STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2017AP002185

STATE OF WISCONSIN,

Plaintiff-Respondent,

HARLAN L. SCHULTZ,

Defendant-Appellant.

BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR WAUPACA COUNTY
THE HONORABLE RAYMOND HUBER PRESIDING

JOHN MILLER CARROLL LAW OFFICE
Attorney for Defendant – Appellant

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ISSUES PRESENTED FOR REVIEW

Did the trial court err in denying the Defendants Motion to Withdraw pleas on the basis of ineffective assistance of prior counsel?

Trial Court: No

The Appellant answers: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give further guidance to the bench and bar in this state.

STATEMENT OF CASE

On Sunday October 27th, 2013 in the Town of Union in Waupaca County, Wisconsin, the Defendant was stopped for crossing left of center while making a right handed turn. Subsequently the Defendant was charged with two (2) counts in Waupaca County Case No. 2013-CT-206: Count 1) Operating while intoxicated (4th) Contrary to Wis. Stat. § 346.63(1)(a); Count 2) Operating with Prohibited Blood Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b). On December 08, 2015, a Plea and Sentencing Hearing was held at the Waupaca County Circuit Court. At said December Hearing, the Defendant entered No Contest pleas to Count 1. As to Count 1, the Court, accepting a proposed Plea and found the Defendant guilty.

After serving his jail sentence and paying costs associated with his conviction, on June 17th, 2016 the Defendant through counsel filed his motion to withdraw pleas based on two grounds: First, that trial counsel was ineffective and Second, that his pleas were constitutionally invalid as not given intelligibly. On October 20th, 2017 Judge Raymond Huber entered the Courts Order Denying the Defendants Motion to Withdraw Pleas. This Appeal follows.

STATEMENT OF THE FACTS:

On October 27, 2013, Waupaca County Sheriff's Deputy James Santiago was working with Deputy Chad Repinski, running stationary radar at the public access boat landing on bridge Road when he received a call from the Comm Center to respond to a citizen assist just south of Bear Creek Corners. While en route to the call, Deputy Santiago, observed a beige Ford truck, with lettering and two chrome colored tool boxes on each side, pass in front of the squad car, traveling east on HWY 22. Deputy Santiago turned right on HWY 22, and was traveling behind the truck. The truck activated its right turn signal and then crossed over the "fog line" with the passenger side front and rear tires. This occurred while the Defendant was approaching an intersection that is unique in that it specifically has a lane set aside for making this particular turn. The defendant was attempting to use the turning lane to make his turn and due to the closeness of the trailing officer attempted to enter the lane as soon as it became available. At this point in time Deputy Santiago stopped responding to the call he was dispatched to and began to trail the vehicle of the defendant. The officer followed the Defendant for several miles out of his way. At times during the pursuit the officer tails the lead vehicle so closely that the lead vehicle actually pulls over to allow the officer to pass. After an extended period of time

following the Defendant, eventually a stop is pursued by Deputy Santiago, where the Defendant is put through field sobriety testing and then arrested for Operating while intoxicated.

Under the impression that the driving of Deputy Santiago while tailing the defendant is what caused the stop, the Defendant sought representation from an aggressive attorney to represent him on this case. The Defendant hired Attorney Sarvan Singh. After several consults the Defendants counsel did not file a motion and he was eventually plead guilty to the operating while intoxicated charge. At the time of entering a plea, the defendant maintained the understanding that he would still have the ability to fight the legality of the stop, post-conviction.

STANDARD OF REVIEW

"Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." State v. Young, 2006 WI 98, ¶ 21, 294 Wis.2d 1, 717 N.W.2d 729. The reasonableness determination involves an objective and common sense test. State v. Waldner, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). "Whether reasonable suspicion exists is a question of constitutional fact." State v. Walli, 2011 WI App 86, ¶ 10, 334 Wis.2d 402, 799 N.W.2d 898. Therefore, we apply a two-step standard of review. Id. First, we uphold the circuit court's findings of fact unless they are clearly erroneous. Id. We then review de novo whether those facts give rise to reasonable suspicion. Id. In re Ambroziak, 2015 WI App 82, ¶ 7, 365 Wis. 2d 349, 871 N.W.2d 693

However, where evidence of facts is contained within the record itself or where there is a stipulation as to the facts in a case the Appellant Courts in Wisconsin have applied the Documentary Evidence

Exception and reviewed the memorialized facts in the record De Novo. See Pepin, 110 Wis. 2d at 435,378, N.W.2d at 900 and Mechler, 246 Wis. At 55-56, 16 N.W.2d.

