

**APPENDIX TABLE OF CONTENTS**

**PURSUANT TO THE WISCONSIN RULES OF APPELLATE PROCEDURE, THE FOLLOWING ITEMS ARE REPRODUCED IN THIS APPENDIX:**

**Defendant’s motion to suppress evidence taken from person  
(20:1).....101**

**Defendant’s motion for a new trial  
(131:1-3).....102-104**

**Transcript of postconviction motion evidentiary hearing  
(170:1-45).....105-149**

**Defendant’s brief for a new trial  
(139:1-3).....150-152**

**State’s response to defendant’s postconviction motion  
(140:1-5).....153-157**

**Defendant’s reply brief for a new trial  
(141:1-3).....158-160**

**Transcript of decision hearing  
(171:1-15).....161-175**

**Court of Appeals Decision and Order.....176-183**

**Appellant’s Brief Appendix Certification.....184**



STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff

**DEFENDANT'S MOTION  
FOR A NEW TRIAL**

-vs-

Case No. 15CF132

Justin L. Douglas.

Defendant.

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the court for an order setting aside the finding of guilt against the defendant and for an order granting a new trial. The defendant brings this motion pursuant to sections 805.15 and 809.30 of the Wisconsin Statutes and *State v. Monje*, 109 Wis. 2d 138, 325 N.W.2d 695 (1982).

AS GROUNDS, defendant asserts the following:

Facts.

The defendant was charged with: two counts of sexual assault to a child; four counts of child sexual exploitation; two counts of possession of child pornography; and eight counts of felony bail jumping. As for the charging document, it indicates that Douglas left his phone by C.B.'s residence, that C.B. provided the phone to the police, that the police searched the phone and found content in the phone that resulted in the charges against Douglas.

Subsequently, a motion to suppress evidence obtained from the phone was filed, and a motion hearing was held. At the hearing, the police testified C.B. believed her daughter had been sexually assaulted, Douglas was a suspect, and she informed the police she wanted Douglas's possessions out of her residence – including his phone. Thus, the police picked up the phone on January 28, 2015. The officer that picked up the phone indicated he contacted the officer whom was investigating the sexual assault, and the phone was then secured into an evidence locker. At that point, the police indicated they did not believe there was any incriminating information on said phone – pertaining to this case. However, on January 30, 2015, Douglas's probation agent was advised by the police that they possessed a phone that was likely Douglas's, that the agent may be interested in said phone, and Douglas's agent indicated she was in fact interested since he was not to have a phone as a condition of his probation. Upon questioning by the agent, Douglas indicated the phone was not his. At that point, on the direction of the agent, the police searched the phone, and it obtained information that ultimately led to the charges. Notably, by the time of the evidentiary hearing, trial counsel was provided a tape of a jail recording that, on January 28, 2015, 12:56 p.m., Douglas had made a phone call to a third party to pick up his belongings from C.B.'s residence.

At the hearing, the issue of standing arose – whether Douglas was even claiming it was his phone, since if he was not, there would be no standing. As such, defense counsel had two options: either argue there was no standing and thus the motion is denied at the start, or otherwise arguing the phone was Douglas's, and then the argument could proceed. Here, defense counsel indicated, considering Douglas previously made statements that the phone was not his, and the fact Douglas was not speaking to defense counsel, that defense counsel could not take a position

that the phone was his to have standing. However, defense counsel could have taken the position that the phone actually was Douglas's. In fact, the State's argument was that it was Douglas's phone. Further, the police had information that it was Douglas's phone since C.B. indicated it was Douglas's phone, there was no reason provided why C.B. would lie about this issue, and the fact the agent and police believed it was Douglas's phone since they held onto until it was searched to confirm that it was Douglas's phone. Ultimately, the court denied the motion; in doing so, it indicated the defendant was not claiming it was his phone and thus he did not have standing to bring the issue.

#### Argument.

The absence of defense counsel failing to take the position that it was Douglas's phone had great impact to Douglas's defense. Here, had counsel took the position it was Douglas's phone, Douglas would then have standing to contest whether the police improperly seized the phone. As a preliminary matter, in *Simmons v. United States*, the court ruled the court testimony of a defendant in support of a motion to suppress evidence may not be used against him at trial, over his objection, on the issue of guilt. *Simmons v. United States*, 390 U.S. 377, 394 (1968). Thus counsel could have took the position it was Douglas's phone without concern it would impact Douglas's trial rights.

As for the issue itself, the problem is the seizure of the police when they took the phone from C.B. up until the time the agent sought to view the phone. At that point in time, they were informed it was Douglas's phone, and they seized the phone without any valid reason: they were not doing so on behalf of the agent and they did not believe there was probable cause that the phone itself was contraband or that it contained any illegal content. Furthermore, had the third party picked up the phone, the police would not have obtained the phone nor would the agent been informed that the phone was Douglas's. In addition, the contents of the phone would have almost certainly not been disclosed. As the officer testified at the motion hearing, he was not aware of anything illegal about the phone when it was picked up. P49.

Case law indicates a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Here, the police clearly seized the phone when they took it from the third party and kept it until the agent had the chance to review it. Further, although there are limited circumstances when an officer may seize property without a warrant, such as if there is probable cause to believe that it contains evidence of a crime, and if exigencies of the circumstances demand [the seizure], the officer here testified this was not the case. *State v. Carroll*, 2011 WI App. 155, P26, 322 Wis.2d 299, 778 N.W.2d 1. The police did not think there was anything illegal about the phone. As a result, the evidence obtained through the illegal seizure should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

As for the standards of ineffectiveness and getting a new trial, the court has stated:

The United States Constitution and the Wisconsin State Constitution provide that an individual facing criminal charges shall have the right to be represented by counsel. U.S. Const. amend. VI; Wis. Const. art. 1, Sec. 7. The right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed. 674 (1984). If effective assistance of counsel is not provided at trial, the defendant shall be awarded a new trial. *State v. Carter*, 2002 WI App. 55, P2, 250 Wis.2d 851, 641 N.W.2d 517. As for the ineffective standard, the court has stated:

To prove an ineffective assistance of counsel claim, a defendant must first demonstrate that counsel's performance was deficient, meaning that it "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed. 2d67 (1984). Courts are "highly deferential" in scrutinizing counsel's performance, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant must also show that the deficient performance prejudiced the defense. *Id.* at 692. This requires a "reasonable probability that, but for counsel's professional errors the result of the proceeding would have been different." *Id.* at 694.

*State v. McGuire*, 10 WI 91, P65, 328 Wis.2d 289, 786 N.W.2d 227.

Here's counsel's performance was deficient for failing to pursue the position that it was Douglas's phone so that he would have standing on the issue. In doing it, he would have been able to show the police did not have proper grounds to initially seize the phone; thus, the contents of the poisonous tree should have been suppressed. Clearly this prejudiced Douglas since the poisonous fruit was then permitted to be used against Douglas at trial, and it essentially was the primary evidence.

Considering the above, Douglas requests this court to hold an evidentiary hearing to address this motion.

Date: March 14, 2019

O'Connell Law Office  
Attorneys for the Defendant

  
Timothy O'Connell

State Bar No. 1063957

O'Connell Law Office  
403 S. Jefferson St.  
P.O. Box 1625  
Green Bay, WI 54305-1625  
(920)-360-1811



I N D E X

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

WITNESS

PAGE

**RONALD COLWELL**

Direct Examination by Attorney O'Connell..... 6  
Cross-examination by Attorney Duros..... 19  
Redirect Examination by Attorney O'Connell..... 28

**DARYL LAATSCH**

Direct Examination by Attorney O'Connell..... 31  
Cross-Examination by Attorney Duros..... 35

**JUSTIN DOUGLAS**

Direct Examination by Attorney O'Connell..... 39  
Cross-Examination by Attorney Duros..... 40



1 ATTORNEY O'CONNELL: Ten o'clock.

2 THE COURT: Okay. Have you had any contact  
3 with Attorney Laatsch?

4 ATTORNEY O'CONNELL: I have had some --  
5 some e-mail correspondence. And I do have an  
6 Admission of Service that was signed.

7 THE COURT: Okay. So he didn't respond to  
8 you when he received the Subpoena or anything?

9 ATTORNEY O'CONNELL: He did sign the  
10 Admission of Service indicating that he did receive  
11 it.

12 THE COURT: Okay.

13 ATTORNEY DUROS: He's the main witness as  
14 well. He's the witness who had the motion hearing on  
15 the phone issue.

16 THE COURT: Right.

17 ATTORNEY DUROS: I mean, he's the attorney  
18 who had the hearing on the phone issue. So he's  
19 going to be necessary --

20 THE COURT: Right.

21 ATTORNEY DUROS: -- for this. Attorney  
22 Colwell is probably going to be really brief and  
23 we'll have to reschedule this if he does not show  
24 up.

25 ATTORNEY O'CONNELL: Just to correct. I

1 believe it's Attorney Colwell who was the attorney  
2 for the motion. Um, Attorney Laatsch is the one that  
3 appeared at trial.

4 THE COURT: Right. Okay. All right.  
5 Thank you.

6 Okay. With that then, we can proceed. Who has  
7 the burden here, actually? It's been awhile since I  
8 did the --

9 ATTORNEY O'CONNELL: I have the burden to  
10 prove that counsel was ineffective.

11 THE COURT: Okay. All right. So you'd be  
12 calling the witness then.

13 ATTORNEY O'CONNELL: I'd ask -- I'd like to  
14 call the first witness, Ronald -- Attorney Ronald  
15 Colwell.

16 THE COURT: Okay. We'll have him come up  
17 and sworn in.

18 COURT REPORTER: Can you pull your  
19 microphone a little closer. Thank you.

20 **RONALD K. COLWELL,**  
21 being first duly sworn, testified as follows:

22 THE WITNESS: I do.

23 THE CLERK: Please state and spell your  
24 full name for the record.

25 THE WITNESS: Ronald Keith Colwell.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

R-o-n-a-l-d. K-e-i-t-h. C-o-l-w-e-l-l.

THE COURT: Proceed.

DIRECT EXAMINATION

BY ATTORNEY O'CONNELL:

Q Attorney Colwell, um, you once represented Justin Douglas on Outagamie County Case 15-CF-132; is that correct?

A Yes.

Q And you were provided a copy of a post-conviction motion for a new trial?

A Yes.

Q And did you have an opportunity to review that motion?

A Yes.

Q First I'd like to address the discovery. The Complaint in this case was filed in February of 2015. In reviewing CCAP it looks like there was approximately five attorneys that were on board before -- before -- before you were retained. On or about October 10, 2016, according to CCAP, it appears you were -- you were retained. Now, when you took over repre -- representation on this case did you obtain the discovery?

A Yes.

Q And did you obtain the discovery shortly after you

1           were appointed?

2       A     I don't know when I received it. Um, I don't recall  
3           any unusual delay.

4       Q     And who provided you with the discovery?

5       A     It would have been the prior attorney.

6       Q     And --

7       A     I believe.

8       Q     And in that -- in that discovery did it include CDs  
9           or DVDs?

10      A     I don't have a specific recall, but I think it did.  
11           And I did try to take a look at what I could find as  
12           far as for today and I saw I had a sheet of paper on  
13           it where I had written down something about phone  
14           calls, because I see -- I saw that was in your  
15           motion, and about one and two. I don't know if that  
16           means I didn't -- I only reviewed some or all. But  
17           from that I would draw the inference that there were  
18           jail calls. I think there was also an itemization  
19           log, if I recall correctly, in the discovery, the  
20           police reports. So I think the answer is -- based  
21           upon what I saw in the file, the answer would be  
22           yes.

23      Q     Okay. Thank you. And I just -- just to get I guess  
24           a bit more clarification. Um, in the discovery -- or  
25           I'm sorry, do you recall whether there was in the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

discovery, I believe it was included as a CD or DVD, but a phone call in which the defendant made a jail call to a Linda Harper, which was made on January 28, 2015, in which he had asked her to pick up stuff from a Chelsea Baurain's residence?

A I don't have any specific recall of the content of the jail calls. In fact, quite frankly, as I sit here, I can't even remember listening to them, although apparently from the notes at least I started to. I don't know how far I got.

Q Okay. So you -- do you believe that you likely did have that -- that evidence?

A Yes. I -- I -- I think it's extremely likely I had the evidence.

Q Okay. And are you indicating that you're not sure if you went over it?

A I -- what I am saying is I just don't have any recall about anything specific as to that aspect of the case.

