STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP517-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN PLENCNER,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and an Order Denying Postconviction Relief in the Circuit Court for Racine County, the Honorable Michael J. Piontk, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was Mr. Plencner denied the effective assistance of counsel where his attorneys failed to argue that the nearly four-year delay in searching the seized property rendered the seizure and search unconstitutional? Did the circuit court err in denying Mr. Plencner's post-conviction motion without a ***Machner*** hearing?

The circuit court denied Mr. Plencner's postconviction motion for plea withdrawal and suppression of the evidence based on the ineffective assistance of counsel without a ***Machner*** hearing. The circuit court further denied his motion for reconsideration.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant anticipates that the parties' briefs will adequately address the issues presented. This case requires the application of well-established legal principles to the facts of the case. Neither oral argument nor publication is requested, but is welcomed should this Court deem it necessary.

STATEMENT OF THE CASE AND FACTS

In March, 2010, the Racine Police Department was involved in an investigation of sexual assault of a child. (1:6). Mr. Plencner was arrested, and subsequently charged in Racine County Case Number 10CF464. (1:6)

During that investigation, Officer Spiegelhoff requested a search warrant, which was warrant was issued on the same date by Honorable Judge Simonek. (5:1). Police seized a laptop, a computer tower, and three hard drives. Within days of the filing of criminal charges, the seized

property was turned over to the Wisconsin Department of Justice Division of Criminal Investigations. (DCI).

On April 8, 2010, the electronic devices were released from the Racine Police Department, and turned over to Wisconsin Department of Justice, Division of Criminal Investigation (DCI). (8:1)

On April 14, 2010, Mr. Plencner's then-attorney requested his property be returned. (8:2). The computer, which is the subject of this motion, was not returned. The investigating officer received a preview disc from the computer, but reported that a full evidentiary look at the computer would take weeks or months. (8:2).

Mr. Plencner ultimately pled guilty to the offense on August 20, 2010. The court placed Mr. Plencner on probation for a period of 8 years and imposed 10 months of condition time. After completing his condition time, in August, 2011, Mr. Plencner renewed his request to have his property returned. The property, however, was not returned. (5:2).

Rather, in response to the request, Officer Spiegelhoff stated, "they are still up there [at DCI] and if a DA tells us to turn them over, then I guess we will have to go get them. Otherwise, DCI is still processing them. It takes over a year to get through it all." (5:2).

Two years later, on September 19, 2013, Toby Carlson from DCI contacted Officer Spiegelhoff and indicated that the evidence was being reviewed and child pornography had been found. (8:3). DCI informed Officer Spiegelhoff that it had the 3.5-year-old warrant from 2010, but that under the circumstances, it was requesting a new warrant. (5:2)

The new affidavit submitted by Officer Spiegelhoff indicated that on September 19, 2013 he was contacted by Toby Carlson, who advised that he had "just started working" on this case as it had been previously assigned to other specialists who no longer worked at DCI. (8:3). The court subsequently issued a on September 24, 2013. (8:3). Child pornography was located on one of the hard drives in December, 2013, and form the basis for the charges in the present case. (8:3).

During the pendency of this case Mr. Plencner was represented by two different trial counsel. On July 2, 2015, his first attorney filed a motion to dismiss the case, arguing that the delay in issuing charges, and the staleness of the warrant, violated Mr. Plencner's constitutional rights. (5:1).

The circuit court heard argument and issued a decision on the motion on October 2, 2015. At that hearing, the court made findings of fact related to the timeline of events. (33:7-10). The found that "from a fairness standpoint, it seems totally unfair to have a defendant charged with sexual assault back in 2010, be sentenced, be sentenced on that, and I'm assuming, that the court considered something about what was on the computer . . . [s]o this is about as unfair as it gets." (33:10-11).

However, the court determined that it could not make the finding of actual prejudice required to find a delay in charging unconstitutional. (33:11). The court, concerned with this issue, asked the parties to "revisit" the issue of prejudice, and set the matter over to a new date. (33:13).

Defense counsel filed a second motion to dismiss on November 30, 2015. (8: 1-7). In that motion, the defense focused on how the delayed charging caused actual prejudice to Mr. Plencner, arguing that there were issues with the chain of custody. (8:4-6). The motion also argued that the information in the warrant was "stale and dated". (8:6).

