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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

REPLY BRIEF OF THE DEFENDANT-APPELLANT, CHRISTOPHER E. MASARIK

SUBMITTED BY:

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ARGUMENTS

In reply to the points raised in the State's brief, the defendant-appellant, Christopher E. Masarik, respectfully reasserts the issues and arguments in his brief-in-chief and the following additional 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. Sufficiency of the Postconviction Motion

As part of his postconviction motion, Masarik requested various relief including, in part, that the circuit court grant him an evidentiary hearing, including a ***Machner***[1] hearing, on the issues.

In its brief, the State reframes the findings of the postconviction court, claiming that the circuit court *ruled* that Masarik "failed to sufficiently allege" each of the four issues he raised in the postconviction relief motion including, that Masarik's trial counsel provided ineffective

[1] ***State v. Machner***, 92 Wis. 2d 797 285 N.W.2d 905 (Ct. App. 1979).

assistance of counsel for failing to continue a challenge to the initial warrantless arrest, that counsel provided ineffective assistance of counsel for deficiencies in challenging the police statements made by Masarik to the police, that the trial court erred in denying Masarik's suppression motion, and the trial court's denial of Masarik's sentence modification motion. (State's Brief pp. 4-6). However, Masarik notes that the postconviction circuit court did not state that Masarik "failed to sufficiently allege" material facts to support the postconviction motion, but rather that it denied the motion based on various stated reasons in its January 6, 2015 written decision and order. (R. 102: 1-4, A-Ap. 120-23). Clearly, Masarik disagrees with the postconviction circuit court's decision to deny his postconviction motion, including that the circuit court did not order an evidentiary hearing to be held, as set forth in Masarik's brief-in-chief and for the reasons argued here.

Regarding the evidentiary hearing issue, Masarik notes the opinion in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). In ***Bentley***, the Wisconsin Supreme Court, in relying on ***Nelson v. State***, 54 Wis. 2d 489, 195

N.W.2d 629 (1972), set forth a two-part mixed standard of appellate review:

> . . . . . If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Nelson*, 54 Wis.2d at 497, 195 N.W.2d 629. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo. See *Nottelson v. DILHR*, 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980) (whether facts fulfill a particular legal standard is a question of law).
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard. *Brookfield v. Milwaukee Metropolitan Sewerage Dist*., 171 Wis.2d 400, 423, 491 N.W.2d 484 (1992).

Bentley, 201 Wis. 2d at 310-11.

Masarik points out that the State never raised this evidentiary hearing issue in any substantive fashion in its postconviction motion brief, (R. 97: 1-7), and it would have been without merit to do so. Clearly, Masarik pleaded voluminous material facts and the relevant law in support of the postconviction motion which included the postconviction motion itself, two supporting briefs, an affidavit from Masarik, and an attorney affidavit with exhibits. (R. 94: 1-40, R. 98: 1-10).

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.

The State argues that Masarik failed to show deficient performance of counsel because, the State claims, a challenge to the probable cause for arrest lacked merit. Masarik disagrees. The State argues essentially from the statements of only one person, Jason Kuehn, that the police had probable cause *without a warrant* to arrest Masarik. (State's Brief pp. 10-16).

Important to an understanding of the facts surrounding Jason Kuehn's statements about what Masarik supposedly told him, is the timing of the statement to the police and the interactions between Kuehn and Masarik prior to Kuehn's statements, which make the reliability and also the credibility[2] of the statements to police suspect. On this point, Masarik points to the State's *postconviction* motion brief that references Kuehn's "reliability" stating: "The statements made by the defendant to Mr. Kuehn were

[2] The State claims error regarding a point that Masarik argued in his brief that Kuehn was an *unreliable* witness, with the State arguing that *credibility* is the issue. (State's Brief, p. 13). The State cites no case law supporting the argument. The essential point in Masarik's view is the information provided by Kuehn was too unreliable to support the warrantless arrest.

against the defendant's penal interest, and *there was no reason to believe that Mr. Kuehn was not reliable*. (R. 97: 4) (emphasis added).

Further, Masarik's first trial counsel in a suppression of statements motion challenged not only his statements based on conventional Constitutional *Miranda*[3] 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 was appointed subsequent trial counsel, the attorney did not pursue the illegal arrest assertion, but it was not with Masarik's approval. (R. 110: 6; see also, R. 94-D: Szabrowicz Aff., ¶ 8). 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. The subject statements to the police were made nearly two weeks after the subject

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

fire were allegedly 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).