ARGUMENT

Ineffective Assistance of Trial Counsel

1. That the Defendant was charged with two (2) counts in Waupaca County Case No. 2013-CT-206: Count 1) Operating while intoxicated (4th) Contrary to Wis. Stat. § 346.63(1)(a); Count 2) Operating with Prohibited Blood Alcohol Concentration, contrary to Wis. Stat. § 346.63(1)(b).

2. That on December 08, 2015, a Plea and Sentencing Hearing was held in the above-captioned case. At said December hearing, the Defendant entered No Contest pleas to Count 1.

3. As to Count 1, the Court, accepting a proposed Plea, found the Defendant guilty.

4. The defendants case meets the test for ineffective assistance of counsel established under, *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also; State v. McDowell*, 2004 WI 70, ¶30, 272 Wis. 2d 488, 681 N.W.2d 500; *State v. Franklin*, 2001 WI 104 ¶ 11, 245 Wis. 2d 582, 629 N.W.2d 289.

5. Further, Defendants plea was invalid as outlined below.

6. The Defendants prior counsels representation of this case was deficient and the deficient performance of his counsel caused prejudice to the Defendant so severe that had counsels performance not been deficient the outcome of the criminal case would have likely been different.

7. The failure to know or learn relevant law or to conduct any investigation of the pertinent facts is deficient performance. *State v. Thiel*, 2003 WI 111, ¶ 51, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Mayo*, 2007 WI 78, ¶59, 301 Wid. 2d 642, 734 N.W.2d 115. (Counsel was retained in Waupaca Co. Cases 12-TR-1995 and 12-TR-2139 involving the same issue in this location)

8. At the April 19th, 2017 Motion Hearing the Defendants Trial Attorney could still recall conversations pertaining to the clients desire to challenge the stop in this matter. (R. 59)

9. This desire is rooted in the unique layout of the corner that Mr. Schultz was stopped near and misconduct by the seizing officer. (R. 59; 13)

10. Regardless of being put on notice of this information, trial counsel did not make any reasonable effort to ascertain the layout of this corner and the impact it may have on a challenge of this traffic stop. Trial counsel did not visit the scene of the report. (R. 59; 19-21)

11. When trial counsel was presented with the DVD exhibit of this traffic stop he could not recollect the disc. (R. 59; 16)

12. When questioned about the stop Trial counsel recalled the defendant's vehicle was yellow, when it is in fact Beige. (R. 59; 19-21)

13. When shown an aerial photograph of the scene of this report, Trial counsel admitted he is not familiar with the layout of the corner at issue. (R. 59; 19-21) (R. 29)(R.32- R.41)

14. When shown photographs of the video depicting the Defendants vehicle just before the stop Trial Counsel could not recall enough to even authenticate a photograph of the stop Mr. Schultz wished to challenge. (R. 59; 24)

15. Although the Defendant was followed for a period of time just under 5 minutes, trial counsel testified that he thought the distance was closer to a mile and a half. (R. 59; 25)

16. Trial Counsel did not know the vehicle, the location or the distance Mr. Schultz was followed. (R. 59)

17. It appears from the testimony during the hearing, that Trail counsel was not aware of the material and unique factors surrounding this stop.

18. However, at sentencing Trial Counsel stated "You know, as far as this case, Judge, goes it is incredibly frustrating because I watched the video and the extent of the aggravated driving was Mr. Schultz essentially making slightly wide right turns where he does kid of cross the center line and then essentially gets back in his lane and then *drives perfectly fine for nine minutes*. For nine minutes he is driving flawlessly and after I talked to him- - and you can see the officer speed up to the vehicle which I believe is somewhat reckless the way the officer is traveling, he speeds up furiously to catch up to Mr. Schultz's vehicle and then gets right on his backside with his beams essentially right in Mr. Schultz's review mirror. And so Mr. Schultz is operating the vehicle very well, and the officer testified that hes touching you know the centerline and near the centerline on County Highway O. you watch the video, there is no centerline. There is centerline at the beginning there, but there is no centerline during the stretch of road where Mr. Schultz is being followed, and some of this driving that is detailed in the police report, in all honesty, Judge, is aggravated more or less brought on by the officers behavior, and I think Mr. Schultz is frustrated by that and I agree" (R.56;13)

