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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 15AP000640-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TAMMY R. FULLMER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A CONVICTION IN THE CIRCUIT
COURT FOR COLUMBIA COUNTY, THE HONORABLE
W. ANDREW VOIGT, PRESIDING AND AN ORDER
DENYING POSTCONVICTION RELIEF ENTERED BY
THE HONORABLE DANIEL GEORGE

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ISSUE PRESENTED FOR REVIEW

1. Was trial counsel ineffective for not presenting adequate evidence that would have disproved the State's account of the underlying stop and arrest at a suppression hearing?

The trial court found that counsel's performance was deficient but not prejudicial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Fullmer is not requesting oral argument and the case is not eligible for publication.

STATEMENT OF THE CASE

This appeal originates from a plea entered on October 24, 2013. (48:1). On that date, Ms. Fullmer pleaded no contest to counts one and three of the criminal complaint, operating while intoxicated ("OWI") as a second offense and resisting or obstructing an officer. (17:1). The sentence was stayed pending the outcome of this appeal. (48:15). A notice of intent was timely filed. (16:1).

Attorney Jefren E. Olsen was appointed as appellate counsel. (19:2). After Attorney Olsen identified a conflict of interest, undersigned counsel was appointed in his stead. (21:2; 23:1). A timely motion for postconviction relief was filed.

(26:1).¹ That motion challenged trial counsel's effectiveness with respect to an underlying suppression hearing. (26:8). A motion hearing was held on December 8, 2014. (49:1). An exchange of supplemental briefs followed. (32:1-9; 33:1-10; 34:1-4). In an oral ruling on March 6, 2015, the trial court denied the motion for postconviction relief. (51:7). This appeal followed. (41:1-2).

STATEMENT OF FACTS

The underlying events occurred on July 1, 2012 at around one o'clock in the morning. (47:5). Officer Aeriond Liu of the Poynette Police Department was parked on the "wayside of U.S. Highway 51"—"a couple hundred feet" outside the Village of Poynette and his lawful jurisdiction. (47:19). Notably, the speed limit decreased from 55 to 35 within the village limits. (47:19-20).

Officer Liu observed a solitary vehicle headed in his direction. (47:5; 47:23). He testified at the suppression hearing that the vehicle was "traveling slowly." (47:6). His initial visual estimate was that the vehicle was traveling "around 40 miles per hour." (47:6). Officer Liu took a radar reading and verified that the vehicle was going 35 miles per hour. (47:6). This was lawful conduct, even though the speed limit had not yet changed over from 55 to 35. (47:23).

Officer Liu began to follow the vehicle. (47:6). Officer Liu testified that he observed the vehicle weave. (47:7). In a

¹ Although the original circuit court case was presided over by the Honorable W. Andrew Voigt, the case was transferred to the Honorable Daniel George at some point in the postconviction proceedings. (50:5-6). Ms. Fullmer consented to that inadvertent substitution. (51:3).

contemporaneous written report he indicated that the weaving was “within the lane.” (47:21). The alleged weaving was not recorded on video. (47:58; 11). Officer Liu continued to follow the vehicle. (47:7).

He then observed what he described as an “early” use of a turn signal. (47:7). He alleged that the vehicle continued to weave after completing the turn. (47:7). In his testimony at the suppression hearing, Officer Liu claimed that the vehicle was “driving down the center of the roadway” although he also acknowledged that “there is no fog lines on that street so I didn’t have any fog line or center stripe to make my assessment.” (47:7).

The vehicle then properly signaled and stopped at the intersection of East Seward Street and North Main Street in Poynette. (47:8). Officer Liu alleged, however, that the stop was nevertheless unlawful as the vehicle “came to a stop past the white stop line that marks where you are supposed to stop at the stop sign.” (47:8). After following the vehicle to a residential driveway, Officer Liu conducted a traffic stop. (47:9). His stated reason for the stop was “erratic driving, improper stop at stop sign.” (47:28).

Ms. Fullmer, the driver, was ultimately arrested for an OWI offense and for resisting or obstructing an officer. (47:13-14).

Suppression Motion

Trial counsel for Ms. Fullmer promptly filed a motion to suppress evidence based on an unlawful stop and arrest. (8:1). An evidentiary hearing was held on October 22, 2013.

(47:1). That hearing is the source of the version of events described herein. (47:1-66).

Officer Liu testified that while he could have chosen to manually record Ms. Fullmer's alleged weaving, he chose not to. (47:32-33). A short video of Ms. Fullmer's driving immediately prior to the stop was admitted as a defense exhibit. (47:47-48; 11). On that video, there is no observable weaving. (11). A number of proper driving maneuvers, accompanied by appropriate signaling and stopping, are exhibited. (11). This evidence, trial counsel argued, raised serious doubts as to Officer Liu's version of events. (47:52).

