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 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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF DISPUTED FACTS

On August 29, 2023, one day after the state's deadline, the state filed its response brief alleging facts not in the record. Throughout its brief, it is stated as fact that "Officer Schuld saw a tire iron *and a flat end used to pry stuff open.*" State's Br. at 5 & 8 (citing R38:7, emphasis added). This is incorrect. The quote reads: "As I walked up and I shined the flashlight in the back seat I saw a tire iron, and *it* looked like a flat end used to pry stuff open as well on the back seat of his vehicle behind I believe on the driver's side." R38:7 (emphasis added). When asked to describe the tire iron further, the officer stated that "It was 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." ***Id***. at 9-10. The state's error in fact could cause this Court to believe that the officer's claim of probable cause to search Timm's vehicle was based on two items – a tire iron and a flat item used to pry stuff open. However, it was only one item. Mr. Timm requests that the Court decide based upon the fact in the record that this is one item – an L-shaped tire iron with a flat end – observed in the backseat of Timm's vehicle.

Second, the state's brief also incorrectly states that Timm's vehicle was involved in the suspected burglary. It was not. The state brief reads: "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." State's Br. at 5. Chief Bauer did not testify that Timm's

vehicle was involved in any burglaries. *See* R38:14-18. The chief testified that he told Officer Schuld to "keep an eye out" for Timm's car because "…my goal is to let our department know to watch out for the Pontiac which was involved in a car accident just a month before Officer Schuld pulled him over." ***Id.*** at 16-17. The ADA asked "…so you weren't specifically aware of [Timm's] involvement, but this was you putting together your knowledge from the past?" ***Id.*** at 17. Chief Bauer responded "Absolutely." ***Id.*** On cross examination, Chief Bauer outright admits that Timm's white Pontiac was not involved in any of the burglaries and was not seen at any of the crime scenes. ***Id.*** at 17-18. When undertaking the totality of the circumstances analysis, the state's incorrect factual assertion that Timm's vehicle was involved in burglaries cannot be used. It is not supported by the record.

ARUGMENT

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

The state argues, without citation, that Timm's opening brief concedes that "the circuit court's findings of evidentiary or historical fact should be upheld." State's Br. at 7. While the argument is not fully developed and lacks citation, Timm disputes the state's claim. Mr. Timm disputes several findings of the circuit court in his postconviction motion to reconsider, postconviction affidavit and opening brief. 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. This argument was raised in the opening brief. Def.'s Br. at 25-26. This was not strategic nor was it the trial attorney's right to ban a client from testifying. ***Id.*** at 24-28. The circuit court also erred in its finding of law, found 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. This too was raised in the opening brief. Def.'s Br. at 24-28. Finally, Timm disputes the court's prejudgment of his testimony without a ***Machner*** hearing. Specifically, the court's finding that "[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 was addressed in the opening brief as well. Def.'s Br. at 24-28.

A. The search of Timm's vehicle was illegal

Specifically, the state argues that Timm gave consent to search and that consent was valid based on the totality of the circumstances. State's Br. at 8. As part of the facts included in the totality of the circumstances, the state relies upon the incorrect fact that there are two items in Timm's

backseat in plain view – a tire iron *and a flat end used to pry stuff open.* ***Id.*** at 8. Again, the state doubled the number of observed items to justify the officer's search of the vehicle. Based on the facts in the record, the backseat only contained the tire iron, which comes standard with every car in America. No case law supports that an officer locating a tire iron in the backseat of a car is a basis for searching a vehicle or asking for consent to search a vehicle. There is no evidence to support that a tire iron was used in the burglaries that Timm was charged with committing.

The only other fact that the state claims formed the basis for the officer to ask for consent to search was the officer learning from dispatch that Timm was on probation. State's Br. at 5. The officer was only operating on a hunch. A search based on an "inchoate and unparticularized suspicion or 'hunch' fails the constitutional test." ***Terry v. Ohio,*** 392 U.S. 1, 27, 88 S. Ct. 1860, 1883 (1968). *See also* ***Henes v. Morrissey***, 194 Wis.2d 338, 348, 533 N.W.2d 802, 806 (1995).

