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 PETITIONER-RESPONDENT

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II. Was the Circuit Court correct in ruling that trial counsel was not ineffective for failing to play the squad video and not calling Mr. Mark testify that he was wearing glasses during the stop at the suppression motion hearing and that is prejudiced defendant.

STATEMENT ON ORAL ARGUMENT

Respondent does not request oral argument.

STATEMENT ON PUBLICATION

Respondent does not request publication.

STATEMENT OF CASE AND FACTS

On November 13, 2019, a motion hearing was held in front of the Honorable Judge Peter Grimm (R37, 1). The hearing was for the purpose of taking testimony and evidence on the defendant's motion to suppress filed on August 1, 2019 (R.37, 3 Appx. 12). At the hearing, the following was ascertained:

Prior to February 23, 2019, Officer Belisle was briefed on an individual by the name of Jonathon Mark (R. 37, 5, 6 & 7, 8; Appx. 24,1 & 24, 1). The brief included information that Mr. Mark had an outstanding warrant from probation and parole and was wanted by the Detective Bureau for a violent in nature event. (R. 37, 5, 6 & 7, 8; Appx. 24,1 & 24, 1). The SharePoint briefing contained a photograph of Mr. Mark (R. 37, 7 Appx. 24). During testimony, Officer Belisle confirmed that Mr. Mark was one of the subjects discussed and depicted by photograph during the SharePoint briefings, where it is common practice of the officers to discuss individuals with outstanding warrants within the community. (R. 37; 13 Appx. 15) & (R. 37, 6; Appx. 6).

On February 23, 2019, Officer Joseph Belisle was working in the City of Fond du Lac as a law enforcement officer (R. 37, 5; Appx. 2). At around 10:40 p.m., Officer Belisle was at the Kwik Trip on South Main Street speaking with a victim and witness to a domestic dispute (R. 37, 6- 7; Appx. 19, 10). During his conversation with the victim and witness to the domestic dispute, Officer Belisle observed an individual walking around the west side of the building wearing a winter jacket with his hood up (R. 37, 6; Appx. 22). As the individual walked past, Officer Belisle observed a side profile of this individual's face when the individual was on his way into the store (R.

37, 6; Appx. 23). Officer Belisle testified that he was able to get a good enough look at the individual that he told the victim and the witness that he would need to speak with them in a few minutes (R. 37, 7; Appx. 18). Officer Belisle recognized the individual based upon a photograph from the SharePoint briefing that he had attended (R.37, 5-6 & 7-8; Appx. 24, 1 & 24 , 1).

Officer Belisle radioed for two additional officers to respond to his location (R. 37, 8; Appx. 20). He conducted an in-house check for an individual by the name of Mark King, as he could not remember the wanted individual's name from the SharePoint briefing (R. 37, 8; appx.23). Officer Belisle correctly described the suspect as an individual he recognized from the SharePoint briefing and described the individual as wanted by the detective bureau (R. 37, 8-9; Appx. 25, 1). A responding officer had the correct name for the description of the wanted individual and stated the in-house check was going to be a Jonathan Mark (R. 37, 9; Appx. 9).

Prior to other officers arriving on scene, Officer Belisle attempted contact with Mr. Mark (R. 37, 9; Appx. 23). Officer Belisle observed Mr. Mark leaving the Kwik Trip with a winter jacket with the hood up (R. 37, 17; Appx. 10). Officer Belisle testified on cross examination that he was able to get a full-frontal view of the individual (R. 37, 17; Appx. 7). Officer Belisle tried stopping Mr. Mark by asking for his identification (R. 37, 9; Appx. 24). Mr. Mark told Officer Belisle that he had no reasonable suspicion to stop him. (R. 37, 9-10; Appx. 25,1). Officer Belisle explained to Mr. Mark that he looked like an individual he had dealt with in the past and wanted to make a positive identification (R. 37, 10; Appx.1). Again, Mr. Mark told Officer Belisle that he had no reasonable suspicion to stop him

