

STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT III

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Plaintiff-Respondent)

_____)

(party designation) State)

-vs-)

Defendant-Appellant)

_____)

(party designation) David D. Hartl)

**Brief
Cover**

14 AP292102

Case No. ~~13 CT 125~~

ON APPEAL FROM THE CIRCUIT COURT FOR Chippewa COUNTY,

THE HONORABLE (name of Judge) James M. Isaacson, PRESIDING

BRIEF OF Appellant

*

Name: David D. Hartl

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STATE OF WISCONSIN,

Vs.

Case NO. 13T125

DAVID HARTL,

Statement of Issues for Review

Mr. David Hartl moves the Court for a new trial in this matter on the following grounds.

- I. The court improperly permitted the State to introduce evidence that Mr. Hartl exercised his right to remain silent in response to post-Miranda questioning by police.
- II. Mr. Hartl received ineffective assistance of counsel when his attorney solicited prejudicial testimony from a State witness on cross-examination that had been ruled inadmissible in a pre-trial motion.
- III. During cross-examination when Defense Counsel first asked Officer Sokup specifically, the reason for the traffic, stop and he said that he stopped Mr. Hartl because of an anonymous complaint of an intoxicated driver. This is hearsay and prejudicial to Mr. Hartl's defense.

Statement of Case

On July 11, 2013, David Hartl was charged with Operating While Intoxicated and Operating with a Prohibited Alcohol Concentration as a second offense. According to the criminal complaint in this matter, Officer Daniel Sokup received a notification from his dispatch officer that a lone male subject was leaving a restaurant in a specific vehicle and that he appeared to be intoxicated. Officer Sokup located the vehicle and initiated the stop. After performing field sobriety tests, Mr. Hartl was arrested, and he consented to have an evidentiary sample of his blood drawn. Officer Sokup informed Mr. Hartl of his rights under Arizona v. Miranda, and he declined to answer questions.

The matter was eventually scheduled for Jury Trial on February 26, 2014, and the trial lasted one day. Prior to trial, Mr. Hartl's attorney moved to exclude any evidence relating to the anonymous caller reporting a suspected drunk driver on the grounds that any such testimony is inadmissible hearsay and that it would be unduly prejudicial under 904.03 Wis. Stats. The Court granted the motion. [Transcript of Jury Trial 2/26/14 at pp. 28-32]

Statement of Facts

During Officer Sokup's direct testimony, a document known as an "Alcohol Influence Report" was marked as Exhibit #7. [Tr. 2/26/14 at p. 84] As the State began to question Officer Sokup about this document, the Defense objected on the grounds that it is improper to introduce evidence that Mr. Hartl refused to answer questions after being advised of his Miranda rights. [Tr. 2/26/14 at p. 84-85] Outside of the presence of the Jury, The Court overruled the objection because "[Officer Sokup] can testify to what he observed and what he saw about the defendant. Mr. Hartl has a right to refuse to answer any more questions, and we have already advised the Jury about his right against self-incrimination, so that's the basis of my decision." [Tr. 2/26/14 at pp. 86-87] After recapping his own observations of Mr. Hartl that evening, Officer Sokup testified that he read Mr. Hartl his Miranda rights and that Mr. Hartl refused to answer any questions. [Tr. 2/26/14 at pp. 88-89]

On 25 February 2014, the day before the trial, the defense attorneys, Sonia Anderson and Patrick Waters, filed a Motion in Limine wanting to exclude certain evidence. Prior to the start of the jury trial on 26 February 2014, the attorneys met with the judge to address this motion. One of the requests was to exclude testimony by Dispatcher Brian Franks about an anonymous call received prior to Mr. Hartl's arrest including the recording itself. The 911 recording was of an anonymous tipster who reported that an intoxicated individual was leaving Heckle's in a blue Chevrolet Cavalier.

Mr. Hartl's car is a green Chevrolet Corsica. Officer Sokup located the vehicle and initiated a stop.

The defense objected to the dispatcher's testimony as to its contents of this 911 call, and presumably the playing of the 911 call, on the grounds that it was hearsay and prejudicial. (Transcript at p. 27-29).

