RECEIVED
04-05-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

Wisconsin Court of Appeals
Third District

---

State of Wisconsin, Docket No. 2018-AP-2410-CR

*Plaintiff-Respondent*,

v.

Jacqueline A. Ziriax-Anderson,

*Defendant-Appellant*.

---

**APPELLANT'S BRIEF AND APPENDIX**

---

Appeal from the circuit court for Saint Croix County Circuit Court, the Honorable R. Michael Waterman, presiding.

Kirk M. Anderson (#1078190)
Anderson Law Firm, PLLC
5775 Wayzata Blvd., Suite 700
Minneapolis, MN 55416
(952) 582-2904

*Attorney for Appellant*

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes and Rules**

## STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred as a matter of law in determining that the stop of Appellant's vehicle was lawful?

The circuit court held: Law enforcement had a reasonable suspicion to justify the stop of Appellant's vehicle.

II. Whether the Circuit Court erred in denying Appellant's motion to withdraw her No Contest plea when her counsel did not inform her that the arresting officer may not be available to testify at Trial?

The circuit court held: Appellant's motion to withdraw her plea was denied even though it found her counsel's performance deficient.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant is requesting oral argument in this matter. Further, the decision may justify publication in that it does involve Appellant's constitutional right to be free from warrantless searches and seizures and her right to competent representation.

## STATEMENT OF THE CASE

This is an appeal from an Order denying Appellant's motion to suppress evidence, [Transcript dated July 11, 2017 at p. 30-31], and, alternatively, a motion to withdraw her No Contest plea, [Order dated November 30, 2018; Appx. at A-22], in St. Croix County Circuit Court, Judge R. Michael Waterman. presiding.

Following an evidentiary hearing, the circuit court concluded that law enforcement had reasonable suspicion of criminal activity to justify the stop of Appellant's vehicle and her subsequent arrest. [Transcript dated July 11, 2017 at p. 30-31; Appx. A-12-13].

On April 3, 2018, Appellant entered a No Contest plea pursuant to a plea agreement. On April 18, 2018, Appellant filed a Notice of Intent to Pursue Postconviction/Post-disposition Relief.

On July 19, 2018, Appellant brought a motion to withdraw her plea of No Contest based upon a claim of Ineffective Assistance of Counsel. In an Order dated July 26, 2018, the circuit court found that Appellant had made a prima facie showing of Ineffective Assistance of Counsel and granted a Nelson/Bently hearing. [Decision and Order at Appx. A-2].

On October 11, 2018, the Nelson/Bentley hearing was heard by the circuit court. Following the hearing, the parties submitted written arguments to the circuit court.

On November 30, 2018, the circuit court denied Appellant's motion to withdraw her plea. [Transcript dated November 30, 2018; Order at Appx. A-10]. This appeal follows.

**STATEMENT OF THE FACTS**

On January 14, 2017, Officer Daniel Jents, formerly of the Hudson Police Department, was on patrol in Hudson, WI. On that date, at approximately 2:25 a.m., Off. Jents saw a Black Sedan approach Vine Street and Second Street in Hudson, WI. It was the early morning hours and the roads were covered in snow.

Off. Jents testified that he was on Vine Street facing West. [Transcript dated July 11, 2017 at p. 9]. He saw a Black Sedan facing East, towards him, on Vine Street. [Transcript dated July 11, 2017 at p. 9]. The traffic lights at the time on Vine Street were flashing red (which meant an oncoming vehicle must come to a complete stop), and the lights on Second Street were flashing yellow (which means an oncoming vehicle has the right of way but should proceed with caution). [Transcript dated July 11, 2017 at p. 5].

While stopped, Off. Jents saw a semi-tractor approaching the intersection on Second Street. [Transcript dated July 11, 2017 at p. 5]. Off. Jents testified that he saw the Black Sedan come to a stop and then attempt to enter the intersection. [Transcript dated July 11, 2017 at p. 11-12]. The semi had to slow down so that the Black Sedan could continue through the intersection. [Transcript dated July 11, 2017 at p. 14]. There was not a collision.

