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COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2020AP001406-CR

ERIC TRYGVE KOTHBAUER,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION
ENTERED 13 MAY 2019, AND AN ORDER DENYING THE
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
ENTERED 27 JULY 2020
IN CHIPPEWA COUNTY CIRCUIT COURT, BRANCH III,
THE HONOURABLE STEVEN R. CRAY,
CIRCUIT COURT JUDGE, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

RESPECTFULLY SUBMITTED:

ROY LA BARTON GAY
Asst. District Attorney
711 N. Bridge St.
Chippewa Falls, WI 54729
715-726-7740
Respondent's Attorney

ATTORNEY FOR RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The state takes no position as to oral arguments, or publication.

STANDARD OF REVIEW

Mr. Kothbauer's first issue claims that Attorney

Thorson provided ineffective assistance of counsel during his trial. A claim of ineffective assistance of counsel is reviewed under a mixed question of fact and law standard. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The trial court's findings of fact will not be set aside unless they are clearly erroneous. *Id.* Whether the attorney's performance is deficient is a question of law which the appellate court reviews *de novo*. Id. at 128, 449 N.W.2d at 848.

Mr. Kothbauer's second issue is reviewed in two separate ways. The issue of whether the motion, on its face, alleges adequate facts that would entitled the movant to the relief requested and whether the record shows conclusively that the person is not entitled to the relief he or she is requesting are reviewed de novo. ***State v. Sulla***, 2016 WI 46, ¶23, 369 Wis.2d 225, 245, 880 N.W.2d 659, 669. If the motion fails to state an adequate factual basis or if the record conclusively shows that the movant is not entitled to the relief requested, then the trial court can decide whether to grant or deny a hearing, which the appellate court reviews the decision under the erroneous exercise of

discretion standard. *Id.* at ¶23, 369 Wis.2d at 346, 880 N.W.2d at 669.

ARGUMENT

I. THE BURDEN OF PROOF IS UPON THE DEFENDANT TO PROVE THAT HIS TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT BECAUSE OF THIS DEFICIENT PERFORMANCE, HE WAS PREJUDICED. NONE OF THE ALLEGED ACTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, INDIVISIBLY OR IN COMBINATION, WERE DEFICIENT. NOR WAS MR. KOTHBAUER PREJUDICED BY ANY OF THESE CLAIMED DEFICIENCIES, INDIVISIBLY OR IN COMBINATION. MR. KOTHBAUER CANNOT MEET HIS BURDEN TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

The test for ineffective assistance of counsel has two prongs. ***State v. Byrge***, 225 Wis.2d 702, 719, 594 N.W.2d 388, 395 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477. The two prongs are explained below:

> The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. See Strickland v. Washington, 466 U.S. 668, 688 (1984). In applying this test, we inquire whether, under the circumstances, counsel's acts or omissions were outside the wide range of professionally competent assistance. See id. at 690. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. See id. at 689. We also must be careful to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and

> to evaluate the conduct from counsel's perspective at the time. See id. at 689.
>
> As to prejudice, 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. See Griffin, 220 Wis.2d at 391, 584 N.W.2d at 135.

Id. at 719, 594 N.W.2d at 394-395.

The court may consider the second prong of this test without deciding the first prong. This second prong requires the defendant to prove that the attorney's deficient performance caused actual prejudice. ***State v. Johnson***,153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

A. Attorney Thorson Did Not Provide Ineffective Assistance Of Counsel By Failing To Argue An Illegal Search Requires Suppression. This Argument Lacks Merit. Failure To Raise An Argument Without Merit Is Not A Basis for A Finding Of Ineffective Assistance Of Counsel.

The trial court ruled that there was no illegal search. (R87: 2). The trial court correctly pointed out that Mr. Kothbauer ignored the fact that the search was consensual, and that a consent search is an exception to the rule requiring probable cause to arrest or to the requirement for a search warrant.

Mr. Kothbauer argues that the officer exceeded the scope of the consent he was given to do a pat down search. He argues that this action converted the *Terry* stop into a formal arrest, for which the officer lacked probable cause. He argues that because this constituted an unlawful arrest, all the evidence seized after that must be suppressed.

Mr. Kothbauer argues that he was in custody for Fourth Amendment purposes because the officer searched his pockets. He argues that reaching into his pockets exceeded what action is permissible under ***Terry v. Ohio*** since the officer had no reason to believe he had any weapons. He cites to ***State v. Swanson***, 164 Wis.2d 437, 454, 475 N.W.2d 148 (1991), to support this argument. While ***Swanson*** does say this, it is not applicable to a consent search. As the trial court pointed out, neither is ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). (R87: 2).

Consent searches are deemed reasonable under the Fourth Amendment. ***State v. Douglas***, 123 Wis.2d 13, 22, 365 N.W.2d 580, 584 (Ct.App.1985) and ***State v. Floyd*** 2017 WI 78, ¶29, 377 Wis.2d 394, 415-416, 898 N.W.2d

560, 570. “Requesting permission to search a person who has been lawfully seized does not invalidate the person's consent.” Id. at ¶32, 377 Wis.2d at 418, 898 N.W.2d at 571-572.

At page 23 of his brief, Mr. Kothbauer concedes that the officer had consent to do the pat down search. But Mr. Kothbauer’s then states that “such consent should only be “elicited when an officer reasonably believes an individual to be armed and dangerous.” He cites ***Terry v. Ohio***, 392 U.S. 1 at page 27, [88 S.Ct. 1868, 20 L.Ed.2d 889] (1968). The trial court pointed out that *Terry* was not on point as it addressed a nonconsensual search.