(R. 37, 10; Appx. 19). At that point, Officer Belisle tried to conduct a stop of Mr. Mark (R. 37, 10; Appx. 5). Mr. Mark began walking away, so Officer Belisle tried to stop him by placing him in an escort hold and informing Mr. Mark he had a warrant for his arrest (R. 37, 10; Appx. 7). Mr. Mark responded by saying he did not have a warrant (R. 37, 10; Appx. 8). Mr. Mark subsequently tensed up his arm, squatted down, and pulled his arm away from Officer Belisle (R. 37, 10; Appx. 8). Mr. Mark was successful in breaking the hold and then started running away from Officer Belisle (R. 37, 10; Appx. 9). He began running along the west side of the building (R. 37, 10; Appx. 10). When asked by Deputy District Attorney Edelstein if Officer Belisle had called out or used the name Jonathan Mark, Officer Belisle indicated "Yes" (R. 37, 10; Appx. 12). Officer Belisle explained that Mr. Mark had responded by saying, he did not have reasonable suspicion to stop him, but Mr. Mark did not confirm or deny that he was, in fact, Jonathan Mark (R. 37, 10; Appx. 19). However, Officer Belisle testified that he was able to get a full-frontal view and confirmed that this individual was, in fact, Jonathan Mark (R. 37, 11; Appx. 6).

POST-CONVICTION MOTION HEARING

On September 13, 2022, a motion hearing was held in front of the Honorable Judge Laura Lavey (R. 149, 1). The date had been set to hear Mr. Mark's post-conviction motions based on the claim of ineffective assistance of counsel (R. 149,3; Appx 10). At the hearing, Attorney William Mayer was called to testify (R. 149,3; Appx. 19). Attorney Mayer testified that Mr. Mark filed the motion to suppress evidence pro se (R. 149, 4; Appx. 14). Attorney Mayer ensured the motion was heard (R. 149, 4; Appx. 14). Attorney Mayer could not recall if he had filed a separate motion to suppress evidence as counsel for Mr. Mark, but,

nonetheless, had presented the motion to the Court (R. 149, 4; Appx. 15). Attorney Mayer agreed that at the motion hearing on the defendant's motion to suppress that the court had received testimony from Officer Belisle (R. 149, 5; Appx. 12). Attorney Mayer testified that the officer having only a six or eight second interval to observe Mr. Mark was potentially relevant to his analysis of the motion. (R. 149, 7; Appx 18). However, Attorney Mayer explained that upon his review of the police report and the video, he did not think the that the evidence was sufficient enough to even file a motion (R. 149, 7,8; Appx. 23,1).

ORAL RULING

On September 23, 2022, the trial court, Judge Laura Lavey, made an Oral Ruling. (R. 150, 1). At the hearing, Judge Lavey denied the defendant's post-conviction motions.(R. 150, 5; Appx. 2)

Statement of the Law

Reasonable Suspicion for Temporary Seizure

Whether evidence should have been suppressed is a question of constitutional fact. *State v. VanBeek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W.2d 32. An appellate court reviewing the denial of a motion to suppress will uphold the circuit court's findings of fact unless clearly erroneous, but it reviews de novo whether those facts constitute reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729. Reviewing courts independently and objectively examine the facts known to the officer at the time of the alleged seizure, applying constitutional principles to them. *VanBeek*, 397 Wis. 2d 311, ¶ 22. The burden is on the State to establish that the

stop was reasonable. *State v. Pickens*, 2010 WI App. 5, ¶ 14, 323 Wis. 2d 226, 779 N.W. 2d 1.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnote omitted). Consistent with these protections, police officers may conduct an investigatory stop if they have a "reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." Id. ¶ 20.

"[R]easonable suspicion" means the officer has knowledge of "specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶ 21. The reasonable suspicion standard is a lower standard than probable cause. See *State v. Felton*, 2012 WI App 114, ¶ 10, 344 Wis. 2d 483, 824 N.W.2d 871. A police officer may conduct an investigatory stop so long as "any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn." *Young*, 294 Wis. 2d 1, ¶ 21 (quoting *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990)).

The test for whether a reasonable suspicion exists to justify a stop is an objective test. *State v. Gordon*, 2014 WI App 44, ¶ 12, 353 Wis. 2d 468, 846 N.W.2d 483. The officer's subjective suspicion is not determinative. Rather, the question is, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *State v. Pugh*, 2013 WI App 12, ¶ 11, 345 Wis. 2d 832, 826 N.W.2d 418 (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)). "Thus, although an officer's subjective belief might color an objective

analysis by giving context to an otherwise dry recitation of facts," a reasonable suspicion exists if and only if the facts within the officer's knowledge at the time of the stop would lead a reasonable officer to believe a crime had been, was being, or was about to be committed. *Pugh*, 345 Wis. 2d 832, ¶ 11 (citation omitted).

