STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No, 2017AP002185-CR
Court Case No. 2013CT230

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HARLAN L. SCHULTZ,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR WAUPACA COUNTY
THE HONORABLE RAYMOND S. HUBER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF AUTHORITIES

Cases cited:

United States Supreme Court:

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ISSUES PRESENTED

Did the trial court err in denying the defendant's motion to withdraw plea on the basis of ineffective assistance of prior counsel?

STATEMENT ON ORAL ARGUMENT

The State is not requesting oral argument in this case. Rather, the State believes that the issue can be presented and addressed adequately in written argument.

STATEMENT ON PUBLICATION

The State does not request publication. This case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT ON THE CASE AND FACTS

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a). Facts additional to those presented in Appellant's brief will be set forth where necessary within the argument section. The relevant facts are that on October 27, 2013 the defendant was stopped by Deputy James Santiago of the Waupaca County Sheriff's Department after the deputy observed erratic driving by the defendant. The defendant was charged with Operating While Intoxicated 4th, Operating with a Prohibited Alcohol Concentration 4th, Operating Left of Center Line, Keeping Open Intoxicants in a Motor Vehicle, and Refuse to Take Test for Intoxication after Arrest. Following plea negotiations, in which the defendant was represented

by Attorney Sarvan Singh, he was ultimately convicted on Operating While Intoxicated 4th.

The defendant now contends that Attorney Singh's representation was ineffective and he should be allowed to withdraw his plea. A Machner hearing was held on April 19, 2017 and continued to October 16, 2017. At the conclusion of the October 16, 2017 hearing, the defendant-appellant's motion was denied which ultimately led to this action.

ARGUMENT

I. TRIAL COUNSEL WAS NOT INEFFECTIVE IN HIS REPRESENTATION OF THE DEFENDANT.

The standard for determining whether counsel is ineffective is established under Strickland v. Washington, 466 U.S.668, 687 (1984). The Sixth Amendment right to counsel is the right to effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether Counsel's conduct so undermined the proper functioning of the adversarial process that the trial counsel be relied on as having produced a just result. Strickland v. Washington, 466 U.S.668, 669 (1984).

During a hearing on April 19, 2017 Attorney Sarvan Singh testified that he and Appellant Harlan Schultz met numerous times. Further, they had appeared in court numerous times (App 109 Ln. 23-25). Attorney Singh also testified that Mr. Schultz wanted to challenge the stop. He and Mr. Schultz had numerous conversations about this specifically. Attorney Singh understood exactly what Mr.

Schultz was relaying. However, what Mr. Schultz was reporting was tempered by Attorney Singh's own observations of what was recorded in the video of the traffic stop (App Lines 114 Ln.17-22). Attorney Singh indicated his review of the video led him to conclude that there was no proper basis to file a motion (App.117 Ln.17-18). Attorney Singh again testified that he had conversations with his client about the stop frequently, he realized this was something that was bothered Mr. Schultz. Attorney Singh stated he understood why it bothered Mr. Schultz. He also indicated that he was empathetic, and when he watched the video it was frustrating because Mr. Schultz did drive very well (App. 142 Ln.24-25, App142 Ln. 1-6).

The one inescapable fact that Attorney Singh could not overlook was that Mr. Schultz crossed the double centerline. Attorney Sing was aware of the Popke decision which concluded that crossing the double yellow line is reasonable suspicion to detain a vehicle. No matter how much time passed from the time the infraction took place to the actual time of the stop, there was no way to get around the fact that the defendant crossed the double yellow line (App 143 Ln. 7-16). Atty Singh then stated that he doesn't feel comfortable filing a motion and presenting it to the court claiming there was no reasonable suspicion to detain his client when there is a video that shows him crossing of the double yellow line (App 143 Ln. 17-21).

On cross-examination Attorney Singh indicated that he handles roughly one-hundred (100) OWI cases per year, and at the time of the hearing he had

approximately forty (40) cases now pending. He further indicated that he believed all but one case in his drawer was drunk driving App. 151 Ln. 14-21). Attorney Singh further testified that he was familiar with. State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 and that he was familiar with that case when he watched the video involving Mr. Schultz's case (App. 152 Ln. 18-25).

