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COURT OF APPEALS

DISTRICT IV

Case No. 2022AP000654 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTWAN E. GILL,

Defendant-Appellant.

Appeal from the circuit court Monroe County,
Judge Todd L. Ziegler
Case No 2017CM172

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The trial court erred when it denied Mr. Gill's post conviction motion for a new trial.

- a. The trial court erred when it ruled reasonable suspicion is determined when the FST are performed and not when the officer decides to perform them.
- b. Trial counsel was ineffective and Mr. Gill was prejudiced, when he failed to bring a motion to suppress the results of the breath, blood and sobriety tests based on a lack of reasonable suspicion to conduct these tests.
- c. Trial counsel was ineffective and Mr. Gill was prejudiced, when trial counsel failed to show the jury relevant portions of the squad cam video and cross examine Trooper Edwards on the inconsistencies between the video, his police report and his trial testimony.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will fully present and discuss the issue on appeal.

The opinion in this case should not be published because it does not meet any of the criteria for publication under Rule 809.23(1)(a).

STATEMENT OF THE CASE

A jury found Antwan E. Gill guilty of possession of THC, in violation of Wis. Stat. 961.41(3g)(e) and of operating with a restricted controlled substance in

his blood, 3rd, in violation of Wis. Stat. 346.63(1)(am) after a two day trial that took place between March 24 and 25, 2021. (R. 96, App. ; R. 118 at 98-99). It found him not guilty of driving a motor vehicle while under the influence of a controlled substance, in violation of Wis. Stat. 346.63(1)(a). (*Id.*). Monroe County Judge Ziegler found Mr. Gill guilty of operating a motor vehicle without a valid license, in violation of Wis. Stat. 343.05(3)(a) and keeping an open intoxicant in a motor vehicle, in violation of Wis. Stat. 346.935(3). (R. 96, App. B; R. 118 at 112).

The court entered judgement on March 25, 2021(R. 96, App. B) and sentenced Mr. Gill to serve 65 days in jail on the operating with a controlled substance count. As to the remaining counts, Mr. Gill was fined, assessed costs and had his license revoked for 24 months. (*Id.*).

A post conviction hearing addressing whether trial counsel was ineffective for failing to file a motion to suppress the results of the Field Sobriety Tests, ineffectively cross examining Trooper Jacob Edwards and failing to show the jury key portions of the squad cam video, was held on February 10, 2022. A suppression hearing was held immediately after the *Machner* hearing. (R. 148). On April 13, 2022, the court denied Mr. Gill's post conviction motion. (R. 155, 164).

The Traffic Stop

Mr. Gill was charged with the above referenced crimes after Trooper Edwards stopped him solely for speeding on Interstate 94. (R. 148 at 50). On March 24, 2017, Trooper Edwards clocked Mr. Gill's car as traveling at 84 mph in

a 70 mph zone (R. 21). This stop was videoed by Trooper Edwards' squad cam and took approximately an hour. (See Tr. Ex 6).

At trial, Trooper Edwards testified that a male was driving the car and there was a female passenger. (R. 117 at 148). Trooper Edwards approached the vehicle on the passenger side and the passenger rolled down the window. On the video, Trooper Edwards did not react to a smell of marijuana and he did not say that he smelt marijuana. (Tr. Ex 6 at 2:10-2:42).¹

Trooper Edwards completed the traffic stop and was about to let Mr. Gill's passenger drive the car away,² when he saw what he thought was a marijuana "roach" cigarette in the cup holder between the driver and the passenger seats. (R. 148 at 53, 84-85; Tr. Ex. 6 at 14:20-14:44). Mr. Gill volunteered it was a roach and "old as hell". (R. 148 at 54, 84; Tr. Ex 6 at 14:50-14:55).

Trooper Edwards asked if anything else was in the car and when was the last time Mr. Gill smoked. Mr. Gill responded that it had been awhile and the "roach" in the cup holder was old. The Trooper asked if Mr. Gill had smoked that day and Mr. Gill responded no. (Tr. Ex 6 at 14:50-15:00). Trooper Edwards then

¹ Contrary to his actions on the video, Trooper Edwards testified at trial that when he approached the passenger side, he "briefly detected a faint and transient odor which smelled like raw marijuana and burned marijuana, but it was very brief, kind of as the wind swirled" (R. 117 at 148).