"Whether the reasonable suspicion standard is met is determined by considering the facts known to the officer at the time the stop occurred, together with rational inferences and inferences drawn by officers in light of policing experience and training." *State v. Wortman*, 2017 WI App 61, ¶ 6, 378 Wis. 2d 105, 902 N.W.2d 561 (emphasis added).

Ineffective Assistance of Counsel

Wisconsin courts have frequently stated the well-established standards for reviewing claims of ineffective assistance of counsel: We follow a two-part test for ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687, *Johnson*, 153 Wis. 2d at 127. We have determined that an attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Johnson*, 153 Wis. 2d at 127 (quoting *Strickland*, 466 U.S. at 687). The defendant must also show the performance was prejudicial, which 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. (quotations omitted). A movant must prevail on both parts of the test to be afforded relief. *Johnson*, 153 Wis. 2d at 127 *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

Whether an attorney's actions constitute ineffective assistance of counsel is a question of mixed fact and law. *Johnson*, 153 Wis. 2d at 127, 449 N.W.2d at 848. What the attorney did or did not do is a question of fact, and the trial court's determination on that matter will not be overturned unless clearly erroneous. Id. The ultimate question of whether that conduct constitutes constitutionally deficient representation or prejudice is a question of law, which this court reviews de novo. Id. at 128, 449 N.W.2d at 848.*State v. Brunette*, 220 Wis. 2d 431, 446, 583 N.W.2d 174 (Ct. App. 1998). A defendant must establish by clear and convincing evidence a claim of ineffective assistance of counsel. Cf. *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983) ("clear and convincing evidence" as defendant's burden of proof for "proving ineffective counsel when that counsel is unavailable for response"); see also *Huddleston v. State*, 5 S.W.3d 46, 50 (Ark. 1999) ("clear and convincing evidence" as defendant's burden of proof on a claim of ineffective assistance of counsel); *Thompson v. State*, 702 N.E.2d 1129, 1131 (Ind. Ct. App. 1998) (same); *State v. Burns*, 6 S.W.3d 453, 461 & n.5 (Tenn. 1999) (same).

A defendant must establish that counsel's conduct "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *State v. Trawitzki*,

2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice. *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). See also *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation does not satisfy the prejudice prong of *Strickland*).

In deciding an "actual ineffectiveness" claim, a court need not address both parts of the Strickland test if a defendant fails to meet the burden on one of them. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Under the federal and Wisconsin Constitutions, a defendant claiming ineffective assistance of counsel bears the burden of showing prejudice resulting from deficient performance. *State v. Sanchez*, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). See also *Strickland*, 466 U.S. at 693 ("actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice").

I. **The Circuit Court was correct in ruling that Officer Belisle had reasonable suspicion to seize the defendant and denying the defendant's motion to suppress evidence.**

The test for whether reasonable suspicion exists is an objective test based on the information within the officer's knowledge when the stop is initiated. *State v. Gordon*, 2014 WI App 44, ¶ 12, 353 Wis. 2d 468, 846 N.W.2d 483.

The appellant in their brief, asked the Court to consider 4 points in its analysis: 1) what did Officer Belisle know about the description of the wanted man and recentsy of his knowledge; 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; 4) what evidence was in the record in regard to what Belisle observed about Mr. Mark after Mr. Mark exited Kwik Trip (Marks App. Brief, 16-17). While these questions may be helpful in many cases dealing with reasonable suspicion, they do not apply to this specific case.

1) What Did Officer Belisle Know About the Description of the Wanted Man and Recentsy of His Knowledge?

The Appellant contends that because the record from the motion hearing doesn't reference specific piecemeal descriptions of exactly what the officer observed from his visual of the defendant's face that somehow the officer didn't make a solid identification and is not credible. The record is clear that Officer Belisle had knowledge of Mr. Mark's identifying information because of the photograph from the SharePoint briefing (R.37, 15; Appx. 3).

