STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2022AP654-CR
Trial Court Case No. 2017CM000172

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANTWAN E. GILL,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE TODD L. ZIELGER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

Monroe County District Attorney's Office
112 South Court Street, Room 2400
Sparta, Wisconsin 54656
(608) 269-8780
monroe.call@da.wi.gov

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ISSUE PRESENTED

1. Did Antwan Gill prove that trial counsel was ineffective for failing to file a motion to suppress on the basis that the traffic stop was unlawfully extended for field sobriety tests?

   The trial court concluded: No.

   This Court should answer: No.

2. Did Gill prove that trial counsel was ineffective in his cross-examination of Trooper Edwards?

   The trial court concluded: No.

   This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The issues presented in this case can be resolved by reliance upon established principles of law applied to the particular facts of this case.

STATEMENT OF THE CASE

I. Offense and arrest.

On Friday, March 24, 2017, at 3:53 a.m., Trooper Jake Edwards of the Wisconsin State Patrol stopped Antwan Gill for speeding. (R. 148:49-50.) When Trooper Edwards approached the stopped vehicle and the front passenger window was lowered, Trooper Edwards smelled "a very light [and brief] odor of raw [and burned] marijuana," however it was windy and "[he] couldn't be certain [the odor] was coming from the vehicle, but [he] smelled something of raw marijuana." (R. 148:51; 117:148, 202.) Trooper Edwards did not take any action regarding the odor because "[i]t was so brief that before [he] launch[ed] into a drug investigation [he] wanted[ed] to be absolutely sure that [he was] smelling what [he] believed [he] smelled." (R. 117:150.)

Trooper Edwards returned to his patrol vehicle and completed a citation and written warning for Gill. (R. 148:52-53.) When Trooper Edwards returned to Gill's vehicle to provide Gill the paperwork, he was expecting to send Gill on his way. (R. 148:53; 117:188.) However, as Trooper Edwards provided the documents to Gill, Trooper Edwards "observed a white item that was similar in appearance to a rolled cigarette . . ." in the cup holder between the two front seats that appeared to Trooper Edwards, based on his training and experience, consistent with a "hand-rolled marijuana cigarette, commonly referred to as a joint." (R. 148:53.)

Trooper Edwards requested to see the item. (R. 148:53; 172: 00:14:22-00:14:32.) Gill handed it to him and told Trooper Edwards it was "old as hell." (R. 148:54; 117:151; 170: 00:14:29-00:15:00.) Based on the item's appearance and odor, Trooper Edwards suspected the item "was a burnt marijuana joint." (R. 148:54.) He observed "chunks of a green plant-like substance, or buds, which were consistent in appearance with marijuana. It was mostly burned down, and it had a distinct odor of raw and burned marijuana when [he] sniffed it." (R. 117:151.)

Trooper Edwards asked Gill when the last time he smoked and Gill responded, "I don't know. Probably awhile." (R. 148: 54; 170: 00:14:49-00:14:57.) When asked if he smoked today, Gill laughed and denied doing so. (R. 170: 00:14:47-00:15:01.)

Gill was asked to exit his vehicle, which he did. (R. 148:54.) Trooper Edwards then engaged Gill in conversation during which Trooper Edwards detected an odor of alcohol. (R. 148:55.) Gill denied drinking recently. (R. 148:55.)

Trooper Edwards subsequently searched Gill's vehicle. (R. 148:55.) During the search, Trooper Edwards explained to the backup officer that: he found a "roach" in the cup holder, he was going to place Gill through field sobriety tests, he did not smell anything except cigarettes and air freshener, and he was going to give the passenger a PBT as she was the only valid driver. (R. 170: 00:33:30-00:34:14.) Near the driver's door, Trooper Edwards located a second marijuana cigarette. (R. 148:56.) Trooper Edwards also found an open, 2/3 empty bottle of whiskey on the floor of the backseat that was within reach of Gill. (R. 148:56, 99-100; 170: 00:41:21-00:41:27.)

After the search, Trooper Edwards had Gill do field sobriety tests. (R. 148:56-73; 117:168-183.) A subsequent preliminary breath test indicated Gill had a breath alcohol concentration of 0.010. (R. 148:74, 105.) Gill was arrested (R. 148:75) and his blood drawn for chemical analysis. (R. 117:184.) Testing detected the presence of the restricted controlled substance, Delta-9-THC. (R. 117:234; 82:1.)

The State later criminally charged Gill with (1) possession of THC, (2) operating a motor while intoxicated as a third offense, and (3) operating with a restricted controlled substance as a third offense. (R. 21:1-2.)

Gill went to trial and was convicted of possession of THC, operating with a restricted controlled substance as a third offense, and two civil traffic offenses. (R. 96:1.) Gill was acquitted of operating while intoxicated as a third offense. (R. 90:1.)