Q Okay. Thank you. Okay. Now, on September 17, 2015, the then attorney for Mr. Douglas, an Attorney Gary Schmidt, had filed a motion to suppress evidence. Then on August 9, 2017, there was a motion hearing on that motion. At that time the transcript indicates the State was raising the lack of standing. The

1 Court had asked Defense position, whether it was  
2 Douglas's phone or not, and you had indicated you did  
3 not know. The question is, why didn't you inform the  
4 Court that you were taking the position that the  
5 phone was Douglas so that you would have standing to  
6 raise the motion?

7 A Um, Mr. Douglas, as I recall, was never willing to  
8 affirm that it was his phone. And I took -- I did  
9 have -- I kept some of the file from before. And I  
10 took a quick look at that and I see in the reports  
11 there is something in the police reports where he  
12 told the police it wasn't his phone. Um, so that  
13 would -- that would be -- the answer is he wasn't --  
14 um, as I recall he wasn't willing to go forward and  
15 take -- say it was my phone.

16 Q Thank you.

17 THE COURT: Counsel, before you ask another  
18 question. Um, I got a message from Attorney Laatsch.  
19 He's on the phone in Fond du Lac. Do you want him to  
20 testify by phone or would you prefer to have it in  
21 person? Now, it's somewhat of a hardship on the part  
22 of the court reporter if it's going to be lengthy  
23 testimony.

24 ATTORNEY O'CONNELL: I --

25 THE COURT: What's your position?

1                   ATTORNEY O'CONNELL: What I would suggest  
2                   is to try to -- first of all, I don't have any  
3                   questions for him. Um, what I would suggest is to  
4                   try to get through the questions without him here and  
5                   if it becomes an issue then -- then I think it would  
6                   be wise to stop and stop the hearing and have him  
7                   come here.

8                   THE COURT: But you don't plan on asking  
9                   him any questions?

10                  ATTORNEY O'CONNELL: Oh, I'm sorry, I do  
11                  plan on asking him questions. It's a short -- short  
12                  number of questions.

13                  THE COURT: Okay.

14                  ATTORNEY O'CONNELL: I think there's a good  
15                  shot that I'll be able to do so without him here.

16                  THE COURT: Okay. So that's testimony and  
17                  have you consulted with Mr. Douglas about that issue  
18                  as to allowing him to appear by phone?

19                  ATTORNEY O'CONNELL: I have not.

20                  THE COURT: Okay. Why don't you do that  
21                  right now.

22                                   (Pause in proceedings.)

23                  ATTORNEY O'CONNELL: The defendant would  
24                  prefer to have him here.

25                  THE COURT: Okay. Can you find out if

1 Attorney Laatsch can make it up here. We're taking  
2 testimony right now, so I'll ask the clerk to find  
3 out if he can make it up here and how long it would  
4 take him to get up here. Otherwise we'd have to  
5 reschedule. Without a waiver from the defendant, I  
6 don't think we can take the testimony. I think at an  
7 evidentiary hearing the defendant has a right to  
8 confrontation.

9 THE CLERK: He can be here in an hour.

10 THE COURT: So, well, let's tell him to  
11 come up then. We'll take it up in an hour. Let's  
12 see, I think my calendar would permit that.

13 All right. Then I guess we can proceed.

14 Q (by Attorney O'Connell) Okay. Attorney Colwell, I  
15 believe you were just -- had finished indicating the  
16 reason why you did not take the position that -- that  
17 the phone was Mr. Douglas's. Was there anything  
18 else? I didn't know if you got cut off or not. Was  
19 there anything else that you wanted to add?

20 A No. I mean, I think that's probably where it was at.  
21 You know, he was -- you know, and I looked at your  
22 motion, which I thought was interesting that because  
23 is there some way kind of to get around that about  
24 that. But, you know, um, but, my recollection is --  
25 I think it may have been asked once in the court or

1            somewhere was -- was he willing to, you know, change  
2            his position so he would have standing and say -- you  
3            know, affirm that it was his phone, and I don't think  
4            he ever did.

5            Q        And the decision -- the decision not to argue that  
6            the phone was Mr. Douglas's, um, did you address this  
7            issue with the defendant?

8            A        Yes.

9            Q        Okay.    And what had he indicated to you about that?  
10           And I guess just as to specify, um, the -- not -- I'm  
11           not looking at, um, whether he had indicated the  
12           phone was his or not.    What I am looking at  
13           specifically is, um, the issue of standing, whether  
14           for the purposes of the motion hearing whether you  
15           had a conversation with the defendant if he wanted to  
16           take the position that it was his phone, um, to have  
17           standing or he did not want to take the position that  
18           it was not his phone so he would not have standing.  
19           Did you have any conversation with him regarding that  
20           issue?

21           A        Yes.

22           Q        Okay.

23           A        Something along the lines of, you know, you -- that I  
24           thought he had an issue with standing, and, um, you  
25           know, um, was he, you know, willing to take -- now,

1 um, say the phone was his so that he would have  
2 standing.

3 Q Okay. And then --

4 A And it may have been -- and it may have been -- and I  
5 wouldn't recall the conversation. It may have been  
6 broader than that. I mean, you can -- you can own a  
7 phone, you can have possession. There's different  
8 forms in which you can have an interest in a phone.  
9 Um, and I don't think he was -- as I recall, he  
10 wasn't willing to take -- I don't recall him being  
11 willing to take anything that would have allowed me  
12 to say he had -- I think one of the terms -- and I  
13 don't -- you are more up on the cases here in this  
14 matter, but usually in terms we talk -- I hear in the  
15 law like use, possession, or control. It's a pretty  
16 common phrase. It may not be the right phrase for  
17 this type of an issue. But I don't recall him being  
18 willing to come forward and say that he had like use,  
19 possession, or control of the phone.

20 Q Okay. Did you --

21 A Or something like that, yeah.

22 Q Did you -- did you specifically address standing with  
23 him and inform him that if he didn't agree that the  
24 phone was his, he would have no standing?

25 A I don't recall that conversation, but -- I don't

1 recall specifically having that -- saying that to  
2 him. Would that have been something -- I just don't  
3 recall the specific conver -- specifically saying  
4 that with him one way or the other.

5 Q Do you --

6 A If you were to say you said that, would I say, no, it  
7 couldn't have happened? No, I wouldn't say that.

8 Q Is it --

9 A I just don't recall.

10 Q Did the Court -- okay, so -- is it -- is it your  
11 testimony -- you have no idea, you could flip a  
12 quarter whether that conversation occurred or it did  
13 not occur?

14 A No. I'm just -- I'm just really guessing, you know.  
15 I know we had a conversation about the phone. I know  
16 we had a conversation about the standing issue. And  
17 I know he wasn't willing to take a position which I  
18 felt was necessary to try to raise the issue again.  
19 I mean, which is sort of kind of a conclusion type  
20 thing. And you're asking me specifically about the  
21 details and how we got there. And the details, I  
22 don't have a specific recollection on the details.

23 Q What about -- and you may not have a recollection of  
24 this either, but what about did you, um, inform Mr.  
25 Douglas that -- regarding any case law that even if

1 he took the position that it was his phone at the  
2 motion hearing that it could not be used against him  
3 at trial?

4 A No. I don't think we -- I don't recall having that  
5 conversation. Um, and it's possible, but I would  
6 think we -- I don't recall having that conversation.  
7 Um, and I -- I would really be guessing. I mean,  
8 there are certain circumstances where people will  
9 have -- will say things where it's not allowed to be  
10 used in the case-in-chief in a court. I think that  
11 may, for example, apply if I recall correctly to  
12 certain conversations with the DOC agent, um, and I  
13 warn clients, you have an obligation to talk to them  
14 but I think if you come to court and you then say  
15 something different, that's another issue. There may  
16 be something like that with *Miranda*. Um, I have  
17 those conversations with clients. I don't recall  
18 specifically having a conversation along those lines  
19 with him. But I do have conversations like that that  
20 there is a limited circumstance if you say one thing  
21 now under certain circumstances that -- that may be  
22 used against you at trial. Those -- those kind of  
23 conversations I have. I don't recall specifically  
24 what was said with Mr. Douglas.

25 THE COURT: The Court would just like to

1 comment one thing about this hearing is that since  
2 this attorney is being called by Mr. Douglas's  
3 attorney, it's presumed that the attorney/client  
4 privilege would be waived by Mr. Douglas. Is that  
5 your understanding?

6 ATTORNEY O'CONNELL: It is.

7 THE COURT: Okay. You've discussed that  
8 with Mr. Douglas?

9 ATTORNEY O'CONNELL: I briefly had  
10 indicated to the defendant that before -- before the  
11 Court had come out. And I know at that point he had  
12 nodded that he understood that he'd have to waive  
13 attorney/client privilege for purposes and for the  
14 limited scope for the purposes of this -- this motion  
15 hearing.

16 THE COURT: Right. So is that correct, Mr.  
17 Douglas?

18 THE DEFENDANT: It is correct. I didn't  
19 really have -- I never --

20 COURT REPORTER: Can he use the microphone.

21 THE DEFENDANT: I wasn't at a conclusion  
22 whether I wanted to waive it or not yet. I mean, I  
23 -- I still haven't made the decision. I nodded that  
24 I acknowledge that I would have to waive it if I  
25 wanted him to testify, but I still was undecided of

1           whether or not to or not to.

2                   THE COURT: Well, you control the privilege  
3           and you control the privilege with Attorney Laatsch  
4           as well.

5                   ATTORNEY O'CONNELL: Your Honor, if I could  
6           just have one minute.

7                   THE COURT: Okay.

8                           (Pause in proceedings.)

9                   ATTORNEY O'CONNELL: Your Honor, um, I had  
10          a brief conversation with the defendant. It's my  
11          understanding that he does wish to waive the  
12          attorney/client privilege.

13                   THE COURT: Okay. Is that correct, sir?

14                   THE DEFENDANT: Yes, sir.

15                   THE COURT: As to Attorney Colwell. Are  
16          you also willing if Attorney Laatsch is brought in  
17          that you waive the privilege as well --

18                   THE DEFENDANT: Yes.

19                   THE COURT: for him? Okay. All right.  
20          Then the Court finds that you have waived the  
21          attorney/client privilege for the purposes only of  
22          this hearing.

23                   Okay, and then you can proceed.

24          Q          And, Attorney Colwell, um, at the -- at the motion  
25          hearing you had indicated that you just didn't know

1           whether -- whether the Court had indicated, um, what  
2           your -- what the Defense's position was regarding the  
3           standing. And I know you maintain your position was,  
4           I don't know. Um, and, again, I'm more asking this  
5           for clarification, because I know you already, um, I  
6           don't want to say vaguely answered the question, but  
7           was the -- and I don't want to ask a loaded question  
8           here -- I'm sorry, not loaded -- a leading question,  
9           was the decision not to -- either to or not to  
10          address standing was that your decision or was that  
11          information the defendant had told you this is how he  
12          wanted it -- how he wanted you to respond?

13        A    I -- I don't -- in terms of -- I'm not quite -- in  
14            terms of the way the question is posed, it's hard for  
15            me to answer because you see in terms of the decision  
16            to not address the standing, is that kind of the way  
17            it was --

18        Q    Yeah. That was -- was that -- you decided to make  
19            the call based on the facts -- based on the limited  
20            information you had since there wasn't much of a  
21            conversation between you and the defendant? Or was  
22            it a situation where the defendant had strictly told  
23            you, I do not want you to argue, I do not want you to  
24            take the position that it was my gun (SIC) and I am  
25            okay with us not having standing? Or was there a

1 third option?

2 A He didn't say the second one. He didn't say like  
3 that. I sure don't recall that having -- it was more  
4 of -- it was -- we had a discussion about standing  
5 and him being willing to take steps to be able to  
6 assert standing. And he was never willing to do that  
7 is the -- is the -- is the best way to answer it.  
8 And that -- that's -- it's kind of like you put it  
9 out before the client and you say, you know, here's  
10 the problem we've got. If you want -- if you want to  
11 do this, you have to -- you know, we need something  
12 to come forward to change the landscape, and he  
13 wasn't willing to do that as I recall.

