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DISTRICT II

July 14, 2021

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

2019AP1752-CR State of Wisconsin v. Claude A. Stollenwerk (L.C. #2017CF306)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Summary disposition orders 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).

Claude A. Stollenwerk appeals from a judgment convicting him after a jury trial of operating while intoxicated (4th offense) and from a circuit court order denying his postconviction motion seeking a new trial due to ineffective assistance of trial counsel or in the interests of justice. Based upon our review of the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

Upon encountering Stollenwerk sitting in his parked vehicle in a park at 4:30 p.m. on February 22, 2017, the law enforcement officer detected a "strong odor of intoxicants." Stollenwerk told the officer he had a glass of wine before he left his home two hours before, or 2:30 p.m., and that he arrived at the park at approximately 3:30 p.m. Stollenwerk initially denied drinking in the park, but after he failed field sobriety tests, he admitted to the officer that he had "a sip" of wine in the park. Within Stollenwerk's vehicle, the officer found an open bottle of wine on the front passenger floor, two pocket-size wine bottles in the pocket of a jacket on the passenger seat, and a cup containing wine in the center console. Stollenwerk's preliminary breath screening test (PBT) result was .168. A blood draw at 6:08 p.m., within three hours of 3:30 p.m., the time Stollenwerk admitted operating a motor vehicle, revealed a blood alcohol concentration (BAC) of .184 grams/100 mL. As an individual with prior operating while intoxicated convictions, Stollenwerk was required to have a BAC of no more than .02. WIS. STAT. §§ 346.63(1)(b) and 340.01(46m)(c).

At trial, the officer testified about his interactions with Stollenwerk. A state crime lab toxicologist testified about her retrograde extrapolation analysis of Stollenwerk's .184 BAC. Stollenwerk did not present defense toxicologist testimony relating to his BAC. Based on all of the evidence adduced at trial (the officer's testimony about Stollenwerk's intoxication and the circumstances of the encounter, Stollenwerk's statements to the officer about when he drank and

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

when he drove, the failed field sobriety tests, and the three-hour presumption that Stollenwerk had a BAC of .184 when he drove,[2] the State argued that Stollenwerk operated his vehicle while intoxicated and with a BAC above .02. Stollenwerk countered that he drank in the park, which accounted for the BAC results, and there was no evidence that he was impaired when he drove to the park. The jury found Stollenwerk guilty of operating while intoxicated (4th) and having a BAC above .02. The court convicted Stollenwerk of operating while intoxicated (4th).

Postconviction, Stollenwerk argued that his trial counsel was ineffective in several respects. After evidentiary hearings, the circuit court disagreed and denied Stollenwerk's request for a new trial. Stollenwerk appeals.

On appeal, Stollenwerk argues that his trial counsel was ineffective. To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. ***Id.*** We review de novo whether counsel's performance was deficient or prejudicial. ***Id.*** To show prejudice arising from counsel's performance, a

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[2] The circuit court instructed the jury as follows:

> The law states that the alcohol concentration in a defendant's blood sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating. There is a dispute as to where the operating of the motor vehicle occurred. If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, and that the defendant's blood was drawn within three hours of operating a motor vehicle, you may find from those facts alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so.

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." "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶26 (citations omitted). We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

Stollenwerk argues that his trial counsel should have presented a defense expert to render an opinion about Stollenwerk's BAC by comparing the PBT result and the BAC. To the extent that any of Stollenwerk's ineffective assistance of trial counsel claims are premised on the PBT result, we conclude that Stollenwerk cannot show prejudice because the PBT result is inadmissible. WIS. STAT. § 343.303[3]; ***State v. Fischer***, 2010 WI 6, ¶32, 322 Wis. 2d 265, 778 N.W.2d 629, *superseded by statute on other grounds*, *see* ***State v. Jones***, 2018 WI 44, ¶¶6-7, 381 Wis. 2d 284, 911 N.W.2d 97.[4] Consequently, any defense expert analysis or opinion based upon

[3] WISCONSIN STAT. § 343.303 states in pertinent part that a PBT result "shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under [WIS. STAT. §] 343.305(3)."