In reviewing the page of the *Terry* opinion to which Mr. Kothbauer cites, nowhere on that page or in the entire opinion does the United States Supreme Court state that an officer CANNOT or SHOULD NOT ask for consent to search a person being detained for an investigative stop unless the officer already had a reasonable and articulable basis to believe the person may be armed and dangerous.

Mr. Kothbauer cites to no other authority that

an officer can only ask for consent to do a search only if he or she already has a reasonable suspicion that the person is armed. The fallacy of this argument is self-evident. If an officer already has this reasonable belief, he or she would have no reason to ask for consent. He or she could just do the search for weapons.

The Wisconsin Supreme Court has held that during a traffic stop an officer may ask for consent to do a search for weapons absent such a belief. 2017 WI 78, at ¶28, 377 Wis.2d at 414, 898 N.W.2d at 569-570. Officer safety is an important aspect of a traffic stop's mission. Questions related to officer safety are within the mission of the stop. Id. at ¶26, 377 Wis.2d at 413, 898 N.W.2d at 569. Asking to perform a pat down search is permissible and does not impermissibly prolong the stop. Id. at ¶28, 377 Wis.2d at 414-415, 898 N.W.2d at 569-570.

It is undisputed that the officer asked Mr. Kothbauer's consent to pat down his pockets. It is undisputed that Mr. Kothbauer gave the officer consent

to do the pat down search. At no time has he claimed that this consent was not given voluntarily.

Mr. Kothbauer states that, "[a]s the State did not present any evidence of the officer's subjective or objective belief that Mr. Kothbauer was armed and dangerous, any pat down was unreasonable under the Fourth Amendment's protections against unlawful searches." But this requirement on the officer's part is not relevant in this case. The officer had consent to perform the search.

Mr. Kothbauer's argument stems from a false premise: that there was no consent for a search because the officer could not ask for consent since he did not already have the necessary knowledge needed to perform a non-consensual search.

A pat-down for weapons conducted by police is a search. ***State v. Morgan***, 197 Wis.2d 200, 208, 539 N.W.2d 887, 891 (1995). Consequently, a pat-down search must satisfy the reasonableness requirement of the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution. "A consent search is constitutionally reasonable to the

extent that the search remains within the bounds of the actual consent." ***State v. Douglas***, 123 Wis.2d 13, 22, 365 N.W.2d 580, 584 (Ct.App.1985). As part of the weapons frisk, the officer would have been authorized, after feeling a bulge in Mr. Kothbauer's pocket, to determine whether the item was a weapon. *See* ***State v. McGill***, 2000 WI 38, ¶34-36, 234 Wis.2d 560, 574-575, 609 N.W.2d 795, 803-804. An officer cannot determine whether certain objects are in fact weapons without removing and examining them. Reaching into a suspects pocket is not a separate search, but a continuation of the pat-down search.

Prior to the search, Mr. Kothbauer twice told the officer that he had some "chew" in his pants pocket. (R:37 at 10:24 & 10:27 of the recording). The officer found a metal object in Mr. Kothbauer's pocket(s). A tin of chew. The officer was justified in checking to see if Mr. Kothbauer was truthful as to what was in his pockets.

Had he done the pat down first, the results would have been the same. The intrusion into Mr. Kothbauer's pockets was still consensual. Additionally a tin of

chew can be used as a weapon or may conceal a weapon such as a razor blade. The officer acted reasonably.

When Mr. Kothbauer gave consent to the officer to perform the pat-down search, he did not limit his consent. When the officer reached into his pockets, he did not object to the officer's action. The officer's action of placing his hands into Mr. Kothbauer's pockets was not a separate investigative intrusion. It was part of the pat-down search to which Mr. Kothbauer consented. By consenting to the pat-down search, Mr. Kothbauer consented to the search of his pockets. The officer did not exceed the scope of the consent.

In its decision, the trial court further noted that Mr. Kothbauer "leaps to the conclusion this search caused an illegal seizure." As the court noted this claim was unsupported by facts or legal authority.

Contrary to Mr. Kothbauer's argument, the officer's action did not transform a non-custodial consent search into custody for Fourth Amendment purposes.

Mr. Kothbauer states that because the officer exceeded the scope of the consent he gave, it led him

to believe, "as any reasonable person would", that he was under arrest. (Appellant's Brief at p. 25). What he believed is irrelevant in determining when he was in custody for Fourth Amendment purposes.

The test for determining whether someone is in custody is an objective test. "The standard used to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***State v. Kiekhefer,*** 212 Wis.2d 460, 485, 569 N.W.2d 316, 329 (Ct.App.1997). This case cites *State v. Swanson,* 164 Wis.2d 437, 446–47, 475 N.W.2d 148, 152 (1991). In ***Swanson***, the Wisconsin Supreme Court adopted the objective test, stating:

> ***For consistency and practical reasons, we now abrogate this subjective test and adopt an objective test which assesses the totality of the circumstances to determine the moment of arrest for fourth amendment purposes.*** An objective test will provide uniformity and consistency with cases decided by the United States Supreme Court, this court and other federal and state courts.[5] Furthermore, an objective test will alleviate the need to assess the subjective understandings of the parties and is not wholly dependent on the self-serving declarations of the police officers or suspects. *Berkemer v. McCarty,* 468 U.S. 420, 442 n. 35, 104 S.Ct. 3138, 3151 n. 35, 82 L.Ed.2d 317 (1984). [Emphasis added].

