COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1069 **Cir. Ct. No. 2011CF345**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER J. LONG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Peter J. Long pled guilty and was convicted of his eighth-offense operating a motor vehicle while intoxicated (OWI). He files this appeal, pro se, challenging an order of the circuit court denying his postconviction

motion. Long seeks to withdraw his guilty plea, claiming that trial counsel and postconviction counsel were ineffective.[1] As we conclude that counsel were not ineffective, we affirm the circuit court's decision.

¶2 We recited the facts of this case in detail in Long's direct appeal, ***State v. Long***, No. 2014AP707-CR, unpublished slip op. (WI App Dec. 23, 2014). There, we addressed the constitutionality of Long's traffic stop and subsequent arrest. We upheld the circuit court's denial of Long's motion to suppress and determined that the specific facts known to Officer Corey Colburn at the time of Long's stop were sufficient to support reasonable suspicion that Long had committed, was committing, or was about to commit a crime. ***Id.***, ¶12.

¶3 Long brings this WIS. STAT. § 974.06 (2015-16)[2] postconviction motion to withdraw his plea and frames it as an ineffective assistance of counsel challenge. "A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted). Where a defendant is denied effective assistance of counsel, the manifest injustice standard is met. ***Id.***

¶4 To demonstrate ineffective assistance of counsel, a defendant must satisfy a two-prong test to show both that counsel's performance was deficient and that the deficient performance was prejudical. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is demonstrated where "counsel

[1] After sentencing, Long retained postconviction counsel who filed a direct appeal.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 694). We may dispose of a claim of ineffective assistance of counsel on either prong. ***Strickland***, 466 U.S. at 697.

¶5 Whether trial counsel's performance was deficient and prejudicial is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the circuit court's findings of fact unless clearly erroneous. ***Id.*** at 634. Whether counsel's behavior was deficient and prejudicial to the defendant is a question of law. ***Id.*** On appeal, Long claims that trial counsel was ineffective for failing to sufficiently challenge the unlawful traffic stop[3] and failing to challenge the warrantless blood draw. Long also argues that postconviction counsel was ineffective and that he was subject to an ex post facto law. We address each of Long's contentions below.

[3] In Long's initial motion to suppress, Long argued that Colburn's "attempt to locate" bulletin (ATL) was not supported under the community caretaker exception. The State conceded that the stop of Long's vehicle was not justified under that exception, and trial counsel reasonably dropped the argument. Long submits that it was wrong for trial counsel to "waive[]" the community caretaker exception argument. Long claims this argument "was a *winner* and meritorious" and that trial counsel allowed "the State to analyze Long's traffic stop and seizure under a subsequent 'traditional' Fourth Amendment reasonable suspicion approach which benefited the State." Long is misinformed as to the status of the law. Long won on the community caretaker issue—the State conceded it was not applicable—but that does not end the analysis. We will not find trial counsel ineffective for doing what he was hired to do: provide alternative arguments to secure suppression of the evidence.

Traffic Stop Was Lawful

¶6 In his postconviction motion, Long rehashes all of the same arguments he made in his direct appeal, namely that officers lacked reasonable suspicion to stop his vehicle, but frames his argument in terms of an ineffective assistance of counsel claim. We previously determined that officers had reasonable suspicion to stop Long; however, one factual error requires us to revisit this issue. In Long's direct appeal, the circuit court concluded that Colburn issued the "attempt to locate" bulletin (ATL) after going to the tenant's apartment and hearing Long on the speakerphone with slurred speech and admitting to driving in excess of the speed limit. ***Long***, No. 2014AP707-CR, ¶3 n.1. We found that the record supported that conclusion. ***Id.*** The State now concedes that Colburn issued the ATL before going to the tenant's apartment.

¶7 The question before us is whether reasonable suspicion was still present based on the amended timeline and whether trial counsel was ineffective for not challenging the stop on that basis. As we noted in Long's direct appeal, where an officer relies on information provided by dispatch and relies on an ATL in making a stop, "reasonable suspicion is assessed by looking at the collective knowledge of police officers." *See* ***State v. Pickens***, 2010 WI App 5, ¶¶11-12, 323 Wis. 2d 226, 779 N.W.2d 1 (2009).

