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STATE OF WISCONSIN
COURT OF APPEALS

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DISTRICT I

Appeal Case No. 2017AP002162-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROYCE O. BERNARD,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING POSTCONVICTION
RELIEF, ENTERED IN MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE
MICHAEL J. HANRAHAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did Bernard's trial counsel ineffectively cross-examine a testifying officer during a suppression motion hearing by failing to elicit questions which would have allegedly called into question the officer's credibility, resulting in the trial court improperly denying the motion?

The trial court answered, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Stop, Search, and Arrest of Bernard

On May 1, 2016, just after 2:00 A.M., Milwaukee Police Officers Nicolas Romeo and Brian Wunder were on patrol near the 1800th block of Burleigh Street, in the city of Milwaukee, and heard another police officer Randolph Brusco broadcast a possible stolen vehicle at the 1300th block of West Locust Street. (R19:3-4). The radio call was unrelated to the current assignment of Officers Romeo and Wunder. (R37:5). Officers Romeo and Wunder then travelled along West Burleigh Street and observed Royce Bernard and two other juveniles walking down the middle of North 13th Street, northbound towards Burleigh Street. (R37:5).

Believing that the juveniles were within three blocks of the possible stolen vehicle, walking away from the location of the stolen vehicle, and that they were the only people in the area at 2:00 A.M., Officer Romeo decided to make contact with them. (R37:5-8). He later testified in an evidentiary hearing that at the time he believed them to be about fifteen years old. (R37:8).

As Officer Romeo made initial contact with Bernard, one of the three juveniles, he asked Bernard whether he had a firearm. (R37:9). Bernard “took two steps back with his hands in his hooded sweatshirt pocket,” and refused to remove his hands from his pockets. (R37:9). At that time, Officer Romeo pulled Bernard’s hands out of his pockets and patted him down for weapons, finding a loaded Marlin .22 caliber rifle in his

waistband. (R19:4). Bernard was handcuffed and said, “Man I literally just bought that thing.” (R19:3-4).

Bernard was subsequently charged with two crimes: one count of carrying a concealed weapon, contrary to Wisconsin Statute § 941.23(2), and one count of possession of a dangerous weapon by a person under 18 years old, contrary to Wisconsin Statute § 948.60(2)(a). (R1).

Motion to Suppress

On June 21, 2016, Bernard’s defense counsel, Brian Hagner, filed a motion to suppress derivative evidence, based on an alleged unconstitutional stop of Bernard. (R3:1). The motion alleged that because there was no immediate connection between the possible stolen car and Bernard when he was stopped, “reasonable suspicion did not exist when officers stopped [Bernard].” (R3:2).

Motion Hearing

On August 2, 2016, an evidentiary hearing was held to determine whether officers had reasonable suspicion to stop Bernard. (R37). The hearing consisted of one witness, Officer Romeo. (R37). During cross-examination, Officer Romeo testified that there was no identification of any suspect of the possible stolen car, which was believed to be still running and about three blocks away from Bernard at the time he was stopped. (R37:13). Officer Romeo testified that when he stopped Bernard, he could not see the stolen car from his vantage point. (R37:14). He also said Bernard and the other two juveniles did not appear to be running away from anything at the time, and that none of the juveniles ran or resisted Officer Romeo when they were stopped. (R37:14).

Officer Romeo also testified that after hearing the radio broadcast about the possible stolen vehicle, he observed Bernard and the other two juveniles within about ten seconds. (R37:16-17). After seeing Bernard, Officer Romeo said it took “probably another ten seconds” to park his squad vehicle and begin his field investigation. (R37:17). He also said he was “following traffic rules in the middle of the street in [his] squad, and they were walking in the middle of the street” at the

time he stopped Bernard. (R37:14). Officer Romeo did not testify that he believed he was driving the wrong way on a one-way road at the time he stopped Bernard, nor was the issue raised during argument. (R37:14; 21-23).

On direct examination, the prosecutor asked Officer Romeo whether he believed the juveniles were “over the age of ten.” (R37:8). Officer Romeo responded affirmatively, and clarified that he believed they were all “around fifteen” at the time. (R37:8). Officer Romeo also clarified that by using the term “juvenile,” he meant that term to mean a person under the age of eighteen. (R37:8). Upon questioning by the circuit court, Officer Romeo testified again that he believed all of the juveniles to be “approximately fifteen years old,” and that due to their age they would be committing a curfew violation by walking down the street at that hour. (R37:17-18).

