STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15AP1631-CR

v.

David Vickers,

Fond du Lac County Case
No. 13 CM 1107

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT BRANCH 5, THE HONORABLE ROBERT J. WIRTZ PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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DEFENDANT-APPELLANT'S BRIEF

ISSUES PRESENTED

Was Vickers denied his constitutional right to counsel when his trial counsel failed to investigate and call a co-defendant as a witness and when his trial counsel failed to file a suppression motion?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-appellant (hereinafter "Vickers") anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE CASE

On December 23, 2013, the defendant, David Vickers, was charged in Fond du Lac County, case number 13 CM 1107, with Retail Theft under $500 and bailjumping. (R. 1). Shortly after being charged, Vickers obtained counsel from the State Public Defender's office, specifically by Attorney Laurel Munger (henceforth Trial Counsel). (R. 3). Vickers entered pleas of not-guilty to both charges. (R. 63:4). The case eventually proceeded to a jury trial on May 15, 2014. (R. 66). Following the trial, Vickers was convicted of both charges. (R. 66:137). On September 24, 2014, Vickers was sentenced to 7 months on count 1 and 10 days on count 2, to be served consecutive to

each other. (R. 37). Vickers filed a timely notice of intent to pursue post-conviction relief. (R. 40). On April 10, 2015, Vickers filed a post-conviction motion alleging ineffective assistance of trial counsel. (R. 49). A hearing was held on the motion on July 17, 2015. (R. 70; App 105). Following testimony of three witnesses, including Trial Counsel, the court denied the motion. (R. 70:35; App 138). Vickers now appeals.

STATEMENT OF FACTS

On May 20, 2013, Vickers was subjected to a traffic stop in Dodge County. (R. 66:56-57). The basis for the stop was a headlight violation. (Id). The officer who conducted the stop, Deputy Michael Morell (henceforth Morell), identified the driver as Vickers and a passenger as an individual named John Earl Wright. (R. 66:57-58). Vickers was wearing a white shirt and tan shorts at the time of the stop. (R. 66:58). Morell was able to determine that there was a Dane County warrant for the arrest of Vickers. (R. 70:5, App 109). As a result, Vickers was taken into custody for the warrant. (Id).

After Vickers was taken into custody, Morell

observed an Acer brand computer box and another unidentified box in the backseat. (R. 70:5-6; App 109-110). After observing the computer box in the backseat, Morell asked both Vickers and Wright about the computer. (R. 70:6-7; App 110-111). Vickers initially said the computer belonged to Wright, then said it belonged to Vickers' wife. (R. 70:6; App 110). Wright told Morell that he believed the computer belonged to Vickers' wife. (R. 70:7; App 111). At this time Morell began to further investigate the possibility that the computer was stolen. (Id). Specifically, Morell contacted the authorities in Fond du Lac County and contacted several stores in the area. (Id). Morell was able to determine that the computer had come from the Wal-Mart in Fond du Lac, but was unsure if it had actually been stolen. (R. 70:11; App 115). Specifically, Morell was told that it was supposed to be there, but the manager still needed to check the floor to see if it was actually missing. (Id).

At this point, Morell decided to enter the vehicle and remove the computer. (R. 70:8; App 112). Morell showed the computer to Vickers, who said it had been in

the backseat for ages. (Id). Next, Morell conducted a more thorough search of the vehicle and discovered the previously unidentified box was an unopened Belkin wireless router. (R. 70:5, 8; App 109, 112).

After removing the wireless router from the vehicle, it was taken into custody by the sheriff's department. (R. 70:9; App 113). At no point prior to this happening had the wireless router been reported stolen. (Id). Further, Morell did not ask Vickers about the router. (Id). Morell made no effort to determine how the router had been obtained, nor did he ask if Vickers had a receipt. (Id). The wireless router was eventually discovered as missing from the Fond du Lac Wal-Mart the next day on May 21, 2013. (R. 66:68).

Security camera footage that was later recovered from the Fond du Lac Wal-Mart showed Vickers wearing a white shirt and shorts, on May 20, 2013, entering the store. (R. 66:74). Vickers was observed selecting a wireless router from the shelf and carrying it to another part of the store where he was not observed on camera. (R. 66:79). Later, Vickers is observed leaving Wal-Mart with a grey plastic bag. (R. 66:92). Vickers

was not observed by store personal or on camera placing the router into the bag. (R. 66:92-93). The bag is described as containing a box, however, it is not certain that the router is the box that is in the bag. (R. 66:93-94).

