STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2023AP351 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WAYNE TIMM,

Defendant-Appellant.

Appeal from the Judgment and Final Order Denying Post-conviction Relief in the Circuit Court for Clark County, the Honorable Todd P. Wolf, presiding

---

BRIEF OF DEFENDANT-APPELLANT

KATIE BABE
Attorney for Defendant-Appellant
State Bar No. 1052643

Lakeland Law Firm, LLC
N27 W23957 Paul Road, Suite 206
Pewaukee, WI 53072
(262)347-2000
katie@lakelandlawfirm.net

TABLE OF CONTENT

TABLE OF AUTHORITIES

Case Law

ISSUES PRESENTED

1. Did the circuit court err in denying Timm's motion to suppress the search of his vehicle?

The circuit court answered: No. The court found that the officer had reasonable suspicion to stop Timm's vehicle for speeding and probable cause to search his vehicle based on ***Ohio v. Robinette*** and ***State v. Williams***. Further, the court found, solely based on the officer's testimony, that Timm consented to the search of his vehicle.

2. Was trial counsel ineffective for failing to call Timm as a witness at the suppression hearing to testify that he did not give the officer consent to search his vehicle when Timm wanted to testify?

The circuit court answered: No. The court found, without holding a postconviction hearing, that the trial strategy is under the control of the defendant's attorney, that Timm would be giving up his right to self-incrimination if he had testified and that happens very rarely in criminal cases, and that Timm's credibility would have been easily impeached because of his past convictions and his pending cases at the time of the suppression hearing.

3. Did the circuit court err in denying Timm's postconviction motion and motion to reconsider postconviction decision without a ***Machner*** hearing?

Timm asserts this Court should reverse the circuit court's decision and remand this Case for a ***Machner*** hearing, as the circuit court still does not know the trial attorney's strategy for telling Timm he could not testify, made errors in fact finding, and assumed Timm would be incredible because of his prior record and cases pending at the time of the suppression hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Officer Travis Schuld of the Spencer Police Department pulled over Wayne Timm on April 19, 2015 at approximately 11:40 p.m. R1. He testified that "My assignment was to keep an eye out for a white Pontiac Grand Prix." R38:6; App. 109. Officer Schuld was told by Police Chief Shawn Bauer that the driver of the Pontiac Grand Prix was "possibly involved – or the vehicle was involved in possible burglaries in the – in Spencer area." ***Id***. Officer Schuld had no further information about the possible burglaries, whether the Pontiac Grand Prix' was used in the crimes, or whether the driver of Pontiac Grand Prix' was involved in the possible burglaries. *See* ***id***. at 6-13; App. 109-116.

Chief Bauer testified that he became aware of Timm when he arrested him in 2010 for burglary and he had interviewed him in the past. ***Id***. at 14-15; App. 117-118. Years ago on an unspecified date, Chief Bauer interviewed either Timm or his brother in the Wood County Jail, and either Timm or his brother said that they would not stop committing burglaries. ***Id***. at 16; App. 119. The Chief knew there were burglaries occurring in Clark and Marathon

Counties before this April 19, 2015 traffic stop. ***Id***. He also knew that Timm drove a white Pontiac because the car was involved in an unrelated traffic accident the month before this traffic stop. ***Id***. 16-17; App. 119-120. On cross examination, Chief Bauer admitted that he was not aware of Timm or the white Pontiac Grand Prix' being involved in any of the recent burglaries. ***Id***. at 17-18; App. 120-121.

Officer Schuld testified that, based on his radar, the white Pontiac that his chief told him to look for was traveling at 31 mph in a 25-mph zone. ***Id.*** at 5; App. 108. He did not issue Timm a speeding citation or written warning. *See* ***id.***

As this officer walked up to Timm's car, he "shined the flashlight in the back seat [he] saw a tire iron... on the back seat..." ***Id.*** at 7; App. 110. There is no evidence in the record that a tire iron was used in the possible burglaries in the area. *See* ***id*** & R1. Officer Schuld obtained Timm's driver's license, returned to his squad car, called dispatch, and ran Timm through his mobile data computer. ***Id.*** He found Timm "was on probation for burglary and had a history of burglary charges." ***Id.*** Office Schuld testified that when he returned to Timm's car, he retained possession of Timm's driver's license and asked for consent to search his car. ***Id***. at 12; App. 115.

