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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case: 2016AP1540-CR
Outagamie County Case: 2013CT000214

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Lonnie L. Sorenson,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT Branch V FOR OUTAGAMIE COUNTY

The Honorable Michael W. Gage, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication in this matter.

STANDARD OF REVIEW

Sorenson properly states the standard of review in his brief. Regarding the ineffective assistance of counsel claim, because Sorenson fails to allege facts that would entitle him to relief, relies on conclusory allegations, and because the record clearly shows that Sorenson is not

entitled to relief, the trial court's ruling on that issue should be evaluated for erroneous exercise of discretion. **State v. Allen**, 2004 WI 106, ¶¶ 8-9, 274 Wis. 2d 568, 576–77, 682 N.W.2d 433, 437.

ARGUMENT

1. Sorenson's claims of error are moot in light of the comprehensive jury verdict.

This case demands an extra layer to any harmless error analysis. In addition to examining whether any alleged error may be harmless, the Court should also consider that any error it finds was prejudicial with respect to its relevant charge is still ultimately harmless in the context of the case as a whole.

Assuming, *arguendo*, that any or all of Sorenson's claims of error have merit, he cannot overcome the fact that the jury found him guilty of Operating While Intoxicated (OWI), Operating with a Prohibited Alcohol Concentration (PAC), and Operating with a Restricted Controlled Substance (RCS). Sorenson's claims are aimed the OWI and PAC verdicts. He offers no claims that undermine or even address the RCS verdict even if his claims with respect to the other counts are taken at face

value. The RCS verdict is unassailable regardless of any potential findings on the remaining counts. The net result remains one conviction for counting and sentencing purposes. Wis. Stat §346.63(1) (c). Even if the Court finds merits to Sorenson's claims, the practicality of his situation will not change. The penalties remain the same, the number of convictions remains the same, and the facts brought forth at trial upon which the trial court pronounced sentence remain the same.

Should the Court find prejudicial error with respect to the OWI or PAC counts, that error would be adequately addressed by directing the trial court to amend the Judgement of Conviction to indication conviction for the RCS count, a functionally identical offense of which Sorenson was also found guilty at trial.

2. Sorenson was not entitled to a hearing on his post-conviction motion for a new trial because the facts he alleged would demonstrate neither deficient performance nor prejudice even if true.

Sorenson requested a new trial on multiple grounds, many of which were previously addressed by the trial court either at or before trial. The specific contentions will

be addressed in detail below, as they are the same as brought before the Court in this appeal.

Sorenson additionally argues that he was denied an opportunity to respond to the state's brief due to the withdrawal of counsel. Sorenson contends that it is "patently unfair that argument was taken when only one party to the motion was present." (Appellant's Brief: 13-14).

Sorenson fails to acknowledge that his prior appellate counsel withdrew from representation after the date any reply brief was due. (R. 131). He fails to acknowledge that no appearance was made on his behalf, including by himself, at the March 31, 2016 hearing. (Id). He fails to acknowledge the efforts by the trial judge to ascertain the status of Sorenson's representation and the information he was provided by the Office of the State Public Defender. (Id). No arguments or contentions responsive to the state's brief or the trial court's analysis have been offered to date, casting severe doubt on whether any meaningful additional response was possible from Sorenson. Sorenson has not alleged any way in which there is any reasonable basis to believe a different outcome was possible, let alone likely. He is not entitled to a new

trial or even a hearing on his motion based upon the facts alleged. **State v. Balliette**, 2011 WI 79, ¶ 79, 336 Wis. 2d 358, 389–90, 805 N.W.2d 334, 349.

Additionally, Sorenson affirmatively misstates the facts about the fairness of the hearing held. There was no argument. The state's contribution to the hearing consisted of two words at the close of the hearing: "Thank you." (R. 164:12). Rather than the hearing being patently unfair, Sorenson's contention of *ex parte* argument is demonstrably false.

Sorenson was not denied the right to be heard on his motion as far as he was actually entitled to be heard. No *ex parte* argument was heard by the trial court. There was no error, no denial of right to counsel and no ineffective assistance of counsel. There is no prejudice to Sorenson. He is not entitled to relief on these grounds.

3. Sorenson was effectively represented at trial.

Sorenson argues that his trial counsel should have objected to "speculation" testimony by Diane Kalscheur. In his post-conviction brief to the trial court, Sorenson indicates that the speculative testimony was related to Ms. Kalscheur opining on his intoxication at the time of the

offense. (R. 132:4). Rather than speculate about Sorenson's intoxication, what Ms. Kalscheur actually did was provide information about the effects of alcohol in general. (R. 161:231) She indicated that AMA and NHTSA standards presume intoxication at a BAC level of .10, but specifically stated that she did not like to "just look at the numbers for any case…" (Id). She provided general information from sources experts in her field would reasonably be expected to rely upon. She did not claim knowledge of Sorenson's intoxication or lack thereof, nor did she speculate on the topic.