Off. Jents drove around the block and encountered the Black Sedan again at the intersection of Vine Street and Third Street. Off. Jents testified that he saw the Sedan cross that intersection and it appeared to drift into the oncoming traffic lane. [Transcript dated July 11, 2017 at p. 21-22].

Off. Jents testified the Sedan crossed the snow (that apparently covered the centerline), and then drifted back into her lane of travel. [Transcript dated July 11, 2017 at p. 22, 26]. It was not clear if the Sedan actually crossed the center line because the roads were covered with snow. [Transcript dated July 11, 2017 at p. 22, 26].

Off. Jents followed the Sedan for a few more blocks and then initiated a traffic stop at Sixth Street and Vine Street. [Transcript dated July 11, 2017 at p. 19-21]. Off. Jents testified that he did not see any other traffic

offenses prior to initiating the stop of the vehicle. [Transcript dated July 11, 2017 at p. 19-20]. After initiating the stop, Off. Jents was able to determine that Appellant was the driver of the Black Sedan.

Following the stop, Appellant was eventually arrested and charged with OWI-2nd. As a result of this charge, Defendant retained the services of Attorney Katie Bosworth, to represent her in this matter. On July 11, 2017, Appellant brought a motion to suppress and dismiss. Defendant argued that Off. Jents did not have a lawful basis to stop her vehicle and/or that he did not have probable cause to arrest her for OWI.

The circuit court ultimately denied the motion finding that Off. Jents had a reasonable basis to conduct a stop based upon his testimony that he observed Appellant's vehicle cross the centerline (the snow). The circuit court's order was based almost entirely on Off. Jents testimony, therefore his credibility was clearly at issue. Following the hearing, the matter was set for Trial in December 2017.

On September 27, 2017, Off. Jents was involved in an incident involving his department issued handgun and was ordered to undergo a psychological Fitness for Duty Evaluation. [Letter dated October 5, 2017 at Appx. A-5].

Less than two (2) months later, Off. Jents was forced to resign in lieu of termination. [Separation Agreement at Appx. A-6]. The results of Off. Jents evaluation have not been disclosed.

On November 29, 2017, the State, by and through DA Michael Nieskes, requested that the Trial be continued, which was granted. [Letter dated November 29, 2017 at Appx. A-1]. It is unknown if the State was aware that Off. Jents had already resigned in lieu of termination prior to submitting this request. The Trial was then scheduled for April 11, 2018.

The parties' appeared for a Final Pre-Trial hearing on March 28, 2018. ADA Megan Kelly appeared on behalf of the State and made a new offer to Defendant. [Transcript dated October 11, 2018 at p. 10]. ADA Kelly did not specify at that time the reasons for the amended offer. Ms. Bosworth asked for a short continuance so Appellant could consider the plea offer. [Affidavit of Katie Bosworth at Appx. A-8]. Although reluctant, Appellant eventually agreed to accept the amended offer. [Transcript dated October 11, 2018 at p. 12].

The parties appeared on April 3, 2018, for the Final Pre-Trial. Prior to the hearing, Ms. Bosworth and Appellant

went through a Plea Questionnaire that outlined Appellant's Trial rights and the proposed plea agreement.

Prior to the hearing, Judge Waterman called ADA Kelly and Ms. Bosworth into his chambers to discuss how the hearing was going to proceed. During this meeting, the attorneys informed Judge Waterman of the plea agreement and ADA Kelly disclosed the reasons for the amended offer. This was the first time Ms. Bosworth had been informed by the State that Off. Jents may not be available to testify at Trial. [Transcript dated October 11, 2018 at p. 15].

After meeting with Judge Waterman, the attorneys went back into the courtroom and Judge Waterman started the hearing a very short time later. It is undisputed that Ms. Bosworth did not convey to Appellant that Off. Jents may not be available to testify at Trial. [Affidavit of Katie J. Bosworth at Appx. A-9; Transcript dated October 11, 2018 at p. 13-14].

