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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2018AP999-CR
Lincoln County Case No. 13-CF-157

MARK J. BUCKI,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON 7/3/14, IN THE CIRCUIT COURT FOR LINCOLN COUNTY, AND FROM THE POST-CONVICTION DECISION AND ORDER, FILED 5/2/18, DENYING A NEW TRIAL, PURSUANT TO RULE §809.30, STATS., THE HONORABLE JAY TLUSTY, PRESIDING

REPLY BRIEF

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I. ADMISSION OF THE CANINE EVIDENCE AT TRIAL WAS ERRONEOUS AND NOT HARMLESS ERROR.

A. ***

B. The Admission of Canine Evidence Was Erroneous Under Both §§904.03 and 907.02, Stats., and *Daubert,* When the Court Failed to Consider Physical Evidence of Corroboration in Assessing Its Reliability and Its Resulting Unfair Prejudice.

The State is wrong in several respects (Response, pp. 18-19) when it argues the court's determination "each handler's testimony satisfied" the requirement that admissibility of the evidence was required to be based on "sufficient facts or data." In this respect, the court committed error in assessing the requirements of §907.02, Stats. (Brief-in-chief, pp. 7; 25; 32; 33).

One, this determination was an error of law because it was based on the court's determination a consideration of corroboration was *unnecessary*, before admitting the evidence, because it was not *required* under the holding in *Daubert*. Two, the court exercised erroneous discretion because the court's failure, in fact, to even consider corroboration as part of the sufficient facts or data analysis for admission, under the facts and circumstances of this record, unfairly prejudiced Bucki. Consideration of corroboration by the court would have either

(a) precluded admission of the canine evidence; or (b) required the court to instruct the jury regarding the importance of corroboration. Instead, the court substantially ignored the facts and circumstances of this case, requiring corroboration, including the lack of double-blind testing for two of the dogs; the lack of adequate record keeping; and the lack of recent certification, to reliably support the equivocal and circumstantial nature of the State's evidence.

The State's argument (Response, p. 19) a court's determination corroboration was necessary, to supply the sufficient facts or data to require admission, "would violate" the rule of *Daubert,* is wrong for several reasons. One, Bucki does not argue consideration of corroboration either should, or would, "force the proponent of the evidence to show that something else supports the expert's conclusions." Two, this argument eviscerates the importance of §907.02, Stats., when, in a particular case, necessary and sufficient facts or data are categorically absent and "reliability" was significantly undermined by the DNA testing. Bucki concedes he was not entitled to corroboration of the canine evidence "because the dog evidence tended to show Bucki's guilt" (Response, p. 20).

Further, the State misunderstands (Response, p. 20) Bucki's contention a "drug dog's reliability is never subject to

challenge after a search." Although the reliability of a drug dog's performance can be challenged in court, Bucki argued the accuracy of the drug dog's investigation, where no drugs are detected, is "never subject" to a determination whether the drug dog accurately failed to detect drugs. Instead, the reliability of a narcotic dog's probable cause determination is a self-fulfilling prophecy because narcotic dogs are only challenged when, in fact, narcotics are located after the dog's trained response.

The State ignores Bucki's argument the holding in Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 316 (*quoting* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)), required a consideration and determination by the trial court of the necessity for corroborating evidence based on the trial record in this case (Response, pp. 20-21). Bucki has never argued the *Daubert* standard required imposition of any "specific requirements on trial courts." Bucki's first argument was the trial court was erroneous in application of the law because it found consideration of corroboration under the *Daubert* standard was never required. Two, this ruling by the trial court effectively and erroneously determined admission of the evidence did not require consideration of a corroboration component, despite the uneven and unreliable training, poor

record keeping and stale certifications, in an evidentiary context in which even the handlers don't scientifically know to what, or why, their dogs are alerting.

The allegation in the response (Response, p. 32) that Bucki has forfeited any challenge to the circuit court's "conclusion that counsel were not deficient" is wholly without merit and should be rejected. The citation to State v. Goetz, 2001 WI App 294, ¶18, 249 Wis.2d 380, 638 N.W.2d 386 is inapplicable when Bucki litigated deficient performance extensively in the post-conviction process and raised it on appeal.

