COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1996

NOTICE

No. 95-2852-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH A. ALBRECHT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed*.

SULLIVAN, J. Kenneth Albrecht appeals, on a guilty plea, from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant. He also appeals from an order denying his motion for postconviction relief. On appeal, he argues that his trial counsel was ineffective for not contesting the probable cause for the police to administer a breath test. This court concludes that the trial court properly determined that there was sufficient probable cause for the police to request a breath test; accordingly,

counsel's performance was not ineffective. The judgment and order are affirmed.[1]

I. BACKGROUND.

The following facts were adduced at Albrecht's postconviction motion to withdraw his guilty plea based on ineffective assistance of counsel. Shortly after 2:00 a.m., City of Cudahy Police Officer Jeffrey Lamster spotted Albrecht driving his automobile at speeds nearly twice the posted speed limit of 25 m.p.h. Officer Lamster followed Albrecht as he first tailgated and then passed an unmarked police car on the right. Lamster then pulled Albrecht's car to the side of the street. He exited the squad car and approached Albrecht, who remained in his car, in order to speak with him. Lamster testified that although he did not smell alcohol, Albrecht's "eyes were a little glassy." Lamster then asked him to exit the vehicle; Albrecht's movements in the car were slow. Albrecht admitted that he had consumed "a couple of drinks" and that he was tired; he denied that he was drunk. Officer Lamster testified that Albrecht then said, "Think about what [you]'re doing, I have a family, don't do this to me ...." From this conversation, Officer Lamster believed Albrecht was under the influence of an intoxicant. He then asked Albrecht to recite the alphabet, which the officer testified he completed without a mistake, and that his speech was relatively clear.

Officer Lamster, believing he had probable cause to arrest Albrecht for operating a motor vehicle while under the influence of an intoxicant, asked another officer to preform a preliminary breath test on Albrecht. The test showed Albrecht had a .25 BAC. Albrecht was arrested.

Albrecht's trial counsel testified at the ***Machner***[2] hearing that she did not challenge the probable cause for the breath test because, after reviewing the police reports and having conversations with Albrecht, she concluded that such a motion was fruitless. She cited that Albrecht had been speeding, this his

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[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

[2] *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

eyes were glassy, that he begged the police to give him a break, and that he admitted to the police he had been drinking.

The trial court denied the motion, concluding that counsel's performance was not deficient. The trial court determined that Officer Lamster had probable cause to ask the defendant to take a breath test. Accordingly, trial counsel would not have succeeded in a suppression motion based on an alleged lack of probable cause.

II. ANALYSIS.

Strickland v. Washington, 466 U.S. 668, 687 (1984), the seminal case by which ineffective assistance of counsel claims are adjudicated, articulates a two-pronged test in reviewing the reasonableness of an attorney's performance at trial. The first prong requires that the defendant show that counsel's performance was deficient. ***State v. Johnson,*** 126 Wis.2d 8, 10, 374 N.W.2d 637, 638 (Ct. App. 1985), *rev'd on other grounds*, 133 Wis.2d 207, 395 N.W.2d 176 (1986). That is, the defendant must show that counsel's conduct was "`unreasonable and contrary to the actions of an ordinarily prudent lawyer.'" ***Id***. at 11, 374 N.W.2d at 638 (citation omitted).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. Thus, because of the difficulties in making such a post hoc evaluation, "the court should recognize that counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." ***Id***. at 690.

The second prong requires that the defendant show that the deficient performance was prejudicial. ***Johnson,*** 126 Wis.2d at 10, 374 N.W.2d at 638. To be considered prejudicial, 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"—i.e., "a probability sufficient to undermine confidence in the outcome." ***Strickland,*** 466 U.S. at 694. In reviewing the trial court's decision, this court accepts its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***State v. Johnson***, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990). Further, if the defendant fails to adequately show one prong, this court need not address the second. ***Strickland,*** 466 U.S. at 697.

The crux of Albrecht's claim is whether the police had probable cause to request a preliminary breath test. This court agrees with the trial court that such probable cause did exist.

Probable cause is met when "a reasonable officer would conclude, based upon the information in the officer's possession, that the `defendant probably committed [the offense].'" ***State v. Babbitt,*** 188 Wis.2d 349, 357, 525 N.W.2d 102, 105 (Ct. App. 1994) (citation omitted). The trial court noted the following factors to support its probable cause determination: (1) Albrecht's speed at the particular time of night; (2) his tailgating; (3) his passing the car on the right; (4) his rapid acceleration; (5) his dazed look; (6) his slow movements in the car; (7) his glassy eyes; and, most importantly, (8) his admission he had been drinking.

Taking the factors together, a reasonable officer could determine that Albrecht was operating his car while under the influence of an intoxicant. *See* ***State v. Seibel,*** 163 Wis.2d 164, 183, 471 N.W.2d 226, 235 (1991) (discussing indicia: erratic driving, belligerent behavior); ***Babbitt,*** 188 Wis.2d at 357, 525 N.W.2d at 102 (glassy eyes); ***State v. Sayles,*** 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994) (admission of drinking; officer's experience).

Because this court agrees that the officers had probable cause to ask for a breath test, Albrecht's counsel was not deficient in her performance for failing to contest this probable cause. Counsel's conduct was not "`unreasonable and contrary to the actions of an ordinarily prudent lawyer.'"

Johnson, 126 Wis.2d at 11, 374 N.W.2d at 638 (citation omitted). Hence, this court need not address the prejudice prong of the ***Strickland*** test.

In sum, Albrecht's trial counsel did not provide ineffective assistance. Accordingly, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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