STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1722-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT BRIAN SPENCER,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Joseph Donald, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Jury's Verdict was Unreasonable Because the Circumstantial Evidence was Insufficient to Prove Guilt Beyond a Reasonable Doubt.

On a summer's day, the Milwaukee Police Department executed a no-knock at Mr. Spencer's home while he was a barbeque in his backyard with of family and friends. (83:118; 86:81). There were children present. (86:67) The police threw a flash bang into to execute the warrant, causing confusion and chaos.

The confusion and chaos that is caused when police threw the flash bang evidenced by the testimony of the officers. While both Officers Mengel and McBride testified that Mr. Spencer was in the backyard when they approached, Officer McBride indicated that Mr. Spencer was coming from the north side of the yard where the bag was thrown, and that he observed this about 30 seconds from the execution of the warrant. (83:102-104).

However, Officer Mengel, who was about 10 feet in front of Officer McBride and got the yard first testified that he saw Mr. Spencer standing still and not coming from any direction, which was contrary to this partner's testimony. (83:120). He also told the jury that the as he approached the yard is when the flashbang went off. (83:123). Therefore, Mr. Spencer would not have been able to go retrieve anything from the shed and then throw it over the fence in that short period of time as the state alleges.

Moreover, based on Officer Mengel's version, he should have seen the object being thrown by Mr. Spencer, or should have seen Mr. Spencer at the fence. However, he testified that Mr. Spencer was standing still on the walkway

that leads from the house to the rear gate, and that he did not see anything through the air. (83:109). Likewise, Officer McBride was already at the house when flashbang went off and although he claimed to see Mr. Spencer coming from the direction of the fence, he didn't see him throw anything.

The officers on front containment stated that they saw the object being thrown within seconds of the flash bang. (84:34; 85:22). This observation does not fit the time line of Officer Mengel, who said he approached the yard as the flashbang went off and saw Mr. Spencer standing still. (83: 106), it stands to reason that he would have seen Mr. Spencer at the fence throwing an object, since the officers who observed the object fly over the fence made that observation after the flash bang. The discrepancies in the officers' observations demonstrates the chaotic nature of the execution of the warrant and makes their testimony about timing and positioning of people, which is crucial in this circumstantial case, unreliable.

The state contends that the jury could also reasonably infer guilt beyond a reasonable doubt based on the additional items found in the open shed and at the rear of the property near the alley. These items included Crown Royal bags, scales, balloons, and plastic baggies. The Crown Royal bags had bottles (86:92), and balloons were for the children. (86:93). The $600-700 found in the home is hardly indicative of drug dealing, and this Court should decline to conclude that the presence of everyday household items and having cash is sufficient to make a reasonable inference that Mr. Spencer was dealing heroin.

II. Trial Counsel's Deficient Performance was Prejudicial; Therefore Entitling Mr. Spencer to a New Trial.

A. It was not a rational strategic decision to fail to impeach the credibility of the officer's testimony.

Attorney Peirce had every reason to doubt Officer DeWitt's testimony that his view was unobstructed. He testified at the postconviction motion hearing that his strategy was to cast doubt on positioning and his testimony that he had an unobstructed view. (88:38). Attorney Peirce knew that there was a large tree at the fence line and that the limbs and branches hung over the fence where Officer DeWitt testified having an unobstructed view. (88:38). In fact, Attorney Peirce made it a point to get Officer DeWitt to commit to his testimony that his view was totally unobstructed.

While matters of trial strategy are generally left to counsel's professional judgment, counsel may be found ineffective if the strategy was objectively unreasonable. *See* ***State v. Felton***, 110 Wis. 2d 485, 501-03, 329 N.W.2d 161 (1983). Here, it was objectively unreasonable for Attorney Peirce to fail to demonstrate to the jury that contrary to his testimony, Officer DeWitt could not have had an unobstructed view. Attorney Peirce acknowledged that he his goal of cross-examination with Officer DeWitt was to cast doubt on his positioning and whether or not he really say a hand, which he believed to be questionable. (88:40). For example, by impeaching his credibility, Attorney Peirce could have argued that the bag could have been thrown from further away, which would discredit the theory that Mr. Spencer was at the fence and coming back from that area when Officer McBride saw him. (83:104).

It is unreasonable for trial counsel not to used available evidence to demonstrate that Officer DeWitt's testimony that his view was unobstructed was incredible, given that there was a large tree hanging over the fence. *See* ***State v. Thiel***, 2003 WI 111, ¶¶46, 50, 264 Wis. 2d 571, 665 N.W.2d 305 (concluding that "it was objectively unreasonable for [defendant]'s counsel not to pursue further evidence to impeach" the alleged victim).

B. Trial counsel's failure to do more than leave a card for witnesses and failure to call Mr. Spencer's daughter, who was present when the police arrived, constituted ineffective assistance of counsel.

