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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2023AP000543-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS J. NERO

Defendant-Appellant.

On Appeal from the Final Orders Entered
in the Circuit Court for Dunn County,
The Honorable Christina Mayer and
Honorable James M. Peterson Presiding

**REPLY BRIEF OF
DEFENDANT-APPELLANT**

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ARGUMENT

I. The trial court correctly determined that Nero's claims are not barred by *Escalona-Naranjo* because he provided a sufficient reason.

Here, the trial court concluded Nero's claims were not barred by *Escalona-Naranjo* because it found it "questionable" whether Nero ever had a direct appeal on this case. To explain its conclusion, the court first summarized the "complicated" procedural history of this case.

The court explained how Nero's first appellate counsel filed a no-merit report which was dismissed due to its contingency on the outcome of another pending appeal. Thereafter, 2nd appellate counsel was appointed, and that counsel also filed a no-merit report (case no. 2019AP1120).

In reviewing that appeal, this Court sua sponte raised the issue of whether the trial court properly sentenced Nero; this Court ordered 2nd Appellate Counsel to consult with Nero and either: "(1) submit a written statement from Nero indicating that he wishes to waive any challenge to the court's exercise of discretion on sentencing and that he understands the consequences of his waiver; or (2) request that the Court dismiss this appeal in favor of an extension of time to file a postconviction motion in the circuit court." (202:5; App.33).

The Court of Appeals then rejected the no-merit report and dismissed the appeal; 2nd Appellate Counsel filed Nero's Motion for Resentencing. Nero was resentenced on February 7, 2022. On that same date, 2nd Appellate Counsel filed Notice of Intent to Pursue Postconviction or Postdisposition Relief. (202:5; App.33)

Nero was then appointed 3rd Appellate Counsel. 3rd Appellate Counsel filed the current motion at issue: Nero's Motion for Reconsideration and a New Trial Pursuant to Wis. Stat. §809.30. (202:5; App.33)

After reviewing this procedural history, the circuit court concluded:

“Based upon the appellate history, it would be unfair to hold Mr. Nero to the presumption under *Escalona-Naranjo* that this post-conviction motion is barred. It is questionable whether Mr. Nero actually has had a direct appeal on this case.” (202:5; App.33).

Likewise, Nero asks this Court to agree with the trial court that his claims are not barred.

The State argues that Nero needed to bring his current claims in his motion for resentencing filed by 2nd Appellate Counsel, and that failure to include them in that postconviction motion makes them barred by *Escalona-Naranjo*. (State’s br. p. 13).

However, Nero’s claims should not be barred because a sufficient reason justifies not including these claims in that postconviction motion. Contrary to the State’s assertion, the State does not know if Nero’s current issues lack merit. (State’s Br. p. 12). These issues were not determined by the Court of Appeals in the no-merit appeal because it was dismissed.

This Court rejected the no-merit report because of the sentencing issue and dismissed the appeal. At that point, Nero was in no position to assert his present claims. His 2nd Appellate Counsel had filed a no-merit report. Thus, even after this Court told her about the sentencing issue, she still believed the case lacked merit except for the resentencing issue. In turn, it is unreasonable to conclude that Nero should have asserted these claims on his own in that postconviction motion.

Thus, Nero has a sufficient reason to explain not including these issues in his prior postconviction motion. It is unreasonable to now demand that 2nd Appellate Counsel must have included the present issues in that motion for resentencing because 2nd Appellate Counsel already concluded the case was fit for a no-merit appeal.

Escalona-Naranjo held that WIS. STAT. §974.06(4) bars defendants from bringing claims, including constitutional claims,

under § 974.06 if they could have raised them in a previous postconviction motion or on direct appeal, unless they have a sufficient reason for failing to do so. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 184, 517 N.W.2d 157 (1994).

The circuit court recognized Nero's sufficient reason: specifically, that it would be unfair to bar his claims because it is "questionable" whether Nero had a direct appeal on this case.

In sum, Nero did not get a determination of the merits of his case in the no-merit appeal because the no-merit appeal was rejected and dismissed. And barring his claims now would again prevent him from obtaining a determination of the merits of his case on appeal.

