COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2698-CR **Cir. Ct. No. 2013CF90**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH W. FUNK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: STEVEN P. ANDERSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kenneth Funk appeals a judgment convicting him of seventh-offense driving with a prohibited alcohol concentration. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel and requested a new trial in the interest of

justice. Funk contends his trial counsel was ineffective for failing to investigate Funk's allegation that the arresting officer refused his request for an additional or alternative test pursuant to WIS. STAT. § 343.305(5) (2013-14), and for failing to file a motion to suppress the results of the blood test on that basis. The circuit court found Funk made no such request to the arresting officer. Because the circuit court's finding is based on the credibility of witnesses and is not clearly erroneous, we affirm the judgment and order.

¶2 Funk was stopped for speeding by state trooper Clifford Parr, who ultimately arrested Funk for driving while intoxicated. Parr took Funk to a hospital where he read Funk the Informing the Accused form, and Funk agreed to have his blood drawn. It is undisputed Funk did not make a request for additional testing at this time.

¶3 Parr then drove Funk to the jail for booking. Parr wore a microphone that recorded parts of his conversations and the booking process in the jail on a DVD in Parr's squad car. After booking was completed, Parr turned off the recorder. Funk contends he requested an alternative test three times after Parr turned off the recorder, and each time Parr refused the request because he said it was "too late."

¶4 Funk's account was somewhat corroborated by deputy Robb Jandrt, a booking officer at the jail. Jandrt testified he heard Funk request an alternative test and Parr denied the request.

¶5 Parr testified at the postconviction hearing that Funk did not request any alternative test. The circuit court found Parr's testimony more credible than Funk's and Jandrt's. The court found Funk's trial attorney was not ineffective for

failing to file a motion to suppress the blood test results because the court would have denied the motion.

¶6 To prevail on a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice to his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court need not address both prongs if the defendant makes an insufficient showing as to one of them. ***Id.*** at 697. To establish prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.***

¶7 Funk has not established prejudice from his counsel's failure to seek suppression of the blood test results because the circuit court would not have granted a motion to suppress. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996). The circuit court found Parr more credible because he was the arresting officer, he made a police report regarding the arrest that did not indicate any request for an additional or alternative test, and the DVD recording does not confirm any request by Funk for an additional or alternative test. Funk notes the recorder was turned off six minutes before Parr left the building, leaving enough time for Funk to have requested an additional test. However, the trier of fact was not required to find that Funk made a request merely because he and Jandrt say he did and there was an opportunity to make the request. The credibility of the witnesses is a matter "peculiarly within the province of … the trier of fact." ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736.

¶8 The circuit court reasonably rejected Funk's self-serving testimony because Funk was not consistent regarding the timing of the request and his testimony was not entirely consistent with Jandrt's testimony. When asked at the postconviction hearing when he requested alternative testing, Funk said it was after Parr read him the Informing the Accused form in the booking room, including the part about the right to a secondary test, so Funk could initial it. The record contains no document initialed by Funk. The DVD makes clear that Funk's testimony associating his request with Parr's re-reading the Informing the Accused form was incorrect. After Parr read the ***Miranda***[1] warnings to Funk, and went through the Alcohol Influence Report with him, Parr went back to his squad car to complete the citation. When he returned, he read the citations to Funk and asked if Funk or Jandrt had any questions. Both Funk and Jandrt indicated they had no questions, and Parr then turned off the recording. The DVD makes clear that Parr did not read the Informing the Accused form to Funk after he read the Alcohol Influence Report to him, and Funk does not assert that Parr read him the Informing the Accused form after reading aloud the citations and after Parr turned off the recording. Nothing on the DVD indicates that Parr even mentioned the alternative test to Funk in the booking room. Funk also testified he requested the alternative test within "a minute of having the citations explained to me," a position he now espouses on appeal. The circuit court reasonably found Funk's inconsistency regarding the timing of the request undermined his credibility.

¶9 Jandrt's testimony is also somewhat inconsistent with Funk's. Jandrt hedged his account of the booking process, frequently saying he was "not

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

certain," or he "believed" and was "not sure" of various facts, particularly regarding the timing of the alleged request for an alternative test. Jandrt did not file a report and relied on his year-old memory regarding the booking process. Jandrt did not recall Funk requesting an alternative test three times as Funk stated. Jandrt "couldn't say" how long after receiving the citations Funk asked for the alternative test, but he "believed" it was within a minute or so. The inconsistencies between Funk's various accounts and Jandrt's recollection regarding Funk's impetus for requesting an additional or alternative test, when compared with Parr's unequivocal denial that Funk made such a request, supports the circuit court's credibility finding. Because the court's finding is not inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded fact, we must uphold its finding. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶10 Funk's request for a new trial in the interest of justice depends on his assertion that the jury would not hear the results of the blood draw because that evidence would be suppressed. Because we affirm the circuit court's decision that the evidence would not be suppressed, there is no basis for granting a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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