² The passenger was now driving because Mr. Gill did not have a valid driver's license. (R. 148 at 83).

told Mr. Gill that he has to “check” and see if anything else is in the car and he will do it as quick as he can. (*Id.* at 15:00-15:12).

The search of Mr. Gill and the passenger

Trooper Edwards then asked Mr. Gill to step out of the car so he could be searched. (*Id.* at 15:00-17:00). In the video, Trooper Edwards never reacts to the smell of marijuana or alcohol on Mr. Gill, nor does he say anything to Mr. Gill about a smell of alcohol or marijuana on him. When asked at trial the basis for the FST, Trooper Edwards replied:

Q. Okay. You know, given that, it was merely the roach in the cup holder that caused you to go through the battery of tests with Mr. Gill?

A. That was the biggest motivator, I would say.

(R. 117 at 205). It was not until he was coached by the State, prior to the post conviction hearing, (R. 148 at 78), that Trooper Edwards changed his testimony and also claimed the FST were also based on the smell of alcohol:

There was clarification, things in my report about smelling the faint and transient odor of marijuana and the odor of intoxicating beverage from Mr. Gill compared to my statement to a backup officer that all I could smell, or what I told the officer was all I can smell really was, I believe, something to the effect of air fresheners and cigarettes.

(*Id.* at 77).

Trooper Edwards asked the passenger to step out of the car so that he could search her. (Tr. Ex 6 at 17:20). On the video, as he is searching the passenger, he visibly reacts and unequivocally states that he smells marijuana on her. (*Id.* at 20:00-20:20; R. 148 at 87). However, in his police report he described this event as “I detected a faint odor of raw marijuana near [the passenger]...” (R. 145 at 3). Trooper Edwards admitted at the post conviction hearing that his police report did

not accurately reflect his detection of the smell of marijuana on the passenger, even though he used the video to draft his police report. (R. 148 at 87, 97).

Trooper Edwards smelt marijuana on the passenger but never performed a FST on her and let her drive away. (*Id.* at 86-87).

Trooper Edwards states that he does not smell anything suspicious

Trooper Edwards then spent approximately 20 minutes searching Mr. Gill's car. (Tr. Ex. 6 at 20:50-38:40). At 33:26 he stopped when another Trooper arrived on the scene. At 33:40 he told the other Trooper that he saw a roach in the cup holder. He then stated that he didn't smell anything but cigarettes and air freshener but he was going to put Mr. Gill through a FST. (*Id.* at 33:40-33:56). At the post conviction hearing, Trooper Edwards attempted to explain away this unequivocal statement by stating:

I could not recall whether or not that had been before or after I had determined that [Mr. Gill] had an odor of intoxicating beverage on his person.

(R. 148 at 80). This statement came over 15 minutes after he had searched Mr. Gill. He then continued the search of the vehicle and its contents at 34:12. The search ended at 38:54. In total the search of the car lasted over 17 minutes.

The sole basis for the FST is the roach in the cupholder

Trooper Edwards' statement to the other Trooper is clear that the only information he has is the cupholder roach; despite this he is going to perform a FST. He confirmed this basis when he testified at trial. He stated:

Q. Okay. You know, given that, it was merely the roach in the cup holder that caused you to go through the battery of tests with Mr. Gill?

A. That was the biggest motivator, I would say.
(R. 117 at 205).

**Trooper Edwards changed his testimony as to where he
found the second roach**

The search of the car resulted in a second “roach” in the area of the front passenger seat, in the “cubby” on the passenger side door. (R 117 at 152, 209).

Q Did you search the vehicle?

A. I did.

Q. Were there any other marijuana items that in the vehicle?

A. I located one other similar suspected marijuana cigarette, or roach, in the area of the front Passenger seat.

(R. 117 at 152).

Q. Trooper, I forgot to ask you, you mentioned in Direct that you found a second half-used joint around the passenger side of the vehicle?

A. Yes.

Q. Do you remember where?

A. I believe I recall my report indicating it, was in, I think , the map pocket of the door. Again I'm using gestures, but it's the cubby on the passenger side door, which would be near a passenger's right shin.

(*Id.* at 209). After this testimony, the State showed Trooper Edwards his police report and then the officer changed his testimony:

Q. Trooper, is your recollection refreshed as to where the item was located?

A. It appears I reported it was in the driver's door pocket.

(*Id.* at 210).

Trooper Edwards testified that he then performed a FST on Mr. Gill. (R. 117 at 164).

