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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP351-CR

STATE OF WISCONSIN,	
	Plaintiff-Respondent,
v.	
WAYNE L. 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 PLAINTIFF-RESPONDENT	
	<p>MATTHEW Z. KIRKPATRICK Clark County Assistant District Attorney Attorney for Plaintiff-Respondent State Bar No. 1101068</p> <p>Clark County District Attorney's Office 517 Court St., Room 404 Neillsville, WI 54456 (715) 743-5167 Matthew.Kirkpatrick@da.wi.gov</p>

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as this case involves the application of settled legal principles to the case's facts.

STATEMENT OF THE CASE

FACTUAL HISTORY

In 2010, Spencer Police Chief Bauer arrested Timm for a burglary where he handled the investigation from start to finish. App. 117-118, R38:14-15 As Spencer Police Chief, Chief Bauer had access to previous records in the department. Around the time of Officer Schuld's traffic stop in April of 2015, Chief Bauer looked up department records on Timm. App. 118, R38:15 Chief Bauer learned that in 2006 the Spencer Police Department assisted the Marathon County Sheriff's Department in arresting Timm for a burglary. App. 118, R38:15 Chief Bauer also learned of a motor vehicle accident in the village involving Timm where the Village handled the investigation a month before Officer Schuld pulled him over that involved a Pontiac. App. 118-119 R38:15-16 Chief Bauer remembered with Timm and his brother where one of them made mention that they've been involved in burglaries in the past and weren't going to stop doing this activity. App. 119, R38:16 Chief Bauer knew that there were burglaries going on in Clark and Marathon County and knew Timm to be involved in burglaries in the past. App. 119, R38:16 Chief Bauer let his department know to watch out for the white Pontiac previously involved in a car accident. App. 119 R38:16 Chief Bauer was not specifically aware of Timm's involvement in the burglaries but he put it together from his knowledge from Timm's past. App. 120, R38:17 Chief Bauer believed that Timm had been released from prison in February. App. 120 R38:17 Based on law enforcement experience, Chief Bauer knew burglars are known to keep doing that type of activity. App. 120, R38:17

Officer Travis Schuld of the Spencer Police Department initiated a traffic stop of Timm on 11:40 PM on April 19, 2015. App. 107-108, R38:4-5. The traffic stop of Timm was for a speeding violation. App. 108, R38:5. Utilizing a properly working moving

radar, Officer Schuld observed Timm going 31 miles per hour in a 25 posted speed limit. App. 108, R38:5 Officer Schuld noticed this particular vehicle for another reason on April 19, 2015 - his assignment to keep an eye out for a white Pontiac Grand Prix. App. 109, R38:6 The assignment was because the subject is possibly involved – or the vehicle was involved in possible burglaries in the – in Spencer area. App. 109, R38:6 Officer Schuld learned that a white Pontiac such as the one driven by Timm had been involved in burglaries in the area from his department supervisor, Chief Shawn Bauer. App. 115-116, R38:12-13

When Officer Schuld made the stop he made contact with dispatch and did utilize his mobile computer. App. 110, R38:7 From dispatch and his computer, Officer Schuld learned that Timm was on probation for burglary and had a history of burglary charges. App. 110, R38:7 As Officer Schuld walked up to the vehicle, he shined a flashlight in the back seat. App. 110, R38:7 Officer Schuld saw a tire iron and a flat end used to pry stuff open. App. 110, R38:7 Officer Schuld described the tire iron as the shape of an L with a flat head on the end of it, which he believed was used to pry things open as well. App. 112-113; R38:9-10 Officer Schuld had not seen other tire irons in vehicles, and it wasn't typically something he had seen on a seat. App. 110-111, R38:7-8

Based on the totality of the circumstances, Officer Schuld decided to search the vehicle. App. 111, R38:8 Officer Schuld asked Timm for consent to search. App. 111, R38:8 Timm consented to the search of the vehicle. App. 111, R38:8 Officer Schuld described Timm as cooperative. App. 111 R38:8 Officer Schuld did not place Timm in handcuffs, did not restrain Timm, and did not place Timm in Officer Schuld's squad car. App. 111-112 R38:8-9 Officer Schuld had possession of Timm's driver's license when he asked Timm for consent to search Timm's vehicle. App. 115, R38:12 Officer Schuld did

not tell Timm that he was free to go prior requesting consent to search. App. 116, R38:13

