COURT OF APPEALS DECISION DATED AND FILED

June 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP2336-CR

Cir. Ct. No. 2010CF1365

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY G. GLEISS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER and DONALD J. HASSIN, JR., Judges. *Affirmed*.

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

¶1 PER CURIAM. Jeffrey Gleiss appeals an order of the circuit court denying his postconviction motion. On appeal, Gleiss seeks an order vacating the judgment of conviction and granting a new trial based on a violation of the

principles set forth in ***Brady v. Maryland***, 373 U.S. 83 (1963), or on the ground of newly discovered evidence. We affirm for the following reasons.

¶2 Jeffrey Gleiss was charged with operating while intoxicated as a 6th offense, with a minor in the vehicle, and resisting an officer. The complaint alleged that, after Gleiss was arrested at the scene of a rollover crash, an officer transported Gleiss to a hospital, where a sample of his blood was drawn. A report from the State Crime Laboratory, provided to the defense, indicated that the concentration of alcohol in his blood was 0.4 grams per 100 milliliters.

¶3 Gleiss filed a motion to exclude the blood evidence on the grounds that it "was improperly and illegally obtained." At the outset of the hearing on this motion, defense counsel informed the court that the defense was challenging the State's ability to demonstrate that police had "[r]easonable suspicion to request the field sobriety tests," which ordinarily would suggest an argument that the State could not demonstrate that the police had reasonable suspicion that Gleiss was operating while intoxicated, so as to justify a lawful request to administer field sobriety tests. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). However, as explained below, the parties and the court ended up treating it as a motion seeking to suppress the blood draw based on an argument that the police lacked probable cause to arrest for operating while intoxicated.

¶4 At an April 2011 hearing on this motion, two officers gave testimony that was generally credited by the circuit court.

¶5 The first officer testified to facts that included the following. While driving his squad car he noticed a vehicle that had apparently been involved in a rollover accident and was blocking traffic. Given winter conditions, the officer's

first suspicion was that the operator of the vehicle had spun out in slick conditions. Gleiss was on the scene with a child. Gleiss acknowledged to the officer that he had been driving the vehicle and that the child had been a passenger in the vehicle. The officer received appropriate responses to his questions from Gleiss and observed that Gleiss did not appear disoriented. Gleiss's speech was not slurred and the officer did not detect the smell of alcohol while speaking with Gleiss. The first officer believed that he lacked jurisdiction to investigate the incident, and so he directed traffic until a second officer, who had jurisdiction, arrived on the scene.

¶6 At the same hearing, the second officer to arrive on the scene testified, consistent with the testimony of the first officer, that the second officer spoke briefly with the first officer on the scene and then made contact with Gleiss at about 10:30 a.m. The second officer noted the following regarding the scene: the tracks of Gleiss's vehicle had left the roadway "quite a distance south," proceeded into a ditch, and continued along a ditch line, apparently knocking over a hazard sign post, then continued over a driveway. Vehicle parts were strewn along the ditch line. It appeared that the vehicle had rolled over once. The second officer testified that there had been snow earlier in the day, but he did not think that weather had played any role in the crash.

¶7 The second officer further testified that Gleiss told him that the young person in the squad car had been born in 1985, which would have made the child much older than the child appeared to the second officer. Further, while talking about driving northbound, Gleiss gestured south, not north. When the second officer directed Gleiss's attention to what appeared to be obviously fresh tire marks from Gleiss's vehicle in the snow, Gleiss questioned how the second

officer could determine that the tracks were from his vehicle and sought to argue the point.

¶8 While the second officer spoke with Gleiss, Gleiss was swaying forward and backward while his feet remained stationary, and this swaying was not attributable to wind. The second officer detected a strong smell of alcohol coming from Gleiss and observed that Gleiss's eyes were bloodshot and glassy. When asked twice, Gleiss insisted that he had not been drinking. Gleiss did not have "any extreme perceptible slur" when he spoke, although "he seemed to take some time processing the questions" posed to him.

¶9 The second officer further testified that he began to attempt to conduct field sobriety tests on Gleiss at the roadside, but did not end up conducting those tests, and then placed Gleiss under arrest on suspicion of operating while intoxicated. Gleiss did not resist having handcuffs placed on his wrists, but then there was a sudden change in Gleiss's demeanor, and he became combative.

