

RECEIVED

01-30-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2017AP2162-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROYCE O. BERNARD,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief,
Entered in the Milwaukee County Circuit Court,
the Honorable Michael J. Hanrahan Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

Nicole M. Masnica
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF FACTS.....	1
ARGUMENT	12
I. The circuit court erred in denying Mr. Bernard’s ineffective assistance of counsel claim, as the decision denying the motion made specific credibility determinations without the court first holding an evidentiary hearing on the matter.....	12
A. Legal standard.	12
B. The question of Officer Romeo’s credibility and the denial of an evidentiary hearing	14
CONCLUSION	18
CERTIFICATION AS TO FORM/LENGTH.....	19
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)	19
CERTIFICATION AS TO APPENDIX	20
APPENDIX	100

CASES CITED

<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	13
<i>Honeycrest Farms, Inc. v. A.O. Smith Corp.</i> , 169 Wis. 2d 596, 486 N.W.2d 539 (Ct. App. 1992).....	14
<i>In re the Commitment of Franklin</i> , 2004 WI 38, 270 Wis. 2d 271, 677 N.W.2d 276.....	14
<i>State v. Bentley</i> , 201 Wis. 2d 303, 548 N.W.2d 50 (1996)	14
<i>State v. Love</i> , 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62.....	14, 17
<i>State v. Smith</i> , 207 Wis. 2d 258, 558 N.W.2d 379 (1997)	13, 14
<i>State v. Wesley</i> , 2009 WI App 118, 321 Wis. 2d, 772 N.W.2d 232.....	13
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	13
<i>Terry v. Ohio</i> , 329 U.S. 1 (1969)	13, 18
<i>Wong Sun v. U.S.</i> , 371 U.S. 471 (1963)	13

**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

United States Constitution

U.S. CONST. amend IV 17, 18

Wisconsin Statutes

§ 941.23(2) 2

§ 948.60(2)(a) 2, 6, 7

§ 968.24 13

ISSUE PRESENTED

Did the circuit court err by denying, without an evidentiary hearing, the portion of Mr. Bernard's postconviction motion alleging ineffective assistance of counsel for trial counsel's failure to challenge the officer's credibility at the pretrial suppression hearing?

The circuit court concluded that the evidence presented in the postconviction motion, which contradicted the officer's testimony would have been insufficient for the court to question the officer's credibility and testimony, and therefore, the court denied the motion on its face and declined to hold an evidentiary hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Bernard welcomes oral argument if the court would find it helpful to deciding the issue. Publication is not necessary, as the issue involves the application of well-settled caselaw.

STATEMENT OF FACTS

Stop and Arrest of Mr. Bernard

On May 1, 2016, shortly after 2:00 a.m., Mr. Bernard was walking with two friends on North 13th Street in the City of Milwaukee. A police squad quickly turned down N. 13th Street, traveling south toward Mr. Bernard. (19:2-4). Police Officers Brian Wunder and Nicolas J. Romeo exited the squad and approached Mr. Bernard and the two other young men. (19:2-4). Officer Romeo questioned Mr. Bernard about

where he was coming from and per the officer's report, Mr. Bernard responded that he was coming from home, but didn't know the exact address as he had recently moved (the police report also notes that Mr. Bernard's address is 1008 West Hadley Street, approximately four blocks from the location he was stopped). (19:2-4).

Officer Romeo inquired whether Mr. Bernard had a weapon, which he denied. (19:3). The officer then conducted a pat down of Mr. Bernard, finding a rifle tucked into Mr. Bernard's pant leg. (19:3-4).

Criminal Charges

As a result of the possession of the rifle, Mr. Bernard was charged with two crimes, Count one: carrying a concealed weapon, contrary to Wis. Stat. § 941.23(2), and Count two, possession of a dangerous weapon by a person under 18 years old, contrary to Wis. Stat. § 948.60(2)(a). (1).

Motion to Suppress

On June 21, 2016, trial counsel filed a motion to suppress the gun evidence, alleging the police stopped Mr. Bernard illegally. (3). The motion alleged the following:

1. Officers Wunder and Romeo did not have reasonable suspicion that Mr. Bernard had committed, was committing or was about to commit a crime at the time the contact was made. (3).
2. That it was unreasonable to stop three young men walking down the street simply because the officers allegedly received a dispatch that a suspicious vehicle was recovered nearby. (3).