During direct examination, Officer Belisle testified that he had reviewed a SharePoint presentation that discussed wanted individuals in the community(R.37, 5-6; Appx. 24, 1). During the SharePoint Brief, he was presented with information that probation and the Detectives Bureau were both looking for Mr. Mark (R. 37, 7-8; Appx. 24,1). Attached to that presentation was identifying information and a booking photo of Mr. Mark (R.37, 7; Appx. 24). When asked the following question "had you, prior to the SharePoint presentation that day—I guess, was it that

day", Officer Belisle responded by saying, "It was like every day (R. 37, 13; Appx. 13). It was weeks, it was on our SharePoint that we are looking for him--"(R. 37, 13; Appx. 15). Officer Belisle went on to testify that he was familiar with the descriptors of Mr. Mark (R. 37, 14 & 15; Appx. 6 & 3). Just because Officer Belisle was never asked in a piecemeal fashion what descriptors from the SharePoint briefing matched the individual he saw at Kwik Trip, doesn't mean that the officer's testimony is somehow less credible.

This testimony clearly shows that Officer Belisle had knowledge of Mr. Mark's descriptors, even if the parties failed to ask any follow-up questions (R. 37, 15; Appx. 2). The record is clear that this was not merely a singular presentation of a warrant suspect that Officer Belisle became aware of in passing. Mr. Mark's photograph and identifying information were provided to Officer Belisle on multiple different occasions over a period of time(R. 37, 13; Appx. 13).

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?

Officer Belisle was able to observe Mr. Mark prior to the stop. Specifically, the record shows that Officer Belisle was able to get a side profile view of Mr. Mark as he first walked into Kwik Trip (R. 37, 6; Appx. 24). This side view was enough to alarm him to that previous SharePoint presentation he had viewed, which contained the booking photo of Mr. Mark (R. 37, 6-7; Appx. 23,1 & 21). While Officer Belisle did not originally have the correct name for Mr. Mark, initially identifying him as Mark King, because he could not remember the wanted individual's name from the SharePoint briefing, that does not make the identification of the features of Mr. Mark less credible (R. 37, 8; 19;

Appx. 22). Officer Belisle was able to correctly describe the suspect as an individual he recognized from the SharePoint briefing and describe the individual as wanted by the Detective Bureau (R. 37, 8-9; Appx. 25, 1). A responding officer was then able to give him the correct name for the description of the wanted individual and stated the in-house check was going to be a Jonathan Mark (R. 37, 9; Appx. 9).

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?

Again, Officer Belisle was able to observe Mr. Mark as he walked past him as he went into Kwik Trip(R. 37, 6; Appx. 24). Prior to the interaction with Mr. Mark, Officer Belisle had been a part of several SharePoint briefings that contained a picture of Mr. Mark, his identifiers, and Officer Belisle was able to correctly identify Mr. Mark had an active warrant for his arrest based upon his memory from the SharePoint briefing (R. 37, 7; Appx. 24).

4) What evidence was in the record in regard to what Belisle observed about Mr. Mark after Mr. Mark exited Kwik Trip.

Office Belisle was able to get a full-frontal view of the Mr. Mark and recognized him as the individual from the SharePoint presentation (R.37, 9, 10; Appx. 23, 1). As Mr. Mark left Kwik Trip, Officer Belisle was able to get a positive identification as he was able to see a full-frontal view of Mr. Mark.(R.37,17; Appx. 6) Essentially, his initial side profile view as he entered the Kwik Trip was enough to raise his suspicions that the individual was Mr. Mark, but he was also able to confirm the identification when he got a full-frontal view of Mr. Mark as he left the Kwik Trip. Prior to the stop of

Mr. Mark, Officer Belisle had a number of occasions to see and review Mr. Mark's picture during the SharePoint briefings (R.37, 13; Appx. 15).

The analysis of the descriptors of an individual is not where the court needs to end its analysis of reasonable suspicion for the stop. In the majority of situations presented to the court, the framework provided by Mr. Mark provides a framework to start the analysis, but the court needs to look at the totality of circumstances before making a decision about reasonable suspicion. *State v. Guzy*,

> We recognize the incantation of the traditional test for investigatory stops—"specific and articulable facts"—at times provides little guidance for courts and law enforcement officials in determining the quantum and nature of information necessary to establish the reasonableness of the stop. We agree with Professor LaFave that "[n]o litmus paper test is available to resolve this issue...." 3 Wayne R. LaFave, Search and Seizure, sec. 9.3(d), at 461 (2d ed. 1987). Nevertheless, the law must be sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect. See A Model Code of Pre-Arraignment Procedure, 270–72 (1975). The question is when.
>
> The answer to that question does not lend itself to a simple answer or a black letter rule that governs law enforcement conduct in making investigative stops. The Constitutions of the United States and Wisconsin demand reasonableness. The fundamental question is at what point does the important societal interest in solving crime and bringing offenders to justice reasonably justify the specific intrusion on personal security, i.e., an investigative stop.

