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COURT OF APPEALS

DISTRICT II

Appeal Case No. 2022AP000844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NICHOLAS A. CONGER,

Defendant-Appellant.

On Appeal from an Order Denying Post-conviction Relief
and a Judgement of Conviction Entered
in the Green Lake County Circuit Court,
the Honorable Mark T. Slate, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did Officer Wendt have sufficient reasonable suspicion to extend the traffic stop beyond its original purpose? The trial court ruled there was sufficient reasonable suspicion to extend the stop.

2. Was trial counsel ineffective for not filing a motion to suppress evidence based on the extension of the stop? The trial court ruled that defense counsel did not provide ineffective assistance of counsel.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Publication is not necessary because the Court is being asked to apply well settled rules of law to a recurring fact situation. *See* Wis. Stat. (Rule) 809.23(1)(b)1.

STATEMENT OF THE CASE

On behalf of Nicholas Conger, Attorney Vicki Jobling filed a motion to suppress evidence on September 19th, 2019 for lack of probable cause to arrest and *Miranda* violations. (14).¹ On October 18th, 2019, Officer Bradley Wendt testified at the motion hearing to suppress evidence. (24:4). Officer Wendt testified that had an ARIDE certification. (24:4). He also testified that ARIDE involves training officers about drugs and other substances beyond alcohol that can impair a person's ability to operate a motor vehicle safely. (24:5). Officer Wendt also testified he conducted a traffic stop at approximately 7:03 p.m. on December 3, 2018 for an equipment violation. (24:5-6). Officer Wendt approached the driver's side of the vehicle and identified the lone occupant Nicholas Conger. (24:6-7). Upon first making contact with Mr. Conger, Officer Wendt detected the odor of an intoxicating beverage. (24:7). After returning to his squad vehicle and then re-approaching Mr. Conger's vehicle, Officer Wendt asked Mr. Conger what he was smelling coming from the vehicle. (24:8). Mr. Conger responded "probably the pot." (24:8). Officer Wendt asked if Mr. Conger

¹ Document 14 defense motion to suppress evidence filed in the circuit court on 9/19/2019

had been drinking and he stated that he had a Mike's Hard Lemonade. (24:9). Mr. Conger then handed Officer Wendt an open can of Mike's Hard Lemonade. (24:10). Officer Wendt testified he had reason to believe Mr. Conger had consumed marijuana because it was in the vehicle. (24:10). Officer Wendt also testified that he observed Mr. Conger had bloodshot eyes. (24:10). He testified this could reflect recent marijuana use of alcohol consumption. (24:10). Officer Wendt then asked Mr. Conger if he would be willing to perform Standardized Field Sobriety Tests (hereinafter SFSTs), and Mr. Conger agreed. (24:10).

On cross examination, Officer Wendt testified that the odor of intoxicants was moderate. (24:33). Officer Wendt also testified that Mr. Conger handed him a small amount of marijuana. (24:34).

On November 13th, 2019, the circuit court denied the defense motion to suppress. (71:11-12). At trial Mr. Conger was convicted of operating a motor vehicle while under the influence of a restricted controlled substance (74:217). A motion for post-conviction relief was filed on 1/28/22 citing as grounds, ineffective assistance of counsel, for trial counsels failure to file a motion to suppress evidence based on the unlawful extension of the stop. (79).

On February 28th, 2022 a hearing on the post-conviction motion was held, at which Attorney Vicki Jobling testified. (84:5). After testimony and some argument by appellant Attorney Reynolds, the court made a ruling. (84:18). The circuit court found that there was an odor of intoxicants, an open can of alcohol in the vehicle, a statement by Mr. Conger about the odor of marijuana, Officer Wendt was handed marijuana, Mr. Conger's admission to drinking, and bloodshot eyes. (84:18). The circuit court found there was reasonable suspicion to extend the stop to have Mr. Conger perform SFSTs. (84:18). The circuit court also found that because there

was reasonable suspicion to extend the stop to perform SFSTs, any motion about that issue would not have succeeded and therefore Attorney Jobling was not ineffective and Mr. Conger was not prejudiced. (84:18).

