RECEIVED
07-02-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

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

MARK J. BUCKI,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

REBHOLZ & AUBERRY
Attorneys for Petitioner-Defendant
JAMES REBHOLZ, Esq.
State Bar No. 1012144

1414 Underwood Ave, Suite 400
Wauwatosa, WI 53213
(414) 479-9130
(414) 479-9131 (facsimile)
jrebholz2001@sbcglobal.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

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

MARK J. BUCKI,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

ISSUES PRESENTED

I. SHOULD CORROBORATION OF CADAVER AND TRAILING DOG EVIDENCE, PROFFERED TO PROVE THE GUILT OF THE DEFENDANT, BE REQUIRED TO SOME PROBATIVE DEGREE IN ORDER FOR A TRIAL COURT TO BOTH FIND THE EVIDENCE SATISFIES THE THRESHOLD RELIABILITY CRITERIA UNDER §907.02, STATS., AND *DAUBERT*, AND IS NOT OTHERWISE SUBJECT TO EXCLUSION UNDER §904.03, STATS?

Review is required for several reasons. One, affirmance of the trial court's determination to admit expert testimony concerning cadaver or trailing dog alerts, to prove the guilt of a criminal defendant (rather than establish probable cause in a criminal investigation), under §907.02, Stats., and *Daubert*, is, by itself, an issue of first impression. More directly,

petitioner contends requiring evidence of corroboration of the canine evidence, to some probative degree, before finding the evidence admissible, as Bucki argued below, is a novel issue specifically involving the strictures of §§907.02 and 904.03, Stats., requiring review. *See* Rule 809.62(1)(c)(2).

The issue is novel because the Court of Appeals found, without the benefit of prior Wisconsin case authorities, the trial court was correct to admit this canine evidence, without corroboration, as long as the evidence satisfied the threshold reliability criteria under §907.02, Stats., and *Daubert*, and was not otherwise subject to exclusion under §904.03, Stats. Specifically, the Court of Appeals found that it was undisputed that "no precedential Wisconsin case has yet addressed the admissibility of expert testimony concerning cadaver or trailing dog alerts" (Decision, p. 29).

Review of the Court of Appeals' finding corroboration was unnecessary in determining the threshold reliability of expert testimony concerning cadaver or trailing dog alerts is required because, as the defense expert proffered in pre-trial testimony, based upon all the records, certifications and contamination evidence presented, "the alerts were, to a reasonable degree of professional certainty, not reliable to any known degree" (R.415, p. 185; R.277, pp. 4-5).

In the post-conviction process, Bucki first asserted the canine evidence was unreliable and not admissible to prove guilt without some form of corroboration. Bucki argued corroboration should be required in all cases as a function of the "sufficient facts or data" component of §907.02, Stats.

The Court of Appeals acknowledged Bucki's argument for a categorical rule did not go as far as some courts which have deemed canine evidence too unreliable to admit under any circumstances. (Decision, pp. 28-29). While Bucki did not argue this restricted view, he did argue the admissibility of the evidence should be predicated on the ability of the proponent to have the canine alerts corroborated in some fashion as a foundational criterion. Bucki argued this corroboration component was consistent with the requirements for a foundation to admit canine evidence in a majority of states.

Concerns regarding this predicate foundation is what has led other jurisdictions to address the necessity of corroboration in different, and instructive, ways which the Court of Appeals considered, but rejected. In other jurisdictions, for example, canine evidence was admissible, without corroboration, as long as there was sufficient other evidence of guilt necessary to sustain a conviction.

Instead, the Court of Appeals found a trial court's

determination to admit canine evidence is highly fact-specific and turns on the court's assessment of the totality of the factors identified in §907.02, Stats., as well as excluding evidence under §904.03, Stats. Review of this decision is likely, therefore, to assist trial courts with the development and clarification of these rules of evidence as it affects the very esoteric world of canine evidence. Rule 809.62(1)(c).

Review is further required because Bucki also specifically asserted the evidence of unreliability of the canine evidence in this case required corroboration before the trial court found there were sufficient facts or data to ensure the reliability of the evidence for admissibility. Review of this issue would also assist trial courts with the development and clarification of the rules of evidence as it affects specific areas of facts or data affecting reliability for the admission of canine evidence to establish a criminal defendant's guilt.

For example, Bucki argued there were critical disconnects in this case between the alerts and the lack of any corroboration to establish the cadaver alerts were reliable for admission into evidence. One, a critical disconnect existed when the two cadaver canines could not agree whether there were indications of human remains on the floor bed of Bucki's truck, which the State believed transported Anita's body to the

marsh.[1] Other disconnects involved the State's concession the alert to the shallow grave was possibly a result of a human remains scent "not connected to the case," and the alert to the ATV. Izzy's unreliable alerts were also unfairly prejudicial because Bucki's ATV never traveled the trail to the "shallow grave" on the date of Anita's disappearance. As law enforcement testified, Bucki's ATV did not make any tracks on the hill while law enforcement vehicles searched for Anita's "remains."