The circuit court held a second motion hearing on February 22, 2016. It denied the motion to dismiss, and reasoned that there was no prejudice, or other agreement that prohibited the state from filing the charges, albeit more than four years after the initial seizure of the items. (34:9).

Mr. Plencner ultimately pled no contest to two counts of possession of child pornography. (36:2-3). New counsel was represented Mr. Plencner at his sentencing hearing. The parties proceeded to sentencing, and no reason to delay the sentencing was raised. (37:2). The court sentenced Mr. Plencner to 3 years of initial confinement and 2 years of extended supervision on each count, to be served consecutively. (37: 32-33).

Mr. Plencner filed a postconviction motion arguing that his trial counsels were ineffective for failing to challenge the seizure of his property under the correct theory.[1]

The circuit court denied the postconviction motion. In its ruling, the circuit court reasoned that Mr. Plencner had already raised a constitutional challenge in a pretrial motion and cited to the July 2, 2015 motion, which stated, "that the state's pre-charging delay violated the rights guaranteed by the 4th, 5th 6th and 14th Amendment to the United States Constitution, Article I, Sections 7, 8, and 11 of the Wisconsin Constitution . . ." (22:2; App. 102). Accordingly, the circuit court held that trial counsel had not been "'ineffective' as that term is defined." (22:2; App. 102).

Mr. Plencner, who identified an issue with sentence credit, filed a supplemental postconviction motion, and in doing so, asked the circuit court to reconsider its prior ruling. (23:1-3). Mr. Plencner clarified that his argument was not that the court should have granted the motions as filed by trial counsel, or that the court should reconsider those, rather, he

[1] Mr. Plencner also argued that the DNA surcharge should be vacated. He does not appeal on that issue.

argued that counsel failed to raise the proper Fourth Amendment argument, and that failing to do so, constituted ineffective assistance of counsel. (23:3).

In a written decision and order, the circuit court granted Mr. Plencner's motion for sentence credit, and denied his motion to reconsider its previous decision denying postconviction relief without a hearing. (24).

Mr. Plencner appeals.

ARGUMENT

I. The Nearly Four Year Delay Between the Initial Seizure of the Computer, and the Search of It, Rendered it Unconstitutional. Mr. Plencner was Denied the Effective Assistance of Counsel as His Attorneys Failed to Advance the Correct Theory in their Motions to Suppress the Unlawfully-Obtained Evidence, and the Circuit Court Erred in Denying His Motion Without a ***Machner*** Hearing.

A. Police violated the Fourth Amendment when it seized Mr. Plencner's property in 2010, and failed to perform a search until nearly four-years later.

The facts in this case are largely undisputed. Mr. Plencer's computers and hard drives were seized in 2010, and remained in DCI custody until they were searched in the later part of 2013. (32: 7-8, 10). He was subsequently charged in 2014. (1). A warrant had been issued in 2010, authorizing the police to search Plencner's electronic equipment. (33:7). A preview was done, but the full search of the computers and hard drives seized was not completed. (33:8).

Approximately six months after Mr. Plencner was arrested and charged, he pled guilty and was sentenced. (33:8). After he was released in August of 2011, Mr. Plencner

requested the return of his property. (33:9). The investigator responded that the computers were still at DCI and that it takes "over a year" to get through. (33:9). By this point it had been approximately one and half years since the property was initially seized. Another two years passed. (33:9). In September 2013 the state advised the investigator to seek another warrant. (33:9). The warrant affidavit indicated that DCI "had just started working on the items collected in 2010." (33:10).

1. Legal Principles

The duration of a seizure is relevant to assessing its reasonableness. *See* ***United States v. Place***, 462 U.S. 696 (1983); **S*egura* v. *United States*** *468* U.S. 796 (1984). Important to this analysis is "whether the police diligently pursue their investigation." ***Place***, a462 U.S. at 709.

Even when police have probable cause to seize something or someone in order to perform a search, they must nevertheless still have a warrant, unless one of a few "jealously and carefully drawn" exceptions applies. ***State v. Lee***, 2009 WI App 96, 9 6, 320 Wis. 2d 536, *7*71 N.W.2d 373 (internal citations omitted).

As the United States Supreme Court explained:

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

Place, 46*2* U.S. at 701.

Therefore, after seizing an item, police must obtain a search warrant to search the contents within a reasonable period of time. S*ee, e.g.*, ***Segura***, 468 U.S. at 812 ("[A] seizure reasonable at its inception . . . may become unreasonable as a result of its duration").

