COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2185 **Cir. Ct. No. 2013CT230**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARLAN L. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Affirmed*.

¶1 FITZPATRICK, J.[1] Harlan Schultz pleaded no contest to a charge of fourth offense operating a motor vehicle while intoxicated (OWI) in the Waupaca County Circuit Court. Schultz later filed a motion to withdraw his plea.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The circuit court denied the motion, and Schultz now appeals. Schultz's primary argument concerns the alleged ineffective assistance of his trial counsel. Schultz also contends that his plea was not entered into knowingly, intelligently, and voluntarily. I reject Schultz's arguments and affirm the order of the circuit court.

BACKGROUND

¶2 The following facts are undisputed or are taken from the circuit court's findings. In October 2013, Schultz was stopped by Deputy Santiago of the Waupaca County Sherriff's Department after the Deputy observed Schultz's vehicle cross the center line of the road and go into the oncoming traffic lane. Following a traffic stop and arrest, Schultz was charged with operating a motor vehicle while intoxicated, fourth offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited blood alcohol concentration, contrary to § 346.63(1)(b).

¶3 Schultz retained Attorney Singh to represent him. Schultz pleaded no contest to operating a motor vehicle while intoxicated, fourth offense, and was sentenced to approximately forty-five days in jail. After serving his jail sentence, Schultz filed a motion to withdraw his no-contest plea, asserting ineffective assistance of counsel because his previous counsel did not challenge the constitutionality of the traffic stop and that his plea was not entered into knowingly, intelligently, and voluntarily. Following an evidentiary hearing, the circuit court denied Schultz's motion. Schultz now appeals.

¶4 Other relevant facts will be mentioned in the context of particular parts of the discussion below.

DISCUSSION

¶5 Schultz's primary basis for appeal is that his trial counsel, Attorney Singh, was ineffective because he did not file a motion challenging the constitutionality of the Deputy's stop of Schultz's vehicle. Schultz also argues that his no contest plea was not entered knowingly, intelligently, and voluntarily. I reject each of Schultz's arguments.

I. Schultz's trial attorney was not ineffective.

¶6 I first address Schultz's argument that Attorney Singh rendered ineffective assistance by failing to file a motion challenging the traffic stop. Because Attorney Singh's decision not to challenge the stop was reasonable, I reject this argument.

¶7 Criminal defendants are entitled to legal representation pursuant to the terms of the United States Constitution and the Wisconsin Constitution. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. The right to counsel includes the effective assistance of counsel. ***Id.*** To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that trial counsel's representation was deficient and that he or she was prejudiced by the deficient performance. ***Id.*** (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). This presents a mixed question of law and fact. ***Thiel***, 264 Wis. 2d 571, ¶21. The circuit court's findings of fact will be upheld unless those are clearly erroneous. ***Id.***; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. In this context, findings of fact relate to the circumstances of the case, counsel's conduct, and case strategy. ***Thiel***, 264 Wis. 2d 571, ¶21. The determination of counsel's effectiveness is a question of law that is reviewed de novo by this court. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

¶8 Counsel's performance is "constitutionally deficient if it falls below an objective standard of reasonableness." ***Thiel***, 264 Wis. 2d 571, ¶19. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." ***Harrington v. Richter***, 562 U.S. 86, 88 (2011). Counsel's deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694).

¶9 Whether there is probable cause to stop a vehicle because of a traffic violation is a question of constitutional fact. ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 118. A finding of constitutional fact consists of the circuit court's findings of historical fact, which are reviewed on appeal under the clearly erroneous standard, and the application of the historical facts to constitutional principles, which are reviewed de novo on appeal. ***Id.***

¶10 An officer may stop a vehicle when he or she has probable cause to believe that a traffic violation occurred. ***Id.***, ¶13. "Probable cause refers to the 'quantum of evidence which would lead a reasonable police officer to believe' that a traffic violation has occurred." ***Id.***, ¶14 (quoting ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)).

