STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019AP001176 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RYAN C. DIEHL, Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CRAWFORD COUNTY CIRCUIT COURT THE HONORABLE LYNN M. RIDER PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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Issue presented

Did Diehl receive ineffective assistance of counsel where trial counsel failed to object and seek a remedy when the State at trial introduced evidence that Diehl had a "restricted" driver's license which set an alcohol concentration limit of .02, and that the "normal" alcohol concentration limit was .08?

The circuit court said no. 71:28; Ap.110.

Position on oral argument and publication

Counsel does not request oral argument. Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a specific set of facts.

Statement of the case

The State filed an information which charged Diehl with operating a motor vehicle with a prohibited alcohol concentration as a 7th, 8th, or 9th offense. 12:1. Ap.102-103. The case proceeded to a one day jury trial wherein the jury found Diehl guilty as

charged. 69:181-182. The circuit court sentenced Diehl to 4 years initial confinement and 4 years extended supervision. 70:7. The circuit court found Diehl eligible for the Earned Release Program. 70:8.[1]

Diehl filed a notice of intent to pursue postconviction relief, 38:1, pursuant to which the State Public Defender appointed the undersigned counsel to represent Diehl on postconviction matters. By and through counsel, Diehl filed motion for new trial based on the same issue addressed in this appeal. 41:1-9. After conducting an evidentiary hearing, the circuit court denied the motion, 71:28, and entered an order to such effect, 55:1. Diehl filed a notice of appeal, 56:1, and these proceedings follow.

Statement of facts

Facts pertaining to evidence introduced at trial.

[1] As Diehl was over 40 years of age, he was not eligible for the Challenge Incarceration Program. Wis. Stat. Sec. 302.45(2)(b) provides that only inmates who have not attained the age of 40 as of the beginning of the programming are eligible for "boot camp."

The introduction of the evidence at issue came during the State's direct examination of the arresting officer, Marcus Ploessl, and during the State's cross-examination of Diehl.

Ploessl's testimony

Ploessl testified that on January 9, 2018, at around 8:00 p.m., he was behind Diehl's truck in a fully marked squad car when he noticed that the registration sticker on the license plate showed November of 2017. 69:20,22. Ploessl entered Diehl's license plate into the computer of his patrol car and confirmed that the registration had expired. 69:21. At that point, Ploessel intended to stop Diehl only to talk to him about getting his registration fixed. 69:21.

Ploessl had been following Diehl's truck for about a mile. 69:22. In that time period, Ploessl did not notice anything odd, erratic, or different about Diehl's driving. 69:22. Diehl did not cross the centerline or the fogline. 69:22. Diehl was not speeding.

69:22. Ploessl activated his lights, and Diehl pulled over immediately. 69:23.

Ploessl asked Diehl about the registration, and Diehl explained that he just bought the truck, and had not yet had time to go to the "DMV." 69:23.

Ploessl asked for, and received Diehl's driver's license, and ran a check on it. 69:25. Diehl's license was valid. 69:25.

At this point in Ploessl's testimony, the following question and answer took place regarding restrictions on Diehl's license:

Q: Did you learn of any other stipulations or any restrictions on his license at that time?

A: I learned that his blood alcohol was restricted to a .02

Q: And how do you—how did you learn that?

A: Dispatch will read that back to us.

Q: And is that another thing that you look for if there's a restriction such as that on a person's driving record?

A: Yes.

Q: The normal is .08?

A: Correct.

Q: Okay. And he was restricted to a .02

A: Correct.

69:26.

Ploessl then testified that he saw a "thirty pack" of beer inside Diehl's truck, so he decided to ask Diehl if he had been drinking that evening. 69:26. Diehl admitted that he had had two or three beers. 69:26. Ploessl asked Diehl if he would submit to a "PBT." 69:27. Diehl agreed. 69:27.

Afterwards, Ploessl placed Diehl under arrest for being over the 0.02 limit. 69:27. Ploessl then transported Diehl to Crossing Rivers Hospital in Prairie du Chien where a nurse took a sample of Diehl's blood. 69:27.[2] Diehl was "completely cooperative" and consented to the blood draw. 69:28. Diehl was not "combative, angry or anything like that." 69:28. Diehl's blood was drawn at 9:53 p.m. 69:35.

[2] During later testimony, A.G., a forensic toxicologist with the Wisconsin Crime Lab, testified that she analyzed the blood sample obtained from Diehl. 69:55. The result was .031 grams of alcohol per 100 milliliters of blood. 69:54.

Diehl's testimony

Diehl testified that on January 9, 2018 at about 6:00 p.m., he went to a bingo tournament at the Wooden Nickel Saloon in Ferryville, Wisconsin. 69:67-68. While there, Diehl drank two or three bottles of beer. 69:71. Diehl drank the last one right before he left at about 8:00 p.m. 69:71. Diehl testified that he weighed about 180 pounds. 69:72.

During the State's cross-examination of Diehl, the following question and answer took place:

Q: So you weren't—you weren't under the influence or drunk or anything, were you?

A: No.

Q: You did know that you had a .02 restriction?