Trial counsel's deficient performance

Trial counsel never filed a suppression motion seeking to suppress the results of the FST for lack of reasonable suspicion to perform them.

Trial counsel cross examined Trooper Edwards extensively on Tr Ex 6, and the FST, (R. 117 at 187-208), but did not begin his questioning related to the video until minute 42:33. (*Id.* at 192). Trial counsel never asked Trooper Edwards about his statement at 33:47 in which he states that he does not smell anything suspicious but will perform a FST anyway, despite the Trooper's earlier trial testimony that he smelt marijuana. Trooper Edwards also incorrectly estimated that approximately 10-15 minutes had passed after he first had contact with Mr. Gill, before the FST. (*Id.* at 208-09). The video established that it did not begin until approximately 42 minutes into the stop.

At the post conviction hearing, trial counsel admitted that he should have filed a suppression motion; admitting that Trooper Edwards' statement, that he did not smell anything suspicious, could have formed the basis for a suppression motion and a basis to attack his credibility at trial. (R. 148 at 13-14). He further admitted that he never considered the discrepancy between the police report and the video statements:

I don't know that I ever processed Trooper Edwards' statements [on the video] that I just heard and that we've discussed in conjunction with the report that he smelled, like, a faint odor of marijuana.

Id. at 13. He further admitted that Trooper Edwards' smell of marijuana on the passenger also could have supported a motion to suppress. *Id.* at 15.

So, in other words, to answer the question about why we didn't file, is because I think probably that issue was missed.

Id. at 16.

Trial counsel had no answer as to why he did not show the jury the video of this statement or why he did not cross examine Trooper Edwards on this contradiction. He did agree that it would have been important evidence for the jury to have and that it would have hurt Trooper Edwards' credibility. (*Id.* at 18-19).

Q. So, again, I hate to belabor the point, but one more time, having shown that video where he said he didn't smell anything certainly takes -- would have gone a long way of taking away the credibility of that statement basis for that he smelled that odor and would sustain a the field sobriety tests?

A. Right. I think I've acknowledged that. But, yes, I think that would have been an important thing for the -- both potential fact finder at a suppression hearing to know and as well as a jury.

(*Id.* at 40).

Trial counsel similarly could not explain why he did not show the jury and cross examine Trooper Edwards on his video reaction to smelling marijuana on the passenger versus the description in his police report.

Q. Okay. After Trooper Edwards reads his police report, he then says he did not detect an odor of marijuana on the passenger. So do you think showing that portion of the video to Trooper Edwards and cross-examining him on it, and to the jury, would have once again called into question Trooper Edwards' credibility and the reliability of that police report?

A. I do.

(*Id.* at 19-21). Trial counsel also had no answer to why he allowed Trooper Edwards, who twice testified at trial that he found a second roach by the passenger door, to change his testimony and claim he found it by the driver's door, after reading his admittedly inaccurate police report.

Q. So after Trooper Edwards -- let me start by saying, do you remember after Trooper Edwards testified twice that the second roach was found on the passenger side, the

district attorney on redirect once again showed Trooper Edwards a portion of his police report, and then Trooper Edwards changed his testimony and stated that the second roach was found in the driver's side. Do you recall that testimony?

A. I hadn't recalled that until you mentioned it now, and at this point I do vaguely recall it. And I don't know sitting here today how that ended up playing out. That's all.

Q. Okay. So don't you think had you shown Trooper Edwards and the jury those prior discrepancies between his police report and the video of the real time what was happening this change in his testimony based on the reading of his police report could have also gone to the reliability of that report and his credibility?

A. I agree that that could have had an impact on the jury.

Q. And do you know why you didn't follow up with the change in testimony from Trooper Edwards?

A. So similarly to other answers I've given, I don't recall ever having a conscious thought process about whether to do that or not, but just doing in the moment the best I could is I think what happened, so I didn't not cross-examine in that particular way on purpose. It was just something I didn't do.

(*Id.* at 22-23).

The court's ruling

The court denied Mr. Gill's post conviction motion finding that reasonable suspicion is determined at the time the officer performs the FST and not when he makes the decision to perform it:

So the issue, again, is whether or not there was reasonable suspicion to complete field sobriety tests. This is at the time that field sobriety tests were completed, not when Mr. Gill was taken out of the vehicle.

...I'll state that there was no mention of field sobriety tests until after the search, and even if there was, it doesn't matter, it's when the field sobriety tests were done. And that's the point in time that I am looking at.

