COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1983-CR **Cir. Ct. No. 2007CT1452**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN A. BROAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Stephen A. Broad appeals from a judgment of conviction for operating a motor vehicle while under the influence (OWI), third

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

offense, contrary to WIS. STAT. § 346.63(1)(a). Broad additionally appeals from an order denying his motion for postconviction relief. Broad raises three arguments: (1) the trial court erred in denying his motion to suppress evidence because the officer lacked probable cause for his arrest, (2) he is entitled to a new trial based on the trial court's failure to conduct a colloquy on the record regarding the waiver of his right to testify, and (3) he received ineffective assistance of trial counsel. Based on our review of the record, we reject each of Broad's arguments and affirm the judgment of conviction and order denying postconviction relief.

BACKGROUND

¶2 On September 20, 2007, Broad was charged with OWI and operating with a prohibited alcohol concentration (PAC), both as a third offense. The facts underlying the charge were testified to by Deputy Sheriff Mark Blicharz at a hearing on Broad's motion to suppress evidence based on lack of probable cause to arrest. On March 1, 2007, at approximately 2:00 a.m., Blicharz was dispatched to an area of County Highway 11 in Racine County. A caller had reported a vehicle off the road in a ditch on the right side of the road. Blicharz estimated that he arrived at the scene approximately five minutes later and observed a vehicle off in the ditch, approximately "50-feet plus from the actual roadway" with a person standing right outside the driver's side door with the door open. The vehicle matched the description provided by the caller. Blicharz described the road as curving in that area, "[s]o if somebody were actually to go straight in that curve, they would have ended up off the roadway as this vehicle did." Based on the tracks the vehicle left in the snow, it "went through a substantial high snowdrift" and then "sideswipe[d] a black and white marker pole," resulting in damage to both the pole and the vehicle.

¶3 Broad had gotten into his vehicle before Blicharz approached him. Blicharz noticed that the vehicle was running and that there were tracks in the snow consistent with tires spinning in an effort to get the vehicle "unstuck from the snow." Blicharz spoke with Broad and asked for his driver's license. At first, Broad was reluctant to provide it, and then fumbled in attempting to find it. Broad appeared ready to "give up looking" for it when Blicharz pointed it out and Broad gave it to him. When asked if he was the driver of the vehicle, Broad stated that he was. Blicharz detected the odor of intoxicants coming from inside the vehicle and noted that Broad's eyes were red and glassy in appearance. Blicharz asked Broad to step out of the vehicle for field sobriety testing and when Broad did so, he was unsteady on his feet and Blicharz again noted the odor of intoxicants "coming from him." Blicharz did not recall if he had asked Broad whether he had been drinking.

¶4 Blicharz conducted field sobriety testing on a paved roadway which was plowed and dry. Blicharz described Broad as "stumbling in the snow" on his way to the roadway. Blicharz first conducted the horizontal gaze nystagmus (HGN) test and noted two clues of intoxication. Blicharz also had Broad perform the walk-and-turn test and one-legged stand test and Broad did "very poorly." Finally, Blicharz administered a preliminary breath test (PBT) which indicated the presence of alcohol. Blicharz then placed Broad under arrest for OWI.

¶5 While Blicharz testified at the motion hearing that the vehicle was running and warm, and the keys were in the ignition, Blicharz acknowledged that he failed to note those facts in the police report. Blicharz also acknowledged that he had not seen the vehicle operating on a road and that the dispatch report also indicated that the vehicle was "off of the road." Blicharz also testified that Broad's Lake Street residence is "very close" to the field where the vehicle was

located. Broad's attorney argued that Blicharz lacked probable cause to believe that Broad had been operating the vehicle on a roadway. The trial court disagreed and denied Broad's motion.

¶6 The matter proceeded to a two-day jury trial at which Blicharz and three other witnesses testified, namely, Kyle Freeman, Jessica Aiken, and William Kohl. Freeman and Aiken, who had been in a vehicle following Broad's vehicle, testified as to their observation of Broad's vehicle leaving the roadway and entering the ditch. Kohl, a private investigator hired by the defense, offered testimony intended to impeach testimony from Freeman and Aiken. Broad, who did not testify, was found guilty on both counts.