II. The postconviction proceedings.

Gill thereafter filed a postconviction motion seeking a new trial contending trial counsel was ineffective for failing file a motion to suppress evidence derived from an unlawful extension of the traffic stop of Gill (R. 131:2, 5-7) and for failing to sufficiently cross-examine Trooper Edwards at trial. (R. 131:7-8.)

The trial court held an evidentiary hearing at which trial counsel testified. (R. 148.) To address the issue of whether trial counsel was ineffective for not filing a suppression motion, the court also heard testimony from Trooper Edwards.

After hearing the testimony, the trial court denied Gill's motion finding trial counsel provided constitutionally adequate representation. (R. 164: 2-17; 155:1-2.)

Gill now appeals.

The State, as respondent, will present additional facts as necessary in the argument section of this brief.

ARGUMENT

I. Gill failed to establish trial counsel rendered ineffective assistance when counsel did not file a motion to suppress.

A. Relevant legal principles and standard of review.

A criminal defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). A defendant claiming ineffective assistance must prove both that his lawyer's representation was deficient and he suffered prejudice as a result of the deficient performance. *Id*. at 687. If the court concludes the defendant has not proven one prong, it need not address the other. *Id*. at 697.

To prove deficient performance, a defendant must show his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id*. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id*. at 690.

To demonstrate prejudice, the defendant must show the alleged deficient performance prejudiced him. *Id*. at 693. The defendant must show more than counsel's errors had a conceivable effective on the proceedings' outcome. Rather, the defendant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Courts strongly presume counsel rendered adequate assistance and "made all the significant decisions in the exercise of reasonable judgment." *State v. Glass*, 170 Wis.2d 146, 151-52, 488 N.W.2d 432 (Ct. App. 1992). Appellate courts must not second-guess trial counsel's performance through the skewed perspective of hindsight. *Strickland*, 466 U.S. at 689. If tactical or strategic decisions are based on rationality founded on the facts and the law, the courts will not find those decisions constitute ineffective assistance of counsel, "even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161 (1983).

Whether counsel's performance constitutes ineffective assistance is a mixed question of fact and law. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845

(1990). Any factual findings by the trial court will be upheld unless the findings are clearly erroneous. *Id*. However, the ultimate conclusion of whether counsel's performance was deficient and prejudicial, such that it constitutes ineffective assistance, is a question of law that is reviewed independently of the trial court. *Id*. at 128.

B. Trial counsel's decision to not file a suppression motion was based on a reasonable strategy, and thus does not constitute deficient performance.

Trial counsel did not perform deficiently when he failed to file a suppression motion related to the traffic stop's extension. Performance can only be deficient if it falls "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Trial counsel, who had been practicing criminal law for approximately fifteen years at the time he handled this case (R. 148:24-25), testified he specifically contemplated a motion to suppress. (R. 148:13, 29-30, 38.) Counsel explained his analysis of the issue. (R. 148:29-30.) He testified that he believed in his professional judgment, after having filed "several [suppression motions] a year [for approximately fifteen years]" (R. 148:27), that the motion would be unsuccessful. (R. 148:13, 29-30, 38.)

Counsel's decision to not file a suppression motion was a professionally reasoned decision, not an unintentional omission. Counsel rationally contemplated, weighed, and considered a motion based on the facts of the case and his knowledge of the law. Such performance does not fall outside of competent assistance.

As such, counsel's failure to file the suppression motion is not constitutionally deficient.

C. Alternatively, Gill's counsel was not deficient and Gill was not prejudiced by his counsel not filing a suppression motion because the motion would not have succeeded.

Counsel's failure to file a suppression motion challenging the extension of the traffic stop was not deficient nor did it result in prejudice to Gill because the

extension was supported by the requisite level of suspicion and the trial court would have denied such a motion.

1. An officer must have reasonable suspicion to extend a traffic stop.

A police officer may make a traffic stop if he reasonably suspects a person is violating traffic regulations. *State v. Colstad*, 2003 WI App 25, ¶ 8, 260 Wis.2d 406. If, following a valid stop, an officer becomes aware of additional suspicious facts which are sufficient to give rise to an articulable suspicion that the person has committed, or is committing, an offense separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis.2d 167. "An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." *Id*.

Reasonable suspicion means the police officer "possess[es] specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *State v. Young*, 2006 WI 98, ¶ 21, 294 Wis.2d 1. What constitutes reasonable suspicion is a common-sense, totality-of-the-circumstances test that asks, "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996).

Operating a motor vehicle while intoxicated consists of two elements: (1) the defendant drove or operated a motor vehicle on a highway and (2) the defendant was under the influence of an intoxicant at the time the defendant drove or operated the motor vehicle. Wis. JI-Criminal 2669 (2022). "Under the influence of an intoxicant" requires that the defendant's ability to operate a motor vehicle was impaired due to the consumption of alcohol. *Id*.