Upon the close of evidence, defense counsel centered his argument on the factors which pertained to reasonable suspicion to stop Bernard. (R37:22). Defense counsel argued that Bernard’s close proximity to the stolen car was not enough to effectuate a stop. (R37:22). He also argued that since the stolen car was not visible to Officer Romeo at the time he stopped Bernard, and that Bernard was not running away at the time, there were no factors justifying suspicion that Bernard had been involved with a stolen vehicle, was committing a crime, or had committed a crime. (R37:23).

The prosecutor argued that the following facts supported reasonable suspicion to stop Bernard: (1) the stolen car was still running at the time; (2) whoever had stolen the car would have fled on foot; (3) Bernard and the other individuals appeared to be walking away from the location of the stolen vehicle; and (4) the juveniles would have been in violation of a city curfew ordinance. (R37:24).

The circuit court found reasonable suspicion existed to stop Bernard. (R37:27). The circuit court cited the following factors as a basis for this finding: (1) Bernard was walking away from the location of the stolen vehicle at the time he was stopped; (2) the engine of the stolen vehicle was left running; (3) it would be reasonable for Officer Romeo to believe only a short amount of time had elapsed since the person driving the

vehicle had left it running; (4) there were no other people observed in the area at the time; (5) the incident occurred at about 2:15 A.M.; (6) Bernard was walking down the middle of a street indicating he was not “following [] the rules of the community;” and (7) the stop occurred only three blocks from the possible stolen vehicle. (R37:28-29).

Conviction and Sentencing

After the denial of Bernard’s motion to suppress, defense counsel requested a plea and sentencing date. (R37:30). On August 18, 2016, Bernard pled guilty to carrying a concealed weapon and possession of a dangerous weapon by an individual under the age of eighteen. (R38:9). The circuit court sentenced Bernard to six months in the Milwaukee House of Correction for the charge of carrying a concealed weapon, and a probationary sentence for the charge of possession of a firearm by an individual under the age of eighteen. (R38:24-25).

Postconviction Proceedings

On June 19, 2016, Bernard filed a postconviction motion alleging that Bernard’s defense attorney failed to properly litigate the credibility of Officer Romeo during the evidentiary hearing. (R18). Bernard contended that had certain discrepancies been litigated by defense counsel, the circuit court would not have found Officer Romeo to be a credible witness, and would have granted Bernard’s motion to suppress. (R18:11). Specifically, Bernard contended that the following five discrepancies cast doubt upon Officer Romeo’s credibility:

1. 18th Street and Burleigh Street is not an intersection.

First, Bernard argued that the route Officer Romeo took in finding Bernard would be impossible. (R18:12). Bernard stated that there is no intersection of 18th and Burleigh, because there is a cemetery set between 19th Street and 16th Street on Burleigh Street. (R18:12). Therefore, Bernard contended that Officer Romeo could not have simply travelled along Burleigh Street before eventually spotting Bernard walking along 13th Street, since the route was impossible. (R18:12).

In response, the State responded that since Officer Romeo came into contact with Bernard within ten or so seconds of hearing the police broadcast, it was reasonable to believe that Officers Romeo and Wunder were simply in the near vicinity of Bernard before he was stopped. (R22:5-6). The State further argued that given the quick response time of Officers Romeo and Wunder, litigating Officer Romeo's exact location would have been inconsequential, and therefore did "not fall outside the range of professionally competent assistance" rendered by defense counsel. (R22:6).

The circuit court agreed with the State, finding that Officer Romeo had only testified to an "approximate" location when he received the police broadcast of the possible stolen vehicle. (R29:4). The circuit court also found that since Officer Romeo had arrived within ten or so seconds, this supported the intersection of 18th Street and Burleigh Street to be an approximation of where he was upon receiving Officer Brusio's broadcast, not an exact location. (R29:4).

2. Officer Romeo's finding of Bernard could not have been within ten seconds of hearing the police broadcast of a possible stolen vehicle.