164 Wis.2d at 446, 475 N.W.2d at 152.

Mr. Kothbauer's subjective opinion is irrelevant. While his freedom was curtailed, it was not curtailed to the extent one would associate with a formal arrest. ***State v. Kilgore***, 2016 WI App. 47, ¶33, 370 Wis.2d 198, 219, 882 N.W.2d 493, 503. "[T]he inability to leave is 'not the determinative consideration.' [cite omitted]". Id. It is only a factor to be considered in determining the "'*ultimate*' question, whether there was a 'restraint on freedom of movement of the degree associated with a formal arrest.' [cites omitted]." Id. Under the totality of the circumstances, the facts as cited above, show he was not in custody before or after this consent search. The consent search itself did not change the a *Terry* seizure into an arrest.

The record, including the L3 Cam recording, (R37), shows that Mr. Kothbauer was not handcuffed until he was formally arrested. At no time was a gun drawn and/or pointed at him. A *Terry* frisk was performed after he was asked by the officer if he could do so and he voluntarily gave consent. It is significant that the officer asked for permission to

perform this pat down search of Mr. Kothbauer's pockets rather than simple did so. Asking for consent itself is evidence he was not in custody. See ***State v. Gruen***, 218 Wis.2d 581, 596, 582 N.W.2d 728, 733-734 (1998).

During the entire contact between Mr. Kothbauer and the officers, he was never physically restrained or handcuffed. Mr. Kothbauer was not moved to another location and was not placed into a police vehicle until he was formally arrested. All questioning was performed while Mr. Kothbauer was in his own personal vehicle or on the shoulder of the road behind his vehicle. The officer expressly told Mr. Kothbauer the goal was to determine if he could safely operate his car, and if he could, he would be on his way.

Initially there were two officers. After Mr. Kothbauer began displaying aggressive and belligerent behavior, two additional officers showed up. At no time did any of these officer display a weapon or point a weapon at Mr. Kothbauer. Only Officer Checkalski did any questioning of Mr. Kothbauer and the other three officers maintained a discreet

distance from Mr. Kothbauer until he was placed under arrest.

The period of detention was no more than was necessary to complete the mission of the stop. That mission was to determine if Mr. Kothbauer could safely operate a motor vehicle, and if not, whether he was under the influence of an intoxicant. ***State v. Smith***, 2018 WI 2,¶21-22, 379 Wis.2d 86, 104-105, 905 N.W.2d 353, 362. The L3 dash cam recording shows that much, if not all, of the delay in completing this mission was occasioned by Mr. Kothbauer's abusive, aggressive and uncooperative behavior. Mr. Kothbauer continually refused to answer legitimate questions designed to answer this enquiry and continued to demand to be told the same information, such as why he was stopped, repeatedly. Officer Checkalski made every effort to complete the mission of the stop within a reasonable period of time. This stop was not unreasonably prolonged by law enforcement. At no point was his freedom of movement restricted to the degree associated with a formal arrest. 2016 WI App. 47, ¶33, 370 Wis.2d at 219, 882 N.W.2d at 503.

Throughout his brief, Mr. Kothbauer continues to refer to his arrest as being illegal. He maintains that the officer did not have sufficient probable cause to arrest him. Although he was not in custody at the time of this consent search or immediately thereafter, when he was actually arrested and told he was under arrest, the officer possessed adequate information to establish probable cause to make a lawful arrest.

At the evidentiary hearing on 20 November 2017 the testimony showed that the officer had more than the odor of an intoxicant upon which to act. (See judge's comment at Status hearing on 30 May 2017, ((R96:3-4). Prior to the stop the officer observed poor driving, which is an indicator that the driver's ability to safely operate a motor vehicle was impaired. Prior to the stop, the officer observed Mr. Kothbauer's speed fluctuating, and two traffic offenses: failure to stop at a stop sign and an illegal left turn from a non-turning lane. (R94:6-7). Mr. Kothbauer has not challenged the legality of the stop.

Upon contact with the vehicle the officer observed the odor of an intoxicant, and that Mr. Kothbauer had

glassy eyes, and that his speech was slow and delayed. Then the officer asked a number of question the officer was entitled to ask as part of the mission of the traffic stop. 2018 WI 2, ¶12, 376 Wis.2d 86, 97-98, 905 N.W.2d 353, 359. The answers to these questions confirmed that the odor of intoxicant was coming from Mr. Kothbauer because he had been drinking and had had his last drink about an hour before the stop. Nor were these questions coercive under the totality of the circumstances.

Contrary to Mr. Kothbauer's assertion, given the information known to Officer Checkalski, he had sufficient probable cause to requests a PBT, if not to arrest Mr. Kothbauer for Operating a Motor Vehicle While Impaired. ***County of Jefferson v. Renz***, 231 Wis.2d 293, ¶33, 308-309, 603 N.W.2d 541, 548 (1999). After Mr. Kothbauer refused to submit to the PBT test, the officer had sufficient probable cause to arrest Mr. Kothbauer. His refusal to do the PBT can be used for purposes of establishing probable cause to arrest. ***State v. Babbitt***, 188 Wis.2d 349, 359, 525 N.W.2d 102, 105 (Ct. App.1994).