This officer testified that Timm gave consent to search his vehicle while the officer had possession of Timm's driver's license. ***Id.*** Timm disputes that he gave consent to search his vehicle in his post-conviction affidavit. R181:4-8; App. 229-233. He asserts the officer never asked for consent. ***Id*** at 2; App. 230. The officer also testified that he did not tell

Timm he was free to leave before asking for consent. R38:13; App. 116. Timm was not arrested or taken to the police station. *See* ***id***. After the search, none of the items in Timm's vehicle were seized and he was allowed drive away. *See* ***id***. Mr. Timm asserts in his affidavit that based on his review of the squad car video, that is not in evidence, that about 45 minutes into the stop, after searching his car, Officer Schuld gave him back my driver's license. ***Id***. at 3; App. 231. The facts detailed above originate from the one suppression hearing held in this Case on December 21, 2016, unless otherwise noted having originated from Timm's postconviction affidavit.

Procedural History

Mr. Timm did not testify at the suppression hearing. R38; App. 104-151. The court did not inquire as to why he did not testify. *See* ***id.*** The court denied Timm's Motion to Suppress. R38:25-29; App. 128-132. The court found that there was reasonable suspicion for the officer to stop the vehicle due to speeding. ***Id***. at 25-26; App. 128-129. The court found that the officer used radar, and the radar was in proper working order. ***Id***. at 25; App. 128. Even though the officer testified that Timm was driving 31 mph in a 25 mph zone (***id***. at 5; App. 108), the circuit court found that the officer testified Timm was "going 35 miles an hour in a 25 miles an hour zone" (***id***. at 25-26; App. 128-129). The court found that there may be some "pretext behind [the stop], but as long as they still have a valid reason for stopping the vehicle initially there's nothing improper with that." ***Id***. at 26; App. 129. The circuit court found that the officer received

consent to search the vehicle freely and voluntarily without coercion. ***Id***. at 26-29; App. 129-132.

Nine months after the suppression hearing, on August 21, 2017, trial counsel filed a Motion to Reconsider Ruling Denying Defendant's Motion to Suppress Fruits of Vehicle Search. R47; App. 152-156. The state filed a written response (R51; App. 157-158), and trial counsel filed a written reply (R52; App. 159-161). Nearly three months later after the motion to reconsider was filed, the circuit court issued an oral ruling without further testimony again denying the defendant's motion. R144; App. 162-174.

Thereafter, Timm pled no contest to nine offenses charged in this Case, the court accepted his plea, and found him guilty of three counts of misdemeanor Entry into a Locked Building, three counts of misdemeanor Theft, and three counts of misdemeanor Criminal Damage to Property. Timm timely filed his Notice of Intent to Appeal.

After a no-merit report was rejected on the suppression issue that is the focus of this Appeal, a postconviction motion was filed (R178; App. 175-188) and was denied by written ruling without a hearing (R180; App. 224-225). A motion to reconsider the postconviction decision (R181; App. 226-233) was filed and, again, denied without a hearing by written decision (R184; App. 234-235).