Trial counsel also argued that Officer Liu's version of events was fundamentally problematic in that it he was clearly mistaken as to one essential aspect of his narrative: The existence of the white stop line Ms. Fullmer allegedly failed to abide by. (47:53). While Officer Liu claimed that he knew "for a fact that there was a white stop line there at that intersection," trial counsel introduced a Google Maps photograph that apparently contradicted that claim. (47:24; 47:25-26). Although he called the line "imaginary" at one point in his testimony, Officer Liu repeatedly asserted that Ms. Fullmer had failed to stop at a physically existing line. (47:27; 47:8; 47:40; 47:41).

The existence of the stop line was the subject of "significant debate" at the motion hearing. (47:59). Officer Liu pointed out that trial counsel's photograph was undated and therefore implicitly unreliable. (47:26). The State also objected to the admission of the Google Maps exhibit, pointing out its lack of a date. (47:46). The State asserted that it was not an accurate representation of the scene. (47:27). The State also

asserted that the stop line existed and relied on that line's existence in its argument for both reasonable suspicion and probable cause. (47:49-50). Although trial counsel eventually testified at a postconviction hearing that he did not anticipate a disagreement as to the line's nonexistence, he actually conceded at the motion hearing that he did not know whether a line existed or not. (49:10-11; 47:53).

The trial court accepted the line's existence. (47:62). It denied the defense motion, asserting that there was reasonable suspicion to stop Ms. Fullmer based on one of three possible rationales:

- Her alleged weaving;
- Her alleged failure to stop;
- Both of these alleged violations combined.

(47:56-63). In addition, it held that there was probable cause to arrest for OWI. (47:62).

Postconviction Proceedings

Ms. Fullmer, by counsel, ultimately filed a postconviction motion alleging ineffective assistance with respect to the suppression hearing. (54:1-45). Ms. Fullmer appended to that motion numerous pieces of evidence intended to prove that the stop line did not exist on the night in question. (54:21-32).

At the *Machner* hearing held on December 8th of 2014, the State conceded, for the first time, that the stop line in question did not exist. (49:4-5). Trial counsel testified that the issue was legally significant and that he had failed to present

sufficient evidence that would enable the trial court to conclude the line did not exist. (49:8-10). Trial counsel testified that he had no strategic reason for not obtaining properly authenticated and dated photographs that could have definitively resolved the issue. (49:9-10).

Officer Liu was called as a witness by the State. (49:15). Officer Liu testified that he did not “believe” there was a stop line at that intersection. (49:17). However, he also testified that the line was “imaginary” and “exists even if it’s not clearly painted on the ground.” (49:17). He also averred, for the first time, that he may have mistaken the crosswalk for a stop line. (49:17).

The trial court, in an oral ruling, held that trial counsel was constitutionally deficient for failing to properly present sufficient evidence as to the stop line’s nonexistence. (51:4). However, it held that trial counsel’s performance was not prejudicial as there were other grounds for upholding the stop of Ms. Fullmer’s vehicle. (51:7).

SUMMARY OF ARGUMENT

In this case, trial counsel was confronted with a traffic stop based in part on erroneous information. Trial counsel could have easily proven that Officer Liu was mistaken as to a relatively rudimentary fact that was critical to the reasonable suspicion calculus. Instead, he merely printed off an undated Google Maps photograph. This was deficient performance. Trial counsel’s failure to present adequate evidence disproving Officer’s Liu’s account was prejudicial inasmuch as it undermines confidence in the resulting outcome—the trial court’s decision to deny the suppression motion.

STANDARD OF REVIEW

Determining whether trial counsel provided ineffective assistance of counsel is a mixed question of fact and law. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). An appellate court will not overturn a trial court's findings of fact concerning counsel's conduct and strategy unless the findings are clearly erroneous. *Id.* However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law which this Court reviews de novo without deference to the circuit court. *Id.* at 236-37.

ARGUMENT

I. Trial counsel was ineffective for failing to adequately corroborate his allegation that there was no white stop line.

A. Legal standard.

A criminal defendant has the right to the effective assistance of counsel under both the State and Federal constitution. U.S. CONST. AMEND. VI & XIV; WIS. CONST. ART. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). An attorney's performance is deficient if it falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 33, 264 Wis. 2d 571, 665 N.W.2d 305.

To prove prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine confidence in the outcome." *Thiel*, 2003 WI 111, ¶ 20 (citing *Strickland*, 466 U.S. at 694). Trial counsel's ineffectiveness constitutes a manifest injustice, thereby allowing a criminal defendant to withdraw a plea of guilty. *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50 (1996).