Later in his brief, Mr. Kothbauer discusses how if

expert testimony had been presented, the jury would have seen his behavior was due to his injuries and not due to intoxication. In determining whether there is a sufficient basis for probable cause, an officer is not required to consider if there may be an innocent explanation for the behavior. ***State v. Tullberg***, 2014 WI 134, ¶35, 359 Wis.2d 421, 441, 857 N.W.2d 120, 130. As long as an inculpatory inference can be drawn from the observed facts, probable cause to make the arrest can be found. ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis.2d 182, 189-190, 738 N.W.2d 125, 128.

Mr. Kothbauer says that even if the motion was still denied, Attorney Thorson should have used this information at trial to discredit the officer and his testimony. Attorney Thorson cross examined the officer on this issue with no objection by the state. Mr. Kothbauer testified as to how shocked he was by the officer's action. (R98: 145). Mr. Kothbauer states Attorney Thorson should have done more to call this illegal search to the jury's attention.

While the state did not object to the questions asked at trial, none of this testimony was relevant as

to whether Mr. Kothbauer's ability to safely operate a motor vehicle while impaired was due to his consumption of alcohol. Evidence is probative and relevant if it tends to prove the existence of a fact of consequence to the determination of guilt or innocence. Sec. 904.01, Stats. Whether the officer performed an unconstitutional search of Mr. Kothbauer's pockets is not probative of whether Mr. Kothbauer was guilty of the offense with which he was charged. This evidence was totally irrelevant to prove or disprove any of the elements of the offense of Operating a Motor Vehicle while Impaired or of Operating a Motor Vehicle with a BAC in excess of the legal limit.

Mr. Kothbauer asserts that evidence of this unconstitutional search could have been used to impeach the officer's credibility. He cites no authority to support this argument.

Attorney Thorson's failure to argue this basis for suppression was not deficient performance. This basis for suppression lacks merit. Trial counsel is not ineffective for not pursuing a legal argument and/or a motion that lacks merit. ***State v. Toliver***,

187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct.App1994). Attorney Thorson's failure to raise this argument did not prejudice Mr. Kothbauer's defense.

B. Attorney Thorson Did Not Provide Ineffective Assistance Of Counsel By Not Moving To Suppress The Results Of The Field Sobriety Test.

The trial court denied this portion of Mr. Kothbauer's motion finding that the record showed he was not entitled to this relief. This conclusion was based in part on the absence of any authority that requires strict compliance with the requirements of the National Highway Traffic Safety Administration (NHTSA) manual.

To support this argument Mr. Kothbauer cites ***County of Jefferson v. Renz***, 231 Wis.2d 293, 603 N.W.2d 541 (1999). He argues that the officer did not have probable cause to requests him to submit to a Preliminary Breath Test, PBT. As he did at the trial level, he fails to recognize that the level of probable cause to request a PBT is less that needed to make an arrest. See Appellant's Brief at 28, note 148. ***Renz*** establishes that the probable cause needed to requests a PBT test is less than the probable

cause needed to arrest a person. Id. at 315-316 (¶47), 603 N.W.2d at 551-552. Mr. Kothbauer is at least in part based upon a misunderstanding of the holding of ***Renz***.

When the officer requested Mr. Kothbauer to submit to a PBT, Mr. Kothbauer refused to do so. His refusal to do so is evidence of consciousness of guilt and admissible to determine the existence of probable cause to arrest. 188 Wis.2d at 359, 525 N.W.2d at 105. ***Renz*** is not applicable to the issue of suppressing the results of the field sobriety tests.

Mr. Kothbauer's brief abruptly shifts to a discussion of the NHTSA manual and the officer's training. As the trial court noted, Mr. Kothbauer has cited to no legal authority in Wisconsin that requires Wisconsin law enforcement to strictly comply with the manual in administering Field Sobriety Test (FST).

While this court is welcome to take judicial notice of this governmental publication, its doing so will not provide support to Mr. Kothbauer's argument.

Contrary to Mr. Kothbauer's assertion, compliance with standards set forth by the National Highway

Traffic Safety Administration in its manual is not mandatory in Wisconsin and non-compliant FSTs cannot be excluded in determining the existence of probable cause to requests a PBT or to arrest. If there is a legal basis for this motion, Mr. Kothbauer should have included it in his brief. A trial attorney cannot be found to be ineffective for failing to file a motion that has no factual or legal basis. Having failed to cite any such authority, this portion of the motion is without merit 187 Wis.2d at 360, 523 N.W.2d at 118. The trial court's decision should be affirmed.

Mr. Kothbauer cannot prove his defense was prejudiced by this omission. As noted above, the officer had more than enough indications of impairment to requests a PBT.

The officer was not required to believe Mr. Kothbauer's claim as to his injuries. If there are any indications of conduct that supports probable cause for impairment, the officer can act on that indication, despite the possibility of other innocent explanation. "[A]n officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference

that favors probable cause." 2007 WI App 189, ¶14, 304 Wis.2d at 189-190, 738 N.W.2d at 128. An arresting officer has no duty to seek out an innocent explanation of a person's conduct. Nor is an officer required to ignore an inculpatory inference in the presence of other exculpatory inferences. Id.