Operating a motor vehicle with a detectable amount of a restricted controlled substance is comprised of two elements: (1) the defendant drove or operated a motor vehicle on a highway and (2) the defendant had a detectable amount of a restricted controlled substance in his blood at the time the defendant drove or operated the motor vehicle. Wis. JI-Criminal 2664B (2022).

"Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion." *Hogan*, 364 Wis.2d at ¶ 36. In other words, police do not need "to rule out the possibility of innocent behavior before initiating a brief stop." *Waldner*, 206 Wis.2d at 59. Thus, when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. *State v. Anderson*, 155 Wis.2d 77, 84, 454 N.W.2d 763 (1990).

2. Trooper Edwards reasonably suspected an OWI-related violation, which allowed him to extend the traffic stop for field sobriety tests.

Under the totality of the circumstances present in this case, Trooper Edwards had reasonable suspicion Gill was operating while intoxicated, operating with a restricted controlled substance, or both. The following facts support that conclusion.

Gill was driving 14 miles over the speed limit around 4:00 a.m. on a Friday. While approaching the vehicle and the window was lowered, Trooper Edwards smelled marijuana. Trooper Edwards was about to send Gill on his way when he saw what he suspected was a marijuana cigarette in the front cup holder. Trooper Edwards' inspection of it confirmed his suspicions. Trooper Edwards observed the cigarette was burnt. Gill denied smoking that day but was unable to tell Trooper Edwards when he smoked last.

Trooper Edwards had Gill exit the car. The two had further conversation, during which Trooper Edwards smelled alcohol. Gill denied drinking. When Trooper Edwards searched the vehicle, he found a second marijuana cigarette near the driver's door and an open bottle of whiskey with only 1/3 of the contents remaining that was within reach of Gill.

The reasonable-suspicion calculus couples the above "specific and articulable facts . . . with rational inferences from those facts" to point to the

conclusion that the "intrusion" of continued detention was warranted. *Terry v. Ohio*, 392 U.S. 1, 21, 88S.Ct. 1868 (1968).

It is reasonable for Trooper Edwards to infer Gill was operating while under the influence or with a detectable amount of a restricted controlled substance from: (1) the odor of marijuana, (2) a partially consumed marijuana cigarette in close proximity to the driver, (3) Gill's inability to state when he last consumed marijuana, (4) the odor of alcohol, and (5) the open, partially consumed alcohol within Gill's reach. While the incident did not "take[ ] place at or around 'bar time,'" the timing of the stop [at 4 a.m. on a weekend] still "lend[s] some further credence to [Trooper Edwards'] suspicion that [Gill] was driving while intoxicated." *State v. Post*, 2007 WI 60, ¶ 36, 301 Wis.2d 1; *see Waldner*, 206 Wis.2d 51 (time of day is a relevant factor in a reasonable suspicion inquiry).

Based upon these known facts and their reasonable inferences, a reasonable officer in Trooper Edwards' position could reasonably suspect Gill committed the crime of driving while intoxicated and/or with a restricted controlled substance, the investigation of which would be further by his performance on field sobriety tests at the time he extended the stop for field sobriety tests.

3. Trial counsel's failure to raise a meritless motion is not deficient performance and does not prejudice Gill.

The testimony at the postconviction hearing demonstrates Trooper Edwards lawfully extended the traffic stop of Gill and a suppression motion challenging it would have been denied. It is well-established that an attorney is not deficient by failing to pursue a meritless motion. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."); *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270 (failure to raise a meritless issue is not deficient performance.); *see State v. Jacobsen*, 2014 WI App 13, ¶ 49, 352 Wis.2d 409 ("An attorney does not perform deficiently by failing to make a losing argument."). On this basis, Gill has not proven his trial counsel performed deficiently.

Further, Gill has not established prejudice because the failure to file an unsuccessful motion does not demonstrate a reasonable probability that the outcome of the proceedings would have been different.

Consequently, Gill's claim of ineffective assistance of counsel on the basis of counsel failing to file a suppression motion fails.

II. Gill failed to establish counsel performed ineffectively when he cross-examined Trooper Edwards.

Gill next argues counsel's cross-examination of Trooper Edwards was insufficient. Gill identifies three areas that he contends counsel should have used to attack the trooper's credibility: (1) Trooper Edwards' statement that he did not smell anything except cigarettes and air freshener; (2) Trooper Edwards' reaction to smelling marijuana on the passenger; and (3) Trooper Edwards' change in testimony as to where he located the second marijuana cigarette in the vehicle. According to Gill, counsel's failure to highlight these issues led to his convictions.

Gill's contentions do not establish ineffective assistance of counsel.