¶8 Long argues that the reasonable suspicion analysis only includes those facts known to Colburn at the time he *entered* the ATL.[4] We need not reach this issue as we find that the information provided to Colburn by the tenant prior to issuing the ATL was sufficient under the totality of the circumstances for Colburn to reasonably suspect that Long was committing an offense or was going to commit an offense, or both. *See* ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634; *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on the narrowest possible grounds). Reasonable suspicion requires less certainty than probable cause. ***State v. Eason***, 2001 WI 98, ¶19, 245 Wis. 2d 206, 629 N.W.2d 625. "In other words, the required showing of reasonable suspicion is low, and depends upon the facts and circumstances of each case." ***Id.*** We consider the facts in each case not in isolation, but taken together in total. ***State v. Waldner***, 206 Wis. 2d 51, 56-57, 556 N.W.2d 681 (1996).

¶9 Colburn was the officer who responded to the first complaint by one of Long's tenants that evening. The tenant claimed that shortly after midnight Long was demanding rent payments, threatening the tenant, and pounding his head on the tenant's apartment door. *See* ***State v. Williams***, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106 (noting that citizens who report that they witnessed

[4] Long relies on ***United States v. Hensley***, 469 U.S. 221, 231-32 (1985), for this proposition, but ***Hensley*** did not involve a situation where officers obtained additional information *after* issuing the police bulletin, so the Court did not address this factual situation. *But see* ***In re M.E.B.***, 638 A.2d 1123, 1129 (D.C. 1993) (finding that where an officer obtains additional information after notifying dispatch, the officer is not required to issue a new broadcast if, at the time of the stop, "the information collectively known to the police is constitutionally sufficient to justify that intrusion"); 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.5(j) (5th ed. 2016) (suggesting that a temporary stop based on a police bulletin is valid if the police collectively have reasonable suspicion at the time the stop is made).

a crime are viewed as reliable). When Colburn arrived on the scene, he attempted to make contact with Long, who resides in a separate, but adjacent, building. He repeatedly knocked on Long's door—he could see Long inside his apartment through the window—but Long would not answer. Colburn eventually had dispatch call Long at home, and through the door, Colburn overheard Long tell the dispatcher that he was in Milwaukee. Long's behavior was clearly suspicious, and it was not unreasonable for Colburn to suspect that Long may have been intoxicated based on his behavior.

¶10 Colburn's suspicion was strengthened when, approximately an hour later, a different tenant of Long's reported that she thought Long was on drugs or intoxicated. Colburn testified that the tenant, who lived in the same building as Long, was a "concerned friend" who told Colburn that Long was "either under the influence of narcotics or intoxicants and was currently driving at 120 miles [per hour to Milwaukee] to kill an old cellmate he had in prison. She was concerned for his safety and also the other drivers on the road." Colburn then issued the ATL and proceeded to the tenant's apartment to verify her report.

¶11 Before even meeting the tenant in person, Colburn was able to initially verify the tenant's credibility because she lived in the same building as Long. The tenant also established the basis of her knowledge by indicating that she and Long "were good friends" and that Long plays video games with her two children. The tenant did not give Colburn her name as she feared retaliation by Long, but she did provide her address and phone number. The tenant was not anonymous as she provided identifying information to police; thus, her tip was reliable. *See* ***State v. Rutzinski***, 2001 WI 22, ¶32, 241 Wis. 2d 729, 623 N.W.2d 516 (explaining that a tip is generally found reliable where the informant provides identifying information as the informant runs the risk of being "arrested if the tip

proved to be fabricated"). Just as the tenant said, Long was stopped en route to Milwaukee.

¶12 As we found in Long's direct appeal,[5] regardless of when Colburn issued the ATL, the totality of the circumstances known to Colburn and the other officers demonstrates reasonable suspicion for an investigatory stop, and trial counsel was not ineffective for failing to argue that Colburn did not have reasonable suspicion at the time the ATL was issued.[6] *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not deficient or prejudicial for failure to present a meritless defense).

Warrantless Blood Draw Was Lawful

¶13 After Long was arrested, he refused to comply with Wisconsin's implied consent law and submit to an evidentiary blood test. A warrantless blood draw was taken, which revealed a blood alcohol concentration (BAC) of .151—well over the prohibited BAC of .02 applicable to Long. Long first argues that trial counsel was ineffective for failing to object to the blood draw as unreasonable, claiming that he refused to submit to the blood test as "he feared *another* possible [Methicillin-resistant Staphylococcus aureus (MRSA)] infection from sticking a needle in his arm."

[5] For more detail as to the information Colburn obtained after he issued the ATL, see ***State v. Long***, No. 2014AP707-CR, unpublished slip op. ¶¶2-5 (WI App Dec. 23, 2014).

[6] Long also argues that trial counsel was ineffective for failing to argue that officers did not have probable cause to arrest Long immediately after his vehicle was stopped. As we addressed this argument on direct appeal, reasoning that Long was not arrested immediately after the stop, we need not reach this issue again. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not deficient or prejudicial for failure to present a meritless defense).