The State argues that "Kuehn was credible because everything he said was later corroborated by Masarik's confession to police." (State's Brief p. 10). This argument ignores an essential issue in the case asserted by Masarik, that is, that he was coerced into making a false confession, including being fed information regarding various details of the subject arson-homicide. (Masarik's Appellant Brief, pp. 23-32). In the attorney affidavit submitted with the postconviction motion, 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) (emphasis added). Thus, the State's claim that Kuehn was a credible informant because information he gave was supposedly corroborated by Masarik's later "confessions" should be rejected by this Court.

Likewise, the State's argument that Kuehn was a known individual as opposed to a "confidential informant" should not be viewed as providing any great credence to the overall unreliability of Kuehn's witness statement to the police. (State's Brief, p. 12). The State cites to a case, ***United States v. Koerth***, 312 F.3d 862 (7th Cir. 2002), that is off-point on this issue raising that the informant in that case was arrested with illegal drugs and identified Koerth contemporaneously at the time of his arrest. In the present case, Kuehn was not arrested and there was nothing contemporaneous about his statements to the police.

In its brief, the State also faults Masarik because it claims it can not comprehend on what basis Jason Kuehn would be seen as an unreliable or incredible in providing information to the police which the police subsequently used to support the warrantless arrest of Masarik. (State's Brief, pp. 13-14). The State does not deny that Jason Kuehn admitted smoking marijuana and consuming

alcohol with Masarik *after* Masarik allegedly made an admission to killing M.J. and allegedly threatening Kuehn. What type of credible person who claims he is threatened by someone, goes on and places himself in danger by intoxicating himself by smoking marijuana and drinking alcohol (making himself further vulnerable) and then waits days to contact the police?

C. State's Claim of Attenuation

The State argues that there was sufficient attenuation from "the allegedly" illegal arrest of Masarik by the police. The State argues that the confession was two days following his arrest. The State ignores the fact that Masarik, once arrested, was subjected to immediate and repeated interrogations lasting over the subject two days. (State's Brief, pp. 16-17). The State further makes the incorrect claim that "Masarik does not argue that the police lacked the minimal *Terry* reasonable suspicion." (*Id*.). Masarik disagrees.

Mr. Masarik asserts that the subject evidence and derivative evidence, including the physical evidence and the statements made by him to police officers should be

suppressed as fruit from the poisonous tree following from the illegal arrest.

In attenuation cases the "primary concern" is "whether the evidence objected to was obtained by exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint." ***State v. Anderson***, 165 Wis. 2d 441,447-48, 477 N.W.2d 277, 281 (1991). A court must also look to "the temporal proximity of the official misconduct and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct." *Id*. at 448.

In the present case, Masarik was interrogated while in custody following an unlawful arrest by the police. The interrogations followed shortly upon his being brought to the police department in custody. There was no break in Masarik's custody during the numerous police interrogations, (R. 110: 7), and he had no support of counsel. (R. 113: 1-40).

Accordingly, this Court of Appeals should reverse the Circuit Court's order denying Masarik's motion to suppress the statements and the all the derivative evidence in this case.

D. State's Claim of Inevitable Discovery

The State argues that the physical evidence and Masarik's statements following the evidence under the inevitable discovery doctrine. Masarik disagrees with the State's claims on this issue.

Masarik first notes that the State brings the issue up for the first time on appeal, and not in its postconviction motion brief. Further, Masarik asserts that the State just engages in "far reaching speculation" about how a *Terry* stop (rather than as the actual arrest as occurred at the gas station here) would have played out. (State's Brief, pp. 18-19). The State cites to ***State v. Lopez***, 207 Wis. 2d 413, 559 N.W.2d 264 (Ct. App. 1996) and its requirements for the State's burden of proof. The State was not following its leads in investigating Masarik, rather they were making the *arrest* of Masarik. (R. 94-D, Szabrowicz Aff., Exhibit A, p. 2).

