STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal No.: 2020 AP 1406 – CR

ERIC TRYGVE KOTHBAUER

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

Respectfully submitted,

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Defendant-Appellant-Petitioner

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PETITION FOR REVIEW

Petition for Supreme Court to review the decision of the Court of Appeals, District III, in the case of *State of Wisconsin vs Eric Trygve Kothbauer* filed on May 3, 2022, in which the Court of Appeals affirmed the decision of the Circuit Court for Chippewa County denying the defendant-appellant's postconviction motion.

ISSUES PRESENTED FOR REVIEW

Statement of the Issues

First, whether counsel's performance was deficient and prejudiced Kothbauer?

Second, whether the circuit court erred in its decision to deny Kothbauer's motion for postconviction relief without an evidentiary hearing?

Manner of Raising the Issues in the Court of Appeals

This issue was raised in the Court of Appeals by direct appeal to that court from a final order of the Circuit Court for Chippewa County.

How the Court of Appeals Decided the Issues

The Court of Appeals held that counsel was not deficient. Furthermore, the Court held Kothbauer failed to demonstrate prejudice by any of counsel's performance. Lastly, the Court held that circuit court did not err in denying Kothbauer's postconviction motion without an evidentiary hearing.

CRITERIA FOR REVIEW

This Court should take this case for four main reasons. First, a real and significant question of both federal and state constitutional law is presented. Second, the decision by this Court will help develop, clarify, and harmonize the law. The questions presented are novel, and their resolution will have statewide impact. Additionally, the questions presented are not factual in nature but are questions of law likely to recur unless resolved by this Court. Finally, the Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court, the Wisconsin Supreme Court, and the Wisconsin Court of Appeals.

This case involves an unconstitutional search and seizure and the officer's reliance thereupon to justify further constitutionally prohibit intrusions. Caselaw in both Wisconsin and the United States Supreme Court have clarified that the Constitution permits a limited investigative inquiry where there is reasonable suspicion to believe that a crime is, was, or will soon to be committed. *Terry* and its progeny provide guidepost in determining if and when such inquiry breaches constitutional protections. It is also well-settled that warrantless arrests are unlawful if unsupported by probable cause. Here, the case examines the quantum of evidence sufficient to convert reasonable suspicion to extend a traffic stop into probable cause to arrest for an OWI. The Court of Appeals seemingly extends *State v. Blatterman*[1] to find that the quantum of evidence to extend the stop, adding no additional reliable information, is sufficient to support a warrantless arrest.

[1] 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26.

Additionally, the Court of Appeals no longer follows *State v. Bentley.*[2] The Court of Appeals found that Kothbauer failed to sufficiently allege prejudice resulting from counsel's deficient performance. Kothbauer's pleadings demonstrated, with specificity, the ways in which counsel's performance was prejudicial, this included inferences a jury would likely make but for counsel's error. In so alleging, Kothbauer met the pleading requirements to warrant an evidentiary hearing to further develop the record. The Court of Appeals requiring more has the effect of whittling away of the constitutional protections against ineffective assistance of counsel. Additionally, the parties agreed circuit court erred; nonetheless, the Court of Appeals excused the error. The Court of Appeals failed to look at the errors cumulatively and consider the fact that the verdict may have been different without those mistakes.

[2] 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

STATEMENT OF THE CASE AND FACTS

On the night of March 23, 2016, at or about 2:07 a.m., Eric Trygve Kothbauer was stopped by Officer Michael Checkalski for failing to stop at a stop sign and conducting an illegal turn.[3] During the course of the investigation, Checkalski expanded the scope of the stop into an investigation for operating while intoxicated (OWI) based upon him noting an odor of intoxicants, Kothbauer's admission to drinking, and Kothbauer's driving behavior.[4] After Kothbauer stepped out of the vehicle, Checkalski asked Kothbauer if he could conduct a pat down search.[5] Kothbauer agreed.[6] However, Checkalski did not conduct a pat down search, and instead put his hands directly into Kothbauer's pockets without first patting him down.[7]

Checkalski then had Kothbauer perform Standardized Field Sobriety Tests (SFTS).[8] While administering the Walk and Turn test, Kothbauer informed Checkalski that he had balance issues due to having been the victim of five roadside bombs during his service in Iraq.[9] Kothbauer asked for an alternative test.[10] Checkalski told Kothbauer he could do an alternative test if he did not wish to do the Walk and Turn test.[11] Kothbauer stated he wished to do an alternative test.[12] Following Kothbauer's performance on the Horizontal

[3] R.2 at 4.
[4] ***Id.***
[5] R.37.
[6] ***Id.***
[7] ***Id.***
[8] R.2 at 4.
[9] ***Id.*** at 5.
[10] ***Id.***; R.37.
[11] R.2 at 5.
[12] R.37.

