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

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TAMMY R. FULLMER,

Defendant-Appellant.

REPLY 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

Respectfully submitted,
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I. The State's arguments regarding prong two of the ineffectiveness inquiry, prejudicial effect, are underdeveloped and unresponsive to Ms. Fullmer's position.

A. Alternative grounds for stop.

The State's main argument is that defense counsel's performance was not prejudicial because there existed ample evidence to support the stop of Ms. Fullmer *even if* the stop line issue is conceded. (State's Br. at 7). The State cites its own summary argument in an earlier pleading for the proposition that there were six alternative indicia of impairment that support reasonable suspicion. *Id*. Notably, the State cites no legal authority other than a footnote apparently lifted without citation from an unnamed Wisconsin Supreme Court opinion. *Id*. Setting aside cosmetic defects in the State's presentation of its argument, it goes without saying that Ms. Fullmer heartily disagrees with the underlying substantive claim.

Obviously, Ms. Fullmer would agree that at least *some* of the factors identified, in the right circumstances, may have a role in the reasonable suspicion calculus.[1] In this case however, the outcome favored by the State is arrived at via some very questionable arithmetic indeed.

[1] Keeping in mind that reasonable suspicion is a fact-dependent, case-by-case inquiry disfavoring bright line, formulaic rules. *See State v. Post*, 2007 WI 60, ¶ 26, 301 Wis.2d 1, 733 N.W.2d 634.

The State's first factor is the time and date of the stop. (33:2). Ms. Fullmer would concede that the time and date are suggestive. However, time of night, without more, does not equal reasonable suspicion.[2] Clearly, something more is needed. Unfortunately, the remaining factors fail to get the State over the hump.

For example, the State's second and sixth factors are exceedingly weak, almost negligible in the reasonable suspicion calculus. The second factor is Ms. Fullmer's allegedly abnormal speed. (33:2). The State cites to a single non-binding, unpublished decision on this point. (33:2). The State neglects to mention, however, that the facts of this case are unique, involving what can arguably be labeled a 'speed trap' designed to catch unwary drivers near the point where the speed limit changes from 55 to 35 miles per hour. (47:19-20).

Not coincidentally, 35 miles per hour was the *exact* speed at which Ms. Fullmer was traveling when she was spotted by Officer Liu's parked vehicle. (47:6). Ms. Fullmer was driving to her home, which was located a few minutes from the area in which she first attracted the attention of Officer Liu. (11). At least one rational inference is that Ms. Fullmer was familiar with the setting, including the speed changeover and, possibly, this very speed trap.

Without going too far afield, the point being made is that the State's "proof" of suspicious driving, when reflected on in context of *all* the facts and circumstances, is actually much more ambiguous and may support explanations

[2] *See State v. Waldner*, 206 Wis.2d 51, 61, 556 N.W.2d 681 (1996).

consistent with innocence. While the Court is not *obligated* to consider such alternative inferences, it is Ms. Fullmer's position that they nevertheless have a bearing on the "reasonableness" of the law enforcement action at issue and the relative strength of the State's arguments. Viewed in this light, this is a very flimsy piece of evidence, incapable of providing the strong foundation which is required for *reasonable* suspicion.

Likewise, the State's sixth factor, an "early" turn signal, is unsupported by *anything* other than Officer Liu's unqualified conjecture. It suffices to say that this Court should not approve the usage of such an inherently subjective and ambiguous criterion in the reasonable suspicion calculus.

Finally, the State's other three factors are actually just one, Ms. Fullmer's disputed weaving. (33:3). Ms. Fullmer avers that while weaving is a well-settled piece of evidence supporting reasonable suspicion, there are no grounds for triple-counting allegedly continuous weaving, as the State has done here. (33:3).

Altogether, the proffered alternative grounds for the stop are simply not as overwhelming and convincing as the State believes. Simply put, the claim cannot be defeated via a rote application of the reasonable suspicion formula, as the State claims. Absent the certainty provided by an alleged stop line violation, the grounds for reasonable suspicion are *considerably* less persuasive than the State claims.

B. Officer Liu's credibility.

Officer Liu's credibility and believability, the

reasonableness of his observations and the trustworthiness of his testimony have all been deservedly attacked throughout this case. Interestingly enough, it is the State who now wishes to have the last word and to "pile on" its own witness. The State therefore tries to circumvent the problems generated by Officer Liu's problematic testimony and writes them off as *his* failures of preparation. (State's Br. at 9).

In so doing, however, the State has failed to substantively address the issue relating to Officer Liu's credibility as it was developed in Ms. Fullmer's opening brief. Instead, the State merely inserts its own explanations for Officer Liu's inaccurate testimony and parrots the circuit court's remark that this is not a "falsus in uno" situation. (States' Br. at 9).