14 ATTORNEY O'CONNELL: Your Honor, I don't  
15 have any further questions.

16 THE COURT: Okay. Attorney Duros.

17 CROSS-EXAMINATION

18 BY ATTORNEY DUROS:

19 Q Attorney Colwell, you -- you indicated that the  
20 defendant was not willing to take a position on  
21 whether this was his cell phone; is that true? Or  
22 that --

23 A That's --

24 Q Or that he told you that it was not his cell phone?

25 A No. I think that that would be the -- he -- he'

1           wasn't willing to take the position that it was his  
2           cell phone.

3       Q     You indicated that given that position of your  
4           clients that you were not comfortable pursuing a  
5           contrary position; is that true?

6       A     Correct.

7       Q     And why were you not comfortable doing that?

8       A     Well, I don't think I can come forward and take a  
9           position that's not -- does not have some support in  
10          law or my client's -- well, what my client says. I  
11          can't just decide, well, my client should say that,  
12          that would be the smart thing to do, so I am going to  
13          say that that is what his position is.

14      Q     So generally in -- in the past you would have  
15          conversations with your clients about whether you  
16          should pursue motions or not, true?

17      A     Yes.

18      Q     And how long have you been an attorney?

19      A     I started in May of 1979 -- or June, early June. So  
20          that makes it just over 40 years.

21      Q     So you've handled thousands of criminal cases?

22      A     That's about, yes, because that's -- that's probably  
23          a good 90 percent of what I do or have done up until  
24          the last year.

25      Q     And I would assume that you've tried hundreds of

1 cases in your career?

2 A I don't know if it's hundreds, but I've tried quite a  
3 few.

4 Q Did you thoroughly review the discovery in this case  
5 like you would in any other case?

6 A I know -- I know I looked at the police reports very  
7 carefully. Um, and, um, I'm a little vague as to the  
8 jail calls, how much I did on that. I also know  
9 that, for example, there was a DVD, I believe  
10 something -- we were talking about on the phone with  
11 the exact thing, and I never went and looked at that.  
12 I know it's been looked at by my client I think with  
13 Attorney Gary Schmidt. I knew what was on the phone.  
14 And if I -- if it had gone to the point where I was  
15 going to be the attorney at trial, um, you know, then  
16 I was obviously going to have to -- have to do that.  
17 Um, this case when I got involved initially it was  
18 coming off a series that the focus for a long time  
19 had been the competency. Um, and that shift then was  
20 -- after the -- actually he was found to be  
21 competent, the shift then went as far as -- um, and  
22 based upon the conversations with my client, the  
23 focus that we both felt the case should probably take  
24 was going to be on the NGI aspect of the plea. Um,  
25 and -- um, and as far as why we both were focusing on

1 that, some of that kind of gets me again into  
2 attorney/client conversations, and I don't -- I don't  
3 want to start volunteering things if I don't have  
4 to.

5 Q Okay. But the bottom line is, you -- you've looked  
6 at the discovery and you talked with your client  
7 about -- about this phone issue, true?

8 A Yes. And I --

9 Q Go ahead. Sorry.

10 A And I also took a look at a number of cases. He had  
11 one case cited. I went to take a look and see. And  
12 I -- I checked to see -- most of the file was -- a  
13 copy of the file was -- the original file went to I  
14 think Attorney Wallace. He took what I called the  
15 basic part of the file. The client at that time had  
16 an issue as I recall with me giving some of the  
17 mental health records to his next attorney. Um, so I  
18 -- I just gave that -- that part to Attorney Wallace.  
19 I did keep some copies of some things in the file.  
20 It was at a later point during the trial that  
21 Attorney Laatsch contacted me and I drove down to his  
22 area and I gave him -- I think I may have actually  
23 had them still in the binders. I mean there were  
24 thousands of pages of mental health, psychological  
25 records that I did at that point. But in looking at

- 1           -- when I did look at what I have, I saw that I do  
2           apparently have photocopies -- did have photocopies  
3           of cases that I had taken a look at dealing with the  
4           stalking horse. And there were -- so that issue was  
5           -- that issue, which is somewhat related to the  
6           standing issue because you want the standing to get  
7           to the stalking horse, but, yeah, I had -- I actually  
8           kept the copies of the cases I had looked at on the  
9           stalking horse. So I have them here with me.
- 10        Q    Okay. So just to put this in perspective. Um, based  
11           on what you recall about this case, the defendant was  
12           charged with numerous counts of sexual assault,  
13           true?
- 14        A    Correct.
- 15        Q    And those charges were the result of a probation  
16           agent and officers locating videos of an individual  
17           performing oral sex on a three-year-old girl; is that  
18           true?
- 19        A    I'm trying -- as I say, I'm trying to remember if  
20           there was oral sex. I think -- there is something  
21           about a diaper being moved and being taken away and  
22           there is touching and stuff. And was there oral sex?  
23           It was -- as I recall from the reports it was pretty  
24           graphic.
- 25        Q    Right. And those -- those videos were located on a

1 phone, correct?

2 A Correct.

3 Q And it was your client's position all along that that  
4 was not his phone, right?

5 A That's -- that -- I believe that is in the police  
6 report what he had when he was confronted with it,  
7 because I also had some of reports I looked at, and  
8 he said not my phone.

9 Q Now, if we look at this from a strategic standpoint,  
10 what are your thoughts, and what were your thoughts,  
11 about saying that it was your client's phone? Could  
12 that harm his case --

13 A Yes.

14 Q -- for him to say that he possessed this phone, which  
15 contained videos of an individual performing oral sex  
16 on a three-year-old?

17 A It does. I mean, it certainly puts him at the  
18 crime.

19 Q Now, I think on direct we talked about whether or not  
20 we can use things elicited at motion hearings at  
21 trials, right?

22 A Correct.

23 Q So were you aware that the State filed a memo on this  
24 issue asking for clarification of whether the  
25 defendant even had standing to challenge the phone?

1 A Would that memo have been filed as part of the  
2 post-conviction?

3 Q No. It was filed after the motion on the phone was  
4 filed.

5 A Okay. Um, I know that -- I know standing was an  
6 issue. Um, and I know, um, it may have been with you  
7 even in the hallway mentioning it. I also saw Gary  
8 Schmidt once and I have a recollection with him. But  
9 the standing question, you know, it was -- you know,  
10 it was discussed.

11 Q So -- so to prove that this was an illegal search,  
12 you first had to prove that you had standing to even  
13 challenge it, right?

14 A That was my understanding of the law.

15 Q And --

16 A Yes.

17 Q And to prove that you have standing, you need to  
18 prove that the defendant had the phone, right?

19 A In some capacity I thought you did.

20 Q So in that regard you would -- it was your burden on  
21 the motion, correct?

22 A Correct. And the -- as I saw it strategically, the  
23 problem you had was that to gain standing you put  
24 yourself more at the scene of the crime. If you're  
25 going -- if you're going to go down that route you

1 better be 110 percent certain that you are going to  
2 win on the motion because otherwise you are just  
3 taking a bad situation and you're making it worse.

4 Q Right. And you would have to call individuals to the  
5 stand and get sworn testimony regarding the fact that  
6 this was the defendant's phone, right?

7 A You would need to have -- you would need to do  
8 something to lay -- to -- to show that you had  
9 standing. Calling -- calling witnesses. Um, I guess  
10 there was a question raised by the Defense that he  
11 could maybe testify himself, that is Mr. Douglas  
12 could testify, but that couldn't be used against him  
13 later on in the case-in-chief or at least could not  
14 be used against him at trial. I don't know that  
15 there -- that the memorandum separated case-in-chief  
16 from -- from the issues of impeachment.

17 Q So from a strategic standpoint did you view it, and  
18 do you still view it, as somewhat dangerous and  
19 almost counter-productive to prove that your client  
20 possessed this phone with all of those videos?

21 A I -- yes. And that was -- that would be more of the  
22 nature of the conversation I think with Mr. Douglas  
23 would be, you know, you can go either way. There's  
24 -- there's a risk if -- you can go this way, you can  
25 go that way. There's -- there's -- there's pluses

1 and minuses to both, you know. How do you -- how do  
2 you want this handled.

3 Q Were aware that at the trial the defendant indicated  
4 that that was not his phone? Were you aware of  
5 that?

6 A At trial?

7 Q Yeah. I guess you weren't the attorney at trial.

8 A No. I was -- it was actually, I think John Wallace  
9 got it for a short time and then Attorney Laatsch was  
10 the final attorney.

11 Q Okay. And I want to talk about one more thing that  
12 you said. You said when you filed these motions,  
13 especially in a sensitive position like this, you  
14 want to be 110 percent sure that you are going to win  
15 the motion, right?

16 A Well, you want to be very, especially on something  
17 like this, yes, you don't want -- yes. You want to  
18 be -- maybe not 110. You want to make sure -- it's a  
19 risk, reward, balance. And the greater the risk, the  
20 more the reward and the percentages and stuff here.

21 Q Um, so with your worry, if you lost this motion, you  
22 set yourself up for failure because you have proven  
23 that this was in his possession and that he  
24 controlled this phone which contained the videos?

25 A I would help establish that. That would be a

1 concern.

2 Q You would help build the State's case?

3 A Yes.

4 ATTORNEY DUROS: All right. I don't have  
5 anything further.

6 THE COURT: Attorney O'Connell, any  
7 follow-up questions?

8 REDIRECT EXAMINATION

9 BY ATTORNEY O'CONNELL:

10 Q Did you -- um, do you recall whether the defendant  
11 had informed you that he would take the stand to --  
12 at the motion hearing to testify that the phone was  
13 his?

14 A I -- I don't recall anything like that. And while my  
15 recollection is going to be -- obviously is far from  
16 perfect, to put it mildly, um, there are certain  
17 things which if they occurred you would be more  
18 likely to recall than other things. I think that's  
19 one of the things I would be more likely to recall,  
20 I'm not 100 percent sure. And I -- I don't recall  
21 any conversation like that.

22 ATTORNEY O'CONNELL: I don't have any  
23 further questions.

24 THE COURT: Okay. You may step down. Then  
25 he can be released from the subpoena, right?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ATTORNEY O'CONNELL: Yes.

THE COURT: Okay. We'll wait for Attorney Laatsch to arrive. We'll be in recess probably for over a half-hour yet.

ATTORNEY COLWELL: Sorry I was late, Your Honor, this morning.

THE COURT: Well, apparently you thought it was 10:30.

ATTORNEY COLWELL: I thought it was 10:30, and.

THE COURT: All right. Mistakes happen.

(Recess taken.)

THE COURT: Let the record reflect that we're back in session in State versus Justin Douglas, 15-CF-132. We now have our witness. I understand the circumstances surrounding that. You don't have to apologize. It was beyond your control, um, Attorney Laatsch. So, you know, you've always been respectful of this Court and on time. And you were essentially held hostage in Fond du Lac County.

ATTORNEY LAATSCH: The judges are aware of what is going on in their court and they don't look too far beyond that.

THE COURT: Right. And it's my understanding that you advised the Court that you had

1 this and, you know, they decide whatever they decide. #  
2 And then, you know, some judges are -- bend over #  
3 backwards to help other courts while others don't.  
4 So we'll just proceed. And it's not your fault.

5 So, all right, Attorney O'Connell. I should  
6 state that the defendant is present, along with both  
7 counsel, so.

8 ATTORNEY O'CONNELL: I'd call the second  
9 witness, Attorney Daryl Laatsch.

10 THE COURT: Right over here.

11 THE WITNESS: And, ma'am, I affirm rather  
12 than swear.

13 THE COURT: Okay. You do the Quaker oath?

14 THE WITNESS: Yes.

15 THE COURT: Okay.

16 (The clerk swears him in.)

17 THE COURT: No. He affirms it. He doesn't  
18 say -- he doesn't swear, so help me God. That is the  
19 Quaker oath. Don't you have that?

20 THE CLERK: I do not have that one.

21 THE COURT: Okay.

22 THE WITNESS: Sorry. I'm a little older #  
23 and it shows. #

24 THE COURT: Well, William Penn would be  
25 offended, but anyway. So you affirm?

1

THE WITNESS: Yes, I affirm.

2

3

4

THE COURT: Okay. That's fine. You need to get a Quaker hat if you are going to take the oath. So, all right, proceed.

5

THE WITNESS: Right.

6

DIRECT EXAMINATION

7

BY ATTORNEY O'CONNELL:

8

Q Attorney Laatsch, you once represented Justin Douglas on Outagamie County Case 15-CF-132; is that correct?

10

11

A That is.

12

Q And you were provided a copy of the post-conviction motion for the trial?

13

14

A Yes.

15

Q And did you have an opportunity to review that motion?