19. When Examined on this statement during the Machner hearing Trial Counsel stated: "Right. Well, if there was no -- if I said in the transcript there was no reasonable suspicion to detain Mr. Schultz, that doesn't make any sense. I mean, I don't know if it was misheard or what. But if I know that there's no reasonable suspicion to stop Mr. Schultz, but I'm pleading, **that flies in the face of pretty much anything that a defense attorney would do.** So that's just a statement or phrasing in the transcript is -- I can only assume erroneous." (R. 59; 58)

20. When examined on the legal standard for challenging the stop, Trial counsel misidentified the legal standard that applied in this scenario expressly stating: "But it's not a totality of the circumstance analysis." (R. 59; 44)

21. As the attorney making the decision to forego filing this motion and failing to familiarize with facts surrounding the stop or even the legal basis for challenging the stop was ineffective assistance.

22. As Trial counsel stated: "There is no excuse for a .15 blood test and I agree with that. I concede that point. But I think but for the

officers behavior and his driving pattern, Mr. Schultz doesn't commit anything that would constitute reasonable suspicion to be detained, and I know that he seems very frustrated with that because the way he sees it, and I would agree to some extent is the officer is driving in a very aggravated way. He's crossing the centerline, he's speeding, but there is no consequence." Yet there was no motion filed. (R. 56;13)

23. Counsel goes on to state: "Mr. Schultz is driving his vehicle and he'd be operating perfectly normal and hes [the officer in pursuit] obviously violating the law." (R. 56;13)

24. To prove that the trial attorney's deficient performance was prejudicial, the defendant must show that if the attorney had provided proper representation, a "reasonable probability" exists that the result would have been different. *See e.g., Strickland,* 466 U.S. at 694; *Mayo*, 2007 WI 78, ¶ 64, 301 Wis. 2d 642.

25. Specifically, had trial counsel motioned the court to suppress the fruits of the stop as an invalid detention, the outcome of this case had a reasonable probability of being substantially different. Negotiations for the resolve would have a different element and had the motion been granted the case likely would have been dismissed. The evidence of intoxication could have been suppressed had a successful motion been filed and heard.

THE TRAFFIC STOP OF HARLAN SCHULTZ WAS NOT SUPPORTED BY REASONABLE SUSPICION

1. Generally in a suppression hearing, the state bears the burden to show that the evidence was obtained in conformity with the constitutional standards. *State v. Kieffer,* 217 Wis. 2d 531,541,577 N.W.2d 352 (1998)

2. The legality of temporary detention is governed by section 968.24, which codifies the standard of *Terry v. Ohio,* 392 U.S. 1 (1968), into Wisconsin Law [states]:

   "After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer *reasonably suspects* that such person is

committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the persons conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped."

3. A seizure has occurred when a person complies with a show of police authority, under circumstances in which a reasonable person would not have felt that he or she was free to leave or to disregard a police request. *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991); *State v. Young,* 2006 WI 98, ¶26, 294 Wis. 2d 1, 717 N.E.2d 729; *State v. Williams*, 2002 WI 94, ¶23, 255 Wis. 2d 1, 646 N,W,2d 834.

4. A stop of a car constitutes a seizure of the car's passengers, well as the driver. *Brendin v. California,* 551 U.S. 249, 256-57 (2007)

5. The state's failure to satisfy the judge by specific articulable, objective facts that there was a reasonable basis for suspicion should result in the suppression of the evidence. *See e.g. State v. Fields*, 2000 WI App 218, ¶23, 239 Wis. 2d 38, 619 N,W,2d 279

6. Prior to the stop taking place, the Defendant was traveling eastbound on highway 22 towards Symco road in the Town of Union, Waupaca County, Wisconsin. The reporting officer, Deputy James Santiago is said to have witnessed driving behavior that "I [he] couldn't ignore".

7. The area in question is a section of curvy road on Highway 22 near Symco road, where many drivers often commit lane deviations due to the roads layout. This particular area is patrolled late at night to catch patrons of the local taverns. Officers in this jurisdiction often wait for travelers to commit this common error, during late hours of the night, as a guise to conduct OWI stops. Due to the layout of the road, the common mistake witnessed and the conduct of the Officer after this original violation the Defendant believes his stop lacked the reasonable to be justified as reasonable.

8. Further, at one point during the 5 minutes that Schultz is

tailed by the officer he actually pulls over to the side of the road so that the aggressively tailing officer can proceed past him. There is evidence that the disorderly erratic driving that was occurring behind Schultz was distracting his ability to operate a vehicle. At one point during the pursuit prior to the Deputy activating his lights the defendant actually pulled to the side of the road voluntarily to allow the vehicle to pass.

