STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15AP1631-CR

vs.

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

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary as the State believes that the briefs of the parties will fully meet and discuss the issues of appeal.

STATEMENT ON PUBLICATION

Publication would not be appropriate as this Court's decision would not modify, clarify or criticize an existing rule. Wis. Stats.§§ 809.22 and 809.23(1)(a)1.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel is a mixed question of law and fact. State v. Carter, 210 WI 40, ¶19, 324 Wis. 2d 640. While this court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question that this court reviews de novo. Id.

ARGUMENT

I. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS THE SEIZURE OF THE ITEMS TAKEN FROM THE VEHICLE DRIVEN BY THE DEFENDANT.

A. Introduction

The defendant filed a post-conviction motion alleging that trial counsel rendered ineffective assistance of counsel for "failing to seek suppression of the seized evidence." (R. 49:3). In his motion, the defendant asserted that counsel

failed to file any motions relating to the warrantless search of the vehicle. (R. 49:3)

A post-conviction hearing was held on July 17, 2015. Following the testimony of Deputy Morell, the circuit court held that the traffic stop of the vehicle that the defendant was driving was for a valid purpose. (R. 49:70:34) The trial court found that the objects seized thereafter were in plain view, in the back seat of said stopped vehicle; that the defendant was subject to arrest due to an outstanding warrant; and that the traffic stop was not going on for an extensive period. (R. 49:70:34) In addition, the trial court found that Deputy Morell tried to investigate the circumstances of the items that were in the back seat of the stopped vehicle; that both of the occupants of the vehicle provided different stories about the items that were in the back seat of the stopped vehicle; that Deputy Morell made a few calls and learned that the computer located in the back seat of the stopped vehicle was stolen and was with another electronic item that would usually be associated with the computer; and that Deputy Morell then seized both items in the back seat of the stopped vehicle which were in plain view associated with a theft of matters from Wal-Mart in Fond du Lac. (R. 49:70:35) The circuit court concluded that the seized items would not have been suppressed. (R. 49:70:35)

In addition to the above, trial counsel testified that she reviewed the 2 reports prepared by Deputy Morell and because of the inconsistent stories from the

defendant about the items in the back seat of the vehicle driven by the defendant, she felt there was probable cause to continue investigating on the potentially stolen merchandise. (R.70:16-17)

As the State will demonstrate, the circuit court properly denied The defendant' ineffective assistance of counsel claim on this issue.

B. General discussion of legal principles guiding review of ineffective assistance of counsel claims.

A criminal defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984).

To prove deficient performance, the defendant must show that trial counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. Id. at 688. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. See also State v. Carter, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 "[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate.").

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. Strickland, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. Id. Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; see also Carter, 2010 WI 40, ¶ 37. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 792 (2011).

C. Trial counsel did not render deficient performance because a motion to suppress would not have succeeded.

In alleging deficient performance related to a failure to file a motion, the defendant must show a reasonable probability that the motion would have been successful. State v. Wheat, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441. Vickers cannot do so here.

1. Deputy Morrell had multiple reasons to stop the vehicle being driven by the defendant.

In the context of a traffic stop, "an officer may make an investigative stop if the officer ... reasonably suspects that a person is violating the non-criminal traffic laws." County of Jefferson v. Renz, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (footnote and citations omitted).

§347.06(1), Wis. Stats., states that … "no person may operate a vehicle upon a highway during hours of darkness unless all headlamps, tail lamps and clearance lamps with which such vehicle is required to be equipped are lighted. …"

In addition, TRANS 305.32 Wis. Adm. Code, requires tinting to permit passage through the windows of at least 50% of the visible light striking the front side windows.

Deputy Morrell lawfully stopped the vehicle that the defendant was driving because the vehicle's headlights were not on when the deputy felt they should have been, and further said vehicle had dark tinted windows. (R. 70:4)

2. **Deputy Morrell's extension of the traffic stop was reasonable**.

Deputy Morrell testified that after identifying the defendant, he learned of a warrant for the arrest of the defendant through the Dane County Sheriff's Department, which was for retail theft. (R. 70:5)

Deputy Morrell testified that the defendant gave inconsistent explanations for the presence of the computer that was located in the back seat of the stopped vehicle, (R. 70:6), and later learned that the computer he could see in plain view was stolen. (R. 70:11)

3. Deputy Morrell had probable cause to seize items of stolen property that were seized from the vehicle that Vickers was driving.

A warrantless search is per se unreasonable unless it falls within a clearly delineated exception to the warrant requirement. State v. Artic, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430. One such exception exists when "'police have probable cause to believe that a vehicle contains evidence of a crime.'" State v. Lefler, 2013 WI App 22, ¶ 7, 346 Wis. 2d 220, 827 N.W.2d 650, quoting State v. Pozo, 198 Wis. 2d 705, 710, 544 N.W.2d 228 (Ct. App. 1995).

Whether a given set of facts establishes probable cause for a search is a question of law subject to this court's independent review. State v. Gaines, 197 Wis. 2d 102, 110, 539 N.W.2d 723 (Ct. App. 1995). In making this determination, an appellate court upholds the circuit court's findings of evidentiary or historical facts unless those findings are clearly erroneous. State v. Brereton, 2011 WI App 127, ¶ 5, 337 Wis. 2d 145, 804
N.W.2d 243.

