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CLERK OF WISCONSIN
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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

**Appeal No. 2022AP001739 CR
Circuit Court Case No. 2019CM000178**

JONATHON M. MARK,

Defendant-Appellant.

AN APPEAL FROM THE ORDER ENTERED NOVEMBER 13, 2019 DENYING THE DEFENDANT'S MOTION TO SUPPRESS: ILLEGAL SEIZURE AND FROM THE JUDGEMENT OF CONVICTION ENTERED MARCH 30, 2021, THE HONORABLE PETER L. GRIMM PRESIDING, AND FROM THE ORDER ENTERED SEPTEMBER 23, 2022, THE HONORABLE LAURA J. LAVEY PRESIDING, DENYING THE DEFENDANT'S POST-CONVICTION MOTION FOR ORDER GRANTING MOTION TO SUPPRESS: ILLEGAL SEIZURE ON GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL ALL IN FOND DU LAC COUNTY CIRCUIT COURT.

BRIEF OF THE DEFENDANT-APPELLANT JONATHON M. MARK

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STATEMENT OF ISSUES PRESENTED

- I. Did the Circuit Court err when the Court decided that a police officer had reasonable suspicion to seize the defendant and denied the defendant's motion to suppress evidence?**

The Circuit Court answered "No".

- II. Was trial counsel ineffective when he did not introduce a squad video into evidence and did not call the defendant to testify at the hearing on the defendant's motion to suppress evidence which alleged that a police officer did not have reasonable suspicion to seize the defendant and were trial counsel's omissions prejudicial?**

The Circuit Court answered "No".

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Jonathon Mark, the defendant-appellant, does not request oral argument as he believes that the briefs of the parties will sufficiently address the issue on appeal. He further states that publication is not appropriate because the issue is case specific and determination of the issues involves the application of well-settled rules of law to the facts of this case.

STATEMENT OF THE CASE AND FACTS

On February 23, 2019, at approximately 10:40 p.m., Jonathon Mark turned the northwest corner of a Kwik Trip in Fond du Lac, walked down the sidewalk in front of the Kwik Trip and entered that business. (R. 37:6-7; Appx. 8-9.) ("Appx." is used henceforward as an abbreviation for "Appendix".)

Joseph Belisle, a City of Fond du Lac police officer, was on the same sidewalk talking to two people in regard to an unrelated incident. (R. 37:6; Appx. 8.) Officer Belisle's police vehicle was parked so that it faced the Kwik Trip sidewalk, the video recording system in the vehicle was operating and it recorded Officer Belisle's activities on the Kwik Trip sidewalk. (R. 148.) The squad video also recorded Mr. Mark walking down the sidewalk in front of Kwik Trip, entering Kwik Trip, subsequently exiting Kwik Trip and walking on the sidewalk away from the building. (R. 148; 10:29:22.¹)

Mr. Mark passed Officer Belisle on the sidewalk as he walked toward the Kwik Trip entrance. (R. 37:7; Appx. 9.) Belisle developed the impression that Mr. Mark was an individual with an active warrant for his arrest. (R. 37:6-7; Appx. 8-9.) He seized Mr. Mark after Mr. Mark declined to identify himself and started to walk away. (R. 37:10; Appx. 12.) Mr. Mark struggled free and ran. (R.37:10; Appx. 12.) Ultimately, Mr. Mark was tackled to the ground by officers and arrested. (R.37:12; Appx. 14.)

Mr. Mark was charged with Resisting or Obstructing an Officer, in violation of Wis. Stat. §946.41(1), in Fond du Lac County Case No. 17-CM-148 on February 27, 2019. (R.1.) Mr. Mark, by trial counsel, Attorney William Mayer, filed a Motion to Suppress: Illegal Seizure on August 1, 2019. (R. 26.) The motion asserted that Officer Belisle did not have reasonable suspicion to

¹ R.148 is the video recording from Officer Belisle's police vehicle which was entered into evidence at the post-conviction motion hearing held on September 13, 2022. (R. 149.) 10:29:22 is a time stamp from the recording. So, R. 148; 10:29:22 references the squad video at 10:29 p.m. and 22 seconds.)

seize Mr. Mark and that all evidence obtained as a result of the seizure should be suppressed. (R. 1: 2-3.)

On November 13, 2019, a hearing was held on the Motion to Suppress before the Honorable Peter L. Grimm. (R. 37.) The state called Officer Belisle to testify at the hearing. (R.37:4; Appx. 6.) Belisle testified that it was raining with "icy conditions" at the time of the incident. (R. 37:7; Appx. 9.) While Belisle was speaking to the people involved in the unrelated incident, a male individual walked past him. (R. 37:8; Appx. 10.) That person was wearing a winter jacket with the hood "completely" up around his head (R. 37:6, 17; Appx. 8, 19.) Belisle testified that he saw the "side profile" of the man (R. 37:6; Appx. 8) He was not able to see the color of the man's hair. (R. 37:17; Appx. 19.)