ARUGMENT

I. The circuit court denied Timm's suppression motion in error

A. Principles of Law and Standard of Review

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect the right to be free from unreasonable searches. ***State v. Dearborn***, 2010 WI 84, ¶ 14, 327 Wis.2d 252, 786 N.W.2d 97. A warrantless search is *per se* unreasonable unless it falls within a clearly delineated exception. ***State v. Artic***, 2010 WI 83, ¶ 29, 327 Wis.2d 392, 786 N.W.2d 430. One such exception exists where "police have probable cause to believe that a vehicle contains evidence of a crime." ***State v. Pozo***, 198 Wis.2d 705, 710, 544 N.W.2d 228 (Ct.App.1995). Probable cause to search exists when sufficient facts "excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***State v. Sloan***, 2007 WI App 146, ¶ 23, 303 Wis.2d 438, 736 N.W.2d 189 (citation and emphasis omitted). Probable cause must be viewed in light of the knowledge and experience of the person conducting the search. *See* ***Pozo***, 198 Wis.2d at 712–13, 544 N.W.2d 228. It contemplates the totality of the circumstances at the time of the search. ***State v. Robinson***, 2010 WI 80, ¶ 27, 327 Wis.2d 302, 786 N.W.2d 463.

What constitutes reasonable suspicion of criminal activity to justify an investigative detention was first articulated by the U.S. Supreme Court in ***Terry v. Ohio***. 392 U.S. 1, 88 S. Ct. 1860 (1968). The Court explained that in order to assess whether the officer's conduct in stopping an

individual was justifiable, a police officer "must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion". ***Id.*** at 392 U.S. at 18, 88 S.Ct. at 1878. The objective criteria requires a court to determine "[whether] the facts available to the officer at the moment of …the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate." ***Id.*** at 21-22, 88 S.Ct. at 1880. A search based on an "inchoate and unparticularized suspicion or 'hunch' fails the constitutional test. ***Id.*** at 27, 88 S.Ct. at 1883. *See also* ***Henes v. Morrissey***, 194 Wis.2d 338, 348, 533 N.W.2d 802, 806 (1995).

Courts review a circuit court's decision on a motion to suppress under a two-part standard. "When a Fourth Amendment challenge is raised at the trial court level, the trial court considers the evidence, makes findings of evidentiary or historical fact, and then resolves the issue by applying constitutional principles to those historical facts." ***State v. Griffith***, 2000 WI 72, ¶ 23, 236 Wis. 2d 48, 58, 613 N.W.2d 72, 77. Reviewing courts give deference to the trial court's findings of evidentiary or historical fact, but determine the question of constitutional fact independently. ***Id.*** Whether Timm was still seized, within the meaning of the Fourth Amendment, when he gave his alleged consent presents a question of constitutional fact that is reviewed *de novo. See* ***State v.Williams***, 2002 WI 94, ¶ 17, 255 Wis. 2d 1, 10, 646 N.W.2d 834, 838.

B. The circuit court incorrectly applied the Badger stop exception; this was not a Badger stop

The circuit court relied on two cases in reaching its finding. It held that under ***State v. Williams***, Timm's consent to search was voluntary. R180:1-2; App. 224-225. In ***Williams***, the officer used the Badger technique by handing the driver his license back, telling him that he was free to go, and taking a few steps away from the vehicle before turning around and asking the driver about illegal activity and asking for consent to search the vehicle. The Court determined a reasonable person in the driver's position would have felt free to leave under the totality of the circumstances. 2002 WI 94, ¶¶ 5-12, 255 Wis. 2d 1, 8, 646 N.W.2d 834.

The stop in this Case is distinctly different from the stop in ***Williams***. Officer Schuld gave no verbal or physical action to clearly convey to Timm that the speeding matter had concluded, as the officer did in ***Williams***. Unlike the officer in ***Williams***, Officer Schuld did not use the Badger technique. He did not give Timm his driver's license back, tell Timm he was free to go, give Timm a warning or a citation for speeding, or physically move away from Timm's vehicle as though the stop had ended. To uphold the lower court's ruling requires a finding that that any driver can leave the stop without their driver's license. Timm was not given his license until after the search was completed.