¶7 Following sentencing for OWI, Broad filed a motion for postconviction relief. Broad argued that the trial court had failed to conduct a colloquy on the record as to the waiver of his constitutional right to testify and that he had received ineffective assistance of counsel. On June 29, 2009, the trial court held a postconviction motion/***Machner***[2] hearing at which both Broad and his trial counsel, Kathleen Quinn, testified. The trial court acknowledged that it had not conducted an on-the-record colloquy as to Broad's waiver of his right to testify, and therefore, examined the issue in light of the supreme court's decision in ***State v. Weed***, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485. Based on the court's decision in ***Weed***, the trial court permitted the State at the postconviction hearing to attempt to establish that Broad's waiver of his right was knowing and voluntary.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

¶8 After hearing testimony and evidence at the postconviction motion hearing, and considering written arguments, the trial court issued a written decision on July 10, 2009, in which it denied Broad's motion for a new trial. Broad appeals.

DISCUSSION

1. Probable Cause to Arrest

¶9 Broad first argues that Blicharz lacked probable cause to arrest him for OWI because he did not have any direct knowledge that Broad had operated his vehicle on a public roadway contrary to WIS. STAT. § 346.63(1)(a). Stated differently, Broad argues that "Blicharz did not have probable cause to arrest [him] because [Blicharz] did not know who was operating the vehicle when it entered the field." Broad does not challenge the validity of the initial stop or the probable cause to request a PBT.

¶10 Whether an officer had probable cause to arrest the defendant is a question of law, subject to our independent review. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). "Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Nieves***, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. "Probable cause to arrest does not require 'proof beyond a reasonable doubt or even that guilt is more likely than not.' It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the 'defendant probably committed [the offense].'" ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994) (citations omitted). In determining whether probable cause exists, we must look to the

totality of the circumstances. *See* ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986).

¶11 We conclude that the information available to Blicharz provided probable cause to arrest Broad for OWI. Blicharz was dispatched to respond to a vehicle off the road. When Blicharz arrived approximately five minutes later, he observed Broad in the driver's seat of the vehicle, which was warm and running. Broad admitted to being the driver of the vehicle and the tracks in the snow led from the public roadway to the location of Broad's vehicle in the field. Broad's eyes were glassy and he smelled of intoxicants. Additionally, Blicharz performed several field sobriety tests on Broad and observed further indicia of intoxication. Finally, Blicharz has eleven years of experience as a police officer and has investigated "a hundred if not more" cases of intoxicated driving. *See* ***State v. Wille***, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994) (an officer's investigative experience may be considered in determining whether facts known to officer established probable cause). These facts, taken together, support Blicharz's reasonable conclusion that Broad had probably operated a motor vehicle while intoxicated. *See*, *e.g.*, ***Kasian***, 207 Wis. 2d at 622 (probable cause to arrest existed when defendant was involved in one-car accident, officer observed strong odor of intoxicants on defendant, and defendant's speech was slurred).

¶12 Broad's contention that Blicharz lacked probable cause to arrest because Blicharz did not see him operating on a public highway is not convincing. Probable cause is a flexible, commonsense standard which requires only that the facts available to the officer would warrant a person of reasonable caution to believe that an offense likely was committed. ***Nieves***, 304 Wis. 2d 182, ¶14. It deals with probabilities, not certainties, and it does not require an officer to rule out innocent explanations before making an arrest. *See* ***id.*** (an officer is not

required to draw an inference of innocence merely because one existed). We conclude based on the totality of circumstances that Blicharz had the requisite probable cause to arrest Broad. We therefore uphold the trial court's order denying his pretrial motion to suppress evidence.

2. Waiver of Right to Testify

¶13 A defendant's constitutional right to testify at trial is a fundamental right, the waiver of which requires the trial court to conduct an on-the-record colloquy. ***Weed***, 263 Wis. 2d 434, ¶¶39, 43. The colloquy, conducted outside the presence of the jury, should consist of a basic inquiry to ensure that the defendant is aware of the right to testify, and that the defendant has discussed that right with his or her counsel. ***Id.***, ¶43. It is undisputed that the trial court failed to conduct such a colloquy in this case.

¶14 Broad contends that automatic reversal is the appropriate remedy for a violation of a defendant's right to testify and, therefore, he is entitled to a new trial based on the court's failure to conduct a colloquy. Broad also argues that, if a postconviction evidentiary hearing is deemed to be an appropriate remedy, then the State failed to prove by clear and convincing evidence that he knowingly, voluntarily, and intelligently waived his right to testify.