The man continued walking past and entered Kwik Trip. (R. 37:6; Appx. 8.) Belisle did not stop him at that point. (R. 37:9; Appx. 11.) Belisle told the two people to whom he was talking to "standby" that he "...would have to speak to them in a few minutes." (R. 37:8; Appx. 10.) He then radioed for two, additional officers to come to his location. (R. 37:8; Appx. 10.) Belisle had been present at police department briefings, utilizing the Share Point system, and testified he was aware that there was an active probation warrant for an individual wanted in relation to "some sort of battery" and that the individual was known as someone who "would fight with officers". (R. 37:5-8, 13-14; Appx. 7-10, 15-16.) Belisle testified that the Share Point information included a frontal booking photograph of the man with the warrant and the information included physical descriptors of that person. (R. 37:14-15; Appx. 16-17.) Belisle testified that it was his "routine practice to be made aware of individuals or suspects in the community that may be wanted on warrants." (R.37:6; Appx. 8.) He gave no testimony in regard to how many days, weeks or months prior to February 23, 2019, he viewed the booking photograph and physical descriptors of the wanted man. (R.37.)

Officer Belisle provided no testimony in regard to the physical descriptors, such as height or weight, of the wanted man in the Share Point system. (R. 37:4-20; Appx. 6-22.) He gave no testimony in regard to how the physical appearance of the man on the Kwik Trip sidewalk matched the booking photo or physical descriptors of the man in the Share Point system. (R. 37:4-20; Appx. 6-22.)

At the point the man first passed Belisle, Belisle wasn't sure that the man he saw was the person with the warrant. (R. 37:15; Appx. 17.) Belisle remembered the name of the wanted person as "Mark King." (R. 37:8; Appx. 10.) He later testified that, when he radioed for additional officers, he was advised that the man with the active warrant was named "Jonathon Mark". (R. 37:8-9; Appx. 10-11.) Prior to February 23, 2019, Belisle had never personally interacted with Jonathon Mark. (R. 37:5; Appx. 7.)

While Belisle was waiting for additional officers, the man walked out of Kwik Trip and Belisle testified he got a full frontal view of the man. (R. 37:11, 19; Appx. 13, 21.) Belisle then asked the man for his ID. (R. 37:10; Appx. 12.) According to Belisle, the man told Belisle that Belisle did not have reasonable suspicion to stop him. (R. 37:9-10; Appx. 11-12.) Also, according to Belisle, Belisle again asked for ID and the man again said that Belisle did not have reasonable suspicion. (R. 37:10; Appx. 12.) At some point, Belisle asked the man his name and Belisle testified the man's response was that Belisle did not have reasonable suspicion. (R. 37:10; Appx. 12.) The man started to walk away and Belisle grabbed his arm, put him in an "escort hold" and told him he had a warrant for his arrest. (R. 37:10; Appx. 12.) No evidence was produced at the hearing that Officer Belisle identified himself as a police officer, pursuant to Wis. Stat. § 968.24,² before he detained Mr. Mark. (R. 37: 4-20; Appx. 6-22.) According to Belisle, the man denied he had a warrant and "...tensed up his arm,

²Wis. Stat. §968.24 authorizes a police officer to "stop a person in a public place" "after having identified himself or herself as a law enforcement officer". (Wis. Stat. 968.24 (2019-2020).)

squatted down to get a lower center of gravity, and then pulled his arm away from me and began running away along the west side of the building." (R. 37:10; Appx. 12.) Subsequently, additional officers arrived and the man was tackled to the ground and arrested. (R. 37:12; Appx. 14.)

On cross-examination, Officer Belisle testified that the person he seized was not wearing glasses. (R.37:16; Appx. 18.) He also acknowledged that Mr. Mark had not identified himself as "Jonathon Mark" at the point when the officer seized Mr. Mark. (R. 37:19; Appx. 21.) When asked if it was correct that he did not have "an actual positive ID" of Jonathon Mark at the point he "grabbed on to" Mr. Mark, Belisle responded, "Correct". (R.37:19; Appx. 21.)

Neither the state or the defense moved to enter Officer Belisle's squad video into evidence at the motion hearing and Mr. Mark did not testify at the hearing. (R.37.) Mr. Mayer argued that, when Officer Belisle grabbed Mr. Mark's arm, the officer engaged in a stop and detention of Mr. Mark and that the officer did not have the requisite reasonable suspicion, under Terry V. Ohio, to detain Mr. Mark. (R. 37:21-22; Appx. 23-24.) Counsel for the state, Deputy District Attorney Douglas Edelstein, argued that the officer was aware from Share Point that an individual was in warrant status, that the officer was familiar with the "unique physical characteristics" of that individual, that Mr. Mark was a larger individual and that the officer had reasonable suspicion to detain him. (R. 37:23-24; Appx. 25-26.)

Judge Grimm denied the motion to suppress stating that, when Mr. Mark first walked past Officer Belisle, the officer got a "good enough" look at Mr. Mark so as to prompt the officer to suspend his interaction with the two other people and to call for "back-up". (R. 37:26; Appx. 28.) Judge Grimm found that there "...was no exact testimony that Belisle knew the height or weight from his SharePoint or the briefings, so I can't make that finding of fact in today's record..." (R. 37:26; Appx. 28.) Judge Grimm stated that the evidence was "crystal clear" that the Share Point information included a photograph and that

the officer relied on that photograph when he "made the connection" to the man outside Kwik Trip and the person with the warrant. (R. 37:26-27; Appx. 28-29.) Judge Grimm said that the other "key fact" was that Officer Belisle got a full frontal view of the man when the man came out of the store and the judge described that as a "confirming visual" and said that Belisle had "more than a hunch, This is a positive visual ID." (R. 37:27; Appx. 29.) The judge noted that Mr. Mark did not stop at that point and the officer had "every right and duty to go hands on" with Mr. Mark. (R. 37:28; Appx. 30.)