Deputy Morrell testified that prior to seizing any items from the vehicle that the defendant was driving, he was advised by a person from Wal-Mart, in Fond du Lac, that one of the items that was in plain view was supposed to be in their store and it was not and therefore stolen. (R. 70: 9-11).

4. The circuit court properly ruled that a motion to suppress the items seized from the vehicle driven by the defendant would have been denied.

The circuit court found that the seized objects were in plain view, in the back seat of the stopped vehicle; that the defendant was

> subject to arrest due to an outstanding warrant; and that the traffic stop was not going on for an extensive period. (R. 49:70:34) In addition, the circuit court found that Deputy Morrell tried to investigate the matters of the items that were in the back seat of the stopped vehicle; that each of the occupants of the vehicle provided different stories about the items were in the back seat of the stopped vehicle; that Deputy Morell made a few calls and learned that the computer located in the back seat of the stopped vehicle was stolen and was with another electronic item that would usually be associated with the computer; and that Deputy Morell then seized both items in the back seat of the stopped vehicle which were in plain view associated with a theft of matters from Wal-Mart. (R. 49:70:35)

The historical facts demonstrate that Deputy Morell seized the items in question from the vehicle that was being driven by the defendant with probable cause to believe that the seized items were stolen.

II. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND SUBSEQUENTLY PRESENT AS A DEFENSE THE POSSIBILITY THAT A CO-DEFENDANT WAS THE PERSON RESPONSIBLE FOR THE THEFT.

A. Introduction

The defendant also asserted that "(t)rial counsel failed to investigate and subsequently present as a defense the possibility that a co-defendant was the person responsible for the theft. (R. 49:4)

During the aforementioned post-conviction hearing, trial counsel testified that after receiving the discovery materials for the case she sent a copy to the defendant but that she was unable to discuss those materials with the defendant because he never wished to make himself available to have an office meeting to go over the matter. (R. 70:15-16)

Trial counsel explained that she reviewed the videotapes provided through discovery and determined that it was very clear that the defendant was the person who carried out the item from Wal-Mart, not the co-defendant. (R. 70:18)

As the State will demonstrate, the circuit court properly denied The defendant' ineffective assistance of counsel claim on this issue.

B. General discussion of legal principles guiding review of ineffective assistance of counsel claims.

In Strickland, Id. 691, the Supreme Court stated:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to

> believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

An attorney's reasonable actions may be significantly or substantially influenced/determined by the defendant's statements or actions. State v.Banks, 2010 WI App 107 at ¶ 40, 328 Wis.2d at 791.

Further, a lawyer is not ineffective for not pursuing something the defendant knew, but did not reveal. State v. Eison, 2011 WI App 52, ¶ 21, 797 N.W.2d 890, State v. Jones, 2010 WI App 133, ¶ 33, 329 Wis.2d 498, 791 N.W.2d 390; see also State v. DeLain, 2004 WI App 79, ¶ 18, 272 Wis.2d 356, 679 N.W.2d 562, aff'd, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484.

Moreover, "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). See also Jandrt v. State, 43 Wis. 2d 497, 505-506, 168 N.W.2d 602, 607 (1969).

B. Trial counsel did not render deficient performance because the defendant did not disclose the need for the argued investigation and counsel's investigation demonstrated that there was no need for any such investigation.

Trial counsel reviewed all of the discovery associated with the matter before this court. Because of that review, she understood that the only person seen carrying anything from the Wal-Mart in Fond du Lac was this defendant. Any subsequent investigation by her or an investigator would only have resulted in the possibility of evidence that was inconsistent with the video evidence, and makes no sense whatsoever. Avoiding an inconsistent theory of defense is a valid strategic decision.

The circuit court found that the affidavit and testimony of the co-defendant, John Wright, to be incredible. Further that the circuit court found that trial counsel reviewed the credible evidence herself, which was inconsistent with the now proffered defense. (R.70:33-34)

CONCLUSION

For the reasons noted herein, this Court should uphold the trial court's finding and historical facts as to both issues. In addition, the defendant has failed to establish that a motion to suppress would have been granted, had one been filed, fails to establish that the additional investigation would have been helpful to the defendant in any way. The appeal should be denied.

Respectfully submitted this 29th day of January, 2016.

By: _____

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FORM AND LENGTH OF CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 10 pages, 2,255 words.

Further, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as filed on this date. A copy of this certificate had been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of January, 2016.

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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 Wis. Stats. § (Rule) 809.10(2)(a); That is 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 have submitted an electronic copy of this brief, including 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.

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.

Dated this 29 day of January, 2016.

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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 finding 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.

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Curtis A. Borsheim

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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 seven (7) pages.

Dated this _____ day of January, 2016.

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Curtis A. Borsheim

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Dated this _____ day of January, 2016.

_____

Curtis A. Borsheim

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I hereby certify that:

This brief was, on January 29, 2016, 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).

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