It is well established that trial counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." ***Strickland v. Washington***, 466 U.S. at 691, 104 S.Ct. 2052; ***Stanley v. Bartley***, 465 F.3d 810, 813 (7th Cir.2006). After investigating, or making a reasonable decision that no investigation is necessary, counsel may make a legitimate strategic decision not to call a witness if he makes a determination "that the testimony the witness[ ] would give might on balance harm rather than help the defendant." ***Toliver v. McCaughtry***, 539 F.3d 766 (7th Cir. 2008) ((citing ***Foster v. Schomig***, 223 F.3d 626, 631 (7th Cir.2000); (quoting ***Hall v. Washington***, 106 F.3d 742, 749 (7th Cir.1997)).

To assert that Attorney Peirce "tried everything he could to locate, interview and perhaps call as defense witnesses" the three men located on the property when then police arrived (State's Br. at 18) mischaracterizes his own testimony at the postconviction hearing. Attorney Peirce was appointed by the State Public Defender and handled all investigation in this matter. (88:9,13). In relation to interviewing or locating other witnesses, counsel testified that

he personally went to knock on the door of the two witnesses that were neighbors. (88:13). He stated that he left a business card, but was not sure if he left a note. (88:13). Therefore, there was no way for either of the witnesses to know why Attorney Peirce might be calling.

Attorney Peirce's testimony demonstrates that he never spoke with either Mr. Medley or Kenneth Wooten, and that his decision not to call either witness was not based on any investigation or determination that their testimony would be harmful to his theory of defense. ***Hall***, 106 F.3d 742, 749 (7th Cir.1997). Attorney Peirce stated that he believed that if he had called them to testify, they would have testified consistently with their statements to the police, although neither Mr. Wooten nor Mr. Medley gave statements to the police. (88:15). Attorney Peirce thought that had they testified they would have testified about who was where in the yard and the timing of events, generally, which counsel acknowledged furthered his goal, which was to create doubt by showing that other people were in the yard and that positioning of people and timing was crucial since that was "precisely" what police relied on to conclude Mr. Spencer threw the bag of drugs. (88:15, 23-25).

The state argues that Attorney Peirce did everything he could to locate these witnesses who did not want to be found. (State's Br. at 18). However, Attorney Peirce thought he spoke with either Albert Medley or Kenneth Wooten at the preliminary hearing, or a "different one" and he could not recall if he "actually spoke to them about the case or about Mr. Spencer." (88:13). If in fact he did meet theses witnesses they were not uncooperative as the state contends.

Counsel's failure to investigate and subpoena a witness whose testimony would have been used to create doubt about the timeline of events testified to by police constitutes deficient performance. And, contrary to the state's argument that Mr. Medley's testimony would be "useless" (State's Br. at 19), it would have done exactly what Attorney Peirce was

trying to achieve – create doubt. For example, according to Mr. Medley, Mr. Spencer was inside the house when the flash bomb went off. (91:10; 92:8). Mr. Medley placed himself inside the backyard just before the flash bomb went off (91:15, 26), which was consistent with both Mr. Spencer's testimony and Ms. Rash's. (86:80-81, 63).

In relation to Mr. Spencer's daughter, the state first argues that even if the jury believed Ms. Young's testimony that her father was in the house and then came back out seconds after, it could have still found that he had enough time to go to the shed, grab the heroin, and throw it over the fence. (State's Br. at 20). However, this argument fails considering the timing of events described by the officers. For a jury to believe that Mr. Spencer came out of the house seconds after hearing the flashbang and that after that he retrieved and tossed the heroin, the officers on the back containment would have had to have seen it. Accordingly, Ms. Young's testimony was critical to creating doubt, just as Mr. Medley's was.

"[O]nly choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity." ***Strickland***, 466 U.S. 668, 690-91.(1984). Here, Attorney Peirce made no reasonable investigation nor did he provide any testimony to support that his decisions related to witnesses were well thought out. There is nothing to suggest that Attorney Peirce properly investigated and determined that testimony of these witnesses would somehow harm his theory of defense.

Attorney Peirce's decision to not pursue, subpoena and call witnesses that could have corroborated the defense theory that Mr. Spencer was in the house when the flash bang went off, and that would have painted a very chaotic scene is not reasonable. Moreover, Mr. Medley testified that he was in the

yard, thereby creating additional doubt as to whose arm could have been seen reaching over the fence.

Attorney Peirce performed deficiently and his errors when assessed cumulatively prejudiced the outcome of the trial. ***Thiel***, 264 Wis. 2d 571 ¶59. His failure to investigate, subpoena witnesses and impeach the officer undermine confidence in the result. ***Id***. ¶ 20. Mr. Spencer is entitled to a new trial.

III. The Circuit Court Erred When It Determined that the Good Faith Exception Applied Without Holding a Hearing.

The state argues that postconviction counsel could have asked trial counsel at the ***Machner*** [1]hearing why he did not file a suppression motion, and therefore Mr. Spencer's argument that the trial court should have ordered a suppression hearing is without merit. (State's Br. at 24). However, the circuit court's decision and order granted a ***Machner*** hearing on only the issue related to counsel's decision not to call certain witnesses, and the issue related to publishing the photographs to the jury. (62:8). In relation to the issue of a suppression motion, the circuit court ruled in its written order by finding that even if there was a lack of reasonable suspicion to issue the no-knock warrant, suppression was not the remedy. (62:4).