State v. Guzy, 139 Wis. 2d 663, 676, 407 N.W.2d 548, 554 (1987)

The court found that these situations require giving officers some leeway to make quick decisions in regard to reasonable suspicion to stop. A black letter rule would be impossible as it would be difficult for the court to be able to make a black letter rule that would adequately cover every possible situation. The court in *Guzy*, goes on the explain the following:

> We conclude that the reasonableness of an investigative stop depends upon the facts and circumstances that are present at the time of the stop. Given a triggering fact or facts of suspicion, law enforcement officers and reviewing courts may also consider the circumstances that were present in determining the weight to be given those facts in making the balance between the intrusion and the societal interest.

State v. Guzy, 139 Wis. 2d 663, 679, 407 N.W.2d 548, 555 (1987)

Guzy clearly explains that while the descriptors available to the court through testimony are an important part of the analysis, they are not the entirety of what is used to determine if a stop was reasonable. We need to look at the totality of the circumstances to determine the reasonableness of the stop.

It is clear, based on the record, that a similarly situated officer would have believed he had reasonable suspicion to stop Mr. Mark. First, we have the testimony of Officer Belisle that he had seen the physical description, the photograph, and the warrant of Mr. Mark for weeks on the SharePoint presentation (R. 37,13; Appx. 15). His initial observation and side profile view of Mr. Mark as he went into Kwik Trip was enough to raise the suspicion of Officer Belisle that the man walking past him had active warrants(R. 37, 9; Appx. 6). However, Office Belisle didn't make a stop at that point (R.37, 8-9; Appx. 23, 1). Instead, he made investigatory attempts to corroborate his reasonable suspicion (R. 37, 8,9; Appx.23,1).

Upon Mr. Mark exiting Kwik Trip, Officer Belisle was able to corroborate his reasonable suspicion even further and make a sound determination that Mr. Mark was, in fact, the individual in warrant status from the SharePoint presentation he had observed multiple times (R. 37, 11; Appx. 6). The testimony shows that Officer Belisle reasonably suspected, after observing Mr. Mark walk towards Kwik Trip, that he was, in fact, the individual who had active warrants for his

arrest (R.37 7,8). The side profile view of Mr. Mark was good enough that he ended a conversation he was having with witnesses to another incident to investigate further (R. 37,7, Appx. 18). Officer Belisle then contacted dispatch and gave the incorrect name of Mark King (R.37, 8; Appx. 23). However, Officer Belisle was able to provide enough information to dispatch, that another officer was able to respond and say the correct name was going to be Jonathan Mark.(R. 37, 9; Appx. 3) As Officer Belisle was confirming the warrant, Mr. Mark exited Kwik trip, Officer Belisle was able to get a full-frontal view of Mr. Mark and confirmed he was the wanted person from the SharePoint presentation (R. 37, 17;Appx. 7). Officer Belisle testified that at the time of the stop, Mr. Mark and his picture had been on the SharePoint presentation for weeks, giving him a number of opportunities to observe the attached photo (R. 37, 13; Appx. 15).

These facts alone, coupled with the knowledge Officer Belisle had of Mr. Mark from the SharePoint presentation, are enough for a reasonable officer to stop an individual for a brief moment to request identification and further investigate the reasonable suspicion. However, reasonable suspicion is bolstered by the reaction of Mr. Mark when Officer Belisle attempted contact. A normal citizen, when confronted by a request from an officer, is not going to respond by saying, "you don't have reasonable suspicion to stop me." (R. 37,10; Appx. 1). Reasonable suspicion is a very specific legal standard and the fact that the defendant knew to state it to Officer Belisle shows a few things. First, it shows that Mr. Mark knew he was dealing with a police officer. Second, it shows avoidance behavior on behalf of the defendant. Third, it shows some familiarity with the criminal justice system by the defendant. When called out by name, Mr. Mark responded

not by confirming or denying that he was Jonathan Mark, but instead he responded by saying, "you don't have reasonable suspicion the stop me"(R.37, 10,; Appx. 16). This odd behavior by Mr. Mark at the time of contact, would have significantly raised the suspicions of any reasonable officer that found themselves in a similar situation. This suspicious behavior further provides a basis for Officer Belisle to initiate a stop.

