COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0931-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRY GRIFFITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

SNYDER, P.J. Terry Griffith appeals from a judgment of conviction for obstructing an officer contrary to § 946.41(1), STATS., possession of tetrahydrocannabinal (THC) contrary to § 961.41(3g)(e), escape contrary to § 946.42(3)(a), STATS., and from an order denying postconviction relief. Griffith contends that his trial counsel was ineffective in failing to challenge the officer's

lawful authority to ask him identification questions during a traffic stop in which he was a passenger in the backseat of a vehicle. Griffith responded to the officer's questions, and when the officer detected discrepancies in his responses, Griffith was arrested for obstructing, removed from the vehicle and searched. He then fled the scene. We affirm the conviction because Griffith has failed to persuade us that he would have prevailed on a motion challenging the lawful authority of an officer to question a passenger in a vehicle lawfully stopped for a traffic violation and because the law concerning his arrest for obstructing an officer under these circumstances is unsettled in Wisconsin.

The relevant facts are undisputed. On November 19, 1996, City of Racine Detective William Warmington observed a vehicle owned by Tyrone Malone being operated on a city street. Warmington knew that Malone did not have a valid driver's license and instructed his partner, Detective Bruce Larrabee, to follow the vehicle. Warmington radioed for a marked squad car, but before it responded the vehicle pulled into a residential parking lot and stopped. Larrabee pulled behind the vehicle in a manner preventing it from leaving. Malone exited the vehicle's front passenger door and Warmington ordered that he get back into the vehicle. The driver of the vehicle, Damien Robinson, also known to Warmington, admitted when asked that he did not have a valid driver's license. During these events, Griffith was in the left rear seat of the vehicle.

Warmington thought that he recognized Griffith but could not recall his name. Warmington then asked Griffith several identification questions. When asked his name, Griffith replied that his last name was "Stevenson." When asked to spell his last name, Griffith responded, "S-t-e-v-e-n." Griffith then said that his first name was "Rick." When Warmington asked for his date of birth, Griffith answered, "1-19-73." When asked his age, Griffith responded, "Twenty-two."

Because Griffith did not spell "Stevenson" correctly and would have been twenty-three rather than twenty-two years old based upon the date of birth he provided, Griffith was arrested for obstructing an officer, removed from the vehicle, handcuffed and searched.

During the search, Detective Richard Geller removed a crumpled facial tissue from Griffith's right jacket pocket containing a green vegetable substance that Geller suspected was marijuana. When Geller asked Griffith, "What do we have here?" Griffith fled with Geller's handcuffs. Robinson and Malone told the officers that Griffith's nickname was "Smack" but provided no other name. On December 5, 1996, Griffith was taken into custody as the person who had fled from Geller. On June 11, 1997, a jury convicted Griffith of obstructing an officer, possession of a controlled substance and escape from custody.[1]

Griffith claims that his trial counsel was ineffective in failing to recognize that the police had no lawful authority to ask him identification questions as the vehicle's backseat occupant. We view Griffith's ineffective counsel claim in two parts: first, was trial counsel ineffective in not challenging Warmington's lawful authority to ask Griffith identification questions; and, second, was trial counsel ineffective for not challenging Warmington's lawful authority to arrest Griffith for obstructing an officer after Griffith responded to the questions.

There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient and a

[1] Griffith was acquitted of theft of the handcuffs with which he fled.

demonstration that such deficient performance prejudiced the defendant. *See* ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997). The defendant has the burden to prove both components. *See* ***id.*** An attorney's performance is not deficient unless it is shown that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992) (quoting ***Strickland v. Washington***, 466 U.S. 668, 690 (1984)). We thus assess whether such performance was reasonable under the circumstances of the particular case. *See* ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992). Deficient performance is limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue. *See* ***State v. McMahon***, 186 Wis.2d 68, 85, 519 N.W.2d 621, 628 (Ct. App. 1994).

We will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. *See* ***id.*** Griffith has the burden to show a reasonable probability that but for counsel's failure to challenge the legality of his arrest for obstructing an officer the result of the proceeding would have been different. *See* ***State v. Johnson***, 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990).

We first address Griffith's threshold contention that Warmington lacked lawful authority to ask him identification questions during the traffic stop. "Lawful authority" goes to whether Warmington's actions were "conducted in accordance with the law." ***State v. Barrett***, 96 Wis.2d 174, 181, 291 N.W.2d 498,

501 (1980). While mere police questioning does not constitute a Fourth Amendment seizure, *see* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991), the temporary detention of the occupants of a vehicle during a traffic stop constitutes a seizure of those occupants within the meaning of the Fourth Amendment, *see* ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). Griffith concedes that the stop of the vehicle and his seizure as an occupant of the vehicle were conducted in accordance with the law because Warmington had probable cause to stop and briefly detain the vehicle and its occupants for a traffic violation.

Griffith argues, however, that ***Terry v. Ohio***, 392 U.S. 1, 29 (1968), requires that questioning of seized vehicle occupants must be "reasonably related in scope to the justification" for the stop. He contends that he was questioned after Robinson had admitted to the traffic violation, that his identity had no reasonable relationship to the traffic violation, and that during the stop Warmington had no reason to believe that Griffith "[was] committing, [was] about to commit or ha[d] committed a crime." *See* § 968.24, STATS.[2] Therefore, Griffith reasons that Warmington's questions violated the protections intended by ***Terry***. We disagree.

Terry specifically declined to address "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." ***Terry***, 392 U.S. at 19 n.16. Justice Byron White, in a concurring opinion, made these further observations on the matter of interrogation during a lawful investigative stop:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person

[2] The rule of ***Terry v. Ohio***, 392 U.S. 1, 29 (1968), is codified in §§ 968.24 and 968.25, STATS.

> approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances ... it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Id. at 34 (White, J., concurring). Because ***Terry*** does not specifically address or support Griffith's claim that Warmington acted in violation of Griffith's Fourth Amendment rights by asking him identification questions as a lawfully seized vehicle occupant, we conclude that ***Terry*** does not support Griffith's ineffective assistance of counsel claim.[3]

Griffith also relies on ***Brown v. Texas***, 443 U.S. 47 (1979), to support his argument that trial counsel was deficient in not challenging Warmington's identification questions. ***Brown*** is easily distinguished. Brown was walking in an alley when confronted by a police officer rather than being lawfully seized as a vehicle occupant during a traffic stop. *See* ***id.*** at 49. Under Wisconsin law, Brown could not have been prosecuted for obstructing an officer based upon his refusal to provide the requested identification information. *See* ***State v. Hamilton***, 120 Wis.2d 532, 543, 356 N.W.2d 169, 175 (1984). Griffith, however, chose to answer Warmington's questions in a false and misleading manner. In addition, the ***Brown*** Court expressly noted that it "need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements." ***Brown***, 443 U.S. at 53 n.3. ***Brown*** fails to support Griffith's

[3] We also note that while Griffith's appellate argument is that Warmington did not have lawful authority to ask him questions as an occupant of a lawfully stopped vehicle, his primary defense at trial was mistaken identity.

contention that his counsel was deficient in failing to challenge Warmington's lack of lawful authority to ask for his identification.[4]

At Griffith's ***Machner*** hearing,[5] his trial counsel testified that the issue of Warmington's lawful authority to question Griffith was not "a meritorious issue to bring." Counsel explained that the officers had a reasonable suspicion to stop the vehicle, and once stopped, the officers had "enough lawful authority to ask the people in the vehicle, based on the circumstances, their identity." The trial court held that a challenge would be without merit and that counsel's representation was not deficient. We agree. Counsel cannot be faulted for not bringing a motion that would have failed. *See* ***State v. Simpson*****,** 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

Griffith also contends that because an obstructing an officer charge requires that the officer acted with lawful authority,[6] his defense counsel's failure

[4] Griffith also cites to a Georgia case where a vehicle passenger provided officers with false identification information during a traffic stop, was arrested for obstructing an officer and the conviction was overturned. *See* ***Holt v. State***, 487 S.E.2d 629 (Ga. Ct. App. 1997). While ***Holt*** may be supportive of Griffith's arguments, it is not persuasive authority here. In addition to lacking precedential value in Wisconsin, the ***Holt*** decision appears to ignore a lawful traffic stop (broken windshield) and holds that furtive, nervous movements by a passenger do not alone provide a particularized reason for detaining an individual. *See* ***id.*** at 632. We agree with the State that the ***Holt*** decision is concerned with differential enforcement of the law based on race rather than whether an officer can reasonably ask for identification from a person who is lawfully seized during a traffic stop.

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

[6] The elements of obstructing an officer are set forth in ***State v. Caldwell***, 154 Wis.2d 683, 689, 454 N.W.2d 13, 16 (Ct. App. 1990): (1) the defendant obstructed an officer; (2) the officer was doing an act in his or her official capacity and with lawful authority; and (3) the defendant obstructed the officer knowingly, that is, the defendant knew or believed that he or she was obstructing the officer while the officer was acting in his or her official capacity and with lawful authority. Section 946.41(2)(a), STATS., unambiguously states that "obstruction" is the knowing recital of false information to an officer with the intent to mislead him or her in the performance of his or her duty.

to challenge Warmington's questions denied Griffith effective representation. Whether Griffith violated § 946.41(1), STATS.,[7] by falsely answering Warmington's identification questions has not been settled in Wisconsin. In ***Hamilton***, our supreme court held that a person cannot be convicted of obstructing an officer if the person refuses to answer an officer's identification questions during an investigation. However, the ***Hamilton*** court expressly noted that the "issue *not* presented ... is whether the officer was authorized to ask the defendant to furnish identifying information." ***Hamilton***, 120 Wis.2d at 536, 356 N.W.2d at 171. The court limited its holding to whether Hamilton's refusal to answer identification questions upon the officer's request served to "hinder, delay, impede, frustrate or prevent" the officer from performing his or her duties. ***Id.*** at 537, 356 N.W.2d at 172 (quoted source omitted).

Unlike the defendant in ***Hamilton***, Griffith was arrested for obstructing because he provided false answers to Warmington's request to answer identification questions. We are not aware of controlling Wisconsin precedent resolving the issue of whether false identification answers during a lawful stop and seizure would obstruct an officer by serving to "hinder, delay, impede, frustrate or prevent" the officer from the exercise of his or her duties and Griffith directs us to none. For ineffective assistance of counsel purposes, "[c]ounsel is not required to object and argue a point of law that is unsettled." ***McMahon***, 186 Wis.2d at 84, 519 N.W.2d at 628.

[7] Section 946.61, STATS., provides that a person who "knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor."

In sum, we conclude that Griffith has failed to meet his burden of showing that his trial counsel was deficient in not challenging Warmington's lawful authority to ask identification questions of a lawfully seized occupant of a vehicle during a constitutionally valid traffic stop. We further conclude that trial counsel was not deficient in failing to challenge Griffith's arrest for obstructing an officer where the law in Wisconsin is unsettled. Because we conclude that Griffith's trial counsel was not deficient, we need not address the issue of prejudice.

By the Court.—Judgment and order affirmed.

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