Attorney Singh indicated that he was familiar with the process of filing motions, and in his observation of the video, there was a basis for detaining Mr. Schultz App. 153 Ln. 1-17). Finally, Attorney Singh stated that in its most rudimentary form, as applied to Mr. Schultz's case, crossing of the centerline is a sufficient basis to stop (App. 154 Ln. 5-9).

Attorney Singh also testified on cross-examination that he discussed the issue of filing the motion with both of the other attorneys in his firm, that being Attorney Dennis Melowski and Attorney Matthew Murray. Attorney Singh stated as a general rule, his firm will discuss cases together to get each other's feedback. Mr. Schultz's case was discussed with the firm in reference to the appropriateness of filing a motion. Everyone in the firm agreed there was no basis for the filing of a motion (App. 155 Ln. 9-18).

The Court, during the October 16, 2017 continued hearing indicated what was important to him, when he looked at the video, was that Mr. Schultz went all the way left across the center line into what was the westbound traffic lane to make a right hand turn when he had a lane-and-a-half or so width to make the turn in. The Court indicated that was certainly sufficient basis for, in the Court's

opinion, a belief that there wasn't a basis to challenge stop (App 189 Ln. 17-24). The Court finally stated that it was reasonable that Attorney Singh concluded that there was a sufficient basis for a stop and he was not deficient in his decision to not pursue a motion to suppress (App. 190 Ln. 7-10).

II. THE TRAFFIC STOP OF HARLAN SCHULTZ WAS SUPPORTED BY REASONABLE SUSPICION

The State contends the fact in this case that the Appellant Harlan Schultz crossed the double yellow centerline is undisputed. Therefore, the stop was reasonable based on the holding in State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569 which concluded that the police officer had probable cause to believe a traffic code violation had occurred, namely operating left of center, and also that the officer had reasonable suspicion to believe the defendant was operating a motor vehicle while intoxicated. Therefore, the traffic stop was constitutional, and thus, the defendant's motion to suppress evidence should be denied.

III. THE DEFENDANT'S PLEA WAS ENTEREED KNOWINGLY, INTELLIGANTLY AND VOLUNTARILY

The State agrees 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 State v. Bangart 131 Wis2d 246,259-60,389 N.W.2d 12 (1986). The State agrees with the assessment of the Court during the October 16, 2017 continued Motion hearing that the plea colloquy between Mr. Schultz an d the Court was more than sufficient (app. 190 Ln.12-14). In addition, the State agrees

that the allegations that he didn't understand the elements and nature of the charges against him have not been adequately shown. This was Mr. Schultz 4th OWI offense and he clearly understood the nature and ramification as he sought out and hired the Melowski law firm, specializing in the field of OWI defense. Attorney Singh also testified at the April 19, 2017 Motion hearing that he both met with Mr. Schultz, and appeared in court with him on numerous occasions (App. 109 Ln.24-25, App. 110 Ln.1). This would contradict Appellant's allegation that he was ignorant to the general legal proceeding involving OWI type offenses and that he did not enter his plea knowingly, intelligently and voluntarily.

CONCLUSION

Based on the record in this case, this Court should find that the Circuit Court properly applied the law to un-contradicted facts and documentary evidence. Further, the Circuit Court correctly determined that trial counsel was not ineffective, that the officer involved, had reasonable suspicion to stop the Appellant for operating a motor vehicle under the influence of an intoxicant, and that the Appellant entered his plea knowingly, intelligently and voluntarily.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and 3b in that it is a monospaced font, 10 characters per inch, double spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 1,420 words.

DATED this 28th day of February, 2018.

Signed:

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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 28th day of February, 2018.

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CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on February 28th 2018, deposited in the United States mail for delivery to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage pre-paid.

DATED this 28th day of February, 2018

Signed:

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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; and (3) 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 first names and last initials instead of full names of persons, specifically including 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 28th day of February, 2018

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