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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2020 AP 1406 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ERIC TRYGVE KOTHBAUER,

Defendant-Appellant.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED
ON JULY 27, 2020, IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY, THE HONORABLE
STEVEN R. CRAY, PRESIDING

Respectfully Submitted,

ERIC TRYGVE KOTHBAUER,
Defendant-Appellant.

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ARGUMENT

I. Trial counsel was ineffective.

A. The illegal search conducted by Checkalski should have been challenged by trial counsel, and not doing so was ineffective and prejudiced Kothbauer.

The State claims Checkalski's search of Kothbauer was not illegal, arguing Kothbauer consented to a full search of his person when he consented to a pat-down.[1] Upon Kothbauer consenting to a pat-down, Checkalski put his hands directly into Kothbauer's pockets without first performing said pat-down. The State claims, "reaching into a suspects pocket is not a separate search, but a continuation of the pat-down search."[2] The State cites to ***State v. Morgan***, 197 Wis. 2d 200, 539 N.W.2d 887 (1995), where the Wisconsin Supreme Court held a pat-down constituted a search. However, Kothbauer's situation differs because a pat-down was never conducted, unlike in ***Morgan***.[3] Thus, there can be no "continuation" of a pat-down that was never performed.

The State then argues Checkalski was authorized to place his hands directly into Kothbauer's pockets, stating part of a weapon frisk authorizes an officer, after having felt a bulge, to proceed to place his hands into a subject's pockets to determine if what he felt was a weapon.[4] An officer must first conduct a pat-down and feel a bulge which could reasonably be construed as a weapon before he simply

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[1] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 9.
[2] ***Id.***
[3] ***State v. Morgan***, 197 Wis. 2d 200, 205, 539 N.W.2d 887, 889 (1995).
[4] ***State v. McGill***, 2000 WI 38, ¶ 34-36.

reaches into a suspect's pockets.[5] The Wisconsin Supreme Court has stated a proper investigative pat-down, "involves only a search that is carefully limited to a pat-down of the outer clothing of a suspect."[6] There is no Wisconsin caselaw, and the State cites to none, which allows an officer to *bypass* the requirement for a frisk by asking consent to conduct a frisk.

The cases the State cites to do not say merely because an individual consents to a pat-down police may then do a full search of his person. The items the officer found on the defendants in ***State v. Morgan*** and ***State v. McGill*** were both found after the officer had conducted a *Terry* frisk, not a search as intrusive as the search Checkalski conducted of Kothbauer.[7] The State further seeks to justify Checkalski's actions by stating, "Prior to the search, Mr. Kothbauer twice told the officer that he had some 'chew' tins in his pants pocket…the officer was justified in checking to see if Mr. Kothbauer was truthful as to what was in his pockets. Additionally a tin of chew can be used as a weapon or may conceal a weapon such as a razor blade."[8]

First, the way for Checkalski to check to see if Kothbauer was truthful was to perform a pat-down. No caselaw was cited in which an officer, upon hearing a suspect has objects in his pockets, can simply reach in said suspect's pockets.

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[5] ***State v. Matejka,*** 2001 WI 5, ¶ 37, 241 Wis. 2d 52, 68, 621 N.W.2d 891, 898 (*citing* ***Walter v. United States***, 447 U.S. 649, 656 (1980)) ("The scope of consent to search may be limited by the terms of its authorization."); ***Florida v. Jimeno****,* 500 U.S. 248, 252, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) ("One who consents to a search "may of course delimit as he chooses the scope of the search to which he consents.").

[6] ***State v. Richardson***, 156 Wis.2d 128, 146-47,456 N.W.2d 830 (1990).

[7] 197 Wis.2d 200 539 N.W.2d 887 (1995); 2000 WI 38, 234 Wis.2d 560, 609 N.W.2d 795.

[8] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pgs. 9-10.

Turning to the issue of the chew tins, if a weapon were inside Kothbauer's chew tins, Kothbauer would have had to undo the chew tin and attack Checkalski while Checkalski and the other officer on scene were watching him. This logic is irrational.