[4] For his contrary position, Stollenwerk relies upon a decision in ***Fischer v. Ozaukee Cnty. Circuit Court***, 741 F. Supp. 944, 959-60 (E.D. Wis. 2010), in which the federal court vacated Fischer's conviction because "the Wisconsin Supreme Court's decision affirming the exclusion of Fischer's expert's testimony [which partially relied upon the PBT result] involved an unreasonable application of federal law." ***Id.*** at 947-48, 958. We are not bound by federal district court decisions. ***State v. Lepsch***, 2017 WI 27, ¶34 n.14, 374 Wis. 2d 98, 892 N.W.2d 682; *see also* ***State v. Webster***, 114 Wis. 2d 418, 426 & n.4, 338 N.W.2d 474 (1983) (a federal decision granting habeas relief to one defendant did not, in a subsequent case involving a different defendant, "stand as a precedential bar" to the Wisconsin Supreme Court following one of its previous decisions, which was contrary to the federal decision). We are bound by the Wisconsin Supreme Court's decision in ***State v. Fischer***, 2010 WI 6, ¶32, 322 Wis. 2d 265, 778 N.W.2d 629, *superseded by statute on other grounds*, *see* ***State v. Jones***, 2018 WI 44, ¶¶6-7, 381 Wis. 2d 284, 911 N.W.2d 97. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

the PBT result would not have been admissible. In addition to the foregoing, we note that at the postconviction motion hearing, the toxicologist presented by Stollenwerk, James Oehldrich, stated that he did not rely upon the PBT result when he conducted his retrograde extrapolation and that no portion of his report was premised on the PBT result. Stollenwerk cannot show prejudice arising from his trial counsel's failure to present a witness who would opine on the significance of the PBT result. *See* ***State v. Cameron***, 2016 WI App 54, ¶27, 370 Wis. 2d 661, 885 N.W.2d 611 (trial counsel does not provide ineffective assistance by making pointless or futile requests). We address the PBT-related issues no further.

We turn to Stollenwerk's claim that his trial counsel was ineffective for not presenting a defense toxicologist to address the retrograde extrapolation analysis of his BAC. In support of this postconviction claim, Stollenwerk presented Oehldrich's testimony that Stollenwerk had a BAC of 0.00 at 2:30 p.m. when he left his home. The circuit court found that trial counsel had a strategy of cross-examining the State's expert and rejected the ineffective assistance of trial counsel claim.

We affirm the circuit court on different grounds. *See* ***State v. Rognrud***, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990). As the State points out, although Oehldrich stated that his BAC analysis was based on information set out in the police report and information provided by Stollenwerk, the information he used to calculate Stollenwerk's BAC at 2:30 p.m. was contradicted by the time line in the record, including Stollenwerk's statements to the officer who found him in the park.[5] Oehldrich's Anterograde Alcohol Extrapolation Report opined that

[5] Defense counsel argued to the jurors that they should not believe Stollenwerk's statements to the officer about when he drove, when he drank and that he only had "a sip" in the park.

Stollenwerk had a 0.00 BAC at 2:30 p.m. based on the following: Stollenwerk drank 3.17 ounces of wine at 1:00 p.m., he drank seven additional 3.17-ounce servings of wine steadily from 1:45 p.m. until 3:45 p.m. (suggesting that he was drinking while driving and after he arrived in the park), and then four 4.23-ounce servings of wine from 3:55 to 4:30 p.m. (the officer encountered Stollenwerk in the park at 4:30 p.m.). These alcohol consumption details[6] contradict Stollenwerk's statements to police: that he only had "a sip" of wine after he arrived at the park at 3:30 p.m. and that he had a glass of wine two hours before he arrived at the park, which means Stollenwerk was drinking at 1:30 p.m., not 1:00 p.m. Oehldrich conceded that if he did not have the correct information about Stollenwerk's drinking, his BAC analysis would be incorrect.

It was Stollenwerk's postconviction burden to show ineffective assistance of trial counsel, *see* ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6, and he attempted to do that with Oehldrich's BAC analysis. Oehldrich's analysis suggested that Stollenwerk was consuming alcohol while driving between 2:30 p.m. (leave home) and 3:30 p.m. (arrive at park), which would not have been helpful to his defense. Because Oehldrich's analysis does not establish a reasonable probability that the result of the trial would have been different, Stollenwerk did not show prejudice arising from his trial counsel's failure to consult a defense toxicologist. *See* ***id.***, ¶26.