Officer Checkalski observed indications of intoxication during his contact with Mr. Kothbauer. While these observation could be symptoms of Mr. Kothbauer's brain injuries, they are also indications of being under the influence of an intoxicant. The officer was not required to determine if these observations were symptoms of a brain injury. While Mr. Kothbauer told him of the brain injuries, the officer was not required to take his word that these conditions were symptoms of his brain injuries. They are indications of intoxication and impairment. The officer had no duty to ignore these indicators of intoxication because they could also be an indication of a brain injury or have an innocent explanation. ***State v. Tullberg***, 2014 WI 134, ¶35, 359 Wis.2d 421, 441, 857 N.W.2d 120, 130.

The record shows conclusively that this omission by Attorney Thorson, even if deemed ineffective assistance of counsel, was not prejudicial to Mr. Kothbauer.

C. Attorney Thorson Was Not Ineffective For Failing To Show The Dash Cam Recording To The Jury, And If He Was, Mr. Kothbauer's Defense Was Not Prejudiced.

The trial court noted that the video cuts both ways. The trial Court inferred that both sides had a strategic reason for not playing the video. There was no factual basis for this finding. However, the record conclusively shows that Mr. Kothbauer is not entitled to the relief he is requesting.

Mr. Kothbauer speculates that if the jury had seen the video, the jury would have seen the officer conduct an illegal search and that the officer did not conduct the field sobriety tests correctly and would have concluded he was wrongfully arrested. He argues the jury would have acquitted him on both counts. These are issues for the judge, not for the jury.

Contrary to Mr. Kothbauer's assertion, the state believes the jury would have found him guilty of both

counts. The jury would have seen a person who could not safely operate a motor vehicle on a highway. The jury would have seen a person who was intoxicated. The recording shows a person who had had more to drink than the three drinks, even pint size drinks, to which he testified he imbibed. (R98: 136). They would have seen a person whose behavior was consistent with having a BAC over .08, and a person who was argumentative and belligerent: a person who judgment was impaired.

Watching this video would have given the jury reason to disbelieve Mr. Kothbauer's testimony wherein he painted a picture of himself as a man who is not impaired. It would have shown his lack of veracity as to his testimony that the officer had followed him from the bar and had tailgated him along the way. The jury would have seen his tirade about how the police followed him from the bar because they knew his father lived above the bar and how they were harassing him.

The jury would have seen when the officer began to video the events and how far away from his vehicle the officer was. It would have shown that the search of his pockets was not what made him frustrated and

contradicted his testimony that it did. It would have shown the jury that he was belligerent and hostile, using profanity. The jury would have heard him say, “Fuck you guys”, which he denied saying during his testimony. (R98: 146). The recording was more beneficial to the state than to Mr. Kothbauer.

Assuming *arguendo*, that Attorney Thorson was ineffective for not playing the video for the jury, Mr. Kothbauer’s defense was not prejudiced. The phrase that the proof is in the pudding seems apropos in this context. Attorney Thorson’s not having played the video, whether a strategic decision or not, resulted in the jury finding Mr. Kothbauer not guilty of operating while impaired.

The jury was faced with a test result showing a blood alcohol content of .127, and expert testimony to support it. The jury had little choice but to find that the state had proven beyond a reasonable doubt that Mr. Kothbauer had operated a motor vehicle on a public highway with a BAC above .08. Playing the video would not have had any impact on the jury’s verdict as to this count.

As to the PAC count of which he was convicted, Mr. Kothbauer cannot meet his burden to prove that he was prejudiced by this claimed deficient performance by Attorney Thorson. He cannot prove that there is a reasonable probability of a different result had this recording been played. ***State v. Hunt***, 2014 WI 102, ¶ 40, 360 Wis.2d 576, 602-603, 851 N.W.2d 434, 447.

D. Attorney Thorson Performance Was Not Deficient Because He Failed To Obtain and Present Medical Records Or Expert Testimony As To Mr. Kothbauer's Brain Injuries. If It Was, Mr. Kothbauer Cannot Prove His Defense Was Prejudiced.

Judge Cray denied this portion of the motion. He noted that no facts or other information was presented as to whether an expert was available and to what this expert would testify. (R 87: 4). He implicitly found that the medical reports were as detrimental to the defense position as to the state.

Mr. Kothbauer argues that Attorney Thorson should have obtained medical records and expert testimony to explain Mr. Kothbauer's brain injuries. He argues that Attorney Thorson had months to obtain these medical

records and failed to do so. Attorney Thorson could have had these admitted without testimony pursuant to sec. 908.03(6m)(b), Stats. He claims that the jury would have been able to tell that his behavior on the night of his arrest was due to his brain injuries, and not due to him being intoxicated. He attached medical records from 2011 to his motion.

One of the records Mr. Kothbauer attached to his motion, was a six page report of an examination. (R79: 51-56). This document shows the results of some medical tests performed on 1 June 2011. Information contained in this document showed that Mr. Kothbauer should have been able to perform the field sobriety tests he was asked to perform on 23 March 2016. This report would have allowed the jury to conclude that his failure to perform the FTS was due to his consumption of an intoxicant.

The court quoted a portion of this report to support its decision. In its trial brief, the state directed the court's attention to page 4 of 6. The court quoted this language and more in its decision:

> He [Mr. Kothbauer] has full active range of motion in all four extremities. Strength is 5/5. No focal sensory deficits. Reflexes 2+.