Moreover, Checkalski did not testify he believed the chew tins contained a weapon, or that they could be used as one. The State also claims, "when the officer reached into his pockets, [Kothbauer] did not object to the officer's actions."[9] As can be seen by the L3 Dash Cam, Kothbauer did express his displeasure while Checkalski searched him.[10] Regardless, the burden was not on Kothbauer to raise an objection to the unreasonable search, as the Fourth Amendment protects individuals from said unreasonable searches. Mere acquiesce to an officer's actions does not equate to consent.[11] Thus, the search was illegal and should have been challenged by trial counsel, and the failure to do so prejudiced Kothbauer.

B. Under the totality of the circumstances, Kothbauer would have believed himself under arrest.

The State says part of the, "ultimate question is whether Mr. Kothbauer's freedom of movement was restrained to the degree associated with a formal arrest."[12] Courts have considered a variety of factors when looking specifically at the degree of restraint, including:

> (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a *Terry* frisk was performed; 4) the manner in which the

[9] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 10.
[10] R. 37.
[11] ***Bumper v. North Carolina***, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).
[12] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 12.

> defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved.[13]

It is important to note these are not the only factors to be considered.[14]

Kothbauer was pulled out of the vehicle and he asked multiple times if he could leave and was told he could not.[15] Prior to Kothbauer performing the standardized field sobriety tests (SFST), there were only two officers on scene. Before the investigation was concluded and Kothbauer placed under arrest, there were four officers on scene surrounding him. The State's brief claims the two additional officers were necessary after Kothbauer began displaying, "aggressive and belligerent behavior."[16]

Checkalski testified at trial Kothbauer was "frustrated" but did not refer to him as being "aggressive or belligerent."[17] The additional officers arrived on scene after Checkalski had searched Kothbauer's pockets and found no weapons. Thus, there was no need for so many additional officers on scene. Further, Kothbauer suffers from a traumatic brain injury and is more vulnerable than others. It would be reasonable for Kothbauer to feel his freedom was curtailed to the degree normally associated with formal arrest based upon how the four-armed police officers handled the investigation. Given he was subjected to a full search that should only be done upon arrest, had multiple police officer surrounding him, was told he could not

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[13] ***State v. Gruen***, 218 Wis. 2d 581, 595-596, 582 N.W.2d 728 (Ct. App. 1998).
[14] ***Id.*** at 594.
[15] R. 37.
[16] ***Brief of Plaintiff-Respondent***, ***State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 13.
[17] R. 98 at 53-55, (Kothbauer was referred to as "frustrated" but not hostile").

leave, and suffers from a traumatic brain injury, Kothbauer was under arrest when viewed in the totality of the circumstances long before Checkalski officially declared he was. Had trial counsel challenged the illegal search being such that Kothbauer was placed under arrest by the action of the search, there would have been no probable cause to arrest Kothbauer, and the case would not have appeared in front of a jury.

Evidence of this illegal search was probative to the issue of whether Kothbauer was operating with a prohibited alcohol concentration. At trial, had the jury seen how Checkalski improperly searched Kothbauer, it would have highlighted the improper response of Checkalski which, when combined with the totality of the circumstances and what led to Kothbauer's arrest, would had made the jury question whether or not the whole investigation was done properly. "Inconsistencies and contradictions in a witness's testimony are for the jury to consider in judging credibility and the relative credibility of the witnesses is a decision for the jury."[18] Thus, trial counsel should have brought such constitutional violations to the attention of the jury for them to consider whether or not Checkalski was a credible witness, and failure to do so prejudiced Kothbauer.

C. Trial counsel was ineffective by not moving to suppress the results of field sobriety tests.

Checkalski lacked probable cause to administer a preliminary breath test (PBT) and to arrest Kothbauer. The State cites to the odor, the fact Kothbauer

[18] ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63, 66 (1978).

admitted to consuming alcohol, and his driving behavior as reasons why Checkalski had probable cause.[19] Checkalski would need more than a driving violation to place Kothbauer under arrest for operating while under the influence (OWI).[20] An odor of intoxicants does not mean a person is intoxicated. It simply means an individual had something to drink recently, which Kothbauer admitted too. Moreover, drinking and then driving is not unlawful, as Wisconsin has not prohibited driving after consuming intoxicants.

