STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP001474-CR

BRANDON ARTHUR MILLARD,

Defendant-Appellant.

ON APPEAL FROM THE JUDGEMENT OF CONVICTION AND FINAL ORDER ENTERED ON JUNE 22, 2016 IN ROCK COUNTY CIRCUIT COURT BRANCH 6, THE HONORABLE RICHARD T. WERENER PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Plaintiff-Respondent State of Wisconsin agrees with the Defendant-Appellant Brandon Millard that this case is not appropriate for publication. Further, oral argument is not warranted. The briefs of the parties adequately develop the law and facts necessary for the disposition of the appeal. This case can be decided by applying the cited case law and legal principles to the facts of the case.

ISSUED PRESENTED

1. Whether the Horizontal Gaze Nystagmus (HGN) is a common sense observation and not expert testimony?

   Trial Court Answered: Yes

2. Whether trial attorney Anthony Kraujalis provided effective assistance of counsel?

   Trial Court Answered: Yes

STANDARD OF REVIEW

The Sixth Amendment right of counsel and its counterpart under article I, § 7 of the Wisconsin Constitution encompass the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 226-36, 548 N.W.2d 69 (1996). The Sixth Amendment right to counsel serves to protect a criminal defendant's fundamental right to a fair trial. *Strickland*, 466 U.S. at 684-86.

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. Id. at 687. If a court concludes that a defendant has not established one prong of the test, the court need not address the other. Id. at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. Id. at 688. Said another way, the defendant must demonstrate that specific acts or omissions of counsel

fell "outside the wide range of professionally competent assistance." Id. at 690. 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. A court should presume that counsel rendered adequate assistance. Id. at 690; 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*, 324 Wis. 2d 640, ¶ 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).

SUPPLEMENTAL STATEMENT OF FACTS

Officer Welte, of the City of Janesville Police Department who is trained to visually identify speeding vehicles, testified he first observed the defendant's vehicle on August 11, 2012 at 3:20 a.m. operating in excess of the posted limit on Milton Avenue in Janesville, Rock County, Wisconsin. The officer testified that early morning hours are a common time for intoxicated drivers based on his training and experience. (See: March 24, 2016 transcript at pg. 24) The vehicle suddenly slammed on its breaks and slowed considerably. The officer began to follow the vehicle as it traveled southbound on Milton Avenue. The vehicle changed lanes without using a turn signal. The officer stopped the vehicle, and he made contact with the defendant, Brandon Millard. The officer testified that the defendant had a strong odor of intoxicants on him. (See: August 27, 2014 transcript at page 5) The defendant was talking on his cell phone, which the officer

found unusual. The officer described the defendant's speech as very slurred, and his eyes were bloodshot and glassy. The defendant also admitted to consuming alcohol prior to driving. The defendant's motor skills were slow and deliberate. The defendant's appearance was disheveled and he had a wet spot in his groin. Although the officer did not determine the cause of the spot, the defendant either urinated in his pants or spilled on himself.

During the traffic stop, the officer asked the defendant to get out of his car, and in doing so the defendant had difficulty maintaining his balance. He had to lean up against his car. The only Field Sobriety Test the officer was able to perform was the Horizontal Gaze Nystagmus (HGN). The officer, who is trained and certified in the use of the HGN, testified that the defendant had six (6) of six (6) clues. The defendant then claimed he had a bad back that would prevent him from performing any further tests, so the testing was stopped at that point. The officer also testified that he had made approximately 500 arrests for OWI in his 16 years of law

enforcement experience. (See: February 9, 2015 transcript at pgs. 63 to 76).

The defendant was read the informing the accused form, and he consented to the collection of his blood for testing. (Id. at pg. 78) That blood was drawn by a phlebotomist at Mercy Hospital in Janesville, Wisconsin. (Id. at pg. 121). The blood was forwarded for testing to the State Lab of Hygiene in Madison, Wisconsin. The blood was tested at the Lab, and the test results showed the defendant had a blood ethanol concentration of .176 per 100 milliliters of blood. (Id. at pg. 143). At trial, the defendant agreed during cross examination that his blood ethanol concentration was in fact .176 grams per 100 milliliters of blood at the time of arrest. (Id. at pg. 177).

ARGUMENT

I. HGN Evidence Is Not Expert Testimony Subject to Wisconsin's Expert Testimony Rule Set Forth in Section 907.02 Wis. Stats.