Mr. Mark entered a plea of No Contest to the charge of Obstructing on March 30, 2021 and was sentenced to 225 days jail (time served) and a fine, court costs and surcharges. (Judgment of Conviction: R. 75; Appx. 35.) He filed a Notice of Intent to Seek Postconviction Relief on March 30, 2021 (R. 76.) On September 8, 2021, the Wisconsin Court of Appeals ordered an extension of the time for filing a Notice of Appeal to January 5, 2022 (R. 92) and, on November 24, 2021, undersigned counsel was appointed to represent Mr. Mark. (R. 106.) On January 4, 2022, Mr. Mark filed a Notice of Appeal. (R. 107.) On March 28, 2022, the Wisconsin Court of Appeals granted Mr. Mark's motion to withdraw the Notice of Appeal and to remand to the Circuit Court and further ordered an extension of the time limit for filing a post-conviction motion to May 2, 2022. (R. 118.)

On May 2, 2022, Mr. Mark filed a Post-Conviction Motion for Order Granting Motion to Suppress: Illegal Seizure on Ground of Ineffective Assistance of Counsel. (R. 121.) The motion asserted that trial counsel was ineffective at the suppression hearing for not introducing Belisle's squad video into evidence and for not having Mr. Mark testify that he was wearing glasses when he was at Kwik Trip on February 23, 2019. (R. 121: 1-2.) The motion further argued that the Court would not have found Belisle had reasonable suspicion to seize Mr. Mark if the video was entered into evidence and if Mr. Mark testified he was wearing glasses. (R. 121: 1-2.)

On September 13, 2022, a hearing was held on the post-conviction motion before the Honorable Laura J. Lavey. (R. 149.) At the hearing, the DVD containing the video from Officer Belisle's squad was received into evidence and a portion of the video, at time stamp 10:28:14 through 10:32:39, was viewed by the Court. (R. 149:14-15; Appx. 49-50; R. 148.)

The squad video starts with Officer Belisle standing on the sidewalk in front of Kwik Trip approximately 10 feet from the doors into Kwik Trip. (R. 148: 10:28:14.) A vehicle is parked in front of the location where the officer is standing, but his voice can be heard on the video along with the voices of the two people to whom he was talking in regard to the unrelated incident. (R.148:10:28:14.) Also, given the officer's height, one can see the top of his head above the vehicle parked in front of his location. (R.148:10:28:14.)

Jonathon Mark is first visible on the video at time stamp 10:29:22 at the northwestern corner of Kwik Trip. (R. 148: 10:29:22.) He was wearing a heavy jacket with the hood pulled up over his head. (R. 148: 10:29:22-28.) The hood of the jacket not only "completely" surrounded Mr. Mark's face, but extended beyond his face. (R. 148: 10:29:22-28.) The video shows Mr. Mark walking west to east along the sidewalk in front of the store. (R. 148: 10:29:22-28.) He had his head down as he walked. (R. 148: 10:29:22-28.) He was facing forward as he walked, so the video shows his left side. (R.148: 10:29:22-28.) Only his hood is visible from the side; nothing can be seen of his face. (R. 148: 10:29:22-28.)

Mr. Mark passed the location of Officer Belisle at time stamp 10:29:28. (R.148:10:29:28.) He passed Officer Belisle and his back was turned to the officer before the time stamp of the video changed to time stamp 10:29:29. (R.148:10:29:28-29.) Meaning that the length of time from the point Mr. Mark turned the northwest corner of Kwik Trip and stepped onto the sidewalk (10:29:22) to the point his back was to Officer Belisle (10:29:29) is seven seconds in length. Mr. Mark entered Kwik Trip at time point 10:29:33.

(R.148:10:29:33.) Mr. Mark came out of Kwik Trip at 10:32:00. (R. 148:10:32:00.) His hood was still up and surrounding his face and he was walking with his head bent over. (R. 148:10:32:00.) By this time, Officer Belisle was standing about 12 feet from the Kwik Trip doors. (R. 148:10:32:00.) Mr. Mark walked westerly along the sidewalk and passed Officer Belisle by time point 10:32:06. The officer spoke to him at this point. Mr. Mark stopped at time point 10:32:07, but did not turn to face the officer. Instead, he stopped with his body turned sideways to the officer. (R. 148: 10:32:07.) By time point 10:32:12, Mr. Mark had his back to the officer and was walking away. At time point 10:32:14, Officer Belisle grabbed Mr. Mark and told Mr. Mark to stop. At time 10:32:26, the name 'Jonathon Mark' is heard being broadcast over the squad radio and Officer Belisle began referring to Mr. Mark as 'Jonathon'. (R. 148:10:32:26.) At 10:32:44, Mr. Mark pulled free and ran from Officer Belisle. (R. 148: 10:32:44.)

Mr. Mark testified at the motion hearing that he was wearing glasses when he interacted with Officer Belisle on February 23, 2019. (R. 149:16; Appx. 41.) Photographs of Mr. Mark's glasses were produced at the hearing, Mr. Mark verified that the photographs were images of the glasses he was wearing on the incident date and the photographs were received into evidence. (R. 149:16, 18; Appx. 51, 53.)