Invocation of the "falsus in uno" concept mischaracterizes Ms. Fullmer's argument. Ms. Fullmer is not claiming that Officer Liu has "willfully testified falsely." *See* WIS-JI Criminal 305. Ms. Fullmer is not attacking Officer Liu personally with allegations of perjury. Rather, it is Ms. Fullmer's position that trial counsel's ineffectiveness has revealed notable shortcomings in Officer Liu's testimony and that those shortcomings undermine confidence in the resulting proceedings.

These shortcomings are partially conceded by the State. The fact that Officer Liu either imagined a white line or fabricated an extralegal requirement on the night of the stop has an indisputable impact on his general credibility. That credibility is the key to the case as a whole and to those issues germane to the suppression motion. After all, Officer Liu's say-so is the only thing connecting Ms. Fullmer to the six

"clues" discussed above. Because this case is all about the validity of Officer Liu's observations, proof that he was mistaken about the stop line *does* undermine his observations regarding weaving, etc.—especially when other available evidence, such as the video of Ms. Fullmer's driving, contradicts his claims. (11). Proven instances of poor perception can properly be taken into account without impugning Officer Liu with the connotations suggested when one views this case through a "falsus in uno" lens.

Officer Liu's inconsistent explanations in his postconviction testimony also raise additional questions regarding his credibility and believability. Officer Liu's continued explanations have taken this case far afield from the principles reasonably grappled with by the suppression court. The case is now presented in a thoroughly different light by virtue of trial counsel's ineffectiveness. In acknowledging this simple fact, it is clear that trial counsel's ineffectiveness should entitle Ms. Fullmer to withdraw her plea at this time.

C. The State endorses an outcome determinative test for prejudice and does not respond to Ms. Fullmer's argument that this is the wrong standard.

Ms. Fullmer's argument in the opening brief is that 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. But-for counsel's error, Ms. Fullmer asserts, there is reason to doubt the outcome of the earlier

suppression hearing and therefore grounds to withdraw her plea.

Evidence that Officer Liu was mistaken as to a fundamental concept central to the controversy at issue—the existence of a stop line—is dynamite evidence, the type of Gotcha! moment that all lawyers raised on *Matlock* dream of, but seldom realize. When confronted with this evidence during postconviction proceedings, Officer Liu's presentation crumbled, and the record is replete with his self-serving, inconsistent justifications. Clearly, defense counsel believed he had this same outcome in his sights when he sprung the Google Maps photograph on Officer Liu at the suppression hearing. Unfortunately for defense counsel, the anticipated fireworks failed to materialize. If defense counsel had managed to do his proper homework and disprove the State's account at the suppression hearing, there is therefore a reasonable probability of a different outcome. That outcome is a reality in which Officer Liu was fully held to account for *all* of his testimonial shortcomings at the proper time and the circuit court was allowed to assess his credibility *completely*.

This Court *should not* construct excuses for the State or its witnesses. It should not minimize Ms. Fullmer's claim with a reductive, backwards-looking assessment of the reasonable suspicion inquiry. Rather, so long as the Court is convinced that *confidence* has been undermined, reversal should follow. For all of the reasons advanced in the initial brief, that is the proper outcome here.

II. Response to new authority: *State v. Houghton*, 2015 WI 79, 354 Wis.2d 623, 848 N.W.2d 904.[3]

Ms. Fullmer's opening brief included brief commentary on an argument raised by the State during trial court litigation that Officer Liu's mistake should somehow be contextualized as a mistake of law. (Opening Brief at 12). The issue centers on Officer Liu's explanation of his mistake regarding an "imaginary" white line. (49:17). The State's remarks to the trial court and its written brief during postconviction proceedings show that it endorses this as one possible explanation for Officer Liu's actions. (49:11; 33:1-2). The State appears to have abandoned this claim on appeal, however, focusing instead on a relatively narrow set of arguments in its response brief.

Regardless, it remains a fact that Ms. Fullmer's opening brief is based on "bad" law to the extent that it places any precedential weight on *State v. Brown*, 2014 WI 69, ¶ 22, 365 Wis.2d 668, 850 N.W.2d 66. However, the brief also acknowledges the reasonableness inquiry mandated by *Heien v. North Carolina*, 135 S.Ct. 530, 536 (2014) and adopted in this State by *Houghton*. Following *Houghton*, a mistake of law must be "objectively reasonable." *Houghton*, 2015 WI 79, ¶ 52. That perspective was anticipated and addressed in the opening brief. It is Ms. Fullmer's position that Officer Liu's mistake was manifestly unreasonable and for that reason the substance of her argument remains unaffected by the decision in *Houghton*.

[3] Because the following is not directly in reply to arguments raised in the response, Ms. Fullmer does not object to the State being given a final opportunity to address the impact of the *Houghton* decision in a supplemental filing under WIS. STAT. § 809.19(10).

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 plea and should therefore be reversed on appeal.

Dated this 21st day of July 2015.

Respectfully submitted,

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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 1,872 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 21 day of July, 2015.

Christopher P. August
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CERTIFICATION OF SERVICE

I hereby certify that on this 21 day of July, 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 21 day of July, 2015.

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