16

17

A I did.

18

Q And did you -- in this case you did obtain the discovery before trial; is that correct?

19

20

A Yes.

21

Q And do you recall, did you receive the discovery shortly after you were appointed as counsel for the defendant?

22

23

24

A I can't say exactly when, but, yes, relatively soon after being appointed.

25

1 Q And who provided you with the discovery?

2 A I believe it came from the State. Um, although I  
3 actually don't recall that specifically. But my  
4 usual practice is whenever I come into a case I ask  
5 the district attorney's office for a fresh set of  
6 discovery as it were.

7 Q So you're not sure who provided you with the  
8 discovery?

9 A Right. There -- there were some -- there were some  
10 documents that the predecessor counsel and Mr.  
11 Douglas had generated that I also received during the  
12 course of representation and that's -- I wasn't --  
13 that's why there's a little bit of vagueness to my  
14 recollection.

15 Q And did the discovery include a phone call which the  
16 defendant made a jail call to a third party on  
17 January 28, 2015, in which he had asked the third  
18 party to pick up his stuff from a Chelsea Baurain's  
19 residence?

20 A It did.

21 Q And do you recall which -- where you got that  
22 discovery? If it came from prior counsel? If it  
23 came from the district attorney's office?

24 A I am assuming from the DA's office, but I -- I don't  
25 have any specific recollection. I -- I was certainly

1           aware of the call.

2           Q     Okay. Now before you -- before you were retained to  
3           represent Mr. Douglas there was a motion to suppress  
4           that was argued and lost. Were you aware of that  
5           motion?

6           A     I was.

7           Q     Did you order a transcript of that motion hearing?

8           A     No.

9           Q     Did you have a conversation with Mr. Douglas or any  
10          of his prior attorneys regarding what transpired  
11          regarding that motion hearing?

12          A     I -- I may have talked with Mr. Douglas about it as  
13          part of talking about his case overall. I can -- I  
14          can make the observation that I was aware that a  
15          motion to suppress had been brought and that it was  
16          denied. Mr. Douglas was aware that there had been a  
17          motion to suppress brought and that it had been  
18          denied. And we -- we did not discuss relitigating  
19          it. It was simply -- it was part of the landscape of  
20          the case. When you step in as successor counsel  
21          there's always some parts of the case that have been  
22          decided and some have not. And that one was in the  
23          decided column.

24          Q     Okay. And I guess this is more for clarification. I  
25          think you just sort of vaguely answered what my next

1 question is. But what was the reason why you did not  
2 choose to refile a motion to suppress?

3 A Again, it had been -- it had been brought, argued,  
4 and decided. And so we knew to the extent that it  
5 was otherwise relevant that that evidence was going  
6 to come in. So that part of trial strategy had to  
7 deal with that reality. And I didn't think bringing  
8 the motion a second time would be -- would be  
9 productive.

10 Q Okay. So that was -- it sounds like that was your  
11 decision then not to bring the -- a motion a second  
12 time? Or did you have a conversation with the  
13 defendant and he decided?

14 A To the -- if we talked about that, we certainly  
15 didn't talk about it at great -- we didn't talk about  
16 that particular phone call at great length, nor --  
17 nor did we talk about bringing the motion a second  
18 time. If we talked about that at all it certainly  
19 wasn't at great length. I have -- not that it's  
20 happened all that often, but I've found over the  
21 years that most judges once they've decided something  
22 unless there is some new -- new evidence that's --  
23 that might be cause for reconsideration don't  
24 appreciate hearing the same arguments and having the  
25 same issues hashed out two or three times. I'll stop

1           there.

2           Q    And you had indicated the reasons why -- why the  
3           motion was not raised.  Um, I'm looking just to  
4           follow up on that.  Did you ask the defendant if he  
5           wished to relitigate the issue?

6           A    I don't recall asking him that.

7                         ATTORNEY O'CONNELL:  I don't have any  
8           further questions, Your Honor.

9                         THE COURT:  Okay.  Attorney Duros, any  
10          questions?

11   CROSS-EXAMINATION

12                         BY ATTORNEY DUROS:

13          Q    Was it your client's position that the phone at issue  
14          was not his phone, if you recall?

15          A    I don't recall if we had a specific discussion about  
16          that or not.  I was aware that there had been an  
17          issue about whether it was his phone or not and that  
18          there might -- therefore raised an issue of whether  
19          he had standing to object or not.  And my  
20          understanding was that for purposes of the motion to  
21          suppress it was taken as if it was his phone.  And so  
22          -- so that the motion was decided on that basis.

23          Q    Would it be fair to say that by claiming that it was  
24          his phone that would not have helped your case at  
25          trial, correct?

1 A I don't -- I don't know that it would have made a  
2 difference. I think we proceeded as if it were his  
3 phone. There was certainly no issue raised that it  
4 was not that I recall.

5 Q So you don't recall any issue that the defendant  
6 raised regarding whether this was his phone or not?

7 A No. I don't recall that coming up at trial.

8 Q You recall that the videos at issue, specifically the  
9 video of the defendant sexually assaulting a  
10 three-year-old, were located on one specific phone,  
11 correct?

12 A Yes.

13 Q So could you see how it could be harmful if the  
14 defendant said that that is my phone, which contains  
15 the videos, especially when he's charged with  
16 possession of child pornography?

17 A Yes.

18 Q Do you recall the defense in the case is that it was  
19 not the defendant on the video?

20 A That I do recall.

21 Q And there were two other males -- or at least one  
22 other male that were residing or at least staying in  
23 the same house during the time when the defendant  
24 lived with that young girl. Do you remember that?

25 A Yes.

1 Q And it was a defense of yours that it could have been  
2 one of those other individuals who sexually assaulted  
3 and recorded that girl, correct?

4 A Um, I -- I specifically recall that Mr. Douglas was  
5 saying it was not him on the video. Um, I think it  
6 flows from that that it was someone else. So I guess  
7 the short answer, yes.

8 Q Okay. So your defense all along was it was not the  
9 defendant on that video, correct?

10 A Yes.

11 Q And it was helpful -- or it would have been helpful  
12 to your defense if you would have stated that it was  
13 not the defendant's phone?

14 A Probably so.

15 Q And just so the record is clear, how long have you  
16 been an attorney?

17 A Forty years.

18 Q And you've done numerous jury trials in the past,  
19 correct?

20 A Somewhere between 100 and 200.

21 Q And you have litigated numerous motions as well?

22 A Yes.

23 Q Are you also a commissioner or --

24 A No. At one point, and this goes back a few years, I  
25 was a municipal judge for 14 years.

1 Q So is it your general practice in these cases to --  
2 to review the discovery, determine if there are any  
3 motions that need to be filed, and then proceed  
4 accordingly?

5 A Certainly.

6 Q And did you do that in this case to the best of your  
7 recollection?

8 A Yes.

9 ATTORNEY DUROS: I don't have any further  
10 questions.

11 THE COURT: Any follow-up?

12 ATTORNEY O'CONNELL: I don't.

13 THE COURT: Okay. You may step down.

14 You're released from the subpoena. And sorry that we  
15 had to cause you a little stress today but, you know,  
16 we didn't know what was going on in Fond du Lac. So  
17 I appreciate you being able to make it up here.

18 ATTORNEY LAATSCH: Oh okay.

19 THE COURT: Good to see you again.

20 ATTORNEY LAATSCH: Likewise.

21 ATTORNEY O'CONNELL: Your Honor, the  
22 defendant would like to testify and I have two  
23 questions for him.

24 THE COURT: Okay. Well, since it's just  
25 two questions, he can stay at the table. We'll just

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

have him sworn in.

**JUSTIN L. DOUGLAS,**

being first duly sworn, testified as follows:

THE WITNESS: I do.

THE CLERK: Please state your full name for the record.

THE WITNESS: Justin Lee Douglas.

J-u-s-t-i-n. L-e-e. D-o-u-g-l-a-s.

THE COURT: Okay. Attorney O'Connell.

**DIRECT EXAMINATION**

**BY ATTORNEY O'CONNELL:**

Q Justin, you had heard these two attorneys testify earlier today. My question -- my first question is, did either of them have a conversation with you and inform you that any testimony that you provide at a suppression motion hearing indicating that the phone was yours could not be used against you at trial?

A No. I didn't know that until just today when you stated it to my attorneys and I brought it to your attention that nobody ever told me that until I just heard it today.

Q Okay. And had one of the attorneys -- had either of the attorneys told you that the -- that your testimony could not be used against you at trial would have you chose to -- to provide the Court with

1 information that the phone was yours?

2 A I most certainly would because if it can't be used  
3 against me, it can only help me. It can't hurt me.  
4 I mean, if it's not -- if it's not able to be used  
5 against me outside of that motion hearing, then I  
6 would have definitely said, yes, that is my phone.  
7 Because I took -- or I pled the NGI stating that I  
8 know it was me on the phone, but I wasn't reasonably  
9 insane at the time of the crime.

10 ATTORNEY O'CONNELL: I don't have any  
11 further questions.

12 THE COURT: Okay. Duros -- Attorney Duros,  
13 sorry, do you have any questions?

14 ATTORNEY DUROS: Just a couple.

15 CROSS-EXAMINATION

16 BY ATTORNEY DUROS:

17 Q You claimed all along that it wasn't your phone,  
18 right?

19 A I didn't claim that it wasn't my phone. I just  
20 didn't say whether it was or wasn't my phone.

21 Q And you were worried at the time that by saying it  
22 was your phone that would harm your case because  
23 that's where the videos were found, right?

24 A That is correct. But if I would have knew that it  
25 couldn't have been used against me I would have took

1           that chance.

2           Q       Okay.

3                    ATTORNEY DUROS: The rest of my questions  
4           can be sufficiently addressed in argument. I have no  
5           further questions.

6                    ATTORNEY O'CONNELL: No follow-up.

7                    THE COURT: Okay. Correct me if I'm wrong,  
8           during the trial I believe the defendant testified it  
9           was not his phone; is that correct?

10                   ATTORNEY DUROS: I would be guessing right  
11           now.

12                   THE COURT: Okay. I guess I would be, too.  
13           But did you get a chance to look at the transcript of  
14           the trial?

15                   ATTORNEY O'CONNELL: I did. I have it in  
16           front of me. It looks like he did not testify at the  
17           trial but then there was a second day. That -- the  
18           second day of the trial that was regarding his  
19           insanity and that one he did testify.

20                   THE COURT: Oh, okay. All right.

21                   ATTORNEY DUROS: I'm requesting that we  
22           have a short amount of time to brief the issue unless  
23           the Court wants to decided to. The issue is, one,  
24           whether the attorneys were deficient; and if they  
25           were, then whether it was prejudicial to the

1 defendant.

2 THE COURT: Do you agree?

3 ATTORNEY O'CONNELL: Yeah, that's fine,  
4 Your Honor. If we could schedule something where we  
5 could file a brief based on the information that was  
6 provided today, the State could file a response, and  
7 then we could file a reply.

8 THE COURT: Why don't we just do  
9 simultaneous briefs.

10 ATTORNEY O'CONNELL: Okay.

11 THE COURT: And then I'll just give you  
12 time to respond to the other one's at the same  
13 time.

14 ATTORNEY DUROS: Okay.

15 THE COURT: So we'll set up a briefing  
16 schedule. How much time would you like for your  
17 initial briefs? Do you want a month?

18 ATTORNEY O'CONNELL: Yeah. I think the  
19 court reporter probably would want a few weeks.  
20 We're -- I just talked to the State. We're probably  
21 going to order the transcript.

22 THE COURT: Well, she's pretty quick.

23 ATTORNEY O'CONNELL: Would a month be okay?

24 THE COURT: You know, how much time would  
25 you like?

1 THE COURT REPORTER: Well, next week I am  
2 out because we have a trial all week.

3 THE COURT: Yeah, she's out.

4 THE COURT REPORTER: So I wouldn't start it  
5 till -- I don't know. Two or three weeks.

6 THE COURT: So maybe we should set your  
7 first brief due in the middle of October. That  
8 should give you sufficient time. How about October  
9 18th for the initial date? That would be a Friday.

10 ATTORNEY DUROS: Could you say that date  
11 again.

12 THE COURT: October 18th.

13 ATTORNEY DUROS: That works.

14 ATTORNEY O'CONNELL: Sure.

15 THE COURT: And then responding to those  
16 would be, how about November 1st, which is two weeks  
17 later on a Friday.

