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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

REPLY BRIEF 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

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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.

In its reply brief, the State addressed the arguments posed by Mr. Bernard on appeal largely under the rubric of *State v. Allen*, 2004 WI 106, 23, 274 Wis. 2d 568, 682 N.W.2d 433. (State's Brief, 10 -12, 14-16). Addressing each point individually, the State argued that Mr. Bernard's postconviction motion did not meet the threshold under *Allen* to justify the grant of a *Machner* hearing on the motion. These responses are largely pointed toward Mr. Bernard's original postconviction motion and request for a *Machner* hearing on the matter rather than addressing the question posed by Mr. Bernard on appeal – did the court make improper credibility determinations regarding the testimony of Officer Romeo without first holding a live evidentiary hearing.

Further, the State's response seems to presume that the circuit court denied Mr. Bernard's postconviction motion because his pleadings were in some way deficient. That is not the case. The circuit court denied Mr. Bernard's motion by concluding that even if there were problems with the testimony of Officer Romeo, trial counsel was not ineffective as a matter of law because there was no prejudice. (29:7). The circuit court wrote that it would have found Officer Romeo credible even if trial counsel had made all of the relevant inquiries outlined in the postconviction motion. (29:7). The

circuit court's decision and reasons behind this conclusion is largely the basis for Mr. Bernard's appeal.

Mr. Bernard argued in his opening brief that by ignoring and explaining away the repeated inconsistencies in Officer Romeo's testimony, the circuit court ran afoul with *State v. Love*, which requires that credibility determinations are to be resolved by live testimony. *See 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). This, Mr. Bernard argues, was an erroneous exercise of discretion.

By failing to specifically address Mr. Bernard's claim that the circuit court made improper credibility determinations in its decision, the State should be presumed to be in agreement with Mr. Bernard's argument. *See State v. Chu*, 2002 WI App 98, ¶ 41, 253 Wis. 2d 666, 643 N.W.2d 878, citing *Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Finally, regarding Mr. Bernard's argument that the circuit court failed to consider the most important challenge to the testimony of Officer Romeo – that the CAD report and police response summary report of Officer Randolph did not support Officer Romeo's assertion that that Officer Brusio called in a *possible abandoned stolen vehicle* – the State contends that the circuit court did in fact address this claim. (State's Brief, 15-16). In support of this position, the State simply points to the portion of the circuit court's decision that discussed the timing set forth by Officer Brusio's CAD report and how it was relatively consistent with the timing reported by Officer Romeo. (State's Brief, 15-16). The State concludes that “[i]t 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.” (State’s Brief, 15-16).

This conclusion by the State again fails to address the argument being made by Mr. Bernard. In his postconviction motion and opening brief, Mr. Bernard never contends that the actions of Officer Romeo and the call by Officer Brusio are not related, as the State appears to allege in its brief. The argument, which to this point has not been addressed by either the circuit court or the State, is that Officer Brusio reported a *vehicle blocking traffic* on the 1200 block of Locust to dispatch, not that he had come upon an *abandoned stolen vehicle*. This distinction is extremely important to this case and has great implications on the outcome of the motion hearing.

If Officer Brusio reported that there was a vehicle blocking traffic, as he wrote in his report and is documented in the dispatch records, and not that there was an abandoned stolen vehicle as Officer Romeo testified, this fact turns what could be a legal stop into one that violated Mr. Bernard’s rights under the Fourth Amendment. Both the circuit court’s decision and the State’s brief rely entirely on the presumption that the call from Officer Brusio was that he found an abandoned stolen vehicle and therefore, Officer Romeo had lawful authority to stop potential suspects in that crime. If there was never a report that a crime had potentially occurred, there was never reasonable suspicion to stop and search the three young men and the stop would have been contrary to law.

An evidentiary hearing, in which both Officer Romeo and Officer Brusio 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. As pointed out in Mr. Bernard's opening brief, an 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).

If Officer Brusio were to testify and confirm what his reports already set forth, that he told dispatch that he found a car blocking traffic on 13th and Locust, not an abandoned stolen car as Officer Romeo claims was stated, the outcome of this hearing would very likely have been different. Without a hearing to assess these issues, the court cannot properly determine whether there was reasonable suspicion to stop Mr. Bernard.

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 9th day of April, 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 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 1,044 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 9th day of April, 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