 103: 1-3).

STATEMENT OF THE FACTS

On August 26, 2009, a criminal complaint was filed against Christopher E. Masarik (Masarik) for one count of felony murder under § 943.03, Wis. Stats., alleged to have been committed by Masarik by the setting of a fire on or about August 7, 2009 at a residence on South Wentworth Street in the City of Milwaukee and which resulted in the death of M.J. (R. 2: 1-5; A-Ap. 105-09). Relevant to this postconviction motion, the complaint states in part:

> Upon the statement of City of Milwaukee Police Detective Jason Dorava, who stated that on Friday, August 7, 2009, at approximately 4:15 a.m., he was dispatched to [a S. Wentworth Ave house], City and County of Milwaukee, to assist in a fire investigation.
>
> * * *
>
> . . . . The firefighters then broke out all of the second floor windows and it took approximately 3-5 minutes before Lieutenant Hinsencant was able to go into the structure. He was followed by Unrein and firefighter Polka. The smoke level was approximately 1 foot off of the ceiling. In the west side bedroom, Lieutenant Hinsencant observed a person, later

identified as [M.J.], on the floor of the west side bedroom. [M.J.] did not appear to be breathing. Polka and Unrein then carried the victim, [M.J.], out through the back stairs and placed him in Medical Unit 15. Life saving efforts were performed but firefighters were unable to revive the victim.

* * *

Detective Wallich further states that the defendant, Christopher Masarik, was arrested on August 20, 2009 at a gas station located at 1425 N Farwell, City and County of Milwaukee, driving a Maroon 1993 Chevrolet Lumina minivan. Detective Wallich searched the defendant's van and found a bag containing 22 books of matches within a box which held 50 books of matches when full. There was a skillet pan on the front passenger seat and a lighter was inside the skillet. In the back of the minivan, there were three gas cans, two 1-gallon gas cans and one 2 1/2 - gallon gas can, which was in the tire storage area. One of the 1-gallon gas cans had trace of gasoline and the other 1-gallon gas can had a smell of a gas/oil mixture. The 2 ½ - gallon gas can had about 1/8 of an inch of a liquid substance, which smelled like gasoline in the bottom of the can.

Upon the statement of City of Milwaukee Police Detective James Hutchinson, who states that on August 22, 2009, he together with Detective Jeremiah Jacks interviewed the defendant . . . [.]

Masarik stated that on the above-date at approximately 2 a.m., he was in his 1993 red Chevy Lumina van and after going to a gas station, he decided to stop at his friend [M.J.'s] house who lives off of Russell on Wentworth. He stated that he went there in order to get more gas. He stated he parked in front of the house and retrieved a gas can from behind his seat, where he kept it in a tire, and then walked to the back of the home where his friend [M.J.'s] lives. Masarik stated that he went to the back stairs carrying the plastic gas can. He knocked on the door and after receiving no answer, believed that [M.J.] was not home. Masarik stated that he was going to check under the stairs in a storage area that has a door to see if there was any gas to put into his can. He stated that while in the storage area, he did attempt to look into the gas tank of the push lawn mower and found that it was empty. He stated that at this time, he decided to do what he described as

> "something stupid." He stated that he took the top of the paper portion of a cigarette box and after ripping it off of the cigarette pack, straightened it out and lit it on fire, putting it in the gas tank of the lawn mower. He stated that he did not light the lawn mower on fire. He took his lighter and after seeing a twine string, which was located to the right of the door hanging on a hook, he lit this string on fire. Masarik stated that he possibly shut the door to the storage area, then walked back towards the van. He stated that when he arrived near the van at the street, and while approximately 10 feet from his van, he observed the flame on the string "glowing." He stated that the size of the flame at that time to be about 6 inches in length, comparable to the height of a soda can.

(R. 2: 1-5, A-Ap. 105-09).

Important to the appeal in this case were the alleged statements of Masarik's friends/co-workers and which were relied upon in support of the arrest of Masarik without a warrant. Relative to this issue, the complaint indicates, in part:

> Upon the statement of City of Milwaukee Police Detective Charles Mueller, who states that he interviewed a citizen witness, Jason Kuehn, on August 20, 2009. Kuehn stated that he is a friend of the defendant, Christopher Masarik. After the above-described fire, he had a conversation with Christopher Masarik. Masarik told Kuehn that he was at [M.J.'s] house, he was in [M.J.'s] backyard and for a prank, he took the gas cap off the lawn mower and put a piece of paper or a rag in the gas tank and lit it. He stated that after he lit it, nothing happened and he walked away. On August 8, 2009, Kuehn and Masarik were working on a job together and Masarik made the comment that he can't believe that [M.J.] is gone. On August 14, 2009, Kuehn and Masarik were going to go fishing and when Masarik went and opened up the rear hatch to his red minivan to grab the fishing poles, he grabbed a small red plastic gas can with a yellow spout on it and made the

> comment, "this is the gas can that I used," referring to the fire at [M.J.'s] house. Kuehn described the gas can as being a red plastic, approximately 1 or 2 gallon in capacity, with a yellow plastic spout. At that point, Kuehn stated, "I thought you didn't use gas," but Masarik did not reply to this comment. Subsequently on that day, the defendant stated, "I can't believe I killed my friend," and then later stated, "I can't believe I got away with it," and then stated several times, "I can't believe I burned [M.J.]." While they were fishing, the defendant told Kuehn that if he tells anybody, he'll burn his house and his mom's house and Brian and Ned's house. Kuehn stated that when Masarik was making these comments, he was telling him he didn't want to hear it but that Masarik kept talking and would not let it rest.
>
> Kuehn further states that on Tuesday evening, August 18, 2009, he again spoke with the defendant. The defendant stated that on the night that [M.J.] was killed, he drove down to [M.J.'s] house at about 1:30 in the morning. The defendant stated that he was in [M.J.'s] backyard and there was nobody around and that he took a piss in the backyard. The defendant again made the comment that he was pouring gas at [M.J.'s] place and he started a fire just as a prank at [M.J.'s] house. When the defendant stated that he was pouring gas, Kuehn asked, "I thought you didn't pour any gas," and the defendant did not respond to him. The defendant stated that [M.J.'s] had been harassing him and picking on him the last couple of weeks.