Mr. Mayer also testified at the hearing. (R. 149:3-12; Appx. 38-47.) He testified that the motion to suppress was "...Mr. Mark's motion..." and he "...just followed up with it." (R. 149:4; Appx. 39.) He stated that the fact that Officer Belisle only had six or eight minutes to observe Mr. Mark as he walked toward Kwik Trip was "potentially relevant", but did not change his (Mr. Mayer's) "analysis of the motion". (R. 149:7; Appx. 42.) Mr. Mayer explained that by, his "analysis of the motion", he meant that there was "not enough to file the motion". (R.149:8: Appx. 43.) He further testified on this topic, as follows:

"Well , I guess my opinion is that if an officer has a belief that that (sic) individual may

be an individual that is--that they would question further regarding a warrant--potential warrant that he felt existed for him, even 1 second would be sufficient." (R. 149:8; Appx. 43.)

Mr. Mayer was asked at the hearing if Mr. Mark told him that he was wearing glasses on the date of the incident. (R.149:9; Appx. 44.) Mr. Mayer responded, "I imagine that information probably did come from Mr. Mark. I wouldn't have known it independently." (R.149:9; Appx. 44.)

Attorney Margaret Vinz appeared for the defense at the hearing and argued that Officer Belisle did not have reasonable suspicion to stop Mr. Mark. (R.149:19-22; Appx. 54-57.) Specifically, Ms. Vinz asserted the following points: 1) the officer gave no testimony in regard to the physical characteristics of the person with the warrant and how Mr. Mark matched those physical characteristics; 2) the officer's statement that he got a "side view" of Mr. Mark as Mr. Mark walked into Kwik Trip is not supported by the squad video because Mr. Mark's hood obscured the side of his face and 3) it was unlikely the officer got a "full frontal view" of Mr. Mark because, when the officer approached Mr. Mark as Mr. Mark was walking from Kwik Trip, Mr. Mark did not turn to face Officer Belisle and the time Belisle had to observe Mr. Mark, from the point he exited Kwik Trip to the point Belisle seized him, was very brief. (R.149:19-22; Appx. 54-57.)

Assistant District Attorney Wesley Kottke, appearing for the state, argued that there was no reason to doubt the officer's testimony that he got a side view of Mr. Mark which prompted the officer to call dispatch that he had a person "he had seen on a prior warrant" and that the officer subsequently "got...a good look of him." (R.149:22-23; Appx. 57-58.) Mr. Kottke argued that trial counsel was not ineffective for not entering the video into evidence because the video "backs up what the officer testified to" and, even if the video had been admitted into evidence, it would not have made a difference in the outcome of the hearing on the motion to suppress. (R.149:23-24; Appx. 58-59.) Mr. Kottke also argued that the outcome of the suppression hearing would not have been different if

information that Mr. Mark was wearing glasses had been entered into evidence. (R.149:24; Appx. 59.)

Judge Lavey deferred ruling on Mr. Mark's post-conviction motion until September 23, 2022 when the judge presented her oral ruling on the motion. (R. 150; Appx. 62.) Judge Lavey denied the post-conviction motion. (R.150:4-5; Appx. 65-66.) She stated that, had the evidence of the video and Mr. Mark's glasses been entered into evidence at the original suppression hearing, it would have been more likely that the court would have denied the motion to suppress and that trial counsel, as a result, was not ineffective at the suppression hearing. (R.150: 3-5; Appx. 64-66.)

On September 28, 2022, Judge Lavey executed a written order denying the Defendant's Post-Conviction Motion for Order Granting Motion to Suppress: Illegal Seizure on Ground of Ineffective Assistance of Counsel. (R. 143; Appx. 68.) On October 10, 2022, Mr. Mark filed a Notice of Appeal. (R.144.)

STATEMENT OF THE LAW

Reasonable Suspicion for Temporary Seizure

Under the Fourth Amendment to the United State Constitution, people are protected from unreasonable searches and seizures. State v. VanBeek, 2021 WI 51, ¶23, 397 Wis.2d 311, 326, 960 N.W.2d 32, 39 (2021). The protections under Article I, section 11 of the Wisconsin Constitution have been deemed "consistent with" and "nearly identical" to those of the Fourth Amendment. VanBeek, Id., citing State v. Kramer, 2009 WI 14, ¶18, 315 Wis.2d 414, 759 N.W.2d 598.

A seizure must occur for the Fourth Amendment to be implicated. VanBeek, Id. at ¶26, 397 Wis.2d at 327, 960 N.W.2d at 40. Law enforcement officers can make contact with, question and request identification from individuals without triggering Fourth Amendment concerns as long as the

officers "...do not convey a message that compliance with their request is required." VanBeek, Id. at ¶26, 397 Wis.2d at 327, 960 N.W.2d at 40, citing Florida v. Bostwick, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991).

"A seizure occurs if, under the totality of the circumstances, "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." VanBeek, Id. at ¶29, 397 Wis.2d at 328, 960 N.W.2d at 40, citing Bostwick, 501 U.S. at 439, 216, 111 S.Ct. 2382. A seizure takes place when an officer restrains an individual by the use of force or by an assertion of the officer's authority. VanBeek, Id. at ¶29, 397 Wis.2d at 328-29, 960 N.W.2d at 40, citing United States v. Mendenhall, 446 U.S. 544, 552, 100 S.Ct. 1870 (1980).