¶15 As to the appropriate remedy, we observe that during the pendency of this appeal, this court decided ***State v. Garcia***, 2010 WI App 26, No. 2009AP516. We determined that the proper procedural response to a trial court's failure to conduct the mandatory colloquy is to hold an evidentiary hearing to determine whether a defendant knowingly, voluntarily and intelligently waived the right to testify. ***Id.***, ¶4.

> When the circuit court neglects its duty to hold the appropriate colloquy, the State carries the burden to show that the defendant's waiver was knowing and voluntary and must do so by clear and convincing evidence. If the State carries the burden, the conviction will stand; however, if it does not, the defendant is entitled to a new trial.

Id., ¶9 (citations omitted). Consistent with ***Garcia***, we reject Broad's contention that an automatic reversal is the proper remedy for the trial court's failure to conduct a colloquy. We therefore turn to the record of the postconviction evidentiary hearing.

¶16 Whether Broad knowingly and voluntarily waived his right to testify presents a question of constitutional fact—a mixed question of fact and law that is reviewed using a two-step process. *See* ***id.***, ¶5. We will uphold the trial court's findings of historical fact unless they are clearly erroneous; however, we review de novo the trial court's determination of constitutional fact. ***Id.***

¶17 In its written decision following the postconviction motion hearing, the trial court set forth the following findings of fact relevant to Broad's waiver of his constitutional right to testify. First, it found that Attorney Quinn's testimony clearly and convincingly established her position that Broad knew and was aware of his right to testify at all times leading up to trial, and her testimony was corroborated by correspondence and emails from her to Broad. The court referenced Quinn's testimony that (1) "she and Broad discussed his right to testify at either the first or second meeting upon her being retained" and also discussed the same issue in the context of a similar case pending in Milwaukee county, (2) "the decision to testify or not to testify was always a decision left to Broad," and (3) "her direct recollection and her habit and practice was to discuss with defendants their right to testify," and that this subjects them to both direct and cross-examination.

¶18 The trial court's factual findings are amply supported by facts in the record and are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Quinn testified that Broad "seemed to understand perfectly that it was his decision" whether to testify. She testified:

> In fact, at one point … when he seemed committed to perhaps testifying which would be against my advice yet still his decision, I had offered to refund my fees at that point to let him go to another lawyer to see if another lawyer would be willing to agree with his strategy at trial.

According to Quinn, while Broad did not choose to retain other counsel, he did continue to indicate his wish to invoke his right to testify "throughout [her] representation of him." Quinn testified that she had "zero doubt" that Broad understood his right to testify.

¶19 The trial court clearly found less credible Broad's assertion that, while Quinn counseled or advised him not to testify, he was never advised he had an absolute right to testify in his defense. In addition to the testimony from Quinn, detracting from Broad's testimony was the length of time the case was pending which was consistent with Quinn's testimony that she had "on-going meetings and strategizing" with Broad, and his demeanor during the trial including his participation in the proceedings, and his assistance to Quinn regarding questions to ask during cross-examination.[3] Finally, Broad testified at the postconviction hearing that he had discussed his desire to testify with Quinn, who had advised against it; however, he believed he had "the final say." When asked whether

[3] While Broad argues that the participation noted by the trial court is not reflected in the trial record, we are not convinced that this undermines the court's observations. The same judge presided over both the trial and postconviction motion hearing. Surely the trial court would have observed Broad's interactions with counsel even though they may not be recorded in the transcript.

Quinn had informed him of his right to testify, Broad responded, "Yes. I believe it was probably when I hired her right on—early on."

¶20 Based on the facts deduced at the evidentiary hearing, we conclude that the State carried its burden of showing that Broad's waiver of his right to testify was knowing and voluntary. The colloquy mandated by ***Weed*** requires the court to ascertain that the defendant is aware of the right to testify and that the defendant had discussed that right with counsel. ***Weed***, 263 Wis. 2d 434, ¶43. Here, the trial court's findings of fact as to Quinn's discussions with Broad are not clearly erroneous and satisfy the colloquy requirements of ***Weed***.

3. Ineffective Assistance of Counsel

¶21 Broad contends that Quinn provided ineffective assistance of counsel because she failed to pursue the theory of the case that she introduced during opening statements, thereby prejudicing his defense. "To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Brunette***, 220 Wis. 2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, the defendant must show that "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.***, ¶20 (citation omitted).