Second, relying on ***Ohio v. Robinette***, the circuit court denied Timm's suppression motion in part, because the officer was not required to advise Timm he was "free to go" before asking for consent to search. R180:1-2; App. 224-225. In ***Robinette***, the defendant was stopped for speeding, the

officer ran his license, asked Robinette to step out of his car, issued him a verbal warning for speeding and handed back his license, before asking Robinette "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?," and then asking for consent to search his vehicle. 519 U.S. 33, 35-36. Even though the officer did not tell Robinette he was free to go, by giving Robinette the verbal warning and handing back his driver's license, a reasonable person in Robinette's situation would have believed he was no longer seized for purposes of the traffic stop and was free to leave.

The facts of ***Robinette*** are dissimilar to the facts leading up to the search of Timm's vehicle in this Case. Mr. Timm was still seized at the time the officer asked for consent to search Timm's vehicle. Officer Schuld's testified that he retained Timm's driver's license at the time that he asked for consent. R38:12.

Instead, the court should have looked to ***State v. Lefler***, in which a driver was pulled over for failing to stop at a stop sign and had a screw driver hanging out of his pocket. 2013 WI App 22, 346 Wis. 2d 220, 827 N.W.2d 650. The driver told the officer the screwdriver was needed to open his car door, but the officer was able to open the car door without assistance. ***Id***. at ¶ 3. The officer saw prying-type tools in plain view and asked the driver about them. The driver said that the tools were for work. ***Id***. However, the officer knew the driver's occupation and that he did not need such tools for work. ***Id***. The officer also knew the driver was having financial problems that might motivate him to commit

burglary. ***Id***. at ¶ 13. In addition, the driver was already a known suspect in a burglary. ***Id***.

Unlike the officer in ***Lefler***, Officer Schuld did not ask Timm any questions about the tire-iron in plain view. He did not know Timm's occupation, and he did not ask. He did not know if Timm had a motive to commit the possible burglaries. Officer Schuld only knew his assignment was to look out for the white Pontiac, that Timm had a prior burglary conviction and that Timm was on supervision. Unlike the defendant in ***Lefler***, Timm was not a known suspect. Officer Schuld had no specific, articulable facts that made Timm a suspect. Further, Chief Bauer had no specific, articulable facts to support giving Officer Schuld his assignment. Using the collective knowledge doctrine, the officer was permitted to rely upon any additional facts his chief had, but his chief had no additional facts to support probable cause existed. There was no reason to believe Timm or his white Pontiac was involved in the possible burglaries. The chief told his officer to watch for Timm's white Pontiac on a hunch. Officer Schuld lacked probable cause to search Timm's vehicle.

C. The warrantless search of Timm's car was illegal because there was no reasonable suspicion that Timm was engaged in criminal conduct

The Defendant's Motion to Suppress Fruits of the Vehicle Search cited the constitutional amendments, statutes and case law one would expect to find in a motion to suppress. R34:1; App. 102. While short, the motion asserted four factual claims and the requested relief: 1) Timm was

seized based on a pretext and without probable cause; 2) Timm was not seized pursuant to a warrant; 3) Timm did not give valid consent for a vehicle search; 4) the officer did not have reasonable suspicion to believe that Timm committed, was committing or was about to commit a crime; and 5) the Clark County warrant for the installation of a GPS tracking device for Timm's car should be suppressed as it was issued based on information gained during the illegal search at the center of this Case. ***Id***.

Courts have explained that to establish reasonable suspicion "the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot." ***State v. Rutzinski***, 2001 WI 22, ¶ 14, 241 Wis. 2d 729, 623 N.W.2d 516. Reasonableness is not gauged by an officer's "inchoate and unparticularized suspicion or 'hunch'[.]" ***Terry***, 392 U.S. at 27. The test focuses on an objectively reasonable officer and "simple good faith on the part of the arresting officer is not enough." ***State v. Pugh***, 2013 WI App 12, ¶ 11, 345 Wis. 2d 832, 826 N.W.2d 418.