Thus, Nero's claims should not be barred by *Escalona-Naranjo* and this Court may properly determine these issues.

II. Because Nero's probation statement and UA test result both served as investigatory leads, the blood test result is a fruit derived from the compelled statement.

Nero asserts that the facts demonstrate Sergeant Kurtzhals relied on the UA test results to justify the blood test. And the UA test resulted from Nero's compelled probation statement. As a result, the blood test results were derived from the compelled probation statement. (Nero's Br. p. 19).

The State reiterates the circuit court's conclusion that, even though Nero admitted to using drug six days prior in his probation statement, that admission was actually a denial of drug use. The State says such a denial could then not lead to the UA test request. (State's Br. P. 14). However, the State presents no other facts that explain why the probation agent requested a UA test only after Nero made that statement.

Absent any other facts showing why the probation agent requested a UA test, the only mention of drug use remains Nero's statement—in which he raised the issue of drug use regardless of whether it gets viewed as an admission or denial. It was simply the

first mention of drug use tied to this incident; and from that point on the investigation turned to investigating drug use. First with a UA request. Then Sergeant Kurtzhals used the UA test to justify the blood test. Thus, the probation statement served as an investigatory lead for the UA request. And the UA result led to the blood test.

As explained below, because no independent source justified the blood test request, the blood test result was entirely derived from the UA result.

III. The State cannot meet its burden to demonstrate an independent source justifying the blood test.

Nero maintains that the State failed to demonstrate that any independent source justified the blood test request. Specifically, Nero maintains that Sergeant Kurtzhals was in no better position than the arresting officer to investigate Nero for OWI.

The State proposes that Kurtzhals possessed additional knowledge that the arresting officer did not have which provided probable cause regardless of the UA test result. That additional knowledge: the location of Nero's car and the confirmation of the extent of Nero's erratic driving. The State asserts "On October 14 [the arresting officer] did not know that Nero's vehicle had turned into a farmer's field where no road or field driveway existed and drove through a tall crop for quite a distance until driving the nose of the vehicle into a dip and becoming stuck." (State's br. Page 18).

However, the record contradicts the State's conclusion. The record disputes that Kurtzhals relied on, or even considered, these additional facts important to justify probable cause. Kurtzhals testified twice about what he knew about Nero's case prior to requesting the blood test from Nero in the jail.

To start, Kurtzhals believed he had probable cause prior to going to the jail to visit Nero in the afternoon. Kurtzhals got involved with the case around noon and visited Nero in the jail within the next two hours. (Nero signed his consent for the blood test at 1:45 pm.) Kurtzhals said he did not advise Nero of his *Miranda* rights because

Kurtzhals was no longer investigating the incident when he went to request the blood test. (192:19-20). Therefore, because he was no longer investigating the incident, Kurtzhals believed he had probable cause to justify the blood test prior to his afternoon visit with Nero in the jail.

Thus, Kurtzhals developed probable cause between starting his shift that day and visiting Nero in the jail. The record shows Kurtzhals engaged with Nero's case in two ways before he visited Nero in jail: (1) he signed Deputy Vernor's report regarding where the vehicle was found, and (2) he learned about the case while conversing with one of the front desk secretaries.

Signing Deputy Vernor's report did not give him probable cause. Kurtzhals admitted that he never read Vernor's report and did not recall signing it. (193:11).

In turn, he could only have developed probable cause through his conversation with the front desk secretary. But when Kurtzhals twice testified about his involvement in the investigation, he never emphasized the erratic pattern of driving or nature of the stuck vehicle. Instead, he emphasized learning about the UA test result both times.

At the first suppression motion hearing, when asked about his role in following up on Nero's case Kurtzhals testified:

Q: And what did your follow up [of Nero's case] consist of?

A: "I was informed by the secretary at the front desk of the kind of the dynamics of what we had so far and that it needed following up on. That there had been an at some point there was a urine analysis conducted at the request of Mr. Nero's probation officer and - was informed of the results of that urine analysis that was conducted at our Jail [sic]." (193:7)

At the second suppression motion hearing, Kurtzhals again testified about what he knew about Nero's case prior to requesting the blood test from Nero.