During the hearing, but after Appellant had entered her plea, ADA Kelly made a comment that the State was having "witness issues." [Transcript dated April 3, 2018 at p. 10]. This was the first time Appellant had any indication that the State was having witness issues. [Transcript dated October 11, 2018 at p. 14-15]. Had ADA

Kelly not said anything Appellant likely would still be unaware that Off. Jents may not be able to testify.

Following the hearing, Appellant inquired to Ms. Bosworth about ADA Kelly's statement. Ms. Bosworth told Appellant what had been discussed in chambers and Appellant was livid. [Transcript dated October 11, 2018 at p. 16, 22]. After the hearing, Appellant did some investigating online and was able to determine that Off. Jents was forced to resign in lieu of termination because he was having mental health issues. [Transcript dated October 11, 2018 at p. 16-17].

Appellant filed a Notice of Intent to seek Postconviction Relief. On October 11, 2018, the circuit court held an evidentiary hearing on Appellant's motion.

On November 30, 2018, the parties' appeared for the circuit court's decision on her motion to withdraw. Judge Waterman ruled that Appellant's trial counsel had been deficient because she did not inform Appellant of the information that she had received about Off. Jents prior to going through with the plea. [Transcript dated November 30, 2018 at p. 6-7]. However, Judge Waterman denied the motion because he found that Appellant was not prejudiced by the deficiency in her representation. [Transcript dated November 30, 2018 at p. 7-9]. This appeal follows.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED WHEN IT DETERMINED LAW ENFORCEMENT HAD A REASONABLE SUSPICION TO JUSTIFY THE STOP OF APPELLANT'S VEHICLE.

A. Standard of Review.

When reviewing a motion to suppress, this Court will uphold the circuit court's findings of fact unless they are clearly erroneous. State v. Eckert, 203 Wis. 2d 497, 528 N.W.2d 539, 547 (Ct. App. 1996). However, application of constitutional principles to the facts as found by the circuit court is a question of law that this Court reviews de novo. State v. Patricia A.P., 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct.App. 1995).

B. Applicable Law.

Both the United States Constitution and the Wisconsin Constitution guarantee the "right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. Art. I, Sect. 11.

To execute a valid investigatory stop, Terry and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. Terry v. Ohio, 392 U.S. 1, 30 (1968); State v. Richardson, 156 Wis.2d 128, 139, 456 N.W.2d 830 (1990); Wis. Stat. §

968.24. Such reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21.

These facts must be judged against an "objective standard: would the facts available to the officer at the moment of the seizure. . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, 392 U.S. at 21-22. This test applies to the stopping of a vehicle and detention of its occupants. See e.g., U.S. v. Hensley, 469 U.S. 221, 226 (1985).

The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of the circumstances:

> It is a commonsense question, which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.

State v. Jackson, 147 Wis.2d 824, 831, 434 N.W.2d 386 (1989).

Law enforcement may make reasonable inferences from articulable facts they cite that unlawful conduct is occurring, but the inferences must be reasonable ones.

State v. Young, 212 Wis.2d 416, 569 N.W.2d 84, 91 (Ct. App. 1997).

Generally, warrantless searches are per se unreasonable. New York v. Quarles, 467 U.S. 649, 653 n.3 (1984); State v. Sanders, 311 Wis.2d 257, 267-68, 752 N.W.2d 713, 718 (2008). The burden of proof is on the state to establish an exception to the search warrant requirement. Sanders, 311 Wis.2d at 268, 752 N.W.2d at 718.

C. Analysis.

In this case, as will be more fully argued below, the circuit court erred in determining that the arresting officer had reasonable suspicion to justify the stop of Appellant's vehicle.

In this case, the officer testified that the basis for the stop was either the encounter at the intersection and/or the apparent lane violation. The circuit court held that the stop was justified because Appellant did not yield to the semi and because she veered over the center line. [Transcript dated July 11, 2017].

As an initial point, Off. Jents was the only witness at the motion hearing and his testimony was essentially what the circuit court relied upon in making its decision. Thus, his credibility and competency was clearly at issue.