¶22 A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***Id.***, ¶21. We uphold the trial court's findings of fact

unless they are clearly erroneous. ***Id.*** Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." ***Id.*** (citation omitted). Whether counsel's performance is constitutionally ineffective is a question of law we review de novo. ***Id.*** Broad has not contested any material findings of fact. Thus, we turn to whether his counsel was constitutionally ineffective.

¶23 Quinn's strategy at trial was to create reasonable doubt as to whether Broad actually drove the vehicle on a public roadway. Quinn planned to impeach the State's witnesses who claimed to have seen Broad's vehicle leave the roadway and enter the field at approximately 2:00 a.m. The witnesses' accounts of their observations had changed during the pendency of the case with their original statement being that they had first seen the vehicle in the field. Quinn planned to "call into question and impeach [their] claim because, in fact, they didn't know when the car went into the ditch. They didn't know who drove it into the ditch." During opening statements, Quinn informed the jury that "this is clearly a case where Mr. Broad brought a beer from his house where he had been drinking and tried to get his car unstuck or closer to a road on a snowy night where it had gone into the ditch."

¶24 Broad's postconviction motion sets forth the defense strategy he believes should have been pursued at trial. Broad argues that Quinn was ineffective for failing to call him as a trial witness and failing to present or subpoena Melvin Serkowski as a witness. According to Broad's postconviction motion, Serkowski would have testified that (1) he met Broad at the Beachview Lounge on Highway 11 at about 10:00 p.m. and they left together at midnight, (2) he observed Broad's car traveling down Highway 11 behind him, and (3) Broad was not intoxicated when he left the Beachview Lounge. Broad argued that Serkowski's testimony would have also been admissible as a prior consistent

statement that Broad told him the day after the incident that he had gone into the ditch, went home, had a few drinks, and then returned to the car. However, at the ***Machner*** hearing, Quinn testified that she had met with Serkowski prior to trial and Serkowski indicated that he had seen Broad drink "hard liquor," he did not see Broad's car leave the Beachview Lounge, he never saw Broad's vehicle on the road, and it was possible Broad had gone back into the bar. After that meeting, Quinn did not believe Serkowski would be "at all helpful."

¶25 During the course of the ***Machner*** hearing, Quinn testified to several potential strategies she explored with Broad prior to trial, including an alcohol curve defense, none of which she believed would be as effective as impeaching the State's witnesses. Broad testified to his belief that he should have testified at trial to establish that he had stopped at the Beachview Lounge, left around midnight, slid into the ditch, tried unsuccessfully to dislodge his vehicle, walked home, drank a few more drinks, and then returned to his vehicle at 2:00 a.m. to try again to dislodge it. Broad acknowledged Quinn's concern that his testimony would establish that when he entered the ditch he was on his way home from a bar. While Broad believes his trial strategy would have been successful, we are unconvinced that Quinn's refusal to employ it was unprofessional error or that the result of the proceeding would have been different had it been used. Simply put, Broad has failed to prove either that Quinn's performance was deficient or that he was prejudiced as a result of her representation. *See* ***Thiel***, 264 Wis. 2d 571, ¶18.

¶26 Finally, the trial court determined that Broad had a "legitimate" trial strategy as both of the State's witnesses had provided inconsistent statements. The trial court had the opportunity to see and hear Broad's approach at trial and evaluate its purpose. *See* ***State v. Maloney***, 2004 WI App 141, ¶¶21-23, 275 Wis. 2d 557, 685 N.W.2d 620. A trial court's determination that counsel had a

reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." ***Id.***, ¶23. Attempting to create doubt as to the defendant's responsibility for the crime by discrediting the only witnesses to it is a reasonable strategy. "Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***Id.*** We therefore reject Broad's contention that he received ineffective assistance of counsel.

CONCLUSION

¶27 We conclude, based on the totality of circumstances, that the officer had probable cause to arrest Broad for OWI. As to the waiver of Broad's constitutional right to testify, we conclude that the postconviction evidentiary hearing was the proper remedy under ***Garcia***, and that the State carried its burden of establishing that Broad's waiver was knowing and voluntary. Finally, we are satisfied that Broad received effective assistance of counsel. We therefore affirm the judgment of conviction and the order denying Broad's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.