> Finger to nose and heel to shin are within normal limits. He is able to walk on toes and heels and ***perform single leg stance***. [Emphasis added].

(R79: 44 & R87: 4).

This report shows he could perform the one leg stance test despite his injuries. The jury would have been able to draw this same conclusion had it seen this report. This report would not have shown the jury his inability to do the field tests was due to his brain injuries. The jury could have found that the reason for his inability to perform these field sobriety tests that night was his consumption of an intoxicant; specifically alcohol.

The court also quoted language from a second report attached to Mr. Kothbauer's brief. (R79: 48-50). "MCT: Pt is able to react in a timely manner to maintain balance amidst varying amplitude perturbation." (R87: 4).

This report addressed testing done on 8 August 2011. This record states that Mr. Kothbauer's "'Specific Balance Confidence Scale' was 95". (R79: 48). This report shows that much of his balance related results are within normal limits (wnl). The

report does note some difficulty as to maintaining an upright position on an incline and/or a decline. However the report also showed: “[Patient] is able to utilize his vision, somatosensory and vestibular input to effectively maintain postural control despite challenges to these systems.” It also states: “[Patient] is able to react in a timely manner to maintain balance amidst varying amplitude perturbations.” (R79: 50). From this information the jury would have been able to conclude his failure to successfully do the FSTs on 23 March 2016 was due to intoxication.

In a letter from the Department of Veterans Affairs, (VA), dated 4 May 2013, The VA explained its decision as to his disability rating. (R79: 52-57). The VA determined Mr. Kothbauer’s disability as it related to his “motor activity facet” was zero and as to his “visual spatial orientation facet”, which in part addresses balance, was also zero. (R79: 54).

Essentially they found nothing wrong with his motor activity or his ability to maintain his balance. The VA also noted that the decision was not permanent

since there was a likelihood of improvement.(R79: 56).

According to these documents, Mr. Kothbauer's balance was within normal limits except on inclined or declined surfaces. The FSTs in this case were conducted on a flat level surface. (R37). According to these reports, he should have been able to perform the FSTs. A jury, given this information, could reasonably conclude his inability to do the FSTs was not due to his brain injuries, but was due to his intoxication.

On cross-examination, an expert witness would have had to explain to the jury the findings of these tests and reports. As the trial court recognized, the state would have made much of this information on cross examination. (R87: 4). The State would have argued to the jury that this information showed that Mr. Kothbauer's balance was largely unaffected by his brain injuries. This testimony would not have benefitted Mr. Kothbauer or his defense.

These medical records and expert testimony, if any, would have been beneficial to the state. If it was beneficial to the defense, it was only as to the

impaired driving charge, of which he was found Not Guilty. This information would not have had any impact on the evidence as it related to the PAC charge. Since the jury found him not guilty of the OWI count, its inclusion would not have changed the outcome of the trial. These reports would not have had any impact on the BAC test results. The jury, following the jury instructions, had little choice but to accept the BAC test results and to find Mr. Kothbauer guilty of count two: Operating on a Public Highway with a BAC in excess of .08. Mr. Kothbauer cannot prove his defense was prejudiced by his attorney's failure to obtain or submit this evidence to the jury or to have an expert witness testify as to these findings.

The judge found the trial attorney's decision not to seek to introduce this evidence was a strategic decision based upon a rational basis. There is no factual basis for this finding.

The state would argue that the correct basis for the court's decision is that the record proves conclusively that Mr. Kothbauer is not entitled to the relief he is requesting. He does not have the ability

to meet his burden to prove prejudice as to this omission by Attorney Thorson. The record proves conclusively Mr. Kothbauer is not entitled to the relief requested as to this issue. The trial court made the right decision, but for the wrong reason. This court should affirm the trial court's decision despite its erroneous factual finding. ***State v. Rognrud***, 156 Wis.2d 783, 789, 457 N.W.2d 573, 576.

E. The Cumulative Effects Of Attorney Thorson's Alleged Deficient Performance Did Not Prejudiced Mr. Kothbauer And Deny Him His Right To A Fair Trial.

The trial judge concluded that the cumulative effect of all the acts and omissions of Attorney Thorson claimed to be deficient performance was the same as each one individually.(R87: 5). The court concluded that the record showed conclusively that Mr. Kothbauer was not entitled to the relief requested.

While this court's review is de novo, the state believes that the trial court's conclusions are correct. There was no deficient performance by Attorney Thorson. Assuming, there was, there was no

prejudice. Mr. Kothbauer has not alleged adequate facts, which if true, would entitle him to the relief requested. Nor is there a legal basis to support many of his claims for relief. There is no probability of a different result. This court can have confidence that Mr. Kothbauer had a fair trial and that the jury reached a correct verdict.

II. BASED UPON THE INSUFFICIENCY OF HIS MOTION, MR. KOTHBAUER IS NOT ENTITLED TO THE RELIEF HE IS REQUESTING. AN EVIDENTIARY HEARING WAS NOT NEEDED. THE TRIAL COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION BY NOT HOLDING A HEARING ON MR. KOTHBAUER'S MOTION.

The trial court concluded that Mr. Kothbauer's Motion for Postconviction Relief was insufficient as to necessary facts. The court further found that the record showed conclusively that Mr. Kothbauer was not entitled to the relief requested. Having made these findings, it was within the court's discretion whether to hold an evidentiary hearing. 2016 WI 46 at ¶23, 369 Wis.2d at 246, 880 N.W.2d at 669.