A temporary seizure by law enforcement violates the Fourth Amendment if it is not based on a reasonable suspicion that the detained individual has committed, is committing or is about to commit a crime. VanBeek, Id. at ¶51, 397 Wis.2d at 339, 960 N.W.2d at 45; Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884 (1968). Reasonable suspicion is an "objective test" determined based on the totality of the circumstances. VanBeek, Id. at ¶52, 397 Wis.2d at 339, 960 N.W.2d at 45, citing State v. Guzy, 139 Wis.2d 663, 675, 407 N.W.2d 548, 555 (1987). In deciding if an officer acted reasonably, "...due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch', but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry, Id. 392 U.S. at 27, 88 S.Ct. at 1883. The reasonableness of the officer's action is determined using the facts available to the officer at the time of the seizure. Terry, Id. 392 U.S. at 21-22, 88 S.Ct. at 1880.

A circuit court's findings of fact at a hearing on a motion to suppress evidence alleging a Fourth Amendment violation are upheld on appeal unless those findings are "clearly erroneous". VanBeek, Id. at ¶22, 397 Wis.2d at 326, 960 N.W.2d at 39. However, an appellate court "independently and objectively" examines those facts to determine the lawfulness of an investigatory stop under

the Fourth Amendment. VanBeek, Id. at ¶22, 397 Wis.2d at 326, 960 N.W.2d at 39, State v. Gordon, 2014 WI App 44, ¶10, 353 Wis.2d 468, 476, 846 N.W.2d 483, 487 (2014).

If a temporary seizure violates the Fourth Amendment, evidence stemming from the illegal search should be suppressed as the "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416 (1963). In Terry v. Ohio, the United States Supreme Court wrote that police conduct "...which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification that the Constitution requires...must be condemned by the judiciary and its fruits excluded from criminal trials." Terry, Id. 392 U.S. at 15, 88 S.Ct. at 1876.

Ineffective Assistance of Counsel

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the Wisconsin Constitution guarantee a criminal defendant the right to effective assistance of counsel. State v. Dillard, 2014 WI 123, ¶84, 358 Wis.2d 543, 569-70, 859 N.W.2d 44, 56 (2014). "To show that he has been deprived of that right, the defendant must prove (1) that trial counsel's performance was deficient and (2) that this deficiency prejudiced the defendant." Dillard, Id. at ¶85, 358 Wis.2d 570, 859 N.W.2d at 56, citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

A defense attorney is deficient if his or her performance falls below the measure of "...reasonableness under prevailing professional norms." Strickland, Id. at 688, 104 S.Ct. at 2065.

To demonstrate that he was prejudiced by deficient performance, a defendant must show "...there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." ."
." State v. Harbor, 2011 WI 28, ¶ 72, 333 Wis.2d 53, 84, 797 N.W.2d 828, 843 (2011), citing Strickland, Id. at 694, 104 S.Ct. 2052.

ARGUMENT

I. The Circuit Court erred when the Court decided that a police officer had reasonable suspicion to seize the defendant and denied the defendant's motion to suppress evidence.

On February 23, 2019, Officer Belisle was standing on the sidewalk of a Fond du Lac Kwik Trip talking to two people. (R.37:6; Appx. 8.) Belisle had information from the police department Share Point system that a male individual was wanted on an outstanding warrant. (R.37:7-8; Appx. 9-10.) Jonathan Mark walked down the sidewalk, passed Belisle, and entered Kwik Trip. (R.37:6-7; Appx. 8-9.) Belisle considered Mr. Mark to potentially be the wanted man. (R.37:7-8; Appx. 9-10.) Mr. Mark came out of Kwik Trip and again passed Belisle. (R.37:9-16; Appx. 11-18.) Belisle attempted to identify Mr. Mark and ultimately put him in an "escort hold" when Mr. Mark tried to walk away. (R.37:10; Appx. 12.)

Mr. Mark, by Attorney Mayer, filed a motion to suppress evidence on the ground of a seizure without reasonable suspicion. (R.26.) At the hearing on the defendant's motion, the state did not contest that Officer Belisle seized Mr. Mark on February 23, 2019. (R. 37.) However, Judge Grimm denied the motion to suppress because he decided that Officer Belisle had reasonable suspicion to seize Mr. Mark. (R.37:28; Appx.30.)

Officer Belisle's testimony was the only evidence in the record at the motion hearing. Thus, Judge Grimm's decision was based on Belisle's testimony in regard to the sequence of events from the point Mr. Mark initially stepped onto the sidewalk and passed Belisle to the point Belisle grabbed Mr. Mark. Therefore, in determining whether Judge Grimm's decision was in error, it is useful to consider the following points of analysis: 1) What evidence did

Belisle's testimony provide to show he had knowledge of what the wanted person looked like and that his knowledge was recent; 2) what evidence was in the record in regard to Belisle's ability to observe Mr. Mark when Mr. Mark passed Belisle on his way into Kwik Trip; 3) what evidence was in the record in regard to what physical descriptors Belisle observed about Mr. Mark when Mr. Mark walked toward Kwik Trip and 4) what evidence was in the record in regard to what Belisle observed about Mr. Mark after Mr. Mark exited Kwik Trip.

1. What Did Officer Belisle Know About the Description
Of the Wanted Man and the Recency of His Knowledge

Officer Belisle testified that he was present at police department briefings, utilizing the Share Point system, and was aware from those briefings that there was an active probation warrant for a male individual. (R.37:5-8, 13-14; Appx. 7-10, 15-16.) He also testified that the Share Point information included a frontal booking photograph and physical descriptors of the wanted man. (R.37:14-16; Appx. 16-17.)

He gave no testimony in regard to what the physical descriptors were. There was no information in the hearing record about what the wanted person looked like--what his height, weight, eye color or hair color were. Nothing.