(R. 2: 4-5, A-Ap. 108-09).

After the criminal proceedings were commenced against Masarik, the case proceeded through the judicial system.

Relevant to this appeal is the suppression of statements motion, and also *an initial challenge to the arrest* made of Mr. Masarik. Regarding the later point,

Masarik's first trial attorney submitted a motion indicating, in part:

> 1. That the statements were made pursuant to a detention by the police without probable cause for arrest and were not sufficiently attenuated to permit the use at trial of the statements. Dunaway v. New York, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979).

(R. 5: 1; A-Ap. 110).

As referenced in the complaint and later at trial, statements made by an individual named Jason Kuehn to the police nearly two weeks after the subject fire, i.e., alleged statements by Masarik to Kuehn on occasions of the two doing roofing work and while fishing, drinking alcohol, and smoking marijuana, were the reasons that prompted Masarik's arrest by police. (R. 118: 55-73, R. 94-D, Szabrowicz Aff., Exhibit A, p. 2).

Referenced in the police reports are statements made by Brian Linnane and Jason Kuehn to the police on August 20, 2009, i.e., thirteen days after the August 7, 2009 fire. The reports indicate in part:

> Upon the conclusion of this interview, LINNANE and KUEHN had agreed to arrange to meet with MASARIK. This meeting was done via KUEHN calling MASARIK on his cell phone. Based on these phone conversations, arrangements had been made to have MASARIK arrested at the location they were to meet.

> Based on the information that was obtained by KUEHN, MASARIK was located at a gas station at 1425 N. Farwell driving a maroon 1993 Chevrolet Lumina APV with WI/plate of 451PYX. . . . . [Police Officers] were all present and assisted in taking MASARIK into custody. Officer RHODE and POVOLO conveyed MASARIK to the Police Administration Building where he was processed at PPS. The van was towed from the scene . . . . [.]

(R. 94-D, Szabrowicz Aff., Exhibit A, p. 2).

After Masarik was appointed successor counsel, from Attorney Richard Johnson to Attorney Richard Poulson, the arrest without probable cause challenge was apparently dropped, (R. 110: 6), but according to Masarik, not by his choice, (R. 94-D, Szabrowicz Aff., ¶ 8, A-Ap. 118), and the motion to suppress statements challenge alone continued.

A *Miranda-Goodchild* hearing took place on July 14, 2010, to determine whether the statements from the interrogations would be suppressed. (R. 113: 1-42). The Circuit Court set forth a purported agreement limiting the scope of the motion, stating the following:

> THE COURT: And my understanding is that Mr. Masarik gave a statement for a period of time, allegedly then asked for a lawyer, the statement was stopped, there was then a break off of the recording, the recording then resumed with a request for Mr. Masarik to continue talking. The detectives gave Mr. Masarik his constitutional rights, his Miranda rights, and then the statement continued.

> MR. WILLIAMS [ASSISTANT DISTRICT ATTORNEY]: Yes.
>
> THE COURT: And the issue here is basically what happened during that break period. But in order to understand everything, we agreed that we were going to play the relevant portions of the statement around that time frame. Correct?
>
> MR. WILLIAMS [ASSISTANT DISTRICT ATTORNEY]: Yes. . . . .

(R. 113: 3-4). For the State, a portion of the police interrogations statements were played aloud in court, and Milwaukee Police Detectives Erik Gulbrandson and Rodney Young testified regarding the circumstances of the police interrogations. (R. 113: 4-20, 29-34, see also, R. 124, State's Exhibit 1 - Compact Disc Audio Recording). For the defense, Mr. Masarik himself testified. (R. 113: 21-28).

After the parties closed their cases and made their respective arguments in support or against suppression of the statements, the circuit court made its oral ruling denying the motion to suppress. (R. 113: 34-39, A-Ap. 125-30). In denying the defense motion to suppress statements, the Circuit Court stated, in part:

> THE COURT: Well, it's my understanding that when a defendant invokes his right to counsel in an interrogation, that the invocation of that right has to be unequivocal. It's got to be absolute and unequivocal. Not should I or shouldn't I have a lawyer? Maybe I should have a lawyer. But it

should be I want a lawyer, I don't want to speak anymore. Is that your understanding, Mr. Williams?

MR. WILLIAMS: Yes.

THE COURT: And Mr. Poulson, correct?

MR. POULSON: Yes.

THE COURT: And what I am hearing here is Mr. Masarik basically equivocating. However, the detectives went the extra mile and viewed it as a request for a lawyer. They stopped the questioning. There was a 15-iminute break for Mr. Masarik to think, because that was what he said, that was part of the recorded testimony is he needed time to think; again, making it not unequivocal, but still the detectives followed through.

And then when the detectives came back to check on him, he starts talking again voluntarily. The detectives then tell him that he can't continue to talk until they go through some additional procedures, follow those procedures by re-mirandizing him and then continuing on with the statement.

The reason why I bring up the unequivocal issue, even though it's not really at issue here, is from the original statement, it makes it highly possible and quite probable that Mr. Masarik would equivocate later on and want to talk more about the case.