II. IS REVIEW REQUIRED TO AFFIRM OR CLARIFY WHETHER COUNSEL'S SIXTH AMENDMENT RESPONSIBILITY TO EFFECTIVELY REPRESENT HIS CLIENT AND PERFORM REASONABLY IN MATTERS OF TRIAL STRATEGY UNDER *STRICKLAND V. WASHINGTON* OR WHETHER STRATEGIC TRIAL DECISIONS CAN BE REASONABLY DELEGATED TO THE CLIENT AS "FUNDAMENTAL DECISIONS" UNDER *JONES V. BARNES*, OVER WHICH THE CLIENT HAS THE ULTIMATE AUTHORITY?

Review is required for three reasons . One, because a real and significant question of federal and state constitutional law is presented. *See* Rule 809.62(1)(a).

---

[1] The parties never argued, and the court never addressed, whether any canine evidence should, or could, be somehow limited in any respect without, at least, consistent responses from both dogs within each discipline. *See* State v. Wainwright, 18 Kan. App.2d 440, 856 P.2d 163, 168 (Kan. App.1998) (bloodhound evidence admissible where it is corroborated by other independent evidence).

During trial, counsel asked their client whether an expert witness should be called to confront the state's canine evidence tending to establish their client's guilt. The expert witness had testified previously in the pre-trial proceedings and had challenged the reliability of canine evidence with both cadaver and trailing dogs. Counsel testified in the post-conviction proceedings they were ready, willing and able to provide this expert's testimony but, after a discussion with their client, agreed not to present this expert testimony.

Bucki testified in the post-conviction process that he was neither capable, nor adequately informed, to make the decision whether to present expert testimony. Bucki argued counsel's reliance on their consultation with Bucki was, therefore, ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), and violated the holding in related federal and Wisconsin case authorities, including State v. Eckhart, 203 Wis.2d 497, 510, N.W.2d 539 (Ct. App. 1996) (once counsel had identified with his client the general theory of defense, counsel has the right to select from available defense strategies) (*citing* State v. Koller, 87 Wis.2d 253, 264, 274 N.W.2d 651 (1979)); Tolliver v. Pollard, 688 F.3d 853, 862 (7th Cir. 2012) (failure to call a useful corroborating witness, despite potential bias, is IAC).

The Court of Appeals thought otherwise and found the circuit court's determination this "group decision" had not "unreasonably delegated" to Bucki the task of deciphering whether Meyers should testify at trial.

While Bucki agrees counsel was required under *Strickland* to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution," Bucki asserted requiring a client to make a critical strategic decision during trial whether to present expert witness testimony is neither the consultation nor the communication addressed in Strickland v. Washington, p. 688. Rather, the Court of Appeals' decision implies a criminal defendant has the authority under Jones v. Barnes, 463 U.S. 745 (1983), to make critical strategic trial decisions, including whether to present critical expert witness testimony, because these (strategic) decisions are "fundamental decisions regarding the case" (Decision p. 46).

Two, review is required because the Court of Appeals interpreted *Jones v. Barnes* to absolve trial counsel of their responsibilities under *Strickland*. Thus, this holding is in conflict with controlling opinions of the U.S. Supreme Court and the Wisconsin Supreme Court evaluating counsel's performance. Rule 809.62.(1)(d), Stats. In *Jones v. Barnes*,

the court never suggested strategic mid-trial decisions regarding presentation of expert testimony were fundamental decisions over which the defendant could exercise control. *Jones v. Barnes* identified two fundamental decisions over which a criminal defendant had control, including whether to appeal and whether to proceed *pro se* on appeal, following Faretta v. California, 422 U.S. 806 (1975). Conversely, the holding in *Jones v. Barnes* established it was counsel's ultimate prerogative and responsibility to make strategic (appellate) decisions once the decision to appeal was made and counsel appointed. Jones v. Barnes, p. 751.

Review is also required because a decision by this Court would help develop and clarify and the holdings in *Jones v. Barnes* and related Wisconsin case authorities as they affect lower court decisions addressing claims of ineffective assistance of counsel involving trial counsel's delegation of critical trial strategy decisions to the client when the client has no authority to make the decision. Rule 809.62(1)(c), Stats. Those fundamental decisions over which the client has authority are limited to pleading guilty, waiving a jury, testifying on their own behalf and whether to appeal. *See* Jones v. Barnes, p. 752 (*citing* Wainwright v. Sykes, 433 U.S. 72, 93 n.

1 (1977)).

The Court of Appeals decision, therefore, has created a confusion over whether trial counsel can assign and require defendants make strategic decisions for which professional training and ability is required. The language in the Court of Appeals' decision also offers conflicting and confusing advice to trial courts who may believe the *Strickland* performance standard (and presumption of reasonableness) may not be applicable in a post-conviction court's evaluation of IAC claims when a defendant has been assigned the responsibility to make a strategic trial decision without the professional ability to do so.

In *Jones v. Barnes,* the United States Supreme Court sought to identify counsel's various responsibilities in the representation of his criminal client and determined and clarified those rights which belonged to the defendant alone and which must be exercised by counsel. The decision held that it was counsel's responsibility to exercise professional control and have the authority to make discretionary and strategic decisions during the appeal once the attorney and his client had identified the defendant's objectives. The Court of Appeals' decision has created a significant friction between the holding in *Jones v. Barnes* and state and federal cases

addressing ineffective assistance of counsel claims under *Strickland*, which requires resolution.