And I'm not sure it makes any difference in this situation, but, nonetheless, I believe that's the time that I am looking at is when the actual -- I'm not sure it would be called a seizure, but when Mr. Gill was requested to perform field sobriety tests. And that wasn't done until after the search.

(R. 164 at 7-8). The court then considered all the factors that occurred after

Trooper Edwards made the decision to perform the FST:

So we have an initial faint and transient odor of marijuana. Again, that's not something that Trooper Edwards could contribute to the vehicle. We have the speeding at 84 miles per hour in a 70-mile-an-hour zone; the marijuana joint in the cup holder; the odor of intoxicants on Mr. Gill; the second marijuana joint found in the driver's side door; and the one-third full bottle of whiskey in the back of the vehicle.

(*Id.* at 8).

The court also discounted Trooper Edwards' statement that he did not smell anything:

Trooper Edwards' comment to another trooper, I'm also finding his testimony credible, that that didn't mean that he didn't at any point smell something more.

(*Id.*). Trooper Edwards' testimony on this point, referred back the roach found in the cupholder:

A. In that moment the odors from the vehicle would probably not have had any odor other than the odors I had indicated. Certainly, at some point, for example, when I had been handed the roach, at the point I smelled the roach I certainly had smelled the odor of marijuana.

It's part of how I identified it as such, so I wasn't -- by saying that to the other officer I wasn't saying that I had never smelled anything other than air fresheners and cigarettes.

(R. 148 at 101-102).

The court then dismissed Trooper Edwards' trial testimony concerning the basis of the FST because it was at trial and not at a suppression hearing:

The testimony at trial -- his testimony at trial that the joint was the motivator for field sobriety tests means little if nothing, from my perspective. That was not a suppression motion. That was really him indicating that was a primary motivator. It doesn't mean that there weren't other things that he considered, so I don't find that to be important in this decision.

(R. 164 at 9). At trial when asked if there were other factors, Trooper Edwards referred to the faint odor he could not attribute to Mr. Gill's car:

Q. Okay. Was there another one?

A. Well, based on my training in SFSTs, or Standardized Field Sobriety Tests, driving behavior's such as speed are often associated as a risk-taking behavior with consumption

of alcohol and drugs, and then the odor, though it was, as I testified and reported, faint and transient.

(R. 117 at 205).

The court then found reasonable suspicion based on operating with a restricted control substance in the blood:

I can look at this from an operating with a restricted controlled substance in blood case as well, and there was clearly reasonable suspicion at that point for that as well as I would say under the influence such that it would be sufficient for -- sufficient to perform field sobriety tests or to expand to having field sobriety tests completed.

I would point to a case that I think is pertinent here. That is State v. Adell, A-D-E-L-L, 399 Wis.2d 399. It's a Wisconsin Court of Appeals case. It's a .02 restriction case, which I think has some similarities to a restricted controlled substance case. And I believe that that decision and some of the holdings certainly supports the decision that the Court has made that it was sufficient for reasonable suspicion for the field sobriety tests.

(R. 164 at 10).

The court did not find trial counsel's performance deficient or that Mr. Gill was prejudiced when he failed to a suppression motion:

I find nothing deficient in Mr. Hammer's performance in relation to not filing the suppression motion really based on the evidence that he had. I understand Miss Kelly's position that he should have filed the motion, but in the end it's not prejudicial to Mr. Gill because he was not successful on the suppression motion.

(*Id.* at 11).

Finally, the court did not find trial counsel ineffective on his failure to cross examine Trooper Edwards on the inconsistencies between the video, his police report and his trial testimony. The court also admitted that it did not understand the argument concerning where the second roach was found:

So next, or, finally, Mr. Gill argues that trial counsel was ineffective for failing to cross-examine Trooper Edwards on three specific issues. One was his statement to another trooper that he did not -- didn't smell anything suspicious but will perform field sobriety tests anyway.

That's not necessarily the exact statement. I didn't look it up, but Trooper Edwards did clarify that at the motion hearing, and I believe that's how he would have clarified it at the trial as well. The trial was whether he committed the offense charged not whether

field sobriety tests should have been performed. So I realize that that suggests that he had not smelled anything, but I believe that he would have further clarified his testimony for the jury.

The second one is not cross-examining Trooper Edwards' reaction to smelling marijuana on the passenger. At this point we'll simply state this is not whether the passenger possessed the marijuana or was driving with a restricted controlled substance in blood, it's whether Mr. Gill was.

