RECEIVED
10-10-2016
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP001474-CR

BRANDON ARTHUR MILLARD,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and
from an Order Denying Post-Conviction Relief Entered
in the Circuit Court for Rock County,
The Honorable Richard T. Werner, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Statutes

Other References

ISSUES PRESENTED

Was Brandon Millard deprived of his constitutional right to effective assistance of counsel?

The trial court ruled that there was not ineffective assistance of counsel.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs, but welcomes the opportunity for oral argument if the Court has questions not resolved by the briefs. Publication is not permitted pursuant to Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered on February 9, 2015 in Rock County, The Honorable Richard T. Werner presiding, following a jury trial and guilty verdict by the jury on that same day. (R.48.) This appeal is also from the Order Denying Defendant's Post-Conviction Motion entered on July 1, 2016. (R.79; A-App. 101.)

By a criminal complaint filed on September 13, 2012, the State charged Brandon Millard with one count of Operating a Motor Vehicle While Intoxicated—3rd Offense in violation of Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)3 and one count of Operating with Prohibited Alcohol Concentration—3rd Offense in violation of Wis. Stat. §§ 346.63(1)(b) and 346.65(2)(am)3. (R.1) The case was tried to a jury on February 9, 2015. (R.97.) The jury returned a guilty verdict on both counts on the same day. (R.97:207-208; R.44.) The court then proceeded to sentencing, sentencing Mr. Millard to six months in the Rock County jail, thirty month revocation of driving privileges, ordered ignition interlock device, and imposed fines and costs. (R.97:212.)

Mr. Millard timely filed a Notice of Intent to Pursue Post-Conviction Relief on February 9, 2015. (R.49.) On October 13, 2015, Mr. Millard filed a post-conviction motion pursuant to Wis. Stat. § 809.30 to vacate the judgment and for a new trial. (R.61.) He then filed an amended motion on February 8, 2016. (R.66.) The trial court held evidentiary hearings on March 4, 2016 and May 4, 2016[1]. (R.98 and 99.) The court issued a Memorandum Decision on June 22, 2016. (R.78, A-App. 102.) It then entered a written order denying the motion on July 1, 2016. (R.79, A-App. 101.) Mr. Millard timely filed his notice of appeal in this case on July 20, 2016. (R.100.)

STATEMENT OF FACTS

This case arises from a traffic stop for speeding that resulted in a charge of operating while intoxicated. Officer Shawn Welte conducted the stop of Mr. Millard's car and administered one field sobriety test, the horizontal gaze nystagmus (HGN), to Mr. Millard before determining that there was probable cause for an arrest and a blood draw. Officer Welte testified to Mr. Millard's appearance and demeanor during the stop (R.97:67-68).

At trial, the State examined Officer Welte on the HGN test as if he were an expert. He testified generally to his background and experience with field sobriety tests and the HGN in particular, including that he was certified in field sobriety testing. (R.97:69, 71.). He explained the HGN using terms of art and testified to the existence of specialized "clues" and "indications of impairment" that he looks for in an HGN. (R.97:73-74.) Officer Welte testified that four "clues" indicate impairment. (R.97:73.) Although he did not testify to the specific "clues" Mr. Millard exhibited, he explained the test in detail to the jury and testified that Mr. Millard exhibited six out of six possible clues. (R.97:71-75.)

[1] This Court granted a motion to extend the deadline for the Circuit Court to decide the post-conviction motion. (R.75.)

Importantly, he testified that after conducting the HGN he concluded that Mr. Millard was impaired. (R.97:75.) Therefore, he arrested Mr. Millard. (R.97:76.)

Defense counsel did not object to Officer Welte testifying as an expert. Nor did counsel cross-examine Officer Welte on whether he administered the test properly, the reliability of the HGN when properly administered, or whether Officer Welte's background, experience, and certifications were sufficient to form an opinion on Mr. Millard's impairment. (R.97:86-113, 115-116.) Indeed, he asked only two questions about the HGN test: whether pain medication would affect the HGN testing (R.97:104) and if a bright light such as the squad car's light could affect it (R.97:116.) The Defense did not call any expert witness on HGN and called only one witness: Mr. Millard. (R.97:155-178.)

The jury returned a verdict of guilty after twenty-one minutes. (R.97:207.) The trial court then moved straight to sentencing. (R.97:209)

Mr. Millard filed a post-conviction motion that his trial counsel was ineffective, in part because he did not challenge the admission of the HGN test and results, his counsel did not adequately cross-examine Officer Welte, and that counsel was ineffective for failing to file a *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) motion challenging the HGN test. (R.67.) The court held hearings on March 24, 2016 and May 4, 2016 on the motion. (R.98,99.)