2. The duration of the seizure rendered it unconstitutional; therefore the evidence obtained should be suppressed.

Even though the police had probable cause to seize the computer in 2010, they were not permitted to keep it indefinitely, particularly after Mr. Plencner requested it be returned to him, personally, and through his counsel. (8:1) The nearly four years that Mr. Plencner's computer was held by the state without any explanation, constituted an unreasonable seizure, and therefore a violation of the Fourth Amendment. Accordingly, the evidence obtained from the search should be suppressed.

Instructive here is the Fourth Amendment analysis that The Seventh Circuit undertook in ***U.S. v. Burgard***, 675 F.3d 1029, 1033 (7th Cir. 2012). In that case, the defendant sought to suppress evidence obtained from his phone when a six-day delay occurred between the time the phone was seized, and a warrant obtained. ***Id***. 1031.

In its decision, The Seventh Circuit explained that pursuant to the U.S. Supreme Court's holding in ***Place***, courts must "assess the reasonableness of a seizure by weighing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." ***Id***. at 1033 (quoting ***Place***, 462 U.S. at 703)(internal quotations omitted).

The Court explained that on the side of the individual, the "longer the police take to seek a warrant, the greater the infringement on the person's possessory interest will be." ***Id***.

This, the Court stated, is true not only because more time is a greater infringement, but also because "unnecessary delays" "prevent the judiciary from promptly evaluating and correcting improper seizures." ***Burgard***, 675 F.3d at 1031. Whether the "person from whom the item was taken ever asserted a possessory claim to it" is also relevant to this analysis, though not essential, as it reflects whether the seizure in fact affected the person's possessory interests. ***Id***.

With regard to the government's interest, the Seventh Circuit explained that the strength of the state's basis for the seizure was a "key factor" in the analysis. ***Id***. Also, however, central to the analysis is whether police acted with diligence: "When police neglect to seek a warrant without any good explanation for that delay, it appears that the state is indifferent to searching the item and the intrusion on an individual's possessory interest is less likely to be justifiable." ***Id***.

In that case, the Seventh Circuit ultimately determined that although the defendant had a strong possessory interest in the cell phone, and that although there was "police imperfection," the delay was not unreasonable since the officer's delay was not the "result of complete abdication of his work or failure to see any urgency." ***Id***. at 1034 (internal quotation omitted).

The distinction between ***Burgard*** and the facts at hand in this case is plain. In that case, the defendant complained of a six-day delay between the seizing of his property and the application of the search warrant. ***Id***. at 1031. Here, Mr. Plencner was deprived his possessory interests for nearly f*our years* before the police obtained a second warrant and searched the contents of his electronic items. (33: 9-10).

There is nothing in the record to show that the police or DCI did anything to move the investigation along. Even after Mr. Plencner requested the return of his property in August of 2011, another two years passed until a second

warrant application was made. (33:9-10). In fact, the affidavit signed on September 24, 2013 stated that DCI "just started working on the items collected in 2010." (33:10). In contrast to ***Burgard***, where although there was "police imperfection" but no abdication of work or failure to see urgency where an officer's warrant application was delayed due to changes in shift and an intervening armed robbery ***Id***. at 1031; here, the record only demonstrates some changes in staff at DCI. This is not sufficient to justify a nearly four-year delay.

The exclusionary rule requires courts to suppress evidence "obtained through the exploitation of an illegal search or seizure." ***Wong Sun v. United States***, 347 U.S. 471, 488 (1963). "This rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the State shows sufficient attenuation from the original illegality to dissipate that taint." ***State v. Carroll***, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1.

Here, there is no justifiable reason for the delay and the length of time the computer was kept, and no intervening circumstances, no independent source or new information; indeed, the information in the warrant obtained in September, 2013 was nearly identical to the one from March, 2010. (33:10). The evidence obtained and used against Mr. Plencner was a direct result of the constitutional violation; thus, suppression is required. ***Id***.

The infringement on Mr. Plencner's rights was unreasonable, and therefore this Court should find that the evidence obtained in the search of the illegally- detained computers should be suppressed.

B. Mr. Plencner was denied the effective assistance of counsel when his attorneys failed to raise the correct constitutional challenge in their motions to suppress the evidence.

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. "This right includes the right to effective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111. To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced his defense. ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430.

