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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP1522-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Case No: 22AP1522

Circuit Court Case No. 2020CM310

BRANDON B. SMILEY

Defendant-Appellant

Appeal from the Jefferson County Circuit Court

Case No. 20CF310

The Honorable Robert F. Dehring Jr. Presiding

**BRIEF OF DEFENDANT-APPELLANT, BRANDON B.
SMILEY**

KIRK D. HENLEY

Attorney for Appellant-Defendant

State Bar No. 1107974

The Law Office of Kirk Henley, LLC

P.O. Box 511820

Milwaukee, WI 53203

attykirkhenley@gmail.com

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ISSUES PRESENTED

Brandon Smiley was convicted on one county of Lewd and Lascivious Behavior. Mr. Smiley filed a postconviction motion alleging that his trial counsel was ineffective for failing to file a motion to suppress a pre-trial identification through means of a photo array. The circuit court denied Mr. Smiley's motion. Mr. Smiley now submits the following question for review.

Question Presented:

Whether Mr. Smiley's trial attorney was ineffective when he failed to file a motion to suppress Mr. Smiley's identification through a photo array prior to trial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Defense does not request oral argument or publication on this matter.

STATEMENT OF THE CASE

Statement of the Record:

On August 12, 2020, the state charged Mr. Smiley with lewd and lascivious behavior contrary to Wisconsin Statute Section 944.20(1)(b). R.2, 1. On November 23, 2020, Mr. Smiley entered a plea of not guilty and the matter was set for trial. R. 127, 2,9.

A jury trial took place on September 13, 2021. R. 109. At trial, the jury returned a verdict of guilty for the single count alleged in the complaint. R. 109, 241. Judge Dehring entered a judgement of conviction on the verdict. *Id.* Mr. Smiley was sentenced to nine months in the county jail on October 26, 2021. R. 114, 15.

On April 6, 2022, Defense filed a motion to set aside the verdict and judgement of conviction entered on September 13, 2021, alleging that Mr. Smiley's trial counsel, Attorney Karl Huebner, was ineffective. R. 130. A Machner hearing was held on June 23, 2022. R160.1. After the hearing, the order of the circuit court denied the Defense's motion. R154.1. An order of the Court of Appeals set the deadline for filing a notice of appeal to September 13,2022. R. 159, 2. A

notice of appeal was timely filed on September 8, 2022. R. 165, 1.

Statement of the Facts:

On June 22, 2020, J.H. made a statement to police officers that she saw a man masturbating in the Dollar Tree located at 703 South Church Street in the City of Watertown, Jefferson County Wisconsin. R. 156, 1. The description J.H. gave was that the suspect was male, “approximately young to mid-20’s with curly hair, not an afro style, but ethnic, African American or mixed race with light skin, thin build, approximately 5’10” to 6’, wearing a baggy white t-shirt, baggy black pants or jeans.” *Id.* She also reported that she saw the man get into a blue vehicle with two support ribbons on it that were red, white, and blue “on each side of the Chevy emblem.” *Id.*

In her statement, J.H. said that she saw the man smiling at her and she said “hi” to him. R. 156, 1. She turned around to walk down the aisle, and she heard the man say “hey”, which caused her to turn back toward him. *Id.* When she turned, she observed the male subject had his penis exposed and in his hand. *Id.* She described that the man was masturbating successfully. *Id.* J.H. told officers that she saw the same individual one more time walking out of the store. *Id.*

On July 9, 2020, J.H. presented to the Watertown police department to view a photo array of potential suspects in the incident that occurred on June 22. R. 155, 1 The photo array contains six photos of young black men. *Id.* at 2. The photos are monochromatic black and white. *Id.* Five of the six photos depict young black men with dark skin and short hair. One of the six photos depicts a young black man with light skin and short hair. *Id.* The photo depicting a young black man with light skin and short hair is the photo depicting Mr. Smiley. *Id.* J.H. informed the officers on the photo array that she was about 30% sure or less that the photo of Mr. Smiley was the photo of the person she saw at the Dollar Tree on June 22 stating that the eyes on the photo were lighter. *Id.* at 3.