Gaze Nystagmus (HGN) and One Leg Stand tests, Kothbauer was placed under arrest for OWI.[13] This entire incident, from the initial stop to Kothbauer's arrest, was captured on Checkalski's Dash Cam.[14] This footage does not provide a clear and up-close video of Kothbauer's eyes.[15]

On March 27, 2017, counsel filed a Motion to Suppress Statements, claiming Checkalski attempted to elicit incriminating statements from Kothbauer without first administering a ***Miranda*** warning.[16] A motion hearing was to be held on the issue of Kothbauer's statements on May 30, 2017.[17] At the motion hearing, the court asked the State if it was ready to proceed with the scheduled motion hearing, which the State responded it was not.[18] The court stated it could then either grant the motion, or issue a voluntary dismissal.[19] When the court asked counsel how it wished to proceed, counsel requested the court set the matter out for a motion hearing, as he wanted the issue before the court to be "fleshed out."[20] At the May 30, 2017 hearing, the court advised counsel that he could file a motion to dismiss if he wished to be heard on the suppression matter further.[21] Counsel filed a motion to dismiss on August 11, 2017.[22]

[13] R.2 at 5.
[14] R.37.
[15] ***Id.***
[16] R.23.
[17] R.26.
[18] R.96 at 2.
[19] ***Id.***
[20] ***Id.*** at 3.
[21] ***Id.*** at 5.
[22] R.28.

A motion hearing was held on the issue of the Motion to Suppress Statements and Motion to Dismiss on November 20, 2017, in which Checkalski testified.[23] The court found that the statements made by Kothbauer and the questions asked by Checkalski did not fall under the custodial interrogation standard set forth in ***Miranda v. Arizona***, 384 U.S. 436.[24] As such, the court denied both the Motion to Suppress Statements and Motion to Dismiss.[25] Counsel filed a motion for reconsideration on March 7, 2018.[26] Counsel argued Checkalski went beyond the time necessary to complete the mission of the traffic stop when he asked Kothbauer unnecessary and argumentative questions.[27] These questions created an unnecessary delay in the Kothbauer's stop.[28] Counsel asserted "the unnecessary escalation of this stop results in not only a 5th Amendment violation, but a 4th Amendment violation as well pursuant to the Smith [***State v. Smith,*** 2018 WI ¶ 2, 376 Wis. 2d 86, 905 N.W. 2d 353] case."[29] At the time of his filing of the motion for reconsideration, counsel attached two disks which contained the Dash Cam footage of Kothbauer's detention and arrest.[30] The court issued an Order Denying the Defendant's Motion to Reconsider on May 23, 2018.[31] The court stated it reviewed the Dash Cam footage of the incident.[32] The court

[23] R.94.
[24] ***Id.*** at 29.
[25] ***Id.*** at 31.
[26] R.35.
[27] R.35 at 2-3.
[28] ***Id.***
[29] ***Id.*** at 3.
[30] R.37
[31] R.38
[32] ***Id.***

found when Kothbauer made incriminatory statements, he was not in custody for purposes of ***Miranda***.[33] No other motions to suppress were filed in Kothbauer's case.

A jury trial was held on April 22, 2019.[34] At the trial, counsel asked the judge what was allowed for questioning of the witnesses with respect to Kothbauer's medical issues.[35] Counsel informed the court he was aware that head injuries could cause nystagmus and wanted to know the limitations of questioning.[36] The court informed counsel any statements made by Kothbauer to Checkalski would be admissible, but any statements by any doctors would be hearsay, and Kothbauer's medical documentation would not be admissible due to there being a lack of foundation.[37] These medical records showed Kothbauer was diagnosed with a traumatic brain injury caused by an improvised explosive device (IED) explosion in November 2010.[38] His records further showed this incident had given him dizziness, headaches, affected his sleep as well as his balance, and he was found to have a slower than normal perception of time along with difficulty activating the correct posture stabilizers to maintain an upright position against an incline or decline in the support surface.[39]

Counsel did not subpoena any qualifying medical professional, nor did he submit Kothbauer's medical records to the court or the State in advance. As such, counsel was not

[33] ***Id.*** at 2.
[34] R.98.
[35] ***Id.*** at 37.
[36] ***Id.***
[37] ***Id.*** at 38.
[38] R.79 at 48-50.
[39] ***Id.*** at 43-45.

able to admit any medical documentation or testimony relating to Kothbauer's medical conditions.[40]

At the trial, Checkalski stated he had received training in administering field sobriety tests.[41] Checkalski testified he told Kothbauer he needed to speak with him outside the vehicle based upon Kothbauer's driving behavior, the fact he had admitted to consuming alcohol, and Checkalski's observations of possible impairment (slow and delayed speech, slow reaction time).[42] Checkalski put Kothbauer through SFST. On the HGN test, Checkalski testified he noted four clues.[43] On the Walk and Turn test, Checkalski stated he observed Kothbauer break the instructional stance before Kothbauer informed Checkalski he had balance issues with his leg.[44] Checkalski testified he did not observe any issues with Kothbauer that were noticeable with his walking or completing the Walk and Turn test.[45] Checkalski testified that Kothbauer stated he did not want to complete the test and asked if there was an alternative test he could take, to which Checkalski stated there was not.[46] Checkalski also testified Kothbauer performed the One Leg Stand test, during which he noted multiple clues.[47] Checkalski testified he had Kothbauer perform an

[40] R.98 at 38.
[41] ***Id.*** at 50.
[42] ***Id.*** at 53.
[43] ***Id.*** at 58.
[44] ***Id.*** at 61.
[45] ***Id.*** at 61-62.
[46] ***Id.*** at 62.
[47] ***Id.*** at 62-64.

alphabet test, which Kothbauer successfully completed.[48] After Kothbauer performed the tests, Checkalski testified that he placed Kothbauer under arrest for OWI.[49]