He gave no testimony in regard to how recently he had reviewed the Share Point booking photograph or physical description. He testified that he attended "shift briefings" and that he "often" discussed individuals with warrants, but gave no testimony to indicate that he had reviewed the photograph and the description of the wanted man the day before, the month before or, indeed, possibly the year before the incident in this case. (R.37:6; Appx. 8.) He remembered the name of the wanted man as "Mark King" which indicates that his review of the Share Point information was not recent enough for him to accurately remember the name of the wanted man. (R.37:8; Appx. 10.).

2. Officer Belisle's Ability to Observe Mr. Mark As Mr. Mark Passed the Officer Heading Into Kwik Trip

The incident in this case occurred in February at around 10:40 p.m. So, it was dark out. Officer Belisle testified it was raining. (R.37:7; Appx. 9.) He testified that he was talking to two people about an unrelated incident before he saw Mr. Mark. (R.37:6; Appx. 8.) So, initially, that was where he was directing his attention. He testified that, when he saw Mr. Mark, Mr. Mark was wearing a winter jacket with the hood "completely" up around his head. (R.37:6, 17; Appx. 8, 19.) He could not see Mr. Mark's hair color. (R.37:17; Appx. 19.) The officer testified he got a "side profile" view of Mr. Mark. (R.37:6; Appx. 8.) He did not testify that he got a frontal view of Mr. Mark when Mr. Mark was heading into Kwik Trip.

3. What Did Officer Belisle Observe About Mr. Mark As Mr. Mark Walked Toward Kwik Trip

Officer Belisle gave no testimony in regard to what caught his attention about Mr. Mark as Mr. Mark walked toward the Kwik Trip entrance. For instance, he did not testify that Mr. Mark was the same height as the wanted person or that he appeared to be the same weight as the fugitive. He did not testify that Mr. Mark's face appeared the same or similar to the face of the wanted man. Indeed, he could not have given such testimony because he saw only the "side profile" of Mr. Mark (R.37:6; Appx. 8) and Mr. Mark's side profile was covered by the hood of his winter jacket which was "completely" around his head. (R.37:6, 17; Appx. 8, 19.) He was "unsure" that Mr. Mark was the man with the warrant. (R.37:15; Appx. 17.) He had no prior interactions with Mr. Mark, he could not identify him as Mr. Mark and he was "unsure" that Mr. Mark was the person the police were looking for. (R.37:5, 15; Appx. 7, 17.)

4. What Did Officer Belisle Observe About Mr. Mark
As Mr. Mark Walked Away From Kwik Trip

Officer Belisle testified he got a "full frontal view" of Mr. Mark after Mr. Mark left Kwik Trip. (R.37:11, 17; Appx. 13, 19.) However, the officer gave no testimony in regard to why that view was significant. Did Mr. Mark's eye color match that of the wanted man? Did his facial features look like those of the wanted man? Belisle provided no testimony in regard to why the full frontal view caused him to decide that Mr. Mark was the wanted man. He acknowledged he did not have "an actual positive ID" of Jonathon Mark at the point he "grabbed on to" Mr. Mark. (R.37:19; Appx. 21.)

In short, Officer Belisle's testimony boils down to this: Officer Belisle knew a male individual had an arrest warrant. He saw Mr. Mark at Kwik Trip. He did not know Mr. Mark from previous contacts and he did not know Mr. Mark's name, but he saw Mr. Mark and decided he was the wanted man. We do not know how he reached that decision because he gave no testimony in regard to what fact or facts caused him to link Mr. Mark's appearance to that of the wanted man. That is not reasonable suspicion to seize.

Reasonable suspicion is an objective test which requires that the police have "...specific, articulable facts and reasonable inferences from those facts that the individual has committed a crime." State v. Guzy, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). In Guzy, the Wisconsin Supreme Court stated, "... the most important consideration concerning a physical description "is whether the description is sufficiently unique to permit a reasonable degree of selectivity from the group of all potential suspects."" Guzy, Id. at 680, 407 N.W.2d at 556 (citation to 3 Wayne R. LaFave, *Search and Seizure* omitted).

Officer Belisle did not articulate specific facts in support of his seizure of Mr. Mark. He did not give testimony that, when he seized Mr. Mark, he had an image of the wanted man in his memory and that the image had enough unique

features to it so as to prevent him from potentially seizing any number of male individuals.

State v. Harris is instructive here. State v. Harris, 206 Wis.2d 243, 557 N.W.2d 245 (1996). In Harris, the Milwaukee police were searching for a home robbery suspect. Id. at 246, 557 N.W.2d at 247. The police knew the height and weight of the suspect. Id. The only other descriptors they had were that the suspect was "a young black male with very short hair." The police saw a vehicle parked in front of the robbery suspect's house. Id. As far as the police knew, the suspect did not have a car. Id. at 246-47, 557 N.W.2d at 247. The vehicle pulled away from the house and the police "cut it off", stopping the vehicle. Id. at 247, 557 N.W.2d at 247. After the vehicle was stopped, an officer observed that the front seat passenger was a "young black male with close-cropped hair." Id. at 247, 557 N.W.2d at 247. The passenger, Mr. Harris, was searched, marijuana was found in his waistband and he was charged with possession of that substance. Id. at 247, 557 N.W.2d at 247. Mr. Harris filed a motion to suppress evidence due to an illegal seizure. Id. at 248, 557 N.W.2d at 247.