On September 11, 2020 Attorney Karl E Huebner was appointed to represent Mr. Smiley. Attorney Huebner

represented Mr. Smiley at the jury trial on September 3, 2021. At the jury trial, J.H. identified Mr. Smiley as the person she saw masturbating at the Dollar Tree. J.H. stated at trial that she was only 60-70% sure that Mr. Smiley was the person she saw at the Dollar Tree. R. 109, 78. Attorney Teresa Beck represented the state at trial. Attorney Beck established J.H.'s identification of Mr. Smiley with use of the July 9 photo array. *Id.* The photo array and police reports cataloguing the process used during the showing of the photo array to J.H. was provided to Attorney Huebner prior to trial. No motion was brought to the circuit court prior to trial to suppress the identification of Mr. Smiley through the July 9 photo array. R. 160, 7.

At trial evidence was presented that Mr. Smiley may have been the driver of a vehicle that was at the Dollar Tree around the time of the incident with J.H. R. 109, 156. Additionally, testimony of Detective Matthew Lochowitz and exhibits 5, 6, and 7 showed that Mr. Smiley's GPS bracelet was located at the Dollar Tree on June 22. R. 109, 189.

Defense filed a post-conviction motion to set aside the verdict and judgement of conviction entered on September 13, 2021, alleging that Mr. Smiley's trial counsel, Attorney Karl Huebner, was ineffective for failing to file a motion to suppress the identification made by J.H. prior to trial during the photo array. R. 130. At the Machner hearing Attorney Huebner testified that he believed that the photo array was not material to the state's case and so he did not pursue a motion to suppress the identification made through the photo array. R. 160 16-17. After arguments the court ruled that Attorney Huebner was not ineffective because it found that he was not deficient for failing to file a motion to suppress the identification of Mr. Smiley. *Id.* at 35. The court's decision was based both on the court's opinion that the photo array was not impermissibly suggestive as well as the court's opinion that Attorney Huebner's performance was not deficient. *Id.*

Mr. Smiley now appeals the court's decision to deny his motion to set aside the verdict.

ARGUMENT

I. THIS COURT SHOULD FIND THAT BRANDON SMILEY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN ATTORNEY HUEBNER FAILED TO FILE A MOTION TO SUPPRESS MR. SMILEY'S IDENTIFICATION DURING THE JULY 9 PHOTO ARRAY BECAUSE A MOTION TO SUPPRESS THE IDENTIFICATION HAD A REASONABLE PROBABILITY OF SUCCESS.

A defendant in the state of Wisconsin has the right to the effective assistance of counsel. Wisconsin Constitution Article 1 section 7; U.S. Constitution 6th Amendment. A defendant is denied their right to ineffective assistance of counsel where the defendant's counsel fails to perform in a way that a reasonable attorney would perform in under the same circumstances and where the defendant was prejudiced by their counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A. Standard of Review

This Court reviews the circuit court's denial of an ineffective assistance of counsel claim as a mixed question of law and fact. *State v. Kimbrough*, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. While this Court does not reverse any factual findings of the circuit court unless they are clearly erroneous, this Court reviews whether counsel's performance was deficient and prejudicial to the defendant de novo. *Id.* Because the issue presented is whether Mr. Smiley's trial counsel's performance was deficient and prejudicial, this court should review that issue de novo. As part of the court's reasoning, the circuit court determined that a photo array was not impermissibly suggestive which is a determination of fact. Because the court's ruling on whether the photo array was impermissibly suggestive is a determination of fact, this court should use the clearly erroneous standard regarding that sub issue.

B. Attorney Huebner's performance was deficient for failing to file a motion to suppress Mr. Smiley's identification because the July 9th photo array was impermissibly suggestive, and the in-court identification of the defendant would not have been derived from an independent source.

The first step in determining whether a defendant's counsel was ineffective is to determine whether their decisions at the time were deficient under the circumstances. "In considering alleged incompetency of counsel, one should not by hindsight reconstruct the ideal defense. The test of effectiveness is much broader and an accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation." *State v. Machner*, 285 N.W.2d 905, 907, 92 Wis.2d 797 (Wis. App. 1979), Quoting *State v. Harper*, 57 Wis.2d 543, 556-7, 205 N.W.2d 1, 9 (1973).

In the current case, the failure to bring a motion to suppress the identification of Mr. Smiley through the photo array was deficient because a motion to suppress the identification had a reasonable probability of success with the information that Attorney Huebner had at the time.

The test for determining whether an out-of-court photographic identification is admissible or, on review, whether the out-of-court identification was properly admitted has two facets. First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures. *Powell v. State*, 271 N.W.2d 610, 86 Wis.2d 51 (Wis. 1978).

1. The circuit court's finding that the July 9 photo array was not impermissibly suggestive was clearly erroneous because the photo depicting Mr. Smiley shows someone with clearly lighter-colored skin and brighter eyes than the remainder of the individuals depicted in the photo array.