Off. Jents testified that the semi was forced to stop in the intersection in order to avoid a collision with Appellant's vehicle. [Transcript dated July 11, 2017 at p. 12]. However, in Off. Jents' police report he only said that the semi slowed down so Appellant could proceed through the intersection. [Transcript dated July 11, 2017 at p. 14]. This was not a traffic infraction therefore it cannot serve as a basis for the stop.

Next, Off. Jents testified that observed Appellant's vehicle drift into the other lane of traffic between Third and Fourth Street. [Transcript dated July 11, 2017 at p. 7]. Off. Jents testified that he knew the vehicle crossed the center line because the vehicle had gone over the snow the was covering the center line. However, the roads were completely covered in snow so he could not have seen if the vehicle actually cross the center line.

Appellant's position was that Off. Jents could not have made this determination because the entire road was covered with snow. Appellant's counsel pleaded with the circuit court to view more of the video from the evening in question so that it could see the condition of the road at the time of the incident. [Transcript dated July 11, 2017 at p. 30]. The circuit court refused and based its decision entirely on the testimony presented.

Off. Jents' testimony was inconsistent with his reports which were prepared within a couple of days from the incident. Further, Off. Jents testimony that he saw Appellant's vehicle cross the center line of the roadway was not credible because the roads were covered in snow. If Appellant did not actually cross the center line, then there was not a basis for the stop at all. If the stop was unlawful, then any evidence obtained as a result of the stop must be suppressed.

Additionally, as will be more fully stated below, Off. Jents' credibility and perhaps his competency to testify at the motion hearing is seriously in question based upon the fact that he was having mental health issues less than three (3) months after the hearing.

For these reasons, the circuit court erred in determining Off. Jents has a reasonable suspicion to justify the stop of Appellant's vehicle.

## II. APPELLANT'S MOTION TO WITHDRAW HER PLEA OF NO CONTEST SHOULD HAVE BEEN GRANTED BECAUSE IT WAS NOT KNOWINGLY AND VOLUNTARILY MADE.

### A. Standard of Review.

Ineffective assistance claims present mixed questions of fact and law. State v. Balliette, 336 Wis.2d 358, 805 N.W.2d 334 (2011). The circuit court's factual findings will be upheld "unless shown to be clearly erroneous," but

"the ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law." Id.

B. Applicable Law.

Both the United States and Wisconsin Constitutions' guarantee individuals accused of a crime the right to counsel. U.S. Const. amend VI; Wis. Const. Art. I § 7. The right to effective assistance of counsel is integral to the Sixth Amendment right to a fair trial under the Constitution of the United States. U.S. Const. amend. VI.

The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (quoting United States v. Wade, 388 U.S. 218, 227-28 (1967)). The United States Supreme Court has held that 'critical' stages includes plea negotiations. Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399, 1406 (2012).

A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of "manifest injustice" by clear and convincing evidence. State v. Rock, 92 Wis.2d 554, 558-59, 285 N.W.2d 739 (1979). Wisconsin courts have recognized that the "manifest injustice" test is met if the defendant was denied the effective assistance of counsel. Rock, 92 Wis.2d at 558-59, 285 N.W.2d 739;

State v. Reppin, 35 Wis.2d 377, 385-86, 151 N.W.2d 9 (1967) (adopting what is now § 14-2.1 of the American Bar Association's *Standards for Criminal Justice* (2d ed. supp.1986)). See also State v. Washington, 176 Wis.2d 205, 213-14, 500 N.W.2d 331 (Ct.App. 1993).

The United States Supreme Court held that the two-part test set forth under Strickland v. Washington, 466 U.S. 668 (1984), applies to challenges to guilty pleas based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370 (1985). Under Strickland, a defendant must show that counsel's performance was both deficient and prejudicial. 466 U.S. at 687; State v. Pitsch, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). In order to satisfy the prejudice prong of the Strickland test, the defendant seeking to withdraw his or her plea must allege facts to show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59, 106 S.Ct. at 370 (footnote omitted).

C. Analysis.

In this case, Appellant brought a motion to withdraw her plea based on the fact that her attorney did not disclose to her that Off. Jents may not be available to

testify at trial nor did she request a continuance to investigate the reasons as to why Off. Jents may not be available to testify.