A: Actually, I didn't believe I had it because I was not on probation anymore. I thought that was only for during probation.

Q: So—

A: I didn't know that.

Q: You had no reason to believe you were under any restriction whatsoever?

A: No. I didn't think—I didn't know that I had that.

Q: Have you been convicted of crimes in the State of Wisconsin in the past?

A: Yeah. Twice.

Q: So you didn't know that you—at this time you didn't know that you were under any restriction?

A: What was that?

Q: At that time, January 9th, you did not understand that you were under any restriction?

A: No. I didn't realize that I was still under that restriction.

69:77-78.

Facts pertaining to postconviction hearing.

Trial counsel was the only witness at the postconviction hearing.

Trial counsel could not recall any reason for not objecting to Ploessl's testimony that Diehl had been operating on a "restricted" license. 71:6. Trial counsel could not recall having any strategic or tactical reason for not objecting to such evidence. 71:6. Trial counsel had "no idea" if there was any strategic or tactical reason for not objecting to Ploessl's testimony that a .08 alcohol concentration was the "normal" limit. 71;6. Trial counsel

did not consider moving to strike Ploessl's testimony or moving for a mistrial because of it. 71:6-7. Trial counsel did not consider whether testimony that Diehl had a "restricted" driver's license constituted irrelevant or "other acts" evidence. 71;9. Trial counsel did not consider objecting on these grounds. 71:9. When trial counsel was asked if he considered that the State's manner of questioning Diehl highlighted that Diehl had prior OWI convictions, trial counsel responded, "I don't know." 71:9. Trial counsel could not recall any strategic or tactical reason for not objecting to the State's questioning Diehl about his restricted license. 71:9-10.

Facts pertaining to circuit court's findings and conclusions.

The appendix contains transcript excerpts of the circuit court's findings and conclusions. Ap.106-110. The circuit found that trial counsel was not deficient. Ap.110; 71:28. The circuit court additionally found that even if trial counsel was deficient, there was no prejudice. Ap.100; 71:28.

Argument

Trial counsel was ineffective by failing to object to and seek a remedy for the introduction of evidence that Diehl was operating with a "restricted" driver's license, specifically, one which provided for a .02 alcohol concentration limit, and that a .08 alcohol concentration limit was "normal."

A. Standard of review.

Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *State v. Trawitzki*, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801.

In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. *Strickland*, 446 U.S. at 687. The

defendant must also show that he or she was prejudiced by the deficient performance. *Id.*

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.* at 688. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (1993).

In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must 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." *Strickland*, 466 U.S. at 694. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the

proceedings." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Trawitzki*, 244 Wis. 2d 523, ¶19. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo. *Id.*

B. Trial counsel's failure to object and seek a remedy was deficient.

The testimony regarding Diehl's "restricted" license, and the distinction between the .02 limit and the .08 "normal" limit, was improper for two reasons. First, such testimony constituted irrelevant evidence. Second, such testimony constituted improper "other acts" evidence.

The operative legal standard for what is or is not "relevant evidence" is Wis. Stat. §904.01. Such section defines "relevant evidence" as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Wis. Stat. §904.02 provides that "[e]vidence which is not relevant is not admissible."

As instructed by the court, the elements of the offense were as follows:

> *Number 1, the defendant drove a motor vehicle on a highway. Drive means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.*
>
> *Number 2, the defendant had a prohibited alcohol concentration at the time that the defendant drove the motor vehicle. Prohibited alcohol concentration means more than .02 grams of alcohol in 100 milliliters of the person's blood.*

69:137.

Evidence that Diehl had been operating on a "restricted" driver's license was not probative of either one of the two elements of the offense. It did not have a tendency to make more probable that Diehl drove a motor vehicle on a highway. It did not have a tendency to make more probable that Diehl had more than .02

grams of alcohol in 100 milliliters of his blood at the time of operation. Such evidence was therefore irrelevant and inadmissible.

The same is true with respect to the testimony that a .08 alcohol concentration was the "normal" limit. That the .08 limit was "normal" and different from Diehl's "restricted" limit of .02 was not probative of either one of the two elements of the offense. It did not have a tendency to make more probable that Diehl drove a motor vehicle on a highway. It did not have a tendency to make more probable that Diehl had more than .02 grams of alcohol in 100 milliliters of his blood at the time of operation. Such evidence was therefore irrelevant and inadmissible.

Additionally, evidence that Diehl was driving on a "restricted" driving license, and was subject to a reduced alcohol concentration limit, constituted improper "other acts" evidence. Wis. Stat. §904.04(2)(a) provides as follows:

> ... evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence that Diehl had a "restricted" license communicated to the jury that he had engaged in some crime, wrong or act which caused the restriction. Evidence that the specific restriction limited Diehl's permissible alcohol concentration communicated to the jury that Diehl had engaged in some crime, wrong or act which pertained drinking and driving. Evidence that the "normal" permissible concentration is .08 communicated to the jury that Diehl had engaged in some crime, wrong, or act so as to be treated differently than the average motorist in Wisconsin. As discussed later in this brief, the manner in which the evidence was presented to the jury communicated to the jury that Diehl had previously been convicted of OWI offenses.