A. Gill fails to show trial counsel's cross-examination of Trooper Edwards was constitutionally deficient.

Gill's attorney's cross-examination was not deficient. To demonstrate deficiency, Gill needed to show counsel's actions were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Gill has not pointed to such errors and the record establishes that two of the three areas complained of by Gill were, in fact, put in front of the jury.

Trooper Edwards' faulty recollection of location of second marijuana cigarette.

Trooper Edwards testified on direct examination that he found the second marijuana cigarette by the front passenger seat. (R. 117:152.) On cross-examination,

Trooper Edwards testified consistently. (R. 117:209.) On re-direct, Trooper Edwards again testified the second marijuana cigarette was found near or in the passenger side front door. (R. 117:210.) Trooper Edwards subsequently admitted he was not certain where he found the second marijuana cigarette. (R. 117:211.) He then reviewed his report, in front of the jury, and recalled the second marijuana cigarette was actually found in the driver's door pocket. (R. 117:211.)

Trooper Edward's observation of the odor of marijuana on the passenger.

Similarly, the jury knew from Trooper Edwards' cross-examination that Trooper Edwards smelled an odor of marijuana coming from the passenger. (R. 117:203.) In fact, he was cross-examined on it twice by counsel. (R. 117:203; 118: 20.)

It can hardly be said counsel's performance was deficient when counsel covered the very topics which Gill currently argues trial counsel should have addressed with Trooper Edwards.

Trooper Edwards' statement he did not smell anything except air freshener and cigarettes.

The single area Gill complains of that trial counsel did not address with Trooper Edwards was the trooper's statement to the other officer that he did not smell anything other than cigarettes and air freshener.

While cross-examination on this issue may have been a proper and effective technique, failure to do so does not constitute deficient performance. The courts recognize "[t]here are countless ways [for counsel] to provide effective assistance in any given case . . ." and with the benefit of hindsight, it is possible to see how a lawyer could have acted differently. *Strickland*, 466 U.S. at 689. However, the courts "are to be 'highly deferential' " when evaluating counsel's performance and "must avoid the 'distorting effects of hindsight.' " *State v. Thiel*, 2003 WI 111, ¶ 19,

264 Wis. 2d 571. The courts have repeatedly observed " '[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate.' " *Id*.

The trial court in this case made numerous findings in support of its conclusion that counsel was effective throughout the trial and acknowledged counsel succeeded in getting an acquittal on one count by skillfully convincing the jury Gill was not impaired. (R. 164:14-16.)

Accordingly, Gill's attorney's performance was not deficient during his cross-examination of Trooper Edwards.

B. Gill fails to prove counsel's performance, if it was deficient, prejudiced him.

Assuming the challenged conduct of counsel was unreasonable, Gill has not demonstrated prejudice.

To demonstrate prejudice, Gill needed to show a reasonable probability that, absent counsel's unprofessional errors, the jury would have reached a different verdict. *Strickland*, 466 U.S. at 694.

The information Gill claims should have been presented to undercut Trooper Edwards' credibility was presented in substantial part to the jury. Therefore, Gill cannot establish the prejudice prong. To the extent the information did not come before the jury, the information was minor and would have had little, if any, effect on the case because there was a vast amount of information from which the jury could convict Gill.

The keys to this case were Gill's acknowledgement the marijuana in the car was "old as hell," thereby establishing possession, and the analysis of Gill's blood indicating he had a detectable amount of Delta-9 in his blood. The omitted information is relatively unpersuasive when it is viewed in the context of the totality of the record, which is what must be examined to determine the effect of errors. *Strickland*, 466 U.S. at 695-96 (the "entire evidentiary picture" presented to the factfinder is important).

Given the overwhelming evidence in this case, counsel's purported error could only have had a trivial, if any, effect and does not jeopardize the reliability of the proceedings or confidence in its result.

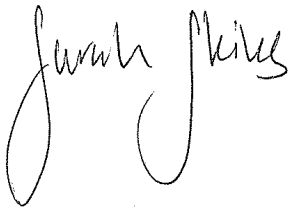
For these reasons, Gill fails to prove his claim that counsel was ineffective during cross-examination of Trooper Edwards.

CONCLUSION

Because Gill fails to prove any of his claims of ineffectiveness, Gill's request for a new trial should be denied. The State respectfully requests this Court affirm the trial court's order denying Gill's motion for postconviction relief.

Dated this 11th day of October, 2022.

Respectfully submitted,



Sarah M. Skiles
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

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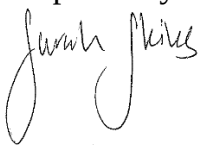
CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes or footnotes, leading of minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 17 pages, 2,656 words.

Dated this 11th day of October, 2022.

Respectfully submitted,



Sarah M. Skiles
State Bar No. 1093720
Assistant District Attorney