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STATE OF WISCONSIN
COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2018AP001963-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROSALEE M. TREMAINE,

Defendant-Appellant,

BRIEF OF PLAINTIFF- RESPONDENT

ON APPEAL FROM A CONVICTION IN THE CIRCUIT COURT
FOR COLUMBIA COUNTY,
THE HONORABLE W. ANDREW VOIGT PRESIDING

Respectfully submitted,

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Plaintiff-Respondent
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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	3
STATEMENT OF THE ISSUES	4
TRIAL COURT'S ANSWER	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
I. FACTS	4
II. QUESTION PRESENTED	5
III. TRIAL COURT'S FINDINGS THAT ATTORNEY HOLTZ WAS NOT INEFFECTIVE	5
IV. ARGUMENT	6
V. CONCLUSION	8

TABLE OF AUTHORITIES

<u>CASE</u>	Page
<i>State v. Popke</i> , 317 Wis.2d 118; 765 N.W.2d 569 (2009).	5
<i>Strickland v. Washington</i> , 466 U.S. 668, 687 (1984)	6
<i>State v. Johnson</i> , 153 Wis.2d 121,127 (1990)	7,8

STATEMENT OF THE ISSUES

The Appellant claims that there are four issues presented. The Respondent asserts that the only issue properly presented to this court is whether the defense counsel provide ineffective assistance of counsel to the defendant during the motion to suppress?

TRIAL COURT'S ANSWER

The Trial Court found that Attorney Holtz's performance did not meet the criteria for ineffective assistance of counsel.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent does not request the opportunity to present oral argument in this case.

The Respondent does not request that this case be published because the Respondent believes that this case will be limited to its own facts and have little or no precedential value to future cases.

I. FACTS

The facts in the case as recited in the appellant's brief are not in dispute.

II. QUESTION PRESENTED

The only question that is relevant for this appeal is whether the trial court erred in finding that Attorney Holtz's performance at the motion to suppress constituted ineffective assistance of counsel.

III. THE TRIAL COURT'S FINDING THAT ATTORNEY HOLTZ'S PERFORMANCE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT CLEARLY ERRONEOUS.

The Respondent believes that the Standard of Review for this Court on the question presented is that it is a constitutional question of law that this Court will review *de novo*. A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review *de novo*. *Id.*, ¶¶ 18–19. *State v. Popke*, 2009 WI 37, ¶¶ 9-10, 317 Wis. 2d 118, 126, 765 N.W.2d 569, 573.

The Trial Court held Attorney Holtz was not ineffective stating:

"I don't think the magic is in number in Arias. The magic is the delay had to be unreasonable, and Mr. Holtz asked all kinds of questions trying to ascertain that...around the timing of how all this happened, in what order, and who did what, and who arrived when, I just don't think that under the circumstances that I could find that that was definitionally ineffective at this point." (R. 77:22).

IV. ARGUMENT

Ineffective assistance of counsel requires the attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions exercising reasonable professional judgment. *Id.* at 689.

"The *Strickland* Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. The first test requires the defendant to show that his counsel's performance was deficient. 'This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the 'Sixth Amendment.' *Id.* at 687. Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. 'This requires showing that counsel's errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable.'
Id." *State v. Johnson*, 153 Wis.2d 121, 127 (1990).

The Appellant has not overcome the strong presumption that Attorney Holtz acted reasonably within professional norms.

The Appellant has asserted that her counsel, Attorney Holtz, was ineffective because Attorney Holtz failed to establish the precise length of the extension of the traffic stop after the citations had been issued to allow for the K-9 officer to conduct a sniff of the vehicle.

At the *Machner* hearing, Attorney Holtz was asked one question relevant to the issue presented by appellate counsel. Appellate counsel asked Attorney Holtz whether or not Attorney Holtz had a strategic reason for not eliciting evidence at the suppression motion regarding the timing of the dog sniff in relation to the issuance of the written warnings. (R. 77:5-6). Attorney Holtz responded that he was not aware that such information was not elicited at the hearing and would not know why it would not have been. (R. 77:6).

Attorney Holtz also testified that he did not remember much about the case. (R. 77:6). In fact, even after reviewing the transcript of the suppression motion, Attorney Holtz could not accurately recall the suppression hearing testimony that he elicited regarding whether the K-9 officer was even present when the warnings were being issued. (R. 77:10). The suppression motion transcript reveals that Attorney Holtz asked Officer Clark if the driver had the warnings

in hand prior to the K-9 search of the vehicle. (R. 67:25). Officer Clark responded that he did. (R. 67:25).

Attorney Holtz was not the only one asking questions at the motion hearing. Prior to Attorney Holtz asking questions of Officer Clark, Officer Clark was questioned by the prosecutor. Attorney Holtz would have been present when Officer Clark testified that he had not yet completed the written warnings when the K-9 officer, Deputy Stroik, arrived. (R. 67:18). Officer Clark also testified the *Machner* hearing and clarified that he would not have been able to quantify the amount of time that passed between when he issued the warnings and when the K-9 alerted on the vehicle. (R. 77:27-28). Officer Clark also testified that after he issued the warnings to the driver, Officer Clark told the driver that Deputy Stroik was going to do his check (dog sniff) and then Deputy Stroik was allowed to do what he was going to do. (R. 77:28).

At the *Machner* hearing, the trial court made a finding that Attorney Holtz was not ineffective for not asking a question to which there was no answer. (R. 77:22).

V. CONCLUSION

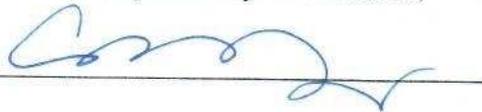
State v. Johnson, 153 Wis. 2d 121 (1990), requires that "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's

perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *Id.* at 127. Given the testimony of Attorney Holtz, at the *Machner* hearing, it is clear that Attorney Holtz acted within professional norms. The appellant claims that Attorney Holtz was ineffective for not getting the exact times which were not available to anyone. The court disagreed and refused to require Attorney Holtz to extract information that simply did not exist. (R. 77:22).

Given the facts of this case, the Trial Court was absolutely correct in its ruling that the officer did not unreasonably extend the traffic stop and that Attorney Holtz was not ineffective. Because the Trial Court was correct in its ruling, the Respondent asks that this Court uphold the Trial Court’s decision and deny the appeal.

Dated at Portage, Wisconsin, August 5, 2019

Respectfully submitted,



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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a Proportional Serif Font. The length of this brief is 1531 words.

Dated this 5th day of August, 2019.

Signed,

A handwritten signature in blue ink, appearing to read 'Crystal N. Long', written over a horizontal line.

Crystal N. Long
Attorney

**CERTIFICATE OF COMPLIANCE WITH RULE
809.19(2)**

ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2018AP1963, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 5th day of August, 2019.

Signed:



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