COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP648-CR **Cir. Ct. No. 2007CF166**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE J. CORBINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sawyer County: JOHN P. ANDERSON, Judge. *Judgment affirmed; order affirmed in part; reversed in part, and cause remanded for further proceedings*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Maurice Corbine, pro se, appeals a judgment convicting him of fifth-offense operating with a prohibited alcohol concentration (PAC) and second-offense operating after revocation. He also appeals an order

denying postconviction relief. Corbine claims his trial attorney was ineffective by failing to obtain and review a DVD of Corbine performing field sobriety tests and by failing to argue that the PAC count should have been charged as a fourth offense. He also contends the circuit court erred by denying his request for a ***Machner***[1] hearing on these issues.

¶2 We conclude Corbine was entitled to a ***Machner*** hearing with respect to his attorney's failure to obtain and review the DVD. However, we agree with the circuit court that Corbine's attorney was not ineffective by failing to argue the PAC count should have been charged as a fourth offense. We therefore affirm in part, reverse in part, and remand for further proceedings.[2]

BACKGROUND

¶3 According to the complaint, officer Twylia Dailey stopped a vehicle for speeding at about 12:50 a.m. on September 28, 2007. Corbine was arrested and subsequently charged with fifth-offense operating with a prohibited alcohol concentration, fifth-offense operating while intoxicated (OWI), and second-offense operating after revocation. At trial, Corbine conceded that he was intoxicated on the morning in question and that his driver's license was revoked.

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

[2] Corbine also faults the circuit court for failing to assure his presence at a postconviction motion hearing held on January 30, 2013. We decline to address this issue as any prejudice Corbine claims resulted from his lack of participation in that hearing may be addressed by the trial court on remand for a ***Machner*** hearing. In addition, Corbine argues he is entitled to a new trial in the interest of justice, based on the combined effect of the errors outlined above. Because we remand for a ***Machner*** hearing on counsel's failure to obtain and review the DVD, it would be premature for us to address this argument.

He also stipulated to having four prior OWI or PAC convictions. The only disputed issue was whether Corbine was the driver of the vehicle Dailey stopped.

¶4 Dailey testified she was driving north on Highway K in Bass Lake when she observed a Dodge Durango traveling south on Highway K at about fifty-one miles-per-hour in a thirty-five-mile-per-hour zone. Dailey turned her vehicle around and pursued the Durango. After about a mile, the Durango turned into a bar parking lot, and Dailey followed and activated her emergency lights. Dailey testified that she never lost sight of the Durango during the pursuit and that she was immediately behind the Durango when it pulled into the parking lot.

¶5 About ten seconds after the Durango stopped, the driver's side door opened and a man, later identified as Corbine, got out of the vehicle. The front and rear passenger's side doors then opened, but Dailey instructed the passengers to remain in the vehicle. Corbine identified the passengers as Rodney Corbine (Rodney) and Rachel Butler. Dailey observed that Corbine's eyes were red, his speech was slurred, and he smelled strongly of intoxicants. She therefore transported him to the Sawyer County jail for field sobriety tests. Dailey then cited Corbine for OWI, and after he refused to submit to a breath test, she transported him to the hospital for a blood draw.

¶6 Dailey testified she was with Corbine for a total of two-and-one-half hours on September 28. During that time, he never indicated he was not the driver of the Durango. Dailey also testified that neither Rodney nor Rachel Butler admitted to being the driver.

¶7 Rodney testified he was driving the Durango on the morning in question. He stated that, after he stopped the Durango in the bar parking lot, he "jumped out" of the vehicle and "jumped back in" on the passenger's side because

he did not have a driver's license. Corbine got out of the Durango and began walking toward the bar. Rodney estimated that ten to fifteen seconds elapsed between the time he parked the Durango and the time Dailey pulled into the parking lot. On cross-examination, Rodney conceded he is Corbine's first cousin. He also admitted he never told police he was driving the Durango or that Corbine was not the driver.