Officer Schuld located clothes, including a gray sweatshirt that was wet to the touch, in the back seat. App. 112 R38:9. In the back trunk, Officer Schuld located a green canvas bag, which contained burglarious tools including pry bars and a bulk cutter. App. 112-113 R38:9-10

PROCEDURAL HISTORY

Timm filed a Motion to Suppress on November 11, 2016. App. 102-103; R34:1-2 An evidentiary hearing was held on December 21, 2016 where Officer Schuld and Chief Bauer testified. App. R38:1-29; App. 104-132 After testimony at an evidentiary hearing, the Court made an oral ruling denying the Motion to Suppress. App. 128-132; R38:25-29

On August 21, 2017, Timm filed a Motion to Reconsider Ruling Denying Defendant's Motion to Suppress Fruits of Vehicle Search. App. 152-156; R47:1-5 Timm attached an Exhibit to the Motion, which was a suppression ruling in Taylor County Case Number 15-CF-52. App. 155-156; R47:4-5 Timm did not attach anything further to the Motion. App. 152-156; R47:1-5 On October 5, 2017, State filed State's Response to Defendant's Motion to Reconsider. App. 157-158; R51:1-2 On October 20, 2017, Timm file his reply, Defense Rebuttal in Support of Motion to Reconsider Suppression of Evidence. App.159-161; R52:1-3 On November 13, 2017, an Oral Ruling on Timm's Motion to Reconsider was held, where the Court denied Timm's Motion to Reconsider. App.162-174; R144:1-13

On October 8, 2019, Timm plead guilty to 9 misdemeanors following the State filing an Amended Information. R120:1-11; R122:1-3; R140:1-16 On October 17, 2019, the Court sentenced Timm to 9 months jail on Counts 1, 4, 7, and 5, which will be

consecutive to each other and consecutive to any sentence, and sentenced Timm to 9 months jail imposed and stayed on Counts 2, 3, 6, 8, and 9 and running consecutive to each other with 3 years of probation concurrent to each other. R139:1-21

On August 29, 2022, Timm filed Defendant's Postconviction Motion and Exhibits attached thereto. App.175-188; 189-223 R178:1-14; R179:1-35 On October 7, 2022, the Court filed an Order on Defendant's Post Conviction where it ruled that Timm's motion to reconsider is denied and that Timm had not established facts to justify a hearing on his claim for ineffective assistance of counsel and that motion is denied. App.224-225; R180:1-2 On October 28, 2022, Timm filed Defendant's Motion to Reconsider Postconviction Decision and attachments thereto R181:1-8; App.226-233 On January 17, 2023, the Court filed an Order Denying Defendant's Motion to Reconsider Postconviction Decision App.234-235; R184:1-2

ARGUMENT

I. The circuit court correctly denied Timm's suppression motion

The instant case presents a question of constitutional fact subject to a two-part standard of review. *State v. Matejka*, 2001 WI 5, ¶ 16, 241 Wis. 2d 52, 621 N.W.2d 891; see also *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis. 2d 48, 58, 613 N.W.2d 72. First, the circuit court's findings of evidentiary or historical fact are upheld unless clearly erroneous. *Matejka*, 2001 WI 5, ¶ 16. Second, The determination of whether Timm was "seized" for Fourth Amendment purposes is reviewed de novo. *Id.* A review of Timm's argument shows a focus on the seizure issue and a concession that the circuit court's findings of evidentiary or historical fact should be upheld. For the sake of brevity, the State will focus on the seizure issue.