III. WHETHER THE COURT'S FINDINGS DENYING BUCKI'S OTHER SPECIFIC ALLEGATIONS OF DEFICIENT PERFORMANCE UNDER THE SIXTH AMENDMENT WERE IN VIOLATION OF THE HOLDING IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND RELATED WISCONSIN CASE AUTHORITIES?

Review is required because the court's findings denying (Decision pp. 46-50) these other specific allegations of deficient performance arguably violated the holdings of *Strickland v. Washington* and its progeny. *See* Rule 809.62(1)(d), Stats.

Bucki argued in the post-conviction process and on appeal his lawyers provided deficient performance in failing to adequately present evidence of scent (shoe) contamination and their failure to challenge the prosecution's "shallow grave" theory. The Court of Appeals found counsel's failure to raise the issue whether Anita wore the tennis shoes providing the scent for the trailing dogs was not deficient because counsel had no reason to believe Clint Bucki would have been able to testify at trial he had seen his mother wearing his shoes on one occasion (Decision p. 48).

The Court of Appeals also concluded trial counsel was

not deficient for failing to present law enforcement photographs admitted into evidence during the post-conviction *Machner* hearing because Bucki offered no explanation for how the "disturbed earth" was created on his property and that these photographs "do not undercut the notion that Bucki could have been present in the area of disturbed earth during the relevant time" (Decision p. 50).

STATEMENT OF CASE

A Criminal Complaint, filed on 5/14/13, charged Mark J. Bucki (Bucki) with First Degree Intentional Homicide (Count 1) for causing the death of his wife, Anita G. Bucki (Anita) on 4/26/13, in the Town of Corning, Lincoln County, contrary to §§940.01(1)(a) and 939.50(3)(a), Stats., a Class A felony; Hiding a Corpse (Count 2), contrary to §§940.11(2), and 939.50(3)(g) Stats., a Class G felony; and Strangulation and Suffocation (Count 3), contrary to §§940.235(1) and 939.50(3)(h), Stats., a Class H felony (R.1).

Following a preliminary hearing on 8/2/13, Bucki's case was bound over for trial (R.381, p.58).

An Information charging the same three counts alleged in the Criminal Complaint was filed on 8/5/13. On 9/20/13, the defendant was arraigned and entered pleas of not guilty (R.15;R.382, p.4).

A motion to dismiss the Criminal Complaint following the preliminary hearing (R.22;23), pursuant to §§971.31(2) and (5), Stats., was denied on 10/1/13 (R.383, p. 17).

Following an 8-day jury trial, the defendant was convicted of the three counts charged in the Information (R.406, pp. 5-6; R.226). The jury was polled (Id., pp. 6-8). An order for pre-sentence investigation was entered (R.227).

On 7/3/14, the court imposed a life sentence on Count One, with eligibility for release to extended supervision on 5/13/2048. The court imposed imprisonment on CountTwo of 4 years (2 IC/2 ES) and a term of imprisonment of 3 years on Count Three (1 IC/2 ES), with both Counts Two and Three to be served concurrent with Count One and each other (R.409, pp.115;122). A judgment of conviction was filed (R.241).

A post-conviction evidentiary hearing on the defendant's petition for new trial (R.267) was conducted on 7/6/17 and concluded on 8/24/17. On 5/2/18, the court denied the petition (R.374).

The Notice of Appeal was timely filed (R.375).

On 6/2/20, the Court of Appeals filed its decision and order affirming the judgment of conviction and the post-conviction order denying the petition for new trial, pursuant to Rule 809.30, Stats.

The petition for review is due, therefore, on 7/2/20.

STATEMENT OF FACTS

Prior to trial, the defense filed a motion to suppress canine evidence it claimed was irrelevant, unfairly prejudicial and speculative, pursuant to §904.03, Stats. (R.33). The State responded (R.37-39). This motion sought to suppress "human remains" search evidence by two cadaver dogs at the Bucki residence and surrounding property, as well as evidence from a "live scent" search by two trailing dogs[2] on Taylor County Highway "C," next to the marsh area where the victim's remains were discovered on 5/10/13.

In opposing admissibility of the canine evidence, the defense argued admissibility of this evidence did not require a *Daubert* evaluation of the pre-trial evidence under §907.02, Stats. It argued the evidence, while relevant, created a "novel issue in Wisconsin" and should be excluded under §904.03, Stats., because the proffer was without any corroborating evidence to establish its reliability (R.391, pp. 122-23). The State argued the evidence was relevant and §907.02, Stats.,

[2] These "trailing" dogs are inaccurately characterized as "tracking" dogs in various pre-trial documents. Tracking dogs are principally asked to follow a "track," rather than a specific human scent.Trailings dogs are trained to follow a specific human scent (R.387, p. 31).

required the court to analyze the reliability of the evidence presented at the *Daubert* hearing for "both types of dogs" (Id., pp. 124, 126). In reply, the defense argued a dog handler should not be allowed to make "expert" conclusions about a canine's alerts from a scent because it was "way beyond their scope of any expertise" (Id., 126-27).