Later, the passenger from the traffic stop on May 20, 2013, John Earl Wright, signed an affidavit indicating that he stole the router on that date. (R. 38; App 103). Wright further affirmed that Vickers did not steal any of the items removed from the car. (Id).

At the post-conviction motion hearing on July 17, 2015, trial counsel testified that she did not file a motion to challenge the search of the vehicle and subsequent seizure of evidence because she believed the officer had probable cause based on the conflicting stories regarding ownership of the Acer computer. (R. 70:16-17; App 120-21). Trial counsel further testified that she did not interview John Wright regarding the theft of the router because she believed that Vickers had stolen the router based on the security camera footage. (R. 70:18-19; App 122-23).

STANDARD OF REVIEW

Whether the assistance rendered to a defendant by trial counsel was ineffective presents a mixed question of law and fact. State v. Sanchez, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The court will uphold findings of historical fact unless clearly erroneous, while the court will determine whether counsel's performance was deficient or prejudicial *de novo*. Id. at 236-7.

ARGUMENT

I. VICKERS WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL WHEN HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL TO HIS DEFENSE.

A. Vickers Has A Constitutional Right To Counsel And Counsel Must Be Effective To Satisfy That Constitutional Right.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. Amend. VI; See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Assistance of counsel must be effective to satisfy the Sixth Amendment. Id. at 685-86.

To establish a claim for ineffective assistance of counsel, a defendant must show: 1) that counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. State v. Pitsch, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985)(citing Strickland, 466 U.S. at 687).

To prove deficient performance, the defendant must show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." State v. Smith, 207 Wis. 2d 258, 273, 588 N.W.2d 379 (1997); Strickland, 466 U.S. at 687. The standard for deficient performance is if the "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. To do so, the defendant must show a specific act or omission of counsel that places the representation outside the wide range of professionally competent assistance. Id. at 690.

To prove the second prong of ineffective assistance of counsel, it must be shown that trial counsel's performance was prejudicial. Smith, 207 Wis. 2d at 275. To prove prejudice, it must be shown that

the defendant was deprived of a fair proceeding with a reliable result. Id. This does not mean that a showing of a different outcome is required, but rather, all that is needed is a showing that the outcome is suspect. Strickland, 466 U.S. at 694.

B. Vickers Was Denied His Constitutional Right To Counsel When His Trial Counsel's Performance Was Deficient And Prejudicial For Failing To Investigate And Call John Wright As A Witness.

1. Trial counsel was deficient in failing to investigate and call John Wright as a witness.

Failure to call a witness may constitute deficient performance. State v. Jenkins, 2014 WI 59, ¶41, 355 Wis.2d 180, 848 N.W.2d 786. Trial counsel does not act deficiently if the failure to call the witness is based upon a reasonable trial strategy. Id. ¶45.

In Jenkins, the court found that trial counsel acted deficiently in failing to call an eyewitness who would have supported the defendant's version of events. Id. ¶¶44,48. The court went on to note that Jenkins' trial attorney would have had no reasonable trial strategy to not call the witness. Id. ¶47. Trial counsel for Jenkins failed to even meet with this witness to get a statement or determine the witness's credibility. Id.

In the present case, trial counsel for Vickers failed to meet with or interview the co-defendant, John Wright. (R. 38; 70:17). In September 2014, four months after Vickers' trial, John Wright signed an affidavit affirming that he took all the items from Wal-Mart on May 20th 2013. (R. 38; App 103). He also affirmed that Vickers had no knowledge of the thefts. (Id.) Finally, he affirmed that had he would have testified to these facts at Vickers' trial had he been asked. (Id.)

In failing to interview or speak with John Wright prior to Vickers' trial, Vickers' trial counsel acted deficiently. Had trial counsel spoken to Wright she would have learned that he was taking claim for the theft of the Belkin wireless router. This would have boosted the trial strategy used by trial counsel of arguing that it was impossible to know what, if anything, was in the bag being carried out of the store by Vickers.