On cross examination, counsel asked Checkalski if he had performed a pat down search of Kothbauer.[50] Checkalski testified he asked for Kothbauer's consent to perform a pat down search, and Kothbauer consented.[51] Checkalski stated he then performed a pat down search.[52] Counsel questioned Checkalski, stating that Checkalski did not perform a pat down search, but simply placed his hands into the pockets of Kothbauer.[53] Checkalski stated in response "Based on my report, that is when I found the tins of chew."[54] Counsel then asked Checkalski if he had reviewed the Dash Cam footage of the arrest prior to his appearance at trial, to which Checkalski stated he had not.[55] Checkalski stated he asked Kothbauer to step out of the vehicle "to speak with him further regarding, yes, the tests or the observations with intent to, yeah, have Kothbauer perform tests, if he would consent to [the tests]."[56]

Checkalski testified he had lost his report from the night of March 23, 2016, and rewrote two weeks or more after the arrest.[57] Counsel was aware that Checkalski had lost his original report, as the report counsel had received in discovery was the rewritten

[48] ***Id.*** at 64.
[49] ***Id.***
[50] ***Id.*** at 77.
[51] ***Id.*** at 78.
[52] ***Id.***
[53] ***Id.***
[54] ***Id.***
[55] ***Id.*** at 79.
[56] ***Id.***
[57] ***Id.*** at 81.

report.[58] Checkalski testified Kothbauer had informed him that he had been injured by five roadside explosives while in Iraq around six years earlier.[59] Checkalski further testified he was aware nystagmus could be caused by something other than intoxication, such as certain health issues.[60] In his closing statement, counsel reminded the jury that even though Checkalski was aware of Kothbauer's physical injuries, he still administered him balance based tests.[61]

Kothbauer testified, at trial, that while he consented to a pat down search, Checkalski never conducted a pat down search.[62] Kothbauer testified Checkalski simply put his hands directly into Kothbauer's pockets.[63] Kothbauer also testified that, when he was asked to perform the Walk and Turn test, he informed Checkalski that he would have difficulty due to his injuries.[64]

In closing, the State noted, "Now, he claims that there were leg injuries here, and we don't have any real proof of that other than him saying so."[65] The jury returned a verdict of not guilty on the OWI charge and guilty on the PAC charge.[66]

After sentencing, the court issued an Order Denying Kothbauer's Motion for Postconviction Relief without an evidentiary hearing on July 27, 2020.[67]

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[58] ***Id.***
[59] ***Id.*** at 87.
[60] ***Id.*** at 81.
[61] ***Id.*** at 181.
[62] ***Id.*** at 145.
[63] ***Id.***
[64] ***Id.*** at 147.
[65] ***Id.*** at 178.
[66] ***Id.*** at 195.
[67] R.87; (App. A-11).

In his Motion for Postconviction Relief, Kothbauer alleged that counsel was ineffective and his performance was unfairly prejudicial to Kothbauer.[68] Kothbauer explained counsel was ineffective for failing to file suppression motions on the issues of Checkalski's unlawful search and seizure of Kothbauer, as well as on the field sobriety tests and the evidence derived from them.[69] Kothbauer also explained that counsel's strategy was ineffective, as counsel sought to suppress statements Kothbauer made based upon a ***Miranda*** violation.[70] Counsel was further ineffective for failing to utilize the Dash Cam footage of Kothbauer's arrest, as such footage showed Checkalski illegally searched and seized Kothbauer when he put his hands directly into Kothbauer's pockets in lieu of performing the pat down search.[71] The footage also showed Checkalski did not properly administer the SFST as required by National Highway Traffic Safety Administration (NHTSA).[72] Checkalski did not ask Kothbauer if he had suffered any injuries that would have affected his performance on the tests, and even after Checkalski had been made aware Kothbauer had suffered injuries pertaining to his legs and had issues with balance, he still wished for him to perform the Walk and Turn test.[73] The footage further showed how Checkalski informed Kothbauer that he could perform an alternate test instead of the Walk and Turn, and how Checkalski never told Kothbauer he would penalize him if he did not perform the test.[74] Finally, Kothbauer argued in his Motion for Postconviction Relief that

[68] R.79.
[69] ***Id.*** at 5, 10.
[70] ***Id.*** at 13.
[71] ***Id.*** at 15-16; R.37.
[72] ***Id.*** at 15; R.37.
[73] ***Id.*** at 15-16; R.37.
[74] ***Id.*** at 15-16; R.37.

his counsel was ineffective for not obtaining a medical expert or presenting Kothbauer's medical records to bring forth evidence of Kothbauer's injuries at trial.[75]

The circuit court pointed to six reasons as to why there was no need for an evidentiary hearing pursuant to ***Machner***.[76] The circuit court found that Kothbauer was not seized due to there being, in the court's eyes, no evidence that Kothbauer did not consent to the search of his person.[77] The circuit court found counsel was not ineffective for failing to file a suppression motion on the results of the field sobriety tests due there being no case law cited stating an officer must strictly follow the National Highway Traffic Safety Administration manual in having a driver perform SFST.[78] The circuit court further stated Kothbauer declined to perform an alternative test when offered one by Checkalski, and no evidence was presented to indicate Checkalski did not consider all of these issues when making his arrest decision.[79] The circuit court also saw no facts presented to it that supported a claim that counsel's strategy was ineffective in regards to the PAC charge, as Kothbauer was found not guilty of OWI.[80] The circuit court also found counsel made no mistake in failing to present the Dash Cam footage, saying such a choice was a "strategic decision and has rational basis."[81] The circuit court also found counsel was not ineffective for failing to present expert testimony or Kothbauer's medical records, stating no evidence was presented to show what exactly an expert would testify to, along with what opinions