Prior to the ruling on the admissibility of the canine evidence at trial, the State agreed it would not refer to the "hole" discovered on a trail on the Bucki property, during the search for the victim, as a "shallow grave" (for the victim) (R.396, p. 18; R.391, pp. 31-32).

The court determined an evidentiary hearing was required to address the reliability of the canine evidence based upon the considerations established in *Daubert v. Merrell Dow Pharmaceuticals*[3] (R.90, pp.3-4; 11; 13-14).

The defense argued the scent search was also unreliable because "the scent" used to search had been contaminated by others who wore the tennis shoes used in the search (Id., pp. 128-29).

At the *Daubert* hearing conducted over two full days, the State presented testimony with documentation from four

[3] 509 U.S. 579 (1993).

canine handlers regarding the training, certification and experience of the handlers and their dogs in tandem, and addressed potential contamination of the scent used by the trailing dogs (R.384, p. 144). Various exhibits were received, including police reports (R.67-69; 73-74; 81-82; 85); certificates (R.64;75;79); training records (R.65; 97); professional articles (R.77; 83-84); CVs (R.95;98); summary of dog trailing records (R.99); and death and crime scene logs (R.100).

On 3/25/14, the defense presented testimony of Dr. Lawrence Myers, an associate professor from the College of Veterinary Medicine at Auburn University.

Dr. Myers reviewed the training and certifications of the four handlers and their dogs, as well as the reports describing law enforcement's procedure in providing scent from a tennis shoe taken from the Bucki residence to the trailing dogs to determine whether the defendant was at the location where Anita's body was found. Dr. Myers testified there was no scientific consensus when a dog can smell decomposition or when a scent leaves an area (R.387, pp. 19-20). He described how double-blind testing helps to minimize "cuing" by the handler and stated he had specific concerns with cuing in this case (Id., p. 47). Dr. Myers concluded there was no baseline

reliability measure for these handler and dog teams, particularly on the basis of a lack of any records showing double-blind testing for all of the dogs as required for certification. He testified the self-reporting records for testing from the handlers also made their training certifications unreliable (Id., pp. 27-29; 53-55). Dr. Myers also found the procedure providing the human scent to the bloodhounds from the tennis shoes indicated contamination, thereby preventing any reliable determination of which scent the dogs were following, if two individuals (or more) had worn those tennis shoes (Id., pp. 22; 38-41; 107-08). On redirect, he opined the cross-contamination which existed, together with Anita's presence in the marsh next to the highway, prevented any reliable determination which scent Polly or Missy were trailing (Id., p. 109-10).

The State presented rebuttal testimony from Rex Stockham, an agent assigned to the forensic canine program with the Federal Bureau of Investigation (FBI). Stockham said proper storage of a scent object prior to its presentation to a trailing dog is important. He said the best practice would be to use a glass jar, which had not been used here (Id., pp. 216-17). Stockham also described the necessity to use a "dismissal list" for trailing dogs at the search site so the dogs can dismiss

every person who potentially had contact with the object (Id., pp. 217-18; 233). Stockham said, if multiple individuals had worn the same tennis shoe, it would be difficult to tell which scent the dog was trailing at the homicide scene (Id., p. 235). Finally, Stockham said he would be unable to assess whether any of the dogs would meet his or federal standards without personally testing the dogs (Id., p. 249).

On 4/4/14, the court made various rulings regarding admissibility of the canine evidence. The court first determined this testimony was "expert," not lay, testimony, and so the revisions to §907.02, Stats., effective 2/1/11, adopting the *"Daubert* reliability standard," were applicable (R.392, p.4). The court described the requirements of the new rule, including that expert testimony must be based on "reliable principles . . . reliably applied to sufficient facts and data" (Id., p. 5). The court explained the burden of proof was on the proponent by the preponderance of the evidence (Id., pp. 5-6). The court found this evidence was relevant under §904.04, Stats., and was not substantially outweighed by the danger of unfair prejudice under §904.03 Stats. (Id., pp. 7-8). The court then qualified the four canine handlers as experts and found these experts had relied on sufficient facts and scientific data to qualify as experts (Id., pp. 14-16).

The court identified the seven factors it would consider in determining whether the canine evidence was admissible (Id., p. 17). The court found the technique and theory has been generally accepted in 38 states for trailing dogs, and five states for cadaver dogs and, therefore, generally accepted in the scientific community (Id., p. 22). In sum, the court found the proffered testimony was based on reliable principles and methods for both cadaver and trailing dogs and the motion to admit the evidence would be granted and the motion to suppress denied (Id., pp. 26-27).

Finally, the court found consideration of corroborating physical evidence required by the majority of the other states (Id., pp. 36-41; 43) was not a necessary part of the *Daubert* analysis (Id., p. 44).

The court then ruled on other various pre-trial motions brought by both parties excluding other act evidence and admitting Anita Bucki's statements and e-mails to others, including the defendant (Id., pp. 111-13; 134-39;141).

A jury was chosen without objection (R.394, p. 190).

In opening statement, the prosecution concluded with the description and results of the work of the four canines at the Bucki property and at the marsh (Id., pp. 223-225). The defense concluded by challenging the work of the canines (Id.,

pp. 240-41).

