COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1452-CR **Cir. Ct. No. 2014CT463**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY F. LEMBERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Gary Lemberger appeals his conviction for operating a vehicle while intoxicated—4th offense, and denial of his motion for postconviction relief. For the following reasons, I affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶2 Lemberger was found guilty at a jury trial. In a postconviction motion for a new trial and an accompanying brief filed in the circuit court, Lemberger argued that the State violated his constitutional rights at trial by inviting the jury to infer his guilt "based on Mr. Lemberger's exercise of his constitutional right to refuse a warrantless search in the form of a breathalyzer test" (I will call this "the breathalyzer issue"), and that his trial attorney's failure to address the breathalyzer issue at any point throughout the trial constituted ineffective assistance of counsel.

¶3 Without requiring the State to respond to the postconviction motion, the circuit court denied the motion as being "without merit," and stated the following:

> Breathtakingly, the legal brief filed by defense counsel completely failed to address controlling legal authority, including ***State v. Albright***, 98 Wis. 2d 663[, 298 N.W.2d 196] (Ct. App. 1980), ***State v. Bolstad***, 124 Wis. 2d 576[, 370 N.W.2d 257] (1985), and others. Distressingly, this failure appears to be contrary to defense counsel's ethical obligations regarding *candor to the tribunal* found in SCR 20:3.3(a)(2).[2]

¶4 The court's concise observations are accurate. Lemberger's 14-page postconviction brief fails to even mention case law that, at least on its face, appears to control this issue in the State's favor. *See* ***Bolstad***, 124 Wis. 2d at 585-

[2] Lemberger's counsel on appeal is the same attorney who represented Lemberger on the postconviction motion. The attorney files an appendix that reproduces 203 pages of transcript, for no readily apparent good reason, but fails to include a copy of the court's one-page decision and order containing the language we quote in the text. This violates a rule of appellate procedure. *See* WIS. STAT. RULE 809.19(2)(a) (appendix "shall" contain "the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues"). The table of contents for the appendix states that the decision and order is included, but it is not included.

86; ***Albright***, 98 Wis. 2d at 669-72. This is all the more surprising in light of the fact that Lemberger's postconviction motion contained an ineffective assistance of trial counsel argument, which obligated Lemberger to show that trial counsel's performance was deficient under settled law. *See* ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis. 2d 595, 698 N.W.2d 583. Therefore, Lemberger's counsel knew or should have known that, in order to prevail on the ineffective assistance claim, he had to show that trial counsel had failed to make use of, or ran afoul of, settled law in this area.

¶5 On appeal, Lemberger raises the same arguments on the breathalyzer issue, along with the closely related ineffective assistance claim, that were rejected as meritless by the circuit court. However, this time, unlike in the circuit court, Lemberger briefly addresses the authority identified by the circuit court as controlling on the breathalyzer issue.

¶6 Given the striking language used by the circuit court in its decision denying the postconviction motion, quoted above, I might have expected the State to argue on appeal that Lemberger forfeited the legal arguments that he now makes by failing even to mention to the circuit court, much less to engage at the necessary level of detail, legal precedent that on its face appears to be controlling. However, regardless of the lack of such an argument from the State, I conclude that Lemberger forfeited the arguments he now makes by failing to preserve them before the circuit court.

¶7 Appellate courts strive to avoid reversals that would "blindside trial courts ... based on theories which did not originate in their forum," and therefore it is not enough to raise general, related issues in order to preserve particular arguments for appellate review. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539

N.W.2d 897 (Ct. App. 1995) (explaining that the forfeiture rule requires that, to preserve its arguments, a party must "make all of [its] arguments to the trial court"). This court need not, but typically will, reject arguments raised for the first time on appeal. *See* ***State v. Moran***, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884; *see also* ***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 we may exercise discretion to address issues raised for the first time on appeal).

¶8 Taking these concerns into account, I conclude that reversal based on the theory that apparently controlling law has been silently overruled would blindside the circuit court. At perhaps its barest minimum, preserving an issue for review requires addressing law that appears to control on the issue. Any other approach here "would seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party." *See* ***Townsend v. Massey***, 2011 WI App 160, ¶26, 338 Wis. 2d 114, 808 N.W.2d 155; *see also* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal.").

¶9 Lemberger did not move for reconsideration before the circuit court. This would have at least provided the court with an opportunity to consider arguments addressing precedent that on its face appears to be controlling. As it stands, such arguments were never even hinted at in the circuit court. It is true that the circuit court, on its own initiative, identified legal authority that cried out to be distinguished or explained, given Lemberger's argument. However, the court's prior knowledge of or discovery of this on-point precedent does not change the

fact that Lemberger failed to develop any argument distinguishing or explaining the authority in the circuit court. The State has elected to limit its arguments to the merits, but I am not obligated to take that path.

¶10 Moreover, there is a problem beyond forfeiture. While Lemberger now suggests arguments that might be resolved in his favor by *new* interpretations of the law by our supreme court, I am confident that if I addressed his arguments on the merits I would conclude that this court lacks authority to apply interpretations that would appear to conflict with ***Albright***, ***Bolstad***, and ***State v. Crandall***, 133 Wis. 2d 251, 394 N.W.2d 905 (1986). *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Put differently, assuming without deciding that, as Lemberger suggests, there are genuine tensions between these opinions and more recent developments in federal and state case law, any potential "fix" would surely be for our supreme court to make in the first instance at this point. *See* ***id.***

¶11 Without taking the time to provide more details, I now briefly mention two factors that contribute to my conclusion that a review on the merits would certainly result in affirmance by this court, following ***Cook***. First, Lemberger does not deny in his principal brief on appeal that the prior precedent, at least when ***Albright***, ***Bolstad***, and ***Crandall*** were released, would have precluded his current argument, and his argument on appeal as to how and when that might have changed is vague. Second, Lemberger fails to file a reply brief in response to extensive argument by the State tied directly to unambiguous statements in ***Albright***, ***Bolstad***, and ***Crandall***.

¶12 For all of these reasons, I reject both the breathalyzer issue argument and the ineffective assistance of trial counsel argument, and accordingly affirm.

By the Court.—Judgment and order affirmed.

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