B. Deficient performance.

The stop line's existence was a central issue in this case. (47:59-60). Officer Liu elected to conduct a traffic stop of Ms. Fullmer for two stated reasons: 1) her alleged weaving and 2) her failure to stop properly at an intersection. (47:28).

Importantly, one of the stated rationales for the stop has now been conclusively disproven via the State's postconviction stipulation. (49:4-5). Trial counsel's instincts have been proven correct with respect to a fact trial counsel considered legally significant. (49:8). The problem, however, is that trial counsel did not do the necessary legwork to adequately present this issue to the court at the proper time. Trial counsel could have easily sent out a staff investigator to view the scene and take photographs. (49:10). He chose not to do so. He could have easily obtained information from the Village of Poynette, as prior appellate counsel did, as to the line's existence. (49:10). He chose not to do so. Instead he used only an undated, "old," Google Maps photograph. (49:9).

The trial court was therefore not persuaded as to the line's nonexistence and based its ruling on an inaccurate understanding of the facts and an incomplete assessment of Officer Liu's credibility. That outcome was avoidable. When

confronted with the exhibits contained in the postconviction motion, the State quickly conceded the underlying factual issue. Trial counsel, for his part, conceded that he had no strategic reason for not doing more to expose the weaknesses in the State's account. (49:10). This was deficient performance.

C. Trial counsel's deficient performance prejudiced Ms. Fullmer.

i. Legal standard.

When trial counsel fails to bring a suppression motion, courts usually evaluate that claim in light of whether or not the suppression issue would have succeeded. *See State v. Jackson*, 229 Wis.2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999), *review denied*, 230 Wis.2d 272, 604 N.W.2d 571 (1999). There is a paucity of cases, however, dealing with the exact situation here: A scenario in which the trial attorney correctly identifies the issue and brings a meritorious motion but whose conduct with respect to the ensuing motion hearing nevertheless falls below an objective standard of reasonableness.

Importantly, the prejudice prong of the *Strickland* standard *is not* intended to be outcome determinative. *See State v. Moffett*, 147 Wis.2d 343, 354, 433 N.W. 2d 572 (1989). The proper question is whether trial counsel's errors undermine this Court's confidence in the ensuing outcome—the trial court's decision to deny the motion. *See Id.* at 357. Criminal defendants need not prove acquittal would have occurred but-for trial counsel's errors in the context of a trial. Rather, ineffectiveness will be found even when the evidence against them is otherwise substantial. *See State v. Pitsch*, 125 Wis.2d 628, 645, 369 N.W.2d 711 (1985). Importing those

concepts to the suppression hearing context, it is clear that the omitted evidence undermines confidence in the trial court's decision to deny the defense motion. But for counsel's error, there is a reasonable possibility that Ms. Fullmer would have prevailed at the hearing, eliminating the need to plead guilty at all.

- ii. Proof of the stop line's nonexistence undermines confidence in the trial court's decision to deny the suppression motion.

First, the stop line's nonexistence undermines the most straightforward rationale for the controverted stop. If there was a white line, and Ms. Fullmer was over it, she was in violation of WIS. STAT. § 346.46. Even if her driving was otherwise immaculate, the officer would arguably have reasonable suspicion to seize her vehicle at that time. *State v. Begicevic*, 2004 WI App 57, ¶ 6, 270 Wis.2d 675, 678 N.W.2d 293. The trial court recognized this at the time of the suppression hearing and held that this was one possible rationale for its decision denying the defense motion. (47:60).

However, Officer Liu was wrong. There was no physically existing white stop line at that intersection at that time, as the State has stipulated. Accordingly, Officer Liu made a mistake of fact. In order for a mistake of fact to justify the ensuing stop, the mistake must be "reasonable." *State v. Reiersen*, No. 2010AP596-CR, ¶ 9, unpublished slip op. (Wis. Ct. App. April 28, 2011). Here, Officer Liu's mistake was clearly "unreasonable" inasmuch as it concerns his inability to properly identify rudimentary traffic markings within his own jurisdiction. Allowing a stop based on an imagined stop line is roughly analogous to upholding a stop based on an imagined

stop *sign* or stop *light*—and produces an equally absurd result. Arguably, the strongest supporting justification for the trial court’s decision has now been decisively undercut. To say that this undermines confidence is to slightly understate the proposition.

