COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1540-CR **Cir. Ct. No. 2013CT214**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNIE L. SORENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Lonnie Sorenson appeals a judgment of conviction entered upon a jury verdict for second-offense operating a motor vehicle with a prohibited alcohol concentration (PAC) and possession of drug paraphernalia. He

[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 noted.

also appeals an order denying his postconviction motion. Sorenson contends: (1) the circuit court erred in denying him a ***Machner***[2] hearing on his trial counsel's alleged ineffective assistance; (2) the State failed to disclose before trial a State expert witness's estimation of the time when Sorenson ingested tetrahydrocannabinols (THC); and (3) he was denied his constitutional right to confrontation when the State's expert witness testified about the results of a blood-alcohol-concentration test that the expert did not perform. We reject Sorenson's arguments and affirm.

BACKGROUND

¶2 A police officer stopped Sorenson's vehicle at 1:45 a.m. for driving without its headlights turned on. Upon approaching Sorenson's vehicle, the officer smelled the odors of alcohol and burnt marijuana. The officer requested a canine back-up unit. Upon arrival of that unit, a drug-sniffing canine alerted the officers that a drug odor emanated from the vehicle. The officer searched the vehicle and discovered a warm pipe containing burnt marijuana residue behind the vehicle's front passenger seat. Sorenson then performed field sobriety tests and was arrested after another officer determined he failed the tests. A sample of Sorenson's blood was later drawn and tested by the Wisconsin State Laboratory of Hygiene.

¶3 An amended Information charged Sorenson with second-offense operating a motor vehicle while intoxicated (OWI); second-offense PAC; second-

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

offense operating with a restricted controlled substance in the blood; and possession of drug paraphernalia.

¶4 The State indicated it would have Diane Kalscheur of the Wisconsin State Laboratory of Hygiene testify about the tests of Sorenson's blood for THC and alcohol. Kalscheur analyzed Sorenson's blood for THC, but another unavailable analyst analyzed Sorenson's blood alcohol concentration. At trial, Kalscheur provided an expert opinion, based upon her own analysis of the documented data and procedures, that the tests of Sorenson's blood sample were accurately performed and they revealed concentrations of 3.2 nanograms per milliliter of Delta-9 THC and 0.100 grams per 100 milliliters of alcohol. Kalscheur also opined that, based upon calculations from Sorenson's blood sample, Sorenson ingested THC approximately one-and-a-half to four hours before his sample was drawn. Sorenson's trial counsel moved to exclude Kalscheur's calculations during a sidebar on the grounds that those calculations were not previously provided to the defense. The court denied the motion after determining the calculations were implicit within the data previously disclosed to Sorenson. No expert witness testified on Sorenson's behalf.

¶5 The jury found Sorenson guilty of all charges. Judgment was entered on the verdicts for the second-offense PAC, *see* WIS. STAT. § 346.63(2)(am), and drug paraphernalia charges.

¶6 Sorenson filed a motion for postconviction relief, contending that his trial counsel was ineffective, that the circuit court erred by permitting Kalscheur to testify regarding the timing of his ingestion of THC, and that he was denied his right to confront the analyst who tested his blood alcohol. The court permitted

Sorenson's appointed postconviction counsel to withdraw from representation because counsel was being called to active duty in the armed forces.

¶7 Sorenson failed to appear at the postconviction motion hearing in person or through counsel. The State appeared by an assistant district attorney. Before discussing the motion, the circuit court explained it had contacted the state public defender's office and received no information about whether counsel had been reappointed for Sorenson or whether Sorenson decided to proceed pro se or with hired counsel.

¶8 The circuit court then explained its reasons for rejecting Sorenson's postconviction arguments. First, the court determined Kalscheur's testimony did not violate Sorenson's confrontation rights because she was a qualified expert on blood testing procedures and a foundation was properly laid for her testimony. Second, the court determined the calculations from Sorenson's blood sample could be reasonably anticipated from the underlying data provided to Sorenson and did not prejudice Sorenson's defense. Third, regarding his ineffective assistance of counsel claim, the court determined Sorenson's motion insufficiently alleged that his trial attorney was deficient or any deficiency prejudiced his defense. The court entered an order denying Sorenson's postconviction motion. Sorenson now appeals.