Second, Bernard argued that the approximate location of Officer Romeo when he heard Officer Brusio's broadcast would require at least three minutes of travel time before arriving at the location of Bernard. (R18:13). This would be inconsistent with Officer Romeo's insistence that he arrived within ten seconds of hearing the police broadcast. (R18:13).

The circuit court did not find this argument compelling, stating:

Had trial counsel tried to pin the officer down as to his whereabouts at precisely 2 a.m., 2:01 a.m., 2:02 a.m., etc., the court would still have found that the officer was in the vicinity of the possible stolen vehicle, and that the CAD report for police call #161220348 supported [Officer Romeo]'s testimony.

(R29:6).

3. Officer Romeo was not following traffic rules when he stopped Bernard.

Third, Bernard contended that Officer Romeo would have had to drive the wrong way down a one-way street in order to make contact with Bernard on North 13th Street, and thus could not have been following traffic laws at the time he stopped Bernard. (R19:13). Bernard conceded that “this is a detail that may have not influenced the court’s decision directly.” (R19:13).

In response, the State contended Officer Romeo’s testimony did not clarify whether he ever travelled on North 13th Street, and therefore any allegation that he travelled along the street in violation of a traffic law would not be found in evidence. (R22:6).

The circuit court again found that Officer Romeo’s credibility was not at issue despite Bernard’s allegation. (R29:4-5). The court explained:

[H]ad trial counsel pursued this avenue, it would not have affected the court’s assessment of the officer’s credibility. 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

(R29:4-5).

4. The three juveniles stopped by Officer Romeo were not actually fifteen years old.

Fourth, Bernard contended that Officer Romeo “cannot be believed,” because none of the juveniles were, in fact, fifteen years old as he testified. (R19:14). Bernard cited that at the time of the stop, he was seventeen years old, and was 6’0” and 160 lbs. (R19:14). The second of the other juveniles has a birthday of 7/10/1998, making him seventeen years old, and was “visibly over the age of fifteen” according to the bodycam footage. (R19:14). The third individual was found to be sixteen years old according to a CAD report. (R19:14).

In response, the State contended that Officer Romeo's testimony was not implausible given their relatively close ages to Officer Romeo's estimation. (R22:7). The State also argued that the estimation of the juveniles' ages was not used by the circuit court in its finding of reasonable suspicion, and is therefore not at issue. (R22:7).

The circuit court found none of the age discrepancies weighed against Officer Romeo's credibility. (R29:5). The court cited that Officer Romeo made the age estimations at nighttime, and was in his squad as he initially encountered the juveniles. (R29:5). The court also found that even had defense counsel litigated the issue further during the motion hearing, it would have been inconsequential because "[t]he officer's assessment was that [Bernard] was a juvenile, and he was correct." (R29:5).

5. Whether there was a police broadcast regarding a possible stolen vehicle around three blocks from where Bernard was stopped.

Finally, Bernard contended that the CAD report pertaining to this incident does not include information about Officer Bruso's initial broadcast of a possible stolen vehicle. (R19:15). Bernard also argued that there was supporting information about an investigation as to whether Bernard was involved with the stolen vehicle, which undermines the testimony of Officer Romeo. (R19:15).

The circuit court again found that Officer Romeo's testimony was consistent with the evidence on the record. The court cited the fact that a CAD report for Officer Bruso's police call was generated showing the call occurred for a "traffic hazard" at 1:59 A.M. at 1200 West Locust Street and mentioned a Nissan Altima. (29:5). The circuit court found this to be consistent with Officer Romeo's testimony that he had heard Officer Bruso's call for a possible stolen vehicle "around 2 a.m." near the 1300th block of West Locust Street. (R29:5). The court further found that Officer Romeo's vehicle was assigned as a backup on Officer Bruso's police call, which supported Officer Romeo's testimony that he was relatively close to Officer Bruso's location at the time he stopped Bernard. (R29:5-6).

The circuit court ultimately found that none of these unlitigated discrepancies were sufficient to show ineffectiveness by defense counsel during the motion hearing, since “none of them would have been sufficient to call Officer Romeo’s credibility into question.” (R29:7). The circuit court found Officer Romeo’s testimony consistent with the CAD report moved into evidence, and that it was “quite remarkable that all of this activity could take place within four minutes and thirty-five seconds.” (R29:7). The circuit court denied Bernard’s request for a hearing on the postconviction claim, since they would not have changed the outcome of the evidentiary hearing. (R29:7).