A. The consent to search was valid based on the totality of the circumstances.

The Court correctly focused on *Ohio v. Robinette* in addressing the issue of seizure. "The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances," *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). When Officer Schuld made the stop he made contact with dispatch and did utilize his mobile computer. App. 110 R38:7 From dispatch and his computer, Officer Schuld learned that Timm was on probation for burglary and had a history of burglary charges. App. 110 R38:7 As Officer Schuld walked up to the vehicle, he shined a flashlight in the back seat. App. 110 R38:7 Officer Schuld saw a tire iron and a flat end used to pry stuff open. App. 110 R38:7 Officer Schuld described the tire iron as the shape of an L with a flat head on the end of it, which I believed was used to pry things open as well. App. 112-113 R38:9-10 Officer Schuld had not seen other tire irons in vehicles, and it wasn't typically something he had seen on a seat. App. 110-111 R38:7-8 Based on the totality of the circumstances, Officer Schuld decided to search the vehicle. App. 111 R38:8 Moreover, Officer Schuld asked Timm for consent to search. App. 111 R38:8; Timm consented to the search of the vehicle. App. 111 R38:8 Officer Schuld described Timm as cooperative. App. 111 R38:8 Officer Schuld did not place Timm in handcuffs, did not restrain Timm, and did not place Timm in Officer Schuld's squad car. App. 111-112 R38:8-9 Officer Schul had possession of Timm's driver's license when he asked Timm for consent to search Timm's vehicle. App. 115 R38:12 Officer Schuld did not tell Timm that he was free to go prior requesting consent to search. App. 116 R38:13

B. Officer Schuld's actions in furtherance of Chief Bauer's goals were compliant with the Collective Knowledge Doctrine

To further question the validity of the search, Timm raises the Collective Knowledge Doctrine concerning the information relayed from Chief Bauer to the officers in his department. The collective knowledge doctrine permits an officer to stop, search, or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion to permit the given action. *U.S. v. Williams*, 627 F.3d 247, 2010 WL 4157339 (7th Cir. 2010) citing *United States v. Hensley*, 469 U.S. 221, 232-33, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) In order for the collective knowledge doctrine to apply, (1) the officer taking the action must act in objective reliance on the information received, (2) the officer providing the information-or the agency for which he works-must have facts supporting the level of suspicion required, and (3) the stop must be no more intrusive than would have been permissible for the officer requesting it. *U.S. v. Williams*, 627 F.3d 247, 2010 WL 4157339 (7th Cir. 2010) citing *United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir.1992).

Officer Schuld acted in objective reliance on the information received. The traffic stop of Timm was for a speeding violation. App. 108 R38:5 Officer Schuld noticed this particular vehicle for another reason on April 19, 2015 - his assignment to keep an eye out for a white Pontiac Grand Prix. App. 109 R38:6 Officer Schul learned that a white Pontiac such as the one driven by Timm had been involved in burglaries in the area from his department supervisor, Chief Shawn Bauer. App. 115-116 R38:12-13. Furthermore, when Officer Schuld made the stop he made contact with dispatch and did utilize his mobile computer. App. 110 R38:7 From dispatch and his computer, Officer

Schuld learned that Timm was on probation for burglary and had a history of burglary charges. App. 110 R38:7

Chief Bauer providing the information to Officer Schuld based on facts supporting the level of suspicion required. In 2010, Spencer Police Chief arrested Timm for a burglary where he handled the investigation from start to finish. App. 117-118 R38:14-15 As Spencer Police Chief, Chief Bauer had access to previous records in the department. Around the time of Officer Schuld's traffic stop in April of 2015, Chief Bauer looked up department records on Timm. App. 118 R38:15 Chief Bauer learned that in 2006 the Spencer Police Department assisted the Marathon County Sheriff's Department in arresting Timm for a burglary. App. 118 R38:15 Chief Bauer also learned of a motor vehicle accident in the village involving Timm where the Village handled the investigation a month before Officer Schuld pulled him over that involved a Pontiac. App. 118-119 R38:15-16 Chief Bauer remembered with Timm and his brother where one of them made mention that they've been involved in burglaries in the past and weren't going to stop doing this activity. App. 119 R38:16 Chief Bauer knew that there were burglaries going on in Clark and Marathon County and knew Timm to be involved in burglaries in the past. App. 119 R38:16 Chief Bauer let his department know to watch out for the white Pontiac previously involved in a car accident. App. 119 R38:16 Chief Bauer believed that Timm had been released from prison in February. App. 120 R38:17 Based on law enforcement experience, Chief Bauer knew burglars are known to keep doing that type of activity. App. 120 R38:17