Where canine evidence is proffered, as here, to prove guilt, Bucki asserts there must be "sufficient foundational evidence" proffered to satisfy a multi-prong test and the dictates of §§904.03, 907.02, and *Daubert* (Response, p. 26). The cases cited by Bucki address different foundational requirements, based on different trial case records, encouraging courts to consider, based on the rubric of "wide latitude," corroboration as a part of the "multi-prong test." Further, these holdings tend to reject the trial court's circular determination, in this case, consideration of corroboration was not necessary, because it was not required.

The State's contention (Response, pp. 21; 23) the cases

cited by Bucki were not applicable, because the holding in *Daubert* was rendered after most of the holdings cited, is misguided where no Wisconsin appellate court has considered the application of *Daubert* to canine evidence to establish guilt. Nor has a Wisconsin appellate court considered this specific application of *Daubert* within the strictures of §§904.03 and 907.02, Stats. Moreover, while Bucki does not dispute the trial court in this case implicitly considered many of the requirements considered by the courts in the various other jurisdictions cited by Bucki, he does dispute any implication the Bucki court implicitly considered "corroboration" in its findings (Response, pp. 21-22).

The State concedes (Response, p. 22) three of the cases cited by Bucki hold canine evidence alone is not enough to show guilt beyond a reasonable doubt. This concession is important because, as here, the circumstantial evidence submitted by the State, independent of the canine evidence, was equivocal and did not support "conviction" beyond a reasonable doubt. In the vacuum of any consideration of the canine evidence, Bucki's conviction should be vacated and remanded for a new trial.

Bucki does not, as the State argues, argue the court should have instructed the jury it "could not find the dog

evidence reliable unless there was corroboration" (Response, p. 25). When the trial court found consideration of corroboration was not required in determining whether the canine evidence was admissible under *Daubert,* the court was required to grant the defense request that the jury was to consider corroboration with the other evidence. Rejection of the defense request was erroneous because the proposed instruction met the four criteria of *State v. Coleman*, including the unequivocal evidence in the record the canine evidence was uncorroborated by physical evidence. State v. Coleman, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996). The instruction submitted by the court was not adequately covered by "part of Bucki's requested instruction" and this error was not harmless.

The error was not harmless because the "compromised" instruction submitted allowed the jury to believe evidence of corroboration was less significant and inferior to their consideration of "training . . . proven ability, if any, of the dog, its trainer, and its handler" and effectively eviscerated the corroboration defense (Response, pp. 25-26). Coleman, p. 216.

The State argues (Response, p. 26) Bucki has waived, and this Court should not consider, Bucki's argument a higher standard for admissibility than a preponderance of evidence is

necessary for a court's determination whether to admit canine evidence, in a criminal prosecution, to establish guilt. Bucki argued either evidence of corroboration, or a higher standard for admissibility, was required in a criminal prosecution to balance the competing interests identified within the totality of the circumstances and assist the court in avoiding, as here, the likelihood of unfair prejudice from admissibility of the canine evidence.

This Court should reject this waiver argument for several reasons. One, the admissibility of canine handler opinion testimony, used to establish guilt in a criminal prosecution, is an issue of first impression in Wisconsin. This Court's analysis of this issue would, therefore, benefit from a consideration of these respective burdens. *See* Olmsted v. Circuit Court for Dane County, 2000 WI App 261, ¶12, 240 Wis.2d 197, 662 N.W.2d 29 (issue in question was of sufficient public interest to merit a decision). Two, admission of this evidence is of significant importance to the future work of trial courts, throughout Wisconsin, as more canine units are employed to assist law enforcement in their various criminal investigations in which prosecutors and law enforcement work to ferret out crime within a standardized and consistent fact-collecting process. Olmsted, ¶12 (consideration whether error would

recur is another factor to be considered in granting review). Three, the proper burden for the admissibility of evidence is an issue of law in this case in which no facts require resolution. Four, the issue implicates the Fifth and Sixth Amendments to the United States Constitution and due process as it affects a criminal defendant's right to a fair trial. *See also* In the interest of Baby Girl K, 113 Wis.2d 429, 448, 335 N.W.2d 846 (1943). In these respects, the State's citation to State v. Rodgers, 198 Wis.2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995), does not control resolution of this issue.