An evidentiary hearing was held and the State called a single witness, Officer Nicolas Romeo. Officer Romeo's testimony largely tracked his police report, but additional details were elicited at the hearing. (38). Officer Romeo told the court that he and the other officer assigned to his squad were at "18th and Burleigh" when they received the call over dispatch regarding a possible stolen vehicle recovered in the area of the 1300 block of West Locust and that as they were "traveling eastbound on Burleigh..., [he saw] what appeared to be three juveniles walking in the middle of the 3000 block of North 13th Street northbound towards Burleigh." (38:5). He testified that the individuals appeared to be "over the age of ten," and that he thought they were around fifteen years old¹

¹ Per the police department firearm report, Mr. Bernard was listed at 6'0" and 160 pounds at the time of this arrest. (19:12). Mr. Bernard was also less than two months from his eighteenth birthday (DOB: 7/24/1998). Further, while the written police reports do not specifically discuss the names or ages of the other two individuals stopped with Mr. Bernard, one is visible on the body camera video of Officer Sergio Rentas, who is not mentioned during the hearing but is on scene along with several other unnamed officers. The body camera does not show the stop and arrest, but captures the scene following Mr. Bernard's placement in the police squad. (Exhibit I: Body Camera Video).

The video shows one of the other two young men, who tells the officer his birthday is 7/10/1998, making him legally an adult for purposes of the City of Milwaukee juvenile curfew. This young man clearly appears older than fifteen. The third individual is not seen on the body camera video, but his name and date of birth appear in the CAD report. He was identified as Christopher D. Reed, DOB: 5/12/1999, thus was almost 17 years old at the time of the stop. (Ex. I).

(continued)

when he decided to perform the stop. (38:8). The officer made it clear, however, that the reason he stopped Mr. Bernard was because he believed the men to be involved in the call he received from Officer Randolph Bruso about a “possible stolen vehicle.”²

During cross-examination, Officer Romeo provided additional details about the stop. He stated that he “was following traffic rules” when he came upon the young men. (38:14). However, North 13th Street is a one-way street that allows only for northbound travel. (19:13). Thus, as the squad was headed southbound on that road,³ it could not have been complying with legal traffic rules as asserted by Officer Romeo. (19:14-15). The officer also claimed that approximately ten seconds passed after he received the dispatch and then came upon the three young men, and that he traveled from 18th and Burleigh to 13th and Burleigh in that time frame. (38:15).

This additional information was not raised by trial counsel during the motion hearing or in his written motion in an effort to challenge the credibility of the officer.

² STATE: And just to be clear, you did believe that this might be related [to the possible stolen vehicle], and that’s why this whole stop occurred to begin with?

OFFICER ROMEO: Yes, sir.

(38:12).

³ This is confirmed by the body camera video included with the postconviction motion exhibits, as it shows the squad car parked facing south. (Ex. I).

At the hearing, trial counsel's questioning focused primarily upon the details Officer Romeo had about the "possible stolen vehicle" from dispatch and the reasons Mr. Bernard and his two friends were identified as potential suspects. During oral argument on the motion, trial counsel argued that there was not enough information from the dispatch call "to provide reasonable suspicion to stop...Mr. Bernard in this case." (38:26).

At the conclusion of oral argument, the court denied Mr. Bernard's motion to suppress, concluding:

[U]nder the totality of the circumstances, which is what the law requires us to apply, believe that the officer had, and I find that the officer had, reasonable suspicion that these individuals had committed a crime, that being taking part in a stolen vehicle."

(38:27).

In support of the denial, the court pointed to four specific facts. First, the court opined that it was important that Mr. Bernard was traveling in a direction away from and nearby the place where the alleged stolen vehicle had been abandoned. (38:28). Second, the trial court concluded that the fact that the vehicle was still running indicated that it was likely the vehicle had recently been abandoned by the thief, as it had not run out of gas and there was no information that somebody had called the vehicle in. (38:28). Third, the court considered the officer's testimony that this all occurred around 2:15 a.m. and there was nobody else on the street as a basis to support reasonable suspicion to stop Mr. Bernard. Finally, the court stated it was "marginally" significant that the young men were alleged by Officer Romeo to have been walking down the middle of the street, as they were violating the "rules of our community" by not walking on the sidewalk.

(38:29). The court concluded that these four factors supported the officer's position that there was reasonable suspicion to stop Mr. Bernard and his friends because of the possibility that they were involved in abandoning the nearby vehicle. After the oral ruling, Attorney Hagner requested a plea and sentencing hearing.