¶8 Corbine similarly testified that Rodney was driving the Durango on September 28. He stated Rodney pulled the vehicle into the bar parking lot and then "exited the driver's side and … jumped back in … the back passenger's side." Corbine testified he exited the passenger's side of the vehicle and began walking toward the bar. Dailey pulled into the parking lot eight to eleven seconds after Corbine got out of the Durango. Corbine testified he told Dailey during the stop that he was not the person driving the Durango.

¶9 The jury found Corbine guilty on all counts.[3] Corbine then filed a pro se motion for postconviction relief, arguing his trial attorney was ineffective by failing to obtain and review a DVD of Corbine performing field sobriety tests at the Sawyer County jail. Corbine claimed the DVD would have shown that he told Dailey he was not the driver of the Durango, which would have impeached Dailey's trial testimony and damaged her credibility, prompting the jury to acquit him. Corbine also argued his attorney was ineffective by failing to argue that the PAC count should have been charged as a fourth offense instead of a fifth offense.

[3] The OWI count was subsequently merged, pursuant to WIS. STAT. § 346.63(1)(c). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Corbine requested a ***Machner*** hearing on these claims. He also sought a new trial in the interest of justice.

¶10 At a hearing on December 5, 2012, the circuit court concluded the PAC count was properly charged as a fifth offense. The court also "conditionally den[ied]" Corbine's claim that counsel should have obtained and reviewed the DVD of the field sobriety tests. However, the court refused to make a final ruling until the State attempted to locate the DVD. The court scheduled a follow-up hearing for January 30, 2013.

¶11 At the January 30 hearing, the State conceded that "[t]he police reports talk about a DVD recording."[4] However, the State asserted, "[T]here's no evidence log of a DVD. There's no DVD." The State theorized that Dailey had placed a DVD in the recording device, but for some reason it failed to record. The State told the court it had brought an evidence technician to the hearing "to tell the Court that there is no DVD." However, the technician did not actually testify.

¶12 At a subsequent hearing on March 6, 2013, the State reiterated it could not produce a DVD of the field sobriety tests because no such DVD existed, and it again suggested the recording device had malfunctioned. The State did not, however, present any evidence to support these assertions.

¶13 The circuit court did not make any factual findings about the existence of the DVD. Instead, the court concluded that, even if the DVD did

[4] Specifically, the complaint stated that Dailey "placed a DVD into the DVD recorder to record the pre-booking process" after she arrived at the Sawyer County jail with Corbine. Dailey then had Corbine perform field sobriety tests. After that, she transported Corbine to the hospital for a blood draw. Upon returning to the jail, Dailey "retrieved the DVD out of the DVD recorder." The DVD was then "logged, tagged and secured into evidence."

exist, Corbine was not prejudiced by his attorney's failure to obtain and review it. The court reasoned:

> The defendant's argument here is based solely on the presumption that he is making that … Dailey's testimony would be so impeached by this alleged exculpatory statement that no reasonable jury could then find based on all the evidence and all the inferences that he would be guilty. I'm not satisfied that even if … that DVD existed and even if there was something on the DVD that showed that he again made the statement I didn't do it that in and of itself would nullify the jury's decision after they heard all the evidence. The evidence here to be quite frank was barely significant and accumulative and I don't see how that fact in and of itself would rise to such a level that a reasonable jury still could not find him guilty.

Corbine now appeals.

DISCUSSION

¶14 Whether counsel rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶15 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show 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." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶16 It is a prerequisite to appellate review of an ineffective assistance claim that the challenged attorney explain his or her actions at a postconviction evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The circuit court must hold a ***Machner*** hearing if the defendant's motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the defendant's motion meets this standard is a question of law that we review independently. ***Id.*** "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[,]" the circuit court has discretion to deny the defendant's motion without a hearing. ***Id.***

I. Failure to obtain and review DVD of field sobriety tests

¶17 Corbine first argues his trial attorney was ineffective by failing to obtain and review the DVD of Corbine performing field sobriety tests. In his postconviction motion, Corbine alleged: (1) counsel was aware that a DVD of the field sobriety tests existed; (2) counsel was aware that Corbine told Dailey he was not the driver during the field sobriety tests; (3) counsel failed to obtain and review the DVD; and (4) had counsel obtained the DVD and introduced it into evidence at trial, it would have impeached Dailey's testimony that Corbine never

told her he was not the driver, which would have damaged Dailey's credibility. We conclude these allegations, if true, are sufficient to entitle Corbine to relief.[5] The circuit court therefore erred by denying Corbine's motion without a ***Machner*** hearing.