For the above reasons, trial counsel had a valid basis under §904.02 and §904.04(2)(a) to object to the evidence introduced by the State, move to strike, and request a mistrial. Reasonably prudent counsel would have done so. Trial counsel wholly failed to take any action. This was objectively unreasonable. Further,

trial counsel's testimony at the postconviction hearing makes clear that he had no strategic or tactical reason for his nonaction. He simply failed to consider, and recognize, that the evidence offered by the State was objectionable. He additionally failed to consider, and recognize, that a remedy, most appropriately, a mistrial, was warranted.

C. Trial counsel's failure to object and seek a remedy caused prejudice.

In *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903), the Wisconsin Supreme Court explained the hazards in a jury's learning of other alleged bad acts by a defendant:

> *[Other cases] are cited more especially to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question of whether the real evidentiary facts hasten guilt upon him beyond a reasonable doubt. In a doubtful case, even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent it having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect. Id. at 99.*

Consistent with such rationale, the Supreme Court has stated that as a general rule, receipt of evidence of the defendant's bad character or commission of specific disconnected acts is prejudicial error. See *Hart v. State*, 75 Wis.2d 371, 394-395, 294 N.W.2d 810 (1977). The evidence at issue here fell into this category.

The testimony that Diehl had been operating on a "restricted' license, and that he was subject to a reduced alcohol concentration limit communicated to the jury that besides the conduct that Diehl was presently accused of, Diehl had previously engaged in some other crime, wrong or act. Most problematically, the evidence impliedly communicated to the jury that Diehl had prior OWI convictions.

This is made clear in the context of the State's cross-examination of Diehl:

Q: So you weren't—you weren't under the influence or drunk or anything, were you?

A: No.

Q: You did know that you had a .02 restriction?

A: Actually, I didn't believe I had it because I was not on probation anymore. I thought that was only for during probation.

Q: So—

A: I didn't know that.

Q: You had no reason to believe you were under any restriction whatsoever?

A: No. I didn't think—I didn't know that I had that.

Q: Have you been convicted of crimes in the State of Wisconsin in the past?

A: Yeah. Twice.

Q: So you didn't know that you—at this time you didn't know that you were under any restriction?

A: What was that?

Q: At that time, January 9th, you did not understand that you were under any restriction?

A: No. I didn't realize that I was still under that restriction.

69:77-78.

The State's cross-examination closely linked questions about how many times Diehl had been convicted of a crime with his knowledge of whether he had any restrictions on his license. The juxtaposition of the questions implied to the jury that Diehl had prior OWI convictions which caused the limit of his blood alcohol concentration to be set at .02 rather than the "normal"

.08. The State's emphasis on the .02 level, the distinction between that level and the .08 level, and Diehl's restricted driving status, at a minimum created a substantial risk that the jury concluded that Diehl was subject to the lower standard because he was a repeat offender. There is a reasonable probability that the jurors, when provided this information, concluded that Diehl was more likely to be guilty in this case.

Wisconsin courts have long recognized that disclosing prior convictions to a jury creates an unreasonable risk that the jury might be improperly influenced to enter a guilty verdict based on prior conduct. See, e.g., *State v. Coleman*, 2015 WI App38, 362 Wis.2d 447, 865 N.W.2d 190 (Ct. App. 2015)(disclosure of prior convictions by defense counsel constitutes deficient performance); *Mulkovich v. State*, 73 Wis.2d 464, 243 N.W.2d 198 (1976)(unnecessarily informing a jury of a defendant's prior convictions can constitute prejudicial error, mandating either a mistrial or reversal). This influence is particularly problematic in

OWI cases. See *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

While the State will argue that any error in admitting the evidence complained of was harmless, the record refutes such an argument. Diehl's BAC level was low, .031. Diehl also presented compelling expert testimony in support of a defense that his BAC level at the time of operation was actually lower than then what it was at the time he gave the sample. 69:84-133. Even the circuit court at the postconviction hearing acknowledged thinking during trial that "the jury could go either way." Ap.110; 71:28. There is a reasonable probability that had the jury not been exposed to the impermissible evidence, it would have accepted Diehl's argument rather than rejecting it, and the result would have been different. Instead, the State's introduction and emphasis on the impermissible evidence tainted the jury's analysis.

In evaluating prejudice, this court should also consider that there was no order striking the impermissible evidence or

instruction by the court directing the jury to disregard it. In this regard, it is well-recognized that limiting and cautionary instructions may serve to reduce the risk of unfair prejudice caused by certain information presented before the jury. See *State v. Marinez*, 2011 WI 12, ¶41, 331 Wis.2d 568, 797 N.W.2d 399. Here, there was no such instruction which arguably cured any taint caused by the introduction of the impermissible evidence.

Conclusion

For the above reasons, this court should vacate the judgment of conviction and sentence and remand the case for a new trial.

Dated this _____day of August 2019.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 3241 words.

Dated this ___day of August 2019.

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CERTIFICATION

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 s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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.

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CERTIFICATION 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 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 upon all opposing parties.

Dated this ___ day of August 2019.

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