Stollenwerk argues that his trial counsel was ineffective for failing to challenge the State's toxicologist's qualifications under ***Daubert***.[7] As the gatekeeper, the circuit court's

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[6] Oehldrich contended he obtained this information from Stollenwerk.

[7] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993); WIS. STAT. § 907.02(1).

"function under the ***Daubert*** standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***State v. Giese***, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. Postconviction, Stollenwerk argued that the toxicologist's opinion was not based on sufficient facts and data because she relied upon several assumptions about Stollenwerk's alcohol consumption, including that Stollenwerk consumed and absorbed all of the alcohol by 2:30 p.m., before he left his home, and that he did not consume any alcohol at the park.[8] The circuit court rejected this ineffective assistance claim because the same issues were addressed as part of a motion in limine during which Stollenwerk challenged the toxicologist's expertise, training and experience in retrograde extrapolation along with the assumptions she made in her analysis. The same challenge occurred during trial. Issues relating to the toxicologist's expertise, training and experience were fully aired in the circuit court. Based on this record, Stollenwerk cannot establish that the result of the proceeding would have been different had his trial counsel made a specific ***Daubert*** challenge. *See* ***Jeannie M.P.***, 286 Wis. 2d 721, ¶26 (prejudice not shown).

Stollenwerk also argues that his trial counsel should have challenged the State toxicologist's BAC opinion in light of the evidence of alcohol consumption found in his vehicle. In Stollenwerk's vehicle, the officer found an open bottle of wine, two "pocket sized" bottles of wine, and a cup containing wine in the vehicle's center console. The toxicologist acknowledged that she did not know what Stollenwerk drank or whether his BAC was increasing or decreasing when his blood was drawn at 6:08 p.m., and she assumed that Stollenwerk did not drink alcohol

[8] We observe that the State toxicologist's assumptions were based in the record, i.e., Stollenwerk's statements to the officer who encountered him in the park at 4:30 p.m.

after he drove to the park. In his closing argument, trial counsel argued that Stollenwerk drank in the park, which caused his elevated BAC. It is not reasonably probable the outcome of the trial would have been different had counsel cross-examined the toxicologist regarding the contents of Stollenwerk's vehicle. *See* ***id.***, ¶26 (prejudice not shown).

Stollenwerk contends that his trial counsel misled the jury about the burden of proof when he argued that the State had to prove beyond a reasonable doubt that Stollenwerk was not drinking at the park. This argument was consistent with Stollenwerk's theory that his BAC resulted from drinking in the park. As the circuit court stated in its decision denying Stollenwerk's ineffective assistance of trial counsel claim:

> [Stollenwerk] contends that by using the "beyond a reasonable doubt" language, trial counsel was at odds with the actual burden of proof. In reality, trial counsel's unique turn of phrase was a clever way to position the case. It was the opposite side of the same coin. No one disputes that the State bore the burden of proof to show that Defendant Stollenwerk operated a motor vehicle while under the influence of an intoxicant. Trial counsel strategically decided to make the jury focus on the burden in a different way. Whether this was a prudent or effective strategy is not the issue. This case theory did not jeopardize Defendant Stollenwerk's ability to achieve a fair trial.

We agree with the circuit court. Additionally, the court instructed the jury that the State bore the burden to prove beyond a reasonable doubt that Stollenwerk operated a motor vehicle on a highway and he was under the influence of an intoxicant when he did so. The jury is presumed to have followed the court's instructions. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). We are not convinced that Stollenwerk can show prejudice arising from how trial counsel argued the case. *See* ***Jeannie M.P.***, 286 Wis. 2d 721, ¶26.

Having affirmed the circuit court's denial of Stollenwerk's ineffective assistance of trial counsel claim, we also reject his request for a new trial in the interests of justice. A request for discretionary reversal based on the cumulative effect of non-errors cannot succeed. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).[9]

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[9] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").