At trial, a sheriff's dispatcher described Bucki's calls to the Lincoln County Sheriff on 4/21/13 and 4/26/13 regarding Anita's spousal property rights and then her disappearance. The Wisconsin State Patrol described forensic preparation of the maps depicting the Buckis' 84-acre Lincoln County homestead east of the Taylor County marsh where Anita's body was eventually found (R.400, pp. 14-16; 31; 35-36; 39; 41; 43).

Clint Bucki testified the grey tennis shoes introduced into evidence (Exhibit 55) were his. He said he last used the tennis shoes on 4/13/13 on a visit to his parents' residence, while helping his "mother load up the U-Haul" (R.401, pp. 60-61).

On recross-examination, he was asked if his mother "was in the habit of slipping on whatever shoes were available." The court sustained the State's objection on grounds it was "beyond the scope" of the re-direct (Id., p. 67).

Collingsworth identified a photo of the disturbed area, taken 5/1/13, after police started digging (Id., pp. 106; 108-11;114). He described the disturbed area as having been an area between 2-3 feet wide, by 5-6 feet long, and excavated to a depth about 6-10 inches down "until we started hitting rocks"

(Id., pp.186;191-92).

Detective Mark Gartmann testified he interviewed Bucki on 4/26/13. (R.404, p. 133). He said Bucki told him Anita left behind, in the residence, her white, puffy winter coat (Id., p.208).

The State rested (Id., p. 243).

The defense motion to dismiss was denied (R.405, pp. 6-7;12-14).

The defense called various Wisconsin Crime Lab (WCL) technicians to testify regarding their investigations.

Raymond Lenz, a trace evidence technician, said there was no physical evidence examined which either "tied Mr. Bucki to the death of his wife or excluded him" (Id., pp. 20; 22).

DNA Analyst, Bart Naugle, testified he examined swabs submitted for DNA testing and there was no DNA testing which included or excluded the defendant as the killer and there was no evidence of sexual assault (Id., pp. 29; 35-36; 40). He said bleach and cleaning materials will destroy human DNA (Id., pp. 39-40).

WCL Fingerprint Analyst, Anna Sorrenson Schmitz, said she visited the crime scene on 4/30/13 and 5/1/13 to search for physical evidence involving the missing person, including blood stains (Id., p. 46). She indicated there was nothing in her

investigation of the physical evidence which included or excluded the defendant as the killer (Id., pp. 63-64).

The defense informed the court it would not call Dr. Myers as a witness for the defense (Id., p. 88).

On 4/15/14, Bucki testified and described how he had not been working because a work injury prevented him from heavy lifting (R.411, p.10). He told the jury the disturbed area was on his ATV trail and denied the disturbed area was his attempt to dig a grave for Anita's body (Id., pp. 27). He said the only work he did near this area was to fill in a hole with ant hill dirt in 2012 on the ATV trail (Id., p. 28).

On cross-examination, he agreed Anita had made statements she was going to Angie's husband, Jesse, about Bucki's relationship with Angie (Id., p. 88). On re-direct, he said there was no reason for him to kill Anita. (Id., p. 112).

The defense rested (Id., p. 114).

At closing, the State told the jury there were "more than 40 items of circumstantial evidence in this case" which supported the prosecution theory it was Bucki who murdered his wife on 4/25/13 or early 4/26/13 (Id., p. 179). The prosecution described the importance of the canine "alerts" (Id., pp. 201-04; 210-11; 220). The State conceded it did not have physical evidence to support its theory (Id., p. 219) and

argued no one else had a motive to kill Anita (Id., pp. 226-27).

The defense argument focused on the lack of any physical evidence connecting the defendant to his wife's death (Id., p. 230).

The jury returned guilty verdicts the following day on the three counts in the Information (R.406, pp. 3; 5-6).

On 10/20/16, the court granted an evidentiary hearing on Claims I-A, B, C, D, and F in the petition for new trial (R.267) and denied a hearing on Claim I-E (R.414, p. 30)

At the hearing on 7/6/17, the defense submitted testimony from both trial counsel regarding their considerations in failing to present expert canine testimony and performance in challenging the tainted scent evidence and "shallow grave.".

The petitioner submitted into evidence the affidavit (R.277) and testimony of Dr. Myers, who was available to testify at trial. The defense proffered his pre-trial testimony (R.415, pp. 184-185; 188; 316) in support of his opinion, based upon the canine training records and certifications, as well as the contamination evidence, "the alerts were, to a reasonable degree of professional certainty, not reliable to any known degree" (R.415, p.185; R.277, pp. 4-5).

Bucki's son, Clint, testified he came home with his tennis shoes in 2010 after basic training and left them at home

(Id.,168). He said he told his father's lawyers his mother wore his tennis shoes during the 2010 visit home (Id., p. 170-71).