The record is clear, Officer Belisle had an opportunity to get a good look at Mr. Mark. In her ruling, the Honorable Judge Lavey had the parties participate in a brief exercise. She asked the parties to take six seconds and look around at the faces in the room and then went on to explain that even though six seconds was a short period of time, it was still enough time for her to get a good look at everyone that was present in the room.(R. 150, 3,4). This simple exercise shows that a brief opportunity for observation, would have been enough time for Officer Belisle to identify that the suspect was the person he remembered from the SharePoint Presentation.

Mr. Mark contends that the existence of the hood around his face would have made it impossible for Officer Belisle to identify him. Based on the record, this argument is pure speculation and there is nothing in the record to support it. Officer Belisle testified that he was able to get a good look at the individual. Officer Belisle's physical description of Mr. Mark, provided over the police scanner, was so sufficient it allowed a second officer to identify the correct name of the suspect Officer Belisle was describing and that name was Jonathan Mark(R. 37, 8,9). Mr. Mark would have the Court believe based upon the arguments in his brief that Officer Belisle and the rest of the Police Department picked, at random, a person who happened to be

him and that just happened to be a wanted person. There is no information in the record to support that position. It would be an illogical conclusion based upon the information the court was provided through the testimony. The only logical reading or understanding of that testimony is that when Officer Belisle originally saw a side profile of Mr. Mark, he saw enough to initiate an investigation, and when he was able to get good full-frontal view of Mr. Mark, he was able to recognize him as the individual in the picture that was attached to the SharePoint Warrant. It is clear, based on this record, that at the time of the stop, Officer Belisle had reasonable suspicion to stop Mr. Mark.

II. Trial Counsel was not ineffective for failing to play the video and not having Mr. Marks testify that he had glasses on during the stop.

We follow a two-part test for ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687, *Johnson*, 153 Wis. 2d at 127. We have determined that an attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Johnson*, 153 Wis. 2d at 127 (quoting Strickland, 466 U.S. at 687). The defendant must also show the performance was prejudicial, which 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. (quotations omitted). A movant must prevail on both parts of the test to be afforded relief. *Johnson*, 153 Wis. 2d at 127.

State v. Allen, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

Judge Grimm, in his ruling, found the testimony of Officer Belisle to be credible because it was clear that Officer Belisle was able to get a good look at Mr. Mark. In his ruling, he explained the following:

> And the evidence shows that the briefings from the administration to their street officers, including the information on SharePoint, included information that the subject, Jonathon Mark, has been known to be resistive and/or violent, and that was in the knowledge of Officer Belisle, and, thus, while he was speaking to these two people in front of the Kwik Trip, he did observe the defendant come around the corner and walk directly past the officer. The officer got a good side profile, and as he has confirmed on the witness stand with credible testimony, that the look was good enough, as he ceased his duties with the domestic violence individuals and told them that he would get back to them.
>
> "Officer Belisle obviously was convinced enough that he spotted the defendant that he did radio in that he had observed the person wanted on SharePoint and with the warrant from the DOC. And the officer explained, in part, he's trained to get backup when he involves with people that have known resistance or violence with officers, and the officer did testify today that he did know the defendant -- or at least observed to be six foot one, about 310 pounds plus.
>
> I know the State technically argued facts not in the record. 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, but the evidence is crystal clear that there was a photograph of the defendant that Officer Belisle relied upon when he made the connection that I know that guy, there's a warrant on him, and he's wanted through SharePoint. And that's confirmed because when he called dispatch, that's actually what he shared as well, that the person, while he had the name wrong, he did make the connection through SharePoint.
>
> And the other key fact is that the two domestic violence individuals were sent inside the store, and then Mr. Mark came out, and the officer got a frontal full view of the defendant as he exited Kwik Trip, and this is a confirming visual that this is the

> same fellow that he was trained that he was wanted from SharePoint with an active DOC warrant. So there is, as a fact, way more than a hunch. This is a positive visual ID."

(R. 37, 26-27; Appx. 12, 1).

While the findings from Judge Grimm are long, they are important. The trial court's findings provide the framework of why and how Judge Grimm weighed that evidence and this case.

a) Failing to play the video at the motion hearing did not fall below the prevailing professional norms.

