STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP000213

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH WILLIAM NETZER,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON OCTOBER 29, 2014, IN THE CIRCUIT COURT OF LA CROSSE COUNTY, THE HONORABLE TODD W. BJERKE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. Netzer's ineffective assistance of counsel claim fails as he possessed no constitutional right to counsel and did not raise his claim before the circuit court.

A. Applicable Law.

Strickland v. Washington, 466 U.S. 668 (1984), establishes the standards for evaluating claims of ineffective assistance of counsel. To prove an ineffective-assistance claim, the defendant must satisfy *Strickland's* two-part test: he must prove that counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland,* 466 U.S. at 687.

The constitutional right to counsel, however, does not attach in civil proceedings. *See State v. Krause*, 2006 WI App 43, ¶ 11, 289 Wis.2d 573, 712 N.W.2d 67 (*citing Stroe v. INS*, 256 F.3d 498, 500 (7th Cir. 2001)). "The general rule is that civil litigants have no constitutional right to counsel and therefore no constitutional right to effective assistance of counsel." *Id*. (*citing Stroe*, 256 F.3d at 498). Therefore, *Strickland*'s applicability is inherently predicated upon whether Netzer possessed a constitutional right to counsel in this case.

B. Netzer cannot demonstrate violations of a constitutional right to counsel he did not possess.

On October 29, 2014, at the conclusion of a court trial that spanned three dates, the circuit court issued a written order finding Netzer guilty of the sole charge of first-offense operating under the influence of a restricted controlled substance, contrary to Wis. Stat. § 346.63(1)(am), and imposed a sentence of a total forfeiture and costs of $842.50, a driver's license revocation of six months, and an order for an alcohol assessment and driver safety plan (48:18). A first offense within the preceding ten-year period, the circuit court's ruling resulted in a noncriminal conviction. *See* Wis. Stat. § 346.65(2)(am)(1).

Because the sole charge Netzer faced before the circuit court constituted a civil rather than a criminal offense, Netzer possessed no constitutional right to counsel. Wis. Stat. § 346.65(2)(am)(1); *Krause*, ¶ 11. Because Netzer possessed no constitutional right to counsel, he is logically precluded from demonstrating a violation of a right he did not possess. *Krause*, ¶ 11.

Consequently, whether Netzer's trial counsel's actions fell below the objective standard of reasonableness or prejudiced Netzer is irrelevant. Netzer's proper recourse against civil trial counsel is a malpractice suit, not the reversal of his conviction and the outright dismissal of the case which he now seeks. *See Village of Big Bend v. Anderson*, 103 Wis.2d 403, 308 N.W.2d 887 (Ct. App. 1981).

C. Netzer's failure a claim of ineffective assistance of counsel before the circuit court would otherwise prevent this court from examining the merits of his argument.

Assuming Netzer possessed a constitutional right to counsel in this case, his failure to raise claims of ineffective assistance of counsel in a postconviction motion before the ciruit court would otherwise preclude this court from reviewing his claim. *State v. Giebel*, 198 Wis.2d 207, 218, 541 N.W.2d 815, 819 (Ct. App. 1995).

The *Giebel* court reiterated, "Issues not raised in a postverdict motion are not reviewable as a matter of right." 198 Wis.2d at 218 (*citing Rennick v. Fruehauf Corp*., 82 Wis.2d 793, 808, 264 N.W.2d 264, 271 (1978)). *Giebel* recognized this holding to be especially true in claims of ineffective assistance of counsel. *Id*. (*citing State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

In this case, Netzer failed to preserve trial counsel testimony through a postconviction evidentiary hearing, instead alleging a number of perceived deficiencies in trial counsel performance without affording counsel an opportunity to respond. Netzer's Brief at 18-27; *See Machner* at 804 ("it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel" at a postconviction hearing).

This court has previously declined to review allegations of ineffective assistance of counsel under identical circumstances. *See Giebel*, 198 Wis.2d at 218. The State maintains that even if Netzer possessed a constitutional right to counsel, identical treatment would have been appropriate in this case.

II. Netzer's right to a trial was not violated when both he and his trial counsel failed to request a jury trial or pay the applicable jury fees for over eight months following entrance of his plea.

A. Standard of Review.

This court shall affirm discretionary decisions if the circuit court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion. *State v. Peterson*, 222 Wis.2d 449, 453, 588 N.W.2d 84 (Ct. App. 1998).

B. Netzer waived his right to a jury trial by failing to file a timely request or pay the applicable juror fees.

Netzer asserts he was denied a right to jury trial, couching much of his argument again in a claim of ineffective assistance of trial counsel. Netzer's Brief at 23-25, 27. The State shall not restate its entire argument once more but directs this court's attention to Sections I.B and I.C of this brief in requesting that this court reject Netzer's claim.