Plea and Sentencing

On August 18, 2016, Mr. Bernard entered guilty pleas to both counts in the criminal complaint. On that same day, the Honorable Michael J. Hanrahan imposed a sentence of six months in the Milwaukee House of Correction on count one and imposed and stayed an additional six months of jail time on count two, placing Mr. Bernard on twelve months of probationary supervision, consecutive to the jail time in count one. (9). On August 23, 2016, a Notice of Intent to Seek Postconviction Relief was filed on behalf of Mr. Bernard by trial counsel and undersigned counsel was later appointed to handle the appeal. (8)

Postconviction Proceedings

Following the appointment of counsel on appeal, Mr. Bernard filed a motion seeking a stay of his probation supervision ordered on Count 2. The motion alleged that Mr. Bernard's conduct was not illegal under Wis. Stat. § 948.60(2)(a) and therefore, his conviction and resulting probation term was illegal. On June 6, 2017, the trial court heard Mr. Bernard's motion requesting that his probation term and any potential stayed sentence be stayed pending appeal. The trial court granted that motion and signed the Order Granting Stay of Probation and Sentence Pending Appeal on June 12, 2017. (17).

On June 19, 2017, Mr. Bernard filed his postconviction motion, which alleged that trial counsel was ineffective in its challenge of the stop in the instant case, and also that Mr. Bernard conviction on Count 2 was without a factual basis because his conduct was not prohibited by Wis. Stat. § 948.60(2)(a). (18).

In his motion, Mr. Bernard argued that trial counsel was ineffective during the cross-examination of Officer Romeo, as several of the officer's statements were incorrect or easily refutable.

First, Mr. Bernard's motion alleged that Officer Romeo's account of how the young men looked at the time of the stop was inaccurate. During his testimony, Officer Romeo told the court that the individuals he stopped appeared to be juveniles and between the ages of ten and sixteen. (38:8). Per the police department firearm report, however, Mr. Bernard was listed at 6'0" and 160 pounds at the time of this arrest. (19:12). Mr. Bernard was also seventeen years old and less than two months from his eighteenth birthday at the time of the arrest (DOB: 7/24/1998). Further, while the written police reports do not specifically discuss the names or ages of the other two individuals stopped with Mr. Bernard, one is visible on the body camera video of Officer Sergio Rentas, who is not mentioned during the hearing but is on scene along with several other unnamed officers. The body camera does not show the stop and arrest, but captures the scene following Mr. Bernard's placement in the police squad. (Exhibit I: Body Camera Video).

The video shows one of the other two young men, who tells the officer his birthday is 7/10/1998, making him legally an adult for purposes of the City of Milwaukee juvenile curfew. This young man clearly appears older than fifteen.

The third individual is not seen on the body camera video, but his name and date of birth appear in the CAD report. He was identified as Christopher D. Reed, DOB: 5/12/1999, thus was almost 17 years old at the time of the stop. (Ex. I). This additional information was not raised by trial counsel during the motion hearing or in his written motion in an effort to challenge the credibility of the officer.

Next, Officer Romeo testified that he was located at “18th and Burleigh” when the squad received a call over dispatch regarding a possible stolen vehicle recovered in the area of the 1300 block of West Locust and that as they were headed eastbound on Burleigh toward the location of the stolen car when they arrived upon Mr. Bernard and his friends on 13th Street walking northbound towards Burleigh. (38:5). He reported that this drive took only about ten seconds and that added that he “was following traffic rules” when he made contact with Mr. Bernard. (38:14). Mr. Bernard argued in the postconviction motion that Officer Romeo’s account about where he was during the call and how he discovered Mr. Bernard was impossible.

Officer Romeo’s testimony was problematic because it is not possible to drive from 18th and Burleigh to 13th and Burleigh simply by heading east. (38:14). Union Cemetery is set between 19th and 16th Street and there is no connecting road at Burleigh Street. Additionally, had the officers been near where Officer Romeo reported at the time of the call, the squad would have had to drive southeast on W. Hopkins Street, east on W. Chambers Street, then North of N. Teutonia Avenue (heading away from the 1300 block of W. Locust Street – the location of the alleged stolen vehicle) and finally continuing east on W. Burleigh Street for approximately three blocks. (19:14-16). This drive, according to a Google Maps search, would have taken approximately three minutes, far

longer than Officer Romeo's reported ten second trip. (19:14-16). Moreover, North 13th Street is a one-way street that allows only for northbound travel. (19:13). Thus, as the squad was headed southbound on that road,⁴ it could not have been complying with legal traffic rules as asserted by Officer Romeo. (19:14-15). Mr. Bernard argued in his postconviction motion that trial counsel was ineffective for failing to cross examine the officer on these points.