9. That the Deputy Santiago's conduct in following Mr. Schultz was so bad at one point that Mr. Schultz had to factually pull over to the side of the road to allow the close following vehicle to pass. It is critical to note that at this point in the stop, rather than rely on the observation of crossing the fog line that the officer testified was grounds for the stop, driving that "I [he] couldn't ignore" and seize the defendants vehicle - Deputy James Santiago pulls behind the defendants vehicle apparently waiting for him to get back on the roadway. Deputy Santiago then awaits the departure of Schultz's vehicle from the shoulder and once again begins following the defendant as he drives away. (R. 59; Ex 2 video of stop)

10. Regardless of the advertising representations of Counsel and payment of $8,500.00 Schultz's Counsel did not file one motion in his case. Rather, Schultz's case was scheduled from initial appearance directly to a Plea and Sentencing where a plea of No Contest was entered.

11. There is at least one issue with the determinations made by the arresting officer that there was Reasonable Suspicion to seize the defendant's vehicle.

12. Trial counsel should have motioned the Court challenging the grounds for the stop.

13. There is a reasonable probability of success on a motion challenging the seizing officer's causation at the time of the seizure.

14. That a successful suppression motion challenging the stop as not supported by required Reasonable Suspicion could have been granted in this case and that the suppression of the evidence in question would have led to a significantly different outcome.

THE DEFENDANTS PLEA WAS NOT ENTERED KNOWINGLY INTELLIGABLY AND VOLUNATARLY.

15. At the time of the Plea Hearing in this matter, the Defendant, by virtue of his general ignorance to legal proceedings, did not understand that he was absolutely waiving his right to a jury trial or to file a dispositive Motion relative to Count 1. Further, the defendant did not understand his right to otherwise contest the allegations contained in the same. Finally the Defendant did not understand that he would not be permitted to file a motion and challenge the stop if he were to plea.

16. That in ***Rahhal v. State***, 52 Wis.2d 144, 187 N.W.2d 800 (1971), the Court stated that "... [t]he distinction between a motivation which induces and a force which compels the human mind to act must always be kept in focus. When the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced...." Id. at 151-52.

17. That at the time of the Plea Hearing in this matter, the Defendant did not know that in entering a plea his remedy for an issue surrounding the grounds for the stop would be waived. Further the Defendant was not made aware of the procedure for challenging government action as unconstitutional. Finally, at the time of the Plea the Defendant did not know that he had the right to challenge the grounds for the stop through pre-trial motions and incorrectly assumed that his aggressive defense counsel would have done everything possible to fight the charges against him. Further, at the time of entering a plea Mr. Schultz was improperly informed of what his rights would be on appeal. Mr. Schultz thought that he could still challenge the stop at issue after conviction on the Circuit Court level, For these reasons, the Defendant's pleas were not made knowingly, voluntarily, and intelligently. *The Defendants Plea was not valid (R. 59;72)*

18. That for a guilty or no-contest plea to be constitutionally firm, the plea by the defendant must have been made knowingly, voluntarily, and intelligently. *See* ***State v. Bangert***, 131 Wis.

2d 246, 259-60, 389 N.W.2d 12 (1986).

19. "When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process.'" *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis.2d 594, 716 N.W.2d 906 (citing *State v. Van Camp*, 213 Wis.2d 131, 139, 569 N.W.2d 577 (1997)).

20. In *Brown*, the Court emphasized the allowance of a trial court to "tailor a plea colloquy to the individual defendant." Id. But nonetheless held that, "[i]n customizing a plea colloquy, however, a circuit court must 'do more than merely record the defendant's affirmation of understanding.'" Id. at ¶58 (citing *Bangert,* 131 Wis.2d at 267, 389 N.W.2d 12).

21. "[I]t is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, without an *affirmative showing* that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of sec. 971.08, Stats. A statement from defense counsel that he has reviewed the elements of the charge, without some summary of the elements or detailed description of the conversation, cannot constitute an 'affirmative showing that the nature of the crime has been communicated.'" *Brown*, 2006 WI 100, ¶ 58, 293 Wis.2d 594, 627-28,716 N.W.2d 906, 922-23 (emphasis in original) (citing *State v. Bangert*, 131 Wis.2d 246, 268-69, 389 N.W.2d 12.

22. That at the time of the Plea Hearing in this matter, the Defendant possessed a minimal, if not almost non-existent, comprehension of the general process and procedure of the criminal court system.