Here, what the officer knew before searching Timm's vehicle did not amount to reasonable suspicion that he was committing, was about to commit, or had committed a crime. The officer only knew two facts at the time of the stop. He testified "My assignment was to keep an eye out for the white Pontiac Grand Prix," and that the "[s]ubject is possibly involved – or the vehicle was involved in possible burglaries

in the – in Spencer area." R38:6; App. 109. The chief that gave the officer his assignment testified that he had no knowledge of Timm or his vehicle being involved in the possible burglaries. He knew that Timm was convicted of burglary in the past and that the white Pontiac Grand Prix was involved in a traffic accident unrelated to any burglaries. ***Id***. The chief did not share this information with the officer. ***See id.*** This does not amount to reasonable suspicion that Timm committed a crime, was committing a crime or was about to commit a crime. The officer testified that he also pulled over the white vehicle for traveling 6 mph over the speed limit. ***Id***. at 6; App. 108. This does not amount to reasonable suspicion when added to the officer's assignment that day. The officer observed a tire iron in the backseat of Timm's car when he approached the vehicle.

II. Trial counsel was ineffective for denying Timm the right to testify at the suppression hearing

Mr. Timm's trial counsel was deficient in her handling of the suppression issue, and he was prejudiced as a result of that deficiency, as the evidence resulting from the illegal search of his vehicle should have been suppressed. Mr. Timm has established that trial counsel's failure to allow him to testify and resulting failure to present any evidence to refute voluntary consent violated his state and federal constitutional rights to the effective assistance of counsel.

A. Principles of Law and Standard of Review

The standard, two-pronged test for ineffective assistance of counsel requires that the defendant first show

"that counsel's performance was deficient" and second show that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Although the Court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," id. at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." ***Kimmelman v. Morrison***, 477 U.S. 365, 384 (1986) (citing ***Strickland***, 466 U.S. at 688-89). An attorney's performance is deficient if counsel's representation "'fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986) (*quoting* ***Strickland***, 539 U.S. 466 U.S. at 688): ***Kimmelman***, 477 U.S. at 375.

In evaluating performance, a court should "not construct strategic defense which counsel does not offer" just at it should not second-guess counsel's strategic decisions. ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004) (*quoting* ***Harris v. Reid***, 894 F.2d 871, 878 (7th Cir. 1990)); *see also* ***Kimmelman***, 477 U.S. at 386-87. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." ***Id***. at 384 (*citing* ***Strickland***, 466 U.S. at 689).

The deficiency prong is met when counsel's errors result from oversight rather than reasoned strategy. *See*

Wiggins v. Smith, 539 U.S. 510, 534 (2003); ***State v. Thiel*** 2003 WI 111, ¶51, 264 Wis.2d 571, 665 N.W.2d 305. To establish prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If this test is satisfied relief is required; no supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000). Moreover, "[t]he defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case." ***State v. Moffett***, 147 Wis.2d 343, 354 (1989) (*quoting* ***Strickland***, 466 U.S. at 693)).

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-634, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless clearly erroneous, *see* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235 (1987), but whether counsel's performance was deficient and prejudiced Timm is a question of law, which are reviewed *de novo*, *see* ***Pitsch***, 124 Wis.2d at 634.

B. Trial counsel was deficient for not allowing Mr. Timm to testify at the Suppression Hearing

At the close of state's witness testimony, the Court asked trial counsel "Do you intend to call any witnesses?" and trial counsel responded that she did not. Id. at 18; App. 121. The court did not inquire as to whether or not Timm

wished to testify or if his attorney informed him of his right to testify. *See* ***id***. The defense did not call any witnesses. The deficiency of trial counsel's decision is clear from the circuit court's ruling. When issuing its oral ruling at the end of the hearing, the circuit court found:

> …[T]here's been no contrary evidence given to this Court at all that, in fact, the officer's testimony was incorrect that he asked permission to search the vehicle and *Mr. Timm gave him permission. There's clearly nothing contrary, no evidence contrary to that*. ***Id***. at 27; App. 130 (emphasis added).

