COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2011AP315-CR **Cir. Ct. No. 2008CF336**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE W. BIELSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON and ROBERT J. KENNEDY, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Lawrence W. Bielski appeals from a judgment of conviction for operating a motor vehicle while intoxicated as a fifth offense and

from an order denying his motion for postconviction relief.[1] Bielski argues that trial counsel was ineffective for failing to file various pretrial motions and that the State violated his due process rights by knowingly permitting a witness to testify falsely at his postconviction hearing. We disagree and affirm.

¶2 In 2008, Officer Lee Redlin arrested Bielski for operating a motor vehicle while intoxicated. According to Redlin's initial police report, he performed a traffic stop after observing Bielski's car driving at a high rate of speed and without functioning license plate lamps. Bielski appeared intoxicated and tests later confirmed that his blood-alcohol concentration was well above the legal limit.

¶3 Bielski remained in custody and trial counsel contacted the police department to arrange an inspection of the car's license plate lamps. Trial counsel was told he needed to obtain authorization from the district attorney's office and he sent a letter to the State requesting access to the car. By the time trial counsel arranged the inspection, the police department had already released it to Bielski's brother-in-law, Daniel Fernandez. After retrieving the car, Fernandez parked it at Bielski's mother's house.

¶4 Following a court trial, Bielski was found guilty of operating while intoxicated. Bielski filed a pro se postconviction motion alleging that trial counsel was ineffective for failing to file various pretrial motions relating to Redlin's observations prior to the traffic stop. The trial court denied Bielski's

[1] The Honorable James L. Carlson presided at trial and entered the judgment of conviction. The Honorable Robert J. Kennedy heard and decided Bielski's postconviction motion.

postconviction motion following a ***Machner***[2] hearing at which trial counsel, Fernandez, and Redlin all testified.

¶5 On appeal, Bielski argues that trial counsel was ineffective for failing to file pretrial motions to preserve the chain of custody and for suppression and discovery. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, the defendant must demonstrate 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.*** at 694.

¶6 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id.*** at 698. The trial court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

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

Trial Counsel was not ineffective for his performance relating to the release of the car from police custody

¶7 Bielski raises several interrelated claims concerning the functionality of his license plate lamps and the release of his car from police custody. First, Bielski contends that trial counsel was ineffective for failing to file a motion to preserve the chain of custody in order to ensure that his vehicle remained in the State's control. Bielski's basic premise is that trial counsel's failure to file this motion prevented an inspection of the lamps and hampered any ability to rebut Redlin's claim that the lamps failed to illuminate.

¶8 It is undisputed that while Bielski was in custody, his car was released from the police to Fernandez after trial counsel expressed a desire to inspect the vehicle. The police released the car to Fernandez after initially contacting the registered owner, who informed police that she no longer owned the car. According to Bielski, though his name was not on the title, he was "in the process of buying" it.

¶9 At the ***Machner*** hearing, trial counsel testified that within a couple of weeks after learning the car had been released, he retained an investigator to examine the vehicle. The defense investigator found that neither of the license plate lamps illuminated. Trial counsel testified that had his investigator reported that the lights actually worked, he would have filed a suppression motion challenging the legality of the traffic stop. Trial counsel testified that the fact of the car's release from police custody would not have precluded him from filing a suppression motion because the State was ultimately responsible the vehicle's pre-inspection release.

¶10 Postconviction, Fernandez testified that shortly after the police released the car to his custody, he checked the license plates lamps and found that one of the two lights illuminated. Fernandez testified that after the defense investigator's inspection, he checked the lights again, and that this time, neither lamp illuminated. Fernandez testified that he had to "hit them … to make it work." He testified that if you tap a malfunctioning bulb "[s]ometimes it goes on, and sometimes it don't."

¶11 Trial counsel confirmed his recollection that Fernandez had at some point mentioned to him that the lights illuminated, but that on the day of trial, Fernandez said "he had to hit them or flicked them to get them to work, that he [thought] there might have been a short in them." Trial counsel testified that based on his investigator's report and Fernandez's observations, he did not believe there were grounds on which to challenge the traffic stop.