In deciding the issue of whether the seizure was illegal, the Wisconsin Supreme Court stated the following:

"The only specific and articulable facts of the record before us, namely that a vehicle pulled away from the curb close to the robbery suspect's address, and that the vehicle contained several black males, do not amount to reasonable, articulable suspicion. Nor does consideration of all the circumstances surrounding the incident add up to reasonable, articulable suspicion. There is nothing in the record to indicate the time or geographic interval between the actual robbery and this seizure. The physical description of the robbery suspect is general, and at the time the officers curbed the vehicle in question, they had little or no opportunity to match even the physical descriptors to the occupants of the vehicle." Harris, Id. at 262, 557 N.W.2d at 253.

The Court further stated, "From this record we know little or nothing about the armed robbery, the suspect or the information the police may have possessed about the suspect, the crime or his getaway." Id. at 262, 557 N.W.2d at 253. The Court stated that the police did not "possess reasonable, articulable

suspicion" to stop the vehicle and decided that the motion to suppress evidence should have been granted. Id. at 263, 557 N.W.2d at 253-54.

The fact situation in Mr. Mark's case is even more egregious than that in Harris. The record from the hearing on his motion to suppress contains no descriptors of the wanted man, no information on how Mr. Mark matched the appearance of the wanted man and no evidence to demonstrate that Officer Belisle had a recollection of the Share Point information that was recent enough and detailed enough to allow the officer to seize Mr. Mark. Officer Belisle did not have reasonable suspicion. What he had was a hunch and a hunch is not enough. Terry, Id. at 27, 88 S.Ct. at 1883. As a result, Judge Grimm's determination that the officer had reasonable suspicion was in error. Therefore, all evidence obtained subsequent to Mr. Mark's seizure was obtained in violation of the Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution and the motion to suppress that evidence should have been granted pursuant to Wong Sun v. United States. Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416 (1963).

II. Trial counsel was ineffective when he did not introduce a squad video into evidence and did not call the defendant to testify at the hearing on the defendant's motion to suppress evidence and trial counsel's omissions were prejudicial.

Argument I. above asserts that Officer Belisle's testimony at the hearing on Mr. Mark's suppression motion was insufficient to support Judge Grimm's decision that Belisle had reasonable suspicion to seize Mr. Mark. As an alternative argument, Mr. Mark asserts that trial counsel, Attorney Mayer, was ineffective for not entering the video recording from Belisle's squad vehicle into evidence and for not calling Mr. Mark to testify that he was wearing glasses on February 23, 2019 and that those omissions prejudiced Mr. Mark at the suppression hearing.

To show ineffective assistance of counsel, a defendant "...must prove: (1) that trial counsel's performance was deficient and (2) that this deficiency prejudiced the defendant." Dillard, Id. at ¶85, 358 Wis.2d 570, 859 N.W.2d at 56, citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

In Mr. Mark's case, the squad video would have provided the following information had it been entered into evidence at the motion hearing: The video shows Mr. Mark walking down the sidewalk toward Kwik Trip. (R.148:10:29:22-28.) One can see in the video that he is wearing a heavy jacket. (R.148:10:29:22-28.) The hood of the jacket is up. The hood was not only "completely" up around his head, as the officer testified, but the video shows it extended beyond his head. (R. 37:6, 17; Appx. 8, 19; R.148:10:29:22-28.) The video shows that, when Mr. Mark was headed into Kwik Trip, his face was always facing forward. (R.148:10:29:22-31.) The video shows that the length of time from the point Mr. Mark stepped onto the sidewalk (R. 148:10:29:22) to the point he passed Belisle and had his back to Belisle (R.148:10:29:29) was brief--seven seconds in length. When Mr. Mark came out of Kwik Trip his hood was still up around his face, partially covering it. (R.148:10:32:01) He walked down the sidewalk in the direction of the northwest corner of the building and passed Officer Belisle at time point 10:32:06. (R.148:10:32:06.) From that point to the point Officer Belisle seized Mr. Mark (time point 10:32:39), Mr. Mark never again faced Belisle--he either had his back to Belisle or was sideways to Belisle. (R.148:10:32:06-10:32:39.) So, Mr. Mark was only facing Belisle for five seconds-- walking down the sidewalk with his hood up and his head down. (R.148:10:32:06-10:32:39.) Belisle testified at the motion hearing that the two people to whom he was originally talking went inside Kwik Trip. (R.37:9; Appx. 11) The video shows that those people were still with Belisle when Mr. Mark came out of Kwik Trip. (R.148:10:32:01-10:32:39.)

In regard to the glasses, Mr. Mark testified at the hearing on his post-conviction motion that he was wearing glasses when he was seized on February

23, 2019 and produced photographs of the glasses at the hearing. (R. 149:16; Appx. 51; R. 138, R.139.) Officer Belisle testified at the suppression hearing that Mr. Mark was not wearing glasses. (R.37:16; Appx. 18.)

The video evidence and evidence of the glasses are important because they serve to strengthen Mr. Mark's assertion that the officer had only a hunch, not reasonable suspicion, that Mr. Mark had a warrant. Officer Belisle testified that he got a side profile of Mr. Mark as Mr. Mark was walking into Kwik Trip. (R.37:6; Appx. 8.) The video shows that was highly improbable given that Mr. Mark was wearing a heavy hood which surrounded and extended beyond his face. The video further shows that Mr. Mark was continuously facing forward as he walked down the sidewalk and the amount of time Belisle had to observe him before his back was to Belisle was only seven seconds. Belisle's ability to get a side profile of Mr. Mark was further impaired by the fact that he was dealing with two other people and his attention, at least initially, was directed toward those people.