On 8/24/17, Bucki testified. He said he always believed Dr. Myers would testify at trial and always believed it would help him (R.416, pp. 70-71). He explained how he had not worn the tennis shoes used for the scent since "late summer, early fall" of 2012 (Id., pp. 78-79). He described how his post-conviction review of the discovery CDs proved his ATV and its round tires, rather than law enforcement's UTV and its flat tracks, were not present on the path near the disturbed dirt on the day or evening his wife disappeared (Id., pp. 83; 92-92). He identified a summary (R.330) of law enforcement photographs (R.332-33;337-46) corroborating this testimony, along with a photo of the tennis shoes positioned in a common area in his residence (R.328).

The court's decision denying the petition for new trial found trial counsel's performance was not deficient and Bucki was not prejudiced and denied the motion (R.374, pp.21;23).

In the Court of Appeals decision, the court explained that admissibility of expert canine opinion testimony was not, under *Daubert* and §907.02, Stats., conditioned on the evidence "being unassailable." The court stated factors considered under the statute established "something less than

one hundred percent accuracy is acceptable." The court explained the circuit court had made the threshold reliability finding necessary to admit the expert opinion evidence and deficiencies in the theory, methodology or application could be explored on cross-examination and the jury could give the opinion evidence whatever weight it deemed appropriate (Decision, p. 36).

The court also explained trial counsel had not provided ineffective assistance of counsel because it agreed with the circuit court's conclusion, under the circumstances at the time of the decision, "the defense strategy not to call Dr. Meyers was objectively reasonable and constituted sound trial strategy" (Decision, p. 45). The court also stated trial counsel had not performed deficiently in taking the approach of a "group decision" not to call Dr. Meyers to testify at trial, citing Jones v. Barnes, p. 751, which recognized the principle an accused had the "ultimate authority to make certain fundamental decisions regarding the case" (Decision, p. 46).

The court also found Bucki's other claims his counsel had performed deficiently had not been proven (Decision, pp. 46-50).

ARGUMENT

I. REVIEW IS REQUIRED TO DETERMINE WHETHER CADAVER AND TRAILING DOG EVIDENCE, PROFFERED TO PROVE THE GUILT OF THE DEFENDANT, REQUIRES SOME PROBATIVE DEGREE OF CORROBORATION IN ORDER FOR A TRIAL COURT TO BOTH FIND THE EVIDENCE SATISFIES THE THRESHOLD RELIABILITY CRITERIA UNDER §907.02. STATS., AND *DAUBERT,* AND IS NOT OTHERWISE SUBJECT TO EXCLUSION UNDER §904.03, STATS.

In ruling on the admissibility of cadaver and trailing dog evidence, the trial court relied on and applied the factors outlined in §907.02, Stats., and the holding of Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Our Supreme Court recently adopted the *Daubert* standard for assessing the admissibility of expert testimony and found trial courts should act as gatekeepers, rather than fact finders, in ruling on the admissibility of all expert opinions. Seifert v. Balink, 2017 WI 2, ¶¶59-60 372 Wis.2d 525, 888 N.W.2d 316. Additionally, the Court found trial courts may rely on and apply the language of §907.02, Stats., and held it would only overturn a trial court's exercise of discretion in admitting or disallowing an expert opinion if it was erroneous. Id., ¶18.

The *Seifert* court adopted *Daubert's* reliability standard which "entails a preliminary assessment of whether the

reasoning or methodology is scientifically valid." Id., ¶61 (*quoting* Daubert, pp. 592-93). A number of factors may be considered by trial courts in determining the reliability of expert testimony and opinions, which include:

1. Whether the methodology can and has been tested;

2. Whether the technique has been subjected to peer review and publication;

3. The known or potential rate of error of the methodology;

4. Whether the technique has been generally accepted in the scientific community;

5. Whether the expert is proposing to testify about matters growing naturally and directly out of research conducted independent of the litigation, rather than conducted for purposes of testifying;

6. Whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

7. Whether the expert adequately accounted for obvious alternative explanations;

8. Whether the expert is being as careful as she would be in her regular professional work outside her paid litigation consulting; and

9. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Siefert, ¶¶62-63.

The defense moved to preclude[4] admission of all testimony from dog handlers authenticating the canine alerts as evidence of guilt at trial on the grounds (a) it had not previously been admitted in Wisconsin courts; (b) the probative value was substantially outweighed by the danger of unfair prejudice under §904.03, Stats.; and (c) the evidence did not meet the standards of admissibility as outlined in *Daubert*. *See* Florida v. Harris, 568 U.S. 237, n. 2 (2013).[5]

The crux of the defense motion was to argue the functional differences between the canine evidence in the Bucki prosecution and narcotic-sniffing dogs should require something more for determining the reliability of the canine evidence when proffered to convict an individual of a crime, especially when the standards were so unreliably and inconsistently satisfied by the four dogs and their handlers, based on the testimony of both expert witnesses who testified at the *Daubert* hearings.[6] Because Bucki effectively contested

---

[4] "Motion to Suppress All Evidence Pertaining to Cadaver Dogs and Tracking [sic] Dogs" (R.33).

[5] Even in a Fourth Amendment context, Justice Souter warned the "infallible dog" is a "creature of legal fiction." Illinois v. Caballes, 543 U.S. 405, pp. 410-11 (2005) (Souter, dissenting).