Second, proof of the stop line’s nonexistence undermines the believability and credibility of Officer Liu, which goes to the trial court’s other two proffered rationales. While the trial court was “not particularly accepting” of this argument during postconviction proceedings, it did not make a specific finding that Officer Liu’s credibility was otherwise ironclad. (51:6). The credibility of the officer is always an issue at the suppression hearing and was especially at issue in this case. *See State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994), *review denied*, 524 N.W.2d 140 (1994). Proof that the officer was mistaken about a fundamental observation is extremely pertinent to the trial court’s determination of his general credibility and believability. Importantly, that credibility and believability was already called into question as a result of the discrepancy between Officer’s Liu’s unrecorded observations of Ms. Fullmer’s driving and the driving behaviors that *were* recorded.

If anything, the postconviction proceedings have only further imperiled Officer Liu’s credibility and believability. Not only is it now provable that he made an embarrassingly inaccurate observation on the night of the stop, his testimony at the postconviction hearing is also confused, inconsistent, and self-justifying. Simply put, he is an incredibly unreliable witness as he has offered a panoply of contradictory excuses that strain credibility.

For example, he may still believe he saw the white line that all parties agree does not exist. (49:17). In and of itself, this is damaging testimony. But it gets worse. Officer Liu has also claimed, for the first time (some 2.5 years after the fact) that he *may* have mistaken the crosswalk for a stop line. That assertion makes little sense and, if anything, further calls into question Officer Liu's powers of observation and deduction. This is not a reasonable mistake to make, especially for a trained law enforcement officer. That is, although the excuse is convenient, it is not particularly convincing.

In addition, Officer Liu has offered yet another justification—the line was an imaginary legal concept. (49:17). That statement is at odds with his prior testimony, once again, and is also contrary to the legal reality. There is nothing in the traffic code that speaks of an “imaginary” white line and, in any case, that interpretation is contrary to the clear meaning of § 346.46. Inasmuch as Officer Liu contends he now made a “mistake of law” rather than of fact, his mistake may be viewed more deferentially in light of very recent Supreme Court precedent. *See Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). However, settled Wisconsin precedent indicates that a traffic stop cannot be based on a mistake of law. *See State v. Brown*, 2014 WI 69, ¶ 22, 365 Wis.2d 668, 850 N.W.2d 66. Even if this State were to adopt the Supreme Court's reasoning, however, this does not save Officer Liu: After all, a mistake of law must still be *reasonable*. *See Heien*, 135 S. Ct. at 536. A clearly invented legal standard certainly comes shy of that mark.

In any case, Officer Liu has vacillated between inconsistent positions. His explanations are completely inconsistent with the law, the facts and his own invented logic.

To suggest that this is a problem for his general credibility is an egregious understatement. Because the trial court relied on his un-corroborated observations as a basis for its ruling, this has a bearing on a reviewing court's confidence in that outcome.

Above all, the preceding shows that the very nature of the case has changed in light of trial counsel's error. New facts have been developed which are at odds with those relied on by the trial court in its ruling. In addition, a panoply of new legal concepts that must be factored into the reasonable suspicion analysis have been swept in along with these new facts. The trial court was never given an opportunity to address any of these issues or facts at the prior hearing. It would appear that the real controversy in issue is only now, in the course of postconviction proceedings, being uncovered.

Trial counsel's deficient performance therefore "could reasonably be taken to put the whole case in such a different light as to undermine confidence" in the result. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Accordingly, reversal is warranted.


CONCLUSION

Trial counsel's performance was constitutionally deficient and, inasmuch as it undermines confidence in the outcome, prejudiced Ms. Fullmer. The trial court erred by not permitting a withdrawal of Ms. Fullmer's guilty plea and should therefore be reversed on appeal.

Dated this 12th day of June 2015.

Respectfully submitted,

Ms. Tammy Fullmer
Defendant-Appellant

A handwritten signature in black ink, appearing to read 'C. August', written over a horizontal line.

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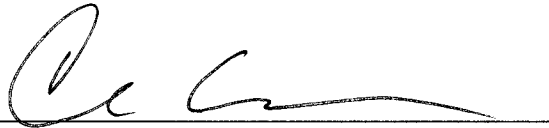
CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in WIS. STAT. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,243 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to WIS. STAT. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

I further certify that I have complied with WIS. STAT. § 809.86 requiring the usage of pseudonyms for crime victims.

Dated this 12th day of June, 2015.

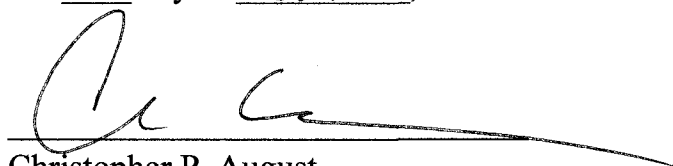
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Christopher P. August
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION OF SERVICE

I hereby certify that on this 12 day of June 2015, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 12 day of June, 2015.

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