Had the State disclosed this evidence earlier, Appellant would have had the time to investigate whether Off. Jents was physically able to testify at trial and/or whether he was competent to testify. This would have given Appellant the ability to make an informed plea.

Appellant never raised a discovery violation as a basis to withdraw her plea. However, Appellant is concerned the State did not disclose the fact that its only witness may not have the mental capacity to testify for several months. Indeed, the State requested a continuance of the Trial (without disclosing Off. Jents' issues), in November 2017. Certainly a witnesses mental health is relevant to their credibility.

Nonetheless, the State ultimately did disclose this evidence to Appellant. However, Appellant's attorney did not request a continuance so she could investigate this issue. And, perhaps most importantly, Ms. Bosworth did not even tell Appellant about this learned fact. She simply proceeded to go through with the plea. Had ADA Kelly not said anything during the hearing, Appellant may not have

ever learned of this. Thus, Appellant based her motion on Ineffective Assistance of Counsel.

The circuit court found that Appellant's attorney was deficient for failing to inform Appellant of this newly learned fact. [Transcript dated November 30, 2018, Appd. At A-19]. Thus, the first prong is satisfied.

However, the circuit court denied the motion finding that Appellant was not prejudiced. [Transcript dated November 30, 2018, Appx. at A-20]. This was clearly erroneous because Appellant testified that had she known of this information, she would not have entered a No Contest plea. [Transcript dated October 11, 2018 at p. 16]. Thus, her plea was not knowingly and voluntarily made.

At the very least, Appellant was prejudiced because she was not given to opportunity to see if Off. Jents was going to be able to testify. After all, just because the State represented that Off. Jents was available to testify, it was unknown whether he actually was and/or whether he competent to testify without knowing his mental health status. This is a fact the circuit court overlooked in its' decision.

Further, Appellant testified that she wanted to appeal the circuit court's decision to deny her motion to suppress. That hearing was conducted on July 11, 2017, and

the incident that led to Off. Jents resignation occurred in September 2017. Off. Jents was the only witness at that hearing and his credibility and competency to testify were clearly relevant. Considering there was only three (3) months between Off. Jents' testimony and the incident, there is a legitimate question as to whether he was competent to testify at that hearing. At the very least, his credibility could have been challenged based on his mental health issues.

As stated above, if Defendant's motion to withdraw had been granted, she would have brought a further motion to obtain Off. Jents' medical records and incident report from the September 2017 incident that led to his resignation. Appellant may have a basis to reopen her motion to suppress.

D. Conclusion.

For the reasons stated above, Appellant respectfully requests this Court reverse the circuit court's denial of her motion to withdraw her plea.

**CONCLUSION**

For the reasons stated above, Appellant respectfully requests this Court reverse the circuit court and remand for further proceedings consistent with this Court's decision.

Dated: March 29, 2018 **Anderson Law Firm, PLLC**

*/s/ Kirk M. Anderson*

Kirk M. Anderson (#1078190)
5775 Wayzata Blvd., Suite 700
Minneapolis, MN 55416
(952) 582-2904

**AMENDED CERTIFICATION AS TO FORM AND LENGTH**

I, Kirk M. Anderson, hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced using the following font:

- Courier New, a monospaced font: 12-point font; 10 characters per inch; double-spaced; 1.5-inch margin on the left side and 1-inch margins on the other 3 sides. The length of said brief 24 pages long and is 4,436 words.

Dated: April 5, 2019 **Anderson Law Firm, PLLC**

*/s/ Kirk M. Anderson*
Kirk M. Anderson (#1078190)
5775 Wayzata Blvd., Suite 700
Minneapolis, MN 55416
(952) 582-2904

I, Kirk M. Anderson, hereby certify that:

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

I further certify that:

Other than the signature line, 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: April 8, 2019 **Anderson Law Firm, PLLC**

*/s/ Kirk M. Anderson*

Kirk M. Anderson (#1078190)
5775 Wayzata Blvd., Suite 700
Minneapolis, MN 55416
(952) 582-2904