On March 2nd, 2022, appellant filed a motion to reconsider the circuit court's February 28th, 2022 ruling. (83). On April 18th, 2022, a hearing was held at which time Officer (now Deputy Wendt) testified. (93:6). Deputy Wendt testified that he is trained in drug recognition. (93:15). Among other things, he testified about what he based his decision to extend the stop to include SFSTs, on. (93:25). The circuit court then made a written ruling denying the appellants post-conviction motion. (94). The court found certain facts:

- December 3, 2018, Officer Wendt, of the Princeton Police Department, pulled the defendant, Nicholas Conger, over on a traffic stop for a defective high mounted stop lamp.
- Upon walking up to the defendant's vehicle Officer Wendt smelled an odor of intoxicants coming from the motor vehicle.
- The defendant was the only person in the vehicle at the time.
- When Officer Wendt returned to the vehicle a second time he asked the defendant what the smell was.
- The defendant replied it was "probably the pot".
- The defendant then handed Officer Wendt a baggie of marijuana.
- Upon further inquiry, the defendant had admitted that he had been drinking alcoholic beverages.
- The defendant handed an open can of Mike's Hard Lemonade, which is an alcoholic beverage, from inside the vehicle to the officer.
- The defendant's eyes appeared bloodshot to the officer.

(94:2).

The circuit court ruled that while Attorney Jobling did not specifically file a motion about the reasonableness of the extension of the stop, all the evidence regarding that issue still

was received at the original October 18th, 2019 motion hearing. (94:3). The circuit court reiterated the facts known at the time of the original motion hearing on October 18th, 2019:

[T]he defendant had an odor of intoxicants, the defendant admitted that he had marijuana and handed it to the officer, the defendant admitted that he had been drinking alcohol. The defendant handed an open can of alcohol to the officer during the traffic stop and the defendant's eyes appeared bloodshot.

(94:4).

The circuit court ruled that based on these facts, under the totality of the circumstances, the officer had reasonable suspicion to extend the stop to include SFSTs, as Mr. Conger may have under the influence of alcohol, marijuana or both. (94:4). Because a motion to suppress evidence based on the extension of the stop would have been unsuccessful, the circuit court ruled that there was not ineffective assistance of counsel, and denied the motion. (94:5).

STANDARD OF REVIEW

The appellant correctly states the standard of review that should be used in this case. There is a question of constitutional fact that should be reviewed under two different standards. *State v. Hughes*, 2000 WI 24, ¶ 15, 233 Wis. 2d 280, 607 N.W.2d 621. The court upholds a circuit court's findings of fact unless they are clearly erroneous. *Id.* (citing *State v. Secrist*, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999)). The court then independently applies the law to those facts *de novo*. *Id.* (citing *State v. Kiekhefer*, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997)).

ARGUMENT

UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE FACTS, AS DETERMINED BY THE CIRCUIT, ARE SUFFICIENT TO SUPPORT REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP TO INCLUDE SFSTS

The appellant argues that there were no indicia of impairment operating while intoxicated (hereinafter OWI) investigation and that possession of marijuana is not sufficient to conduct an operating with restricted controlled substance (hereinafter RCS) investigation.

Here however, these two issues should not be analyzed separately but rather together in light of the totality of the circumstances. The circuit court made factual findings that when analyzed as a whole support the conclusion that there was reasonable suspicion to extend the traffic to include SFSTs for an OWI/RCS investigation.

A. Applicable law

The validity of an extension of a traffic offense stop is tested in the same manner and under the same criteria as the initial stop/seizure of the defendant. Reasonable suspicion is the required amount of information/quantum of evidence. *State v. Adell*, 2021 WI App 72, ¶ 16, 399 Wis.2d 399, 407, 966 N.W.2d 115. An officer may extend a justifiable traffic stop for further investigation if, during the stop, the officer becomes aware of additional suspicious circumstances that give rise to a reasonable suspicion that the driver has committed or is committing an offense distinct from that prompting the initial stop. *Id.* Reasonable suspicion to extend a traffic stop considers the information possessed by the officer in initiating the stop as well as the information acquired by the officer during the stop.

