COURT OF APPEALS DECISION DATED AND FILED

April 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1474-CR

Cir. Ct. No. 2012CT428

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON ARTHUR MILLARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Brandon Millard appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

third offenses, and an order of the circuit court denying his motion for postconviction relief on the ground of ineffective assistance of counsel. Miller contends that his trial counsel was ineffective because counsel failed to challenge the arresting officer's testimony regarding Millard's performance on the horizontal gaze nystagmus (HGN) field sobriety test. For the reasons discussed below, I affirm.

BACKGROUND

¶2 Millard was charged with third offense OWI and PAC. At trial, Shawn Welte, an officer with the Janesville police department, testified that in August 2012, he stopped a motor vehicle driven by Millard after observing the vehicle speeding and change traffic lanes without using the proper turn signal. Officer Welte testified that after initiating the traffic stop, he observed that Millard's speech was slurred, his eyes were bloodshot and glassy, a strong odor of intoxicants was coming from Millard; and Millard was "disheveled" and had a wet area around his groin.

¶3 Officer Welte administered the HGN test. Officer Welte testified, without objection, that during this test, an officer looks for six different indicators of intoxication, and that the observation of four indicators indicates impairment. Officer Welte testified that he observed all six indicators when Millard performed the HGN test. Based on Millard's driving, his appearance, his slurred speech, and his performance of the HGN test, Officer Welte determined that probable cause existed to arrest Millard for OWI and PAC, and for a chemical test of Millard's blood.

¶4 The jury found Millard guilty. Millard moved the circuit court for postconviction relief on the ground of ineffective assistance of counsel. Millard

argued that his trial counsel was ineffective for failing to challenge Officer Welte's testimony regarding the HGN test. The circuit court denied Millard's motion following a ***Machner***[2] hearing. Millard appeals.

DISCUSSION

¶5 Millard contends the circuit court erred in denying his postconviction motion for a new trial on the basis of ineffective assistance of counsel.

¶6 To set aside a judgment of conviction for ineffective assistance of counsel, a defendant must show both that his or her counsel's performance was deficient and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, a defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." ***Id.*** Because a defendant must show both deficient performance and prejudice, an appellate court need not consider one prong if the defendant has failed to establish the other. ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878.

¶7 Millard contends that Officer Welte's testimony regarding the administration of the HGN test to Millard "amounted to expert testimony," and

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

that his trial counsel was deficient because counsel did not challenge the admissibility of Officer Welte's testimony under WIS. STAT. § 907.02[3] by bringing a ***Daubert***[4] motion.

¶8 Under WIS. STAT. § 907.02(1), the circuit court is charged with the gatekeeping function of ensuring that proposed scientific evidence testimony is relevant and reliable. *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 588-95 (1993). The circuit court must determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. ***Id.*** at 592. The United States Supreme Court in ***Daubert*** identified the following list of factors that a court may utilize in its analysis: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the theory or technique has a known or potential error rate; and (4) whether the theory or technique is generally accepted. ***Id.*** at 593-94.

¶9 Millard does not develop an argument addressing the threshold inquiry, which is whether Officer Welte's testimony regarding the HGN test and his administration of that test to Millard constituted "scientific, technical, or other

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[3] WISCONSIN STAT. § 907.02(1) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

[4] *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 588-95 (1993).

specialized knowledge" under WIS. STAT. § 907.02(1). ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we generally do not address undeveloped arguments). However, even if Millard had, I would reject that argument.

¶10 This court has previously rejected arguments that ***Daubert*** applies to a law enforcement officer's testimony regarding HGN. *See* ***State v. VanMeter***, No. 2014AP1852, unpublished slip op. (WI App Nov. 24, 2015), and ***State v. Warren***, No. 2012AP1727, unpublished slip op. (WI App Jan. 16, 2013).

¶11 In ***Warren***, this court rejected the argument that the arresting officer's opinions on how the appellant in that case performed during the HGN test amount to expert scientific testimony, and the court concluded that ***Daubert*** did not apply to that testimony. ***Warren***, unpublished slip op. at ¶1. This court explained that field sobriety tests, including the HGN test, are used as a subjective tool by an officer to measure whether there is probable cause to arrest a defendant for OWI and the tests are not science based. ***Id.*** In reaching that conclusion, this court in ***Warren*** relied on ***City of West Bend v. Wilkens***, 2005 WI App 36, ¶17, 278 Wis. 2d 643, 693 N.W.2d 324 (2005), wherein we concluded that field sobriety tests, including HGN tests, are "not litmus tests that scientifically correlate certain types or numbers of 'clues' to various blood alcohol concentrations." *See* ***Warren***, unpublished slip op. at ¶7-8. They are observational tools, not scientific tests, "that law enforcement officers commonly use to assist them in discerning various indicia of intoxication, the perception of which is necessarily subjective" and which are "not beyond the ken of the average person to understand." ***Wilkens***, 278 Wis. 2d 643, ¶1. In ***VanMeter***, this court agreed with this court's decision in ***Warren*** that ***Daubert*** does not apply to a law enforcement officer's testimony regarding HGN tests because such testimony does

not constitute "'scientific, technical, or otherwise specialized knowledge.'" ***VanMeter***, unpublished slip op. at ¶11.

¶12 Millard acknowledges this court's decisions in ***Warren*** and ***VanMeter***. He argues, however, that those cases should not be considered persuasive authority because they rely on ***Wilkens***, 278 Wis. 2d 643, which was decided before the ***Daubert*** standard was adopted in WIS. STAT. § 907.02(1).

¶13 In ***Wilkens***, we concluded that field sobriety tests are not scientific tests. ***Wilkens***, 278 Wis. 2d 643, ¶16. Millard does not, however, explain how the adoption of the ***Daubert*** standard makes our conclusion in ***Wilkens*** no longer good law, and I conclude that it does not. ***Daubert*** established a gatekeeping function for the court for determining the admissibility of expert testimony. It is not a standard for determining whether a theory or technique is scientific, technical, or otherwise specialized. Thus, our conclusion in ***Wilkens*** remains unaffected by the adoption of the ***Daubert*** standard.

¶14 Although not binding precedential authority, I conclude that our reasoning in ***Warren*** and ***VanMeter*** is persuasive. *See* WIS. STAT. RULE 809.23(3) (unpublished single judge authored cases issued on or after July 1, 2009, may be cited for persuasive value). I conclude that Millard's trial counsel was not deficient for failing to raise a ***Daubert*** challenge to Officer Welte's testimony regarding the HGN test because Officer Welte's testimony was not scientific, technical, or otherwise specialized and, therefore, ***Daubert*** does not apply. Accordingly, I conclude that the circuit court did not err in denying Millard's postconviction motion.

CONCLUSION

¶15 For the reasons discussed above, I affirm.

By the Court.—Judgment and order affirmed.

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