Mr. Kothbauer takes exception to the trial court's conclusion that no evidentiary hearing is necessary.

He argues that the motion states adequate facts to require an evidentiary hearing and the court must schedule one.

Mr. Kothbauer's conclusion is incorrect. If the court finds that the record shows conclusively that the movant is NOT entitled to the relief requested, the court may then decide not to hold an evidentiary hearing. *Id.* The trial court's final conclusion was that the record showed conclusively he was not entitled to the relief he has requested. (R87: 5).

As to the suppression issue, Mr. Kothbauer argues that the search transformed the noncustodial stop into a custodial stop. There is no legal authority to support this argument. As the state has noted, an attorney cannot be found to have provided ineffective assistance of counsel by failing to argue a motion that lacks merit. 187 Wis.2d at 360, 523 N.W.2d at 118. An evidentiary hearing would not have been helpful on this issue. The trial court did not erroneous exercise its discretion as to this issue.

Mr. Kothbauer next moves to his claim of deficient performance as to moving to suppress the FSTs. He

refers to ***State v. Zivcic***, 229 Wis.2d 119, 128, 598 N.W.2d 565, 570 (Ct. App. 1999). He argues that this case shows that the officer's training must comply with the requirements of the NHTSA manual and training. In ***Zivcic*** the court states:

> The record reflects that Deputy Pauley testified that he was trained in administering and evaluating the test. Thus, there was a reasonable basis for the trial court to conclude that he was qualified, pursuant to § 907.02, stats., to offer the expert opinion regarding the HGN sobriety test.

Id. at 128, 598 N.W.2d at 570.

Nowhere in this opinion does the term NHTSA or the words for which it stands, appear. Mr. Kothbauer equates "properly trained" with being trained according to the NHTSA manual. There is no Wisconsin statute or caselaw holding that training according to this manual is necessary to be properly trained to administer the HGN test in Wisconsin. Thus the court was correct to implicitly hold this issue lacked merit.

Mr. Kothbauer argues that the court based its decision on incorrect facts as to an alternate test being offered and that the officer did not take into account Mr. Kothbauer's performance in the "walk and

turn” and “one leg stance” test. He says the evidence shows the officer took these test results into account in making his decision as to probable cause to arrest.

Whether Mr. Kothbauer was offered an alternate test that he refused is irrelevant. In his motion, He argued that the officer had him do the test and did not tell him that if he could not do them, he would not take the results into account. He argues the clues from these tests should not have been used by the officer.

The burden of proof is on Mr. Kothbauer, not on the state. In his motion he presented no facts or caselaw that the officer’s actions were inappropriate or that the officer could not use his performance on the balance tests in determining the existence of probable cause. His argument is apparently based upon the NHTSA manual requirements, which are not mandatory in Wisconsin.

This argument is also based upon an assumption that all of Mr. Kothbauer’s balance problems were due to his medical condition. The medical reports discussed earlier show that this assumption is not correct. A review of the dash cam further shows that

Mr. Kothbauer was drunk and his balance problems were due to his intoxication. (R37).

The court in ***State v. Tullberg***, 2014 WI 134, ¶ 35, 359 Wis.2d 421, 441, 857 N.W.2d 120, 130, rejected Tullberg's assertion that bloodshot and glassy eyes should not be used as signs of intoxication and could not be used by the officer to determine probable cause. The court noted specifically that the study by the NHTSA, which was cited by Tullberg, did not excluded intoxication as a cause of bloodshot and glassy eyes. The court "reaffirmed" that an officer is permitted to use these observations as an indication of intoxication. Id. The court did not require the officer to first determine if another explanation for bloodshot and glassy eyes existed before making a probable cause determination. *Id*. The court did not impose upon the officer any duty of due diligence to make any such determination of an innocent explanation.

The trial court correctly concluded that no caselaw required compliance with the NHTSA manual. The trial court correctly concluded that no facts had been alleged to support his claim his attorney was

ineffective. The trial court was correct when it concluded the record conclusively showed Mr. Kothbauer was not entitled to the relief he requested. This court should affirm this portion of the court's decision.

Mr. Kothbauer raises a valid point that without an evidentiary hearing, the trial court cannot state that the attorney made a strategic decision not to play the dash cam for the jury. The court's decision is not supported with any evidence.

However the trial court reached the correct decision, but for the wrong reason. Had the jury seen the recording, it would have seen a person who could not safely operate a motor vehicle on a highway, disabilities or not. Its shows a person who had had more to drink than the three drinks, even pint size drinks, to which he testified he imbibed. It shows a person whose behavior was consistent with having a BAC over .08. It shows a person who was argumentative and belligerent. It shows a person who was "drunk".

Implicit in the trial court's decision is that this recording is a double edge sword. It hurts the defense as much or more than it helps. An effective

attorney would have made a rational decision not to play the recording. That is not the correct standard.

However, the fact that the recording cuts both ways and that Mr. Kothbauer was found Not Guilty of the impaired driving offense shows that Mr. Kothbauer defense was not prejudiced by Attorney Thorson's not having played the recording.

Mr. Kothbauer speculates that had the jury seen the recording, it would have found him not guilty of both counts. The state can speculate that had the recording been played, he would have been found guilty of both counts. This recording was only probative of one count, and he was found not guilty of that count.