...

The third and final is why -- the argument of why trial counsel allowed Trooper Edwards to change his testimony to that the second roach, or joint, was found in the driver's side door, when he had testified twice it was in the passenger side door.

I'm not sure I understand that argument. If trial counsel had objected to the District Attorney on redirect, addressing this with his police report, the objection would have been overruled. Certainly, Miss Skiles at the time would have been allowed to let Trooper Edwards review his report to refresh his memory as to where that second joint was found.

So it's not a matter of Mr. Hammer allowing the testimony to go through. It's a matter of the Court would have allowed it, regardless of whether Mr. Hammer would have objected. It's something that the State certainly could address on redirect as Mr. Hammer had addressed on cross-examination.

While I understand that these couple of, I'm going to say, very minor issues go to credibility, I don't think there is -- as I stated at the hearing that we had, I don't think there's ever a trial where a trial attorney, if they are being honest, can't look and say they could have done, one, two, or even more things a little bit differently that might have potentially changed things.

These issues were very minor, from my perspective in looking at the trial as a whole. I do remember this trial. The representation simply was not deficient by Mr. Hammer, and trial counsel was also not prejudiced, even if deficient.

(*Id.* at 11-14).

ARGUMENT

I. The Court Erred When It Ruled Reasonable Suspicion Is Judged When The FST Is Performed And Not When The Officer Decides To Perform The FST

A. Standard of Review

A circuit court's ruling on a motion to suppress evidence presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶ 9, 314 Wis. 2d 661, 762 N.W.2d 385. The court's findings of fact will not be overturned unless

they are clearly erroneous. *Id.* However, the application of statutory and constitutional principles to those findings of fact presents a matter for independent appellate review. *Id.*

When reviewing a determination of reasonable suspicion, this court considers the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶¶21-22, 241 Wis. 2d 631, 623 N.W.2d 106. The determinative issue in considering the totality of the circumstances is whether the officer's actions were reasonable under the circumstances. *Id.*

B. Trooper Edwards did not have reasonable suspicion to perform a FST when he made the decision to perform the FST.

The trial court erred when it ruled that the time to determine reasonable suspicion is when the FST test is performed and not when the officer decides to perform the FST. The question is whether Trooper Edwards discovered information subsequent to the initial stop which provided reasonable suspicion that Mr. Gill was driving under the influence of an intoxicant, in order to expand his investigation and ask Mr. Gill to perform a FST. *Columbia Cnty. v. Johnson*, 2015 WI APP 75, ¶13, 365 Wis.2d 196, 870 N.W.2d 248.

The relevant moment to determine whether reasonable suspicion existed is the moment Trooper Edwards decided to perform a FST. This is true because reasonable suspicion is judged by what a reasonable officer would suspect based on the totality of the circumstances. *State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996) (citations omitted). “The reasonableness of a stop is

determined based on the totality of the facts and circumstances.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis.2d 1, 733 N.W.2d 634. Because Trooper Edwards stated at minute 33:40-34:00 of Tr. Ex. 6 that he was going to perform a FST, this is the moment to determine whether reasonable suspicion existed. At this moment in time, based on the totality of the circumstances as they existed at that moment, Trooper Edwards did not have reasonable suspicion.

Had Trooper Edwards not found anything further when he searched the car, but still performed the FST, would the trial court have granted the motion to suppress? That is in essence what Trooper said he was going to do. It did not matter to Trooper if he found anything further, the decision was made.

Trooper Edwards did not observe erratic driving or make any observations as to Mr. Gill’s speech, eyes, or motor coordination. Based on his video statement and his trial testimony, his sole basis was the “old as hell” roach. The presence of an old roach does not provide reasonable suspicion that Mr. Gill was driving under the influence. *Columbia Cnty*, 2015 WI APP 75 at ¶17. *Columbia Cnty* analyzed the “totality of the circumstances” and held that separately any one of the following facts would not amount to reasonable suspicion: 1) a strong odor of intoxicants from inside a vehicle with the driver as the only occupant; 2) a tip that the driver was speeding and had pulled over and thrown up; and 3) that the car was pulled over in a parking lot of a closed business at 2:00 am with the engine running and lights on. Only the combination of all these factors created reasonable suspicion to perform a FST. 2015 WI APP 75 at ¶15-17.