The state does not address Timm's argument that the circuit court should have decided the suppression motion under ***State v. Lefler***, 2013 WI App 22, 346 Wis. 2d 220, 827 N.W.2d 650, and not under ***State v. Williams***, 2002 WI 94, ¶¶ 5-12, 255 Wis. 2d 1, 8, 646 N.W.2d 834, because this was not a Badger stop. *See* State's Br. At no point does the state address this significant argument found in pages 12 through 15 of Timm's opening brief. These cases are not cited in the state's brief. *See* ***id.*** Unrefuted arguments are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC***

Sec. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

The state relies upon ***Ohio v. Robinette*** as its sole legal support to argue that Timm gave valid consent to search. State's Br. at 8. As explained in Timm's opening chief (pp. 8-9, 20-22) and postconviction filings in the circuit court (R178:6-10; App. 180-184; R181:1-2; App. 226-227; R181:4-8; App. 229-233), Timm did not give consent. His trial attorney took away Timm's ability to testify that he did not consent when she refused to allow him to testify at the suppression hearing and refused to raise the argument. Def.'s Br. at 25-26. ***Ohio v. Robinette*** does not apply, as explained in the brief in chief due to the dissimilar fact pattern. Def.'s Br. at 13-14.

B. The collective knowledge doctrine does not make this warrantless search valid

The state cites the three-part test in ***U.S. v. Williams*** in support its argument that Officer Schuld acted in furtherance of Chief Bauer's goal and, therefore, the vehicle search was valid. State's Br. at 9-11. That test requires: 1) the officer conducting the search must act in objective reliance on the information received; 2) the officer providing the information 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. *See* State's Br. at 9 *citing* ***U.S. v. Williams***, 627 F.3d 247 (7th Cir. 2010) *citing* ***U.S. v. Nafzger***, 974 F.2d 906, 911 (7th Cir. 1992).

This argument fails, as neither the officer who made the stop nor the chief of police who directed the officer to make the stop had knowledge to constitute probable cause to stop or search the vehicle for a burglary investigation. Upon a challenge by the defendant, the state must prove the collective knowledge of the department. ***State v. Pickens***, 2010 WI App 5, ¶¶13-14, 323 Wis. 2d 226, 779 N.W.2d 1. "Proof is not supplied by the mere testimony of one officer that he relied on the unspecified knowledge of another officer." ***Id.***, ¶13. The record must demonstrate "specific, articulable facts" that would support a finding of probable cause. ***Id.*** Chief Bauer had zero specific articulable knowledge that Timm was involved in the burglary that his department was investigating. Chief Bauer had no knowledge of Timm being involved in the burglaries. He had no knowledge of Timm's white Pontiac being involved in the burglaries or at the scene of the crime. He had no knowledge of a tire iron being used in the burglaries. The only fact that Chief Bauer knew was that Timm had committed a burglary five years prior to the stop. The case law cited by the state requires that an officer providing the information must have facts supporting the level of suspicion required to search the vehicle. *See* State's Br. at 9 *citing* ***U.S. v. Williams***, 627 F.3d 247 (7th Cir. 2010). Chief Bauer had a hunch – not probable cause to stop or to search the vehicle. Officer Schuld had Chief Bauer's instruction to stop the white Pontiac if he saw it drive through town and he saw a tire iron in the backseat, in plain view. There were no additional facts elicited by the state indicating that a tire iron in the backseat of a car would be some greater

indicator of criminal activity than finding a tire iron in another place in the car. Again, there was no indication that the tire iron was used in the commission of the burglary that was being investigated. There was no paint or other evidence on the tire iron to indicate that it was used in the crime. The tire iron was of so little significance to the burglary investigation, the officer did not photograph or collect it as evidence (R38:13; App. 116).