[75] ***Id.*** 16-17.
[76] 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)
[77] ***Id.*** at 2.
[78] ***Id.*** at 2-3.
[79] ***Id.*** at 3.
[80] ***Id.***
[81] ***Id.***

they would have put forth that would be admissible at trial.[82] Further, the circuit court claimed testimony about Kothbauer's disability would have gone to the OWI charge.[83] The circuit court also claimed that the records contained information adverse to Kothbauer's position.[84] Lastly, the circuit court found the records demonstrate Kothbauer is not entitled to relief even when the arguments are taken cumulatively.[85]

The Court of Appeals first assumes, without deciding, that the search of Kothbauer's pockets was unconstitutional. The Court of Appeals found that counsel was not deficient for failure to file a suppression motion because the unlawful search did not render Kothbauer under arrest. Moreover, the exclusionary rule would entitle suppression of nothing of evidentiary value, thus Kothbauer failed to demonstrate prejudice. Similarly, the Court of Appeals concluded that Kothbauer was not prejudiced by counsel's failure place more importance on the unlawful search. The Court of Appeal found that probable cause to arrest existed thus counsel's actions were neither deficient nor prejudicial for not moving to suppress evidence for lack of probable cause.

Furthermore, the Court of Appeals held that Kothbauer failed to demonstrate prejudice from counsel's lack of focus on NHTSA manual. In addition, the circuit court erred in concluding that counsel acted strategically in not displaying dash camera video, and Kothbauer had not demonstrated prejudice with the failure to display the dash camera video to the jury. Similarly, the Court of Appeals found that Kothbauer failed to

[82] ***Id.*** at 4.
[83] ***Id.***
[84] ***Id.***
[85] ***Id.*** at 5.

demonstrate prejudice in counsel not presenting medical records or expert testimony about the background. Namely, the medical records were not as clearly beneficial and provide no evidence to dispute the prima facie evidence of prohibited blood alcohol concentration. Lastly, the Court of Appeals concluded that the circuit court did not err in denying Kothbauer's postconviction motion without hearing.

Kothbauer now petitions this Court.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE SUPPRESSION MOTIONS THAT WOULD HAVE CHANGED THE OUTCOME OF KOTHBAUER'S CASE.

A. Standard of Review

A claim of ineffective assistance of counsel presents a mixed question of law and fact.[86] A Court's findings of fact are reviewed for clear error, but whether counsel's performance is constitutionally infirm is a question of law reviewed *de novo.*[87] Evidentiary issues are reviewed under the erroneous exercise of discretion standard.[88]

B. Governing Law

The Sixth Amendment guarantees the "fundamental and essential" right of the defendant in a criminal case to be represented by counsel.[89] "That a person who happens to be a lawyer is present at the trial alongside the accused, however, is not enough to satisfy the constitutional command."[90] Thus, the right to counsel encompasses the right to the effective assistance of counsel.[91]

A claim of ineffective assistance of counsel is analyzed under the two-part ***Strickland*** test, which requires showing both that counsel performed deficiently and that his or her performance prejudiced the defense.[92] To demonstrate deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of

[86] ***State v. Champlain***, 2008 WI App 5, 307 Wis. 2d 232, 744 N.W.2d 889.
[87] ***Id.***
[88] ***State v. Tabor***, 191 Wis. 2d 482, 488, 529 N.W.2d 915 (Ct. App. 1995).
[89] ***Gideon v. Wainwright***, 372 U.S. 335, 344 (1963).
[90] ***Strickland v. Washington***, 466 U.S. 668, 685 (1984).
[91] ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970).
[92] ***Strickland v. Washington***, 466 U.S. at 687.

reasonableness" considering the totality of the circumstances.[93] "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."[94] The defendant must also demonstrate that counsel's deficient performance was prejudicial.[95] "The question on review is whether there is a reasonable probability" of a different result at trial but for counsel's deficient performance.[96] "Reasonable probability" is defined as "probability sufficient to undermine confidence in the outcome."[97]

Although the court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound plan.[98]" "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."[99]

The deficiency prong is met when counsel's oversight or inattention caused the error, instead of a reasoned defense plan.[100] Strategic decisions made after a less than complete investigation of law and facts may still be adjudged reasonable.[101] But "counsel

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[93] ***Id.***
[94] ***Id.***
[95] ***Id.***
[96] ***Id.***
[97] ***Id.***
[98] ***Strickland***, 466 U.S. at 690; ***Kimmelman***, 477 U.S. at 384, *citing* ***Strickland***, 466 U.S. at 688-89.
[99] ***Id.***, *citing* ***Strickland***, 466 U.S. at 689.
[100] *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman v. Morrison***, 477 U.S. 365, 385 (1986); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis. 2d 343, 433 N.W.2d 572, 576 (1989).
[101] ***Strickland***, 466 U.S. at 690–91.

has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[102]"

The defendant must also demonstrate that counsel's deficient performance was prejudicial.[103] The Wisconsin Supreme Court explicitly applies the "cumulative effect" approach to decide whether counsel's deficient performance prejudiced the defendant.[104] The second prong requires resulting prejudice. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case."[105] Rather, "[t]he question on review is whether there is a reasonable probability" of a different result but for counsel's deficient performance.[106] "Reasonable probability," under this standard is defined as "'probability sufficient to undermine confidence in the outcome.[107]'"