Netzer references sec. 345.43(1) Wis. Stat. which expressly and unequivocally required that either he or trial counsel file with the circuit court a timely jury trial request and pay the appropriate jury fees with the circuit court to preserve the right to a jury trial. Wis. Stat. § 345.43(1); Netzer's Brief at 27. Netzer evidently ignores the same statutory subsection which states, "If no party demands a trial by jury, the right to trial by jury is permanently waived." Wis. Stat. § 345.43(1).

Netzer does not assert any supported argument that the circuit court erred in any respect in fulfilling its duties at the initial appearance.[1] Netzer's Brief at 27-28. Nor does Netzer offer any authority that mandated the circuit court extend the deadlines to file a request for a jury trial for over eight months. Netzer's Brief at 27-28.

Rather, Netzer merely argues the circuit court erred in its unwillingness to ignore the untimely filing of his jury trial demand or extend the statutory deadline for eight months, from October 16, 2011 – ten days following the October 6, 2011 initial appearance where a plea was entered on his behalf – to June 14, 2012. Netzer's Brief at 27-28.

Netzer advances such argument despite the fact that he was represented by retained counsel, he did not seek adjournment of the initial

[1] Netzer asserts in passing that the circuit court failed to fulfill its statutory requirements at the initial appearance without articulating specific violations or referencing the circuit court record. Netzer's Brief at 3. Because Netzer concedes that he was not present at the hearing, the basis for his claim is unknown to the State. Netzer's Brief at 3. The circuit court's Memorandum Decision and Order issued July 18, 2012, reveals trial counsel appeared before the circuit court by authorization and entered a not guilty plea on Netzer's behalf (9:1).

appearance while awaiting chemical test results, and neither he nor his trial counsel were forced by the circuit court to immediately enter a plea at the initial appearance (9). *See* Netzer's Brief at 27-28.

The circuit court squarely addressed the claims Netzer now asserts in its Memorandum Decision in Order issued July 18, 2012, recognizing its broad discretion in deciding how to respond to untimely motions in managing its calendar (9). The circuit court acknowledged this court's decisions in *Teff v. Unity Health Plans Ins. Corp.*, 265 Wis.2d 703, 666 N.W.2d 38 (Ct. App. 2003) and *City of Madison v. Donohoo*, 118 Wis.2d 646, 348 N.W.2d 170 (1984), but denied requests to extend the deadline for a jury trial request (9).

As a basis for its decision, the circuit court found no excusable neglect by trial counsel and further differentiated this case from *Donohoo*, noting that a circuit court commissioner in *Donohoo* refused to grant a continuance of the initial appearance for a pro se litigant, forcing the party to enter a plea (9:3-4). *Donohoo*, 118 Wis.2d at 654. Ultimately, the circuit court found Netzer's trial counsel could have requested an extension to the jury demand time limits at the time the plea was entered or pay the modest jury fees in a timely fashion, but did neither (9:4).

The circuit court properly recognized and applied to the facts of this case the applicable law that permitted, but in no way required, the granting of an eight-month extension of statutory deadlines and determined such extension was inappropriate (9).

While Netzer wishes to draw analogies between his own eight-month delay in requesting a jury

trial with the delays attributed to procuring trial witnesses – some of which were caused by successor counsel's lack of familiarity with motions decided before he was retained – no such similarities exist. *See* Netzer's Brief at 28.

III. Chemical test results were properly admitted at trial upon the State presenting a sufficient evidentiary foundation prior to its admission.

A. Standard of Review.

This court reviews the circuit court's evidentiary decisions for an erroneous exercise of discretion. *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264.

B. Chemical test results reported by entities other than the Wisconsin State Laboratory of Hygiene or Wisconsin State Crime Laboratory are not barred from admission at trial.

Netzer finally asserts that the circuit court erred in admitting into evidence the chemical test results of NMS labs, an independent chemical testing facility contracted by the Wisconsin State Laboratory of Hygiene to alleviate testing backlogs, which confirmed the presence of Delta-9-Tetrahydrocannabinols in Netzer's blood following his arrest.[2] Netzer's Brief at 28-34.

[2] Netzer also advances a number of passive, undeveloped arguments, including claims that no probable cause existed

Netzer argues that the chemical test results in this case could *never* be admissible because an entity other than the Wisconsin State Laboratory of Hygiene conducted the testing. Netzer argues that the statutory caveat, "to be considered valid," found within sec. 343.305(6)(a) Wis. Stat. precluded the State from ever establishing the necessary foundation to admit the NMS Labs test results. Netzer's Brief at 29-32.

The State maintains the circuit court properly rejected arguments that laboratory results obtained outside of strictures of Wisconsin's implied consent law are inadmissible, noting that at most, the results may not be valid under sec. 343.305 Wis. Stat (35:24-26).

Citing the Wisconsin Supreme Court's decision in *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427 (1987), the circuit court properly recognized that noncompliance with sec. 343.305(6)(a) Wis. Stat. would strip the results of the presumption of automatic admissibility but would not render them inadmissible if the State were to lay the proper evidentiary foundation (32:26). *Zielke*, 137 Wis.2d at 51.

