COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0684-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOANNE SEKULA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Joanne Sekula appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) in violation of WIS. STAT. § 346.63(1)(a), and from an order denying her motion for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

an evidentiary hearing on whether her trial counsel was ineffective for failing to file a pretrial motion to suppress evidence based upon an illegal stop. We conclude that Sekula was not denied a fair trial due to ineffective assistance of counsel and affirm the judgment and the order.

FACTS

¶2 The relevant facts were established during a jury trial on August 16, 2000. City of Waukesha Police Officer David Prokop testified that on April 7, 2000, at approximately 4:00 a.m., he was dispatched to investigate a fight at the Denny's restaurant located at the intersection of West St. Paul Avenue and Sunset Drive. At the restaurant, Prokop spoke to a couple who stated that while inside a bar, they had been involved in an altercation with three individuals who then drove off in a red Chevy Blazer; the couple was worried that there might be someone in the parking lot waiting for them in order to continue the altercation or to follow them home. The couple asked Prokop to take a look through the area because of their concerns and he agreed to do so.

¶3 Prokop canvassed the parking lot area covering Denny's, Sentry and Fox Run Lanes, which he stated were "pretty much adjacent to each other and are all interconnected." At approximately 4:15 a.m., Prokop observed one vehicle in the Fox Run Lanes parking area, a black-colored Jeep with its brake lights on and its motor running. He approached the Jeep, observed Sekula in the driver's seat, identified himself and asked her if she had information about the incident at Denny's. Sekula told Prokop that she was a bartender at Fox Run Lanes and was warming up her car so that she could go home.

¶4 During his conversation with Sekula, Prokop noticed that her eyes were bloodshot and glassy, and that her speech was slurred. Prokop asked Sekula

if she had been drinking and she acknowledged that she had had one drink. Prokop asked Sekula to exit the Jeep and perform field sobriety tests. Based upon Sekula's performance on the tests, Prokop formed an opinion that she was under the influence of intoxicants while operating a motor vehicle and placed her under arrest.

¶5 Sekula testified that she never started the engine of the Jeep, that she put the keys in the ignition only to open the window to talk to Prokop, and that she was going to call her husband from her phone in the Jeep to pick her up. Sekula agreed that she should not have been driving a motor vehicle, which was why she was calling her husband. Sekula's husband, Chris Sekula, testified that he had spoken to Sekula at about 1:30 a.m. and that Sekula said she was going to need him to pick her up and she would call him when she was ready. The jury returned a verdict of guilty to the OWI charge[2] and the trial court entered a judgment of conviction.[3]

DISCUSSION

¶6 Sekula contends that trial counsel's representation was deficient because he failed to challenge Prokop's investigatory stop of Sekula in the Fox Run Lanes parking lot. Had counsel done so, according to Sekula, the stop would have been determined unlawful and the evidence of Sekula's OWI and BAC violations would have been suppressed. We disagree.

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[2] The jury also returned a verdict of guilty to a charge of operating a motor vehicle with an unlawful blood alcohol concentration (BAC) contrary to WIS. STAT. § 346.63(1)(b). Judgment was not entered on that verdict.

[3] The judgment indicates that Sekula entered a plea of no contest to the OWI charge. Judgments should reflect the record events.

¶7 On review, we will uphold the trial court's findings of historical fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). This is the equivalent of the "clearly erroneous" test set forth at WIS. STAT. § 805.17(2). ***Jackson***, 147 Wis. 2d at 829. However, whether those facts satisfy a reasonableness requirement presents a question of law and we are not bound by the trial court's decision on that issue. ***Id***. In addition, the legality of a traffic stop is a question of law which we also review de novo. ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

¶8 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. Detaining a motorist for a routine traffic stop constitutes a seizure. ***State v. Longcore***, 226 Wis. 2d 1, 6, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. If a detention is illegal and violative of the Fourth Amendment, all statements given and items seized during this detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983). A brief detention, however, is not unreasonable if it is justified by a reasonable suspicion that the motorist has committed an offense. ***Longcore***, 226 Wis. 2d at 6. Reasonable suspicion is based upon specific and articulable facts that together with reasonable inferences therefrom reasonably warrant a suspicion that an offense has occurred or will occur. ***Id***. at 8. Reasonable suspicion is insufficient to support an arrest or search but permits further investigation. ***Id***.

¶9 Sekula claims that her trial counsel was deficient in failing to file a motion to suppress the stop. She specifically argues that no reasonable suspicion existed to detain her because "[t]here is nothing illegal about Ms. Sekula's activities in just sitting in a running motor vehicle" and "[b]loodshot and glassy

eyes and slurred speech are not among" those factors indicating an impaired ability to operate a motor vehicle. We disagree.