C. Counsel was Ineffective for Failing to Seek Suppression of Evidence Derived from Kothbauer's Unlawful Seizure.

Kothbauer was illegally detained as well as illegally searched and seized by Officer Checkalski, and counsel was ineffective for failing to challenge these Fourth Amendment violations. Upon stepping out of his vehicle at Checkalski's command to perform field sobriety tests, Checkalski asked Kothbauer, "if [Officer Checkalski] had consent to pat

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[102] ***Id.*** at 691.
[103] ***Id.*** at 687.
[104] ***State v. Thiel***, 264 Wis. 2d 571, 603–05, 665 N.W.2d 305 (2003) (citing, *inter alia*, ***Washington v. Smith***, 219 F.3d 620, 634–35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under ***Strickland***, rather than the individual errors."); ***Gonzales v. McKune***, 247 F.3d 1066, 1078 n.4 (10th Cir. 2001) ("***Strickland*** . . . makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong.")).
[105] ***Moffett***, 433 N.W.2d at 576, *quoting* ***Strickland***, 466 U.S. at 693.
[106] ***Moffett***, 433 N.W.2d at 577.
[107] ***Id.***, *quoting* ***Strickland***, 466 U.S. at 694.

down his front pockets for any weapons or contraband, which he gave permission to do so."[108] Such consent should only be elicited when an officer reasonably believes an individual to be armed and dangerous.[109] Checkalski never testified Kothbauer was armed and dangerous.[110] The pat down performed by Checkalski was unreasonable under the Fourth Amendment's protections against unlawful searches.

Checkalski exceeded the scope of the pat down search by not performing a pat down search.[111] After Kothbauer gave Checkalski permission to perform the pat down search, Checkalski put his hands straight into Kothbauer's pockets and began rummaging around, which can be seen from Checkalski's Dash Cam footage.[112] This action has been prohibited by the Wisconsin Supreme Court, which stated, "The Terry doctrine precludes reaching into a suspect's pockets during a frisk for weapons unless the officer feels an object that could be used as a weapon."[113]

Checkalski, in effect, seized Kothbauer without probable cause. The test of whether an individual is under arrest for Fourth Amendment purposes is an objective one.[114] An individual is under arrest in the constitutional sense when, "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."[115] Further, "the circumstances of the situation

[108] R.2 at 6.
[109] ***Terry v. Ohio***, 392 U.S. 1, 27 (1968).
[110] R.79 at 5-6.
[111] R.37.
[112] ***Id.***
[113] ***State v. Swanson***, 164 Wis. 2d 437, 454, 475 N.W.2d 148 (1991).
[114] ***Id.*** at 447.
[115] ***Id.*** at 446-47.

including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test."[116]

Kothbauer, after having been searched, would have reasonably believed he was under arrest, as Checkalski did that which he could only do upon arrest. A search may be done only if law enforcement obtained a warrant or if there exists an exception to the warrant requirement.[117] One such exception is the search incident to arrest doctrine, which allows law enforcement officers to search for any possible weapons that may threaten the officer's safety.[118] However, for this to be valid, the officer conducting the search must already have probable cause to arrest the individual, and the individual must be lawfully arrested after the search is conducted.[119]

Checkalski had no such probable cause to arrest Kothbauer, as the request for one to perform field sobriety tests is not enough for probable cause.[120] By Checkalski placing his hands in Kothbauer's pockets and conducting a search of his person, Kothbauer believed that he was in custody and under arrest. Thus, Kothbauer was seized unlawfully.

The United States Supreme Court has made it clear when evidence is obtained in violation of the Fourth Amendment, "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions."[121] The proper remedy for such a violation

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[116] ***Id.*** at 447.
[117] ***Brigham City, Utah v. Stuart***, 547 U.S. 398, 403 (2006).
[118] ***Chimel v. California****,* 395 U.S. 752, 762-63 (1969), *abrogated on other grounds by* ***Davis v. United States***, 564 U.S. 229 (2011)).
[119] ***State v. Sykes***, 2005 WI 48, ¶ 26, 279 Wis. 2d 742, 695 N.W.2d 277.
[120] ***State v. Swanson***, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991).
[121] ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963).

in this case would have been to suppress any evidence obtained after this search and unlawful seizure. This would include the field sobriety tests and the arrest of Kothbauer.

Had counsel filed the appropriate motion and effectively made this argument, there would have been no probable cause for the arrest, and the blood results would not have been admissible. Thus, Kothbauer would have been found not guilty of OWI and PAC. Further, the State would also have likely dismissed both charges upon a successful motion to suppress, as there would have been little evidence admissible at trial.

Furthermore, the issue of the illegal search done by Checkalski should have been given greater importance at trial. At trial, the jury convicted Kothbauer of the PAC charge. If the issue had been given greater importance, it would have resulted in the jury being aware that the activity of searching someone's person, like Checkalski did to Kothbauer, was not legal. This would have caused the jury to question other procedures done by Checkalski during the investigation and arrest of Kothbauer, such as how he administered the field sobriety tests. If the jury believed Checkalski did not follow the proper methods as it relates to procedure and training, there also would have been a question as to whether Checkalski followed proper procedure in reading Kothbauer the Informing the Accused Form and his handling of Kothbauer's blood sample, which led to the PAC charge.[122] In a close case like this, there would have been no conviction had these issues been brought forth.

[122] R.2 at 4-7.

The Court of Appeals first assumes, without deciding, that the search of Kothbauer's pockets was unconstitutional. The Court of Appeals found that counsel was not deficient for failure to file a suppression motion because the unlawful search did not render Kothbauer under arrest. Moreover, Court of Appeals found that applying the exclusionary rule would result in suppressing nothing of evidentiary value, thus Kothbauer failed to demonstrate prejudice.