¶18 The State's position, both in the circuit court and on appeal, is that no DVD of the field sobriety tests ever existed. The State suggests that, although Dailey placed a DVD into the recording device as stated in the complaint, the device failed to record, so no DVD was actually created. Logically, if no DVD was created, Corbine's attorney could not have been ineffective for failing to obtain and review it.

¶19 Significantly, though, the State has not produced any evidence to support its assertion that no DVD was created. At the January 30, 2013 hearing, the State asserted it had brought an evidence technician to court "to tell the Court that there is no DVD." However, the technician did not actually testify. At the March 6, 2013 hearing, the State reiterated that it could not produce a DVD of the field sobriety tests because no such DVD existed. Again, the State failed to present any evidence to support this assertion.

¶20 Moreover, a letter to Corbine from his trial attorney, which was attached to Corbine's postconviction motion, suggests that a DVD of the field sobriety tests did exist at some point in time. In the letter, counsel stated that he requested the DVD shortly after he was appointed to represent Corbine, but police

[5] We must accept the allegations in Corbine's postconviction motion as true for purposes of determining whether Corbine was entitled to a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

indicated "they did not have it or could not find it in the file." However, counsel then stated that "someone who had seen the video described it to me[.]" A DVD must have been created if someone watched the DVD and described it to Corbine's attorney. Because counsel's letter suggests that a DVD did exist, and because the State has not presented any evidence to support its theory that no DVD was ever created, we cannot conclude as a matter of law that the DVD never existed and, as a result, Corbine's attorney did not perform deficiently by failing to obtain and review it.

¶21 The State argues that even if a DVD did exist, Corbine's attorney did not perform deficiently because he made a reasonable strategic decision that playing the DVD at trial would do more harm to Corbine's case than good. *See* ***Strickland***, 466 U.S. at 690 (Counsel's "strategic choices made after thorough investigation of [the] law and facts relevant to plausible options are virtually unchallengeable[.]"). In the letter attached to Corbine's postconviction motion, counsel explained that, based on the description of the video he received from an unnamed source, he determined "any value to your case was substantially outweighed by the fact that [the video] would contain a heated conversation with the arresting officer, as well as you taking and failing sobriety tests and being intoxicated." Counsel stated, "In retrospect, while your statement to the officer that you were not the driver might have been consistent with your trial testimony, the harm to your case of playing it to the jury and showing them the potentially negative footage would have done far more harm than good." Counsel also explained he did not believe the court would have allowed him to play only the portion of the video that was helpful to Corbine because "the district attorney would have insisted on [playing the whole video] as part of the rule of completeness."

¶22 The problem with counsel's explanation is that he never personally viewed the DVD. Instead, he relied on a description of the DVD provided by an unnamed source. Without knowing who that person was, or why counsel believed that person's description was reliable, we cannot conclude counsel's strategic decision that the DVD would do more harm to Corbine's case than good was reasonable. In other words, without more information, we cannot conclude that counsel's strategic decision was made "after thorough investigation of [the] law and facts relevant to plausible options[.]" *See* ***id.*** A ***Machner*** hearing was therefore necessary for counsel to explain his reasoning.

¶23 The State contends a ***Machner*** hearing was not required because other evidence in the record conclusively demonstrates Corbine is not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9. In particular, the State notes that the letter attached to Corbine's postconviction motion shows his attorney attempted to obtain the DVD, but police indicated it was lost or unavailable. The State seems to suggest that counsel fulfilled his duty to provide competent representation simply by requesting the DVD, and after police indicated the DVD could not be found, he did not have any obligation to take further action.