18 ATTORNEY O'CONNELL: So are we -- just for  
19 clarification, are we both filing both briefs on  
20 October 18th and then both of our responses are due  
21 on November 4th?

22 THE COURT: Correct. Okay. Then we'll  
23 call back and get a decision date sometime in the  
24 middle of November, the middle-to-late November. If  
25 the defendant wants to appear by video, he may. It's

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

up to him.

ATTORNEY O'CONNELL: Would you want me to be here for the decision?

THE COURT: You wouldn't have to. You could appear by phone. If your client is here in person, then the Court would want you to be here.

ATTORNEY O'CONNELL: Okay. The defendant would like to be here, so I'll be here also.

THE COURT: Okay.

THE CLERK: November 21st at 1:30.

ATTORNEY O'CONNELL: That works for me.

THE COURT: Okay.

ATTORNEY O'CONNELL: Is the -- is the State -- I am not sure who did the writ here. Did the State do the writ?

THE COURT: I'm sure they did.

ATTORNEY O'CONNELL: So the State would handle the writ?

ATTORNEY DUROS: Yes.

ATTORNEY O'CONNELL: Thank you.

THE COURT: That's what they do.

ATTORNEY DUROS: All right. Thank you.

THE COURT: Okay. Then we'll be adjourned.



STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff

**DEFENDANT'S BRIEF  
FOR A NEW TRIAL**

-vs-

Case No. 15CF132

Justin L. Douglas.

Defendant.

Facts.

The defendant was charged with: two counts of sexual assault to a child; four counts of child sexual exploitation; two counts of possession of child pornography; and eight counts of felony bail jumping. (Complaint:1-9). As for the charging document, it indicates that Douglas left his phone by C.B.'s residence, that C.B. provided the phone to the police, that the police searched the phone and found content in the phone that resulted in the charges against Douglas. (Complaint:10-11).

Subsequently, a motion to suppress evidence obtained from the phone was filed, and a motion hearing was held. At the hearing, the State introduced an exhibit of an arrest warrant which indicated C.B. believed Douglas has assaulted her daughter. (8/9/17:45; Exhibit 1:3-4). The police testified C.B. wanted Douglas's phone out of her residence. (8/9/17:10-11, 30). Thus, the police picked up the phone on January 28, 2015. (8/9/17:10-12). The officer that picked up the phone indicated he contacted the officer whom was investigating the sexual assault, and the phone was then secured into an evidence locker. (8/9/17:13). At that point, the police indicated they did not believe there was any incriminating information on said phone – pertaining to this case. (8/9/17:33). However, on January 30, 2015, Douglas's probation agent was advised by the police that they possessed a phone that was likely Douglas's, that the agent may be interested in said phone, and Douglas's agent indicated she was in fact interested. (8/9/17:31-33). Upon questioning by the agent, Douglas indicated the phone was not his. (8/9/17:21). At that point, on the direction of the agent, the police searched the phone, and it obtained information that ultimately led to the charges. (8/9/17:33-36).

At the hearing, the issue of standing arose – whether Douglas was even claiming it was his phone, since if he was not, there would be no standing. (8/9/15:2-5). As such, defense counsel had two options: either argue there was no standing and thus the motion is denied at the start, or otherwise argue the phone was Douglas's, and then the argument could proceed. Here, defense counsel indicated, considering Douglas previously made statements that the phone was not his, and the fact Douglas was not speaking to defense counsel, that defense counsel could not take a position that the phone was his to have standing. (8/9/15:2-5). However, defense counsel could have taken the position that the phone actually was Douglas's. It would certainly have been consistent with the testimony provided. (8/9/15:10-13). Nonetheless, ultimately, the court denied the motion; in doing so, it indicated the defendant was not claiming it was his phone and thus he did not have standing to bring the issue. (8/9/15:50-52).

Subsequently, a postconviction motion hearing was held. At that time, Douglas's previous attorneys testified that they were provided a tape of a jail recording that, on January 28, 2015, 12:56 p.m., Douglas had made a phone call to a third party to pick up his belongings from

C.B.'s residence. (Trial:162); 8/30/19:8, 32). Further, counsel whom represented Douglas at the motion hearing indicated Douglas did not take a position whether he wished to claim standing, and that counsel did not inform Douglas that even if he invoked standing for purposes of the motion hearing, it could not be used against him at trial. (8/30/19:13-15). As for subsequent counsel, he indicated he did not feel it would have been a good idea to relitigate the issue and he did not recall asking Douglas if he wished to do so. (8/30/19:13-15).

### Argument.

The failure of defense counsel to take the position that it was Douglas's phone had great impact to Douglas's defense. Here, had counsel took the position it was Douglas's phone, Douglas would then have standing to contest whether the police improperly seized the phone. As a preliminary matter, in *Simmons v. United States*, the court ruled the court testimony of a defendant in support of a motion to suppress evidence may not be used against him at trial, over his objection, on the issue of guilt. *Simmons v. United States*, 390 US. 377, 394 (1968). Thus counsel could have taken the position it was Douglas's phone without concern it would impact Douglas's trial rights.

As for the issue itself, the problem is the seizure of the phone when the police took the phone from C.B. up until the time the agent sought to view the phone. At that point in time, they were informed it was Douglas's phone, and they seized the phone without any valid reason: they were not doing so on behalf of the agent and they did not believe there was probable cause that the phone itself was contraband or that it contained any illegal content. Furthermore, had the third party picked up the phone, the police would not have obtained the phone nor would the agent been informed that the phone was Douglas's. In addition, the contents of the phone would have almost certainly not been disclosed. As the officer testified at the motion hearing, he was not aware of anything illegal about the phone when it was picked up. (8/9/15:49).

Case law indicates a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Here, the police clearly seized the phone when they took it from the third party and kept it until the agent had the chance to review it. Further, although there are limited circumstances when an officer may seize property without a warrant, such as if there is probable cause to believe that it contains evidence of a crime, and if exigencies of the circumstances demand [the seizure], the officer here testified this was not the case. *State v. Carroll*, 2011 WI App. 155, P26, 322 Wis.2d 299, 778 N.W.2d 1. The police did not think there was anything illegal about the phone. As a result, the evidence obtained through the illegal seizure should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

As for the standards of ineffectiveness and getting a new trial, the court has stated:

The United States Constitution and the Wisconsin State Constitution provide that an individual facing criminal charges shall have the right to be represented by counsel. U.S. Const. amend. VI; Wis. Const. art. 1, Sec. 7. The right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed. 674 (1984). If effective assistance of counsel is not provided at trial, the defendant shall be awarded a new trial. *State v. Carter*, 2002 WI App. 55, P2, 250 Wis.2d 851, 641 N.W.2d 517. As for the ineffective standard, the court has stated:

To prove an ineffective assistance of counsel claim, a defendant must first demonstrate that counsel's

performance was deficient, meaning that it “fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed. 2d 67 (1984). Courts are “highly deferential” in scrutinizing counsel’s performance, and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. The defendant must also show that the deficient performance prejudiced the defense. *Id.* at 692. This requires a “reasonable probability that, but for counsel’s professional errors the result of the proceeding would have been different.” *Id.* at 694.

*State v. McGuire*, 10 WI 91, P65, 328 Wis.2d 289, 786 N.W.2d 227.

Here’s counsel’s performance was deficient for failing to pursue the position that it was Douglas’s phone so that he would have standing on the issue. In doing it, he would have been able to show the police did not have proper grounds to initially seize the phone; thus, the contents of the poisonous tree should have been suppressed. Clearly this prejudiced Douglas since the poisonous fruit was then permitted to be used against Douglas at trial, and it essentially was the primary evidence.

Considering the above, Douglas requests this Court grant him a new trial along with an Order that the poisonous fruit be suppressed.

Date: October 11, 2019

O’Connell Law Office  
Attorneys for the Defendant



---

Timothy O’Connell

State Bar No. 1063957

O’Connell Law Office  
403 S. Jefferson St.  
P.O. Box 1625  
Green Bay, WI 54305-1625  
(920)-360-1811

Case 2015CF000132

Document 253

Filed 10-21-2019

Page 1 of 5

FILED  
10-21-2019  
Clerk of Circuit Court  
Outagamie County  
2015CF000132

**STATE OF WISCONSIN****CIRCUIT COURT****OUTAGAMIE COUNTY**

STATE OF WISCONSIN

Plaintiff,

DA Case No.: 2015OU000596

Assigned DA/ADA: Alexander E. Duros

Agency Case No.: LAC15-003195

Court Case No.: 2015CF000132

vs.

JUSTIN L. DOUGLAS

Defendant.

**STATE'S RESPONSE TO  
DEFENDANT'S POSTCONVICTION  
MOTION**

For Official Use

## I. INTRODUCTION

The State of Wisconsin, by Assistant District Attorney Alexander E. Duros, requests that the court deny the defendant's postconviction motion for the following reasons: (1) the defendant's trial attorneys were not deficient; and (2) even if the defendant's trial attorneys were deficient, the defendant was not prejudiced.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, a defendant must establish both that his or her trial counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Pursuant to *Strickland*, the defendant bears the burden of affirmatively proving prejudice. *State v. Roberson*, 2006 WI 80, ¶ 35, 292 Wis. 2d 280, 717 N.W.2d 111. In considering whether the defendant met his burden, the court should consider the "totality of the evidence before the trier of fact." *State v. Johnson*, 153 Wis. 2d 121, 129-30, 449 N.W.2d 845 (1990).

To show deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness considering all the circumstances." *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786. A court reviewing counsel's performance must be highly deferential, and trial counsel enjoys a strong presumption that his or her conduct falls within the wide range of reasonable professional

assistance. *Strickland*, 466 U.S. at 689. A court must “make every effort to reconstruct the circumstances of counsel’s challenged conduct, to evaluate the conduct from counsel’s perspective at the time, and to eliminate the distorting effects of hindsight.” *Jenkins*, 355 Wis. 2d 180, ¶ 36 (citing *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695). “[C]ounsel’s performance need not be perfect, nor even very good, to be constitutionally adequate.” *Carter*, 324 Wis. 2d 640, ¶ 22 (citing *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305). Thus, the defendant must overcome the presumption that the alleged deficient conduct “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Even if counsel’s performance was deficient, the defendant must still show the deficient performance prejudiced the defense, which requires a showing that counsel’s performance was “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. The defendant must show that there is a reasonable probability that the result would be different absent counsel’s deficient performance. *Id.* at 694. A reasonable probability is a probability which undermines confidence in the outcome. *Id.* A defendant fails to establish prejudice if it “appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Jenkins*, 355 Wis. 2d 180, ¶ 37. While courts should consider the cumulative effect of the alleged deficiencies, the defendant cannot merely present a “laundry list of mistakes by counsel and expect to be awarded a new trial.” *State v. Thiel*, 2003 WI 111, ¶¶ 59-61, 264 Wis. 2d 571, 665 N.W.2d 305. “[I]n most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling.” *Id.*, ¶ 61. Each error alleged must in itself fall below an objective standard of reasonableness to be included in the cumulative error prejudice calculus. *Id.*; see also *State v. Hunt*, 2014 WI 102, ¶ 55 n.15, 360 Wis. 2d 576, 851 N.W.2d 434 (stating that if one or all of

the alleged acts are not in themselves instances of deficient performance, the reviewing court need not address the defendant's aggregate argument).

**A. The Performances of Douglas's Attorneys Were Not Deficient**

Pursuing the motion to suppress would have been harmful to the defense because the defendant would have been required to offer evidence that the defendant had standing to even challenge the seizure. By offering evidence to show he had standing, the defendant would be offering evidence that the phone—which contained child pornography—belonged to the defendant. Because the defendant was charged with possession of child pornography, testimony related to the defendant's possession of child pornography would have clearly been harmful to the defense.

Attorney Colwell recognized this fact at the *Machner* hearing held on September 4, 2019. He stated, "[I]t certainly puts him at the crime scene." (August 30, 2019 p.24). He continued:

[A]s I saw it strategically, the problem you had was that to gain standing you put yourself more at the scene of the crime. If you're going – if you're going to go down that route you better be 110 percent certain that you are going to win on the motion because otherwise you are just taking a bad situation and you're making it worse.

(August 30, 2019 pp. 25-26). Attorney Laatsch agreed, confirming that it would have been harmful to the defense if the defendant admitted to possessing child pornography in a case charging the defendant with possession of child pornography. (August 30, 2019 p. 36). This is certainly a reasonable strategy that did not "[fall] below an objective standard of reasonableness considering all the circumstances." *Jenkins*, 355 Wis.2d 180, ¶ 36.

