STATE OF WISCONSIN

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2015AP640-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TAMMY R. FULLMER,

Defendant-Appellant,

BRIEF OF PLAINTIFF-- RESPONDENT

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

Respectfully submitted,

The State of Wisconsin,
Plaintiff-Respondent
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STATEMENT OF THE ISSUES

The Respondent agrees that the issue in this case was whether trial counsel was ineffective and if so, was it prejudicial in this case.

TRIAL COURT'S ANSWER

The Trial Court answered this question, stating that the trial counsel was deficient in his performance, (R. 51 page 4, lines 21-25) however, there was not any prejudice as a result of this deficient performance. (R. 51, page 5, lines 11-14).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent would request the opportunity to present oral argument in this case, if the Court would feel that it would be appropriate, to help further define the issues and to clear up any questions that the Court may have.

The Respondent does not request that this case be published because the Respondent believes that this case will be limited to its own facts and have little or no precedential value to future cases.

I. FACTS

The Facts in the case are contained in the transcripts of the motion hearings conducted on October 22, 2013 (R. 47), the motion hearing conducted on December 8, 2014 (R. 49), and the oral ruling held on March 6, 2015 (R. 51). Because the facts are all contained in the transcripts of the above hearings, there is no dispute in the facts, just a dispute in the interpretation of them and a dispute in the law.

II. QUESTION PRESENTED

The question presented in this appeal is whether trial counsel was ineffective in his presentation of the evidence at the Motion Hearing that was conducted on October 22, 2013 (R. 47) and if so, did that prejudice the appellant, Ms. Fullmer.

The Trial Court held that the trial counsel was deficient in his performance, (R. 51 page 4, lines 21-25) however, there was not any prejudice as a result of this deficient performance. (R. 51, page 5, lines 11-14). The Plaintiff-Respondent agrees with the Trial Court's ruling in this case and asks that this Court uphold the Trial Court's ruling because it is not clearly erroneous.

III. TRIAL COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS

The Respondent agrees with the Appellant that the Standard of Review for this Court on the issue of whether trial counsel was ineffective, is a mixed question of law and fact.[1] It is the Respondent's position that the Trial Court's findings were not clearly erroneous, in fact, they were completely correct.

The issue for ineffective assistance of counsel is whether trial counsel's performance was deficient and prejudicial.[2] The only thing that the Respondent would have asked the Trial Court to do differently would have been to reverse the order of the two tests as the Wisconsin Supreme Court explained in *State v. Johnson*, while it was quoting the *Strickland*[3] case,

> When reviewing a claim of ineffective assistance of counsel, the *Strickland* Court states that courts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice:
>
> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant

[1] The standard of review of the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact. *Id.* at 698, 104 S.Ct. at 2070. Thus, the trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Pitsch,* 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985) (citing sec. 805.17(2), Stats.1983-84). *128 The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. *Id. State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845, 848 (1990).

[2] *Id.*

[3] *Strickland v. Washington,* 466 U.S. at 697, 104 S.Ct. at 2069 (1984).

> as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.
>
> *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845, 848 (1990).

IV. ARGUMENT

The Trial Court agreed with the Respondent in this case and found that the Defendant Appellant was not prejudiced in any way by Trial Counsel's deficient performance. (R. 51, p. 5, lines 13-14).

As this Court can see, the Respondent outlined and argued that there were six (6) different indicia of impaired driving that the Defendant Appellant exhibited on the night in question, that were completely separate and distinct from the issue regarding the stopping past the line. (R. 33, p. 4). These six indicators of impairment were sufficient, when taken together under these circumstances to equal reasonable suspicion for Officer Liu to believe that the driver of the vehicle was too impaired to safely operate it.[4]

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[4] **9. *Reasonable Suspicion*.** In order to stop a person an officer must be able to articulate specific grounds for having a "reasonable suspicion" that the individual is engaged in criminal activity. See Wis. Stat. § 968.24 (1997–98) and maj. op. at 549 n. 11 for a description of the reasonable suspicion standard.
The reasonable suspicion standard was adopted in *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), in another context. In that case, the U.S. Supreme Court held that before police execute a search warrant without knocking and

In addition to all of the other indicators of impairment that Officer Liu observed, there still was the issue of the stop. The Respondent has conceded that Officer Liu was mistaken when he testified that the Appellant failed to stop behind a stop line, because there was not a stop line to stop behind. (R. 33, p. 1). The Respondent also offered the logical explanation as to why Officer Liu mistakenly testified that there was a stop line there; that he mistook the crosswalk line for the stop line. (R. 33, p.1). This is the only rational explanation for Officer Liu believing that the Appellant did not stop at a stop line.

The Appellant has shown nothing to allege that Officer Liu made up the stop line in order to "get Ms. Fullmer." It would not be prudent for Officer Liu to make up a fictitious stop line in order to justify him stopping Ms. Fullmer's vehicle, given the existence of the cross walk at the very place that he stated there was a stop line.

Obviously, the only reasonable explanation was that Officer Liu remember the line on the road when he testified at the motion hearing on October 22, 2013 and made himself believe that it was a stop line. The stop itself had taken place over fifteen (15) months earlier, on July 1, 2012. (R. 47, p. 4, line 25). He forgot that it was really a crosswalk that Ms. Fullmer had failed to stop at.

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announcing their presence, the officers must have a "reasonable suspicion," under the circumstances, that knocking would be dangerous or futile or that it would inhibit the effective investigation of the crime. *Richards,* 520 U.S. at 394, 117 S.Ct. 1416. *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 327, 603 N.W.2d 541, 556 (1999).

As the Respondent pointed out in its brief to the Trial Court, failing to stop before either a stop line or a crosswalk are both violations which are right next to each other in the statutes. (R. 33, p. 1-2).

It is clear that Officer Liu did not prepare sufficiently; by either reviewing his reports enough, reviewing the video tape, or going to the scene itself; before he testified at the motion hearing on October 22, 2013, because if he had, he would not have made the mistake of saying that Ms. Fullmer failed to stop before a stop line that did not exist. Officer Liu even testified that he had not viewed the video of the stop since he downloaded it, which he did not recall when that occurred. (R. 47, p. 19, lines 7-15).

The Trial Court has essentially agreed with the Respondent on this point. The Trial Court, in its oral ruling stated,

> This is not a *falsus in uno* type situation where all of the officer's testimony would need to be disregarded as a result of some error concerning the presence of a stop line. There was, in fact, a crosswalk there. That could easily have provided an explanation for confusing "stop line" versus "crosswalk."
>
> But regardless of the issue of the stop line, there is adequate evidence in the record to support the stop. (R. 51 p. 6, lines 18-25 and p. 7, lines 1-2).

V. CONCLUSION

Given the facts of this case, the Trial Court was absolutely correct in its ruling that the Appellant was not

harmed in any way by any deficient performance by trial counsel, therefore the Trial Court had the correct ruling. For all of the above mentioned reasons, the Respondent asks that this Court uphold the Trial Court's decision and deny the Appellant's appeal.

Dated at Portage, Wisconsin, July 7th , 2015

Respectfully submitted,

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CERTIFICATION
I 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 1,616 words.

Dated this _____ day of July, 2015.

Signed,

_____
Troy D. Cross
Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)

ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2015AP640-CR, excluding the appendix, if any, which complies with the requirements of s. 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 this 7th day of July, 2015.

Signed:

_____

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