

FILED
11-01-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

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

REPLY BRIEF OF
DEFENDANT-APPELLANT

KELLY LAW OFFICE
BY ANNICE M. KELLY
State Bar No. 1001958

4623 75th St., #278
Kenosha, WI 53142
312-965-2002
Amkelly8141@gmail.com

TABLE OF CONTENTS

Table of Contentsii

Argument 1

I. The Government failed to address the issue of whether reasonable suspicion is determined when the FST is performed or when the officer decides to perform the FST. Regardless of when reasonable suspicion is determined Trooper Edwards never had it and the trial court erred in denying the suppression motion.1

II. Mr. Gill was prejudiced by trial counsel’s failure to file a suppression motion. 2

III. Trial counsel’s deficient cross examination of Trooper Edwards prejudiced Mr. Gill. 3

Conclusion 4

Certification regarding form/length, Rule 809.19(8)..... 5

ARGUMENT

- I. The Government failed to address the issue of whether reasonable suspicion is determined when the FST is performed or when the officer decides to perform the FST. Regardless of when reasonable suspicion is determined Trooper Edwards never had it and the trial court erred in denying the suppression motion.**

Trooper Edwards did not have reasonable suspicion at the time when the decision was made to perform the FST. The government ignores this fact and instead basis reasonable suspicion on the time the FST was performed. However, even if this is the proper time to determine reasonable suspicion, Trooper Edwards still did not have it.

To support reasonable suspicion, the government points to:

(1) the “faint” odor of marijuana, never attributed to Mr. Gill, but rather the passenger; (2) the irrelevant fact that Mr. Gill could not state when he last consumed marijuana;¹ (3) an “old as hell” partially consumed marijuana cigarette between the passenger and the driver; (4) the odor of alcohol, which only appears in Trooper Edwards’ admittedly inaccurate police report; (5) the open, partially consumed alcohol within Mr. Gill’s reach, and (6) the timing of the stop at 4 a.m. on a weekend. Gov Br at 12-13.

In reality, only the alcohol is relevant and this does not amount to reasonable suspicion in light of the totality of the circumstances. Those circumstances include the fact that Trooper Edwards was seconds from letting Mr.

¹ If this were a valid point, an officer would have reasonable suspicion if the driver smoked a week ago but could not remember exactly when.

Gill drive away because he did not smell or observe anything that aroused his suspicions. Mr. Gill did not have glassy eyes, he did not slur his speech and he was not driving erratically. In these circumstances, the mere possession of a bottle of alcohol and, even including the old marijuana cigarette, does not rise to level of reasonable suspicion that Mr. Gill was driving under the influence.

Trooper Edwards observed Mr. Gill's driving and other than speeding, nothing was suspicious. Therefore, even including all the factors that occurred after Trooper Edwards said he did not smell anything suspicious, he still did not have reasonable suspicion. The trial court erred in denying the suppression motion.

II. Mr. Gill was prejudiced by trial counsel's failure to file a suppression motion.

An objectively reasonable attorney would have filed a suppression motion after viewing the video of the stop. Instead trial counsel made the decision to not file a suppression motion without ever "processing" Trooper Edwards' statements.

I don't know why. I think my judgement at that time was that we have a motion that would have been unsuccessful. 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.

The government misstates trial counsel's testimony when it claims trial counsel did not file the motion because he thought it would fail. Gov Br at 10. The full context of trial counsel's testimony establishes that he stopped his analysis after Trooper Edwards found the cigarette in the car:

So I think the way I was processing this file was I kept getting stymied by the officers finding the marijuana in the car. I think that's where my view of the analysis cut off, at that point in time.

...

I think basically because I believe that that fact, that it was apparently used marijuana, would likely allow the State to survive a Motion to Suppress.

Id. at 29-30. Trial counsel further admitted that because there was a long delay in the prosecution of the case, the case “just sat there waiting for something to happen.” *Id.* at 30.

Trial counsel’s failure to analyze all the evidence in this matter before coming to a conclusion on filing a suppression motion falls below an objective standard of a reasonable attorney. He did not have a strategic reason for not filing the motion because he never analyzed the evidence that would have formed the basis for the motion. This is objectively deficient performance.

III. Trial counsel’s deficient cross examination of Trooper Edwards prejudiced Mr. Gill.

Trial counsel’s faulty cross examination of Trooper Edwards fell below an objective standard and was not based on a strategic reason. As previously discussed, trial counsel never “processed” Trooper Edwards’ statement so failed to show it to the jury or cross examine Trooper Edwards on it. Even the government admits that this was a crucial error by trial counsel. Gov Br at 15. It argues, this court, however, should be “highly deferential” in evaluating trial counsel’s performance. *Id.* Under this standard, no attorney’s performance would ever be judged deficient.

Combining the video, with the contradictions between the police report and the video would have had a significant impact on the jury. Especially since Trooper Edwards “refreshed his recollection” on several keys points with his false police report. During the post conviction hearing, Trooper Edwards admitted his police report was not accurate and did not reflect what occurred on the video. Therefore had trial counsel elicited these admissions at trial, it is likely Mr. Gill would not have been convicted. Mr. Gill was prejudiced when he was convicted. Contrary to the government’s claim these arguments and facts were not presented to the jury. Gov Br at 16. Trial counsel did nothing to undercut Trooper Edwards’ credibility or attack the false police report and as a result Mr. Gill was convicted and prejudiced.

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.

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 1st day of November, 2022.

Respectfully submitted,

Electronically signed by:

Annice M. Kelly

Annice M. Kelly
State Bar No. 1001958
4623 75th St #278
Kenosha WI. 53142
Amkelly8141@gmail.com
312-965-2002

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 1075 words.