¶12 We conclude that trial counsel was not ineffective for failing to ensure that the car remained in police custody because Bielski has failed to demonstrate any prejudice resulting from the car's release. The defense had access to and was able to inspect the lights after the car was released. The investigator retained by trial counsel inspected the lights and found that neither lamp worked. Fernandez, too, twice inspected the lights and confirmed that they were not fully operational. There is no basis in the record for Bielski's speculation that the lights worked when he was stopped but had ceased working due to wear and tear by the time of the defense investigator's inspection. "A showing of prejudice requires more than speculation." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). "The '***Strickland*** Court [placed] the burden on the defendant to *affirmatively* prove prejudice.'" ***Id.*** (citation omitted).

¶13 Next, Bielski argues that trial counsel was ineffective for failing to file a suppression motion based on the State's alleged due process violation in releasing the vehicle to a nontitle holder after the defense had requested access.[3] A defendant's due process rights may be violated if the police: (1) failed to preserve evidence that is apparently exculpatory or (2) acted in bad faith by failing to preserve potentially exculpatory evidence. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994).

¶14 In this case, the evidence was at best "potentially exculpatory" because Bielski can assert only that an earlier test of the lights might have supported a contention that they were fully operational at the time of the traffic stop. *See* ***Arizona v. Youngblood***, 488 U.S. 51, 57 (1988). Bielski therefore must demonstrate that the police acted in "bad faith" by showing that "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Greenwold***, 189 Wis. 2d at 69.

¶15 Even assuming that Bielski could show the officers were aware that the car was potentially exculpatory, he has failed to demonstrate bad faith on the part of the State. That trial counsel had informed the police of his desire to examine the car does not establish official animus or a conscious effort to destroy evidence on the part of the police. *See* ***Illinois v. Fisher***, 540 U.S. 544, 548 (2004) ("We have never held or suggested that the existence of a pending

[3] Though Bielski raises a separate claim challenging the car's release as a due process violation by the State, we will address the issue as raised in the trial court under the rubric of ineffective assistance of counsel.

discovery request eliminates the necessity of showing bad faith on the part of police."). The facts of record demonstrate that the police wanted the car off of their lot and attempted to locate the registered owner. Bielski was not the registered owner, and the police allowed his brother-in-law to take custody of the car. This is not evidence of "official animus" or intentional spoliation. The car was never destroyed and if anything, its release to Fernandez facilitated Bielski's access.

¶16 With regard to strategy, at the ***Machner*** hearing trial counsel testified that while he considered the decision to release the car to be "bogus," he "didn't think that there was a purposeful intent to deny [Bielski's] rights.… It was just a matter of releasing the vehicle pursuant to the Genoa City Police Department's request to not have the vehicle in impound." Trial counsel made a reasonable strategic assessment that the defense could not establish bad faith. Trial counsel did not perform deficiently by failing to file a motion that was doomed to fail. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

¶17 In sum, trial counsel's failure to file a suppression motion based on the release of the car from State custody did not constitute ineffective assistance of counsel. Counsel reasonably determined that he could not establish bad faith on the part of the police. Further, Bielski has failed to put forth any evidence of bad faith, and has not established a due process violation.

Trial counsel was not ineffective for failing to obtain pretrial access to Redlin's supplementary report

¶18 At Bielski's court trial, Redlin testified that he was travelling eastbound on Highway 12 when he observed Bielski's car roll through the stop sign at the intersection of South Road and Highway 12. Bielski's failure to make a complete stop was not mentioned in Redlin's initial police report and on cross-examination trial counsel questioned the officer about this omission. Redlin responded that it was in his supplemental report. Trial counsel indicated that he had never seen the supplemental report, and the court granted a recess to permit the defense to review the supplement. Though the supplementary report was contained in the State's discovery file, trial counsel had not reviewed discovery since the report's addition. The trial continued and the court found Bielski guilty of operating while intoxicated, noting that there was no evidence to rebut either the fact that he was driving or that his blood-alcohol concentration was above the legal limit.[4]

¶19 It is undisputed that trial counsel was unaware of Redlin's supplemental police report until trial. In his postconviction motion, Bielski argued that this constituted ineffective assistance, contending that if trial counsel had known before trial that Redlin would testify about the rolling stop, he could have investigated and rebutted this testimony.