Trial counsel had a willing witness – her client. Mr. Timm was the only witness who could contradict the officer's testimony that he consented to the search of his vehicle. Because there was no ***Machner***[1] hearing, we do not know counsel's reasons for denying her client the right to testify. We do know from Timm's affidavit that he informed trial counsel before the December 21, 2016 suppression hearing that he wanted to testify. R181:4-8; App. 229-233.

Trial counsel had another opportunity to present evidence on the lack of consent when she filed the Motion to Reconsider (R47; App. 152-156) nine months after filing the Defendant's Motion to Suppress. She did not take advantage of the opportunity to present at defense to the consent at this point either. Instead, the Motion to Reconsider was based on the conflicting ruling in Taylor County that suppressed this very stop. *See* ***id***. Instead of providing Timm's testimony stating that he did not consent to the search and providing the

[1] 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

transcript of the Taylor County ruling, trial counsel only provided the two-page written Taylor County decision to the Court. R47:4-5; App. 155-156.

At the November 13, 2017 Oral Ruling Hearing, the court denied the Defendant's Motion to Reconsider. The Court found that the Taylor County Court had not considered the issue of consent. R144:7-8; App. 168-169. Having no evidence to contradict the officer's testimony, the circuit court again held that Timm's consent to the vehicle search was voluntary. ***Id.*** at 8-9; App. 169-170. However, had the transcript from the Taylor County suppression hearing been filed by trial counsel, the circuit court would have learned that Officer Schuld testified he had Timm's consent when he testified in Taylor County. R179:9; App. 197. However, Officer Schuld testified that he never told Timm why he stopped him (***id***. at 12 & 16; App. 200 & 207), did not tell Timm he was free to leave before asking permission to search (***id***. at 15 & 16; App. 206-207), did not tell Timm that he did not have to give consent to the search (***id***), and Officer Schuld still had Timm's driver's license when he asked for permission to search the vehicle (***id***. at 14; App. 202).

C. Trial counsel's failure to counter the alleged consent was deficient and prejudicial

Few errors are more prejudicial than failing to offer a defense that can lead to the suppression of evidence and, ultimately, the dismissal of a case before trial. Timm asserted in his affidavit that he was not speeding prior to the stop of his vehicle, and he did not give consent for police to search

his car. R181:4-6; App. 229-233. If allowed to testify and found credible, the officer who pulled Timm over did so solely based on a hunch that he was involved in the burglaries. A search based on an "inchoate and unparticularized suspicion or 'hunch' fails the constitutional test." ***Terry***, 392 U.S. at 27, 88 S.Ct. at 1883. *See also* ***Henes v. Morrissey***, 194 Wis.2d 338, 348, 533 N.W.2d 802, 806 (1995). Timm asserts that he would have testified to those facts at the suppression hearing, but that his counsel did not give him the opportunity to testify. We cannot disregard Timm's available testimony as not fitting with trial counsel's strategy, because trial counsel offered no strategy to contradict the officer's testimony that Timm consented to the search of his vehicle. In evaluating performance, a court should "not construct strategic defense which counsel does not offer" just at it should not second-guess counsel's strategic decisions. ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004) (*quoting* ***Harris v. Reid***, 894 F.2d 871, 878 (7th Cir. 1990)); *see also* ***Kimmelman***, 477 U.S. at 386-87. We are not second-guess trial counsel's strategic decision not to have Timm testify at the suppression motion, because there is nothing in the record to show that it was a strategic decision. Trial counsel had no evidence to contradict the officer's testimony that Timm consented to the search without Timm's testimony.

There can be no strategic reason outside of the record for not having her client testify. The officer who searched the vehicle found no illegal items. He found a tire iron in the backseat of the vehicle that anyone could legally own. He

found tools in the trunk of the car that anyone can legally own. Nothing in the record shows that the possible burglaries were committed with a tire iron. Had Timm testified to his ownership of these items at the suppression hearing and lost the suppression motion, the state would not have additional evidence to convict Timm at trial from his suppression hearing testimony.