II. Trial counsel's performance was deficient and prejudicial

The evidence resulting from the illegal search of Timm's 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. The state argues that this Court has the benefit of being able to compare this trial attorney's performance to Timm's Taylor County trial attorney's performance. Essentially, for purposes of the ***Strickland*** analysis, the state argues that the Taylor Counsel trial attorney, who won the suppression hearing, is the standard for a reasonable attorney faced with the exact same facts of the case. *See* State's Br. at 11-12.

The state argues that both this trial attorney and Timm's Taylor County took the same actions and, therefore, this trial attorney is not deficient. ***Id.*** This argument is factually flawed. First, the state argues that both trial attorneys did not play the squad car video for the court. ***Id.***

That is incorrect. Mr. Timm's Taylor County trial attorney, who won the suppression hearing, attempted to play the video and when it would not play due to technical issues, he made sure the judge reviewed it before deciding the suppression motion. R179:32; App. 220. The Taylor County judge stated on the record that she would review the squad car video before issuing a decision. ***Id.*** at 33; App. 221. The trial attorney in this Case did not take any steps to ensure the circuit court reviewed the squad car video. *See* R38.

Second, the trial attorney in this Case did not adequately develop arguments on the record (R38; App. 104-151) or in writing (R34:1-2; App. 102-103, R47; 152-156, R52; 159-161) to prove suppression should be granted, as Timm's Taylor County trial attorney did (R179; App. 189-223). The deficiency of trial counsel's performance is clear from the circuit court's ruling. As explained in the opening brief (p. 22), this is not mere second guessing. 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*. R38:27; 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. *See* R181:4-8; App. 229-233.

Third, the state argues that Timm did not testify at the suppression hearing held in this Case nor did he testify at the Taylor County suppression hearing to refute the officer's testimony that he consented to the search. State's Br. at 11. However, this argument overlooks the fact that the Taylor County prosecutor did not argue the consent was valid, despite Officer Schuld testifying at the Taylor County suppression hearing that Timm consented (R179:9; App. 197). *See* R179 & App. 189-223. As such, Timm's testimony was not necessary in Taylor County.

Forth, trial counsel in this Case did not draw out the following testimony from Officer Schuld, as Timm's Taylor County trial attorney did: 1) that he never told Timm why he stopped him. (R179:12 & 16; App. 200 & 207); 2) that he did not tell Timm he was free to leave before asking permission to search his vehicle (R179:15 & 16; App. 206 – 207); 3) that he did not tell Timm that he was not required to give consent to search (***id.***); and 4) that he still had Timm's driver's license when he asked for permission to search his vehicle (***id.*** at 14; App. 202). This trial attorney did not present through the testimony of the officer or through the review of the squad car video that the officer did not return Timm's driver's license until the end of the stop. *See* R181; App. 231. All of which demonstrate that if consent was given, which Timm maintains he did not give, it was not valid. Mr. Timm was detained and no reasonable person in this circumstance would believe they were free to go.

In one conclusory paragraph, the state argues that no prejudice exists because both trial attorneys took the same

actions. State's Br. at 12. As detailed above, the state's comparative analysis is flawed. Mr. Timm was prejudiced as his suppression motion and motion to reconsider were denied and the case continued, as discussed in his opening brief. Def.'s Br. at 21-23.

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

Mr. Timm is entitled to a ***Machner*** hearing as his postconviction motion, postconviction motion to reconsider and defendant's postconviction affidavit raised 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. The state does not argue that Timm's postconviction motion, motion to reconsider and postconviction affidavit lacks sufficient facts. State's Br. at 12-13. Instead, it argues, wholly without citation, that this writer was required to file a postconviction affidavit signed by trial counsel. ***Id.*** at 13. This is not supported by case law or statute. This requirement simply does not exist.

Conclusion

For the above reasons and those found in the opening brief, 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 13th day of September, 2023.

Respectfully submitted,

Electronically signed by Katie Babe

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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 2,688 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 was mailed to Wayne Timm on September 13, 2023 at: Wayne Timm, DOC #330133, Stanley Correctional, 100 Corrections Drive, Stanley, WI 54768-6500.

Electronically signed by Katie Babe