In the present case, even adding the “faint and transient odor” of marijuana to the old roach, does not amount to reasonable suspicion. The court erred when it found reasonable suspicion existed and denied the motion to suppress.

1. Trooper Edwards’ sole basis for the FST was the cup holder roach

Trooper Edwards pulled Mr. Gill over solely because he was speeding. At the post conviction hearing, Trooper Edwards testified that he had completed the traffic stop and was about to let Mr. Gill’s passenger drive the car away, when he saw what he thought was a roach in the cup holder between the driver and the passenger seats. His answer at trial is clear that the FST was based on the roach. Only when asked a follow up question does he struggle to find more justification and eventually lands on the “faint and transient” odor coming from the passenger window, cited only in his police report and in which he admitted he could not attribute to the car. Trooper Edwards admitted his police report is not an accurate reflection of what occurred during the traffic stop. As such, statements contained in his report, but not supported by the video, should be discounted as incredible.

These statements, combined with his real time statement that he only smelt cigarettes and air freshener, completely eliminates any alleged odor as a basis for reasonable suspicion.

Trooper Edwards lacked reasonable suspicion to expand the scope of the traffic stop in order to conduct an impaired driving investigation. *County of Dunn v. Newville*, 2019 WI App 54, ¶16, 388 Wis.2d 622, 935 N.W.2d 554 (Table). In

Newville, the court upheld the impaired driving investigation because the defendant exhibited signs of driving while impaired by driving slowly, fluctuating his speed and driving over the center line. *Newville*, 2019 WI App 54 at ¶20. Here, Mr. Gill was speeding, which is not an indicator of impaired driving. Combine this with the Trooper's contradictory statements about whether he smelt anything, and not only do you have a lack of reasonable suspicion to test for impaired driving, but you also have a serious credibility issue concerning the one witness upon which Mr. Gill's arrest and conviction relied upon.

C. Trooper Edwards' later inconsistent statements cannot manufacture reasonable suspicion and are not credible

Trooper Edwards prepared his post conviction hearing testimony with the help of the State. That preparation, notably, included adding the smell of alcohol to his basis for performing the FST. However, once again, the video does not support Trooper Edwards' claim that while searching Mr. Gill and standing down wind of him, he "detected a light odor of intoxicating beverage." (R. 145 at 2). First, Trooper Edwards admitted his police report is not an accurate reflection of the events as they unfolded. Second, he searched Mr. Gill prior to his statement to the other Trooper that he only smelt cigarettes and air freshener. Third, he did not react to this alleged smell as he did when he smelt marijuana on the passenger. There is no indication on the video that Trooper Edwards ever smelt anything on or near Mr. Gill.

In his report, at trial and at the post conviction hearing, Trooper Edwards

attempted to manufacture reasonable suspicion. However, the most compelling and incontrovertible evidence continues to be the real time statements and reactions of Trooper Edwards as captured in Tr. Ex. 6 and his admission that his police report is inaccurate.

D. The “faint and transient” odor, if it existed, came from the passenger

The only time Trooper Edwards claims to have smelt marijuana was when he encountered the passenger. In his police report Trooper Edwards states: “I approached on the passenger side. When the window rolled down, I detected a faint and transient odor consistent with the odor of burned marijuana.” (R. 145 at 2).

This alleged odor was not even strong enough to be mild and did not linger and Trooper Edwards did not even know where it was coming from. He described it as a “swirl” in the wind. As such, if it existed at all it did not permeate from the car and therefore was not coming from Mr. Gill. Trooper Edwards adding the “faint and transient” odor to his trial testimony and his police report should not be believed as it belies his real time statement contained in Tr. Ex. 6 that he did not smell anything.

On the video, as he is searching the passenger, he visibly reacts and states that he smells marijuana on her. However, in his police report he described this event as “I detected a faint odor of raw marijuana near [the passenger]...” Trooper Edwards admitted at the post conviction hearing that his police report did not

accurately reflect his detection of the smell of marijuana on the passenger, even though he used the video to draft his police report. This is evidence that the police report is not accurate as compared to the video and when the two differ, the video should be believed.

Trooper Edwards smelt marijuana on the passenger but never performed a FST on her and let her drive away. He never smelt marijuana on Mr. Gill, yet he performed a FST on him.

II. Mr. Gill was prejudiced when his trial counsel failed to file a motion to suppress or to cross examine Trooper Edwards on the inconsistencies between his report, trial testimony and the video.

