State of Wisconsin
Court of Appeals
District IV

Appeal No. 2018 AP 1963 - CR
Columbia County Case No. 2012 CM 660

State of Wisconsin,
Plaintiff-Respondent,

v.

Rosalee M. Tremaine,
Defendant-Appellant.

Reply Brief of Defendant-Appellant

On appeal from a judgment of the Columbia County Circuit Court,
The Honorable W. Andrew Voigt, presiding.

Brandon Kuhl
State Bar No. 1074262

Kuhl Law, LLC
PO Box 5267
Madison Wisconsin 53705-0267
608.501.1001

Attorney for Defendant-Appellant

Table of Contents

Argument

I. Arias

This appeal arose out of the failure of trial counsel to elicit sufficient evidence at a suppression hearing to know whether police unconstitutionally prolonged the stop under *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748.

At the post-conviction motion hearing, one of two things needed to happen for the conviction to remain constitutionally sound. First, trial counsel could have offered some rational, strategic reason for failing to elicit testimony regarding the length of the prolongation of the stop after the issuance of the citations. Second, the State could have elicited that evidence to show that trial counsel's failure to do so was not prejudicial. Neither happened.

Instead, the trial court found that the police never preserved evidence sufficient to show whether the stop was constitutional. Therefore, the reasoning goes, trial counsel could not have elicited testimony about the length of time the stop was prolonged, as police had no knowledge upon which to rest their testimony. As the State puts it in their brief, "the trial court made a finding that Attorney Holtz was not ineffective for not asking a question to which there was no answer." (Resp. Br. 8.)

However, it was never trial counsel's duty to show simply how long the stop was prolonged but, instead, to highlight that the

State was unable to do so. After all, it is the State's burden to prove the reasonableness of seizures at suppression hearings. It would have sufficed for trial counsel to put the State and circuit court on notice that this was a relevant issue, making clear that the State could not meet its burden.

The circuit court's decision suggests that, when ineffective assistance of counsel is raised regarding suppression issues, the State and police simply can claim ignorance. This creates a perverse incentive for the State to be less than ideally forthcoming and renders appellate challenge on this issue effectively meaningless.

The State warns against "hindsight," (Resp. Br. 8.) but it is unclear how to remedy ineffective assistance without looking back at the record at all. Trial counsel should have been aware of applicable law at the time. He acknowledged having lacked a strategic reason not to raise this issue, and the court should have found that this to be ineffective.

II. Caballes and Rodriguez

Further, the State's brief never addresses our argument about application of *Illinois v. Caballes*, 543 U. S. 405 (2005) or retroactive application of *Rodriguez v. US*, 135 S.Ct. 1609 (2015). This failure to respond effectively concedes the correctness of our position that *Caballes* and *Rodriguez* were applicable and controlling.

As such, no extension of the stop was constitutionally permissible, and all evidence arising from that extension should have been suppressed.

Conclusion

Ultimately, either *Arias* or *Caballes* and *Rodriguez* apply. In either case, trial counsel failed to raise the issue or elicit sufficient testimony to argue it. Had he done so, the State would not have been able to satisfy its burden, resulting in the evidence being suppressed. Prejudice is shown by the fact that, without that evidence, the State would have lacked sufficient evidence to proceed to trial, and Ms. Tremaine never would have entered her "no contest" plea.

We ask again that this court vacate the conviction and return the file to the circuit court for dismissal.

Dated this 19th day of September 2019.

Respectfully submitted,

Brandon Kuhl
State Bar No. 1074262

Kuhl Law, LLC
PO Box 5267
Madison WI 53705-0267

608.501.1001
brandon@kuhl-law.com

Attorney for Defendant-Appellant

Rule 809.19(8)(d) Certificate

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 556 words.

Dated this 19th day of September 2019.

Brandon Kuhl

State Bar No. 1074262

Rule 809.19(12)(f) Certificate

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of February 2019.

Brandon Kuhl

State Bar No. 1074262

Certificate of Mailing

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that I caused ten copies of the Brief and Appendix of Defendant-Appellant to be mailed by Priority Mail to the Wisconsin Court of Appeals, PO Box 1688, Madison WI 53701-1688, three copies to the State by Attorney Crystal Nobbe-Long at the Columbia County District Attorney's Office, 400 De Witt Street, PO Box 638, Portage WI 53901-0638.

Dated this 19th day of September 2019.

Brandon Kuhl
State Bar No. 1074262

Statement on Oral Argument and Publication

Neither oral argument nor publication is warranted in this case.

The brief fully presents and develops the issues on appeal, making oral argument unnecessary. Wis. Stat. (Rule) 809.22.(2)(b).