Belisle testified he got a full frontal view of Mr. Mark as Mr. Mark was walking away from Kwik Trip. (R.37:11; Appx. 13.) Again, that is highly improbable. The video shows that Mr. Mark is full face to Belisle for only five seconds. His face is still partially obscured by the heavy hood. Mr. Mark said he was wearing glasses. The officer did not see them. (R.37:16; Appx. 18.)

The video and testimony about the glasses should have been introduced into evidence because they show that it was improbable that Officer Belisle got a "side profile" view of Mr. Mark and, subsequently, a "full frontal" view of him. By extension, it was improbable that the officer had reasonable suspicion to seize Mr. Mark. As a result, "prevailing professional norms" for criminal defense attorneys dictated that the video and glasses evidence should have been submitted at the suppression hearing. Since they were not submitted, the trial attorney's performance was deficient and the first prong for ineffective assistance

of counsel, deficient performance, is met. Strickland, Id. at 688, 104 S.Ct. at 2065.

Judge Lavey decided that Mr. Mayer's performance at the suppression hearing was not deficient and denied the defendant's Motion for Order Granting Motion to Suppress: Illegal Seizure on Ground of Ineffective Assistance of Counsel. (R.150: 4-5; Appx. 65-66.) Judge Lavey based her decision that Attorney Mayer's performance was not deficient on her conclusion that the squad video supported, rather than undermined, reasonable suspicion and that six seconds was a sufficient amount of time for the officer to make a "visual identification" of Mr. Mark. (R. 150:4-5; Appx. 65-66.) The issue of whether the video undermined reasonable suspicion is addressed above.

In regard to Judge Lavey's conclusion that one second is a sufficient amount of time to identify someone (R.150: 3-4; Appx. 64-65) , Judge Lavey overlooked the fact that Officer Belisle's initial side view observation of Mr. Mark was impaired by more than just a short observation time . His observation was also hampered by the fact that Mr. Mark was facing forward and Belisle only saw the side of his face and the side of his face was covered by a hood.

Judge Lavey's also overlooked the possibility of confirmation bias. "Confirmation bias" being "...the tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence." *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Barbara O'Brien, Psychology, Public Policy and Law 2009, Vol. 15, No. 4, 315, 316. Confirmation bias occurs "across a variety of domains" including police investigations. *Prime Suspect*, Id. at 318. Officer Belisle formulated a belief that Mr. Mark was the wanted man even though the officer's ability to actually see the side of Mr. Mark's face was seriously impaired. There is nothing in the record to establish that Belisle had a detailed recollection of any physical characteristic of the wanted man. So, when Belisle supposedly get a better view of Mr. Mark when Mr. Mark was leaving Kwik Trip

did he actually identify Mr. Mark as the fugitive or did he, in his mind, just confirm the hunch, based on his earlier, impaired observation of Mr. Mark? The defense suggests he was simply confirming his impaired earlier observation because, as asserted above, there is no evidence in the record that Officer Belisle had a detailed and recent recollection of the appearance of the wanted man and there is no evidence of how Mr. Mark matched the appearance of the wanted man.

Judge Lavey did not consider the second prong of ineffective assistance, prejudice to the defendant, because she found that trial counsel's performance was not deficient. (R.150: 3-5; Appx. 64-66.) "Prejudice" requires the defendant to show "...there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Harbor, 2011 WI 28, ¶ 72, 333 Wis.2d at 84, 797 N.W.2d at 843, citing Strickland, Id. at 694, 104 S.Ct. 2052.

Testimony by Officer Belisle was the only evidence the state offered at the suppression hearing to support reasonable suspicion to seize Mr. Mark. Officer Belisle, however, offered no testimony in regard to what the wanted man looked like and why he thought Mr. Mark matched the description of the wanted man. He testified that he got a "side profile" view of Mr. Mark and, eventually, a "full frontal" view of him with no other testimony to support his seizure of Mr. Mark. Judge Grimm centered his decision on the officer's testimony in regard to the side view of Mr. Mark and what the judge labelled the "confirming visual" of Mr. Mark as he left Kwik Trip. (R.37:27-28; Appx. 29-30.) Judge Grimm denied the motion to suppress as a result.

The video and glasses evidence show that it was improbable that the officer actually got a side profile view and a full frontal view of Mr. Mark. Since it is improbable that the evidence on which Judge Grimm relied is accurate, there is a "probability sufficient to undermine confidence in the

outcome" of the motion hearing and the second prong under Strickland is met. Strickland, Id. at 694, 104 S.Ct. 2052. Since both prongs of Strickland are met, the defendant's Motion to Suppress: Illegal Seizure on Ground of Ineffective Assistance of Counsel should be granted.

CONCLUSION

Based on the above, Jonathon Mark respectfully requests that the Wisconsin Court of Appeals vacate the Judgment of Conviction in Fond du Lac County Case No. 2017-CF-178 and grant his Motion to Suppress Evidence: Illegal Seizure.

Dated at Kingston, Wisconsin this 19th day of December, 2022.

Respectfully submitted,

Electronically signed by,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 8, 327 words.

CERTIFICATION OF THE APPENDIX

I hereby certify that I separately filed an appendix to this brief that complies with Wis. Stat. § 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 Wis. Stats. §§ 809.23(3)(a) or (b); (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 take 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.

Dated this 19th day of December, 2022.

Electronically signed by,

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