The contention that Ms. Kalscheur was incompetent to provide such testimony must fail because it is based upon an inaccurate account of her testimony and it additionally ignores the background, training, experience and common sense underlying the testimony that was given. (R. 161:214-223).

Failure by Sorenson's trial counsel to call a rebuttal expert to contest the assertions made by Ms. Kalscheur regarding the drug and alcohol testing is not shown to be deficient performance. Speculation that drug and alcohol retrograde extrapolation testimony "may" have created reasonable doubt is a conclusory statement without backing.

At best, such testimony would have been redundant to what was in evidence. Trial counsel was able to elicit testimony from Ms. Kalscheur sufficient to argue during closing argument that Sorenson's blood alcohol level could have been below the legal limit at the time of his driving based upon Sorenson's account of events. (R. 161:298, 331-334).

Having established that such an occurrence was possible using the state's witness, an additional expert would have no additional effect. The jury's decision would still come down to an assessment of Sorenson's credibility, whether one, two or 50 experts established that the defendant's account of events, if true, could have left him below the prohibited alcohol concentration at the time of driving. Sorenson cannot show that such testimony would refute the state's contention that the blood test results were the result of his consumption of alcohol prior to driving. **State v. Nixon**, 2013 WI App 138, ¶ 8, 351 Wis. 2d 684, 840 N.W.2d 139 (*cited for persuasive value only*).

Neither deficiency nor prejudice is shown. Sorenson is not entitled to relief based upon ineffective assistance of trial counsel.

4. The state did not violate its discovery obligation with respect to providing notice of expert opinion.

The state complied with its discovery obligations under Wisconsin Statutes §971.23(1) (e). As noted by the trial court, it is not clear that the calculation was undertaken prior to the trial, nor was it clear that the issue of the timing of THC ingestion was implicated until the trial began. (R. 164:6). It was the defense that raised the issue of passive inhalation and thus, the timing of inhalation on the day of trial. (R. 161:10). (R. 164:6, 7). The trial court properly looked at the testimony as defensive or rebuttal. (R. 164:7).

It was Sorenson who, through a series of defenses leading up to and at the time of trial, who would have been most aware that the timing of the ingestion of the THC could be an issue. (R. 164:6). Conclusions on that issue were implicit and ascertainable from the data provided. (R. 164:7). Whether they would be implicated was only determined based upon the defense strategy at trial.

Sorenson cannot show that he was prejudiced by the statutory violation alleged. No specific allegation of prejudice was made either during post-conviction proceedings before the trial court, nor is any made in

Sorenson's motion before this Court. That he was "unable to present appropriate rebuttal expert testimony," is conclusory and speculative. (Appellant's Brief: 18). Sorenson has not provided any indication, even with the benefit of more than two years of hindsight, what obtainable testimony from what additional witness could have constituted a meaningful response to Ms. Kalscheur's testimony. This is because there is no such testimony.

Sorenson is not entitled to relief grounds of a violation of discovery obligations.

5. Ms. Kalscheur provided permissible expert opinion based upon her own knowledge, expertise, experience and review of the relevant data regarding Sorenson's blood ethanol analysis.

When addressing the admissibility of Diane Kalscheur's testimony as expert, the trial court referred to a pretrial hearing that was taken up on the same issue with respect to a different analyst who was to have testified. (R. 164:5). Citing the relevant cases and the facts of the prior witness' qualifications as ascertained at a prior hearing, the trial court found it to be a "straight forward

application" of the law that established the admissibility of the anticipated testimony. (R. 95:4).

At trial, Diane Kalscheur's qualifications were established with respect to her background and her review of the relevant information in this case. (R. 161:214-226). She reviewed the records for Sorenson's sample including the functionality of the testing equipment, the testing analyst's report and the peer reviewer's report, as well as the records from the entire testing run. (R. 161:220, 221, 226, 243). Sorenson's argument she "merely performed a *review* of the results obtained by another employee" not only ignores his own admission that a qualified individual who "*reviews* the work of the testing analysis" may provide their own opinion. (Appellant's Brief: 19. *(Emphasis added)*). The argument also disingenuously downplays the actual materials Ms. Kalscheur reviewed to be able to provide her opinion.

The same analysis that applied to the original analyst applies to the testimony of Ms. Kalscheur, as the trial court noted. (R. 95:5). Further, unlike the analyst originally set to testify, Ms. Kalscheur personally performed analysis on the Sorenson's THC level in addition

to reviewing the work of the ethanol. She was not a mere conduit for the opinion of another.

Sorenson is not entitled to relief upon his claim that his right to confrontation was violated.

CONCLUSION

Because the facts of this case demonstrate neither error nor prejudice to Sorenson based upon any one or combination of his claims, Sorenson is not entitled to any relief. The state respectfully requests that the Court deny the motion for a new trial in its entirety.

Respectfully submitted this 24th day of February 2017.

By:_____
Zak Buruin
OUTAGAMIE COUNTY
ASSISTANT DISTRICT ATTORNEY

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 11 pages.

Dated: February 24, 2017

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