“The validity of any photographic identification requires a case-by-case application of the rule to the particular facts of each case and must be determined in light of the totality of the surrounding circumstances.” *Powell v. State*, at 616, citing *Holmes v. State*, supra, 59 Wis.2d at 495, 208 N.W.2d 815; *Simmons v. United States*, Supra, 390 U.S. at 383, 88 S.Ct. 967. “Some aspect of the photographs themselves might serve to emphasize unduly the photo of the suspect. The manner in which the photos are presented, grouped, displayed or otherwise exhibited to the eyewitness might be highly suggestive. Finally, the words or actions of the law enforcement official overseeing the viewing might lead or sway an uncertain viewer, thereby compromising the reliability of the resulting identification.” *Id.*, citing *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Regarding photo arrays, “[w]hat is required is the attempt to conduct a fair lineup, taking all steps reasonable under the ‘totality of circumstances’ to secure such result.” *Powell*, 271 N.W.2d 610, quoting *Wright v. State*, 46 Wis.2d 75, 86, 175 N.W.2d 646, 652 (1970).

Defense does not argue that the actions of the officer during the display of the photo array created any impermissible suggestion. However, the photographs themselves unduly emphasize the photo of Mr. Smiley. The circuit court made a record that all of the photos in the that the men depicted had similar hair styles and the lighting in the photos reflected light spots on the men’s faces. The photos are in black and white, and the lighter spots do exist in each photo. However, Defense argues that the lighting is not what makes the photo array impermissibly suggestive. Five of the photos in the photo array show men with considerably darker skin than Mr. Smiley, making him noticeably distinguishable from the others because he is the only black male with “light skin.” This photo emphasized one of the identifying factors that J.H. described to the officers in her written statement. The color of Mr. Smiley’s eyes also differentiates him from the remaining men depicted in the photos. His eyes are light colored while the rest of the men’s eyes are dark in color. In J.H.’s statement on the photo array she writes that the bright eyes one of the factors that makes her 30% sure that this was the individual who exposed himself to her.

The law does not require the individuals in a photo array to be identical, but when one photo depicts a someone that is clearly the odd man out, the array should be found impermissible. Here, under the totality of the circumstances surrounding the conducting of the photo array, Mr. Smiley, being the only light-skinned black man in the photo array, is singled out. Because the photo array singles out Mr. Smiley the court's finding is clearly erroneous. Because the circuit court's finding was clearly erroneous, this Court should determine that the photo array was impermissibly suggestive.

2. The in-court identification of Mr. Smiley could not be independently sourced without the use of the impermissibly suggestive photo array.

Once a photo array is found impermissibly suggestive, “the state has the burden of showing that the subsequent in-court identification derived from an independent source and was thus free of taint.” *Powell v. State*, at 66 citing, *Holmes v. State*, 59 Wis.2d at 496, 208 N.W.2d 815; *Fells v. State*, 65 Wis.2d 525, 536, 223 N.W.2d 507 (1974). Whether the in-court identification can be derived from an independent source is determined by the totality of the circumstances. *State v. Robertson*, 2019 WI 102, 389 Wis.2d 190, 205, 935 N.W.2d 813, 820 (Wis. 2019). The Court uses five factors to determine whether the totality of the circumstances shows that the identification is derived from an independent source; “(1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of his prior description of the suspect, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.” *Id.*, citing *Manson v. Brathwaite*, 432 U.S. at 114, 97 S.Ct. 2243.

The Court of Appeals has found that the in-court identification of a defendant can be free of the taint of an impermissibly suggestive photo array where the witness knew the defendant prior to the commission of the crime. *State v. Wiley*, 345 Wis.2d 847, 826 N.W.2d 123, 2013 WI App 13 (Wis. App. 2012). In *State v. Wiley*, the witness was shown a photo array of potential suspects in a homicide investigation. *Id.* The defendant in the case had physical defect in his right

eye. *Id.* In the photo array shown to the witness, only the photo depicting the defendant showed someone with a physical defect in the right eye. *Id.* The circuit court found that the photo array was unduly suggestive. *Id.*

On appeal, the court of appeals found that although the photo array was unduly suggestive, suppression was erroneous because the state could prove that the in-court identification had an independent source. *Id.* The witness in *Wiley* had known the defendant and had seen him “‘practically every day’ or ‘every other day’ for five to ten years.” *Id.* at ¶15. Because of the independent identification of the defendant, the suggestive line-up did not taint the witness’s identification of the defendant. *Id.*