[6] FBI agent Stockham testified he could not find these dogs reliable based on the incomplete training records; lack of certification ("Pollie"); concerns about variation in training aids ("Izzy"); and two of the four dogs were not "double-blind tested" ("Izzy";

whether the dogs performed reliably in their controlled settings, the court erroneously failed to weigh whether corroboration was necessary before admitting the evidence. Had it done so, the court would have been compelled to grant the motion to preclude the canine evidence.

II. REVIEW IS REQUIRED TO DETERMINE WHETHER COUNSEL'S SIXTH AMENDMENT RESPONSIBILITY TO EFFECTIVELY REPRESENT HIS CLIENT DURING TRIAL, INCLUDING STRATEGIC DECISIONS WHETHER TO PRESENT EXPERT WITNESS TESTIMONY AT TRIAL, CAN BE ABROGATED UNDER THE HOLDING AND RUBRIC OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND WISCONSIN CASE AUTHORITIES, BY DEFERRING STRATEGIC DECISIONS TO HIS CLIENT.

At the post-conviction hearing, counsel described the various considerations in not calling Dr. Myers to testify at trial, particularly the defense concern the State would have been able to rebut his testimony with testimony from FBI Agent Stockham, who had testified for the State in the pre-trial hearings.

In terms of prejudice, the failure to present Dr. Myers' testimony resulted in an unreliable outcome, regardless

---

"Pollie")(R.386, p. 11). Indeed, the State's post-hearing brief, filed 1/2/18, argues the training records were "not totally deficient," which posits a standard arguably below the reliability standard for admission of evidence under §907.02, Stats.(R.368, p.11).

whether the State presented any testimony from Stockham. *See* Strickland, p. 687 (defendant must establish counsel's deficient performance prejudiced him and resulted in an unreliable or fundamentally unfair outcome in the proceeding).

The reason counsel's "strategy" in not presenting any expert canine testimony was deficient and prejudicial was the complete inability of the defense to forensically challenge the reliability of the State's canine evidence. (R. 415, pp. 15-16). Counsel's concern admission of this canine evidence meant the "defense was in trouble," also meant counsel was required to redress this concern with testimony from Dr. Myers (Id., p. 85).

Defense counsels' "group" decision to ultimately transfer the decision whether to call Dr. Myers to testify to their client cannot be characterized as a reasonable "strategy," or even be presumed reasonable, as otherwise required by Strickland, p. 687. (R.415, pp. 28-29; 31-32; 100-01). The decision by trial counsel to have their client decide whether to have Dr. Myers testify at trial was made even though Bucki had no involvement in investigating the canine evidence or in preparation of any defense to this evidence at trial. Attorney Schuster's attempt to rationalize this deficient performance by explaining Dr. Myers' testimony "may have been unnecessary" (given the lack

of corroborating physical evidence) was deficient (Id., p. 29).[7] It was deficient because counsel was aware the "process" of canine detection does not necessarily require corroboration by physical evidence for any alert (except in the testing process). This is why counsel was aware admission of the canine evidence meant the "defense was in trouble" (Id., p. 85).

Once counsel and Bucki determined the general defense objective was, as here, acquittal, counsel has the control and responsibility to make all trial decisions in seeking acquittal. Strickland v. Washington, 466 U.S. 668 (1984). *See* State v. Eckhart, 203 Wis.2d 497, 510, 533 N.W.2d 539 (Ct. App. 1996); Jones v. Barnes, 463 U.S. 745, 751 (1983) (*citing* Wainwright v. Sykes, 433 U.S. 93 (1997)); State v. Kimbrough, 2001 WI App 138, ¶32, 246 Wis.2d 648, 630 N.W.2d 752 (counsel not IAC in failing to seek a lesser-included verdict because the evidence in support of acquittal was "not weak").

Counsel cannot reasonably assign the responsibility of the "ultimate say" to their client in the absence of their client's relevant personal or vocational experiences, or education, and

[7] Post-conviction counsel has been unable to find a state or federal case which requires the prophylactic "presumption" a trial strategy was reasonable, as required by *Strickland*, when that strategy involved relegating their decision whether to present expert testimony at trial to the defendant, thereby insulating this "decision" against any Sixth Amendment evaluation of counsel's performance.

when the client has not insisted on having some control over or been involved in any other strategic decisions. Counsel could not even recall why Bucki agreed not to present Dr. Myers's testimony at trial (Id., pp. 76-77; 102; 107). Instead, Bucki testified at the post-conviction hearing he had no real involvement in any of the pre-trial canine defense strategy, thought Dr. Myers would testify, and offered no particular expertise or knowledge regarding canines which would have made counsel believe Bucki's involvement, as a part of a "team" strategy, would assist the defense (R.416, pp. 70-71). Contrary to the defendant's own perception expert witness testimony at the *Daubert* hearing was helpful, his attorney's ambivalent perception of that testimony made him "flabbergasted" (Id., p. 76).

In summary, a forensic challenge was necessary to require the jury's evaluation of the canine evidence with something more than their own endearing prior experiences with their canines.[8]

III. REVIEW IS REQUIRED BECAUSE THE COURT'S FINDINGS DENYING BUCKI'S OTHER SPECIFIC ALLEGATIONS OF DEFICIENT PERFORMANCE UNDER THE SIXTH AMENDMENT ARE IN CONFLICT WITH THE HOLDING IN STRICKLAND V.