We've heard from the detectives that they did not in any way add any type of coercion or mention anything with regard to lesser penalties or going to bat for him with regard to the D.A. and charges being issued in this case, and the detectives seemed to be far more credible. They are very straight forward in what they say; Mr. Masarik's testimony here was not the most clear.

But the turning point is the fact that when he said he wanted a lawyer, he said I think I should have a lawyer, I need some time to think; which, again in my mind makes it more probable that after his time that he had to think that he would want to continue to talk or may want to continue to talk.

So it's not one of those situations where a defendant says I demand a lawyer, I will not speak with you, and then detectives come back and say,

> well, if you talk with us, we are going to make sure that the charges aren't issued, and then start browbeating him and then he says, okay, fine, I guess if you really want, I will talk to you. It's not that clear. It's more of that middle-level equivocation. And because of all that I believe that all of the proper procedures were followed and the motion to suppress is denied.

(R. 113: 37-39, A-Ap. 128-30).

After the court denied the motion to suppress statements, the case eventually progressed to a jury trial. On August 19, 2010, after the trial, Masarik was found guilty for the offenses of first degree reckless homicide under § 940.02(1), Wis. Stats., and for arson of a building or dwelling under § 943.02(1)(a), Wis. Stats., for events that occurred on August 7, 2009. (R. 37: 1-3, A-Ap. 112-14).

On November 4, 2010, the circuit court sentenced Masarik to serve a combined total bifurcated sentence of forty-eight years of imprisonment, consisting of thirty-two years of initial prison confinement and sixteen years of extended supervision, broken down as twenty-five years of initial confinement and ten years of extended supervision for the first degree reckless homicide offense and a consecutive term of seven years of initial confinement and

six years of extended supervision for the arson offense. (R. 37: 1-3, A-Ap. 112-14).

On October 27, 2014, Masarik filed a postconviction motion seeking to vacate the judgment of conviction and order the suppression of the statements and any derivative evidence, or in the alternative, for a sentence modification, and further requesting that the Circuit Court order a hearing, including a ***Machner*** hearing, to be held. (R. 94: 1-20). The parties filed further briefs, and on January 6, 2015, the Circuit Court entered a decision denying Masarik's postconviction motion without a hearing. (R. 102: 1-4; A-Ap. 120-23).

This case is before this Court of Appeals pursuant to Masarik's notice of appeal filed on January 23, 2015. (R. 103: 1-3).

Additional facts will be added to the arguments section of this brief as necessary.

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN DENYING MASARIK'S CLAIM THAT HIS TRIAL COUNSEL PROVIDED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CHALLENGE THE INITIAL ARREST

A. Standard of Review.

Masarik asserts that his trial counsel rendered ineffective assistance of counsel when he failed to challenge Masarik's initial arrest.

To prevail on an ineffective assistance of counsel claim, a defendant must show that his or her trial counsel's performance was deficient and that such deficient performance prejudiced the defendant. ***State v. Smith***, 207 Wis. 2d 258, 273 558 N.W.2d 379 (1997), *see also*, ***State v. Pitch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711, 714 (1985) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Both the claimed deficient performance and prejudice components of an ineffective assistance of counsel claim present mixed questions of law and fact. ***State v. Glass***, 170 Wis. 2d 146, 151, 488 N.W.2d 432, 434 (Ct. App. 1992). "[The Court of Appeals] will not upset a

trial court's underlying findings as to what happened unless they are clearly erroneous." *Id*. "Whether counsel's performance was deficient and prejudicial however are questions of law which [the Court of Appeals] reviews without deference to the trial court[']s]" determinations. *Id*.

B. The Circuit Court Erred in Denying Masarik's Postconviction Motion of Ineffective Assistance of Counsel for Counsel's Failure to Challenge the Warrantless Arrest.

Masarik asserts that his trial counsel rendered ineffective assistance of counsel when he failed to challenge his Masarik's initial arrest.

In denying Masarik's postconviction motion on this point, the Circuit Court decision states, in part:

> The defendant now claims that trial counsel was ineffective for failing to argue that probable cause did not exist for his arrest in the suppression motion that was filed. He contends that the police should have obtained a search warrant for his arrest in the suppression motion that was filed. He contends that the police should have obtained a search warrant before arresting the defendant because Kuehn "was plainly an unreliable person," purportedly because he said the defendant had threatened him but, at the same time, arranged to meet him as a friend when the police wanted to arrest the defendant. (*Motion*, p. 10). He concludes that Kuehn's statement's to police were "inconsistent and [contained] highly suspect information." (Id.).
>
> The court disagrees. It agrees completely with the State that the facts were sufficient for probable cause to arrest the defendant for the arson and death of [M.J.] which occurred on August 7, 2009. The

> defendant admitted he killed [M.J.] by lighting the fire. He explained to Kuehn how he had put something in the gas tank of the mower and lit it on fire. The defendant made statements about his involvement with [M.J.'s] death on August 14, 2009 when they were working together, and again on August 17, 2009 when they went camping together. These facts were entirely sufficient to lead a reasonable police officer to believe that Masarik had committed a crime. There is not a reasonable probability that a motion to suppress would have been successful had the defendant argued that probable cause did not exist to arrest him. Trial counsel cannot be deemed ineffective for failing to raise such an argument.

(R. 102: 2-3, A-Ap. 121-22). Masarik maintains that the Circuit Court erred in its decision.

The test for ineffective assistance of counsel is met when the defendant demonstrates: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. ***State v. Pitsch***, 124 Wis. 2d, 628, 633, 369 N.W.2d 711 (1985). To demonstrate deficient performance the defendant must show that counsel's representation "fell below an objective standard of reasonableness." ***Strickland v. Washington***, 466 U.S. 668, 688 (1984).