Further, Mr. Bernard alleged that trial counsel was ineffective for failing to challenge the accuracy of Officer Romeo's report that he had received a dispatch call about a stolen vehicle. Officer Romeo wrote in his report and testified that Officer Randolph Bruso had called in a possible stolen vehicle recovered near the 1300 block of W. Locust Street and this spurred the stop of Mr. Bernard. (19:1-4; 38:5). The CAD report of Officer Bruso, however, reflects that the initial call was not for a stolen vehicle. (24:4).

Officer Bruso's CAD report shows that his call was initiated at 1:59:10 a.m. Officer Bruso's report to dispatch is noted as a "Traffic Hazard" at the location of 1200 W. Locust Street, not as an abandoned stolen vehicle. (24:4). The next entry is at 02:02:03, noting that at that time, Squad 5426 (Officer Romeo's squad) was dispatched as an official BACKER to that investigation. (24:4). The next entry is at 02:03:12 in which Squad 5481 is also assigned as a back-up squad to the traffic hazard call. (24:4). At 02:03:45, there is a dispatch from Officer Romeo's squad that noting a recovered stolen automobile, that they had an individual in custody and that a gun had been recovered. (24:4).

⁴ This is confirmed by the body camera video included with the postconviction motion exhibits, as it shows the squad car parked facing south. (Ex. I).

Officer Bruso also submitted a report outlining his involvement in the incident. (19:18). He writes that he was called to the scene as the “Crime Scene Technician” at 2:17 a.m., ten minutes after Mr. Bernard had already been searched and arrested. He notes, “Upon my arrival, sqd-5436 (PO Nicholas (sic) ROMEO and PO Brian WUNDER) advised me of the circumstances regarding this incident. At 2:33 AM, I took 8 digital photographs of this incident.” (19:18). Officer Bruso’s report makes no mention of a dispatch he allegedly made regarding a stolen car or that the two incidents were at all related. Trial counsel did not address this topic during the cross-examination of Officer Romeo or attempt to call Officer Bruso as a witness. For that reason, Mr. Bernard alleged in his postconviction motion, trial counsel was ineffective.

Following receipt of the postconviction motion, the circuit court ordered briefing. (21).

On October 9, 2017, the circuit court issued an order on the postconviction motion. (29). The court granted Mr. Bernard’s motion in part and vacated his conviction and sentence on Count 2 and to dismissed the possession of dangerous weapon by child charge. On his motion alleging ineffective assistance of counsel in the litigation of the suppression motion, the court both declined to order an evidentiary hearing and denied the motion for plea withdrawal on the remaining count.

In its written decision and order, the circuit court held:

In essence, the defendant suggests that Officer Romeo was purposely lying on the stand. The court rejects outright any claim that Officer Romeo knowingly testified untruthfully about his location.

(29:4). The court also held that the officer's location at the time of the call "is not a fact that the court would expect an officer to have a strong recollection about because his exact location at the time the radio call came in" was not relevant to the arrest. (29: 4). The court then went to surmise what the officer must have meant by his testimony⁵, concluding, "had trial counsel pursued this avenue, it would not have affected the court's assessment of the officer's credibility." (29:4).

Regarding the representations of the officer regarding his perception of Mr. Bernard's age, the court wrote that the "body camera recording shows that all three individuals⁶ were young-looking males." (29: 5). The court concluded that the "officer's assessment was that the defendant was a juvenile, and he was correct⁷." (29:5).

Finally, when assessing the inconsistencies in the incident and CAD reports of Officer Romeo and Officer Bruso, the court addressed only the issue of timing – that

⁵ The court stated: "It is entirely conceivable to the court that the officer either did not recall that he had turned onto a one-way street or that he did not notice that it was a one-way street because his attention was focused on the three individuals who were walking down the middle of it at 2 a.m." (29:4-5).

⁶ As outlined in Mr. Bernard's postconviction motion, the body camera recording shows only one of the men, who was seventeen at the time of the stop and not a juvenile. Neither of the other two men were in the video, as they were already placed in squad cars. The dialogue between the officers in the video confirms this. (Ex. I).

⁷ Mr. Bernard, as pointed out in the postconviction motion, was not a juvenile, as he was seventeen at the time of the incident. Mr. Bernard was immediately charged in criminal court as an adult for the conduct.