The State cites to ***State v. Babbit***, in which an officer may use the refusal of a PBT in his probable cause analysis.[21] Kothbauer did not refuse, as Checkalski and another officer on scene told Kothbauer he did not have to do the PBT if he did not want to.[22] Thus, it was also not made clear to Kothbauer that there would be consequences if he did not perform the PBT. As he was being arrested, Kothbauer stated he did not say he would not do the PBT.[23] Kothbauer did not refuse the PBT, and any notion of refusal was not reasonable for Checkalski to use in his probable cause determination.

The State says Checkalski was not required to believe Kothbauer when he informed Checkalski he suffered from a head injury and had issues with balance.[24] Checkalski stated he was trained in administering SFST.[25] At Kothbauer's trial,

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[19] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pgs. 16-18.
[20] ***State v. Colstad***, 2003 WI App 25, 260 Wis. 2d 406, 420, 659 N.W.2d 394.
[21] 188 Wis. 2d 349.
[22] R. 37.
[23] R. 37.
[24] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 22.
[25] R. 98. at 56.

Checkalski testified the use of these tests are meant to show impairment.[26] This testimony by Checkalski was used to demonstrate his training made him qualified to tell if an individual was under the influence based upon said individual's performance. This training is provided by the National Highway Traffic Safety Administration (NHTSA).[27] If a law enforcement officer does not administer the tests as he was trained, his preliminary determination is incorrect, and the main tool he uses to determine whether there is probable cause to request a PBT and to arrest an individual for OWI is no more.[28]

Checkalski based his probable cause determination, in part, on these SFST.[29] Checkalski did not follow his NHTSA training and did not conduct his due diligence in ensuring there were no other reasons for Kothbauer's performance on the tests. While Checkalski is not required to think of an innocent explanation to explain away his observations, he is required to screen individuals out of tests that would cause bias to them as he was trained to by NHTSA.[30] Checkalski also did not testify he didn't believe what Kothbauer said; thus, the State is speculating. Trial counsel was ineffective for failing to raise the issue of Checkalski's probable cause determination in a suppression motion, which was based on these tests. Trial counsel's failure prejudiced Kothbauer.

[26] R. 98. at 59, 64.
[27] DWI Detection and Standardized Field Sobriety Test Manual, (2015); (App. A-10).
[28] R. 82. at 16-17.
[29] R. 98 at 64.
[30] DWI Detection and Standardized Field Sobriety Test Manual, (2015); (App. A-10).

D. Trial counsel was ineffective for failing to show the L3 Dash Cam footage to the Jury.

The State claims the L3 Dash Cam footage would have been harmful if it was shown to the Jury, stating the footage would have shown Kothbauer's behavior was consistent with someone who had a .08 blood alcohol concentration.[31] Contrary to the State's assertation, Kothbauer's testimony matches the L3 Dash Cam, as the footage shows him being frustrated with the officers.[32] Further, no one can testify to Kothbauer's mental state except himself. As such, his testimony is evidence and should be taken as true. The playing of the footage, along with the testimony, would have shown that Kothbauer was not exhibiting the behavior of a person who was above a .08. Thus, the jury would have been more likely to acquit on both charges had the video been played, and trial counsel's failure to do so prejudiced Kothbauer.

E. Trial counsel's failure to obtain medical files or an expert was ineffective.

The State claims had the jury seen the medical records, "The jury would have found that the reason for his inability to perform these field sobriety tests that night was his consumption of an intoxicant; specifically alcohol."[33] The ineffectiveness of trial counsel stems from his failure to use the medical records in conjunction with the testimony of an expert. The State agrees with the trial court's ruling denying Mr. Kothbauer an evidentiary hearing by stating the Motion for Postconviction Relief,

[31] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 25.
[32] R. 98 at 145; R.37.
[33] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 28.

"failed to specify what expert would be called, to what the expert would testify and to what opinion he would give."[34] In a previous filing, Kothbauer stated an expert:

> to explain to the jury the true likelihood of improvement…This testimony would have been able to show that after five years Kothbauer's injury was at a worse stage than when it began.[35]

The State claims these assertations are not facts to which a known expert would testify.[36] There is no way to show this without expert testimony on the subject itself. It cannot be said an expert qualified in the study of neurology would not have been able to testify to Kothbauer's condition at the time of the arrest. An expert could have attempted to recreate the tests given and report his findings for the jury to see. While Veterans Affairs deemed there to be a likelihood of improvement, it did not state Kothbauer would recover. An expert would have been entitled to testify as to the likelihood of improvement of Kothbauer's disabilities and the challenges they posed to him during his arrest had an evidentiary hearing on his Motion for Postconviction Relief been granted. For trial counsel not to obtain said expert and present this before a jury prejudiced Kothbauer.

