COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1171-CR **Cir. Ct. No. 2013CF230**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. BONCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Michael Boncher appeals a judgment convicting him of a fifth offense of operating a motor vehicle while under the influence of an intoxicant, and an order denying his postconviction motion. He challenges the denial of a suppression motion and alternatively contends that counsel provided

ineffective assistance in failing to present additional evidence and arguments at the suppression hearing. For the reasons discussed below, we reject Boncher's claims and affirm the conviction.

BACKGROUND

¶2 A deputy from the Brown County Sherriff's Department was on patrol in an industrial district at about 2:00 a.m. when he observed Boncher's vehicle abort a right turn about a block ahead of the deputy that would have placed Boncher directly in front of the deputy's marked squad car, and instead continue through the intersection onto a dead end street. The officer turned to follow Boncher down the dead end. Immediately thereafter, Boncher pulled into the parking lot of a closed business, waited for the squad car to pass, then exited the lot going in the opposite direction. Because the deputy saw no apparent reason for Boncher to be in the nonresidential area in the middle of the night, and because Boncher's actions appeared to the deputy to be evasive in nature, the deputy initiated a traffic stop, during which the deputy determined that Boncher was intoxicated.

¶3 Boncher moved to suppress the evidence of his intoxication on the grounds that the deputy lacked reasonable suspicion for the stop. After the circuit court denied the motion, Boncher entered a no-contest plea. Boncher then filed a postconviction motion alleging that trial counsel should have presented a video to show that it would have been difficult for Boncher to have identified the deputy's vehicle as a squad car, and should have cited ***State v. Fields***, 2000 WI App 218, 239 Wis. 2d 38, 619 N.W.2d 279, in support of his argument regarding reasonable suspicion. The circuit court denied the postconviction motion and this appeal followed.

STANDARD OF REVIEW

¶4 When we review a suppression motion, we will defer to the circuit court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996); WIS. STAT. § 805.17(2) (2013-14)[1]; *see also* WIS. STAT. § 971.31(1) (authorizing review of suppression determinations notwithstanding subsequent plea). We will independently determine, however, whether the facts establish that a particular search or seizure violated constitutional standards. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶5 Whether counsel provided ineffective assistance presents a mixed question of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). The circuit court's findings of fact regarding counsel's conduct will be upheld unless they are clearly erroneous, but whether counsel's conduct satisfied constitutional standards is a legal determination that this court decides *de novo*. WIS. STAT. § 805.17(2); ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

DISCUSSION

Suppression Ruling

¶6 According to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action would be appropriate. ***Id.*** at 21-22. "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989).

¶7 Evasive behavior—that is, conduct suggesting that an individual is attempting to avoid police contact—can give rise to a reasonable suspicion of criminal activity, and therefore justify an investigatory stop in and of itself. ***State v. Anderson***, 155 Wis. 2d 77, 88, 454 N.W.2d 763 (1990). The police are not required to rule out possible innocent explanations for evasive behavior or other suspicious conduct before initiating an investigatory stop; rather, resolution of any ambiguity about whether the observed conduct is innocent or linked to criminal activity is the very purpose of the detention. ***Id.*** at 84.

¶8 Boncher relies upon ***State v. Fields***, to support his argument that the evidence here was insufficient to provide reasonable suspicion of any criminal activity. In ***Fields***, this court determined that an officer's belief that a driver's extended pause at a stop sign may have been a prelude to evasive action—that is, that the driver was waiting to see which way the squad car would go so that he could go in the opposite direction—failed to provide an objectively reasonable basis to infer that criminal activity was afoot. We differentiated ***Fields*** from ***Anderson***—where reasonable suspicion was found after a driver turned into an adjacent alley after seeing a squad car and then sped away on another street—on two grounds. First, unlike the driver in ***Anderson***, the driver in ***Fields*** had not actually taken any apparently evasive action before being stopped. ***Fields***, 239 Wis. 2d 38, ¶14. Second, the incident in ***Fields*** took place in "the middle of farm

country around midnight" without any testimony regarding lighting conditions. ***Id.***, ¶15.

¶9 Boncher contends that it was not reasonable to conclude that his actions were evasive in nature because it was not plausible that he could have known an officer was observing him from a block away when he first aborted a turn. He notes that, as in ***Fields***, the incident here occurred in the middle of the night and there was no testimony regarding street lighting. Boncher then argues that, without the squad car's overhead lights activated, it would be reasonable to infer that all Boncher could see from the intersection were the headlights of an approaching car. Additionally, Boncher points out that the deputy testified that he could not see what direction Boncher's vehicle was facing as the squad car passed the parking lot where Boncher turned around.

¶10 We conclude that this case is more analogous to ***Anderson*** than ***Fields*** for several reasons. To begin with, the incident here occurred in an industrial district rather than on a country road as in ***Fields***. Therefore, different inferences about street lighting could be made. Next, unlike ***Fields***, Boncher made two overt moves that could be construed as evasive when he first aborted a turn that would have placed him in front of a squad car, then turned into a parking lot and pulled out going in the opposite direction from the squad car. Just as in ***Anderson***, it was reasonable for the deputy to consider that those apparently evasive actions were taken because Boncher had recognized the deputy's marked vehicle as a squad car and was attempting to avoid police contact, even if some alternate, more innocent inference could also be made that Boncher was simply lost or confused. Finally, the fact that there was no ostensible reason for anyone to be driving onto a dead end street in an industrial district or into the parking lot of a

closed business in the middle of the night provided further context for the deputy's evaluation of Boncher's conduct as evasive.

Assistance of Counsel

¶11 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a "defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms" and show that his or her attorney made errors so serious that he or she was essentially not functioning as counsel guaranteed to the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** "We need not address both components of the test if the defendant fails to make a sufficient showing on one of them." ***Id.***

¶12 Boncher argues that trial counsel provided ineffective assistance at the suppression hearing by failing to cite ***Fields*** and failing to present additional evidence, such as a video prepared for the postconviction hearing, to establish that it would have been very difficult given the lighting conditions that were actually present for Boncher to have recognized that the vehicle approaching the intersection as he aborted his turn was a squad car. We agree with the circuit court, however, that additional information that might have shed some light on what Boncher actually could see from the intersection would not have changed the deputy's reasonable interpretation of the conduct he witnessed as having been apparently evasive in nature. Since we have already explained why ***Fields*** is

distinguishable and the additional evidence would not alter our analysis, we cannot conclude that counsel provided ineffective assistance by failing to cite it.

By the Court.—Judgment and order affirmed.

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