¶24 We disagree with the State's position. Knowing that a DVD had been created and apparently viewed by another, counsel should have taken further steps to investigate the DVD's whereabouts. The letter from Corbine's attorney does not indicate what action he took, if any, after he learned police could not find the DVD. Had the circuit court held a ***Machner*** hearing, counsel could have explained whether he took any further action regarding the DVD, or why he chose not to do so. Without this testimony, we cannot conclude as a matter of law that counsel's performance was not deficient.

¶25 Corbine further argues that after police indicated they could not find the DVD, his attorney should have asserted a due process violation pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963). ***Brady*** holds that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Id.*** at 87. The State concedes that ***Brady*** requires disclosure of impeachment evidence. *See* ***Giglio v. United States***, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the ***Brady***] rule." (quoted source omitted)). However, the State observes that only evidence "material" to the defendant's guilt or punishment needs to be disclosed. *See* ***Brady***, 373 U.S. at 87. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***United States v. Bagley***, 473 U.S. 667, 682 (1985). "A reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." ***State v. Chu***, 2002 WI App 98, ¶30, 253 Wis. 2d 666, 643 N.W.2d 878.

¶26 The State argues it is not reasonably probable the result of Corbine's trial would have been different had the jury seen the DVD. For the same reason, the State suggests that Corbine's attorney was not ineffective because his failure to obtain and review the DVD did not prejudice Corbine's defense. *See* ***Strickland***, 466 U.S. at 694 (To establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). We disagree.

¶27 This case hinged on the jury's assessment of the witnesses' credibility. Only three witnesses testified at trial. Dailey testified she was immediately behind the Durango when it pulled into the bar parking lot, and about ten seconds after the Durango stopped, she saw Corbine exit the vehicle through the driver's side door. Conversely, Corbine and Rodney both testified that Rodney was driving the Durango. They also testified that Rodney got out of the Durango on the driver's side and got back in on the passenger's side before Dailey pulled into the parking lot. Rodney explained that he switched seats because he did not have a driver's license. The jury clearly found Dailey more credible than Corbine and Rodney. However, if the jury had seen the DVD evidence disproving Dailey's testimony that Corbine never told her he was not the driver of the Durango, Dailey's credibility would likely have been damaged. Because the witnesses' credibility was key in this case, it is reasonably probable that admission of the DVD would have affected the outcome.

¶28 The State nevertheless argues there is no reasonable probability of a different result because Corbine testified at trial that he told Dailey he was not the driver *during the traffic stop*. Thus, the State argues the DVD "would not have helped Corbine's case because he testified that he said he wasn't the driver during a time which would not have been captured on DVD." This argument fails because Corbine is not asserting the DVD should have been introduced to bolster his trial testimony. Corbine claims his trial counsel was aware that Corbine told Dailey he was not the driver during the administration of the field sobriety tests. He asserts the DVD would have impeached Dailey's testimony that Corbine never

said he was not the driver at any point during the two-and-one-half hours Corbine and Dailey were together.[6]

¶29 The State also argues it is not reasonably probable that admission of the DVD would have led to a different result because "Corbine's supposed statements that he was not the driver would have been hearsay and thus inadmissible for the truth of the matter asserted." *See* WIS. STAT. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). However, Corbine is not arguing the statements on the DVD would have been admissible to prove the truth of the matter asserted—that is, that he was not the driver. He is arguing the statements would have impeached Dailey's testimony and damaged her credibility. Thus, the statements would not have been inadmissible hearsay.