Bernard’s postconviction motion also alleged that there was no factual basis supporting a conviction for the second count of possession of a firearm by an individual under eighteen years old. (R18). The State conceded that there was no factual basis for the charge. (R22:8). Accordingly, the circuit court vacated the sentence and judgment on the second count. (R29:7).

Bernard now appeals, alleging that had the five alleged discrepancies been litigated by Bernard’s defense counsel, the circuit court would not have found him to be a credible witness, and Bernard would not have pled guilty to the charges. (R19:17). In his motion, Bernard specifically contends that the five discrepancies justified an evidentiary hearing as to Officer Romeo’s credibility, and now appeals the circuit court’s discretionary decision in denying the motion without a hearing.

STANDARD OF REVIEW

In order to sustain an plea withdrawal for ineffective assistance of counsel, the U.S. Supreme Court held that the two-part *Strickland* test applies. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)). *Strickland* requires a defendant to show “first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant.” *Strickland*, 466 U.S. at 669, 104 S. Ct. at 2055. “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59, 106 S.Ct. at 370. *Strickland* further requires that "there [be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Further, under the *Strickland* standard, a "reasonable probability" was defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

A defendant is not automatically entitled to a hearing on a motion claiming ineffective assistance. *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 577, 682 N.W.2d 433, 438 (citing *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9, 15 (1999)). Whether a motion for ineffective assistance of counsel requires a subsequent evidentiary hearing is controlled by *State v. Bentley*:

If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing . . . [but], if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing

Bentley, 201 Wis. 2d 303, 310-311, 548 N.W.2d 50, 53 (1996) (citing *Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484, 493 (1992)).

In order to necessitate an evidentiary hearing, a motion must allege sufficient, material facts to meet the *Bentley* standard. *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 585, 682 N.W.2d 433, 441. The *Allen* court described sufficient material facts as including "the five 'w's' and one 'h,' that is, who, what, where, when, why, and how." *Id.* In other words, a motion must show how the alleged facts are relevant in a circuit court's assessment of the postconviction claim. *Id.*

In determining the sufficiency of a postconviction motion, the court may,

[d]eny a postconviction motion for a hearing if all the facts alleged in the motion, *assuming them to be true*, do not entitle the movant to relief; if one or more key factual

allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Allen, 2004 WI 106, ¶ 12, 274 Wis. 2d at 579, 682 N.W.2d at 438. (emphasis added)

The court of appeals reviews a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *State v. Love*, 2005 WI 116, ¶ 26, 284 Wis. 2d 111, 124, 700 N.W.2d 62, 68 (citing *In re the Commitment of Franklin*, 2004 WI 38, ¶ 6, 270 Wis. 2d 271, 677 N.W.2d 276, and *Bentley*, 201 Wis. 2d at 11, 548 N.W.2d at 53). "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *Id.* (citing *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis.2d 646, 656, 511 N.W.2d 879, 883 (1994)).

Appellate courts are not required to come to the same conclusions based on the facts at issue at the circuit court:

It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning."

Hartung v. Hartung, 102 Wis. 2d 58, 66, 305 N.W.2d 16, 20-21 (1981).

ARGUMENT

- I. The circuit court properly denied Bernard's motion for postconviction relief because Bernard's motion failed to allege sufficient facts demonstrating that, but for Bernard's defense counsel's alleged errors, the result of the proceeding would have been different.**

A trial court properly exercises its discretion in denying a post-conviction motion without a hearing when it has

examined “the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process.” *Bentley*, 201 Wis. 2d at 318, 548 N.W.2d at 57. The circuit court did that here, when it determined Bernard’s motion failed to allege sufficient, material facts to warrant a hearing. This Court must determine whether the circuit court properly decided whether Officer Romeo gave incorrect testimony that undermined his credibility, regarding the five separate discrepancies alleged by Bernard.