Counsel was further deficient by failing to subpoena Wright to call him as a witness at Vickers' trial. Wright affirmed in his affidavit that had he been called as a witness, he would have told the jury that

he had stolen the router. (Id). At the post-conviction motion hearing, Wright did testify that he stole the router. (R. 70:21-23; App 125-27). He further testified that Vickers had no knowledge of the theft. (R. 70:24-25; App 128-29).

At the post-conviction motion hearing, trial counsel testified that she was aware of Wright from her review of the case. (R. 70:17; App 121). She went on to testify that she believed it was clear that Vickers was guilty, and it was for that reason she decided to not even speak to Wright. (R. 70:18-19; App 122-23).

Had Wright been called to testify at the trial, he could have been used by trial counsel to create reasonable doubt that Vickers stole the wireless router. The argument made at trial by Vickers was that it was impossible to know what was in the bag that Vickers carried out of the Wal-Mart. (R. 66:126; R.70:19; App 123). The testimony of Wright could have been used to bolster this argument. Wright's testimony also could have been used to create a reasonable doubt that Vickers had any knowledge of any theft that took place that day.

2. Vickers was prejudiced by the failure to investigate Wright's involvement and the failure to call him as a witness.

The failure to investigate Wright's involvement and to subsequently call him as a witness was prejudicial to Vickers. The strategy deployed by trial counsel at the jury trial was, in part, to argue that the State had failed to prove that Vickers took the router from the Wal-Mart. The testimony of Wright would have allowed trial counsel to make this argument significantly more convincing by providing an alternate theory of how the stolen router ultimately found its way to the vehicle Vickers was driving.

Failure to call a witness who claims responsibility is not a reasonable trial strategy. It is up to a jury to make determinations about a witness's credibility. State v. Guerard, 2004 WI 85, ¶49, 273 Wis.2d 250, 682 N.W.2d 12. In Guerard the court determined that trial counsel's failure to call a witness who previously confessed to the crime was deficient and prejudicial to the defendant. Id. The court concluded that despite the strength of the state's case, the jury in Guerard may have found reasonable doubt in light of the confession

of another individual. Id.

Here, had Wright testified, the jury would have needed to judge his credibility and reconcile the state's evidence with that testimony. This is testimony that should have been presented to the jury as it could have been used to create reasonable doubt.

C. Vickers' Trial Counsel Was Deficient For Failing To Move To Suppress The Search And Seizure Of Evidence From The Vehicle.

Trial counsel was deficient for failing to file a motion to suppress the search of the vehicle and the subsequent seizure of the router from the backseat of the vehicle. This failure to file a suppression motion placed trial counsel's representation outside the range of professionally competent assistance.

1. Unreasonable searches are unlawful and evidence obtained from such a search is subject to suppression.

The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the U.S. Constitution as well as Article 1, Section 11 of the Wisconsin Constitution. State v. Dearborn, 2010 WI 84, ¶14, 327 Wis.2d 252, 786 N.W.2d 97. Wisconsin courts interpret the Wisconsin Constitution's

protections regarding warrantless searches identically to the protections under the Fourth Amendment as they are defined by the United States Supreme Court. Id. Warrantless searches are presumptively unreasonable unless an exception applies. Katz v. United States, 389 U.S. 347, 357 (1967); State v. Smiter, 2011 WI App 15, ¶ 10, 331 Wis.2d 431, 793 N.W.2d 920. Evidence obtained by an illegal search is to be excluded from any criminal proceeding. State v. Ward, 2000 WI 3, ¶46, 231 Wis.2d 723, 605 N.W.2d 517.

2. The search of Vickers' vehicle was not a lawful search incident to arrest.

A vehicle search incident to arrest is only lawful if the arrestee is within reaching distance of the passenger compartment at the time of arrest, or if the officer has a reasonable belief that the vehicle contains evidence of the crime for which the person is being arrested. Arizona v. Gant, 556 U.S. 332, 351, 129 S.Ct. 1710 (2009). If neither applies, the warrantless search is unreasonable unless another exception to warrant requirement exists. Id. The Wisconsin Courts have applied Gant to the Wisconsin Constitution and held that it is controlling law. Dearborn, 2010 WI 84,

¶17.