D. Counsel was Ineffective Failed to Seek Suppression of the Field Sobriety Tests Results.

Counsel's failure to argue for the suppression of evidence derived from the administration of the field sobriety tests was also ineffective. In ***Renz***, Wisconsin Supreme Court held that police must possess "probable cause to believe" a person is under the influence of an intoxicant before requesting a preliminary breath test.[123] More specifically, probable cause refers to the amount of evidence within the officer's knowledge at the time that would lead a reasonable law enforcement officer to believe the driver was operating under the influence of an intoxicant.[124]

At trial, Checkalski testified he had received training, education, and was certified in SFST.[125] However, testimony established that Checkalski did not follow his training.

[123] ***Cty. of Jefferson v. Renz***, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999).
[124] ***Id***.; ***State v. Secrist,*** 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999) (considering probable cause to arrest).
[125] R.98 at 50.

NHTSA issues the DWI Detection and Standardized Field Sobriety Testing Manual, which contains the procedure to be used by law enforcement officers on how to administer and properly utilize results.[126]

Checkalski improperly administered the HGN test, making any of the clues he noted invalid. The DWI Detection and Standardized Field Sobriety Testing Manual states that prior to administering the HGN test, officers need to ask subjects questions about eyes and general health conditions.[127] NHTSA training requires officers to conduct a check for resting nystagmus.[128] If the officer notices any abnormal findings during the prechecks, he may choose not to continue with the HGN test.[129] Continuing on with the test after observing abnormalities does not conform with standard protocol and should be noted in the officer's report.[130] Abnormalities include resting nystagmus, which may be caused by brain damage and other neurological issues.[131] Checkalski did not ask Kothbauer if he was suffering from any head injuries or medical issues, nor did Checkalski note in his report he checked for resting nystagmus.[132]

At a suppression hearing, counsel could have questioned Checkalski on the accuracy of his report, as it was rewritten two to three weeks after the night of the arrest and Checkalski utilized the Dash Cam and his memory when rewriting his report. A review of the Dash Cam footage does not provide a clear and up-close video of Kothbauer's eyes,

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[126] ***Id***, (2015); (App. A-1).
[127] DWI Detection and Standardized Field Sobriety Test Manual, (2015); (App. A-1).
[128] ***Id.***, Session 8, p. 23-25 (App.6-8).
[129] ***Id.***
[130] ***Id.***
[131] ***Id.***
[132] R.98 at 87; R.2 at 3.

meaning that the clues Checkalski noted in his report from the HGN test were from dated memory. Counsel could have questioned Checkalski on his improper procedure and would have been able to show that the report and recollection were unreliable. Such questioning would have led to suppression.

At trial, this line of questioning would have led to the jury to doubt the officer's procedure on administration. A jury hearing that Checkalski had to re-write his report, which does not show the subject's eyes, would put doubt into the jury's mind as to whether Checkalski's testimony was reliable. Had counsel presented Kothbauer's medical records showing that he suffered from a traumatic brain injury, the jury would have believed the clues noted were due to his medical conditions, as Checkalski performed no prechecks to prove otherwise.

At a suppression hearing, counsel could have noted that despite being aware of Kothbauer's medical issues, Checkalski wished for Kothbauer to continue with the Walk and Turn and administered him the One Leg Stand test.[133]

Counsel was aware of Kothbauer's physical limitations and the role they played in his performance on the field sobriety tests and, therefore, on Checkalski's probable cause determination. Had a motion been filed to suppress all evidence derived from improperly administered field sobriety tests, the court would have granted the motion. Thus, the blood test evidence would have been inadmissible, and there would be no PAC conviction.

[133] R.37.

Instead, the Court of Appeals found that probable cause to arrest existed thus counsel's actions were neither deficient nor prejudicial for not moving to suppress evidence for lack of probable cause.

II. Counsel was Ineffective for Not Presenting Dash Cam Footage of Kothbauer's Arrest.

The night of Kothbauer's arrest, Checkalski's Dash Camera recorded. The footage established that Checkalski did not ask Kothbauer if he had any physical ailments or head injuries, which is required for the reasons listed above.[134] Checkalski testified at trial he informed Kothbauer there was no alternative test for the Walk and Turn.[135] Such testimony conflicts with the video. This footage would have also shown Checkalski illegally searched Kothbauer's person, as Kothbauer consented to a pat down search only.[136] This showing would have allowed the jury to see the improper procedure Checkalski followed and would have led the jury to doubt other procedures done by Checkalski, such as the SFST. If the jury doubted correct police procedure, it would have likely acquitted on both charges.

The Court of Appeals accepted the party's agreement that the circuit court erred in concluding that counsel acted strategically in not displaying dash camera video. The Court, however, held that Kothbauer had not demonstrated prejudice with the failure to display the dash camera video to the jury.

[134] R.37; DWI Detection and Standardized Field Sobriety Test Manual, Session 8, p. 12-13, 24, 55, 65 (2015); (App. A-4, A-5, A-7, A-9, A-10).
[135] R.98 at 62.
[136] R.37.