Officer Romeo's account of the incident and his role in the arrest corresponded with the time Officer Brusco called in a "*traffic hazard*" in the area of the 1200 block of Locust Street. (29:6). The court noted that it is "quite remarkable that all of this activity [testified to by Officer Romeo] could take place within four minutes and 35 seconds," and that it supports Officer Romeo's account that he was very close to the location of the three men when the call came though. (29:7).

The court ultimately concluded that counsel was not ineffective for failing to present these three arguments during the motion hearing "because none of them would have been sufficient to call Officer Romeo's credibility into question." (29:7). On that basis, the court denied Mr. Bernard's postconviction motion on Count 1. (29:7)

Mr. Bernard now appeals.

ARGUMENT

I. The circuit court erred in denying Mr. Bernard's ineffective assistance of counsel claim, as the decision denying the motion made specific credibility determinations without the court first holding an evidentiary hearing on the matter.

A. Legal standard.

In his postconviction motion, Mr. Bernard argued that trial counsel was ineffective for inadequately pursuing the motion to suppress due to an illegal stop by failing to properly cross-examine and impeach Officer Romeo at the evidentiary hearing on the motion.

When a claim of ineffective assistance of counsel is intertwined with a request for plea withdrawal, a defendant

must make a *prima facie* case of ineffective assistance of counsel. *State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d, 151, 772 N.W.2d 232. When determining whether counsel was ineffective for failing to properly advise a client of a plea bargain, the two-part test set forth in *Strickland v. Washington* is applied. *Strickland*, 466 U.S. 668, 687 (1984). The *Strickland* test requires that a defendant show: (1) counsel's performance was deficient; and (2) counsel's errors or omissions prejudiced the defendant. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

In order to satisfy the "prejudice" prong of the *Strickland* test, there must be 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." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694). In the context of a plea withdrawal case, a defendant is required to establish that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

At issue here is whether trial counsel was ineffective in litigating Mr. Bernard's motion to suppress evidence due to an illegal stop. (18). At the evidentiary hearing on the motion, the State was required to prove that there was a reasonable suspicion for Officer Romeo to believe that Mr. Bernard had committed, was committing or was about to commit a criminal act. See *Terry v. Ohio*, 329 U.S. 1 (1969) and Wis. Stat. § 968.24. If the State failed to meet this burden, the law requires that all evidence obtained as a result of the illegal stop would have been excluded from use at trial under the "fruit of the poisonous tree" doctrine. See *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

When assessing this type of claim, the Wisconsin Supreme Court has made it clear that credibility determinations are to be resolved by live testimony when a postconviction pleading alleges sufficient facts that, if true, would entitle the defendant to relief. *State v. Love*, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62, citing *Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 604, 486 N.W.2d 539 (Ct. App. 1992). If the court declines to order a hearing based on the conclusion that the record “demonstrates that the defendant is not entitled to relief,” as the circuit court did here, the court of appeals must review the lower court’s decision under the erroneous exercise of discretion standard. *Love*, 2005 WI 116, ¶ 16 (citing *In re the Commitment of Franklin*, 2004 WI 38, ¶ 6, 270 Wis. 2d 271, 677 N.W.2d 276 and *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996)).

B. The question of Officer Romeo’s credibility and the denial of an evidentiary hearing.

In his postconviction motion, Mr. Bernard argued that trial counsel was deficient because he failed to adequately litigate the suppression motion at the pre-trial evidentiary hearing. The motion asserted that, had trial counsel been properly prepared for the hearing and focused on the appropriate areas of cross-examination, he would have successfully challenged Officer Romeo’s account and justification for the stop, resulting in suppression of the rifle. (18:11-16).

As argued in his postconviction motion, Mr. Bernard asserted that Officer Romeo’s testimony was inaccurate or contradicted by available facts in five significant areas:

1. Officer Romeo wrote in his contemporaneous written report and also testified that he was at 18th

and Burleigh and traveled east to 13th and Burleigh when he came upon the three men. (19:1-4; 38:5). This route of travel is impossible, as there is a large cemetery between 18th and Burleigh and 13th and Burleigh, and driving this route would have taken the officer away from the 1200 block of Locust Street, the location of the alleged stolen vehicle. (19:14-15).

