

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0406-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD W. MAU, II,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ronald W. Mau II appeals from a judgment of conviction entered against him and an order denying his motions for postconviction relief. He argues on appeal that he was denied effective assistance of trial counsel because his counsel failed to call an expert witness to contest the State's evidence on the reliability of a retrograde blood alcohol analysis and

because trial counsel did not move to suppress the results of a blood test. Because we conclude that Mau's trial counsel was not ineffective, we affirm.

¶2 Mau was convicted of two counts of injury by intoxicated use of a motor vehicle. The accident underlying the convictions occurred in April 1997 at about 9:00 a.m. The weather and road conditions were good. Mau's car crossed over the center lane of a highway and was completely in the oncoming lane where it collided with another car. Prior to the collision, the driver of the other car had pulled her car partially off the highway in an attempt to avoid the collision. Both drivers and a child who was a passenger in the other car were all seriously injured. Neither Mau nor the other driver was conscious when police arrived on the scene.

¶3 Mau was transported by Flight for Life from the scene of the accident to the hospital. Eight hours after the accident, the police had blood drawn from Mau while he was unconscious to test his blood alcohol content. Mau eventually was tried in a bench trial. The State offered expert evidence that Mau's blood alcohol content was over the legal limit at the time of the accident. The expert used a retrograde blood alcohol analysis to determine Mau's blood alcohol content at the time of the accident. This analysis is a mathematical formula in which the number of hours which have passed are multiplied by a standard elimination rate—the rate at which alcohol is eliminated from the body—to determine what the blood alcohol content was at some point in the past.¹

¶4 The court found Mau guilty. Mau then filed motions for postconviction relief which included claims that his trial counsel had been

¹ The formula can be more complex, depending on the circumstances, but this is, in essence, the formula which was used in this case.

ineffective. The court denied the motions. Mau appeals from the judgment of conviction and the order denying his motions. On appeal, Mau asserts that his trial counsel was ineffective for two reasons: (1) for failing to call a defense expert to challenge the retrograde blood alcohol analysis; and (2) for failing to move to suppress the results of the retrograde blood analysis because the police did not have probable cause to order the blood drawn.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. See *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 We review the denial of an ineffective assistance claim as a mixed question of fact and law. See *Strickland*, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we independently review the two-pronged determination of trial counsel's performance as a question of law. See *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶7 There is a strong presumption that counsel rendered adequate assistance. See *Strickland*, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Id.* at 698. To

meet the prejudice test, the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 Mau claims that his counsel was ineffective for failing to offer expert testimony to challenge the retrograde blood analysis. At the hearing on Mau's postconviction motion, his trial counsel testified that he chose not to challenge the retrograde blood analysis, but rather to focus on the question of Mau's competency because he believed Mau to be incompetent. He believed that the blood analysis would be admitted. When asked whether he would have used an expert to say that the retrograde blood analysis was unreliable, he answered that he would have if he had been aware that such an expert was available.

¶9 Also at the postconviction hearing, Mau offered the testimony of an expert to challenge the State's expert on the use of this formula. Mau's expert stated that the retrograde blood alcohol analysis used in this case was unreliable because too much time had passed between the time of the accident and the time when the blood was drawn. She also expressed her opinion that the trauma Mau had suffered, as well as the surgical and medical procedures he had endured, all would have affected the elimination rate of alcohol from the body. On cross-examination, she also testified that using her own calculations, Mau's blood alcohol content was above the legal limit at the time of the accident. She did state, however, that she would not have offered such an opinion because the formula was not reliable under the circumstances in this case.

¶10 The State's expert also testified at the postconviction hearing. He stated that the research with which he was familiar found that trauma and surgical and medical procedures did not significantly affect the elimination rate. He

further stated that the reliability of the results of the formula were specific to the facts of each case.

¶11 The trial court rejected Mau's claim that counsel was ineffective for failing to offer an expert. The court first stated that even assuming it was deficient performance, Mau had not been prejudiced. The court found that the State's expert was more credible than Mau's expert, and that even Mau's expert had testified that his blood alcohol content was over the legal limit at the time of the accident. The court concluded that the result of the trial would not have been different if the defense had called an expert.

¶12 We agree with the trial court's conclusion. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). In this case, the trial court found that the State's expert was the more credible of the two. We see no reason to disturb that finding. Therefore, because the results of the trial would not have been different, we conclude that Mau was not prejudiced by his defense counsel's failure to call an expert witness.

¶13 Mau next contends that his counsel was ineffective for failing to move to suppress the blood tests because the police lacked probable cause to have the blood drawn. Mau asserts that the police did not have sufficient evidence at the time the blood was ordered drawn to conclude that alcohol had been involved in the accident. Mau's counsel testified at the postconviction hearing that he did not move to suppress the evidence because he believed that the police had probable cause. The trial court also rejected Mau's argument.

¶14 The evidence established that the weather and road conditions were good at the time of the accident, the accident occurred in daylight, there were no indications that Mau had attempted to stop his car prior to the collision, and Mau's car was completely in the wrong lane. It appeared as if the driver of the other car had attempted to avoid the collision by pulling off the road and the collision was head on. There was also no apparent indication that Mau's car had experienced a mechanical failure such as a flat tire. In short, there was no other obvious reason for the accident. Further, there was hearsay evidence that someone had seen a car like the one Mau was driving traveling in the wrong lane just a few minutes prior to the accident. These circumstances were sufficient to give the officers probable cause to believe that alcohol was involved in the accident.

¶15 Mau argues on appeal that *State v. Seibel*, 163 Wis. 2d 164, 181-83, 471 N.W.2d 226 (1991), requires that there be four indicia of drinking present before an officer may order blood drawn. He further argues that because the four indicia were not present in this case, the police did not have probable cause to order the blood drawn. We disagree.

¶16 The court in *Seibel* considered whether the police had a reasonable suspicion in that case to order blood drawn in a search incident to a lawful arrest. *See id.* at 179. The court considered four indicia which were present in that case to conclude that the police did have a reasonable suspicion. *See id.* at 181-83. The court did not establish a four-part test to be used in each and every case where blood is drawn. The court concluded that the indicia present in that case, taken together, gave the police reason to suspect that the defendant was impaired by alcohol. *See id.* at 183. The court also stated, "Moreover, we must give deference to the reasonable inferences drawn by the police officers at the accident scene in light of their experience." *Id.*

¶17 Considering all the factors which were known to the police at the time of the accident and giving deference to the reasonable inferences they drew in light of their experience, we conclude that the police had probable cause to believe that alcohol was involved in the accident and to order blood drawn from Mau. Because the police had probable cause to order blood drawn, Mau's counsel was not ineffective for failing to move to suppress the evidence. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments). Therefore, the judgment of conviction and the postconviction order are affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