The State asserts that the trial court correctly held that HGN test, along with the other standard field sobriety tests, is a

common sense observation, not expert testimony. Therefore, it is not subject to the Daubert Standard, and trial counsel was not deficient in failing to file a Daubert Motion challenging the HGN prior to trial. (See: Appendix -1-)

In 2005, the Wisconsin Court of Appeals held that, '"The mere fact that the National Highway and Traffic Safety Association (NHTSA) studies attempted to quantify the reliability of the field sobriety tests in predicting unlawful [blood alcohol contents] does not convert all of the observations of a person's performance into scientific evidence."' *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 19, 278 Wis.2d 643, 693 N.W.2d 324 (quoting *State v. Meador*, 674 So.2d 826, 831-32 (Fla. Dist. Ct. App. 1996)). The Court further noted that "even if science 'validates' observations that police officers make while administering FSTs, that would not mean the observations themselves are based on scientific phenomena rather than plain common sense." (*Wilkens* at ¶ 21). The Court cautioned that its decision should not be read to pass on whether HGN had a scientific basis because the HGN test was not at issue in that

case. (Id. at ¶ 18 n. 3). However, the administration of the HGN test relies upon the same physiological principle as the administration of the Walk and Turn and the One Leg Stand tests—alcohol impairs muscle control. HGN is simply another physical manifestation of alcohol impairment, like swaying or walking off kilter. HGN should not be considered any differently than the other field sobriety tests. The admissibility of the HGN test was not addressed in the *Wilkens* decision is because the test was not administered by law enforcement in that case.

The Wisconsin Court of Appeals in 2013 decided *State v. Warren*, No. 2012AP1727-CR, 2013WL 163520. (Ct. App. Jan. 16, 2013), an unpublished decision directly addressing whether field sobriety tests, including HGN, are expert testimony subject to Daubert's admissibility test under the newly adopted expert testimony rule. (See: Appendix -2-). In an opinion by Chief Judge Brown (the author of the *Wilkens* case), the Court of Appeals held that testimony concerning field sobriety testing is not expert testimony. *Warren* at ¶ 1. (The State cites *Warren* as persuasive authority pursuant to sec.809.23(3)(b) Wis. Stats.) The Warren Court adopted the

Wilkens holding without distinguishing HGN from the other field sobriety tests, stating that the tests are "not science based." Id. By adopting the earlier *Wilkens* ruling without distinguishing HGN as different from the other field sobriety tests, the Warren Court held that, like the other tests, HGN is a common sense observation. The Warren Court noted that such a common sense observation ought not to be considered a '"litmus test that scientifically correlates certain types or numbers of 'clues' to various blood alcohol concentrations."' *Warren*, Id. at ¶ 8 (quoting *Wilkens*, 2005 WI App 36). While the unpublished decision in *Warren* is not binding on this Court, the State believes the ruling is especially persuasive as to whether HGN evidence is uniquely scientific among the field sobriety tests because the same judge who specifically excluded HGN from the *Wilkens* decision chose not to distinguish HGN in *Warren*. This Court should therefore also conclude that "an officer testifying that field sobriety tests [including the HGN test] and other observations led him to form the subjective opinion that a driver's alcohol level was impermissibly high is not scientific or expert testimony." Id. at ¶ 7 (citing *Wilkens* at ¶ 21). In *State v. Murphy*, the Iowa

Supreme Court observed that perhaps the greatest obstacle to HGN's admissibility is "its pretentiously scientific name." 451 N.W.2d 154, 156 (1990). The Court went on to find HGN no more scientific than the other field sobriety tests stating:

> "The [HGN test] consists of checking the movement of an individual's eyes as they follow the path of a moving object, such as a pen, before the eyes. . . The gaze nystagmus test, as do other commonly used field sobriety tests, requires only the personal observation of the officer administering it. It is objective in nature and does not require expert interpretation."

Id. at 157, quoting *State v. Nagel*, 30 Ohio App.3d 80, 81 (1986). Like Iowa and Ohio, North Dakota has found that HGN is not a scientific test. The North Dakota Supreme Court addressed the issue of HGN being outside the scope of the common knowledge of jurors, saying that the same "trained observer" deference afforded to officers in the reasonable suspicion context should be extended when an officer is called upon to opine on the accused's condition. *City of Fargo v. McLaughlin*, 512 N.W.2d 700, 707 (1994). Louisiana echoes the sentiments of other jurisdictions, considering HGN another psychomotor evaluation with objective components. *State v. Waldrop*, 93 So.2d 780, 784 (La. App. 2012). The Waldrop Court, quoting *State v.*

Meador, classified HGN as "in the 'same category as other commonly understood signs of impairment such as glassy or blood-shot eyes, slurred speech, staggering, flushed face, labile emotions, [and the] odor of alcohol.'" Id. Oklahoma has also adopted this position. *Anderson v. State*, 252 P.2d 211, 212-13 (Okla. Crim. App. 2010).