Q. And when did you first become involved with the investigation?

A. It was on the around noon or the early afternoon of the same day you mentioned, the 14th.

Q. And were you advised what the status of the investigation [into Nero's case] was at that point?

A. Yes.

Q. And by whom were you advised?

A. Front desk person named Marie Marty, one of our secretaries.

Q. All right. And what information did you have about the incident?

A. I learned that Mr. Nero had been arrested because he had been involved in a traffic accident, that the arresting officer noticed that Mr. Nero looked to be under the influence of either alcohol or drugs. He was extremely disorientated. I also learned from Marie that Mr. Nero's probation agent had ordered a urine analysis and that came back positive for three different controlled substances. (192:12-13; App.106-107).

First, Kurtzhals is wrong about the arresting officer's concern about drugs or alcohol. The arresting officer never noted that Nero looked to be under the influence of alcohol or drugs. All the arresting officer (Spence) reported was that Nero appeared disoriented. (109:99). In contrast, the arresting officer testified that Nero denied using drugs or alcohol when he asked Nero, and the officer conducted no field sobriety tests. (193:18-19; App. 145-146).

But both times he testified, Kurtzhals testified he considered the UA test result.

Thus, Kurtzhals never testified that the erratic driving pattern, now confirmed in the daylight, nor the location of the found vehicle suddenly provided probable cause to request the blood test. In contrast, he twice emphasized that he learned about the UA test result and then he requested the blood test.

Of note, Kurtzhals also testified that he learned from the secretary that there were items in plain view in the vehicle. He later admitted that the information was incorrect. There were no drug-related items in plain view. (192:2-23).

So, after talking with the front desk secretary, Kurtzhals believed probable cause justified the blood test request. At that time:

- He erroneously believed that there were items in plain view in the vehicle;
- He knew Nero's UA tested positive for three controlled substances; and
- He knew the location of Nero's found vehicle and the path it travelled.

The State argues that just the location of the found vehicle and the path it travelled justify probable cause. Not so. That was the only set of facts that did not include any direct tie to illegal substances.

This account of the record shows that probable cause did not exist without the existence of the UA test result. The record shows Kurtzhals relied on the UA test result. (He also may have relied on the false statement that there were drug-related items in plain view). But Kurtzhals had no contact with Nero prior to visiting him in the jail. In contrast, the arresting officer who interacted significantly with Nero and searched the roads and fields for Nero's lost vehicle for over an hour did not possess probable cause. He did not even conduct field sobriety tests.

Thus, this additional knowledge of the vehicle's location and path traveled did not provide the additional evidence needed for probable cause. Only the UA test result supplied the necessary probable cause. Without those results, no independent source existed to justify the blood test. As such, the State cannot meet its burden to demonstrate an independent source for the blood test request.

IV. Nero adequately asserted his ineffective assistance of counsel claim to justify an evidentiary hearing.

Nero maintains that he adequately stated his claims to justify an evidentiary hearing. In brief, he asserted facts regarding what his friends could have testified to in order to corroborate his story, and he deserves the opportunity to further testify to those facts, and have his friends testify at that hearing.

The State maintains that Nero failed to adequately plead his claim even if he was not required to submit an affidavit. In addition,

the State revisits the trial court's conclusion that failing to present evidence that Nero's car still had fuel was not deficient performance.

The State errs in its conclusion here. The fact that Nero's car still had fuel does not relate only to deficient performance. Instead, it shows possible prejudice. Counsel failed to call corroborating witnesses. And this fact (fuel in the tank) also existed to corroborate the testimony of those witnesses. In sum, Nero said he left his car to hang out with his friends. The State argued he left because he got cold. Nero says his friends could confirm his story. And the fact that his car still had fuel to run his heater supports his story.

Thus, taken alone, counsel's failure to present this fact is not deficient performance. But coupled with the failure to call collaborating witnesses created a cumulative prejudicial effect because it would have bolstered Nero's story—both with witnesses' accounts and circumstantial evidence. See *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

CONCLUSION

For the reasons given above, the circuit court's order denying Mr. Nero's motion for reconsideration and a new trial should be reversed and the case should be remanded for further proceedings.

Respectfully Submitted,

Dated this 9th day of October 2023.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) (bm) and (c) for a brief. The length of this brief is 2,535 words.

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