Relevant to this issue on appeal, Masarik points out to this Court that his first trial counsel in a suppression of statements motion challenged not only his statements

based on conventional *Miranda*[3] and Constitutional grounds, but also a *challenge to the arrest*. The original motion states:

> 1. That the statements were made pursuant ***to a detention by the police without probable cause for arrest*** and were not sufficiently attenuated to permit the use at trial of the statements. Dunaway v. New York, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979).

(R. 5: 1, A-Ap. 110) (emphasis added).

After Masarik filed his postconviction motion, the State filed a brief and to counter Masarik's assertion regarding the probable cause issue. (R. 97: 1-7). On this issue, the State cited essentially to statements made to police by only two individuals, Brian Linnane and Jason Kuehn. (*Id*. at 3-4). Regarding Brian Linnane, the State argued that Linnane told police officers information he claims he heard from Jason Kuehn, i.e., hearsay statements, indicated in part by; "Mr. Kuehn then told Mr. Linnane how Christopher Masarik told him how he set the fire. Mr. Masarik said he stuck a rag in a lawnmower and lit it, but it went out." (*Id*. at 3). Thus, the police reports were based at least, in part, on the double hearsay of Brian

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Linnane. Regarding Jason Kuehn, the State then indicated inculpatory statements allegedly made by Masarik to Kuehn. (*Id*. at 3-4). The State then concluded: "The statements made by the defendant to Mr. Kuehn were against the defendant's penal interest, and *there was no reason to believe that Mr. Kuehn was not reliable*. (*Id*.) (emphasis added). Masarik disagrees.

As referenced in the complaint and later at trial, statements made by Jason Kuehn to the police were used as the basis to conduct the warrantless arrest of Masarik. These statements to the police made nearly two weeks after the subject fire alleged that Masarik had earlier made admissions to Kuehn, on occasions of the two of them doing roofing work, and then socializing while fishing and while drinking alcohol and smoking marijuana. (R. 117: 55-73). Masarik asserts that these statements by Kuehn were unreliable and were insufficient to establish probable cause for the arrest of Masarik with a warrant.

In the police reports are statements made by Brian Linnane and Jason Kuehn to the police on August 20, 2009, i.e. nearly two weeks after the August 7, 2009 fire. The reports indicate in part:

> ***Upon the conclusion of this interview***, LINNANE and KUEHN had agreed to arrange to meet with MASARIK. ***This meeting was done via KUEHN calling MASARIK on his cell phone***. Based on these phone conversations, arrangements had been made to have MASARIK arrested at the location they were to meet.
>
> ***Based on the information that was obtained by KUEHN, MASARIK was located at a gas station*** at 1425 N. Farwell driving a maroon 1993 Chevrolet Lumina APV with WI/plate of 451PYX. . . . . [Police Officers] were all present and assisted in taking MASARIK into custody. Officer RHODE and POVOLO conveyed MASARIK to the Police Administration Building where he was processed at PPS. The van was towed from the scene . . . . [.]

(R. 94 – D, Szabrowicz Aff., Exhibit A, p. 2) (emphasis added).

Masarik's first trial attorney initially challenged the arrest by the police as lacking probable cause. (R. 5: 1, A-Ap. 110). However, after Masarik was appointed successor counsel, the arrest without probable cause issue was apparently dropped, but not by Masarik's choosing, (R. 110: 6; see also, R. 94-D: Szabrowicz Aff., ¶ 8), and the motion to suppress statements alone continued.

Masarik submits that his trial counsel provided ineffective assistance of counsel for failing to challenge that his initial arrest. Masarik asserts that the attorney should have pursued a motion to suppress the obtained statements and the derivative evidence on grounds that his

initial arrest was without probable cause in violation of the Fourth Amendment to the United States Constitution, Article I, section 11 of the Wisconsin Constitution and § 968.07(1)(d), Wis. Stats.

§ 968.07(1)(d), Stats., provides: "A law enforcement officer may arrest a person when . . . . [t]here are reasonable grounds to believe that the person is committing or has committed a crime." Probable cause to arrest is a requirement of the Fourth Amendment of the United States Constitution applicable to all States through the Fourteenth Amendment.

Further. the Fourth Amendment to the United States Constitution and Article I, Section 11, of the Wisconsin Constitution both guarantee to all citizens the right to be free from unreasonable searches and seizures. An investigatory stop is a "seizure" within the meaning of the Constitution, and a law enforcement officer, before stopping an individual must reasonably suspect, in light of his or her training and experience, that the individual is, or has been involved in criminal activity. ***Terry v. Ohio***, 392 U.S. 1, 20-22, 88 S. Ct. 1868 (1968). The test for reasonable suspicion is an objective, common sense test

based upon the totality of the circumstances. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W. 2d 763 (1990). The test "strikes a balance between society's interest in the police preventing and detecting crime, and the individual's privacy interest." ***State v. Kelsey C.R.***, 2001 WI 54, ¶ 41, 243 Wis. 2d 422, 626 N.W.2d 777.

Masarik asserts that the arresting officers impermissibly used the initial arrest without probable cause to essentially initiate the investigation. In ***U.S. v. Griffin***, 884 F.Supp. 767, 775 (U.S. Dist. Ct. E.D. Wis. 2012), the District Court set forth the following:

> The court must give due regard to the officer's experience, knowledge, and expertise, ***United States v. Sholola***, 124 F.3d 803, 812 (7th Cir.1997), but a person's "mere propinquity" to others the officer suspects of criminal activity will not suffice, see ***Ybarra v. Illinois***, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). **Nor may the court consider what the officers discovered after the stop. "Regardless of how compelling the later-learned facts may be, they are not part of the 'snapshot' presented to the officer at the time of the seizure. They are therefore irrelevant to the reasonable suspicion equation."** *Odum*, 72 F.3d at 1284. The government bears the burden of demonstrating reasonable suspicion under Terry. ***United States v. Longmire***, 761 F.2d 411, 417–18 (7th Cir.1985).