DISCUSSION

¶9 Before addressing the merits of Sorenson's appeal of the denial of his postconviction motion, we address Sorenson's argument that the court improperly held "something akin to an ex parte proceeding" when it denied his postconviction motion without him or his attorney. He contends it was "patently unfair that argument was taken when only one party to the motion was

present." However, Sorenson raises no argument that he or his attorney did not receive notice of the hearing. He also does not explain why he failed to appear in person or by an attorney. Because Sorenson fails to cite relevant record facts or authority supporting his "unfairness" argument, we will not address this issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts "cannot serve as both advocate and judge" in addressing arguments that are undeveloped or unsupported by citation to legal authority).

¶10 Sorenson first argues he was entitled to a ***Machner*** hearing on his claims that his trial counsel provided ineffective assistance. For an ineffective assistance of counsel claim to succeed, a defendant must prove both that counsel performed deficiently and that prejudice to the defense ensued from that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show counsel's representation fell outside the wide range of professionally competent assistance. ***Id.*** at 690. To establish prejudice, the defendant must show it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that is sufficient to undermine our confidence in the outcome. ***Id.***

¶11 A circuit court may deny a postconviction motion without a ***Machner*** hearing if the motion does not allege facts entitling the defendant to relief, if the motion provides only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief. ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111. In particular, if the record establishes the defendant was not prejudiced by any claimed deficient performance, he or she is not entitled to relief. *See* ***id.***, ¶44. We review de novo whether a motion sufficiently raises issues entitling a defendant to relief. ***State v.***

Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not, the decision to deny the motion without a hearing is left to the circuit court's proper exercise of discretion. *See* ***id.***

¶12 Sorenson provides two reasons for why his trial counsel was deficient. First, Sorenson asserts counsel should have objected "[a]t points" to Kalscheur's "significant but incompetent testimony." Sorenson's postconviction motion identified the following testimony from Kalscheur on direct examination by the State as objectionable:

> Q: What effect, if any, would a combination of alcohol and THC have on a person or can it have on a person?
>
> A: Both of them have their own associated impairment with each of them, but the combination of the two would be additive.
>
> Q: So say somebody—for example, in this case, we have a .10 alcohol. There's a certain level of impairment associated with that; is that correct?
>
> A: Yes.
>
> Q: And adding the—the THC results to that would just compound the level of impairment; is that correct?
>
> A: It would broaden that scope of impairment.
>
> Q: Are you able to form an opinion as to whether somebody with the results we've discussed, based on your training and experience, would be under the influence to a point where it would affect their ability to operate a motor vehicle?
>
> A: I never like to just look at numbers for a case, but 0.100 is certainly by all the AMA, NHTSA, everybody, believed to be impaired at that level, and the Delta-9 THC which is the impairing analyte is above our reportable limit for THC.

According to Sorenson, the State never established a foundation that Kalscheur was an expert on physiological responses to drugs or that she ever examined him

for signs of impairment. Sorenson thus asserts his trial counsel performed deficiently by not objecting to this line of testimony as both speculative on Sorenson's actual level of impairment and beyond Kalscheur's expertise.

¶13 The record fails to establish Sorenson was prejudiced by his attorney's failure to object to Kalscheur's testimony. First, Kalscheur only provided general observations that alcohol and THC may cause impairment when they reach certain levels in a person's bloodstream, consistent with those discovered in Sorenson's blood. In fact, Kalscheur testified it was not her opinion that Sorenson was physiologically impaired.

¶14 Second, there is no reasonable probability of a different result had Sorenson's trial counsel objected to Kalscheur's testimony on the "additive" or "broaden[ed]" effects of alcohol and THC. Kalscheur testified to levels of alcohol and THC above lawful limits based upon the tests of Sorenson's blood sample. Sorenson concedes Kalscheur could provide an expert opinion in these areas. The circuit court also noted in its postconviction decision that the issue of impairment was immaterial to the PAC charge upon which judgment was entered. *See* WIS. STAT. § 346.63(1)(am). That alone defeats Sorenson's arguments. The circuit court properly determined Sorenson's motion failed to state sufficient facts to show he was prejudiced by Kalscheur's testimony so as to entitle him to a ***Machner*** hearing on the failure to object to Kalscheur's testimony.