¶10 According to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be premised on specific facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be in the works and that action is appropriate. ***Id***. at 21-22. "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***Jackson***, 147 Wis. 2d at 834. This test is designed to balance the personal intrusion into a suspect's privacy generated by the stop against the societal interests in solving crime and bringing offenders to justice. ***State v. Guzy***, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987).

¶11 Prokop went to Denny's in response to a report of a fight. The couple involved in the altercation informed Prokop that the other persons involved in the fight left the area in a sport utility vehicle, specifically, a red Chevy Blazer. The couple was worried that someone was waiting in the parking lot for them and asked Prokop to take a look throughout the area; Prokop agreed. Prokop canvassed the area, which included the adjacent and interconnected Fox Run Lanes parking lot, and spotted one vehicle, a black Jeep/sport utility vehicle with its brake lights on and its engine running. Initially, Prokop did not see anyone in the vehicle, but as he approached the car he saw Sekula. Prokop thought that one of the antagonists could be in the car and asked Sekula if she knew anything about the altercation at Denny's. Prokop testified that even if he had not noticed the motor running and the brake lights on, he would have approached the vehicle

because of the time of day and the fact that the business establishment had been closed for some time.

¶12 Prokop was canvassing the area, looking for a sport utility vehicle. Sekula's vehicle, a sport utility vehicle, was the only vehicle in the parking lot of a closed business establishment at 4:00 a.m. and was running with the brake lights on in an area where a fight had been reported. Prokop had reasonable suspicion to approach the vehicle and question its occupant.

¶13 Prokop also had reasonable suspicion to conduct further investigation into Sekula's level of intoxication. Contrary to Sekula's assertion, bloodshot and glassy eyes, combined with slurred speech, are indeed indicators of an impaired ability to drive. These factors, combined with the fact that Sekula was sitting in her car at 4:00 a.m. outside of an establishment that serves alcoholic beverages and her admission that she had had a drink, constituted reasonable suspicion to allow Prokop to continue his investigation.

¶14 Furthermore, the seizure was justified under the community caretaker exception to the Fourth Amendment. The police community caretaker function was addressed by the United States Supreme Court in ***Cady v. Dombrowski***, 413 U.S. 433 (1973), where a warrantless search of a vehicle was permitted because the police were engaged in community caretaking functions. ***Id.*** at 441. A community caretaker action is not an investigative stop and thus does not have to be based upon a reasonable suspicion of criminal activity. ***State v. Ellenbecker***, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990). When a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police conduct was a bona

fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual. ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), *aff'd after remand*, 149 Wis. 2d 663, 439 N.W.2d 840 (Ct. App. 1989), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

¶15 Here, Prokop testified that even if he had not been investigating the altercation at Denny's, because of the time of day (4:00 a.m.) and the fact that the establishment had been closed for a while, he "would have made a check just to make sure the vehicle [was] empty or whatever's in there should be in the area for a specific purpose." This is a bona fide community caretaker activity and the public's need for investigation of such behavior outweighs the minimal intrusion upon the privacy of the individual.

¶16 A defendant claiming that counsel's assistance was so defective as to require reversal of the conviction must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). While both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of fact and law, the question of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law in which we need not defer to the trial court. ***Id***. at 633-34. An attorney's performance is measured against the standard of the quality of representation that an ordinarily prudent lawyer, skilled and versed in criminal law, would give to a client who privately retained his or her services. ***State v. Brooks***, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

¶17 A motion claiming ineffective assistance of counsel does not automatically trigger a right to an evidentiary hearing. ***State v. Washington***, 176 Wis. 2d 205, 214, 500 N.W.2d 331 (Ct. App. 1993). No hearing is required if the defendant fails to allege sufficient facts to raise a question of fact, the defendant presents only conclusory allegations or subjective opinions, or the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996); ***State v. Saunders***, 196 Wis. 2d 45, 49-52, 538 N.W.2d 546 (Ct. App. 1995).

¶18 Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996). "Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id***. Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit. ***Id***. at 369. Here, we have determined that a suppression motion based on lack of reasonable suspicion is without merit. Thus, trial counsel was not deficient for not filing such a motion. No evidentiary hearing was necessary because the record demonstrates that Sekula is not entitled to relief.

CONCLUSION

¶19 Sekula was not denied a fair trial due to ineffective assistance of counsel. Reasonable suspicion existed to detain Sekula and a suppression motion would have been without merit. Thus, trial counsel was not deficient for not filing such a motion and no postconviction evidentiary hearing was necessary. The judgment of conviction and the postconviction order are affirmed.

By the Court.—Judgment and order affirmed.

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