Id. at 775 (emphasis added). Therefore, the arrest of a suspect is the successful conclusion of an investigation, not the beginning.

Masarik asserts that if the police believed that Kuehn's statements provided probable cause or reasonable suspicion to arrest Masarik, a point Masarik strongly contests that the statements did not, there is simply no reason the officers could not have obtained a search warrant. Further, everything followed from the initial illegal arrest of Masarik, including the interrogation statements and the physical evidence.

Jason Kuehn was a plainly unreliable person as he presented to the police the alleged threats against him, yet he himself arranged to have Masarik meet him as a friend when Masarik was arrested at the gas station, a point that which would indicate a complete inconsistency. (R. 94–D, Szabrowicz Aff., Exhibit A, p. 2, 7).

Further, by Kuehn's own admissions he and Masarik were setting off fireworks, drinking beer and "smoking some bud (marijuana)" on August 14, 2009, after Kuehn alleged that Masarik had five days earlier told him that he lit a fire in a lawn mower gas tank at the subject fire scene. (*Id.*, Exhibit A, p. 7, Kuehn Police Report, p. 3). Again, this is inconsistent and highly suspect information.

The information known to the arresting police officers at the time of the Masarik's arrest was insufficient to lead a reasonable police officer to believe that he had committed a crime. Further, the trial attorney's failure to challenge the arrest casts serious doubt on the reliability of the outcome of the trial. The Wisconsin Supreme Court stated the following regarding whether the deficient performance prejudiced the defendant:

> Although in *Strickland v. Washington* the Court speaks in terms of the defendant's showing that 'but for counsel's unprofessional errors the result of the proceeding would have been different.' The focus is on the reliability of the proceedings. "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable. . . . The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

State v. Pitsch, 124 Wis. 2d, 638, 642, 369 N.W.2d 711, 718 (1985) (citing ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), the at 507 (citation omitted). The statements were obtained from Masarik as a direct result of his arrest. The interrogating Detectives testified at the jury trial that Masarik admitted the offenses and with great detail as set forth below, (R. 117: 96-113, R. 118: 6-48), together with

the physical evidence, gas cans, matches, photographs, and autopsy report, all demonstrated that Masarik's case was prejudiced by his counsel failure to challenge Masarik's arrest by the police.

Therefore, the Circuit Court erred in denying Masarik's postconviction motion which asserted that his trial counsel rendered ineffective assistance of counsel when he failed to challenge Masarik's initial arrest, and in denying Masarik a ***Machner*** hearing on the issue.

II. THE CIRCUIT COURT ERRED IN DENYING MASARIK'S MOTION TO SUPPRESS STATEMENTS

A. The Circuit Court Erred in Denying Masarik's Motion that Trial Counsel Provided Ineffective Assistance of Counsel.

Masarik asserts that his trial counsel provided prejudicially ineffective assistance of counsel by failing to adequately present the suppression of statements motion. Masarik's trial counsel raised a suppression motion regarding Masarik's statement on a *very narrow issue* that missed a critical point of the suppression motion, that is, Masarik's severe mental health impairments and the police interrogators' coercive actions.

The right of effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. In ***Strickland v. Washington***, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), the United States Supreme Court set forth the guidelines for ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, the defendant must show both that counsel performed deficiently and that counsel's errors prejudiced his defense. *Id*. at 687. Failure to properly investigate a defense for a client is ineffective assistance of counsel. ***State v. Leighton***, 2000 WI App 156, 237 Wis. 2d 709, 616 N.W.2d 126. Criminal defense counsel has a duty to make reasonable investigations and reasonable strategic decisions concerning investigations. A strategic decision without a proper investigation may constitute deficient performance by an attorney. ***State v. Domke***, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364.

Masarik's trial counsel was prejudicially ineffective for failing to investigate and to set forth Masarik's mental health and emotional impairments in support of the suppression of statements motion, and in particular his lack of ability to resist the coercive effects of the interrogating

detectives. In support of his postconviction motion, Masarik submitted an affidavit which described emotional and cognitive problems. (R. 94-C; Masarik Aff., ¶¶ 2-5). In his affidavit Masarik states:

> 2. That on or about August 17, 2009 that I was admitted to the Froedtert Hospital and the Milwaukee County Mental Health Division for an incident which, in part, involved an arrest by the Shorewood Police Department Officers and at the hospital while being treated and checked I became agitated. At some point officers grabbed and restrained me in a devise with handcuffs, rings, chains, and a gurney, with my arms and hands contorted over my body in such a way as to cause me to be unable to breathe except for gasping breaths for air and in which I believed that I was in the possibility of suffocating to death. At one point while I strained to speak, I pled to the nurse, "Help me - I can't breathe[,]" and the nurse then told the officers words to the effect "No, this has got to stop, he is in danger[,]" at which point the officers did comply with the nurse's directive. I was fearful of my life being lost during this incident and I felt traumatized, to me it felt that the officer's were torturing me.
>
> 3. That about a week or less following my release from Milwaukee County Mental Health Department, while I was in custody of the Milwaukee Police Department during the police interrogations of me for the instant above-entitled case, the officers raised the August 17, 2009 incident in a threatening tone and stated words to the effect "You don't want to be going through that again, do you?" which I understood as a threat that I was going to be similarly restrained if I did not tell the officers what they wanted to hear. This incident made me feel terrorized and unable to defend myself from the officers.
>
> 4. That I sent pro se motions to the Circuit Court and that my trial attorney, Attorney Richard Poulson took a negative attitude toward my suggestions for defenses and strategies and often misinformed me or failed to inform me at all

> regarding the motions and defense of my case and which I have spoken to my appellate attorney about.
>
> 5. That I have a history of mental health issues that are described, in part, in sealed exhibits filed with my appeal attorney's affidavit in support of a motion requesting a psychiatric competency examination and also in the forensic psychiatrist's report dated December 9, 2013 in the above-entitled court case file.