[8] *See* Illinois v. Caballes, n. 5, *infra*.

WASHINGTON, 466 U.S. 668 (1984)

Bucki asserts the scent used was doomed, *a priori*, to be contaminated when the State negligently failed to employ an item of scent singular to the canine "quarry," such as clothing worn only by a defendant. State v. Barger, 612 S.W.2d 485 (Tenn. Crim. App. 1980) (bloodhound evidence, from sniffing defendant's clothes, properly admitted). It was doomed because the "live scent" article from the tennis shoe was contaminated by the open presence of the tennis shoes in the Bucki household. People v. Willis, 115 Cal. App.2d 379 (Cal. Ct. App. 2004) (scent evidence obtained by the use of scent transfer unit not admissible without proof correct procedures employed).

The haphazard packaging and "scent transfer" from the tennis shoes, following their removal from the Bucki residence, also created the reality the tennis shoe scent would be additionally cross-contaminated by scents from other evidence seized, including personal items seized from the house belonging to Anita. Because, as Dr. Myers testified, we don't know what combination of scents dogs smell when they alert, the jury should have heard about the proper procedures for evidence collection, transfer and storage, so the jury would have been able to evaluate whether the collection, transfer and

storage of this evidence contributed to the cross-contamination of Anita's scent, as it existed on the highway and in the marsh.[9]

Counsel's failure to present testimony from Clint on cross-examination (rather than recross-examination) that his mother also wore the tennis shoes was deficient. This performance prejudiced Bucki because counsel was then unable to argue how it was the presence of Anita's scent which accounted for why Pollie "went that far" into the ditch (toward Anita's body) in Taylor County before allegedly "alerting" to Bucki's scent. The court's credibility finding was clearly erroneous because there was no reasonable explanation for counsel's belated attempt to elicit exculpatory contamination evidence from the witness unless counsel had been previously informed by the witness about the evidence (Decision, pp. 47-48).

Clint Bucki's post-conviction testimony and affidavit (Exhibit B to Petition) established his mother had access to, and use of, Clint's tennis shoes after he left them at home in September, 2010. Both the affidavit and post-conviction

[9] The court denied the post-conviction discovery motion seeking evidence regarding the storage procedures and potential contamination of the tennis shoes prior to their use in the marsh (R.412, p. 22).

testimony establish Clint saw his mother wearing the shoes (R.415, pp. 165-66; 168). Clint said he believed he shared this information pre-trial with his father's attorneys (Id., p. 166), although Attorney Lex testified otherwise.

At the post-conviction hearing, counsel testified there was no need to present any specific challenge to the prosecution argument the canine "alert" on the "disturbed dirt" on the ATV trail established Bucki's attempt to bury his wife's body on his property after she was killed. Counsel characterized this evidence as "insignificant" and only a "red herring," even though the State's case included photos depicting a canine alert (pawprint) on the disturbed dirt (R.415, p. 43-44; 46).

Bucki asserts counsel were required to attack this theory with discovery photos providing indisputable evidence of law enforcement's UTV "flat tracks" at the area of the disturbed dirt, admitted in the post-conviction hearing (R. 327; 330; 332-333; 337-346). These photos, along with the testimony from DOJ Special Agent Pendergast, who explained any evidence the ATV trail was "driven on" leading toward the disturbed area was only from law enforcement UTV vehicles, and not from Bucki's ATV, would have established beyond a reasonable doubt Bucki's ATV did not carry Anita's body on

the ATV trail to the area of the disturbed earth.

Correspondingly, counsel would then have been able to argue to the jury how Izzy's alert at the disturbed dirt was further unreliable because, as Bucki's post-conviction testimony developed, there was no physical evidence Bucki's "totally different" and "round [ATV] tires" had been used to transport his wife's body up the hill toward the disturbed dirt (R.416, pp. 86-87; 92-93). [10]

CONCLUSION

For the reasons stated above, this Court should grant review.

Dated at Wauwatosa, Wisconsin, this 1st day of July, 2020.

Respectfully submitted,

REBHOLZ & AUBERRY

JAMES REBHOLZ
Attorney for Mark J. Bucki
State Bar No. 1012144

[10] Indeed, it was more likely from the evidence presented, regarding this trail between 4/26/13 and 4/30/13, it was law enforcement vehicles which had the best opportunity to have contributed to the creation of the "disturbed dirt" during that time.

P.O. ADDRESS:
1414 Underwood Ave, Suite 400
Wauwatosa, WI 53212
(414) 479-9130
(414) 479-9131 (facsimile)
jrebholz2001@sbcglobal.net

CERTIFICATION

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

> Proportional Arial 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 petition is 7078 words.

Dated: July 1, 2020

JAMES REBHOLZ

E-FILING CERTIFICATION

Pursuant to §809.19(12)(f), Stats., I hereby certify the text of the electronic copy of the Petition for Review is identical to the text of the paper copy of the petition filed.

Dated at Wauwatosa, Wisconsin, this 1st day of July, 2020.

JAMES REBHOLZ

APPENDIX TABLE OF CONTENTS