[4] In closing argument, trial counsel argued that the supplemental police report was unreliable and disputed the legality of the traffic stop. The trial court considered and ruled on the lawfulness of the traffic stop, concluding that Redlin had reasonable suspicion based on his observations that Bielski appeared to be speeding, failed to stop at a posted sign, and that the car's license plate lamps were defective.

¶20 In support of this claim, Bielski called Fernandez as a witness. Fernandez testified that at Bielski's request, he drove to the intersection of Highway H and Highway 12 and parked his car at the stop sign where Redlin was positioned when he reportedly observed Bielski roll through the stop sign across the highway. Fernandez testified that while stopped at Redlin's approximate location, he was unable to see the South Road stop sign Bielski purportedly ran through because his view was obscured by a curve and a hill. The postconviction court asked how far forward Redlin's car would have had to travel into the intersection in order to see the South Road stop sign and Fernandez testified that he did not know.

¶21 Redlin testified at the postconviction hearing that when he was stopped at the intersection of Highway H and Highway 12, he saw the headlights of a vehicle, proceeded eastbound through the stop sign, and then saw Bielski run through the stop sign at the South Road intersection. Redlin acknowledged that had he not proceeded forward, he would not have been able to see the South Road stop sign.

¶22 The trial court rejected Bielski's ineffective assistance claim, finding Redlin's testimony to be "very credible":

> [Y]ou could argue it's possible that that observation of the rolling stop, if the court believed that the officer couldn't have seen it, might have attacked the officer's credibility so sufficiently as to put into question his testimony about later on looking around and seeing the lamps on the plates and seeing they weren't lit. However, the problem with that is, I listened to the officer's testimony today. It rings totally true. The defendant has tried to put a construction on the two reports and the trial transcript to suggest that the officer's contradicting himself.
>
> It is perfectly reasonable what the officer said in both reports. Neither one of the reports, and the testimony in the

> transcript, suggest that the officer was fabricating about seeing the rolling stop. In fact, there's ample ways in which he could have seen that rolling stop. Nothing suggests otherwise. And I found his testimony very credible.

¶23 We conclude that even if trial counsel's failure to obtain pretrial access to the supplemental report was deficient, Bielski was not prejudiced by the deficiency. Bielski has not shown a reasonable probability that early access to the report would have resulted in a successful suppression motion.[5] First, the postconviction court found that Redlin's testimony was credible and that he was telling the truth about observing Bielski's failure to stop at the sign. The postconviction court found that the two police reports were neither inconsistent with each other nor with Redlin's testimony. These findings are not clearly erroneous and as a matter of law, they support the legality of the traffic stop. Second, aside from Bielski's failure to stop at the sign, the traffic stop was independently supported by Redlin's observation concerning the malfunctioning license plate lamps.

Bielski has failed to establish that the State permitted Redlin to testify falsely

¶24 Finally, Bielski argues that the State violated his right to due process by permitting Redlin to testify falsely at the postconviction hearing. We reject this claim because the trial court specifically found that Redlin's postconviction

[5] To the extent Bielski argues that pretrial access to the report would have allowed additional impeachment of Redlin's trial testimony, there is still no prejudice. The issues at trial were whether Bielski was driving the car and whether his blood-alcohol level exceeded the legal limit. Bielski did not rebut these elements and does not contest them on appeal. None of his arguments relate to whether his conviction was reliable.

hearing testimony was credible.[6] "[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses." ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Bielski has not demonstrated that Redlin testified falsely, and therefore cannot show that the State violated his due process rights by knowingly presenting perjured testimony.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

[6] We will reach the merits of Bielski's argument even though he failed to first raise this claim in the trial court. *See* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702 (forfeiture is a rule of judicial administration and this court may in its discretion address issues raised for the first time on appeal).