(Id., ¶¶ 2-5, A-Ap. 115-116). Also, in an attorney affidavit, it indicates counsel's observed accounts of Masarik's mental health issues, (R. 94-D, Szabrowicz Aff., ¶¶ 5-7, A-Ap. 117-19), and statements Masarik made to him. In part, the affidavit indicates:

> 4. That the undersigned affiant-attorney spoke to Christopher E. Masarik and Mr. Masarik stated that he was coerced into making a false confession to the police regarding this case, that the officers coaxed and "fed information to him" regarding all the various details including, in part, possibly spilling gasoline, and starting a string on fire in a stairway storage area outside where [M.J.] lived on August 7, 2009, which Mr. Masarik stated was untrue.

(Id. ¶ 4).

Furthermore, the forensic psychiatrist that prepared a postconviction competency report clearly indicated a long history of mental health problems for Mr. Masarik and prior diagnoses of noted a long history of mental health and behavioral difficulties and prior diagnoses of

"Anxiety Disorder NOS, Schitzotypal Personality Disorder and Polysubstance Dependence[.]" (R. 66: 1-9).

Masarik's trial attorney, however, did not advance a critical point regarding challenges to the interrogation statements, i.e., a person's ability to resist coercive tactics utilized by the police. Masarik maintains, that because there was an earlier entry of a - Not Guilty by Reason of Mental Disease or Defect - defense by his first trial attorney of which his later trial counsel was aware, this demonstrated the later attorney's knowledge of Masarik's mental health issues, yet failed to advance any defense in this regard.

The circuit court decision on the postconviction motion states, in part:

> The defendant also contends that the trial counsel failed to raise a critical issue in his suppression motion with respect to his severe mental health impairments and the coercive actions taken by police during the interrogation process. He submits that the mental health ailments caused him to lack the ability to resist the coercive effects of the interrogating detectives. (Motion, p. 12. In an affidavit, he sets forth what befell him on August 17, 2009 when he was admitted to Froedtert Hospital and the Milwaukee County Mental Health Division with respect to his subsequent interrogation several days later. He claims that Dr. Rawski's December 9, 2013 report supports a finding that reflects his inability "to withstand the coercive effects of the detectives' interrogation tactics." (Motion, p. 13). Unfortunately, Dr. Rawski's report does nothing to support the defendant's frame of mind at the time of his arrest or

> interrogation, and the defendant has not provided any expert opinion which would support his particular position. Dr. Rawski's findings from 2013, four years after the offenses were committed, are insufficient to obtain a hearing on this issue. Trial counsel was not ineffective for failing to raise the defendant's mental health to support a coerced confession claim.

(R. 102: 3, A-Ap. 122) (footnote omitted). Masarik disagrees.

As noted above, the forensic psychiatrist that prepared a postconviction competency report clearly indicated a long history of mental health problems for Mr. Masarik and prior diagnoses of behavioral difficulties and prior diagnoses of "Anxiety Disorder NOS, Schitzotypal Personality Disorder and Polysubstance Dependence[.]" (R. 66: 1-9). While it is true that the report was prepared not as an expert report for the interrogation statements, it still provided objective documentation of dates and mental health diagnoses including the events on August 17, 2009. (*Id*. at 5-6). In addition, the document summaries records reviewed from Milwaukee County Behavioral Health Division, submitted by the defense. (*Id*. at 3-5, R. 64).

In ***State v. Jerrell C.J.*** 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, the Wisconsin Supreme Court articulated the proper standard:

¶ 18. The principles of law governing the voluntariness inquiry are summarized in [***State v.***] ***Hoppe***, 261 Wis. 2d 294. There, the court observed that a defendant's statements are voluntary "if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." Id., ¶ 36 (citing ***Clappes***, 136 Wis. 2d at 236; ***Norwood v. State***, 74 Wis. 2d 343, 364, 246 N.W.2d 801 (1976); ***State v. Hoyt***, 21 Wis. 2d 284, 308, 128 N.W.2d 645 (1964)).

¶ 19. A necessary prerequisite for a finding of involuntariness is coercive or improper police conduct. Id., ¶ 37 (citing ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986); ***Clappes***, 136 Wis. 2d at 239). However, police conduct need not be egregious or outrageous in order to be coercive. Id., ¶ 46. "Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures." Id.

¶ 20. The voluntariness of a confession is evaluated on the basis of the totality of the circumstances surrounding that confession. Id., ¶ 38 (citing ***Clappes***, 136 Wis. 2d at 236); Theriault v. State, 66 Wis. 2d 33, 41, 223 N.W.2d 850 (1974).

This analysis involves a balancing of the personal characteristics of the defendant against the pressures and tactics used by law enforcement officers. ***Hoppe***, 261 Wis. 2d 294, ¶ 38 (citing ***Clappes***, 136 Wis. 2d at 236). The Hoppe court explained:

The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on

> the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination. Id., ¶ 39 (internal citations omitted).

Id. at ¶¶ 18-20.