The defendant claims that even if he testified regarding the standing issue, that testimony could not have been used against him at a subsequent jury trial. See Def.'s Brief at 2. However, that is not entirely true. As noted by the Wisconsin Supreme Court:

Case 2015CF000132 Document 263  
STATE OF WISCONSIN - VS - Justin L. Douglas

Filed 10-21-2019

Page 4 of 5

[P]ost-*Simmons* decisions indicate that the United States Supreme Court has never believed that compelled testimony, within the meaning of the fifth amendment to the United States Constitution, is elicited merely because a defendant was required to make the difficult choice to testify at the suppression hearing. . . . In fact, the majority [in *United States v. Salvucci*, 448 U.S. 83 (1980)] suggested that use of suppression hearing testimony to impeach trial testimony would be permissible.

*State v. Schultz*, 152 Wis.2d 408, 429, 448 N.W.2d 424 (1989). The Wisconsin Supreme Court ultimately decided in *Schultz* that using a defendant's testimony from a motion to suppress hearing at a subsequent jury trial does not violate the Wisconsin Constitution. *Id.* At 431-32.

For these reasons, the defendant's trial attorneys were not deficient.

**B. The Defendant Was Not Prejudiced**

As argued above, the State believes that the defendant's attorneys were not deficient in pursuing a position that would have placed the defendant at the crime scene. However, even if the court finds that the defendant's attorneys should have pursued a position that the phone belonged to the defendant, and even if the court found that the seizure was unlawful, the defendant was not prejudiced because the evidence would not have been suppressed.

In *State v. Wheat*, 2002 WI App 153, ¶¶ 26-29, 256 Wis.2d 270, 647 N.W.2d 441, the Court of Appeals held that the exclusionary rule does not bar the introduction of illegally seized evidence from a probationer. The court noted that "[t]he exclusionary rule is a judicially-created means of deterring illegal searches and seizures but does not prohibit the introduction of illegally seized evidence in all proceedings or against all persons." *Id.*, ¶ 27. The court stated:

[T]he United States Supreme Court has held that the exclusionary rule does not bar the introduction of evidence seized in violation of a parolee's Fourth Amendment rights at a parole revocation hearing. We see little reason to distinguish between illegally obtained evidence leading to a parole revocation proceeding and illegally obtained evidence leading to a probation search.

Case 2015CF000132 Document 253  
STATE OF WISCONSIN - VS - Justin L. Douglas

Filed 10-21-2019

Page 5 of 5

*Id.*, ¶ 26 (citations omitted). The court ultimately held that “[a] reasonable probation search . . . is lawful even if the probation officer relies, in part, on information from law enforcement officials in violation of the Fourth Amendment.” *Id.*, ¶ 29. Therefore, even if the court finds that the defendant should have pursued a position that he had standing, and the court also finds that the seizure of the defendant’s phone was in violation of the Fourth Amendment, the exclusionary rule would still not apply and the evidence would have been introduced at trial. Therefore, the defendant was not prejudiced.

### III. CONCLUSION

For the foregoing reasons, the State respectfully requests that the court deny the defendant’s motion.

Cc: Attorney Timothy O’Connell

Date Signed: 10/21/19

Electronically Signed By:

Alexander E. Duros

Assistant District Attorney

State Bar #: 1090052

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff

**DEFENDANT'S REPLY  
BRIEF FOR A NEW TRIAL**

-vs-

Case No. 15CF132

Justin L. Douglas.

Defendant.

In the State's response brief, it argues counsels' performance were not deficient, and even if it was deficient, it was not prejudicial. As a result, Douglas will address each of the State's arguments.

#### Deficient

The State argues that trial counsels' performance were reasonably strategic since they both indicated they felt it would be harmful to the defendant if they took the position that Douglas had standing. Further, it also cited to *State v. Schultz*, and it argued said case stands for the premise that the State can use the defendant's testimony at a suppression hearing to impeach him at trial. Considering such, counsels' performance were not deficient.

In response, there appears to be a number of issues with the State's argument. Before getting into them, though, Douglas will summarize *State v. Schultz*. In said case, the defendant moved for a new trial claiming that the trial court improperly permitted the State to impeach his testimony at trial with his testimony at a *Goodchild* hearing. *State v. Schultz*, 152 Wis.2d 408, 416, 448 N.W.2d 424 (1989). Ultimately, the Supreme Court denied this argument since "a contrary result would condone perjury at the *Goodchild* hearing or at trial". *Id.* at 426-427.

As for the case the State cites to, as indicated above, it is regarding using a defendant's statements at a *Goodchild* hearing for impeachment purposes at trial. There, the court's concern was condoning perjury. In Douglas's case, this would have never been an issue. Here, the State was seeking from defense counsel what position Douglas was taking on whether the phone was his because it felt Douglas had to take the position the phone was his to get standing to have a hearing on the suppression issue. (Motion hearing:4-5). In response, defense counsel indicated he did not have an answer. (Motion hearing:4-5). Considering such, it is questionable whether the case the State cites to even applies since Douglas's case does not involve a situation where the defendant testified inconsistently in two different hearings but rather a situation where defense counsel took one position at the motion hearing and Douglas was free to testify truthfully at trial.

Nonetheless, even if the law from *Schultz* is relevant, its ruling permitting the State to use counsel's position at the motion hearing to impeach the defendant if chose to testify, is extremely limited and would not even had applied here. First, the *Schultz* case would only permit the impeachment evidence if Douglas testified inconsistent to his counsel's version, and it could not be used as direct evidence. Thus, so long as Douglas did not testify, it could not be used against him. Second, any testimony by the defendant that the phone was not his would have no chance of convincing the jury anyhow. The jury would hear he had 11 prior convictions, and the State had a witness, which would have no reason to lie, indicate the phone was owned by Douglas. (Trial:17, 96-97). Third, we know Douglas did not testify on his behalf. (Trial:174). Thus, ultimately even

if counsel did take the position the phone was Douglas's, it ultimately would have had no effect.

Furthermore, counsel's reasons for failing to raise standing in arguing the motion to suppress were not strategically reasonable. As for attorney Colwell, when asked why he did not take the position that the phone was Douglas's so that they would have standing, he indicated you "better make sure you win because otherwise you are just making a bad situation and you're making it worse". (Motion hearing:25-26). In response, first, as discussed above, taking the position that it was Douglas's phone would have had no effect on the case. Case law indicates the State certainly could not use it on direct, and arguably could not be used for impeachment purposes. Furthermore, we know there is no way it would benefit Douglas to testify at trial that it was not his phone since it would then know he had 11 prior convictions and testimony from a witness whom said it was his phone. On the other hand, winning on a motion to get this evidence suppressed would have almost certainly resulted in the charges dropped. The State would be left without evidence to proceed. Considering this, counsel's decision was not reasonable.

As for attorney Laatsch, he indicated he indicated he did not feel it would have been a good idea to relitigate the issue and he did not recall asking Douglas if he wished to do so. (Motion hearing:13-15). Furthermore, in making his decision, he did not think it mattered if the phone was Douglas's, he proceeded at trial as if the phone was Douglas's, and counsel was not aware of any evidence to suggest it was not Douglas's phone. (Motion hearing:35-36). None of the above reasons were strategically reasonable. As discussed previously, it was important to fight to get the evidence suppressed, and the downside was virtually non-existent.

#### Prejudice.

The State also argues the defendant has failed to show prejudice. In support, it cites to *State v. Wheat*. As a result, Douglas will address *State v. Wheat*.

In *State v. Wheat*, a police officer searched the defendant and found numerous empty baggies, a cell phone, and a calculator on said person. *State v. Wheat*, 2002 WI App 153, P3-4, 256 Wis.2d 270, 647 N.W.2d 441. Subsequently, the officer informed the defendant's agent of said news. *Id.* at P2, 6. Approximately a week later, the defendant met with the defendant as part of his probation condition; at that time the officer's phone call was discussed and the agent indicated the defendant would need to submit to a drug test. *Id.* at P2, 6. However, before being tested, the defendant fled. *Id.* at P18. Based upon the defendant's flight, his history of drug use and possession of drug paraphernalia, and the officer's phone call, the agent decided to search the defendant's residence. *Id.* at P6-7. At that time, a number of drugs were found. *Id.* at P9.

*Wheat*, in turn, made two arguments: 1) the agent acted as a stalking for the police, and 2) the search was illegal because some of the evidence that formed the basis for the search, the officer's illegal search of his person, contaminated the later search of his residence. *Id.* at P13, 24. As for the second argument, the Court determined the search was acceptable for two reasons. First, it indicated a probation search can be lawful when a probation agent relies "in part" on information derived from a violation of the Fourth Amendment. *Id.* at P25. It is important to consider this verbiage since the court of appeals must have meant it was important to use such wording or otherwise it would have left it out and simply said it is lawful when a probation agent relies on information derived from a violation of the Fourth Amendment (with the understanding the agent is merely relying on unlawful information). This appears to be an important point since the agent used the possible improper information in reaching her decision, but she also had other reasons for her decision: his previous history of drug use and possession of drug paraphernalia as well as the fact that he fled when he was asked to get tested. In Douglas's case, the only information the agent

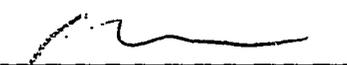
relied on was the unlawful information provided by the police.

Second, and potentially more damning to the State's argument, is the second reason of support the Court provided for its conclusion in permitting the search to stand in that case. There, the court indicated the application of the exclusionary rule to probation searches would have little deterrent effect upon an officer who is unaware that the subject of the search is on probation since the officer will be searching for evidence that could be used at trial and with the understanding any unlawful search will be deemed inadmissible at such. *Id.* at P28. However, in Douglas's case, the police were aware the defendant was on probation at the time of the seizure of the phone, and investigator Matthew Kuether testified the police had no interest in the phone, but that he told the agent he would hold it "in case" she ever wanted it, and at some point later, the agent decided to view it. *Id.* at P30-33, 40-41. Thus, unlike in *Wheat*, the police here were aware the defendant was on probation and they were not holding the phone for their own investigation but rather held it "in case" the agent wanted to later see it. The importance of this difference is the importance of not inadvertently creating a rule that the police can now start breaching our Fourth Amendment rights when they know one is on probation with the understanding that it will now be deemed admissible at trial.

Considering the above, Douglas requests this court grant the defendant's motion to for a new trial along with an Order that the poisonous fruit be suppressed.

Date: October 31, 2019

O'Connell Law Office  
Attorneys for the Defendant

  
\_\_\_\_\_  
Timothy O'Connell

State Bar No. 1063957

O'Connell Law Office  
403 S. Jefferson St.  
P.O. Box 1625  
Green Bay, WI 54305-1625  
(920)-360-1811



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

ALEX DUROS, Attorney at Law,  
DISTRICT ATTORNEYS OFFICE,  
320 S. Walnut Street,  
Appleton, WI 54911; appears on behalf of the  
State.

TIMOTHY O'CONNELL, Attorney at Law,  
PO Box 1625,  
Green Bay, WI 54301; appears on behalf of the  
defendant, JUSTIN L. DOUGLAS, who appears by phone.

\*\*\*

(Proceedings commenced at 3:08 p.m.)

THE COURT: Let the record reflect that  
we're here in Case File 15-CF-132, State of Wisconsin  
versus Justin Douglas, and would counsel state their  
appearances?

ATTORNEY DUROS: Alex Duros appears for the  
State.

ATTORNEY O'CONNELL: Defendant appears in  
person along with -- and I'm sorry. Defendant  
appears in, defendant appears by phone, and his  
attorney appears in person.

1 THE COURT: Okay. And he requested that?

2 MR. O'BOYLE: All right. Hold on one  
3 second. This is Chaplain Justin O'Boyle at Columbia  
4 Correctional Institute, not Justin Douglas.

5 THE COURT: Okay.

6 MR. O'BOYLE: Somebody called and just said  
7 is this Justin. I said yes, and then they put me on  
8 hold, and I got no clue why I'm on this phone call,  
9 guys.