II. The Strategy of Trial Counsel.

The defendant alleges that Attorney Kraujalis was ineffective for failing to more rigorously cross examine Officer Welte on the HGN and thereby prejudiced the defendant. Attorney Kraujalis testified that the attacking the HGN was not his trial strategy. (See: May 4, 2016 Transcript at pg.11) According to Attorney Kraujalis, he intended to focus on the collection of the blood and the blood tests, which is a genuine and common defense in OWI cases. The fact that the strategy was unsuccessful does not mean his performance was legally insufficient as long as the strategy constitutes a genuine defense. *State v. Adams*, 221 Wis.2d 1, 584 N.W. 695 (Ct. App. 1998).

Further, the strategy was genuine because the defendant had a blood ethanol concentration of more than twice the legal limit. That fact was one of the strongest pieces of evidence the State had against the defendant. In order for the jury to acquit the defendant, it was important trial counsel try to discredit those test results. The attack on the collection of the blood, the testing of the blood and the actual test results did constitute a genuine defense. Attorney Kraujalis was in no way deficient in his trial strategy. He vigorously cross examined any of the State's witnesses who in any way involved with the collection, handling or testing of the blood. Additionally, the defendant has failed to affirmatively prove prejudice to the defendant and has failed to substantially show that the outcome of the trial would have been different but for Attorney Kraujalis' performance on this issue. Officer Welte was not qualified as an expert by the court. The trial court also correctly pointed out in its written decision that a detailed examination of Officer Welte about his training experience would only strengthen the officer's testimony, which would have damaged the defense. (See: Appendix -1-)

The defendant also asks this court to view the HGN testing in isolation instead of considering it as one piece of the entire investigation by Officer Welte. When the facts of the case are viewed in their totality, the HGN test is one minor part of the entire set of facts. So much so that the State never even mentioned the HGN in its closing argument. (See: February 9, 2015 transcript at pgs. 198-201). The jury had more than sufficient evidence to convict the defendant even if the HGN had not be part of the equation. The defendant had difficulty driving his vehicle. He could not maintain a proper speed, perform correct braking or even correctly make a lane change. It was the early morning hours, which the jury was told is a common time for intoxicated drivers to be on the road. The defendant was disheveled and had a large wet spot on his pants indicating at a minimum that he lacked coordination. He smelled of alcohol and had red glassy eyes as well as slurred speech. Those are well recognized indications intoxication. The defendant also admitted to consuming alcohol prior to driving, which further confirmed the officer's belief that the defendant was too impaired to

safely operate a motor vehicle. The defendant had difficulty maintaining his balance during his contact with the officer. The fact that alcohol affects a person's motor skills is common everyday knowledge that the jurors could use in the their deliberations. The jurors also heard the defendant's own testimony where he admitted to consuming alcohol, either beer and/or rum, prior to driving. (See: February 9, 2015 transcript at pg. 169) He also testified to having 11 prior criminal convictions, which directly affected his credibility. (Id. at 178) Finally he had a blood ethanol concentration of .176 grams per 100 milliliters of blood. That taken together with his admission of driving on Milton Avenue, a pubic highway, alone is sufficient evidence to convict him of the Prohibited Alcohol Concentration violation. The defense has failed to show that Attorney Kraujalis' performance in any way prejudiced the defendant.

CONCLUSION

This court should uphold the lower court's ruling that Attorney Kraujalis' conduct was not deficient in any of the areas raised by the defense nor was that defendant prejudiced by Attorney Kraujalis' representation. The HGN is a common sense observation and not expert testimony; therefore, trial counsel's failure to file a *Daubert* motion is not fatal nor is it deficient performance. Attacking the blood test and results is a genuine strategy and defense when considering the facts of this particular case.

Dated this _____ day of November, 2016.

Respectfully submitted,

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CERTIFICATION

I certify 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 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,995 words.

Dated this ____day of November, 2016.

Mary E. Bricco
Assistant District Attorney
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CERTIFICATION 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 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.

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, 2016.

_____
Mary E. Bricco
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings of decisions showing the trial court's reasoning regarding these issues.

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 of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been reproduced to preserve confidentiality and with appropriate references to the record.

Dated this____ day of May, 2016.

_____

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