Mr. Millard's trial counsel testified at the March 24, 2016 hearing and at the May 4, 2016 hearing. He testified about filing a motion to suppress the blood draw, but that he did not consider filing a *Daubert* motion challenging the HGN test because he had not seen any clear appellate decision on the issue. (R.98:10-12.) He also testified that he did not consider challenging Officer Welte's testimony about

HGN because it was not part of his strategy: "Not part of the strategy of the case. Not what I was seeking to attack." (R.99:11.)

Officer Welte also testified at the March 24, 2016 hearing. At the hearing, Officer Welte testified that he pulled Mr. Millard over for speeding and his subsequent observations. (R.98: 21-26.) Because Mr. Millard informed him that he had a back injury, Officer Welte only had him perform the HGN test. (R.98:29.) He then testified about the results, his conclusions, and his decision to then have Mr. Millard do a preliminary breath test ("PBT"). (R.98:30-33.)

The trial court issued a memorandum decision on June 22, 2016. (R.78, A-App. 102.) The court concluded that the failure to file a *Daubert* motion regarding the HGN testimony was neither deficient performance by trial counsel, nor prejudicial. The basis for the court's ruling was that in the court's view under Wisconsin case law HGN is a common sense observation and not expert testimony. (R.78:2, A-App. 103.) The court also concluded that trial counsel's cross-examination was a matter of trial strategy that did not prejudice Mr. Millard. (Id.) Therefore, the court denied the motion. (R.79, A-App. 101.)

ARGUMENT

I. Standard of Review and Introduction.

An ineffective assistance of counsel claim presents a mixed question of fact and law for an appellate court. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. On the one hand, this Court will uphold the trial court's findings of fact "unless they are clearly erroneous." *Id.* On the other hand, whether or not trial counsel's performance met the constitutional standards for effective assistance of counsel is a question of law that the appellate courts review de novo. *Id.*

Trial counsel's performance here was ineffective because he failed to grasp the significance of the HGN testing. The HGN testing was the only field sobriety testing done by the officer. After conducting the HGN testing the officer concluded that Mr. Millard was impaired. Thus, counsel should have done everything possible to either keep it out or preclude the officer from testifying as an expert about the HGN testing. Counsel failed to do so and therefore Mr. Millard's right to counsel was violated.

II. HGN TESTS SHOULD BE SUBJECT TO THE EXPERT WITNESS STANDARD.

Officer Welte gave what amounted to expert testimony regarding administering the HGN test, so called "clues," and his opinion that based on the test he felt that Mr. Millard was impaired. Defense counsel was ineffective by not challenging any of this.

The admissibility of expert testimony in Wisconsin is governed by Wis. Stat. § 907.02. *See State v. Giese*, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. The legislature amended § 907.02 in 2011 to codify the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and subsequent cases. *Giese*, 2014 WI App 92 at ¶17. Under amended § 907.02 and *Daubert*, the trial court serves as a gate-keeper "to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* at 18. This gate-keeper role is a change from the prior standard looking only at whether "the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *Giese*, 2014 WI App 92, at ¶17, *quoting State v. Kandutsch*, 32011 WI 78, ¶26, 336 Wis. 2d 478, 799 N.W.2d 865.

In determining whether expert testimony meets the new standards, the trial court should focus on the expert's principles and methodology, not the conclusion. *Giese*, 2014 WI App 92, at ¶18. There is not an exhaustive list of factors,

but the courts have stated: "Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." *Id.*, *quoting Daubert*, 509 U.S. at 593-94.

As raised in his post-conviction motion, there are potential issues with the HGN test that defense counsel can contest. The National Highway Traffic Safety Administration ("NHTSA") attempted to standardize field sobriety testing. The HGN test is one of a three part battery of tests that includes the walk-and-turn test and the one-leg-stand test. Andrew Mishlove and James Nesci, *Wisconsin OWI Defense: The Law and Practice*, 103 (2013). There are issues with using the HGN because there are numerous other types of nystagmus other than alcohol-related. *Id.* at 76, 115. Moreover, as recognized by NHTSA, HGN and other field sobriety tests must be administered under very specific conditions. *Id.* at 113-114. If the tests are not administered correctly, the results are "inherently unreliable." *Id.* at 114. *See also State v. Homan*, 89 Ohio St. 421, 425, 732 N.E.2d 952 (2000) ("The small margins of error that characterize field sobriety tests make strict compliance critical.").

