COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP640-CR **Cir. Ct. No. 2012CM480**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMY R. FULLMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Tammy Fullmer appeals an order of the circuit court denying her postconviction motion to withdraw pleas of no contest to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

operating while intoxicated-second offense and resisting or obstructing an officer. Fullmer moved for plea withdrawal on the grounds that she would have prevailed at the suppression hearing in this case had her trial counsel not been ineffective in failing to impeach officer testimony on a particular issue at that hearing, and if she had prevailed at the suppression hearing she would not have entered the pleas.

¶2 In addressing the plea withdrawal motion, the circuit court agreed with Fullmer that her trial counsel had performed deficiently regarding the identified issue at the suppression hearing. However, the court also concluded that Fullmer failed to show that this deficient performance prejudiced Fullmer, based on other credible evidence presented at the suppression hearing. I conclude that Fullmer fails to show that she was prejudiced by the deficient performance of trial counsel, and as a result she fails to present a basis for plea withdrawal. Accordingly, I affirm.

¶3 Only brief background is necessary to explain my resolution of this appeal.

¶4 At a hearing on Fullmer's postconviction motion to withdraw her pleas, the court[2] explained that Fullmer's motion to suppress had been properly denied based on the following findings regarding Fullmer's conduct immediately preceding the traffic stop: (1) Fullmer was driving at "1 AM on Sunday morning"; (2) she drove "in an extremely slow manner" given the circumstances; (3) she was "weaving from the center line to the fog line, touching each"; (4) she signaled a

[2] The Hon. W. Andrew Voigt initially presided over this action through the entry of Fullmer's pleas and entry of the judgment of conviction. The case was transferred to the Hon. Daniel S. George, who presided over postconviction proceedings.

turn "several hundred yards prior to the location where the turn would have been made"; (5) after executing a turn, "she continued to weave left and right"; and (6) she "essentially" drove "down the center of the roadway," toward any potential oncoming traffic. The court further concluded that these facts were sufficient to support a finding of reasonable suspicion to stop Fullmer.

¶5 The circuit court made clear, in reaching this determination regarding reasonable suspicion, that it was not considering a particular piece of testimony given by the officer at the suppression hearing, which the parties now agree was inaccurate. Specifically, the State conceded to the circuit court, after the suppression hearing, that testimony that Fullmer had failed to come to a stop in front of a white stop line at an intersection was inaccurate. The circuit court found that the officer in his testimony had been referring to a crosswalk at the intersection, which the officer incorrectly recalled as a "stop line."

¶6 This brings us to the ineffective assistance of counsel issue. Following a ***Machner***[3] hearing, the court concluded that trial counsel performed deficiently in failing to effectively impeach the officer's testimony regarding the stop line, because it would have been easy for trial counsel to show that the intersection lacked a stop line. The State does not argue on appeal that this was not deficient performance, and I accept this implied concession.

¶7 Fullmer argues that the court erred in concluding that, although trial counsel performed deficiently, Fullmer was not prejudiced by this deficient performance. More specifically, she asserts in her principal brief that "it is

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

clear"—after one omits the officer's inaccurate stop-line testimony from the grounds for reasonable suspicion—that this omission "undermines confidence" in the circuit court's decision to deny the suppression motion. I conclude that Fullmer fails to support this proposition.

¶8 Appellate review of an ineffective assistance claim presents a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. Courts will not disturb the circuit court's findings of fact unless they are clearly erroneous, but determining whether counsel's performance falls below the constitutional minimum presents a question of law that is reviewed independently. ***Id.***

¶9 In order to prove that counsel was ineffective, a defendant must demonstrate both that counsel rendered deficient performance and that counsel's deficient performance resulted in prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶10 The question here is whether Fullmer showed prejudice. To demonstrate prejudice, a 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.*** at 694. "The focus of this inquiry is not on the outcome," but on "'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted).

¶11 Fullmer asserts that her alleged failure to stop at a stop line provided "the most straightforward rationale" for the stop. By "straightforward" Fullmer apparently means significant. One problem with this assertion is that it does not

matter whether this was the most significant or the least significant clue to impairment presented at the suppression hearing. As stated *infra* in note 4, what matters is "the totality of the facts and circumstances" that remain when that allegation is left out. Another problem with this assertion is that Fullmer's "extremely slow" driving and her driving down the middle of a two-lane road would both appear to be more suggestive of impairment than driving over a stop line.

¶12 Fullmer asserts that the credibility of the officer was damaged through the course of the suppression hearing and the postconviction proceedings and apparently intends to argue that, for this reason, the circuit court should have found different facts based on the suppression hearing testimony. That is, Fullmer seems to argue that the court should have discredited, or in some manner discounted, most or all of the officer's testimony based on the fact that he made one statement at the suppression hearing that proved to be inaccurate. Whatever Fullmer precisely means to argue along these lines, the contention fails because it does not take into account the role that circuit courts have in finding facts in our system of justice, including but not limited to making credibility determinations. *See* ***State v. Harrell***, 2010 WI App 132, ¶8, 329 Wis. 2d 480, 489, 791 N.W.2d 677 ("The trial court is … the sole judge of the credibility of the witnesses testifying at the suppression hearing."). I reject this argument on this basis. I also observe that, as far as is reflected in the portions of the record to which the parties direct me, the court appears to have supported its fact finding in a rational manner, consistent with the law.

¶13 Only in her reply brief does Fullmer first attempt to carry her burden of showing prejudice resulting from her trial counsel's deficient performance by addressing the facts that remain after the stop-line testimony is omitted. I

conclude that this attempt comes too late. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 (this court ordinarily does not address arguments raised for the first time in a reply brief). Discussion of the remaining allegations should have been central to argument in the principal brief, giving the State an opportunity to squarely address Fullmer's prejudice arguments.

¶14 I could stop here. However, I observe that even if I were to consider the content of the prejudice argument in Fullmer's reply brief I would not find it to be persuasive.[4] The facts properly considered by the circuit court, absent the stop-line testimony, represent a clear pattern of irregular driving, including patently unsafe driving at around bar time, that reasonably suggested impairment. Fullmer presents no arguments of substance in her reply brief. For example, she theorizes that she might have driven well below the posted speed limit because she anticipated a "speed trap." However, she fails to explain why the officer was obligated to assess her driving based on this anticipation theory, or for that matter why, even under Fullmer's theory, the officer could not have reasonably deemed premature anticipation of a "speed trap" to be a clue of impairment.

By the Court.—Order affirmed.

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

[4] In determining whether a traffic stop meets the constitutional reasonableness requirement, the question is whether the facts "would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The reasonableness of a stop depends upon the totality of the facts and circumstances. ***Id.*** It is true that weaving within a single lane of traffic does not by itself give rise to reasonable suspicion to permit an investigatory traffic stop, however "driving need not be illegal in order to give rise to reasonable suspicion." ***Id.***, ¶¶2, 24.