¶11 It is undisputed that it is a traffic violation to drive left of the center line. *See* WIS. STAT. § 346.05; ***Popke***, 317 Wis. 2d. 118, ¶17. Here, Deputy Santiago witnessed Schultz's vehicle cross the center line into the oncoming traffic lane. At the post-conviction evidentiary hearing, the circuit court found that Schultz's vehicle "went all the way past the center line," and I see no basis to disturb that finding.

¶12 Deputy Santiago watched as Schultz drove left of center and, consequently, the Deputy had probable cause to believe a traffic violation was committed by Schultz. ***Id.***. Accordingly, the traffic stop was reasonable and consistent with Wisconsin law.

¶13 For those reasons, I agree with the circuit court's conclusion that there was no valid basis for Attorney Singh to challenge the traffic stop because the likelihood of success of such a motion was non-existent. Attorney Singh's representation did not fall below an objective standard for reasonableness. Accordingly, his representation was not constitutionally ineffective and Schultz's argument fails.[2]

II. Schultz's plea was entered knowingly, intelligently, and voluntarily.

¶14 Next, Schultz argues that his no-contest plea was not entered knowingly, intelligently, and voluntarily. This presents a question of constitutional fact that is reviewed independent of the circuit court's conclusion. ***State v. Cross***, 2010 WI 70, ¶14, 326 Wis. 2d 492, 786 N.W.2d 64. But, in making this determination, I must accept the circuit court's findings of evidentiary fact unless those are clearly erroneous. ***Id.***

¶15 To be constitutionally adequate, a guilty or no-contest plea by a defendant must have been made knowingly, voluntarily, and intelligently. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Before the court accepts a no-contest plea, it must "[a]ddress the defendant personally and determine that the

[2] Since Schultz cannot prove that Attorney Singh's representation was deficient, I need not address the second prong of the ineffective assistance of counsel analysis.

plea is made voluntarily with understanding" of the constitutional rights given up, including the right to a jury trial. ***Id.*** (quoting WIS. STAT. § 971.08).

¶16 Here, and in the circuit court, Schultz alleged that he did not fully understand that, by entering a no-contest plea, he was waiving his right to a jury trial and his right to challenge the constitutionality of the traffic stop. Schultz's arguments fail.[3]

¶17 A review of the sentencing transcript confirms that the plea colloquy satisfied all requirements to demonstrate that Schultz's plea was knowing, voluntary, and intelligent as to his waiver of a right to a jury trial. The court explicitly asked if Schultz understood that he was giving up the rights listed in the plea questionnaire form, including his right to a jury trial, and whether Attorney Singh had discussed those rights with Schultz. Schultz answered both of these inquiries affirmatively and signed the plea questionnaire form, indicating that he understood that his no-contest plea constituted a waiver of his constitutional rights in this case, including his right to a jury trial. In addition, at the post-conviction evidentiary hearing, the circuit court found that Schultz understood he was giving up his right to a jury trial by pleading no contest, and there is no basis to overturn that finding.

¶18 Schultz also contends that he did not understand that, by his plea, he was giving up his right to challenge the constitutionality of the traffic stop. Schultz cites no authority to support his implicit contention that a circuit court

[3] Schultz initially argued in this court that the circuit court did not explain the elements or nature of the charges before accepting his plea, but he has in effect abandoned this argument in his reply brief. *See* ***Post v. Schwall***, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990).

must personally address a defendant on the question of whether the defendant understands that his plea waives the right to challenge a traffic stop. Regardless, the circuit court found at the post-conviction evidentiary hearing that Schultz understood full well that he was giving up that right by pleading no contest, and there is no basis to overturn that finding.

¶19 Therefore, I reject Schultz's contention that his plea was not knowing, intelligent and voluntary.

CONCLUSION

¶20 For those reasons, the decision of the circuit court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)4.