Furthermore, there are issues with the studies that purported to validate the use of field sobriety tests to determine impairment. Mishlove and Nesci, at 112. Among these are that the studies were not peer-reviewed and that they used flawed statistical methods that exaggerated the reliability of the various field tests. *Id.* Thus, some courts have rejected the conclusion that the tests are scientific and admissible under Rule 702. *See, e.g.*, *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002).

Appellant acknowledges that there are two unpublished Court of Appeals decisions that hold that HGN testing is not a subject of expert testimony. *State v. Warren*, 2012AP1727-CR, 2013 WL 163520 (Ct. App. Jan. 16, 2013) (A-App. 105) and *State v. VanMeter*, 2014AP1852-CR, 2015

WL 7432604 (Ct. App. Nov. 24, 2015) (A-App. 107). These opinions are not of precedential value under Wis. Stat. § 809.23. More importantly, they should not be of persuasive value because as explained below they rely on a case that was decided prior to the amendment of Wis. Stat. § 907.02.

Both *Warren* and *VanMeter* rely upon *City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324. The Court in *Wilkens* held that field sobriety tests are not scientific tests but mere observational tools used by police officers. *Id*. at ¶¶16-17. The field sobriety tests at issue there were the alphabet test, finger-to-nose test, and heel-to-toe walk test. *Id.* at ¶3. The HGN test was not at issue in *Wilkens*. The Court rejected the idea that just because NHTSA attempted to quantify the reliability of these tests that it then transforms the officer's observations into scientific evidence. *Id*. at ¶19. It also specifically noted that Wisconsin does not follow the federal standard set forth in *Daubert* and therefore even if the tests were scientific evidence they would still be admissible. *Id*. at ¶¶22-23. Subsequently, as noted above, Wisconsin adopted the *Daubert* standard in amending Wis. Stat. § 907.02(1).

Although the Court in *Wilkens* was not considering the HGN test at issue here, the Courts in both *Warren* and *VanMeter* considered HGN tests. Both Courts followed *Wilkens* and rejected the assertion that the *Daubert* standard should apply. See *Warren*, ¶7; *VanMeter*, ¶15. Yet in following *Wilkens*, the Courts were relying on a pre-*Daubert* standard case where the holding that field sobriety tests were not scientific had little actual significance as to whether the evidence was admissible. The *Wilkens* Court did not need to go through the analysis under amended Wis. Stat. §907.02(1) for the admissibility of the evidence. Indeed, the *Wilkens* Court specifically noted that the evidence came in both on the grounds that it had probative value and that Wisconsin was not a *Daubert* state. *Id*. at ¶24. The adoption of *Daubert* changes the analysis.

Warren and *VanMeter* never undertook the analysis required under Wis. Stat. §907.02(1) for the admissibility of the evidence. Instead, they simply rely on *Wilkens* that the evidence is not scientific and therefore conclude amended Rule 907.02 does not apply. Furthermore, there is factually a great difference between the tests in *Wilkens* and the HGN test. The tests in *Wilkens* are arguably simply observations by the officer that the jury can understand. The same cannot be said about the HGN test. Indeed, the Court in *Wilkens* specifically referred to a Florida case for its conclusion that field sobriety tests are only observations not based on science, but then stated "with the exception of observations with respect to the HGN test." *Wilkens*, at ¶20 citing *State v. Meador*, 674 So.2d 826, 832 (Fla. Dist. Ct. App. 1996). Thus, the Court in *Wilkens* recognized a difference between HGN and other field sobriety tests.

III. MR. MILLARD WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment's guarantee of a right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052 (1984). The purpose is to ensure the fair trial to which every defendant is entitled. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The Supreme Court held that there are two requirements that a defendant must show to prove ineffective assistance of counsel: (1) that counsel's conduct was deficient; and (2) that the deficient performance prejudiced the defense. *Id.* at 687. *See also Thiel*, at ¶ 18; *State v. Moats*, 156 Wis. 2d 74, 100, 457 N.W.2d 299 (1990).

A. Trial Counsel's Performance Was Deficient.

The Supreme Court stated that there are no exhaustive lists of what constitutes deficient performance by counsel, but

did give some guidance stressing that there must be a reliable adversarial process.

> From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing processing.

Strickland, 466 U.S. at 688. The inquiry is "whether counsel's assistance was reasonable considering all the circumstances." *Id.* "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." *Thiel*, ¶ 19.

Moreover, although strategic decisions are not grounds for finding deficient performance, the courts should not construct a defense strategy where there is none. "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defense which counsel does not offer." *State v. Jenkins*, 2014 WI 59, ¶36, 355 Wis.2d 180, 848 N.W.2d 786.