First, Bernard contended that Officer Romeo’s testimony that he traveled from “18th Street and Burleigh Street” before stopping Bernard belies his credibility, because the intersection could only exist in a cemetery. (Brief of Defendant-Appellant, p. 15). The circuit court found Officer Romeo’s testimony to be an approximation. (R29:4). The circuit court’s finding was consistent with Officer Romeo’s testimony, which estimated his location “approximately” when testifying on direct examination with the prosecutor. (R37:5). But, even though Officer Romeo only testified to an approximate location, the circuit court also took into account that he was driving his squad while he heard of the initial call of a possible stolen vehicle, and thus would not be expected to remember his *exact* location at the time he heard the call. (R29:4). The circuit court’s analysis demonstrates an application of the relevant facts of the case to the legal question before it.

Further, Bernard failed to demonstrate *why* Officer Romeo’s exact location as he began his investigation of Bernard is a material fact, as required by *Allen*. 2004 WI 106, ¶ 23, 274 Wis. 2d at 585, 682 N.W.2d at 441. Bernard made no suggestion of an alternate starting location, or a possible reason for Officer Romeo to falsify his original location before he stopped Bernard. Thus, while Bernard may be correct in asserting that “18th Street and Burleigh Street” is not an intersection, he fails to show how, or why, this discrepancy is relevant or material.

Second, this Court must consider whether Bernard’s contention that Officer Romeo’s route from the time he heard the call of a possible stolen vehicle to the time he stopped Bernard would have taken “approximately three minutes, much

longer than the ten seconds alleged by the officer” is a sufficient, *material* discrepancy warranting a hearing. (Brief of Defendant-Appellant, p. 15). Regarding this allegation, the circuit court compared the testimony of Officer Romeo to the circumstances of the case and the CAD report:

Had trial counsel tried to pin the officer down as to his whereabouts at precisely 2 a.m., 2:01 a.m., 2:02 a.m., etc., the court would still have found that the officer was in the vicinity of the possible stolen vehicle, and that the CAD report for police call #161220348 supported [Officer Romeo]’s testimony.

(R29:6).

The circuit court concluded that the alleged time difference is inconsequential since, in either case, Officer Romeo stopped Bernard very quickly after receiving the call of a possible stolen vehicle. Even assuming Bernard’s alleged discrepancy, the circuit court found that the time difference does nothing to impugn Officer Romeo’s testimony.

Further, Bernard again failed to show why a difference of “ten seconds” or “approximately three minutes” is a *material* difference sufficient to warrant a hearing. Alleging that this difference undermines Officer Romeo’s credibility is conclusory, and exactly the type of fact deemed *immaterial* in *Allen*. Had the allegation that the “three minutes” as calculated by Bernard hid additional relevant aspects of the investigation, then a hearing may have been warranted. Instead, Bernard simply asserted that Officer Romeo must have driven for three minutes instead of ten seconds, and concluded that this difference itself undermines his credibility. (Brief of Defendant-Appellant, pp. 15-17). The circuit court found that the difference was inconsequential and did not tend to undermine Officer Romeo’s credibility. (R29:7). No additional facts have been alleged suggesting the contrary.

Third, this Court must consider whether or not Officer Romeo was “following the traffic rules in the middle of the street in [his] squad” at the time he came into contact with Bernard bears on his credibility. The circuit court found that Officer Romeo testified only that he was following the traffic rules with respect to driving in the middle of the street, and thus

any other conclusions about Officer Romeo's testimony would be unsupported by the record. (R29:4).

The circuit court went further and again assumed Bernard's contention that Officer Romeo may have driven the wrong way on the street, stating:

It is entirely conceivable 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.

(R29:4-5). Thus, the circuit court's conclusion was that even assuming Officer Romeo unwittingly travelled the wrong way down a one-way street would not justify an inquisition into his credibility, since it would be a reasonable mistake to make. (R29:4-5). *State v. Allen* permits a trial court to dispose of a postconviction motion without a hearing if the court finds that the facts alleged, even if true, do not entitle the movant to relief. *Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d at 579, 682 N.W.2d at 438.

Again, Bernard failed to show how whether Officer Romeo was "following traffic rules" *mattered* regarding the credibility of his testimony. Bernard pointed to no nefarious conduct or any reason why this discrepancy would be material to the subsequent investigation of Bernard. Without such an explanation, Bernard failed to allege sufficient material facts that would warrant an evidentiary hearing under *Allen*. 2004 WI 106, ¶ 23, 274 Wis. 2d at 585, 682 N.W.2d at 441.