State v. Colstad, 2003 WI App 25, ¶ 19, 260 Wis.2d 406, 420, 659 N.W.2d 394. In the context of a traffic offense stop that is extended for OWI reasons, the issue is whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that the driver was driving while under the influence of an intoxicant. *Id.*

The reviewing court analyzes factual findings from using the clearly erroneous standard.

The trial judge not only hears the testimony, but also sees the demeanor of the witness and the body language. As a result, the trial judge hears the emphasis, volume alterations and intonations. The trial judge also has a superior view of the total circumstances of the witnesses' testimony. Consequently, the trial court's findings of fact are only upset when clearly erroneous.

If the testimony leads the trial court to a finding that is not clearly erroneous, such findings should and must be accepted by the reviewing court. Although an appellate court may have found differently, the standard is whether the trial court's findings were clearly erroneous. In this case, even with some contradictory testimony, it was the trial court's responsibility to make the findings of fact.

Confronted with the conflict of testimony, it was the trial court's obligation to resolve it. The fact finder does not only resolve questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony.

State v. Owens, 148 Wis.2d 922, 929-930, 436 N.W.2d 869 (1989).

B. The facts in this case support reasonable suspicion to extend the stop.

There are numerous cases that have analyzed if reasonable suspicion existed to extend a traffic stop beyond its initial purpose. A discussion of a few of these cases is illustrative that there was indeed reasonable suspicion to extend the stop in this case. First, in *State v. Adell*, the issue was whether the extension of the traffic offense stop (for speeding) to investigate whether the defendant was operating with a prohibited alcohol concentration (.02%) was lawful. The relevant facts were:

At the time of the stop, Schlough had seventeen years of experience as a deputy with the Sauk County Sheriff's Department, had received training in investigating incidents of suspected operating while intoxicated, and had made about 150 arrests on charges of operating while intoxicated.

At 5:50 a.m. on August 1, 2019, a Thursday, Schlough made a traffic stop of a vehicle based on a radar reading showing that the vehicle was travelling fourteen miles over the fifty-five miles per hour speed limit. Schlough approached the vehicle and spoke to the driver, identified as Adell, through the open driver's side window. Adell apologized for speeding and said that he was running late for work. Schlough noticed an odor of intoxicants coming from inside the vehicle and observed a passenger in the front seat. Schlough asked Adell if he had consumed any alcohol, and Adell said no. Schlough asked Adell if he had consumed alcohol the previous evening, and Adell said yes.

Schlough returned to his patrol car and “ran Mr. Adell through dispatch.” Schlough learned that Adell had four prior operating while intoxicated convictions and was subject to a .02 blood alcohol concentration (BAC) restriction. Based on his training and experience he knew that a person would have to consume “very little” alcohol to exceed the .02 BAC limit, and that drinking one beer could put a person over that limit. Schlough returned to Adell's vehicle and asked Adell to step out of the vehicle to perform field sobriety tests.

Schlough did not observe any illegal or “suspicious” driving activity other than the speeding before the stop, and he did not observe anything suspicious “about the way that [Adell] talked or what he said” during the stop.

Adell 2021 WI App at ¶¶ 5-9.

The Court in *Adell* concluded that the stop was properly extended to investigate whether the defendant was operating with a prohibited alcohol concentration because the totality of the facts and circumstances gave rise to reasonable suspicion of that offense. *Id.* at ¶¶ 2-32. The Court based its finding on six factors: (1) the officer's training and experience; (2) the defendant's prior OWI related convictions; (3) the defendant was subject to a .02 BAC restriction; (4) the odor of intoxicants inside the vehicle; (5) the defendant's admission that he had consumed alcohol; (6) the defendant was speeding. *Id.* at ¶¶ 20-26.