The trial court reached the correct decision. This court should still affirm the trial court's decision. "Where the trial court makes the right decision for the wrong reason, this court will affirm. *State v. Alles,* 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982)." 156 Wis.2d at 789, 457 N.W.2d at 576.

Mr. Kothbauer correctly points out the same error by the trial judge as to whether Attorney Thorson's performance was deficient for not introducing the

medical records. The state's response is basically the same as it was in reference to the dash cam.

As the trial judge pointed out, these reports showed that Mr. Kothbauer's balance was within normal limits. The judge also pointed out the deficiencies of the motion in that it failed to specify what expert would be called, to what the expert would testify and to what opinion the expert would give. These deficiencies warrant the denial of this portion of the motion without an evidentiary hearing. See ***State v. Saunders***, 196 Wis.2d 45, 51-52, 538 N.W.2d 546, 549 (Ct. App 1995).

The trial court, in pointing out how these medical records were detrimental to the defense, implicitly held that the defense had failed to prove prejudice. It essentially found that had Attorney Thorson's performance been deficient, it was not prejudicial to the defense.

Mr. Kothbauer, then argues that an expert could have testified that Mr. Kothbauer was not a "suitable candidate for the field sobriety tests." He adds that the expert could have "explain to the jury the true

likelihood of improvement and how the condition can worsen and what those effect would look like." (Appellant's Brief at pp. 45-46).

These assertions are not facts to which a known expert would testify. At best these assertions are speculative or generalities that may or may not apply to Mr. Kothbauer. This argument ignores the fact that the VA indicated that it expected that Mr. Kothbauer's condition would improve, not worsen, with time. (R79: 56). Mr. Kothbauer apparently does not understand that the burden of production and the burden of proof is on him to establish a factual basis for both deficient performance and prejudice.

Mr. Kothbauer then argues that the trial court did not address such issues as dizziness or headaches. There was no testimony by Mr. Kothbauer at the trial as to having dizziness or headaches at the time of the stop. Nor was there any factual allegation in the motion suggesting that he was dizzy or had any headache during the stop. Mr. Kothbauer has not indicated in the motion any facts as to his condition being worse than it was in 2013. An expert could NOT testify to

him being worse five years after the 2011 examinations without a new examination. He has not alleged he was reexamined and that the examiner would testify he is worse now or that he has regressed to a later stage. No facts are alleged from which the court could find that information on his brain injuries would have made a different in his defense.

These medical reports were only relevant to the impaired driving count. The jury found Mr. Kothbauer not guilty of the impaired driving count. This "not guilty" verdict is factual proof that Mr. Kothbauer's defense was not prejudiced by Attorney Thorson's alleged deficient performance.

Mr. Kothbauer argues that these medical reports were not only relevant to the impaired driving offense, but also to the probable cause to arrest determination. He argues the expert could have explained how he should not have had to do the FSTs, including the HGN test, due to his brain trauma.

The probable cause determination is one made by the officer and by the court and not the jury. The officer was able to use the results of the HGN test to

determine probable cause. 2014 WI 134 at ¶35, 359 Wis.2d at 441, 857 N.W.2d at 130. As long as an inculpatory inference can be drawn from the observed facts, there is probable cause to make an arrest. 2007 WI App 189 at ¶14, 304 Wis.2d at 189-190, 738 N.W.2d at 128.

Mr. Kothbauer cites to no authority that because of his traumatic brain injury, clues obtain from an HGN test cannot be indicative of intoxication. See ***Tullberg*** for an analogous argument rejected by the Wisconsin Supreme Court.

CONCLUSION

Mr. Kothbauer cannot meet his burden to prove that Attorney Thorson's performance was deficient. Even if he could overcome this hurdle, he would be unable to prove his defense was prejudiced thereby. The jury's decision to find him not guilty of the OWI count shows that Attorney Thorson's performance was not deficient. Attorney Thorson's performance was sufficient to create in the minds of the jurors a reasonable doubt as to whether Mr. Kothbauer's ability to safely operate a motor vehicle was impaired.

The jury was faced with irrefutable evidence that

Mr. Kothbauer was operating with an excessive blood alcohol content. Even had Attorney Thorson's performance at trial been deficient, as alleged, none of the deficiencies related to the evidence as to the PAC count. Since none of the alleged deficient performance can be said to have involved the PAC count, Mr. Kothbauer cannot prove he was prejudiced even if the alleged deficient performance was true.

Mr. Kothbauer failed to allege adequate facts, which, if true, would not have entitled him to the relief he is requesting. He cannot meet his burden of proof as to his defense being prejudiced. Therefore, an evidentiary hearing was unnecessary and the trial court decision should be affirmed.

Submitted this 2nd day of February 2021.

RESPECTFULLY SUBMITTED:

ROY LA BARTON GAY
Asst. District Attorney
711 N. Bridge St.
Chippewa Falls, WI 54729
715-726-7740
Respondent's Attorney

ATTORNEY FOR RESPONDENT

CERTIFICATION

I certify that this Brief and Appendix conforms to the rules contained in secs. 809.19(8) (b) and 809.62(4), Stats., for a petition produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on right and left margins with 1 inch margin on top and bottom. The length of this brief is 45 pages, including this one.

Dated this 2nd day of February 2021.

_____
ROY LA BARTON GAY
Assistant District Attorney
Attorney # 1002794

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 2nd day of February 2021.

_____
Roy La Barton Gay
Assistant District Attorney
Attorney # 1002794