III. Counsel was Ineffective for Not Presenting Kothbauer's Medical Records or Securing an Expert.

At trial, counsel made multiple errors by not attempting to bring forth evidence of Kothbauer's disabilities. Prior to the jury trial, counsel discussed, with the court, the scope of what would be allowed regarding medical history. The court stated any statements Kothbauer had told Checkalski the night of his arrest were fair game; however, "statements about what doctors said, first, are not admissible because of hearsay; and second, because there hasn't been a foundation laid to indicate such a diagnosis."[137] After being told this, counsel stated, "I have the reports, but I don't have a doctor or any – anybody here to lay a foundation on that."[138]

Counsel could have avoided the foundational problem with Kothbauer's medical records had he followed Wis. Stat § 908.03(6m)(b).[139] Counsel had months to gather medical records and have them certified. Counsel did not do so, thereby acting ineffectively and prejudicing Kothbauer.

Kothbauer was diagnosed with a traumatic brain injury prior to his arrest.[140] An expert, could have laid the foundation for Kothbauer's medical records or his own evaluation. An expert would have testified Kothbauer's performance on the SFST was due to his disabilities. This, combined with Checkalski's testimony that nystagmus may be caused by certain medical conditions, would have shown any nystagmus noted was due to the disabilities. The expert would have testified that, based upon the records of Kothbauer or

[137] ***Id.*** at 38.
[138] ***Id.***
[139] Wis. Stat. §§ 908.03(6m)(b)(1)-(2).
[140] R.79 at 48-50.

any evaluation put forth, Kothbauer suffered from traumatic brain injury caused by an improvised explosive device (IED) explosion in November 2010.[141] Balance was also affected.[142]The expert opinion would have bolstered the claim that Kothbauer suffered from balance issues and had disabilities.

Based upon counsel's statements, including his question regarding the use of the medical records, he hoped to be able to use them to put a question in the jury's mind on whether proper protocol was used.

Testimony about any injury or disability came from Kothbauer, who testified that he had experienced five IED explosives.[143] If an expert could be helpful and one is available to testify, counsel must at least consult with that expert.[144] Counsel's decision to not contact a medical doctor as an expert cannot be called a strategic one.

Court of Appeals found that Kothbauer failed to demonstrate prejudice in counsel not presenting medical records or expert testimony about the background. Namely, the medical records were not as clearly beneficial and provide no evidence to dispute the prima facie evidence of prohibited blood alcohol concentration.

IV. The Circuit Court Erred in Denying Kothbauer an Evidentiary Hearing.

If sufficient facts are alleged that would merit relief, a Court grants an evidentiary hearing.[145] Where there are differences in fact, a defendant is entitled to an evidentiary

[141] R.79 at 48-50.
[142] ***Id.*** at 43.
[143] R.98 at 147.
[144] *See* ***Ellison v. Acevedo***, 593 F.3d 625, 634 (7th Cir. 2010).
[145] ***State v. Allen***, 274 Wis. 2d 568, 576, 682 N.W.2d 433 (2004); ***State v. Velez,*** 224 Wis. 2d 1, 18, 589 N.W.2d 9 (1999).

hearing.[146] An evidentiary hearing may also develop the record and benefit the court, which does not have all the facts before it.[147]

The court improperly denied Kothbauer's motion without a hearing. The court found that Kothbauer was not unlawfully searched and seized, stating, "Kothbauer consented to the search and there is no evidence the search was anything other than consensual…The brief citation to ***Terry v. Ohio***, 392 U.S. 1 (1968) is not on point as ***Terry*** dealt with a non-consensual search, not one performed with consent." [148] Kothbauer did not consent to a search of his person. Checkalski asked Kothbauer if he could perform a pat down search, to which Kothbauer stated he could.[149] Checkalski proceeded to put his hands directly into Kothbauer's pockets without having any reason.[150]

It does not follow that because Kothbauer gave consent for Checkalski to perform a pat down search, he consented to any and all searches that followed.[151] Kothbauer testified at the trial that he agreed to a pat down search.[152] The court stated "No facts have been alleged to support a claim that Kothbauer was under arrest at the time of the search or immediately thereafter. No case law is cited to support a claim that a consensual search supports a finding that a person has been seized or arrested."[153] Kothbauer consented to a

[146] ***State v. Allen***, 274 Wis. 2d 568, 576, 682 N.W.2d 433 (2004).
[147] ***Velez,*** 224 Wis. 2d at 17–18, citing ***State v. Garner***, 207 Wis. 2d 520, 534–35, 558 N.W.2d 916 (Ct. App. 1996).
[148] R.87 at 2; (App. A-12).
[149] R.98 at 78.
[150] R.37.
[151] ***Bumper v. North Carolina,*** 391 U.S. 543 (1968).
[152] R.98 at 145.
[153] R.87 at 2; (App. A-12).

pat down, not a search of his person.[154] Checkalski exceeded the scope of said pat down by putting his hands directly into Kothbauer's pockets. The facts as alleged in Kothbauer's post-conviction motion are to be taken as true.[155]

The court also erred in deciding counsel was not ineffective for failing to file a motion to seek the suppression of the field sobriety tests. The court claims no law was cited in support that, "a traffic officer must strictly follow the manual in having a driver perform field tests."[156] This is incorrect. In Kothbauer's Reply Brief to State's Response to Defendant's Motion for Postconviction Relief, he cited to ***State v. Zivcic***, 229 Wis. 2d 119, 128, 598 N.W.2d 565, 570 (Ct. App. 1999), in which the Court of Appeals has held that the results of the HGN test may be admissible as evidence.[157] Chekalski's training was provided in the form of in-person instructors that teach from the DWI Detection and Standardized Field Sobriety Testing Manual. An officer that does not adhere to the manual in their administration of the HGN test is not using proper training methods, and the officer's observations must be discounted. Checkalski did not check for resting nystagmus, and because Kothbauer suffers from a severe head injury, any clues Checkalski noted would not be related to Kothbauer's impairment or blood alcohol level. These facts, as alleged in Kothbauer's previous filings, are enough to support an evidentiary hearing.