The stop by Officer Schuld was no more intrusive than would have been permissible for Chief Bauer who had "let his department know to watch out for the white Pontiac previously involved in a car accident requesting it." App. 119 R38:16 Chief Bauer would have had the same access to the information from dispatch and mobile computer

regarding Timm's criminal history, which includes burglaries, on top of his individual experience with Timm's criminal history. Moreover, Officer Schuld asked Timm for consent to search. App. 111 R38:8 Timm consented to the search of the vehicle. App. 111 R38:8 Officer Schuld described Timm as cooperative. App. 111 R38:8 Officer Schuld did not place Timm in handcuffs, did not restrain Timm, and did not place Timm in Officer Schuld's squad car. App. 111-112 R38:8-9

II. Timm was not deprived of the effective assistance of counsel

Timm's trial counsel was effective as their performance was not deficient and to the extent it was deficient, it did not prejudice the defense.

A. Timm's trial counsel was effective as their performance was not deficient

As Timm notes in his brief the deficiency prong is met when counsel's errors result from oversight rather than reasoned strategy. *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. In this case, the Court did not know whether it was oversight rather than reasoned strategy. Timm wants the Court to presume that nothing asked on cross examination would have been negative to Timm despite Taylor County trial counsel not calling Timm to testify. R179 Timm wants the Court to presume what beneficial information would have been obtained from the squad camera video. However, the Taylor County transcript includes testimony from Officer Schuld that the squad video only allows the listener to hear what's happening in the conversation with Officer Schuld and Timm at his vehicle. R179:9-10 Finally, Timm wants the Court to presume that nothing in the Taylor County transcript would have been negative to Timm. The transcript highlights that another reasonable attorney did not call Timm as witness and was successful. R179. The transcript highlights that another reasonable attorney did not play the squad

audio and was successful. R179. The transcript highlights that Timm's defense that he wasn't speeding was not raised by either Taylor County trial counsel or Clark County trial counsel. R179. To that end, Timm's concerns about deficiency in Clark County appear to have been successful in Taylor County. Compare R179 to R178:7 Moreover, in attempting to convince the court to reconsider its denial of the postconviction motion, Timm did not include affidavits of either of his trial counsel in Clark County to show oversight. R181

B. To the extent trial counsel's performance was deficient, it did not prejudice the defense.

As Timm notes in his brief 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 v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Timm's reliance on the Taylor County ruling highlights the lack of prejudice. Essentially, all the ways in which Clark County trial counsel was allegedly deficient appeared to have benefited Taylor County trial counsel resulting in a positive ruling and dismissal. Compare R179 to R178:7

III. The circuit court did not err in denying Timm's postconviction motion and motion to reconsider the postconviction without an evidentiary hearing

As Timm notes in his brief 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. For the same reasons outlined in Section II, Timm's attaching of the Taylor County transcript to the post-conviction motion sans any supporting affidavits by Clark County trial counsel highlighted that his concerns about deficiency in Clark County appear to have been successful in Taylor County. Compare R179 to R178:7 Timm asked the trial court and is asking this Court to make presumptions about a lack of strategy discussions without supporting affidavits that may have been obtained from Clark County Trial Counsel and filed in support of Defendant's Motion to Reconsider Postconviction Decision. R181

CONCLUSION

This Court should affirm the circuit court's ruling denying postconviction relief.

FORM AND LENGTH CERTIFICATION – RULE 809.19(8)

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 proportional serif font. The length of this brief is 3,495 words.

Dated this 28th day of August 2023.

Electronically signed by:

Matthew Z. Kirkpatrick
MATTHEW Z. KIRKPATRICK
Clark County Assistant District Attorney
Attorney for Plaintiff-Respondent

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 28th day of August 2023.

Electronically signed by:

Matthew Z. Kirkpatrick
MATTHEW Z. KIRKPATRICK
Clark County Assistant District Attorney
Attorney for Plaintiff-Respondent