The failure of Atty. Mayer to play the video did not fall below the standard. The addition of the video would have been merely cumulative evidence. By playing the video for the Court, it would not have added any new information for the Court to review. The existence of the hood that covered Mr. Mark's face is well established in the testimony (R. 37, 6; App. 23).

The video does not provide an angle that shows that it would be impossible for Officer Belisle to see his face. The grainy video from across the parking lot merely shows what we can see to be individuals walking in front of the store, it only shows an individual, that was later identified as Mr. Mark walk past Officer Belisle, proceeding into the store. He then walks out of the store and Officer Belisle gets closer. The video would not have provided any significantly new evidence and would have been merely cumulative.

While defense attorneys often enter into the record videos of an incident, there is no standard that requires them to be played for the Court. Courts have been able to evaluate testimony of individuals long before the availability of video equipment. The availability of this equipment does not create a requirement that it be played in court.

b) Not Having Mr. Mark testify about having glasses on, did not fall below prevailing professional norms.

Having the defendant take the stand at a motion hearing to testify that he had on glasses at the time he was stopped by officers would have been inherently risky from a defense strategy. While the evidence of the glasses may have been relevant impeachment evidence, calling the defendant to testify would have been extremely risky and could have made Atty. Mayer actually ineffective. By calling the defendant to testify at the hearing, he would have subjected Mr. Mark to cross examination. While it's speculative, as we don't know what would have happened during the testimony of Mr. Mark, it could have and likely would have opened the door to additional issues, as Mr. Mark would be subjected to cross examination. The fear of cross examination is one of the reasons it is rare that we see defendants called to testify at motion hearings. In the vast majority of cases, the safest call is to not have the defendant testify. Especially when the existence of the glasses would almost certainly not have changed the outcome of the motion.

a) Even if Atty. Mayer's failure to play the video and sage advice to not have the defendant's testimony about the glasses falls below professional norms, Mr. Mark was not prejudiced as it would not have changed the outcome of the hearing.

At the initial motion hearing that was in front of the Honorable Judge Grimm, Officer Belisle testified that during his observation of Mr. Mark he had his hood up and that hood extended past his face. (R. 37, 6 App. 23) When questioned about his ability to observe Mr. Mark, he contended that he was able to get a good enough look to identify Mr. Mark (R. 37, 7; Appx. 18). Specifically, on cross examination, Officer

Belisle testified that Mr. Mark had his hood up and that he could not see the color of his hair(R. 37, 17; Appx. 13).

The failure of Atty. Mayer to play the video did not fall below the standard required. The addition of the video would have been merely cumulative evidence. By playing the video for the Court, it would not have added any new information for the Court to review. The existence of the hood is established in the testimony, but Judge concluded that Officer Belisle must have been able to get a good view of Mr. Mark because when he put the information over dispatch, it came back as the wanted individual (R. 37, 26-27).

Even if Mr. Mark had testified to the fact that he was wearing glasses, it is unlikely that it would have changed Judge Grimm's ruling in this case. Judge Grimm found the testimony of Office Belisle to be credible stating "Officer Belisle obviously was convinced enough that he spotted the defendant that he did radio in that he had observed the person wanted on SharePoint and with the warrant from the DOC." (R. 37, 26; Appx. 12) Whether or not the defendant was wearing glasses is unlikely to change that conclusion because it does nothing to explain why Officer Belisle would have believed the person in front of him would have had an active warrant.

Conclusion

In conclusion, the trial court was correct in its decision to deny Mr. Mark's motion that Officer Belisle lacked reasonable suspicion for the stop. Further, the failure of trial counsel to play the video and have Mr. Mark testify that he was wearing glasses at the time of the stop did not fall below professional norms and he was not

ineffective. Mr. Mark has not presented any evidence at this point that would show that he was actually prejudiced. He has merely provided maybes and possibilities and not met the burden of showing actual prejudice. Therefore, this appeal should be denied.

Dated: March 15, 2023.

Respectfully Submitted,

Date Signed: 3/15/2023

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a monospaced font. The length of this brief is 7,154 words.

Electronically signed by:
Wesley J. Kottke
Assistant District Attorney

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 14th day of March 2023.
Electronically signed by:
Wesley J. Kottke
Assistant District Attorney