III. The circuit court erred in denying Timm's postconviction motion without an evidentiary hearing.

A. Principles of Law and Standard of Review

A defendant is entitled to a ***Machner*** hearing if his postconviction motion sufficiently alleges ineffective assistance of counsel and the record fails to conclusively demonstrate that he is not entitled to relief. ***State v. Jackson***, 2023 WI 3, ¶ 1, 405 Wis. 2d 458, 463, 983 N.W.2d 608, 610 (*citing* ***State v. Ruffin***, 2022 WI 34, ¶37, 401 Wis. 2d 619, 974 N.W.2d 432). A court may deny a postconviction motion without an evidentiary hearing if the motion does not raise facts sufficient to entitle the movant to relief, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433. A circuit court must hold an evidentiary hearing if the defendant's motion raises sufficient facts that, if true, would entitle him to relief. ***See State v. Burton***, 2013 WI 61, ¶38, 349 Wis.2d 1, 832 N.W.2d 611. Whether a motion alleges such facts is a question of law subject to *de novo* review. ***Id.***

When reviewing the denial of a postconviction motion without a ***Machner*** hearing, the Court evaluates two issues *de novo*. ***State v. Jackson***, 2023 WI at ¶ 8, 405 Wis. 2d at 466, 983 N.W.2d at 612 (*citing* ***Ruffin***, 2022 WI at ¶¶ 27-28). First, the reviewing court assesses whether the postconviction motion on its face alleges sufficient material and non-conclusory facts that, if true, entitle the defendant to relief. *See* ***id.*** at ¶ 27. Second, the reviewing court determines whether the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***Id.*** at ¶ 28.

B. Timm's postconviction motion requires an evidentiary hearing.

In support of this argument, Timm incorporates all factual references and legal arguments made in Sections I and II as they are relevant to this Argument as well. Timm maintains that the record, as referenced throughout this brief, establishes that he received ineffective assistance of counsel. Timm requests that this Court grant his suppression motion. In the alternative, Timm maintains that he has at least established that he is entitled to a ***Machner*** hearing. Timm's postconviction motion sufficiently alleged facts that, if true, would entitle him to relief. In this regard, the motion alleged specific deficiencies by trial counsel, Timm specifically alleged in his postconviction pleadings how such deficiencies caused him prejudice. R178:6-13, App. 180-18; R179, App. 189-223; R181, App. 226-233. This court is required to accept as true the facts alleged in these postconviction motions (R178, App. 175-188 & R181, App. 226-233). *See*

State v. Bentley, 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996). Timm's postconviction motion alleged sufficient facts both as to deficiency and prejudice. The motion did not allege merely conclusory allegations. Finally, the record does not conclusively establish that Timm is not entitled to relief. If anything, the record establishes that he is. For these reasons, if the Court does not grant the suppression motion, it should at least remand this Case for a ***Machner***.

The record in this Case does not conclusively demonstrate that Timm was not entitled to relief because of the circuit court written decision (R180; App. 224-225) contains erroneous findings of both fact and law. Factually, the court found that the postconviction motion claimed that trial counsel informed Timm that he *should not* testify at the suppression hearing. R180:2; App. 225. That is inaccurate; Timm's postconviction motion (R178:6-10; App. 180-184) motion to reconsider postconviction decision (R181:1-2; App. 226-227) and Timm's affidavit (R181:4-8; App. 229-233) all assert that trial counsel told Timm that he *could not* testify. Trial counsel had an obligation to advise her client of the risks of testifying, but the decision itself was Timm's to make. In ***Simmons v. United States***, the U.S. Supreme Court concluded that "…a defendant should not be "obliged either to give up what he believed, with *advice of counsel*, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." 390 U.S. 377, 394, 88 S. Ct. 967, 976 (1968) (emphasis added). This decision makes clear it is the defendant's choice.