¶15 Sorenson also argues he was entitled to a ***Machner*** hearing because his trial counsel "failed to present alternate expert testimony" to rebut Kalscheur's testimony on the results of the blood tests. However, Sorenson failed to raise this issue in his postconviction motion, and we do not address it for that reason. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d

136 (Ct. App. 1996). We thus conclude the circuit court properly rejected his ineffective assistance claim without a ***Machner*** hearing.

¶16 Sorenson next argues the State violated WIS. STAT. § 971.23(1)(e) when it failed to disclose before trial Kalscheur's exact calculations on the time when Sorenson was estimated to have ingested THC.[3] In response to this argument, the State asserts it had already provided the raw data from which Kalscheur drew her conclusion. The State also points out that Sorenson fails to allege how, if at all, this apparent non-disclosure of the estimation prejudiced him. *See* ***State v. DeLao***, 2002 WI 49, ¶60, 252 Wis. 2d 289, 643 N.W.2d 480 (new trial only warranted when a discovery violation is prejudicial). Sorenson acknowledges in his reply brief that "this [issue] alone is probably not a sufficient basis for granting [his] post conviction motion …." Based on that concession by Sorenson, we do not address his argument further.

¶17 Finally, Sorenson argues his Sixth Amendment right to confrontation was denied when Kalscheur testified about the alcohol concentration in his blood sample.[4] Sorenson concedes Kalscheur was a qualified expert regarding both alcohol and THC testing, and he does not challenge Kalscheur's testimony on the

[3] WISCONSIN STAT. § 971.23(1)(e) states, in relevant part, a district attorney is required to disclose "any reports or statements of experts made in connection with the case," including "a written summary of the expert's findings or the subject matter of his or her testimony."

[4] We note that Sorenson potentially forfeited appellate review of whether Kalscheur's testimony violated his confrontation right. He never objected to Kalscheur's testimony on confrontation grounds during the trial. In his postconviction motion, Sorenson also did not argue his trial counsel was ineffective for failing to do so. *See* ***State v. Hansbrough***, 2011 WI App 79, ¶25, 334 Wis. 2d 237, 799 N.W.2d 887 (failure to timely object to an alleged constitutional error waives appellate review). However, the State has not raised a forfeiture argument on appeal, and we therefore choose to reach the merits of Sorenson's argument. *See* ***State v. Gaulke***, 177 Wis. 2d 789, 793-94, 503 N.W.2d 330 (Ct. App. 1993) (forfeiture is rule of administration).

THC tests she performed. Instead, he contends that under ***State v. Williams***, 2002 WI 58, ¶20, 253 Wis. 2d 99, 644 N.W.2d 919, since Kalscheur did not conduct the alcohol-concentration test, she acted as a "mere[] conduit" through which the alcohol test result was brought before the jury.

¶18 Contrary to Sorenson's assertions, the fact that Kalscheur neither supervised this test nor directly performed it does not mean Sorenson's confrontation rights were violated. "[A] highly qualified witness, who … supervises *or reviews* the work of the testing analyst" may provide an independent opinion at trial. ***Id.*** (emphasis added). If an expert witness reviewed data created by a non-testifying analyst and formed an independent opinion based upon that data, an expert's resulting testimony does not violate the confrontation clause. ***State v. Griep***, 2015 WI 40, ¶49, 361 Wis. 2d 657, 863 N.W.2d 567, *cert. denied*, 136 S. Ct. 793 (2016).

¶19 Here, Kalscheur provided a detailed description of the process under which blood samples are received and tested at the crime laboratories, and she further testified she reviewed the records associated with the tests of Sorenson's blood for alcohol. Specific to those records, Kalscheur reviewed the analyst's report and the peer review report of the alcohol test. Based upon those records, she then opined the instrument that performed the chemical analysis in the test functioned properly based upon those records. *See* ***id.***, ¶¶50-51. On the basis of the underlying data from the records, Kalscheur rendered an independent opinion, consistent with the testing analyst, and testified that Sorenson had a blood concentration of 0.100 grams per 100 milliliters of alcohol. *See* ***id.***, ¶55. Accordingly, we reject Sorenson's confrontation argument concerning Kalscheur's testimony concerning the alcohol tests.

By the Court.—Judgment and order affirmed.

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