10 THE COURT: Well, are you a registered sex  
11 offender, sir?

12 MR. O'BOYLE: What's that?

13 THE COURT: I was just wondering if you're  
14 a registered sex offender, sir?

15 MR. O'BOYLE: Absolutely not, sir.  
16 Absolutely not.

17 THE COURT: Okay. All right. It's  
18 obviously the wrong person then.

19 MR. O'BOYLE: So you're looking for  
20 somebody for court?

21 THE COURT: Yes. Justin Douglas is the  
22 name, and he's at Columbia. Are you at Columbia?

23 MR. O'BOYLE: I'm at Columbia Correctional  
24 Institute. I'm the chaplain, I'm not a sex offender  
25 from here.

1 THE COURT: All right.

2 MR. O'BOYLE: Yeah. Hold on one second.

3 Let me -- I'm going to patch you over to my  
4 supervisor, and maybe she will be able to put you  
5 over to Justin Douglas; because he is here, but I  
6 don't know what in the world, how to get over there,  
7 so hold on one second. Thank you.

8 (Off the record.)

9 THE COURT: Okay. Let the record reflect  
10 that we're in session in Case File 15-CF-132. Justin  
11 Douglas appears by phone. His Attorney O'Connell is  
12 present as well as Attorney Duros for the State, and  
13 I was asking Attorney O'Connell if in fact that he  
14 had requested an appearance by phone; is that  
15 correct?

16 ATTORNEY O'CONNELL: I don't believe that  
17 he had made that request. I, I believe the -- I  
18 would have to go back --

19 THE COURT: Okay.

20 ATTORNEY O'CONNELL: -- to the transcript,  
21 but I'm, my guess is that the Court had, had made  
22 that decision at the last hearing.

23 THE COURT: Oh. I don't recall that, but  
24 Justin, Justin, do you wish to appear by phone today?

25 THE DEFENDANT: Rather be there in video

1 court there, but --

2 THE COURT: Okay. For some reason the  
3 video isn't working, and this is a non-evidentiary  
4 hearing.

5 THE DEFENDANT: Oh.

6 THE COURT: So anyway. I think we can  
7 proceed anyway since the Court is, I don't plan on  
8 entertaining additional argument from counsel. It's  
9 been fully briefed, and the Court feels that it is in  
10 a position to render the decision, so the Court then  
11 will issue its decision at this time orally.

12 All right. So this case involved a complaint  
13 that was filed by C [REDACTED] B [REDACTED] regarding a  
14 possible sexual assault of her three-year-old  
15 daughter. Officer Kuether was assigned to  
16 investigate that. Ms. Baurain informed him that  
17 Justin Douglas had visited her home on a few  
18 occasions and that her daughter had been left alone  
19 with him for a few hours during the week prior to her  
20 complaint. Her relationship with Mr. Douglas was  
21 that Mr. Douglas was a friend of her boyfriend.

22 Now, a few days after she reported the alleged  
23 sexual assault of her daughter, she had contacted the  
24 Appleton Police Department to request that the police  
25 pick up an LG cell phone that was left at her

1 apartment and that she believed it belonged to the  
 2 defendant Justin Douglas. Officer Knauer collected  
 3 the phone and secured it in evidence at the Appleton  
 4 Police Department. Then Officer Kuether contacted  
 5 Ms. Baurain or actually it was not Ms. Baurain but  
 6 Ms. Niemuth, probation or parole agent, and advised  
 7 that the phone had been turned in was reportedly  
 8 Justin Douglas's, and that was in secure evidence and  
 9 available if she wished to examine it. That, well,  
 10 communication was between Ms. Niemuth and  
 11 Ms. Baurain.

12 Officer Kuether also informed Ms. Niemuth that  
 13 he had met with Justin Douglas who indicated that he  
 14 did not have a cell phone. Agent Niemuth indicated  
 15 she would contact Officer Kuether if she wished to  
 16 examine the phone. I might be a little confused  
 17 about whether Officer Kuether is a female or a male.

18 ATTORNEY DUROS: He's a male.

19 THE COURT: Okay.

20 ATTORNEY DUROS: Matt Kuether.

21 THE COURT: Okay. That's a male, okay.

22 Now the probation officer, Agent Niemuth, conducted  
 23 an investigation into the incident which provided  
 24 further information regarding Justin Douglas's  
 25 conduct in informing his agent including that he took

1 photos of his penis with Ms. Baurain's cell phone;  
2 two, played a recording on his cell phone For  
3 Ms. Baurain's mother of a conversation involving two  
4 women, Justin Douglas and Ms. Baurain's boyfriend in  
5 which two men refused to pay women for their  
6 services; and three, claims that he had a gun in the  
7 conversation with the women.

8 Agent Niemuth obtained approval from her  
9 supervisor to search the cell phone that was kept in  
10 evidence at Appleton Police Department. She met with  
11 Officer Kuether at the police department to search  
12 the cell phone but was unsuccessful because it had a  
13 pass code. She contacted Justin Douglas at the  
14 Outagamie County Jail the same day to obtain the code  
15 for the phone. Justin Douglas denied owning the cell  
16 phone and did not know the pass code.

17 Now Ms. Niemuth also spoke with two female  
18 friends of Justin Douglas, Linda Harper and Lisa  
19 Collar, both of whom provided her with the  
20 defendant's cell phone number. Linda Harper provided  
21 Ms. Niemuth with a written statement reporting that  
22 the defendant asked her to contact Ms. Baurain in  
23 order to pick up one of his old cell phones left at  
24 her residence with all the contacts in it. Lisa  
25 Collar stated that the defendant showed her

1 pornography on the phone indicating that the phone  
2 contained a lot of dirty pictures of girls.  
3 Ms. Collar reported an occasion when the defendant  
4 said he would like to rape her after she told him to  
5 stop touching her.

6 Agent Niemuth again met with the defendant at  
7 the Outagamie County Jail to request the phone pass  
8 code. Justin Douglas claimed that he did not know  
9 the pass code but admitted to using the phone which  
10 belonged to his friend.

11 In an effort to access the cell phone,  
12 Ms. Niemuth contacted Officer Kuether and requested  
13 that they meet at the police department to examine  
14 the phone for a second time. The agent had obtained  
15 a SIM card reader to try to access the phone  
16 information. However, the phone had an SD card, not  
17 a SIM card. Agent Niemuth then requested that  
18 Officer Leitzinger assist in accessing information on  
19 the cell phone. Officer Leitzinger stated that he  
20 would assist at the request of probation and parole.

21 Numerous pornographic images and photos of the  
22 defendant's face were recovered from the phone's SD  
23 card. Several videos were recovered, some involving  
24 a female child who appeared to be two to three years  
25 old in a diaper. Ms. Niemuth recognized the

1 defendant's voice on the videos, one of which  
2 involved child pornography. Once the pornography was  
3 found, Ms. Niemuth stopped watching the video and let  
4 the Appleton Police Department handle the situation  
5 from that point on.

6 The defendant has now or actually he had moved  
7 to suppress the evidence obtained from the search of  
8 his cell phone, whether or not it was his cell phone.  
9 The State challenged the defendant's standing to  
10 raise the issue because he had claimed the cell phone  
11 did not belong to him. At a motion hearing, the  
12 Court denied the motion on grounds that there was no  
13 standing to claim a reasonable expectation of privacy  
14 regarding the contents of the phone because the  
15 defendant did not claim ownership of it. The phone  
16 was given to law enforcement by a private citizen.  
17 The Court found that because law enforcement and  
18 probation and parole had no reason to believe there  
19 was any expectation of privacy on the defendant's  
20 part, consent was not necessary.

21 Attorney Colwell represented the defendant at  
22 the motion hearing to suppress the phone evidence  
23 while Attorney Laatsch represented him at trial.  
24 Mr. Douglas now claims ineffective assistance of  
25 counsel based on the attorneys' failure to take the

1 position that the cell phone belonged to the  
2 defendant and that he therefore had standing to move  
3 to suppress the evidence obtained therein.

4 In order to establish ineffective assistance of  
5 counsel, a defendant must show that trial counsel's  
6 representation was deficient and that the deficient  
7 performance prejudiced the defendant under *Strickland*  
8 *v. Washington*. Counsel's performance is deficient if  
9 it fails, if it falls, sorry, below an objective  
10 standard of reasonableness. In evaluating counsel's  
11 performance, courts should be highly deferential.  
12 Counsel need not be perfect, indeed not even very  
13 good, to be constitutionally adequate.

14 To demonstrate deficient performance, the  
15 defendant must show a reasonable probability that the  
16 result of the proceeding would have been different  
17 absent counsel's errors. A reasonable probability is  
18 one sufficient to undermine the confidence in the  
19 outcome. However, the focus is not on the outcome  
20 but on the reliability of the proceedings. That  
21 comes from *State v. Thiel*, 264 Wis. 2d 257.

22 In order to challenge the seizure of a cell  
23 phone, the defendant must have been required to offer  
24 evidence that he had standing to do so, he would have  
25 offered evidence that the, that the phone which

1 contained child pornography belonged to him. At the  
2 *Machner* hearing, Attorney Colwell testified he  
3 believed such evidence would harm the defendant's  
4 case. Attorney Colwell's stated it certainly puts  
5 him at the crime. Also stated, as I saw it  
6 strategically, the problem you had was that to gain  
7 standing, you put yourself more at the scene of the  
8 crime. If you're going to go down that route, you  
9 better be 110 percent certain that you are going to  
10 win on the motion, because otherwise you're taking a  
11 bad situation and you're making it worse. That's  
12 found on pages 24 to 26 of the *Machner* hearing  
13 transcript.

14 In this hearing testimony, Attorney Laatsch  
15 agreed that it would have been harmful to the defense  
16 if the defendant had admitted possessing child  
17 pornography in a case charging him with possession of  
18 child pornography. Attorney Laatsch testified that  
19 he did not think it would be productive to relitigate  
20 a motion to suppress as it had been brought, argued,  
21 and decided and would have involved rehashing the  
22 same issues.

23 At this time the defendant argues that if he  
24 testified regarding the standing issue, his testimony  
25 could not have been used against him at a subsequent

1 trial. The State asserts that it is not entirely  
 2 true citing Wisconsin Supreme Court language in *State*  
 3 *v. Schultz*. In that case that's noted that  
 4 post-*Simmons* decisions indicate that the United  
 5 States Supreme Court has never believed that  
 6 compelled testimony, within the meaning of the Fifth  
 7 Amendment of the United States Constitution, is  
 8 elicited merely because a defendant is required to  
 9 make a difficult choice to testify at a suppression  
 10 hearing. The Court noted that it has not yet decided  
 11 whether *Simmons* prevents the prosecution from  
 12 impeaching the defendant's trial testimony with that,  
 13 the defendant's suppression hearing testimony. In  
 14 fact, the majority in *Salvucci* suggested that use of  
 15 suppression hearing testimony to impeach trial  
 16 testimony would be permissible.

17 Even if the Court were to determine that the  
 18 attorneys' performance was deficient and that the  
 19 phone seizure was unlawful, the defendant was not  
 20 prejudiced because the evidence would not have been  
 21 suppressed. In *State versus Wheat*, 256 Wis. 2nd 270,  
 22 the Court of Appeals held that the exclusionary rule  
 23 does not bar the introduction of illegally obtained  
 24 evidence leading to a probation search. The *Wheat*  
 25 Court noted that the exclusionary rule does not

1 prohibit the introduction of illegally seized  
2 evidence in all proceedings or against all persons.  
3 The Court of Appeals held that a reasonable probation  
4 search is lawful even if the probation officer relies  
5 partially on information from law enforcement in  
6 violation of the Fourth Amendment.

7 In this particular case, the Court finds that  
8 the defendant's attorneys made strategic decisions to  
9 avoid relitigating the suppression motion. The  
10 Courts are highly deferential in evaluating counsel's  
11 performance in the context of a claim of ineffective  
12 assistance of counsel. Counsel's performance may be  
13 constitutionally adequate even if it is deemed not  
14 even very good. Even if the Court finds in some  
15 cases that an attorney's performance was deficient,  
16 it appears that in this case it would not have  
17 prejudiced the defense. The search was instigated by  
18 the probation officer based upon her investigation of  
19 the alleged sexual assault incident. Law enforcement  
20 provided her with information regarding the cell  
21 phone but did not request that she search it. The  
22 search is not rendered unlawful merely because law  
23 enforcement provided some information that led to the  
24 search.

25 Therefore, this Court will deny the motion.

1 Okay. So if you want to prepare an, a written  
2 order --

3 ATTORNEY O'CONNELL: I will, Your Honor.

4 THE COURT: -- Attorney O'Connell, to the  
5 Court. You can submit that electronically, the Court  
6 will sign that. Anything else?