To prove deficient performance, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). Establishing prejudice requires that a defendant show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W. 379 (1997) (citing ***Strickland***, 466 U.S. at 694).

And, as in this case, "where the asserted attorney error is a defaulted Fourth Amendment claim, a defendant must first prove that the Fourth Amendment claim is meritorious." ***United States v. Stewart***, 388 F.3d 1079, 1084 (7th Cir. 2004).

In reviewing a claim of ineffective assistance of counsel, appellate courts "grant deference only to the circuit court's findings of historical fact." ***Roberson***, 2006 WI 80, ¶ 24 (quoting ***State v. Thiel***, 2003 WI 111, ¶ 24, 265 Wis. 2d 571, 665 N.W.2d 305). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we [appellate courts] review de novo." ***State v.***

Bentley, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Appellate courts also review de novo "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id***.

In this case, to prove prejudice, Mr. Plencner must show that there is a "reasonable probability" he would not have been convicted in the absence of trial counsel's deficiency. ***Hill v. Lockhart***, 474 U.S. 52, 58-59 (1985). Put differently, he must prove that he would not have pled guilty and been convicted had trial counsel filed a winning suppression motion.

Here, the only evidence in the case was a result of the unreasonable duration of the seizure of his property. Thus, the primary issue is whether there was a reasonable basis for the nearly four-year long seizure of Mr. Plencner's property, and whether trial counsel had a strategic reason for failing to file suppression motion arguing the Fourth Amendment violation.

As argued in the previous section, the duration of the seizure of the property rendered the seizure and subsequent search unconstitutional. Mr. Plencner's first attorney challenged the warrant and the delay in charging. (5; 8). His second attorney, who represented him at only the sentencing, did not seek to withdraw his plea due to this Fourth Amendment violation.

There is no strategic reason forego a Fourth Amendment motion suppress the unlawfully-obtained evidence, when one has already raised challenges to the constitutionality of the charge, and warrant; and moreover, when prevailing on the motion would result in the suppression of the only evidence the state had against Mr. Plencner.

There is a reasonable likelihood that the outcome of the case would have been different had trial counsel filed the suppression motion: evidence would have been suppressed, Mr. Plencner would not have entered his pleas, and the case would have been dismissed.

II. The Circuit Court Erred When it Denied Mr. Plencner's Motion Without an Evidentiary Hearing.

Under ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, the trial court *must* hold an evidentiary hearing if the movant has alleged sufficient facts that, if true, would entitle him to relief. ***Id***. ¶ 9. (Emphasis added). The threshold for an evidentiary hearing is lower than that for a new trial.

Whether a defendant's post-conviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. ***Allen***, 274 Wis. 2d 568, ¶ 9. First, this Court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. ***Id***. This is a question of law, reviewed de novo. ***Id***. ¶ 9.

If the motion raises such facts, the trial court *must* hold an evidentiary hearing. ***Id***. (Emphasis added). However, if the motion does not raise facts sufficient to entitle the movant to relief, gives conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has discretion to grant or deny a hearing. ***Id***. In that case, this Court reviews the trial court's decision for erroneous exercise of discretion. ***Id***.

In his motion, Mr. Plencner alleged that he was denied the effective assistance of counsel when they failed to raise the proper Fourth Amendment challenge to the search and the duration of the seizure. (22). Mr. Plencner explained why he would have prevailed had his attorneys raised the proper claim. (22). The fact that Mr. Plencner had raised motions

challenging the charges, indicates that he would have pursued a meritorious motion had the option been presented. It is logical that a defendant would pursue a motion to suppress the only evidence against him, which if successful, would result in a dismissal of the charges.

Here, the circuit court erroneously exercised its discretion when it denied Mr. Plencner a hearing. In its first decision, the circuit court incorrectly concluded that it had previously ruled on the Fourth Amendment violation that Mr. Plencner alleged in his postconviction motion. (22:2). Even after Mr. Plencner clarified for the court that the Fourth Amendment violation that had actually occurred in this case had not been previously raised, thus forming the ineffective assistance of counsel claim, the court declined to grant a hearing. (24).

CONCLUSION

For all of the reasons set forth above, Mr. Plencner respectfully requests that this Court reverse the decision of the circuit court and vacate the judgement of conviction, suppressing the evidence against him, or, remand the matter for a ***Machner*** hearing.

Dated this 27th day of September, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,567 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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 27th day of September, 2019.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of September, 2019.

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