

RECEIVED

STATE OF WISCONSIN **02-22-2016**

C O U R T O F A P P E A L S
CLERK OF COURT OF APPEALS
OF WISCONSIN

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15AP1631-CR

v.

DAVID L. 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 REPLY BRIEF

PETIT & DOMMERSHAUSEN, S.C.
By: Jaymes K. Fenton
State Bar No. 1084265
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

Attorneys for the
Defendant-Appellant

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.	1
ARGUMENT.	2
CONCLUSION	4

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 L. 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 REPLY BRIEF

INTRODUCTION

The defendant-appellant, David Vickers (hereinafter, "Vickers"), relies on all the authority and reasoning set forth in his original brief-in-chief and incorporates that submission into this reply brief. In addition, he submits the following responses to the arguments in the brief of the Plaintiff-Respondent.

ARGUMENT

I. DEPUTY MORELL LACKED PROBABLE CAUSE TO SEIZE THE WIRELESS ROUTER.

The state argues that when Deputy Morell learned that laptop computer may have been stolen from Wal-Mart, that he was justified in seizing the router as the router was an item "that would usually be associated with the computer." (Resp. 7). This argument is without merit. First, there is nothing in the record to suggest that Deputy Morell was told by Wal-Mart that the router would be associated with the laptop. Second, Morell had not been told by Wal-Mart that the router was in fact a stolen item. At the time he seized the router, he only had information that the laptop computer may have been stolen. (R. 70:11). Even after talking to a Wal-Mart employee, Deputy Morell was still unable to confirm even the theft of the laptop, he was told that it may have been taken, but had received no actual confirmation about this fact. (Id).

Deputy Morell's assumption that the router was stolen because the laptop may have been stolen was

unreasonable. As such, Deputy Morell lacked probable cause to seize the router from the backseat of Vickers' vehicle. Trial counsel's failure to challenge the seizure of the router was deficient and prejudicial.

II. JOHN WRIGHT SHOULD HAVE BEEN CALLED AS A TRIAL WITNESS IN VICKERS' DEFENSE.

The state contends in its reply brief that trial counsel made a valid strategic decision by avoiding a defense theory that was inconsistent with the evidence. (Resp. 10). The state's basis for this argument is that the video evidence showed only Vickers carrying items from the Wal-Mart store. (Resp. 10). This is incorrect and a mischaracterization of the evidence in the case.

At trial, the state played a security camera video from the Wal-Mart store. (R. 66:72; R:26; Exhibit 1). The video shows another individual, John Wright, taking and carrying away items from Wal-Mart and placing those items in the vehicle. (R. 66:77; R:26; Exhibit 1). John Wright can be identified as he is seen on the camera wearing a blue checkered shirt. (R. 66:74; R:26; Exhibit 1). This is the same clothing that Deputy

Morell observed John Wright to be wearing when they had contact later that evening. (R. 66:58).

Furthermore, the state is wrong when it argues that the defendant is at fault for failing to disclose information to his trial attorney. Here, the involvement of John Wright was not a secret or fact known only to Vickers. John Wright's involvement was obvious as he was in the car and seen on video taking items from Wal-Mart. Trial counsel did not need Vickers to tell her to investigate Wright's involvement. Her failure to do so constitutes deficient performance and was prejudicial to Vickers.

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 February, 2016.

PETIT & DOMMERSHAUSEN, S.C.
By: Jaymes K. Fenton
Attorneys for the Defendant-Appellant
State Bar No. 1084265
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

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 February, 2016.

Jaymes K. Fenton

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 five (5) pages.

Dated this _____ day of February, 2016.

Jaymes K. Fenton

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 February, 2016.

Jaymes K. Fenton

CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on February 22, 2016, delivered to the FedEx 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 February, 2016.

Jaymes K. Fenton