¶10 After the close of evidence, the State argued that it had presented sufficient evidence to establish that police had probable cause to arrest Gleiss for operating while intoxicated. The defense responded to the effect that there was not probable cause to arrest for operating while intoxicated because the information available to police established only that Gleiss had been in a crash, appeared disoriented probably because he had been in a rollover crash, and had been drinking but to an unknown degree.

¶11 The circuit court[1] construed the defense motion to be that police lacked probable cause to arrest Gleiss for operating while intoxicated and that any evidence obtained as a result of the arrest should be suppressed. The court credited the testimony of the officers, significantly the more extensive testimony of the second officer, and concluded based on that testimony that the State had established that "the arrest and then the subsequent evidence that was obtained thereon was lawfully obtained."

¶12 Gleiss changed legal counsel, and his new attorney filed a motion for an order suppressing "all evidence derived from the unlawful seizure of Mr. Gleiss'[s] blood," "because the officers lacked reasonable suspicion that Mr. Gleiss had been operating a motor vehicle while under the influence of an intoxicant, and … the consent to draw blood was involuntary." However, as had occurred at the prior hearing, when the court held a second hearing in May 2012, new defense counsel stated that the thrust of his motion was that officers lacked probable cause to arrest Gleiss for operating while intoxicated.

¶13 At the May 2012 hearing, the same two officers gave much the same testimony as they had at the April 2011 hearing. New defense counsel made similar arguments to those made by the first defense counsel, and the court made similar findings and reached similar conclusions to those the court made at the first hearing, denying the second suppression motion.

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[1] The Hon. James R. Kieffer presided at this hearing and over other proceedings in this case until July 2013, when the case was transferred to the Hon. Donald J. Hassin, Jr.

¶14 After Gleiss was convicted at a jury trial, he filed the postconviction motion at issue in this appeal. He sought an order vacating the judgment of conviction and suppressing the blood evidence as unconstitutionally seized, or in the alterative for an order vacating the judgment of conviction and granting a new trial based on a violation of the principles set forth in ***Brady***, 373 U.S. 83 (1963), or as newly discovered evidence, on the grounds that "the State failed to disclose evidence that the arresting officer [the second officer], whose credibility was central at the suppression hearings and trial, was suspended for 16 days while this case was proceeding for 'incompetence' and 'neglect of duty.'"

¶15 The new evidence submitted by the defense was purportedly summarized in a copy of a four-page memo dated October 1, 2011, to the second officer from his department's chief, followed up by a document dated November 5, 2011, that is an apparent note-to-the-file memo by the chief, concluding that the second officer had violated department property inventory procedures and rules and regulations due to "problems" with the second officer's reports. The discipline at issue apparently resulted in a 16-day suspension for the second officer. The defense submission to the court also included 189 pages of police reports and memoranda that the chief alleged were related to "deficient" performance by the second officer. However, the memo does not explain the nature of the deficiencies, it is not readily evident from skimming the 189 pages of reports what the specific deficiencies allegedly were, and Gleiss apparently made no attempt before the circuit court and makes no attempt now to explain the nature of specific deficiencies. Gleiss did not provide the court with a summary of or any commentary on the 189 pages of reports.

¶16 At a hearing on this motion in September 2013, the circuit court observed that the conduct of the second officer subject to discipline appeared from

the submitted materials to have involved allegations only that the second officer was "kind of sloppy" in police work and did not involve allegations of "improper arrests of persons, [or] improperly assist[ing] in … improper prosecution of folks." Based on this observation, the court asked defense counsel what connection the defense alleged between the conduct of the second officer leading to discipline and material issues in this case at the suppression hearing or trial. Defense counsel did not disagree with the court's suggestion that the discipline at issue appeared to involve unspecified allegations of "sloppiness" by the second officer, and acknowledged that "[t]here is no specific tie" between the second officer's conduct subject to discipline and the conduct of the second officer in interacting with Gleiss, except that "sloppiness was in fact an issue in this case." In further discussion with the court, defense counsel asserted that, by "sloppiness," counsel meant that the disciplinary records showed that the second officer had "credibility" problems and was involved in the "fabrication of testimony." However, counsel failed to support these conclusory statements by pointing to any allegations bearing on the officer's credibility or indicating that the officer gave false testimony. Defense counsel appeared to attempt to suggest that the defense could have used the disciplinary records to impeach the second officer's testimony at the suppression hearings and at trial on the topics of how the blood sample obtained from Gleiss was handled and the second officer's observations of potential indicia of Gleiss's intoxication at the scene of the crash, but failed to explain what this impeachment would involve.