2. Officer Romeo testified that he came upon Mr. Bernard within ten seconds of Officer Bruso's call. (38:15). Had he travelled the route he claimed, this would have taken approximately three minutes, much longer than the ten seconds alleged by the officer. (19:14-16).
3. Officer Romeo's gave unsolicited testimony that he was "following traffic rules" when he made contact with Mr. Bernard. (38:14). This is, however, incorrect as he would have driven the wrong way on a one-way street to take the route he claimed. (19:13-15).
4. Officer Romeo both wrote in his contemporaneous report and testified that he believed Mr. Bernard and his friends to be juveniles at first sight. At the hearing, he reported that he believed they were somewhere in the range of ten and sixteen years old. (38:5, 8). Mr. Bernard, however, was 17 years old and legally adult for both criminal charging and curfew purpose and stood at 6' tall and 160 pounds. (19:12). A body camera video showed one of the other young men, who provided his birthday to an officer on camera, 7/10/1998. He too was legally an adult. The third individual's name and date of

birth appear Officer Romeo's CAD report. He was identified as Christopher D. Reed, DOB: 5/12/1999, almost 17 at the time of the stop. (19:17).

5. Finally, Officer Romeo both wrote in his contemporaneous report and testified that he received a call over dispatch from Officer Bruso that he had recovered a stolen vehicle that was still running and that this spurred his investigation and stop of Mr. Bernard. Officer Bruso's CAD report states that he called in a "traffic hazard" and not a "stolen vehicle." (24:4). Further, Officer Bruso was ultimately assigned as a backup officer to the arrest of Mr. Bernard. He wrote an incident report regarding that arrest and makes no mention in his report that the stop and arrest was related to the initial call that he made. (19:18).

The circuit court denied Mr. Bernard's motion on the issue without a hearing, explaining away the inaccuracies in Officer Romeo's testimony regarding the officer's location and perceptions on the night in question. The written decision, however, failed to address Mr. Bernard's final and most important argument – that Officer Romeo's testimony that he received a dispatch from Officer Bruso about a nearby stolen vehicle was contradicted by the CAD and incident reports of Officer Bruso. Instead, the court ultimately concluded that "none [of the arguments presented in Mr. Bernard's postconviction motion] would have been sufficient to call Officer Romeo's credibility into question." (29:7).

The circuit court's conclusion regarding Officer Romeo's credibility was improper, as credibility determinations are to be made by a fact finder following

presentation at an evidentiary hearing. *See State v. Love*, 2005 WI 116, ¶ 16 (citation omitted). Here, the postconviction motion presented sufficient facts to warrant an evidentiary hearing in which trial counsel, Officer Romeo and Officer Bruso would be required to testify regarding the additional facts alleged in the motion.

Without an evidentiary hearing on the matter, we have no way to know what Officer Romeo would say in response to challenges to his story, nor do we know how he would physically behave on the stand when confronted. The circuit court opined that Officer Romeo would have likely have rehabilitated his testimony by claiming that his assertions were only approximations or by adjusting his testimony to better fit with the evidence. (29). The fact of the matter is, however, the court's assumptions are just that - guesses at what the officer would say had he been properly cross-examined. Without an evidentiary hearing on the issue, the court cannot make a contemporaneous credibility determination regarding Officer Romeo. *Id.*

Furthermore, the circuit court's written decision failed to address that Officer Romeo's testimony about the most important fact at issue - that he allegedly stopped Mr. Bernard because the officer suspected him of abandoning a stolen vehicle a few blocks away. (29). Officer Bruso's dispatch and CAD reports do not support that assertion and the reason for the stop is the crux of legality for the stop. (19:18; 24:4). If Officer Bruso simply reported a vehicle was blocking traffic on the 1200 block of Locust and not that the vehicle was stolen, which appears to be the case from the dispatch report, this undermines the entire reason for stopping the young men and turns what could be a legal stop into one that violated Mr. Bernard's rights under the Fourth Amendment.

An evidentiary hearing in this matter, in which both Officer Romeo and Officer Bruso would be required to testify about their conduct regarding the stop, was necessary in this case and justified by the facts alleged in Mr. Bernard's postconviction motion. Evidentiary hearings regarding questions of search and seizure are of particular importance because "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry v. Ohio*, 392 U.S. 1 (1968).

CONCLUSION

For the foregoing reasons, Mr. Bernard respectfully requests that this court reverse the judgment and order of the circuit court and remand this matter for an evidentiary hearing consistent with this court's opinion.

Dated this 29th day of January, 2018.

Respectfully submitted,

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,720 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 29th day of January, 2018.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 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 29th day of January, 2018.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

**I N D E X
T O
A P P E N D I X**

	Page
Order Denying Motion for Postconviction Relief, Dated October 5, 2017.....	101-107