During the trial, on cross-examination, defense counsel Waters played the video of the traffic stop while questioning Officer Sokup, Mr. Waters asked the arresting officer, Daniel Sokup, what he said to Mr. Hartl for the reason he made the traffic stop. Despite the officer explaining that he thought he was not to answer that question, Mr. Waters insisted he answer. Officer Sokup then testified that he had received an anonymous call of an intoxicated driver. Id. At 137. Mr. Waters objected but the court overruled the objection. Note for the record Officer Sokup stating the reason for the traffic stop was because of an anonymous call. (This is hearsay and prejudicial to Mr. Hartl's Defense). This is not a legitimate reason for a traffic stop.

This raises the issue of being hearsay and prejudicial, When Officer Sokup was first asked what he said to Mr. Hartl to why he stopped him and he said that, (he got an anonymous call there was an intoxicate driver). The following sequence of questions took place:

- Q: At this point, what are you talking about?
- A: I am talking about the reason for my stop.
- Q: And what specifically, what words did you say?
- A: I don't know if I am supposed to say. We had a conversation about this earlier.

Q: What specifically, what words did you say?

A: {I told him that I stopped him because I got an anonymous call there was an intoxicated driver.}

Mr. Waters: Objection.

The Court: You asked the question, Mr. Waters.
Overrule the objection.[2/26/14 at p.137]

Mr. Waters provided ineffective assistance of counsel for this alleged error. When Officer Sokup Stated that the reason for the traffic stop was because of an anonymous call there was an intoxicated driver which is hearsay and prejudicial and not a legitimate reason for a traffic stop. The State should declare a mistrial because of this testimony caused unfair prejudice to Mr. Hartl's Defense.

The remainder of the trial proceeded without issue material to this appeal. The Jury deliberated and returned a verdict of guilty on both counts.[Tr.2/26/14 at p. 256] Mr. Hartl was sentenced on April 21, 2014 to ten days in the Chippewa County Jail. [Transcript of Sentencing Hearing 4/21/14 at p. 3] This appeal follows.

ARGUMENT

- I. DAVID HARTL SHOULD BE GRANTED A NEW TRIAL BECAUSE THE COURT IMPROPERLY PERMITTED THE STATE TO INTRODUCE EVIDENCE THAT HE EXERCISED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT IN RESPONSE TO POST-MIRANDA QUESTIONING BY POLICE.

David Hartl requests a new trial because the Court permitted the State to introduce evidence to the Jury that he refused to answer police questions after he had been informed of his right to remain silent under *Miranda v. Arizona*. The decision to declare a mistrial and order a new trial lies within the discretion of the Trial Court. *State v. Pankow*, 144 Wis. 2d 23, 47 (Ct. App. 1988). A trial court properly exercises its discretion when it examines the relevant facts, applies the proper standard of law, and engages in a rational decision-making process. *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis.2d 646, 656 (1994).

The United States Supreme Court has held that the Fifth Amendment protection against self-incrimination as incorporated through the Fourteenth Amendment prevents a prosecutor from drawing attention to the fact that a

criminal defendant chose not to answer police questions at the time of his arrest after being informed of his right to remain silent or from asking the Jury to draw a negative inference from the fact. *Doyle v. Ohio*, 426, U.S. 610, 619, (1976). The Supreme Court later limited this ruling in *Greer v. Miller*, holding that a violation occurs only when a trial court specifically permits the prosecution to call attention to the defendant's constitutionally protected silence. *Greer v. Miller*, 483 U.S. 756, 763-64 (1987).

In the case at hand, the Court specifically permitted the State to draw attention to Mr. Hartl's constitutionally protected refusal to answer questions over the objection of defense counsel in violation of *Doyle* and *Greer*. This was not an instance of an unexpected statement from a witness that could be corrected with a curative instruction. When the State attempted to question Officer Sokup regarding Mr. Hartl's response to the Alcohol Influence Report, defense counsel objected. The State informed the Court that it intended to ask the witness whether Mr. Hartl was "Mirandized" and that the witness would testify that he "lawyered up." [Tr.2/26/14 at pp. 85-86] Such a line of inquiry would be a clear violation of the Fifth Amendment's protection against self-incrimination as incorporated through the Fourteenth Amendment's Due Process clause and *Doyle v. Ohio*, yet the Court overruled the objection. In light of the United States Supreme Court's holding in *Greer v. Miller*, the Court should exercise its discretion and order a new trial in this matter.

II. DAVID HARTL SHOULD BE GRANTED A NEW TRIAL BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY SOLICITED TESTIMONY FROM A STATE WITNESS DURING CROSS-EXAMINATION THAT HAD BEEN ORDERED INADMISSIBLE AFTER A PRETRIAL MOTION.