Wiley is differentiated from the current case because J.H. in the current case did not know the individual she saw in the Dollar Tree prior to the incident. She briefly saw the individual in the aisle while shopping. The opportunity for J.H. to view the suspect at the time of the crime was limited because of the briefness of their interaction. She saw the individual three times. (R. 109 at 73.) She saw the suspect first in the aisle of the Dollar Tree when the suspect said “hey”, second when she walked away, and finally when the suspect left the store. *Id.*

Because the suspect was exposing his penis and masturbating, J.H.’s degree of attention was limited at the time of their interaction. If J.H. was focused on the suspect’s penis to the point that she observed him ejaculating, then J.H. likely did not have a good opportunity to view the suspect’s face. J.H.’s prior description of the suspect was fairly generic. The description J.H. gave was that the suspect was male, “‘approximately young to mid-20’s with curly hair, not an afro style, but ethnic, African American or mixed race with light skin, thin build, approximately 5’10” to 6’, wearing a baggy white t-shirt, baggy black pants or jeans.” No identifying factors such as facial scars, tattoos, or unique clothing or jewelry were provided. The level of certainty demonstrated at the confrontation was very low. J.H. said that she was only 30% sure that the person she saw at the Dollar Tree was Mr. Smiley. Finally, the time between the crime and the confrontation was over two weeks. Seventeen days passed

from the time that J.H. saw the suspect in the Dollar Tree until the time that she was presented with the photo array.

Because J.H.'s in court identification would have been derived from an independent source, J.H.'s in-court identification of Mr. Smiley was not free of taint. Because the photo array was impermissibly suggestive and the in-court identification provided by J.H. would not have been independently sourced and free of taint, this Court should determine that Attorney Huebner's failure to file a motion to suppress was deficient performance in this case.

C. Mr. Smiley was prejudiced by the failure to bring a motion to suppress the identification through the photo array because without the identification through the photo array, the state could not have proven its case beyond a reasonable doubt.

The second prong of the test for ineffective assistance of counsel is the prejudice prong. *Strickland*, 466 U.S. at 682. Prejudice to determine ineffective assistance is defined as "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12 (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Whether counsel's deficient performance satisfies the prejudice prong of *Strickland* depends upon the totality of the circumstances at trial." *State v. Jenkins*, 2014 ¶50 WI 59, 355 Wis.2d 180, 199, 848 N.W.2d 786, 795 (Wis. 2014).

The state provided information at trial that Mr. Smiley was at the dollar tree at the time of the incident through his GPS bracelet and that a vehicle that he was possibly driving left the parking lot at a similar time to the incident. However, without J.H.'s identification that Mr. Smiley was the individual who was exposing himself at the Dollar Tree, the state only had evidence on the record that Mr. Smiley was at the store at the time.

The circuit court determined that the circumstantial evidence that the state presented at trial was enough to prove beyond a reasonable doubt that Mr. Smiley was the individual

who exposed himself to J.H. at the Dollar Tree, however, the circuit court failed to consider that without the in-court identification of Mr. Smiley as the person who exposed himself to J.H., the only evidence on the record of the person who exposed himself was that he was a young light-skinned black male with a short ethnic hair style. Mr. Smiley is surely not the only light-skinned black male in Jefferson County. The in-court identification is the keystone that the circumstantial evidence leans on in the state's case. Without that in-court identification, the jury could have found different avenues to consider reasonable doubts regarding the state's circumstantial evidence.

Because the jury could have considered different avenues of reasonable doubt at trial without the in-court identification, that the motion to suppress was never filed prejudiced Mr. Smiley.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the circuit court and remand this case.

Dated at Milwaukee, Wisconsin this 7th day of November, 2022.

Respectfully submitted

Electronically Signed by Kirk D. Henley

KIRK D. HENLEY
Attorney for Appellant-Defendant
State Bar No. 1107974

The Law Office of Kirk Henley, LLC
P.O. Box 511820
Milwaukee, WI 53203
attykirkhenley@gmail.com

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BRANDON B. SMILEY

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I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief in that it is proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text. The text is 13-point type and the length of the brief is 3343 words.

Dated November 7, 2022 at Milwaukee, Wisconsin

Respectfully submitted

Electronically Signed by Kirk D. Henley

KIRK D. HENLEY

Attorney for Appellant-Defendant

State Bar No. 1107974

The Law Office of Kirk Henley, LLC

P.O. Box 511820

Milwaukee, WI 53203

attykirkhenley@gmail.com