Arguably, this case has more facts supporting reasonable suspicion than *Adell*. Mr. Conger was the only occupant in the

vehicle. (24:6-7). Officer Wendt testified about his ARIDE certification, which provided him with additional training regarding substances other than alcohol that can impair a person's ability to operate a motor vehicle safely. (24:5). Officer Wendt could smell a "moderate" odor of intoxicants coming from the vehicle. (24:33). Mr. Conger handed Officer Wendt marijuana out of the vehicle. (24:34). Mr. Conger admitted to drinking alcohol and handed Officer Wendt an open can of an alcoholic beverage from inside the vehicle. (24:9-10). Officer Wendt observed Mr. Conger to have bloodshot eyes. (24:10). The circuit court made these findings of facts. (94:4).

The appellant fails to adequately address that Officer Wendt gathered all this information roadside in real time and all these facts intermingle with one another. Just because Officer Wendt was handed marijuana does not mean he must ignore the odor of alcohol and the open intoxicant in the vehicle. Officer Wendt was observing a combination of possible intoxicating substances and all that information informed his decision to extend the stop. As the circuit court correctly pointed out:

In this particular case the officer would have reasonably suspected, based on his training and experience, that not only would the defendant have alcohol in his system, but he may have marijuana in his system and that either the alcohol or drugs, or a combination of the two may be affecting his ability to drive a motor vehicle.

(94:4-5).

Another case that analyzed reasonable suspicion to extend a traffic stop was *State v. Haynes*. The car driven by the defendant was stopped for a red light violation. The Court, in finding that the stopping officer acquired reasonable suspicion to extend the traffic offense stop to perform an OWI investigation, stated:

Grabski was in fresh pursuit of Haynes when he crossed the Waukesha/Milwaukee county line and stopped her for a traffic violation. . .

Furthermore, the strong odor of intoxicants, Haynes's bloodshot and glassy eyes and slurred speech, combined with her admission of drinking, were additional suspicious factors sufficient to give rise to a suspicion that she had committed the offense of drunk driving. Consequently, Grabski's continued detention and investigation of Haynes, which included field sobriety tests, was justified.

State v. Haynes, 2001 WI App 266, ¶ 14, 248 Wis.2d 724, 638 N.W.2d 82.

In *Haynes*, there were more traditional indicators of impairment however a key fact in the current case is there were multiple potentially intoxicating substances present at the same time, along with an admission by Mr. Conger that he had consumed alcohol. (24:9). The appellant presents the issue that there were no signs of impairment. (Appellant Brief pg. 7). However, that is not what the circuit court found and the appellant has not provided this Court with sufficient reasons to show the circuit court's findings were clearly erroneous. Even if this Court discounts the officer testimony about bloodshot eyes there is still more than enough facts to support reasonable suspicion to extend the traffic stop.

Lastly, looking at *State v. Bons* is informative. The car driven by the defendant was stopped for speeding. The Court found that the officer had reasonable suspicion to believe that the defendant had been committing or was about to commit an offense involving alcohol (346.935) and, therefore, the extension of the traffic stop to investigate further was reasonable:

We conclude that Ramstack could have formed a reasonable suspicion that Bons was engaged in illegal activity, in addition to the traffic violations, when he extended the traffic stop. Ramstack saw a shot glass sitting on the console of the vehicle in close proximity to the driver's seat. Bons appeared unusually nervous and he rolled up the windows and locked the doors when Ramstack asked him to exit the vehicle. This behavior, coupled with the presence of the shot glass on the console, gave Ramstack reasonable suspicion that Bons had been committing or was about to commit a crime involving alcohol, *see* WIS. STAT. § 346.935 (open container prohibition), and therefore provided Ramstack with the justification to extend the traffic stop to investigate further.

State v. Bons, 2007 WI App 124, ¶ 15, 301 Wis.2d 227, 731 N.W.2d 367.