II. The trial court erred in not granting Kothbauer an evidentiary hearing on his motion for postconviction relief.

The trial court incorrectly denied Kothbauer's Motion for Postconviction Relief without an evidentiary hearing. For the reasons noted above and in his previous filings, none of Kothbauer's previous filings lacked merit, as Kothbauer

[34] ***Id.*** at 40.
[35] R. 82 at 22.
[36] ***Brief of Plaintiff-Respondent, State v. Eric Trygve Kothbauer***, 2020AP01406-CR, pg. 41.

stated adequate facts upon which a hearing should have been granted. The question is not whether or not the submissions in Mr. Kothbauer's Motion for Postconviction Relief are accurate, but assuming said submissions are accurate, whether a hearing should be granted. The answer is yes.

Where a postconviction, "motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing."[37] Postconviction pleadings must allege with specificity both deficient performance and prejudice.[38] Put another way, postconviction motions must contain more than conclusory allegations of deficient performance and prejudice.[39] Mr. Kothbauer's postconviction motion amply cleared that bar.

The court of appeals in ***State v. Saunders*** conceptualized the difference between adequate and inadequate allegations somewhat differently.[40] The ***Saunders*** case distinguishes between adequate, "factual-objective" allegations as opposed to inadequate, "opinion-subjective" allegations.[41] Defendant's allegations in the ***Saunders*** case were opinion-subjective because he merely alleged that "trial counsel failed to properly counsel defendant."[42] That allegation failed because he did not explain the circumstances of his attorney's deficient counseling such that his

[37] ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996) (citing ***Nelson v. State***, 54 Wis. 2d 489, 497, 548 N.W.2d 50 (1996)).
[38] ***State v. Winters***, 317 Wis. 2d 401, 418, 766 N.W.2d 754 (Ct. App. 2009).
[39] ***Winters***, 317 Wis. 2d at 418.
[40] 196 Wis. 2d 45, 51–52, 538 N.W.2d 546 (Ct. App. 1995).
[41] 196 Wis. 2d 45 at 51–52 (citing Jeanne L. Schroeder, *Subject: Object*, 47 U. Miami. L. Rev. 1, 40 (1992)).
[42] 196 Wis. 2d 45 at 52.

motion raised a question of fact requiring a hearing.[43] On the other hand, Mr. Kothbauer alleges factual-objective circumstances with specificity. Therefore, this Court must schedule an evidentiary hearing.[44]

Failure to highlight the improper search performed by Checkalski and challenge the results of the field sobriety tests based upon the officer's training at the pretrial stage through suppression motions prejudiced Kothbauer. Further, failing to bring these issues forward at the jury trial, along with not showing the L3 Dash Cam footage of the incident, prejudiced Kothbauer. Had the jury seen the improper police procedure performed by Checkalski when he searched Kothbauer, it would have questioned Checkalski's credibility and the arrest of Kothbauer. If trial counsel would have retained an expert who would have testified to the effects Kothbauer's injury had on his ability to perform field sobriety tests, or at least submitted the medical records and allowed Kothbauer to explain his disabilities, then the jury would have been able to see that Kothbauer's behavior and his test results that night were due not to him having a blood alcohol content above .08, but because of his disability. The failure of trial counsel to do all of these actions prejudiced Kothbauer.

[43] ***Id.***
[44] ***Bentley***, 201 Wis. 2d at 309.

CONCLUSION

Kothbauer requests that this Court reverse the circuit court's order denying his Motion for Postconviction Relief for the reasons stated in this and Mr. Kothbauer's original brief.

Dated at Madison, Wisconsin, March 22, 2021.

Respectfully submitted,

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Dated: March 22, 2021.

Signed,

BY: /s/electronically signed by Vincent J. Falcone
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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:

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(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) 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.

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I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

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APPENDIX