In ***State v. Pickens***, 2008 WI App 178, 323 Wis. 2d 226, 779 N.W.2d 1, the Court of Appeals addressed the warrant requirement and the State's requirements regarding the State claim of "inevitable discovery," stating:

> ¶49 The State's inevitable discovery argument is simple: because, by the time police illegally searched the safe, they had enough information to obtain a search warrant for the safe, it follows that the police would have inevitably acquired a warrant and legally obtained the contents of the safe. The State does not, however, explain how its theory satisfies the requirement that police be actively pursuing the legal alternative—here, a warrant—prior to the unlawful search. *See* ***State v. Lopez***, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996) (the inevitable discovery doctrine includes the requirement that "prior to the unlawful search the government ... was actively pursuing some alternate line of investigation"). If the existence of probable cause for a warrant excused the failure to obtain a warrant, the protection afforded by the warrant requirement would be much diminished. *See* ***United States v. Cherry***, 759 F.2d 1196, 1205-06 (5th Cir. 1985) (explaining that application of the inevitable discovery doctrine, where agents "could have obtained a warrant but had made no effort to do so," undercuts the warrant requirement).

Id. at ¶ 49. The Court of Appeals in Pickens rejected the State's inevitable discovery claim. (Id. ¶ 50). In the present case, the State does not address why the police, if they believed that Kuehn's claims about Masarik were true, that they would not have obtained an arrest warrant.

This Court should reject the State's arguments under the inevitable discovery doctrine.

Masarik asserts that the arresting officers impermissibly used the initial arrest without probable cause to essentially initiate the investigation. *See* ***U.S. v. Griffin***, 884 F.Supp. 767, 775 (U.S. Dist. Ct. E.D. Wis.

2012). The arrest of a suspect is the successful conclusion of an investigation, not the beginning.

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 which included the critical point of Masarik's severe mental health impairments and the police interrogators' coercive actions.

On this point, the State argues the fact that Masarik "did not testify at the suppression hearing that he suffered from mental illness and presented no proof that police knew he had a mental illness that they then played upon to

coerce his confession" (State's Brief, p. 20-21). However, the State misses the point that Masarik alleges that his trial counsel failed to render effective assistance of counsel. Masarik was on the witness stand, not the one doing the questioning. (R. 113: 1-40). The State then goes on engaging in speculation about the issues that were discussed between he and his second trial counsel stating "it appears he did not mention" his mental health issues to his trial counsel. (Id. at 22). This is just plain speculation. What is not speculation, however, is the fact that at one point on the record, counsel it is clear the two were in some disagreement of the issues to be raised upon a request for new counsel by Masarik. (R. 110: 3-11).

Masarik also disagrees with the State that the alleged statements to Jason Kuehn would not have been coerced. As argued thoroughly however, Kuehn's statements were highly incredible and unreliable.

Most notably, the State makes no reference to ***State v. Jerrell C.J.*** 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, which articulated the proper standard:

> ¶ 20. . . . .
>
> 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. . . .

Id. at ¶ 120.

Masarik asserts that under the totality of the circumstances, his statements to the police were involuntary. A 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). In addition, the document summaries records reviewed from Milwaukee County Behavioral Health Division, submitted by the defense. (*Id*. at 3-5, R. 64).

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).

After review of the State's arguments in its brief, Masarik states that he disagrees with the State's contentions regarding the Circuit Court's denial of his suppression of statements motion, and he reasserts without further argument (except for one matter stated below) the facts and arguments in his brief-in-chief on this matter.

The State argues that Masarik failed to argue the August 22, 2009 statements were connected to the August 20, 2009 statements, i.e., fruit of the poisonous tree. This is plainly not true. In fact, Masarik raised the subsequent August 22, 2009 statements in his postconviction motion brief, (R. 94-B: Memoradum, p. 32), and his defendant-appellant's brief. (Masarik's Brief, pp. 32-33). Marsarik notes that he invoked his right to counsel and that the police recognized it as such, yet reinitiated the interrogation, thus rendering the statements inadmissible.

State v. Cole, 2008 WI App 178, 315 Wis. 2d 75, 762 N.W.2d 711.

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

After review of the State's arguments in its brief, Masarik states that he disagrees with the State's contentions regarding the sentence modification issue, and he reasserts without further argument the facts and arguments in his brief-in-chief on this matter.

CONCLUSION

For all the reasons stated above and in the brief-in-chief, 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 Greenfield, Wisconsin, this 15th day of March, 2016.

_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

Dated this 15th day of March, 2016.

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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 Greenfield, Wisconsin, this 15th day of March, 2016.

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