Here, Vickers had been arrested on an out of county warrant. (R. 70:5; App 109). At the time of the search, Vickers was already in the backseat of the Deputy Morell's squad car and out of reach of the compartments of the vehicle. (R. 70:6-7; App 110-11). Deputy Morell had no reasonable belief that he would obtain evidence related to the warrant when he searched the vehicle. Therefore, the warrant requirement exceptions under Gant would not apply.

3. Deputy Morell otherwise lacked probable cause to search the vehicle.

Aside from the exception allowed in Gant, an officer may conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime. State v. Thompkins, 144 Wis.2d 116, 137-38, 423 N.W.2d 823 (1988). To establish probable cause, it must be shown that the facts available to the officer at the time of the search would create an honest belief in a reasonable mind that the vehicle contains evidence of a crime. State v. Lefler, 2013 WI App 22, ¶8, 346 Wis.2d 220, 827 N.W.2d 650.

At the time the vehicle was searched, Deputy Morell had no reasonable basis to believe there was evidence of a crime within the vehicle. Deputy Morell's entire investigation into stolen merchandise arose from the fact that Vickers initially explained that the computer belonged to Wright before explaining that it actually belonged to Vickers' wife. (R. 70:6-8; App 110-12). The report that the computer belonged to Vickers' wife was also reported by John Wright. (R. 70:7; App 111). Deputy Morell further testified that before he searched the vehicle he checked with Fond du Lac County to determine if there had been any recent reports of retail theft. (R. 70:7-8; App 111-12). He also contacted some stores in the area, none of which were aware of a recent theft. (R. 70:8; App 112). In short, Deputy Morell had no knowledge of any thefts when he searched the vehicle. He had no basis to believe that the vehicle would contain any evidence of a theft. The simple fact that Vickers changed his story about who owned the computer does not create a reasonable basis for Deputy Morell to suspect that it had been stolen. Therefore, Deputy Morell lacked probable cause to

search the vehicle.

4. Deputy Morell lacked probable cause to seize the router.

An officer may, without a warrant, seize a vehicle and/or its contents if there is probable cause to justify the seizure. State v. Brereton, 2013 WI 17, ¶25, 345 Wis.2d 563, 826 N.W.2d 369. To establish probable cause a law enforcement officer must show there was a fair probability that the item seized contained or was itself evidence of a crime. Id.

Here, Morell lacked any sort of probable cause to seize the wireless router. When the router was seized Deputy Morell had no information regarding it. (R. 70:8-10; App 112-14). The router had not been reported stolen. (R. 70:9-10; App 113-14). Vickers was not been asked where the router had come from. (R. 70:9; App 113). Vickers was not asked if he had a receipt. (Id). The decision to seize the router was based solely on a hunch that it may have been stolen. Deputy Morell had no specific, articulable facts to demonstrate that the router was stolen at the time it was seized from the vehicle.

5. Vickers' Was Prejudiced By His Trial Counsel's Failure To Seek Suppression Of The Seized Evidence.

Had trial counsel filed a motion to challenge the search of the vehicle, she could have suppressed all evidence of the router. Challenging the search of the vehicle would have lead to suppression of all evidence obtained, most notably the router. If the search had been successfully challenged and the discovery of the router suppressed, the state would have had no basis to even file charges against Vickers for the theft.

Even had the search been held as valid, a similar outcome could have been made possible had the actual seizure of the router been challenged as well. Again, without the router, the state would have been unable to establish that the router had been stolen and would have had no case against Vickers for theft.

CONCLUSION

Vickers' trial counsel provided him with ineffective assistance of counsel by failing to investigate and call John Wright as a witness, and for failing to file an appropriate suppression motion relating to the search of the vehicle and the seizure

of the wireless router. Because this deficient performance prejudiced Vickers, the conviction should be reversed and the case remanded for a new trial.

Dated this _____ day of November, 2015.

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APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 or 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.

Dated this _____ day of November, 2015.

Jaymes K. Fenton

BRIEF FORMAT CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has nineteen (19) pages.

Dated this _____ day of November, 2015.

Jaymes K. Fenton

ELECTRONIC COPY CERTIFICATION

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. § 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 _____ day of November, 2015.

_____
Jaymes K. Fenton

CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on November 30, 2015, delivered to the United States Postal Service (USPS) for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3)(b). I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this _____ day of November, 2015.

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Jaymes K. Fenton