7 ATTORNEY DUROS: No, Your Honor. Thank  
8 you.

9 ATTORNEY O'CONNELL: No, Your Honor.

10 THE COURT: Okay. Then we'll be adjourned.

11 (Proceedings concluded at 3:36 p.m.)

12 \*\*\*

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

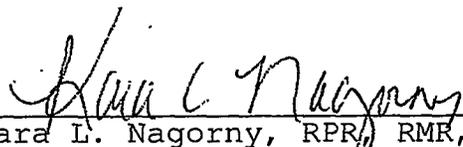
STATE OF WISCONSIN )

COUNTY OF OUTAGAMIE )

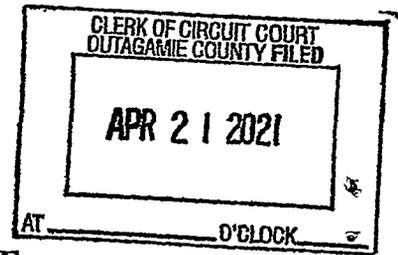
I, KARA L. NAGORNY, RPR, RMR, CRR, and  
official court reporter for Outagamie County Branch  
II, hereby certify that I reported stenographically  
the proceedings held in the aforementioned matter, in  
said court, at the Outagamie County Government  
Center, Appleton, WI, on December 3, 2019, the  
Honorable John Des Jardins presiding;

That the foregoing transcript was reported  
stenographically to the best of my ability and that I  
believe it to be a true and correct transcript of  
said proceedings had on said hearing.

Dated this 11th day of December, 2019.

  
Kara L. Nagorny, RPR, RMR, CRR  
Circuit Court Br. 2  
320 S. Walnut Street  
Appleton, WI 54911

The foregoing certification of this transcript  
does not apply to any reproduction of the same by any  
means unless under the direct control and/ or  
direction of the certifying reporter.



**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 20, 2021**

Sheila T. Reiff  
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. 2020AP84-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2015CF132

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JUSTIN L. DOUGLAS,**

**DEFENDANT-APPELLANT.**

**APPEAL** from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 **PER CURIAM.** Justin Douglas appeals a judgment, entered upon a jury's verdict, convicting him of two counts of first-degree sexual assault of a

No. 2020AP84-CR

child; four counts of sexual exploitation of a child; two counts of possession of child pornography; and eight counts of felony bail jumping, with all sixteen counts as a habitual criminal. Douglas also appeals the order denying his postconviction motion for a new trial. Douglas argues that his trial counsel was ineffective in pursuing a motion to suppress evidence obtained from a cell phone. We reject Douglas's arguments and affirm the judgment and order.

### BACKGROUND

¶2 On January 27, 2015, Carole<sup>1</sup> brought her then three-year-old daughter, Nancy, to the hospital because she suspected Nancy had been sexually assaulted. Carole told a responding officer that Douglas, a friend of her boyfriend, had been left alone with Nancy for two hours on the afternoon of January 22. At that time, Douglas stood charged with burglary and felony theft, and he had been released on a \$5,000 signature bond. Additionally, Douglas, who was a registered sex offender, was on extended supervision resulting from his 2012 conviction for a felony sex offender registration violation.

¶3 On January 28, 2015, Carole asked police to collect a cell phone from her apartment that she believed belonged to Douglas. At the request of Douglas's probation agent, Chelsea Niemuth, law enforcement accessed the contents of the cell phone without using a passcode. Among the contents of the cell phone were videos Douglas took of himself touching Nancy's vagina and performing oral sex on her. After he was charged with the instant offenses, Douglas moved to suppress the contents of the cell phone, arguing that the phone

---

<sup>1</sup> Pursuant to the policy underlying WIS. STAT. RULE 809.86(4) (2019-20), we refer to the child victim and her mother by pseudonyms.

was unlawfully seized. The circuit court denied the motion after a hearing, and the matter proceeded to trial.

¶4 A jury found Douglas guilty of all sixteen charged offenses, rejecting his defense of not guilty by reason of mental disease or defect. The circuit court imposed consecutive and concurrent sentences resulting in an aggregate eighty-year term, consisting of fifty years' initial confinement and thirty years' extended supervision. Douglas's postconviction motion for a new trial was denied after a *Machner*<sup>2</sup> hearing, and this appeal follows.

#### DISCUSSION

¶5 Douglas argues he is entitled to a new trial because his trial counsel was ineffective at the suppression motion hearing. Appellate review of an ineffective assistance claim presents a mixed question of fact and law. *State v. McDowell*, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. Courts will not disturb the circuit court's findings of fact unless they are clearly erroneous, but determining whether counsel's performance falls below the constitutional minimum presents a question of law that is reviewed independently. *Id.*

¶6 To substantiate a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697.

---

<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

No. 2020AP84-CR

¶7 - To establish deficient performance, a defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. A defendant proves prejudice by demonstrating 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. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. However, “a defendant need not prove the outcome would ‘more likely than not’ be different in order to establish prejudice in ineffective assistance cases.” *State v. Sholar*, 2018 WI 53, ¶44, 381 Wis.2d 560, 912 N.W.2d 89 (citing *Strickland*, 466 U.S. at 693).

¶8 At the outset of the suppression motion hearing, defense counsel informed the circuit court that he had filed a motion to withdraw as counsel, stating that before they went on the record, Douglas “would not engage in conversation with me or even acknowledge my presence.” Noting that the matter had been scheduled for a suppression motion hearing and that Douglas was present, the court took the withdrawal motion under advisement and the hearing proceeded.

¶9 An Appleton police officer testified that upon Carole’s request, he was dispatched to retrieve what Carole believed to be Douglas’s cell phone; he secured the phone in an evidence locker; and he informed the investigating officer, Matthew Kuether, of its existence. Kuether, who handled sensitive crime investigations, then notified Douglas’s probation agent Chelsea Niemuth that law enforcement had a phone purportedly belonging to Douglas. Kuether explained that in his dual capacity as the department’s sex offender registry specialist, he had

No. 2020AP84-CR

recently met with Douglas and, during that meeting, Douglas had denied having a phone. Kuether further explained that based on recent contact with Niemuth, he was aware that Douglas had likewise told her that he did not have a cell phone.

¶10 Niemuth confirmed that Douglas had denied having a cell phone, so when she learned there was a phone possibly belonging to him, Niemuth sought to examine its contents “because of [her] supervision” of Douglas. Niemuth asked Douglas for the passcode to the phone, but he did not provide a passcode. In subsequent calls Douglas made to friends using a jail phone while in custody, he denied ownership of any phone. Niemuth asked law enforcement to help her access the contents of the cell phone, and with police assistance, she was able to review the contents, including the inculpatory videos leading to the present charges.

¶11 Relevant to this appeal, the prosecutor asked defense counsel at the hearing whether Douglas’s position was “going to be that this was the defendant’s phone or that it was not his phone.” Defense counsel responded: “I don’t know ... I know according to the reports, ... basically he denied that it was his phone ... admitted that he used it sometimes. And that was part of the reason he couldn’t give a passcode because it wasn’t his phone.” Douglas, who was present for the motion hearing, interjected nothing to dispute his counsel’s statements, despite his various other interruptions during the hearing. The circuit court denied the suppression motion, concluding that Douglas lacked standing to challenge the seizure of the cell phone because he denied owning the phone.

¶12 In his postconviction motion, and again on appeal, Douglas argues that his trial counsel was ineffective at the suppression motion hearing by failing to represent to the court that Douglas owned the cell phone. Douglas also claims

No. 2020AP84-CR

that successor counsel was ineffective by failing to re-file the suppression motion, given previous counsel's "mistake" regarding the phone's ownership.

¶13 Even if we assume without deciding that Douglas's attorneys performed deficiently as alleged, Douglas fails to establish that these claimed deficiencies were prejudicial. Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee that persons shall be free from unreasonable searches and seizures. Generally, seizures are considered "less intrusive than searches, based on the type of rights infringed: [a] seizure affects only the person's possessory interests; a search affects a person's privacy interests." *State v. Brereton*, 2013 WI 17, ¶23, 345 Wis. 2d 563, 826 N.W.2d 369 (citation omitted). Further, as relevant here, "[p]robationers are entitled to a certain degree of constitutional protection under the Fourth Amendment, but their rights against warrantless searches and seizures are significantly curtailed." *State v. Purtell*, 2014 WI 101, ¶22, 358 Wis. 2d 212, 851 N.W.2d 417.

¶14 In the present case, law enforcement did not seize the cell phone from Douglas—rather, they secured a cell phone of undetermined ownership that had been voluntarily provided by a third party. In asking the police to collect the cell phone from her residence, Carole expressed her belief that it belonged to Douglas. However, as noted above, Douglas repeatedly and consistently denied ownership of a phone, and he again denied ownership when given the opportunity to claim the subject cell phone. Therefore, even if the phone belonged to Douglas, his repeated denials reasonably support the conclusion he abandoned any claim to ownership. "Warrantless seizure of property whose owner has abandoned it or requested another to destroy or get rid of it does not violate the [F]ourth

[A]mendment.” *State v. Bauer*, 127 Wis. 2d 401, 407, 379 N.W.2d 895 (Ct. App. 1985).

¶15 Furthermore, even if we could somehow assume the cell phone belonged to Douglas and that it was unlawfully seized, the phone videos were nevertheless admissible at trial as the result of a valid probation search. Warrantless searches are presumed to be unreasonable unless an exception to the warrant requirement exists. *See State v. Tullberg*, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120. One such exception to the warrant requirement is a probation search. *State v. Hajicek*, 2001 WI 3, ¶36, 240 Wis. 2d 349, 620 N.W.2d 781. When a person is on probation, “the special needs of Wisconsin’s probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by ‘reasonable grounds.’” *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987). The reasonable grounds standard is found in Wisconsin’s administrative code, which provides that a Department of Corrections (“DOC”) agent may search an offender’s property at any time if reasonable grounds exist to believe that the property contains evidence of a rule violation. *See State v. Griffin*, 131 Wis. 2d 41, 61, 388 N.W.2d 535 (1986), *aff’d*, 483 U.S. 868 (1987); WIS. ADMIN. CODE § DOC 328.22(1), (2)(a) (Oct. 2019).

¶16 Douglas argues that because he challenged only the seizure of the cell phone and not the resulting probation search, “the analysis should end there.” A reasonable probation search, however, “is lawful even if the probation officer relies, in part, on information from law enforcement officials in violation of the Fourth Amendment.” *State v. Wheat*, 2002 WI App 153, ¶29, 256 Wis. 2d 270, 647 N.W.2d 441.

No. 2020AP84-CR

¶17 Here, Niemuth sought access to the cell phone contents in relation to her supervision of Douglas. The DOC's standard rules of community supervision require true, accurate, and complete information in response to a DOC agent's questions. *See Standard Rules of Community Supervision, State of Wis. DOC*,<sup>3</sup> Because Douglas denied owning a cell phone when questioned by Niemuth despite there being bases to believe it was his, there were reasonable grounds for Niemuth to believe the phone contained evidence of a rule violation. Therefore, the contents of the phone were discovered as the result of a valid probation search.

¶18 As discussed above, the cell phone was not unlawfully seized, and even assuming it had been, the probation search of the phone was nevertheless valid. Therefore, Douglas cannot prove he was prejudiced by counsel's claimed deficiencies, and the circuit court properly denied his postconviction motion based upon his ineffective assistance of counsel claim.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2019-20).

---

<sup>3</sup> This court may take judicial notice of publicly available government documents. *See, e.g., State v. Wachsmuth*, 73 Wis. 2d 318, 331-32, 243 N.W.2d 410 (1976). The Standard Rules of Community Supervision may be found at: <https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/SupervisionRules.aspx>.

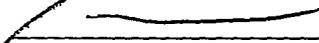
**APPENDIX CERTIFICATION**

I hereby certify that filed with this petition for review, either as a separate document or as part of this petition, is an appendix that complies with Wis. Stat. 809.62(2)(f), and that it contains, at a minimum: 1) a table of contents; 2) the decision and opinion of the court of appeals; 3) the findings or opinion of the trial court necessary for an understanding of petition; and, 4) any other portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

May 18, 2021

Signed:



TIMOTHY O'CONNELL

Attorney

State Bar No. 1063957

O'Connell Law Office

403 S. Jefferson St.

Green Bay, WI 54301

920-360-1811

Attorney for Defendant-Appellant