Trial counsel did not have any good reason for either not bringing a *Daubert* motion or more thoroughly cross-examining Officer Welte. Regarding *Daubert*, counsel simply stated that he was unaware of any case law on the issue. However, *Wilkens* was a published case on the issue of field sobriety testing and expert testimony. The fact that it pre-dated amended Rule 907.02 and specifically stated such in the opinion, should have given counsel reason to more thoroughly research the issue. Moreover, *Wilkens* specifically excepted HGN. Counsel indicated that he knew of *Daubert* and the change in the expert witness rule, and that it "was a big issue." (R.98:11.) Yet, despite knowing that it "was a big

issue," he did nothing further to investigate it or file a motion because he had not seen any decision. (R.98.11-12.) A review of *Wilkens* and the cases cited in it should have upset his conclusion of there being no case law.

Trial counsel also testified that he did not consider challenging Officer Welte's testimony about HGN because it was not part of his strategy: "Not part of the strategy of the case. Not what I was seeking to attack." (R.99:11.) The trial court found that it was a reasonable strategy decision. (R.78:2, A-App. 102.) However, neither the trial court's statement, nor trial counsel's statement, are based on anything other than unsupported conclusions.

First, trial counsel's statement was not that there was a strategic reason for not more thoroughly cross-examining Officer Welte. Instead, all counsel stated was that it was not in his strategy—a strategy that in hindsight did not work very well. There was no reason why counsel's strategy could not have included more thoroughly cross-examining Officer Welte. For example, he did not say that if he did so it would have detracted from his main defense or that it might open the door to more negative evidence.

Furthermore, from counsel's closing argument to the jury the sole defense seemed to be that there is a presumption of innocence and that Mr. Millard was entitled to make the State prove its case. (R.97:202.) Counsel stated in closing that Mr. Millard was drinking, but "thought he was doing fine." (Id.) In his about two page closing argument, trial counsel did not assert any defense for which cross-examining Officer Welte more thoroughly (or bringing a *Daubert* motion) would have conflicted. Indeed, it's questionable whether there was any defense strategy.

Second, the trial court seems merely to have latched on to trial counsel's statement that it was not his strategy. The trial court, like counsel, did not explain how it was a strategic decision, only that it was reasonable. Its conclusion is clearly

erroneous. As our Supreme Court has stated, the trial court should "not construct [a] strategic defense which counsel does not offer." *Jenkins*, 2014 WI 59, at ¶36. That appears to be exactly what the trial court did here. Therefore, it erred in concluding that there was no deficient performance.

B. Trial Counsel's Defective Performance Was Prejudicial to Mr. Millard's Defense.

The second prong to show ineffective assistance of counsel is prejudice, which admittedly is difficult after the fact. The defendant, however, does not need to show that but for the deficient performance it was more likely than not that the outcome would have been different. *Strickland*, 466 U.S. at 693. Prejudice is based only on a reasonable probability. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "The proper test for prejudice in the context of ineffective assistance of counsel is whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Jenkins*, 2014 WI 59, at ¶37 (citation omitted).

Trial counsel's performance does indeed undermine the confidence in the outcome of this case. The HGN test was the only field sobriety test that Officer Welte administered to Mr. Millard. Officer Welte testified that it was after administering the test that he concluded that Mr. Millard was impaired. Thus, the HGN test played a substantial part of the State's case both for probable cause for arrest and for the jury to find him impaired. Counsel, however, did nothing to keep the evidence out or limit it in any manner. First, he did nothing to question that validity of the HGN testing or seek to keep it out. Nor did he seek under amended Rule 907.02 to require that the State have an actual

expert to testify about HGN testing. Second, he allowed Officer Welte to testify as an expert without any objection or cross-examination. In fact, the only two questions that he asked the officer further made him out to be an expert. In short, counsel stood by and let the State put on its evidence with little to no resistance. There did not seem to be any defense strategy other than making the State prove its case. Therefore, counsel's defective performance was prejudicial to Mr. Millard and his right to effective assistance of counsel under the Sixth Amendment was violated.

CONCLUSION

For the above reasons, Appellant respectfully requests that this Court reverse the trial court, vacate the judgment of conviction, and remand this matter to the Circuit Court for a new trial.

Dated this 10th day of October, 2016.

Respectfully submitted,

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3484 words.

Dated this 10th day of October, 2016.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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 filed on or after 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 10th day of October, 2016.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

CERTIFICATION AS TO 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 § 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 one or more initials or other appropriate pseudonym or designation 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 10th day of October, 2016.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

APPENDIX

INDEX TO APPENDIX

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, if any, which complies with the requirements of § 809.19(13). I further certify that:

This electronic appendix is identical in content and format to the printed form of the appendix filed on or after this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 10th day of October, 2016.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org