The decision to testify at a suppression hearing does not rest with counsel but with the defendant.

The circuit court also erred in its finding of law in its written decision when it held: "Whereas, the defendant would be giving up his right to self-incrimination upon taking the stand during a suppression hearing and happens very rarely in criminal case," without citation to authority. R180:2; App. 225. When the case involves a possessory crime, that is untrue. The U.S. Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." ***Simmons***, 390 U.S. at 394, 88 S.Ct. at 976. The circuit court's finding of law would be more accurate had the suppression issue in this Case been a ***Goodchild*** issue. A prosecutor may impeach a defendant's trial testimony with that defendant's ***Goodchild*** hearing testimony without violating either the federal or the state privilege against compelled self-incrimination. ***State v. Schultz***, 152 Wis. 2d 408, 410–11, 448 N.W.2d 424, 425 (1989). However, there is no ***Goodchild*** issue in this Case. The officer conducted this warrantless search to find burglary tools in the vehicle. Mr. Timm gave no incriminating statement to Officer Schuld.

Trial counsel should have advised Timm before the suppression hearing that if *he chose* to testify at the suppression hearing, that he could not testify differently at trial. The ***Simmons*** decision is not designed to allow a defendant to commit perjury at trial. Based on the officer's

suppression hearing testimony and Timm's affidavit stating what he would have testified to had his trial attorney allowed him to testify (R181:4-8; App. 229-233), it seems impossible that Timm would have testified at the suppression hearing that he did not consent to the search of his vehicle and testify at trial that he gave the officer consent to search. Simply put, there was no risk that if Timm testified at the suppression hearing that he was required to waive his right to self incrimination or that his testimony put him at a strategic disadvantage.

Finally, the circuit court assumed, without Timm's testimony and without holding a ***Machner*** hearing, that this defendant's testimony could not be credible. R180:2. The postconviction motion to reconsider was denied in part because "[w]hereas, the credibility of the defendant would easily be challenged based upon past conviction and the pending cases against the defendant at the time of the motion hearing." R180:2; App. 225. This prejudgment of the testimony could be made of all defendants with prior convictions. It is well established that criminal convictions presumptively weigh against a witness' credibility; however, a trial court cannot, consistent with due process guarantees, reach a credibility determination before it hears a witness' testimony. In this Case, Timm's testimony, found in his affidavit (R181:4-8; App. 229-233) would have been bolstered by the squad car video that the circuit court never viewed – an important fact that was not considered by the circuit court. R180; App. 224-225. In the video, Timm asserts that the officer can be heard in his squad car stating "I was

thinking going by what you said: If I saw that white vehicle, stop it. He was just passing through town and that was it." R181:5; App. 230. Just passing through town is distinctly different from the alleged speeding, which the officer testified occurred. Furthermore, pending cases that a defendant has not been convicted of should not impact a defendant's credibility.

Conclusion

For the above reasons, Wayne Timm respectfully requests the Court vacate the judgment of conviction and sentence, and grant his suppression motion. In the alternative, given that the circuit court denied the postconviction motion without an evidentiary hearing, Mr. Timm requests, at a minimum, this Court remand the Case for such a hearing.

Dated this 28th day of June, 2023.

Respectfully submitted,

Electronically signed by Katie Babe

Attorney for Defendant-Appellant
State Bar No. 1052643
Lakeland Law Firm, LLC
N27 W23957 Paul Road, Suite 206
Pewaukee, WI 53072
(262) 347-2000

FORM AND LENGTH CERTIFICATION – RULE 809.19(8)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,976 words.

Electronically signed by Katie Babe

SERVICE CERTIFICATION

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. A copy of the brief and appendix was mailed to Wayne Timm on June 28, 2023 at: Wayne Timm, DOC #330133, Stanley Correctional 100 Corrections Drive, Stanley, WI 54768-6500.

Electronically signed by Katie Babe

APPENDIX CERTICATION

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understand 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 taken 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.

Electronically signed by Katie Babe