This Court should address the issue and determine a preponderance of the evidence burden is inadequate to satisfy the requirements of §§904.03, 907.02, and 907.03, Stats., and the "wide latitude" concerns of *Seifert*. Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W. 2d 316.

C. ***

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH PREJUDICED THEIR CLIENT.

A. ***

B. ***

C. Counsel's Failure to Present and Argue Expert Witness Testimony at Trial to Challenge the Reliability of the Canine Evidence Was Deficient and Prejudicial.

The State asserts (Response, p. 31) the court's determination defense counsel provided reasonable performance in not calling Dr. Myers to testify was not erroneous. The State then argued Bucki never explained how counsel was deficient. Rather, Bucki first established the enormous prejudice which was produced when the defense was without any ability to scientifically establish the unreliability of the canine evidence and how the alerts didn't reliably establish Anita's cadaver was present on the property, or Bucki's scent was present at the marsh. *See* Strickland v. Washington, 466 U.S. 668, 697 (1984) (failure to establish prejudice removes need to evaluate deficient performance prong).

The single, overriding reason counsel, in fact, didn't present Dr. Myers' testimony at trial was their own indecision and unreasonable performance in "outsourcing" to their client his determination whether to call Dr. Myers. Indeed, all of the meager negative considerations not to call Dr. Myers to testify identified by trial counsel were effectively overridden by other, stronger, considerations strategically requiring presentation of his testimony. For example, consideration whether cross-examination of the handlers had gone better at trial than at the

Daubert hearing was irrelevant when the evidence from cross-examination did not establish the unreliability of the alerts, and the handlers were still vouching for the reliability of their canine's alerts. Nor were any concerns about Agent Stockham testifying at trial reasonable (Response, p. 32), given his own evisceration of the reliability of the canine evidence under the totality of circumstances *in this case* at the pretrial hearing (Brief-in-chief, n. 6).

The State is wrong when it argues defense counsel did not leave the decision whether to provide Dr. Myers' testimony at trial "to Bucki" (Response, p. 33). As the post-conviction testimony established, there was no decision made whether to present Dr. Myers testimony, or not present his testimony, until counsel put the decision to their client. Moreover, it is not a "group decision," as the State suggests, when "Bucki could have overruled his attorneys." This decision to rely on their client's election whether to present forensic expert testimony is not entitled to the presumption of reasonableness and is deficient performance when Bucki was never previously involved with, or informed about, the complexities and nuances of this expert canine testimony.

The State also does not explain how, without the presumption of reasonableness, abdication of counsels'

responsibility to their client's goal of aquittal is not a violation of the Sixth Amendment to provide effective representation of counsel. Strickland v. Washington, p. 687 (prejudice presumed where counsel's performance resulted in an unreliable or fundamentally unfair outcome in the proceeding). The State is wrong when it claims the defense failure to present Dr. Myers' testimony at trial would not have led to a different result (Response, p. 36). First, the State has not explained why Dr. Myers' lack of in-person experience with cadaver dogs, and limited in-person experience with trailing dogs, somehow limits the relevance and strength of his academic and professional experience with the physiological processes employed by these canines and studied by Dr. Myers and others in academic institutions. Indeed, the State has not explained why Dr. Myers academic and professional experience is not more relevant and important in explaining to a jury why these alerts from these four dogs and their handlers were unreliable, given their testing weaknesses and stale certifications along with the scientific truth no one knows why canines alert to certain scents, and not others, or why they make important mistakes both in their training and in the field. Second, the FBI witness who testified was without any academic credentials to scientifically support any opinion regarding the reliability of

these canines, other than years of anecdotal experience. Third, the State has not explained how Stockham's anecdotal experience would somehow limit, or minimize, Dr. Myers' forensic opinion regarding the unchallenged lack of any baseline reliability of the four handlers and their dogs and its impact on evidence of their alerts or Bucki's guilt. Four, the State's reliance on Stockham's "credentials" to dismiss Dr. Myers' importance is compromised by the fact both Dr. Myers and Stockham had little or no regard for the training or current certificates of these four handlers and their dogs as it related to the reliability of the dogs in the Bucki investigation at the homestead or the marsh.