23. That at the time of the Plea Hearing in this matter, the Court did not explain the elements or the nature of the charges, except for a brief and perfunctory fashioned statement, before accepting the Defendant's pleas of No Contest.

24. That at the time of the Plea Hearing in this matter, the Defendant was not generally aware of the legal definition of elements of a crime. Moreover, that at the time of the Plea Hearing in this matter, the Defendant was not specifically aware of elements of the crimes he pleaded to by the combined virtue of his ignorance and deficient explanation.

25. That in addition to the Defendant's non-awareness of the elements and nature of the charges against him, the Defendant did not completely and entirely understand the terms of the Plea Agreement or why it was being made.

26. That the Defendant hired Melowski & Associates, LLC to represent him in fighting the charges against him.

27. That Melowski & Associates hold themselves out to the public to be Aggressive DUI Attorneys.

28. Melowski & Associates advertising states: "Some clients and the attorneys providing so-called representation believe that the police have them "dead to rights" following a sobriety or Breathalyzer test. The truth is, the steps involved in administering those tests are rife with error. Poor training and mechanical problems can lead to unreliable results. Much of our success has come from challenging the police and their "scientific" evidence, strategies that many of our peers fear."

29. "The attorneys at Melowski & Associates have distinguished themselves from other lawyers by providing meaningful and **real results** for clients. Simply put, there is no substitute for aggressive and successful courtroom battles to achieve success."

"Area police camp out near local taverns, music festivals, Packer games and other places where alcohol is served. They monitor the cars leaving and follow until they see a minor traffic violation committed or any sign of impaired driving. From there, proper steps must be taken in any and all testing. Violation of procedures or your rights will be brought to the attention of the courts at trial."

"The police must follow strict procedures and avoid any violation of your rights. There must be just cause for that

initial stop, as it sets in motion a process of sobriety and chemical testing that could lead you to jail."

All Quotes directly from: http://www.melowskilaw.com/

30. That the defendant chose the law office of Melowski & Associates for the sole purpose of aggressively fighting his OWI charges.

31. The defendant knew that police generally watch this area and that he was followed but not stopped for over 5 minutes.

32. That the Defendant paid Melowski & Associates $8,500.00 to aggressively fight the charges against him.

33. That the advertising of Melowski & Associates led the Defendant to believe that his case would be aggressively fought in court.

34. The Defendant informed his Counsel that there was an issue with the way the officer completed the stop in this case. Specifically, Defendant Schultz told his counsel that the police officer that seized his person did so after following him for over 5 minutes. That while he was being followed the Officer that seized his [the Defendants] person was following him closely and driving erratically. Several times during the pursuit the tailgating officer was following Schultz dangerously close while concentrating his bright lights on the Defendants mirrors making it difficult to drive. (R. 59; Ex 2 video of stop)

35. Counsel is aware of other stops similar to the one at issue that have been successfully challenged in this area for similar driving habits. (Counsel was retained in Waupaca Co. Cases 12-TR-1995 and 12-TR-2139 involving the same issue in this location) (R. 19 Correspondence requesting judicial notice and enclosing transcripts)

36. The defendant believes that a challenge to this stop could have been motioned for by the Defendants trial counsel.

37. Further the defendant believes that if his prior attorney had provided proper representation, and motioned the court for

suppression a "reasonable probability" exists that the result would have been different.

38. Finally, Mr. Schultz at the time of taking a plea was misinformed as to his rights to challenge the stop on appeal. Mr. Schultz at the time of entering his plea misunderstood the law to allow for challenges as to the grounds for the stop on direct appeal. However, this is not the case.

"No, he didn't say why. He said, "Well, they'll do a deal like this here." At that point, I said I had enough. I mean, he didn't want to do nothing. You want to hire a guy like that, I just won't do it. ***I'll appeal the case*** *and get a different attorney." (R. 59; 73)*

39. That in conclusion, for all the foregoing reasons, individually and collectively, the Defendant asserts that his plea of No Contest in the above-captioned matter should be allowed to be withdrawn in order to avoid a manifest injustice.

WHEREFORE, the Defendant, by his attorney, respectfully requests that this Court overturn the Order of the Waupaca County Circuit Court grant this Motion to Withdraw No Contest Pleas.

DATED at Appleton, Wisconsin this 16th day of January, 2018.

Respectfully Submitted,

JOHN MILLER CARROLL
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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,894 words.

Dated this 16th day of January, 2018.

_____

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 16th day of January, 2018.

_____

John Miller Carroll
State Bar #01010478