David Hartl requests a hearing pursuant to *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (1979) to clarify and preserve the record in this matter is warranted due to ineffective assistance of counsel. The United States Supreme Court established a two-prong test for ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* In

order for the deficient performance to rise to the level of a constitutional violation, "the defendant must establish that his or her counsel 'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. State v. Smith, 207 Wis. 2d 258, 273 (1997) (quoting State v. [Edward] Johnson, 153 Wis. 121, 127 (1990). The standard for measuring attorney performance is whether the performance was reasonable under the totality of the circumstances. State v. Brooks, 124 Wis.2d 349, 352 (Ct. App.1985). An attorney is held to the quality of representation that an ordinarily prudent lawyer, who is skilled in criminal law, provides to his or her clients. Id. The deficiency prong of the Strickland test is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. See State v. Moffett, 147 Wis. 2d 343 353 (1989).

Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense.

State v. Johnson, 153 Wis.2d 121 (1990). The prejudice standard set forth in Strickland states that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 669.

A) Performance

Mr. Hartl's appointed trial counsel in this matter erred when he solicited evidence from a State's witness on cross-examination that an anonymous citizen had called the police to report that Mr. Hartl was driving while intoxicated. Prior to trial, the Defense moved to exclude any reference to the anonymous complaint because it was hearsay and because it was unduly prejudicial. The court agreed that if Mr. Hartl stipulated that there was a valid traffic stop for speeding, then the probative value of the anonymous complaint was outweighed by its potential prejudicial effect on the Jury. Defense counsel "opened the door" to the damaging testimony, however, when he asked Officer Sokup specifically what words he used when he explained the reason for the traffic stop.

When the question was first asked, Officer Sokup responded that he did not think he should answer, but defense counsel repeated the question! Officer Sokup answered the question and said he stopped Mr. Hartl because of an anonymous complaint of an intoxicated driver. When he was first asked, the Officer did not say it was because he was speeding he specifically said it was because of an anonymous complaint. This error was not the result of a deliberate strategic decision, and trial counsel's deficient performance fell below what is expected of a reasonably skilled criminal trial attorney in this instance.

B) Prejudice

Mr. Hartl's defense was prejudiced his attorney's error in this instance because the defense strategy seemed to be to show the Jury that there were no overt signs of intoxication in this instance and to hope that the Jury would therefore disbelieve the results of the blood test. Defense counsel argued that the members of the Jury have seen intoxicated people in their own lives and that Mr. Hartl did not appear to be impaired based upon any of the evidence contained in the video of the traffic stop. [See Closing Argument Tr. 2/26/14 at p. 241] The Defense asked the Jury to consider that the lab results are fallible and asked "could the blood test" really match what you saw on that video? [Tr. 2/26/14 at p. 248]

The fact that an anonymous citizen called the police to report an intoxicated driver directly contradicts the primary strategy of the defense. If a citizen called to report an intoxicated driver it likely means that, he saw either that the driver was noticeably intoxicated or he observed some sort of poor driving that lead him to believe the driver was intoxicated. The lack of poor driving or overt signs of intoxication was exactly the weakness that the defense strategy sought to exploit. In light of the defense strategy, the fact that a citizen had called the police to report an anonymous complaint was especially prejudicial, and it is reasonable to believe that it could have affected the outcome of the trial.

CONCLUSION

First I Mr. Hartl ask this Court to review and change the circuit court's decision, declare a mistrial, and dismiss all charges.

On the following Grounds:

I Mr. Hartl received ineffective assistance of counsel when my attorney solicited prejudicial testimony from a State Witness on cross-examination that had been ruled inadmissible in a pre-trial motion. In light of this, when Mr. Waters, first asked Officer Sokup specifically the reason for the traffic stop and the officer then testified and said that he had received an anonymous call of an intoxicated driver. Note the Officer stating the reason for the traffic stop was because of an anonymous call. This is hearsay and prejudicial to my defense and is not a legitimate reason for a traffic stop. I Mr. Hartl am asking the State to declare a mistrial, and dismiss all charges.

Or order a new trial because the State was improperly allowed to call attention to the fact that I chose not to answer police questions after being advised of my right to remain silent. A hearing pursuant to State v. Machner in order to preserve the record and because I received ineffective assistance of counsel when my attorney solicited information from a State Witness that was prejudicial to my defense when that information had been ordered suppressed by the Court in a pre-trial motion.

Respectfully Submitted,

David D. Hartl
Defendant Appellant