The verdict would have, indeed, been affected if the jury had heard testimony from both Dr. Myers *and* Rex Stockham. However, the jury never heard these opinions and the defense was without this evidence in closing argument to challenge the State's circumstantial evidence.

Whether the defense did, or did not, highlight "most of the facts" they would have discussed with Myers when cross-examining the handlers, "highlighting" cannot be determinative of this Sixth Amendment claim based on the totality of these circumstances (Response, p. 36). Initially, "highlighting" is never as effective as thorough forensic testimony explaining,

for example, how and why canine reliability considerations needed to be, on the record facts of this case, considered by a jury from a qualified expert, as Dr. Myers surely was. Nor did the defense cross-examination of the handlers address "most of the facts they would have discussed with Myers." In fact, the defense never scratched the surface for the jury Dr. Myers' determination there was "no baseline reliability" for these four handlers, and their dogs, in the Bucki investigation and its impact on the jury's verdict.

Indeed, no presumption applies to counsel thinking their client should decide whether, or not, an important forensic expert testify at trial because it did not involve any special or professional skill attributable to a lawyer's education and training. Bucki argues this is a strong example of a case where prejudice can be presumed because their performance, in this respect, was an actual and constructive denial of assistance in violation of the Sixth Amendment. Strickland v. Washington, p. 692.

Finally, the fact Bucki "failed to establish at the post-conviction hearing that someone other than him might have created the area" is irrelevant to the State's prosecution theory and whether Bucki received a fair trial (Response, p.36). Rather, the only relevant evidence is whether, as the State

argued, Bucki used his ATV to transport his wife's body to the disturbed earth area after she went missing, thereby causing the canine alert during execution of the search warrant. The photographs establish the tracks were created by law enforcement and, most importantly, there were no tracks from Bucki's round-tired ATV and so the ATV was not employed to transport Anita to the disturbed earth area after she went missing.

D. Counsel's Failure to Present Expert Testimony Regarding the Contamination of the Scent from the Tennis Shoes Used to Place Bucki at the Marsh Was Deficient and Prejudicial.

It was no "afterthought" for defense counsel to pose this important question to Clint Bucki, regarding his mother's use of his shoes, as the response argues (Response, pp. 33-34). Instead, effective representation required counsel not jeopardize its contamination defense, by posing a question without knowing it might damage the contamination defense. The question was posed only because counsel expected a favorable answer.

E. Counsel's Failure to Discredit the Prosecution Theory the "Disturbed Earth" on the ATV Trail Was a "Shallow Grave" Was Unfairly Prejudicial.

It was not enough, as the State argues, for defense counsel to reasonably believe "it made no sense" the State

would argue Bucki would bury his wife "close to their house" in order to forgive their deficient performance on this issue (Response, p. 35). The State can, and did, attempt to prove otherwise.

The State argues Bucki did not explain when the "flat-track" photos were introduced at trial (Response, p. 35). It was Bucki's claim these photos were never used at trial and were only introduced at the *Machner* hearing to establish prejudice from counsel's not using the photos at trial to defend against the prosecutions "disturbed earth" theory (R. 330: (summary of photos exhibit); R. 332; 333; 337-346).

CONCLUSION

For all the reasons stated, this Court should vacate the defendant's conviction and order a new trial.

Dated at Wauwatosa, Wisconsin, this 17 day of April, 2019.

Respectfully submitted,

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CERTIFICATION

I certify this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Brief prepared using the following font:

> Proportional sans serif font: 12 characters per inch, double spaced; 2 inch margins on the left and right sides and 1 inch margins on the other two sides. The length of this Brief is 2938 words.

Dated: April 17, 2019

JAMES REBHOLZ

E-FILING CERTIFICATION

Pursuant to §§809.19(12)(f) and 809.32(fm), Stats., I hereby certify the text of the electronic copy of the Brief is identical to the text of the paper copy of the brief filed.

Dated at Wauwatosa, Wisconsin, this 17 day of April, 2019.

JAMES REBHOLZ