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DISTRICT IV

December 13, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2016AP31-CR State of Wisconsin v. Steven M. Johnson (L.C. # 2014CF12)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Steven Johnson appeals a judgment convicting him, after entry of a no contest plea, of homicide by intoxicated use of a vehicle and fleeing or eluding an officer. *See* WIS. STAT. §§ 940.09(1)(a), 346.04(3) (2013-14).[1] Johnson also appeals an order denying, after an evidentiary hearing, his postconviction motion for plea withdrawal. Johnson argues that his trial counsel was ineffective for failing to file a motion to suppress test results exhibiting his blood alcohol concentration. Based upon our review of the briefs and record, we conclude at

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the test if the defendant fails to make a sufficient showing as to one of them. ***Id.*** at 697. In this case, we need not decide whether Johnson's trial counsel performed deficiently because we conclude that Johnson has failed to meet his burden of showing prejudice.

To satisfy the prejudice prong of the test for ineffective assistance of counsel, Johnson must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Johnson has failed to meet that burden. Even without the blood test results, it is highly likely, given the quality and quantity of the other evidence in this case, that the State could have proved Johnson guilty of the crimes to which he pled. In exchange for Johnson's pleas, the State amended the information to remove a repeat penalty enhancer, which reduced the charge of homicide by intoxicated use of a vehicle from a Class C felony to a Class D felony. The State also dismissed and read in one count of injury by intoxicated use of a vehicle, and dismissed other felony and forfeiture counts. From the record before us, we are not persuaded that there is a reasonable probability Johnson would have gone to trial even if his counsel had moved for suppression of the blood test results and succeeded on the motion.

For Johnson to be convicted of homicide by intoxicated use of a vehicle under WIS. STAT. § 940.09(1)(a), the State would have needed to prove at trial that Johnson operated a vehicle, that Johnson's operation of the vehicle caused the death of another, and that Johnson was under the influence of an intoxicant at the time he operated the vehicle. *See* WIS JI—CRIMINAL 1185. The record demonstrates that it is highly likely the State would have been able to prove these elements beyond a reasonable doubt.

Police officer Mark Nelson could have testified at trial, as he did at the preliminary hearing, that he observed, around 2:55 a.m. on November 24, 2013, a vehicle operating erratically and crossing the centerline. Nelson identified Johnson in court as the driver of the vehicle. Nelson activated his sirens and attempted to stop Johnson's vehicle, but Johnson sped away. While following in pursuit, Nelson observed Johnson's vehicle collide with an oncoming vehicle. Nelson testified that, both to his own recollection and as depicted in the video recorded by his squad car camera, Johnson's vehicle was left of the centerline when it made contact with the other vehicle.

Nelson called for assistance and got out of his squad car to check on the occupants of the vehicles involved in the collision. In the vehicle he had been pursuing, he saw Johnson in the driver's seat and a front seat passenger, both of whom were unconscious. Nelson recognized the two individuals because he had seen them in a bar earlier that night. Nelson observed a strong odor of intoxicants. He checked on the driver of the other vehicle, who appeared to be unconscious. The driver of the other vehicle was pronounced dead at 3:53 a.m. on the scene after the medical examiner arrived.

Two emergency responders who provided care to Johnson reported that they had smelled intoxicants on him. A written statement of one of the responders states that, when he asked Johnson if he had been drinking, Johnson responded in the affirmative, admitted he had had a lot to drink, and said he shouldn't have been driving. Johnson asked emergency responders if they would "just shoot him." In light of all of the above, we are confident that, even without the blood test results, the State would have been able to present evidence at trial to prove the elements of homicide by intoxicated use of a motor vehicle beyond a reasonable doubt.

The State asserts in its respondent's brief that the charge of fleeing or eluding an officer bore no relation to Johnson's blood alcohol concentration and that, therefore, he cannot demonstrate that his defense to that crime was prejudiced by the blood test results. Johnson does not refute this assertion in his reply brief and, therefore, we assume the point is conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (where an issue is not addressed in the reply brief, we assume the point is conceded).

Because Johnson cannot demonstrate that he was prejudiced by his counsel's failure to move to suppress the blood test results, we reject his argument that he received ineffective assistance of trial counsel.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals