STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1406-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC TRYGVE KOTHBAUER,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

INTRODUCTION

Eric Trygve Kothbauer has petitioned this Court for review on two issues—whether his trial counsel was ineffective in various respects, and whether the circuit court erred in denying his motion for postconviction relief without a hearing. (Pet. 5.) Kothbauer was convicted of operating a motor vehicle with a prohibited alcohol concentration (PAC), after a jury found him guilty of the charge. The circuit court denied Kothbauer's motion for postconviction relief, and the court of appeals affirmed in an unpublished decision. *State v. Kothbauer*, 2022WL1320397, 2020AP1406-CR (May 3, 2022) (unpublished) (Pet. App. 1–30.) The circuit court properly applied well-established law in rejecting Kothbauer's ineffective assistance claim without a hearing, and the court of appeals properly applied well-established law in affirming. This case does not satisfy any of the criteria for granting review, and there is no error to correct. This Court should therefore deny Kothbauer's petition.

STATEMENT OF THE CASE AND FACTS

A police officer stopped a vehicle Kothbauer was driving at around 2:00 a.m. after Kothbauer failed to stop at a stop sign and made an illegal turn. *Kothbauer*, 2022WL1320397, ¶ 3. The officer detected a slight odor of intoxicants and observed that Kothbauer had slowed speech and bloodshot eyes. *Id.* Kothbauer admitted to drinking three drinks. *Id.* The officer had Kothbauer get out of the car and asked if he could pat him down for weapons. *Id.* ¶¶ 3–4. When Kothbauer consented, the officer reached into Kothbauer's pockets and found a tin of chewing tobacco. *Id.* ¶ 4. There was nothing of evidentiary value in the tobacco tin. *Id.* ¶ 25. The officer conducted field sobriety tests and detected signs of impairment on the horizontal gaze nystagmus test, and the one leg stand test. *Id.* ¶¶ 5–6. The officer arrested Kothbauer,

who consented to a blood test, which revealed an alcohol concentration of .127. *Id.* ¶¶ 7–8.

The State charged Kothbauer with operating a motor vehicle while under the influence of an intoxicant (OWI) and PAC, both as second offenses. *Id.* ¶ 8. A jury found Kothbauer guilty of PAC but not guilty of OWI. *Id.* ¶ 13. Kothbauer moved for postconviction relief, asserting that his trial counsel was ineffective for failing to move to suppress evidence, and not presenting his medical records at trial. (R. 79.) The circuit court denied Kothbauer's motion for postconviction relief without a hearing, concluding that Kothbauer's motion did not allege sufficient facts and the record conclusively disproved his claims. (R. 87.) The court of appeals affirmed. *Kothbauer*, 2022 WL 1320397. It concluded that Kothbauer failed to prove that his trial counsel performed deficiently by not moving to suppress evidence, or to present evidence at trial. The court further concluded that Kothbauer was not entitled to a hearing because even if all his factual allegations were true, the record conclusively demonstrates that he cannot prove that his counsel was ineffective.

REVIEW OF THE COURT OF APPEALS' DECISION IS UNWARRANTED.

A. This case does not satisfy the criteria for review.

Kothbauer asserts that review of the court of appeals decision is warranted because this case presents "a real and significant question of both federal and state constitutional law," that is novel, and that is not factual in nature. (Pet. 6.) However, the first issue he raises is "whether counsel's performance was deficient and prejudiced Kothbauer?" (Pet. 5.) The standards for ineffective assistance claims are well-established. Kothbauer is merely seeking review of the court of appeals' conclusion that the circuit court properly applied

those standards. The second issue Kothbauer raises is "whether the circuit court erred in its decision to deny Kothbauer's motion for postconviction relief without an evidentiary hearing?" (Pet. 5.) Again, the standards for determining whether a defendant is entitled to an evidentiary hearing on an ineffective assistance claim are well-established. Kothbauer is merely seeking review of the court of appeals' conclusion that the circuit court properly applied those standards.

B. Kothbauer has not shown that the court of appeals' decision conflicts with binding caselaw.

Kothbauer asserts that review of the court of appeals decision is warranted because "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." (Pet. 6.) He claims that the court of appeals' decision is in conflict with *State v. Blatterman*, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26, because the court of appeals concluded that "the quantum of evidence to extend the stop, adding no additional reliable information, is sufficient to support a warrantless arrest." (Pet. 6.) However, the court of appeals did nothing of the sort. It concluded that the information the officer had: "which included the poor driving, 'slight odor of intoxicants' coming from the car, Kothbauer's admission to drinking that night, his slowed speech, and his glassy eyes," along with the time of day (2:00 a.m.) and Kothbauer's performance on the field sobriety tests, "created probable cause to arrest." *Kothbauer*, 2022WL1320397, ¶ 33.

Kothbauer also claims that "the Court of Appeals no longer follows *State v. Bentley*, [201 Wis. 2d 303, 548 N.W.2d 50 (1996)]" because it concluded that he was not entitled to a hearing on his ineffective assistance of counsel claim because he failed to adequately allege prejudice. (Pet. 7.) However, again, the court of appeals did nothing of the sort. The court of appeals concluded that Kothbauer was not entitled to a hearing because the record conclusively disproved his ineffective assistance of counsel claim. *Kothbauer*, 2022WL1320397, ¶¶ 53–54. The court's decision is entirely consistent with *State v. Ruffin*, 2022 WI 34, ¶ 38, 401 Wis. 2d 619, 974 N.W.2d 432, in which this Court reaffirmed that under *Bentley*, "an evidentiary hearing is not mandatory if a defendant's motion presents only conclusory allegations or if the record as a whole conclusively demonstrates that the defendant is not entitled to relief."

C. Kothbauer has not shown that the court of appeals erred in affirming the order denying his motion for postconviction relief.

As explained above, Kothbauer's petition does not meet any of the criteria for review. Review would be merely for error correction. However, in his petition, Kothbauer does not explain how he believes the court of appeals erred. Kothbauer simply rehashes the arguments the court of appeals rejected in its thorough opinion.

1. Kothbauer has not shown that his trial counsel was ineffective for not moving to suppress evidence.

Kothbauer claims that his trial counsel was ineffective for not moving to suppress evidence on the grounds that he was illegally searched, and that the officer improperly conducted field sobriety tests. (Pet. 19–28.) He asserts that he was illegally searched when a police officer reached into his

pocket and removed a tin of chewing tobacco. (Pet. 21–25.) Kothbauer claims that a reasonable person would have believed he was under arrest when the officer reached into his pocket, and there was no probable cause to arrest him at that time, so any evidence subsequently obtained would have been suppressed had counsel filed a suppression motion. (Pet. 23–24.)

The court of appeals addressed the merits of Kothbauer's claim and rejected it. *Kothbauer*, 2022WL1320397, ¶¶ 18–28. The court assumed that the search of Kothbauer's pocket was unlawful, *id.* ¶ 19, but it concluded that "when examined objectively, the facts do not support a determination that he was under arrest at the time [the officer] searched his pockets." *Id.* ¶ 25. Therefore, the only evidence that would have been suppressed was the evidence in the unlawful search—the tobacco tin which had no evidentiary value. *Id.* The court of appeals also recognized that there is no evidence indicating that Kothbauer believed he was under arrest. *Id.* ¶ 23. Instead, even after the search and field sobriety tests, Kothbauer asked if he was free to leave, demonstrating that he plainly did not believe he was under arrest when the officer reached into his pocket. *Id.* Since nothing of evidentiary value was gathered when the officer searched Kothbauer, and a reasonable person would not have believed he was under arrest at that point, there were no grounds upon which suppression was warranted, and trial counsel was not ineffective for not filing a suppression motion. *Id.* 25. In his petition, Kothbauer has not explained how he believes the court of appeals erred.

Kothbauer also claims that his trial counsel was ineffective for not moving to suppress evidence gathered when he performed field sobriety tests. (Pet. 25–28.) He argues that the officer did not follow his training under the National Highway traffic Safety Administration (NHTSA) manual when he administered the tests, and improperly conducted the horizontal gaze nystagmus test. (Pet. 25–26.)

Again, the court of appeals addressed Kothbauer's claim and rejected it on the merits. The court recognized that under Wisconsin law, field sobriety tests may be used in determining probable cause of an OWI-related offense even if they are not conducted in strict compliance with the NHTSA manual. *Kothbauer*, 2022 WL 1320397, ¶¶ 31–32 (citing *City of West Bend v. Wilkens*, 2005 WI App 36, ¶¶12-16, 22, 278 Wis. 2d 643, 693 N.W.2d 324). The court also recognized that there was probable cause to arrest Kothbauer for OWI based on factors including his poor driving, the time of day (2:00 a.m.), the odor of intoxicants, his glassy eyes and slurred speech, and his admission to drinking, along with his performance on the field sobriety tests. *Kothbauer*, 2022WL1320397, ¶ 33. Kothbauer's trial counsel was therefore not ineffective for not moving to suppress evidence gathered in the field sobriety tests. In his petition, Kothbauer has not shown that the court of appeals erred.

2. Kothbauer was not shown that his trial counsel was ineffective for not presenting dash cam footage or his medical records at trial.

Kothbauer argues that his trial counsel was ineffective for not presenting evidence at trial, specifically dash cam footage and his medical records. (Pet. 28.) He claims that the dash cam footage shows that field sobriety tests were not conducted in strict compliance with the NHTSA manual, and that he was illegally searched, and that if the jury had seen the dash cam footage it would have "doubted correct police

procedure," and "would have likely acquitted him on both charges." (Pet. 28.)

However, as the court of appeals concluded, Kothbauer's claim that the jury would have acquitted him is "speculative and conclusory," and disproved by the record. *Kothbauer*, 2022WL1320397, ¶ 45. As the court of appeals further recognized, given the blood test that revealed an alcohol concentration of .127, and the other evidence, it is not reasonably likely that the jury would have acquitted Kothbauer of operating a motor vehicle with an alcohol concentration above .08. *Id.* ¶¶ 33, 48. In his petition, Kothbauer has not shown that the court of appeals erred.

Kothbauer also claims that his trial counsel was ineffective for not presenting evidence of his traumatic brain injury. (Pet. 29–30.) He asserts that this evidence would have explained his performance on the horizontal gaze nystagmus test, and "put a question in the jury's mind on whether proper protocol was used" in the field sobriety tests. (Pet. 30.)

However, as the court of appeals recognized, "evidence of [Kothbauer's] medical ailments did come into evidence through testimony at multiple points," *Kothbauer*, 2022WL1320397, ¶ 51. In addition, the court of appeals noted that the "medical records are not as clearly beneficial to the defense as Kothbauer asserts," and may have undercut his defense. *Id.* ¶ 52. And the court of appeals recognized that given the evidence that Kothbauer's alcohol concentration was above .08, even if defense counsel somehow performed deficiently in not presenting the medical records, Kothbauer suffered no possible prejudice from the jury not receiving evidence that related only to his performance on field sobriety tests. *Id.* In his petition, Kothbauer has not shown that the court of appeals erred.

3. Kothbauer has not shown that he was entitled to an evidentiary hearing.

Kothbauer claims that the circuit court erred in denying his motion for postconviction relief without an evidentiary hearing. But the court of appeals rejected Kothbauer's claim because it recognized that the record conclusively demonstrates that he is not entitled to relief. The court of appeals was correct. An evidentiary hearing is unnecessary it makes no difference why Kothbauer's trial did not move to suppress evidence. As the court of appeals recognized, the record conclusively demonstrates that Kothbauer would not be able to prove that any deficient performance prejudiced him. Kothbauer is therefore not entitled to a hearing on his motion for postconviction relief. *Ruffin*, 401 Wis. 2d 619, ¶ 38 ("an evidentiary hearing is not mandatory if a defendant's motion presents only conclusory allegations or if the record as a whole conclusively demonstrates that the defendant is not entitled to relief."). Again, Kothbauer has not shown that the court of appeals erred.

CONCLUSION

This Court should deny Kothbauer's petition for review.

Dated: July 22, 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2160 words.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 22nd day of July 2022.

MICHAEL C. SANDERS
Assistant Attorney General