A. Standard of review

Mr. Gill was prejudiced when the results of the FST and blood draw were allowed into his trial. Because of this evidence, he was convicted of operating with a restricted controlled substance in his blood, 3rd and possession of THC. Trooper Edwards did not have reasonable suspicion to perform these tests and therefore they should have been suppressed. However, trial counsel never filed the appropriate suppression motion and was therefore ineffective.

Whether counsel was ineffective is a mixed question of fact and law. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis.2d 358, 805 N.W.2d 334, (Wis. 2011), *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362 (1994). The circuit court's findings of fact will be disturbed if it is shown to be clearly erroneous. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis.2d 488, 681 N.W.2d

500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *Flores*, 183 Wis.2d at 609, 516 N.W.2d 362.

B. Trial counsel's performance was deficient and Mr. Gill was prejudiced.

Trial counsel's failure to file the suppression motion was deficient because it was not based on a reasonable strategic decision and it was objectively deficient. *See, State v. Stroik*, Wis. App. 2022, No. 2021AP447-CR; App. D.

Because of the vital role played by counsel to ensure that a defendant receives due process, " 'the right to counsel is the right to the effective assistance of counsel.' " *State v. Johnson*, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986) (citation omitted). When a defendant argues trial counsel was ineffective, he must show that trial counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985); *State v. Balliet*, 2011 WI 79, ¶ 21, 336 Wis.2d 358, 805 N.W.2d 334.

Mr. Gill can meet this burden. The government cannot perform field sobriety tests and draw blood without reasonable suspicion that the driver of the car is impaired. *Columbia County v. Johnson*, 2015 WI APP ¶13, 365 Wis.2d 196, 870 N.W.2d 248. Because trial counsel failed to file a suppress motion on these issues, he performed below an objective standard of effectiveness and Mr. Gill was prejudiced.

1. Trial counsel's performance was deficient.

The first prong of *Strickland* requires that the defendant show that trial counsel's performance was deficient. Deficient performance is judged objectively. *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis.2d 665, 799 N.W.2d 461. That is, the defendant must show that " 'counsel's representation fell below an objective standard of reasonableness.' " *Johnson*, 133 Wis.2d at 217, 395 N.W.2d at 181 (citation omitted).

a. Failing to file a motion to suppress

Trial counsel's performance was objectively deficient when he failed to file a motion to suppress the conducting of the FST and the results of the breath and blood tests. At the post conviction hearing, trial counsel admitted that he should have filed a suppression motion; admitting that Trooper Edwards' statement, that he did not smell anything suspicious, could have formed the basis for a suppression motion and to attack his credibility and the credibility of the police report. He further admitted that he never considered the discrepancy between the police report and the video statements:

I don't know that I ever processed Trooper Edwards' statements [on the video] that I just heard and that we've discussed in conjunction with the report that he smelled, like, a faint odor of marijuana.

(R. 148 at 13). He further admitted that Trooper Edwards' smell of marijuana on the passenger also could have supported a motion to suppress. *Id.* at 15.

So, in other words, to answer the question about why we didn't file, is because I think probably that issue was missed.

(*Id.* at 16).

b. Failing to impeach Trooper Edwards on his contradictory statements was ineffective assistance.

Mr. Gill was prejudiced when this trial counsel failed to cross examine Trooper Edwards on his inconsistent statements. Because of the lack of this evidence, Mr. Gill was convicted of possession of THC and operating with a restricted controlled substance in his blood, 3rd. *See Stroik*; App. D.

Trial counsel cross examined Trooper Edwards extensively on Tr. Ex. 6, and the FST performed on Mr. Gill, but did not begin his questioning related to the video until minute 42:33, and never asked Trooper Edwards about his statement at minute 33:47 that he does not smell anything suspicious but will perform a FST anyway.

Trial counsel had no answer as to why he did not show the jury the video of this statement or why he did not cross examine Trooper Edwards on this contradiction. He did agree that it would have been important evidence for the jury to have and that it would have hurt Trooper Edwards' credibility.

Trial counsel similarly could not explain why he did not show the jury and cross examine Trooper Edwards on his video reaction to smelling marijuana on the passenger versus the description in his police report.

Q. Okay. After Trooper Edwards reads his police report, he then says he did not detect an odor of marijuana on the passenger. So do you think showing that portion of the video to Trooper Edwards and cross-examining him on it, and to the jury, would have once again called into question Trooper Edwards' credibility and the reliability of that police report?