Fourth, Bernard alleged that Officer Romeo's belief that the three juveniles were "around fifteen" years old undermines his credibility. (R37:8). Bernard asserted that Officer Romeo "cannot be believed," because the three juveniles were, in fact, 16, 17, and 17 years old. (Brief of Defendant-Appellant, pp. 15-16). Again, the circuit court analyzed this discrepancy by reviewing the testimony of Officer Romeo, which did not reflect a belief that the juveniles were *exactly* fifteen years old, but that they were "around fifteen." (R29:5). The circuit court accordingly viewed this statement as an approximation. (R29:5). But the circuit court took additional facts from the record into account, citing that Officer Romeo made this

estimation at nighttime, while in a squad vehicle, not “standing face to face.” (R29:5). Ultimately, the circuit court found that the record did not support Bernard’s claim whatsoever: “[t]he officer’s assessment was that [Bernard] was a juvenile, and he was correct.” (R29:5).

Again, Bernard again fails to show *how* or *why* Officer Romeo’s estimation of the juveniles’ age—other than the conclusion that they were juveniles—is material. While Bernard may be correct in arguing that the juveniles were not *exactly* fifteen years old, there has been no showing that Officer Romeo’s credibility was at issue because his estimation was off by one or two years. Without explaining how or why Officer Romeo’s estimation is relevant to the reasons he was stopped, this discrepancy also is *immaterial* and insufficient to warrant an evidentiary hearing under *Allen*.

Finally, this Court must consider Bernard’s allegation that Officer Romeo fabricated the call of a possible stolen vehicle to facilitate his stop of Bernard. (Brief of Defendant-Appellant, pp. 16-18). Bernard asserts that the circuit court failed to address this allegation altogether. *Id.*

Contrary to Bernard’s assertion, the circuit court cited the fact that the CAD report for the incident was consistent with Officer Romeo’s account, stating “the [CAD] report supports Officer Romeo’s testimony that he had heard the call from Brusio around 2 a.m.” (R29:5). The circuit court further found that the CAD report was consistent with the entirety of Officer Romeo’s testimony: “The CAD also confirms that at 2:03:45 a.m., Officer Romeo’s squad reports that they had a person in custody and that a gun had been recovered . . . within four minutes and 35 seconds of Officer Brusio’s call” (R29:6) The circuit court then outlined fifteen undisputed steps Officer Romeo took in investigating Bernard after he heard Officer Brusio’s broadcast, saying it was “remarkable” that all of the steps could be completed in such short time. (R29:6-7). The circuit court explained that the short timeframe “would only be possible if Officer Romeo was in very close proximity to the arrest scene” when he heard the call from Officer Brusio about a possible stolen vehicle, and that this inference supported the CAD report containing Officer Brusio’s broadcast. (R29:5-7). It is only by ignoring the consistency

between Officer Romeo's testimony and Officer Brusio's broadcast in the CAD report which allows Bernard to allege that the two incidents are unrelated.

By taking into account all of the evidence of record before it, the circuit court found that Bernard had not raised any sufficient facts warranting a hearing. (R29:7). "Trial counsel was not ineffective for failing to present the above arguments because none of them would have been sufficient to call Officer Romeo's credibility into question." (R29:7). In essence, the circuit court found that no facts were alleged that would legitimately undermine Officer Romeo's credibility. This Court should do the same.

The State argues that given the above analysis, no other conclusion can be reached except that the circuit court applied the relevant facts and legal principles at issue, and conducted itself in a rational decision-making process as required by *State v. Love*. 2005 WI 116, ¶ 26, 284 Wis. 2d 111, 124, 700 N.W.2d 62, 68. None of inconsistencies alleged by Bernard were significant, much less material as required by *Allen*. At times, the circuit court even assumed Bernard's contentions, and found them all to be immaterial or inconsequential. At other times, the circuit court applied Bernard's contentions to the factual background of the case, and concluded that Officer Romeo's testimony was consistent with itself and the entirety of the record.

Thus, the circuit court's analysis was well within the confines of what a rational decision-maker could decide, since the entirety of its decision was based on the facts, circumstances, and legal principles which were before it. None of the discrepancies alleged by Bernard were significant, much less material to the investigation of Bernard, and none were sufficient to show ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court of Appeals to deny Bernard's appeal, and uphold the order and decision of the circuit court.

Dated this _____ day of March, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 5,048.

Date

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

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