[154] R.98 at 145.
[155] ***State v. Allen***, 274 Wis. 2d 568, 576, 682 N.W.2d 433 (2004).
[156] R.87 at 2; (App. A-12).
[157] R.82 at 17.

The court incorrectly stated Checkalski offered and Kothbauer denied the request for an alternative test.[158] Kothbauer testified at trial he requested an alternative.[159] Checkalski had Kothbauer recite the alphabet, which he did correctly.[160] Thus, the court is incorrect in its claim that Checkalski offered Kothbauer an alternative test and he refused. Checkalski also testified, he counted the clues he noted on Kothbauer's performance of the Walk and Turn test despite Kothbauer informing him of his balance issues.[161] As such, evidence was submitted to the trial court which showed that Checkalski did not consider Kothbauer's disabilities in his decision when administering the field sobriety tests.

The court further erred in holding counsel was not ineffective for failing to show the Dash Cam footage, as it was strategic.[162] If the jury had seen this video, had an expert been attained to speak on Kothbauer's disabilities (or had medical records establishing those disabilities been admitted at trial), the jurors would have understood the reason for Kothbauer's performance on the SFST. Thus, the jury would have been more likely to acquit on both charges had the video been played.

Again, the court erred in finding that counsel was not ineffective for failing to retain an expert or bring forth medical documentation of Kothbauer's physical disabilities. First, the court stated that these medical records go toward the operating while intoxicated charge, and not the prohibited alcohol concentration charge.[163] Next, the court stated it had

[158] R.87 at 2-3; (App. A-12, A-13).
[159] R.98 at 147.
[160] R.98 at 90.
[161] R.98 at 87-88.
[162] R.87 at 3; (App. A-13).
[163] ***Id.*** at 4; (App. A-14).

not been presented any information in the prior hearings to show what kind of expert was available and what such an expert would testify to.[164] The court also claimed, even though the attorney did not so testify, that it was a strategic decision on the part of counsel to not bring forth these medical records, as parts of medical records, the court believed, would show that Kothbauer did not have issues with his balance.[165]

The medical documentation demonstrates Kothbauer's inability to pass the field sobriety tests for reasons explained above. Checkalski testified that these tests were used to detect impairment.[166] The Manual states these tests detect impairment based upon a certain number of clues reflecting a certain probability of an individual being at or above a .08 BAC.[167] These tests were used by Checkalski to arrest Kothbauer and proceed to read him the Informing the Accused form and test a sample of Kothbauer's blood. It was these actions that led to Kothbauer being charged with PAC, and as such, being able to present evidence on how Kothbauer could not perform tests that were made to detect impairment and a blood alcohol content of .08 and higher goes to the PAC charge.

The court is also incorrect in its assertation that no information about the specifics of expert testimony were provided.[168] Kothbauer's injuries, as Kothbauer's medical records stem from 2013.[169] These records were submitted with Kothbauer's Motion for Postconviction Relief, and such records establish that Kothbauer would not be able to

[164] ***Id.***
[165] ***Id.***
[166] R.98 at 88.
[167] DWI Detection and Standardized Field Sobriety Test Manual, Session 8, p. 13 (2015); (App. A-5).
[168] R.87 at 4; (App. A-14).
[169] R.79 at 42.

perform a balance test without the results being skewed, and that any clues noted in HGN would be irrelevant because of the injury to his head.[170]

The court did not address that Kothbauer's medical documents showed he most likely suffered from a traumatic brain injury.[171] Based upon the totality of the circumstances, counsel's performance was ineffective and prejudicial against Kothbauer.

The court could not make the determinations it did without first hearing counsel's explanation for his actions. Again, "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."[172] As such, an evidentiary hearing is necessary.

The Court of Appeals concluded that the circuit court did not err in denying Kothbauer's postconviction motion without hearing.

CONCLUSION

For the reasons stated in this Petition, this Court should accept this case and reverse the decision of the Court of Appeals.

Dated: June 2, 2022, at Middleton, Wisconsin.

[170] ***Id.*** at 42-45.
[171] R.79 at 41-46, 52-57.
[172] ***United States v. Cronic*****,** 466 U.S. 648, 659-60 (1984).

Respectfully submitted,

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CERTIFICATION

I certify that this petition conforms to the rules contained in s. 809.62 for a petition produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text.

The length of this petition is 7,912 words.

Dated: June 2, 2022.

Signed,

_____
DARRIN CRAWFORD
State Bar No.: 1073488

CERTIFICATION

I certify that the text of the electronic copy of the Petition for Review, which was filed pursuant to Wis. Stat § 809.62, is identical to the text of the paper copy of the petition.

Dated: June 2, 2022.

Signed,

_____
DARRIN CRAWFORD
State Bar No. 1073488

CERTIFICATION

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.

Dated: June 2, 2022.

Signed,

_____
DARRIN CRAWFORD
State Bar No.: 1073488

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 20 AP 1406-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC TRYGVE KOTHBAUER,

Defendant-Appellant-Petitioner.

APPENDIX OF DEFENDANT-APPELLANT

PETITION FOR REVIEW

Respectfully Submitted,

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