A. I do.

(R. 145 at 19-21). Trial counsel also had no answer to why he allowed Trooper Edwards, who twice testified at trial that he found a second roach by the passenger

door, to change his testimony and claim he found it by the driver's door, after reading his police report.

Q. So after Trooper Edwards -- let me start by saying, do you remember after Trooper Edwards testified twice that the second roach was found on the passenger side, the district attorney on redirect once again showed Trooper Edwards a portion of his police report, and then Trooper Edwards changed his testimony and stated that the second roach was found in the driver's side. Do you recall that testimony?

A. I hadn't recalled that until you mentioned it now, and at this point I do vaguely recall it. And I don't know sitting here today how that ended up playing out. That's all.

Q. Okay. So don't you think had you shown Trooper Edwards and the jury those prior discrepancies between his police report and the video of the real time what was happening this change in his testimony based on the reading of his police report could have also gone to the reliability of that report and his credibility?

A. I agree that that could have had an impact on the jury.

Q. And do you know why you didn't follow up with the change in testimony from Trooper Edwards?

A. So similarly to other answers I've given, I don't recall ever having a conscious thought process about whether to do that or not, but just doing in the moment the best I could is I think what happened, so I didn't not cross-examine in that particular way on purpose. It was just something I didn't do.

(*Id.* at 22-23).

Had trial counsel brought out these contradictions, the police report would have been discredited. The trial court admitted it did not understand the issue of the location of the second roach and missed the credibility issue. It also missed that it was a factor that the court considered in determining reasonable suspicion. Therefore if the roach is in the passenger's door and not the driver's door, it argues against reasonable suspicion.

Because Trooper Edwards contradicted his real time statements, it was objectively deficient for trial counsel not to cross examine him on these issues and to show the jury the video of the statements. Such crucial contradictions from a

vital witness screams to be impeached. It also would have called into question the reliability of the police report. It could have been argued to the jury that the only evidence they should believe is what they see on the video.

Any attorney acting reasonably would have impeached Trooper Edwards with his own conflicting statements and report. It was objectively deficient not to do so and it was not based on a strategic decision. *See, Stroik*.

In *Stroik*, the defendant was convicted of sexual assault and filed a post conviction motion based on ineffective assistance of counsel. The Fourth District found that trial counsel was ineffective when he failed to seek out and introduce at trial the victim's prior false allegation of sexual assault. *Id.* at ¶3, 66. During the trial, several witnesses testified to the victim's truthfulness. *Stroik* held that because of trial counsel's deficient performance, the jury never heard the evidence that could have chipped away at her "truthfulness."

This evidence could have been particularly significant in the face of the otherwise unanimous testimony that Amy was consistently truthful, when the verdict in this case turned exclusively on credibility.

Id. at ¶67.

As in *Stroik*, the credibility of Trooper Edwards' and his report, could have been seriously questioned if trial counsel had shown the jury the inconsistencies between his report, his testimony and the video. Just as in *Stroik*, trial counsel was ineffective and the judgment should be vacated. This is also true on the issue of trial counsel's failure to file a suppression motion, he could have challenged the credibility of Trooper Edwards' account with the video at a suppression hearing.

2. Mr. Gill was prejudice

In order to satisfy the prejudice prong of *Strickland*, Mr. Gill must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See *Balliette*, 2011 WI 79, ¶ 24, 336 Wis.2d 358, 805 N.W.2d 334. A reasonable probability is one that undermines the confidence in the outcome. *Id.*, citing *Strickland*, 466 U.S. at 694

In the present case, confidence in the outcome is undermined because trial counsel failed to file a suppression motion, and failed to impeach Trooper Edwards with his videoed taped contradictory statement. Even though the trial court denied the suppression motion, it erred in doing so.

In the alternative, had the jury seen key portions of the video, and had Trooper Edwards been cross examined properly, a reasonable probability exists that the jury would not have convicted Mr. Gill. Again because the witness upon which the arrest and conviction rests, had a serious credibility issue.

CONCLUSION

Mr. Gill was prejudiced and trial counsel was ineffective when he failed to file a suppression motion and failed to question Trooper Edwards on the inconsistencies between his police report, trial testimony and the video of the stop and arrest. Therefore Mr. Gill was denied a fair trial and the judgment should be vacated and Mr. Gill granted a new trial.

Dated this 5th day of July, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S.

809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7417 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s.

809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (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 rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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