Ultimately, *Bons* is not an OWI case however the reasonable suspicion analysis is still applicable. In *Bons*, the officer had nervous type behavior and a shot glass on the console. The current case has many more facts that support reasonable suspicion to continue an investigation into OWI/RCS. *Bons* is a good example that reasonable suspicion is not a particularly high standard when determining if an officer can extend a traffic stop to further an investigation into another matter. The facts of the current case certainly give rise to reasonable suspicion to investigate further into OWI/RCS.

MR. CONGER WAS NOT PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT PREJUDICED BY ANY DEFICIENT PERFORMANCE

A. Applicable law

“Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact.” *State v. Johnson*, 133 Wis.2d 207, 216, 395 N.W.2d 176 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 697 (1984)). “The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.” *Id.* (citing *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985)). “The ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law.” *State v. Felton*, 110 Wis.2d 485, 505, 329 N.W.2d 161 (1983). “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 104 S.Ct. at 2065. An ineffective assistance of counsel claim is analyzed using two prongs. It is up to the appellant to prove both.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was

not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

State v. Ludwig, 124 Wis.2d 600, 607-08, 369 N.W.2d 722 (1985) (citing *Strickland*, 104 S.Ct. at 2064).

B. The appellant has not proven the first prong of the ineffective assistance of counsel analysis

Trial counsel Vicki Jobling testified that it was an oversight on her part not to file a motion to suppress based on the extension of the traffic stop to begin an OWI/RCS investigation. (84:6). However, the circuit court made the finding that based on the evidence received at the original suppression hearing on October 18, 2019, no reasonable attorney would believe they would have been successful on another motion to suppress based on the extension of the stop. (94:3).

The appellant has failed to show that based on the information that she had at the time in October 2019, that Attorney Jobling should have filed an additional motion to suppress based on the extension of the stop. Attorney Jobling’s performance certainly did not fall below any objective standard of reasonableness. In fact Attorney Jobling was actively litigating a motion to suppress that she must have believed held merit and could be potentially successful. There is nothing in the record to suggest that Attorney Jobling did not thoroughly review discovery. She obviously heard Officer Wendt’s testimony on October 18, 2019. Attorney Jobling made the decision to file the motion to suppress that she felt held the most merit and had the best chance of success. After reviewing discovery and hearing Officer Wendt’s testimony about the initial traffic stop and extension on October 18, 2019, there is no reason to believe that a different motion to suppress, based on the extension to stop, would subsequently be successful.

Attorney Jobling's performance certainly does not fall below an objective standard of reasonableness for normal attorney performance.

C. The appellant has not proven the second prong of the ineffective assistance of counsel analysis

The circuit court found that Officer Wendt reasonably extended the traffic stop to investigate if Mr. Conger was under the influence of alcohol, drugs or both. (94:4). Based on that the circuit found that any motion to suppress based on the lack of reasonable suspicion to extend the stop would have been unsuccessful. (94:5). The record does not support a claim that Mr. Conger was prejudiced by any ineffective assistance of counsel. Even if this Court finds that Attorney Jobling's representation fell below the professional norm, Mr. Conger's claim still fails if the outcome would not have been any different.

The circuit court's fact findings become very important for this analysis. The circuit found that there were enough facts to support reasonable suspicion to extend the stop. The appellant has called into question one of those facts, the observation of bloodshot eyes. (Appellant's Brief pg. 26). However, the appellant has not shown why any of the circuit court's factual findings were clearly erroneous. Therefore, if this Court accepts the circuit court's factual findings, which it should, there clearly was enough evidence to support an extension of the stop to include SFSTs and an OWI/RCS investigation. If there was enough evidence to support the extension then Mr. Conger was not prejudiced by Attorney Jobling not filing the motion because the evidence would not have been suppressed anyway.

CONCLUSION

The State asks this Court to deny the appellants motion and affirm the circuit court's ruling denying Mr. Conger's post-conviction motion.

Dated this 6 day of September, 2022.

Respectfully submitted,

GERISE LASPISA
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Electronically signed by
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,796 words.

September 6, 2022
Date

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief 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 brief filed with the court and served on all opposing parties.

September 6, 2022
Date

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