Masarik asserts that under the totality of the circumstances, his statements to the police were involuntary. As stated above, in ***Jerrell C.J.***, "subtle pressures are considered to be coercive if they exceed the defendant's ability to resist." In this case, there were several factors bearing on whether Masarik had the requisite ability to resist, including, all importantly and obviously, his severe mental health deficiencies. This was set off against the interrogation techniques of the police officers, including the extended hours of being in a relatively small interrogation room, (R. 117: 55), several repeated interrogations, at least four separate interrogations conducted over multiple days, (R. 112: 2-4), and in which according to Masarik, the police fed information to him and corecered him into a false confession. (R. 94-D, Szabrowicz Aff., ¶ 4, A-Ap. 118). Defense counsel was therefore deficient in failing to present Masarik's mental deficiencies. The trial attorney's failure to properly and

completely challenge the statements casts serious doubt on the reliability of the outcome of the trial. The Wisconsin Supreme Court stated the following regarding whether the deficient performance prejudiced the defendant:

> Although in *Strickland v. Washington* the Court speaks in terms of the defendant's showing that 'but for counsel's unprofessional errors the result of the proceeding would have been different.' The focus is on the reliability of the proceedings. "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable. . . . The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

State v. Pitsch, 124 Wis. 2d, 638, 642, 369 N.W.2d 711, 718 (1985) (citing ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). As noted above, the statements were obtained from Masarik as a direct result of his arrest. The interrogating Detectives testified at the jury trial that Masarik admitted the offenses and with great detail. (R. 117: 96-113, R. 118: 6-48).

Therefore, the Circuit Court erred in denying Masarik's postconviction motion which asserted that his trial counsel rendered ineffective assistance of counsel by failing to adequately present the suppression of statements

motion and in denying Masarik a ***Machner*** hearing on the issue.

B. The Circuit Court Erred in Determining that Masarik Had Not Invoked His Right to Remain Silent (To Not to Make a Statement).

Masarik asserts that the Circuit Court should have suppressed his statements to the police because they failed to scrupulously honor his invocation of his right to remain silent before his inculpatory statements were eventually made.

In its postconviction motion decision, the Circuit Court states, in part:

> Next, the defendant asserts that Judge Martens erred in determining that he had not invoked his right to remain silent. Judge Martens watched portions of the video and made his determination based on the testimony and credibility of the two detectives and the defendant.. This court perceives no erroneous exercise of discretion in denying the defendant's suppression motion and stands by the ruling that was made.

(R. 102: 3-4, A-Ap. 122-23). Masarik disagrees.

Notably, on this point, the State in its postconviction brief made a conclusory statement as, "It seems obvious from the videotaped (sic) statements that the police treated Mr. Masarik with dignity and did not coerce a statement from him. The judgment of trial counsel

is reinforced by the obvious voluntariness of the statement on the videotape (sic)." (R. 97: 5). Masarik points out the statements were audio-taped and the statements demonstrate coercive tactics including feeding information, including "stringer" and "pink cord," and implied threats as to a disbelieving district attorney, among many devises to coerce a mentally strained and disadvantaged Masarik. (See R. 99, Szabrowicz Aff., Ex. A, Interrogation 08/22/09 pp. 10, 24-26).

In ***State v. Badker***, 2001 WI App 127, 240 Wis. 2d 460, 623 N.W.2d 142, the Court of Appeals stated:

> ¶11 The Fifth Amendment to the United States Constitution provides, "No person … shall be compelled in any criminal case to be a witness against himself." "The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence." ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866, 869 (1985); *see also* ***Michigan v. Mosley***, 423 U.S. 96, 103 (1975); ***Miranda v. Arizona***, 384 U.S. 436, 474 (1966). An accused person may waive the right to remain silent if he or she does so knowingly, intelligently, and voluntarily and does so in an express statement. ***Miranda***, 384 U.S. at 475-76, *citing* ***Glasser v. United States***, 315 U.S. 60, 62 (1942).
>
> ¶12 However, the state may not badger an accused into waiving that right. "The state may again interrogate the accused after the right to silence has been invoked provided that right to silence is 'scrupulously honored.'" ***Hartwig***, 123 Wis. 2d at 284, 366 N.W.2d at 869, *quoting* ***Mosley***, 423 U.S. at 104. This protection exists to shield the accused from "repeated efforts to wear down his resistance and make him change his mind." ***Mosley***, 423 U.S. at

105-06. . . .

Id. at ¶11 ¶12.

Masarik asserted in his suppression motion that the police officers failed to honor his right to remain silent and not make a statement. After the parties closed their cases and completed their arguments, the Court thereafter made its oral ruling denying the motion to suppress. (R. 113: 37-41), stating in part:

> THE COURT: And what I am hearing here is Mr. Masarik basically equivocating. However, the detectives went the extra mile and viewed it as a request for a lawyer. ***They stopped the questioning.*** There was a 15-iminute break for Mr. Masarik to think, because that was what he said, that was part of the recorded testimony is he needed time to think; again, making it not unequivocal, but still the detectives followed through.
>
> And then when the detectives came back to check on him, he starts talking again voluntarily. The detectives then tell him that he can't continue to talk until they go through some additional procedures, follow those procedures by re-mirandizing him and then continuing on with the statement.
>
> The reason why I bring up through the unequivocal issue, even though it's not really at issue here, is from the original statement, it makes it highly possible and quite probable that Mr. Masarik would equivocate later on and want to talk more about the case.
>
> We've heard from the detectives that they did not in any way add any type of coercion or mention anything with regard to lesser penalties or going to bat for him with regard to the D.A. and charges being issued in this case, and the detectives seemed to be far more credible. They are very straight forward in what they say; Mr. Masarik's testimony here was not the most clear.

(R. 113: 37-39, A-Ap. 128-30) (emphasis added).