To adopt Netzer's position and find the laboratory results admitted at trial were forever inadmissible would lead to a number of absurd

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for a blood draw to occur, that the blood draw occurred involuntarily, and that the test results were contaminated due to the arresting officer touching Netzer's skin before the blood draw. Netzer's Brief at 28-29. As Netzer raises these arguments for the first time on appeal, the State offers no response and asks this court to disregard such claims. *See State v. Van Camp*, 213 Wis.2d 131, 144, 569 N.W.2d 577, 584 (1997)(appellate courts need not address arguments raised for the first time on appeal).

results recognized by the circuit court. First, every blood sample tested outside the State of Wisconsin by laboratory technicians presumably lacking the appropriate permit from the department of health services would be rendered inadmissible. Wis. Stat. § 343.305(6)(a). This would be true regardless of which party intends to offer the results.

Second, as recognized in *Zielke*, excluding evidence due to an alleged statutory violation of Wisconsin's implied consent law would actually afford greater rights to an alleged drunk driver under the fourth amendment than those afforded any other criminal defendant. 137 Wis.2d at 52 (*citing Scales v. State*, 64 Wis.2d 485, 493-94, 219 N.W.2d 286 (1974)).

Notwithstanding his first argument, Netzer argues the State laid an inadequate foundation to comply with the court's directive for evidence admission at trial. Netzer's Brief at 29-32. Again, the State maintains the circuit court acted appropriately in admitting the chemical test results into evidence at trial once the proper foundation was offered at trial by witness

In accordance with *Zielke*, the circuit court concluded that the chemical test results were properly admitted at trial once the State laid the proper foundation from a witness familiar with the testing procedures at the testing laboratory and who independently reviewed the results to arrive at her own independent conclusion (35:24-26).

C. Netzer cannot demonstrate a violation of a right to confront witnesses he did not possess as a civil litigant.

Netzer concludes by arguing that the United States Supreme Court's decisions in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009) further preclude admission of the NMS Labs chemical test results. Netzer's Brief at 32-34. Specifically, Netzer appears to argue that the Confrontation Clause of the Sixth Amendment guaranteed his right to confront the forensic analyst who tested his blood sample. Netzer's Brief at 32-34.

Netzer correctly notes that in *Bullcoming* and *Melendez-Diaz*, the United States Supreme Court addressed the constitutional implications of the State introducing into evidence forensic laboratory reports in lieu of testimony from a live witness. Netzer's Brief at 32-34. Both cases specifically addressed whether that practice violates a defendant's constitutional right to confront his accusers. *See Melendez-Diaz*, 557 U.S. at 329; *Bullcoming*, 131 S. Ct. at 2710.

Again, however, much like his claim of ineffective assistance of counsel, Netzer confuses those rights afforded to a criminal defendant with those he maintains as a civil litigant. This court has routinely recognized, "No intendent right to confront witnesses exists under State and United States Constitutions in *civil* proceeding." *W.J.C. v. Vilas County*, 124 Wis.2d 238, 240, 369 N.W.2d 162 (Ct. App. 1985) (emphasis added). Consequently, because Netzer faced solely civil

impaired driving charges, *Melendez-Diaz* and *Bullcoming* should bear no effect on this court's decision.

Notwithstanding his lack of constitutional right to confront witnesses at trial, Netzer acknowledges that he was permitted to cross-examine State witness Ayako Chan-Hosokawa of NMS Labs. Netzer's Brief at 33. The circuit court correctly observed in its Findings of Fact, Conclusions of Law and Decision that Ms. Chan-Hosokawa was not merely acting as a conduit for another expert opinion but was rather closely connected to the tests and procedures involved in this case and supervised and reviewed the testing (48:8-10, 17-18).

Perhaps more importantly, in finding Netzer guilty of the offense of operating with a restricted controlled substance in his blood, the circuit court recognized Ms. Chan-Hosokawa reviewed the testing materials generated for the Netzer's blood sample, interpreted the results, and offered her own independent expert opinion that the sample contained a detectable amount of Delta-9-THC, a restricted controlled substance (48:17).

Because Netzer maintained no constitutional right to confront his accusers, and because the State laid an appropriate foundation from a witness who (1) was employed by NMS Labs, (2) was familiar with the testing procedures at NMS Labs, (3) was assigned to supervise and oversee the testing that occurred at NMS Labs, and (4) reviewed the raw testing data, interpreted the results, and arrived at her own opinion of whether Delta-9-THC was found within Netzer's blood sample drawn subsequent to arrest, the State maintains it offered the proper foundation to

admit the evidentiary chemical test results against Netzer. As a result, the State respectfully requests that this court find the admission of the test results at trial was proper.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the judgment of conviction entered below.

Dated at La Crosse, Wisconsin, this 30th day of July, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,626 words.

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John W. Kellis
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at La Crosse, Wisconsin, this 30th day of July, 2015.

_____

John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on July 30, 2015, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-appellant's brief.

Dated this 30th day of July, 2015.

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John W. Kellis
Assistant District Attorney