¶30 In summary, we conclude Corbine was entitled to a ***Machner*** hearing on his claim that counsel was ineffective by failing to obtain and review the DVD. All of the State's arguments that the circuit court properly denied Corbine's motion without a ***Machner*** hearing fail. With respect to deficient performance, the State has not introduced any evidence to support its position that no DVD of the field sobriety tests was created. Assuming a DVD was created, without a ***Machner*** hearing we cannot determine whether counsel's decision that playing the DVD at trial would do more harm to Corbine's case than good was a

[6] Corbine was never asked at trial whether he told Dailey he was not the driver during the field sobriety tests. Corbine's postconviction motion alleges he told his attorney before trial that he made that statement during the tests. Assuming that allegation is true, counsel's failure to elicit Corbine's testimony that he told Dailey he was not the driver during the field sobriety tests is potentially another instance of deficient performance.

reasonable strategic choice. A ***Machner*** hearing is also necessary for counsel to explain whether he took any action after police informed him they could not locate the DVD and, if not, why he failed to do so. With respect to prejudice, Corbine's motion establishes a reasonable probability that, had the DVD been played for the jury, the result of the trial would have been different. We therefore reverse that portion of the circuit court's order denying Corbine's claim that his attorney was ineffective by failing to obtain and review the DVD. We remand for the circuit court to conduct a ***Machner*** hearing on that claim.

II. Failure to argue the PAC count should have been charged as a fourth offense

¶31 Corbine next contends his trial attorney was ineffective by failing to argue that the PAC count should have been charged as a fourth offense. We agree with the State that the circuit court properly denied this claim without a ***Machner*** hearing. The record conclusively shows Corbine is not entitled to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶32 "Wisconsin has a progressive penalty system for [PAC offenses] in which prior convictions are used to determine the appropriate penalties." ***State v. Garcia***, 2013 WI 15, ¶4 n.6, 345 Wis. 2d 488, 826 N.W.2d 87. "The penalty structure for these convictions changes depending on the number of prior similar convictions the driver has." ***Id.***; *see also* WIS. STAT. § 346.65(2). WISCONSIN STAT. § 343.307 lists the types of prior convictions that can be used to determine the applicable penalty for a PAC conviction. ***Garcia***, 345 Wis. 2d 488, ¶4 n.6. The statute directs a court to count, among other things: (1) OWI convictions; and (2) revocations for improperly refusing to submit to chemical testing. WIS. STAT. § 343.307(1)(a), (f).

¶33 Corbine's certified driving record, which was introduced into evidence at trial, listed three OWI convictions—dated April 20, 2000, September 18, 2000, and July 21, 2003—and a revocation for improper refusal to submit to chemical testing—dated October 26, 2004. Thus, the certified driving record established that Corbine had four prior convictions for purposes of WIS. STAT. § 343.307. As a result, the PAC count was properly charged as a fifth offense.

¶34 On appeal, Corbine contends his license was not actually revoked on October 26, 2004, because "the [c]ourt dismissed the new citation[.]" He therefore argues his attorney should have asserted that the October 26, 2004 revocation did not qualify as a prior conviction under WIS. STAT. § 343.307. However, any argument to that effect would have been meritless. A certified driving record is sufficient to establish the fact of a prior conviction at trial. *See* ***State v. Spaeth***, 206 Wis. 2d 135, 153, 556 N.W.2d 728 (1996). Corbine has not presented any evidence to contradict his certified driving record. Moreover, Corbine stipulated at trial that he had four prior convictions. Thus, any attempt to argue that the PAC count should have been charged as a fourth offense would have failed. An attorney does not perform deficiently by failing to raise a meritless argument. *See* ***State v. Tolliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).[7]

[7] Corbine filed a motion to stay this appeal pending further action in the circuit court to confirm that a charge of fourth-offense OWI was amended to a citation for inattentive driving with no resulting revocation. Corbine attached a letter from the district attorney to his motion confirming a settlement offer to that effect. Corbine confuses the amendment of his OWI fourth citation with a separate revocation for improperly refusing to submit to chemical testing. The latter offense was properly counted to establish that Corbine had four prior convictions for purposes of WIS. STAT. § 343.307.

By the Court.—Judgment affirmed; order affirmed in part; reversed in part, and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.