¶14 Under the controlling law at the time, the police could obtain a sample of a suspected drunk driver's blood without a warrant where there was no reasonable objection to the blood draw. ***State v. Bohling***, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993). Long's blood draw was taken by medical personnel in a hospital. Long makes no argument that the location in which his blood was drawn was unreasonable, and he submits no evidence to support a finding that his fear of contracting another infection was grounded in specific knowledge of the safety of the facility. As we have previously determined, blood draws conducted in a hospital by medical personnel are generally found to be reasonable. *See* ***State v. Daggett***, 2002 WI App 32, ¶15, 250 Wis. 2d 112, 640 N.W.2d 546 (2001).

¶15 Long next argues that the warrantless blood draw was unlawful under the United States Supreme Court decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013). In 2012, at the time Long litigated the motion to suppress, the controlling law in Wisconsin was ***Bohling***, 173 Wis. 2d at 533-34, which held "that the dissipation of alcohol in a defendant's bloodstream, alone, constituted an exigent circumstance justifying a warrantless blood draw." ***State v. Reese***, 2014 WI App 27, ¶17, 353 Wis. 2d 266, 844 N.W.2d 396. Long claims that counsel was ineffective for failing to argue that the warrantless blood draw was unlawful under ***McNeely***, which abrogated our supreme court's decision in ***Bohling***. Although ***McNeely*** was decided by the time Long pled guilty in this case, the effect of ***McNeely*** on Wisconsin law remained unclear. Counsel in this case was not ineffective for "failing to 'object and argue a point of law' that is 'unclear'" or unsettled. ***State v. Morales-Pedrosa***, 2016 WI App 38, ¶16, 369 Wis. 2d 75, 879 N.W.2d 772; ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Further, Long was not prejudiced by counsel's failure to raise ***McNeely*** as under the facts of this case the outcome would not change. *See* ***State v. Kennedy***,

2014 WI 132, ¶37, 359 Wis. 2d 454, 856 N.W.2d 834 (applying the good-faith exception to the exclusionary rule where officers reasonably relied on ***Bohling*** for warrantless blood draw).

Postconviction Counsel Was Not Ineffective

¶16 Long also argues that his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel. Where a defendant claims ineffective assistance of postconviction counsel for not challenging trial counsel's effectiveness, a defendant must also establish that trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. As we conclude that Long failed to prove that his trial counsel was ineffective, we necessarily find that Long also failed to prove that his postconviction counsel was ineffective.

No Ex Post Facto Law

¶17 Long's final argument is a constitutional challenge to WIS. STAT. § 346.65(2) on the ground that it violates the ex post facto clauses of the Wisconsin and United States Constitutions[7] by enhancing his present conviction with offenses that could not have been counted when he committed them. We previously rejected this type of challenge in ***State v. Schuman***, 186 Wis. 2d 213, 520 N.W.2d 107 (Ct. App. 1994). In ***Schuman***, we held:

> Such legislation, creating penalty enhancers for crimes committed after the legislation becomes effective, does not run afoul of the ex post facto clause's "animating principle;" the offender is given a fair warning that subsequent offenses will be more severely punished as a

[7] U.S. CONST. art. I, §§ 9-10; WIS. CONST. art. I, § 12.

> result of their prior offenses. This principle is "premised on the right to know how to conform one's conduct to the law, and the consequences of not doing so, at the time one engages in that conduct."

Id. at 217-18 (citation omitted).

¶18 Long claims that the holding in ***Schuman*** is inapplicable to the present case as ***Schuman*** was decided in 1994 and "the version of the statute Long is challenging did not exist in 1994." Long applies a paint-by-numbers approach to legal analysis, claiming that he "is confident that [***Schuman***] does not apply to his argument" because the facts of this case and those in ***Schuman*** do not perfectly correlate. What Long fails to recognize is that courts often and necessarily apply analogical reasoning—reasoning by analogy—meaning that a case may be treated in a certain way because a similar case has been treated that way. Clearly the reasoning employed by this court in ***Schuman*** is applicable as Long was similarly subject to penalty enhancers for crimes committed prior to enactment of the legislation. Here, like in ***Schuman***, Long was given fair warning that subsequent offenses would be punished more severely as a result of his prior conduct, and he failed to conform his conduct to the requirements of the law and avoid another OWI. He was, therefore, constitutionally subject to stiffer penalties for his latest crime.

By the Court.—Order affirmed.

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