¶17 The court denied the postconviction motion, after concluding that, "without something in the records of [the second officer] to suggest … misconduct, fabrication of evidence, improper arrests, improper warnings, something requisite and … at least tangent[i]al to this particular fact

circumstance," the defense had failed to present evidence that was material to issues at the suppression hearing or at the trial that could merit the relief sought by Gleiss. The circuit court explained that the court found no connection between any alleged conduct underlying the discipline and "any proofs in the case regarding the elements of the offense." Gleiss appeals.

¶18 It is not necessary for us to summarize the law related to ***Brady*** or to motions for a new trial based on newly discovered evidence. This is because we reject Gleiss's appeal for the simple reason that his arguments explicitly depend on the premise that the disciplinary records represent "[e]vidence impeaching [the second officer's] credibility," but he fails to explain how the records submitted to the circuit court from the police department could bear on the second officer's credibility. That is, without addressing any other aspect of this appeal, we reject it based on Gleiss's failure to have presented the circuit court with potential ***Brady*** evidence or new evidence bearing on what Gleiss told the circuit court, and repeats now, is the entire point of his motion: that the second officer's "credibility was the lynchpin to the defense," and that the "credibility of [the second officer's] on-the-scene observations was the crux of the suppression hearings."

¶19 Before the circuit court and again on appeal, Gleiss fails to make any connection between, on the one hand, "sloppiness" and, on the other hand, "credibility" problems or "fabrication of testimony." We do not mean to suggest that we think that certain forms of police conduct that could be characterized as "sloppy" might not raise questions bearing on an officer's credibility. The problem here is that Gleiss gave the circuit court no basis to conclude that any such conduct was reflected in the materials submitted to the court. Gleiss failed to direct the circuit court, as he fails to direct us now, to any aspect of the materials

from the police chief, or to any aspect of the stack of police reports, which would have any conceivable bearing on the issue of the credibility of the second officer.

¶20 In attempt to bolster his argument, Gleiss suggests that the disciplinary materials represent "a motive for the officer to cover up any shoddy police work in this case" by testifying falsely at the suppression hearings and trial. The motive would presumably involve a concern by the officer that if he had "told the truth" at the suppression hearings and trial, and admitted that Gleiss actually lacked indicia of intoxication on the scene, then the officer would have been in trouble with the chief for making an unjustified arrest. Again, however, Gleiss fails to point to anything in the disciplinary materials that involves an allegation that Gleiss had a history of testifying falsely, of making unjustified arrests, or of exaggerating indicia of intoxication on the part of motorists he encountered. Missing is any alleged nexus between the second officer's testimony at the suppression hearings or trial and the reason for disciplinary actions against him.

¶21 Gleiss may intend to make a broader argument. This broader argument would be that there is a reasonable inference that, if the officer had made an unjustified arrest of Gleiss, the officer would have been motivated to cover up that fact because the officer had already been disciplined (or was in jeopardy of discipline),[2] even if the prior discipline was for reasons unrelated to unjustified arrests and in itself did not suggest a lack of credibility. That is, under the broader argument, the existence of any prior discipline of the officer was material evidence

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[2] The parties dispute the significance of the timing of the second officer's knowledge of discipline or of potential discipline relative to testimony that the officer gave in connection with this case. However, our decision does not depend on any argument that the State makes in this regard and we do not discuss this topic further.

for the defense to use in cross-examination, no matter how unrelated the prior discipline might be to any topic of the testimony or to his credibility, because the new testimony would be a theoretical opportunity for the officer to cover up new conduct that might be subject to additional discipline.

¶22 If Gleiss intends to make this broader argument, we reject it for at least the reasons that it invites evidentiary rulings premised on multiple levels of speculation and is unsupported by any legal authority. The only Wisconsin authority Gleiss points to for support comes in an entirely different context: the State failed to disclose to the defense the probation status of a testifying witness, which was a status that would necessarily have placed the witness in fear of probation revocation by state actors at the time he testified. *See* ***State v. White***, 2004 WI App 78, ¶25, 271 Wis. 2d 742, 680 N.W.2d 362.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).