The standard requires only that the suspect make an assertion such that it is "reasonably perceived" to be an invocation to remain silent and not make a statement. See ***State v. Markwardt***, 2007 WI App. 242, ¶ 28, 306 Wis. 2d 420, 742 N.W.2d 546. Pointedly, the officers recognized that at least at some point they had to honor Masarik's statement that he did not want to be questioned without a lawyer, demonstrated by their ending of the interview as acknowledged by the Circuit Court.

Masarik therefore asserts that the Circuit Court erred in denying his suppression of statements motion.

III. THE CIRCUIT COURT ERRED IN DENYING MASARIK'S SENTENCE MODIFICATION MOTION

Masarik asserts that the Circuit Court erred in denying his sentence modification motion. Specifically, Masarik requested a reduced imprisonment sentence running the two offense sentences concurrent to one another. On this point, the circuit court decision on the postconviction motion states, in part:

> Lastly, the defendant seeks sentence modification (a concurrent disposition) on the basis that he shouldn't have been convicted of both arson and first degree reckless homicide. Cited in support of his position is State v. Carlson, 5 Wis. 2d 595 (1958); however that case dealt with felony murder and has no applicability to this case. The defendant herein was not charged, tried and convicted of felony murder with arson as the underlying offense. He was charged, tried and convicted of two separate offenses with separate elements which the State had to prove. Although he was originally charged with felony murder under sec. 940.03, Stats., as Carlson was in State v. Carlson, supra, the State was not precluded from charging him with first degree reckless homicide under sec. 940.02(1), Stats, and with arson under sec. 943.02(1)(a), Stats. . . . . .

(R. 102: 4, A-Ap. 123). The Circuit Court went on and found *Carlson* inapposite to the facts of the present case and denied sentence modification. (*Id*.).

In ***State v. Carlson***, 5 Wis. 2d 595, 93 N.W.2d 354 (1958), the Wisconsin Supreme Court in analyzing a case, stated:

> (4) Separate convictions of arson and third degree murder. The attorney general suggests that defendant should not have been convicted of both arson and third degree murder. We agree. Because the sentences were made concurrent, we are not aware of any way in which defendant can be injured [5 Wis.2d 608] by this error, but for the purpose of clarifying the record, we reverse the judgment based on the separate conviction of arson.
>
> Sec. 940.03, Stats., provides: 'Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony."

> This statute entitled 'Third-degree murder' provides for increase in the maximum penalty for the felony referred to, in this case, arson. See discussion in 1956 Wis. Law Rev. 350, 370. Putting it in different words, third-degree murder is a combination of a felony or attempted felony, and the fact that in the commission or attempt, a death was caused. The information charging defendant with third-degree murder in effect charged the arson and alleged the causing of the death as an additional element affecting the maximum sentence; the verdict of guilty of third-degree murder in effect found the defendant guilty of arson and of the additional element of causing the death; upon such conviction the defendant was properly sentenced to imprisonment for not more than 30 years (15, the maximum for the arson under sec. 943.02, plus 15, the additional number of years provided by sec. 940.03). There was no occasion for a separate information charging arson and if the two proceedings had been tried separately, jeopardy in the first would have been a defense in the second.
>
> As suggested by the attorney general, * * * the correct procedure would be in the first instance to bring but one single charge of third degree murder and for the court to submit to the jury verdicts of third degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of [5 Wis.2d 609] sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third degree murder they would make no finding with respect to the separate form of the verdict of arson. On the other hand if they found the defendant not guilty of third degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.'

Id.

Masarik also noted that a circuit court has the inherent power to modify a previously imposed sentence after the sentence has commenced. ***State v. Wuensch***, 69 Wis. 2d 467, 472-73, 230 N.W.2d 665 (1975).

In ***State v. Ralph***, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990), the Court of Appeals stated the following:

> While the trial court may not revise a sentence merely upon 'reflection' it may review its sentence for abuse of discretion based upon its conclusion that the sentence was unduly harsh and unconscionable. If the sentence is to be reduced upon these grounds, the trial court should set forth its reason why it concludes the sentence originally imposed was unduly harsh or unconscionable.

Id.

Further, Masarik points out to this Court of Appeals that the Presentence Investigation Report writer recommended *concurrent* sentences along with a much lower combined total imprisonment term, i.e., 13 to 16 years of initial confinement and 7 to 10 years of extended supervision. (R. 31: 20).

Therefore, Masarik submits that in a proper exercise of sentencing discretion the Circuit Court erred in denying Masarik's motion for failing to modify the sentences for the two criminal convictions to run concurrently to each other. Therefore, Masarik respectfully requests that this Court order a remand to the trial court granting Walker a sentence modification in this case.

CONCLUSION

For all the reasons stated above, the defendant-appellant, Christopher E. Masarik, respectfully requests that this Court vacate the current judgment of conviction and sentence, that it order suppression of the statements and physical evidence, or in the alternative, that it order a remand to the circuit court for evidentiary hearing or sentence modification, or for such further relief as this Court deems just and appropriate.

Signed at Milwaukee, Wisconsin, this 16th day of September, 2015.

_____

Scott A. Szabrowicz
SBN 1029087
Attorney for the Defendant-Appellant

4227 W. Forest Home Avenue
Milwaukee, WI 53215
Tel: (414)395-6594
Fax: (815)301-3334

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,295 words.

Dated this 16th day of September, 2015.

_____

Scott A. Szabrowicz
State Bar No. 1029087

P.O. Address:
4227 W. Forest Home Ave.
Milwaukee, WI 53215
Tel: (414)395-6594

CERTIFICATION OF ELECTRONIC COPY OF BRIEF

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated at Milwaukee, Wisconsin, this 16th day of September, 2015.

_____

Scott A. Szabrowicz
SBN 1029087
Attorney for the Defendant-Appellant