Accordingly, postconviction counsel was not free to question trial counsel about his decision not to file a motion, as doing so would have been contrary to the circuit court's order for the issues to be addressed at the ***Machner*** hearing. The state asserts that trial counsel recognized that the motion would be meritless either because the court would have upheld the warrant or applied the good faith exception. This is

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[1] ***State v. Machner***, 92 Wis.2d 797, 285 N.W. 2d (1979)

pure speculation as the reasonableness of trial counsel's decision not to file a suppression motion. The state, however, does not provide any speculative reason for not filing a motion where if the warrant were found invalid, the burden would shift to the state to provide good faith. *See* ***State v. Eason***, 2001 WI 98 ¶ 74, 245 Wis. 2d 206, 629 N.W.2d 625.

The good faith exception does not apply when a "reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." ***United States vs. Leon,*** 468 U.S. 897, 923 n. 23 (1984). "The standard of objective reasonableness requires, among other things, that police officers have a reasonable knowledge of what the law prohibits." ***Leon***, 468 U.S. at 919 n. 20. Therefore, the officers in this case were presumed to know that a no-knock warrant required sufficient *particularized* information to support reasonable suspicion reasonable that "knocking and announcing their presence under the particular circumstances would dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997).

The state relies on the fact that Mr. Spencer had a felony record, and that he was attempting to sell a firearm as the basis for its contention that the police had sufficient reason to request the no-knock warrant. (State' Br. at 23). Specifically, the state asserts this information was sufficient to believe that the firearms may be used against the police. (State's Br. at 23). However, the affidavit contained no particularized information as required by ***Eason***. ***Id.***, 245 Wis. 2d 206, ¶ 26. The affidavit contained no information that Mr. Spencer was dangerous, that he had threatened violence, or that he had other dangerous individuals in the home. Moreover, his convictions were dated, with the most recent being a felon in possession of a firearm offense from a decade prior charging of the case at issue. (45:31).

Permitting a no-knock because there is information that a firearm is being sold, or based on an officer's training or experience, or a dated, non-violent criminal record, runs afoul of the prohibition of permitting warrants based on blanket rules. ***Eason***, 245 Wis. 2d 206, ¶26. Accordingly, there was insufficient particularized information to authorize a no-knock warrant.

And, because the officers are presumed to know that a no-knock warrant requires sufficient *particularized* information to support reasonable suspicion that "knocking and announcing their presence under the particular circumstances would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence" ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997), their reliance on a warrant so lacking in the necessary details of particularized information cannot be said to be in good faith.

This Court should reject a blanket rule that the mention of a firearm, without particularized information to show a propensity to violence or other particularized information to demonstrate the need for a no-knock under ***Richards***. This matter should be remanded and the state put to their burden to show good faith applied. Should the circuit court determine the good-faith exception does not apply, then the matter must be reviewed for the ineffective assistance of counsel for failure to file the suppression motion.

IV. Officer DeWitt's Previous Discipline is Material Because it Demonstrates a Willingness to Fabricate Facts to Fit His Narrative or to Cover Up for Other Officers.

The state failed to disclose to the defense that Officer Jason DeWitt, one of the officers that observed a bag being tossed over the fence, had been previously disciplined for intentional untruthfulness within his capacity as a police officer. (45:34-36). Specifically, Officer J. DeWitt lied about his observations in covering up for another office. (App.34-36). Evidence that one of the officers involved in the execution of the warrant had been untruthful in relation to covering up for another officer is favorable to Mr. Spencer as it undoubtedly impeaches that officer's credibility, and potentially raises doubt as to the credibility of the other officers and propensity to cover up for one another or bend the facts to fit their narrative.

The state contends that impeaching Officer DeWitt on his history for being untruthful on the job would have no conceivable impact on his credibility in this case. (State's Br. at 2). This argument is puzzling considering the state's contention that had defense witnesses been called, their testimony corroborating Mr. Spencer's version of events would have had no impact; thereby putting the officer's testimony on a pedestal. Therefore, it stands to reason that any attack on an officer's credibility is highly relevant and in fact, may persuade the jury to conclude that the defense version is more truthful.

CONCLUSION

For all of the reasons set forth above and in his Brief in Chief, Mr. Spencer respectfully requests that this Court reverse the decision of the circuit court and 1) vacate the judgment of conviction due to lack of sufficiency; 2) order a new trial due to the ineffective assistance of counsel; 3) remand for a suppression hearing; or 4) order a new trial due to the *Brady* violation.

Dated this 7th day of November, 2018.

Respectfully submitted,

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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 2,580 words.

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 7th day of November, 2018.

Signed:

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