STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2017AP002185
Circuit Court Case No.: 2013CT230

STATE OF WISCONSIN,

Plaintiff-Respondent,

HARLAN L. SCHULTZ,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT – APPELLANT

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

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ISSUES PRESENTED FOR REVIEW

Did the trial court err in denying the Defendants Motion to Withdraw pleas?

Trial Court: No

The Appellant answers: Yes

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. At the time of sentencing, the Defendant thought he would be able to fight a suppression motion on appeal. (R 59; 73). 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. (R. 59; Ex 2 video of stop) 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. (R. 59; Ex 2 video of stop) 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. (R 32- 36) 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. (R. 59; Ex 2 video of stop) 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. (R. 59; Ex 2 video of stop) 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. (R. 59; Ex 2 video of stop) 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.

ARGUMENT

Ineffective Assistance of Trial Counsel

1. The State in its response limits its argument to one sole observation of conduct with a centerline, inferring that the applicable totality of the circumstances analysis is not necessary due to the observation of one single factor.

2. This is a clearly deficient argument as the Defendant in this case has clearly challenged the effectiveness of trial counsel under the theory that; Trial Counsel, regardless of admitting at the Defendants sentencing hearing that there were issues with the stop in question, failed to familiarize himself with the facts at issue or even the appropriate legal standard and that prejudiced the defendant.

3. Simply put the observation of one fact in isolation is not that applicable legal standard; rather the standard requires us to look at the totality of all the facts.

4. This is the same way trial counsel proceeded and why the Defendant believes he was ineffective. In sum, due to the egregious conduct of the seizing officer in tailing the subject vehicle to illicit a driving violation and the unique layout of the corner in question which is very sharp, approximately 15-30° the mere observation of one fact does not suffice to illustrate the conduct in question as required under the totality of the circumstances.

5. As Trial counsel stated clearly at the sentencing hearing: “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 kind 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)

6. If Atty. Singh was candid as required in his representations at sentencing to the court, it is very strong evidence that the stop at question needed to be developed at an evidentiary motion hearing and that the failure to do so was ineffective.

FAILURE TO RESEARCH AND CONDUCT PRE-TRIAL MOTIONS

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. 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)

9. 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)

10. 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)

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

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

INCONSISTANCY IN REPRESENTATIONS TO THE COURT CONCERNING THE LEGALITY OF THE STOP

13. 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 kind 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)

14. 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)

15. These statements are entirely inconsistent with the statements made by the same counsel at the Machner hearing. Specifically, Atty. Singh Subsequently testified that there was a basis for the same stop, crossing the centerline. (States App. 154 Ln. 5-9)

16. Further as Counsel indicated himself it was important to develop the issue beyond that of a simple lane violation as : " ***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,"*** (R.56;13)

17. The Officers egregious activity in tailing the Defendants vehicle and positioning his squad to illicit a driving violation was critical to this case, the mere fact that a lane violation occurred is not the whole analysis, and the applicable test is the reasonableness of the seizure under the TOTALITY OF THE CIRCUMSTANCES.

18. Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the **totality of the circumstances**, he or she has grounds to **reasonably suspect** that a crime or traffic violation has been or will be committed. *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696. State v. Popke, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 132, 765 N.W.2d 569, 576

TRIAL COUNSELS FAILURE TO KNOW LEGAL STANDARD APPLICABLE TO STOP IN QUESTION

19. 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)

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

21. 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)

22. 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)

23. 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.

24. 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. The States reply as to this challenge focuses entirely on the occurrence of a lane deviation occurring. This is done without bringing to light the circumstances in which the driving conduct occurred.

2. Again, trial counsel brought this issue to the sentencing courts attention, taking issue with the conduct of the officer in attributing to the violations. "***driving that is detailed in the police report, in all honesty, Judge, is aggravated more or less brought on by the officers behavior,"*** (R.56;13)

3. The fact that the Defendants driving was impacted by the conduct of the officer directly impacts the totality of the circumstances in which the reasonableness of this stop should have been determined.

4. With effective representation testimonial evidence would have been produced concerning the unique layout and the officers conduct in tailing the vehicle. The issue isnt limited to the inquiry of a lane violation occurring as the state would insist the Court Rule, Rather the retained attorney has a duty to zealously represent his client and to establish a record that fairly portrays the events at issue. In this case the required a Motion hearing to explain exactly why the officers conduct was what it was.

THE DEFENDANTS PLEA WAS NOT ENTERED KNOWINGLY INTELLIGABLY AND VOLUNATARILY.

5. The State in response to the Defendant opening brief relies entirely on a circumstantial assumption to justify its position. That: due to his involvement in prior proceedings the Defendant did know how the legal system functioned. This is inconsistent with the unrefuted testimonial evidence in the record.

6. 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.**

7. 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)

8. 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)

9. Finally, Mr. Schultz at the time of taking a plea was misinformed as to his rights to challenge the stop on appeal.

10. 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)*

CONCLUSION

WHEREFORE, the Defendant, by his attorney, respectfully requests that this Court overturn the Order of the Waupaca County Circuit Court and grant this Motion to Withdraw No Contest Pleas so that a full evidentiary hearing concerning the stop at issue can take place where the issues pertaining to the stop can be fully developed.

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

Respectfully Submitted,

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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)(c) for a Reply brief produced with a proportional serif font. The length of this brief is 2,976 words.

Dated this 16th day of March, 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 March, 2018.

_____

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