COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1447 **Cir. Ct. No. 2003CF4217**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE J. FRANKLIN, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Jesse J. Franklin, Jr. appeals the order denying his second postconviction motion, made pursuant to WIS. STAT. § 974.06 (2011-12).[1] On appeal, Franklin argues that he should be granted a new trial on the basis of newly-discovered evidence, or, in the alternative, on the basis that trial counsel was ineffective. We disagree and affirm.

BACKGROUND

¶2 On July 25, 2003, Franklin was charged with possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and being a felon in possession of a firearm. Franklin pled not guilty and, in January 2006, stood trial before a jury.

¶3 Milwaukee Police Officers Paul Lough and James Campbell testified on the State's behalf at trial and described how, while on patrol near 29th and Clybourn at about 4:00 p.m. on July 23, 2003, they observed Franklin standing in the middle of the street next to the driver's side window of a passing car, taking part in "what appeared to be a drug transaction." Franklin "was up at the window, leaning on the car with one hand, and he reached his right hand through the driver's side window." While the officers did not see Franklin exchange anything

[1] The Honorable William Sosnay presided over trial and entered the judgment of conviction. The Honorable Timothy Witkowiak entered the order denying Franklin's first postconviction motion, which was the subject of Franklin's first appeal. *See* ***State v. Franklin***, No. 2007AP960-CR, unpublished slip op. (WI App May 20, 2008). The Honorable Timothy G. Dugan denied Franklin's postconviction motion, made pursuant to WIS. STAT. § 974.06 (2011-12), which is the subject of this appeal.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

with the driver, they both testified that Franklin's interaction was, based on their experiences, consistent with a hand-to-hand drug sale.

¶4 Based on their observations and their knowledge of recent complaints of drug dealing at the house in front of which Franklin was standing, Officers Lough and Campbell circled the block, then pulled up behind Franklin, who, by this point, was standing next to a van parked on the side of the street just a few houses away from where they had seen him moments earlier. The officers stopped their car, and Officer Campbell got out and approached Franklin. At a twenty-foot distance, Officer Campbell and Franklin made eye contact. Franklin then reached his hand into the open passenger-side window of the van, pulled his hand back out quickly, and stepped backwards, saying "I didn't do anything, I didn't do anything." As he stepped back, he put his hands up and dropped a set of keys on the ground. Officer Campbell frisked Franklin for weapons, and then, finding none, asked Franklin about the van.

¶5 When Officer Lough approached the van, he looked through the open passenger-side window and saw a large, white plastic Target bag, "kind of sitting slightly open," with a clear plastic bag containing suspected marijuana inside. Lough seized the bag and also found a box of sandwich baggies, a digital scale, and an "off-white chunky substance" that he suspected was cocaine. He also saw, in the van's center console about three feet from the passenger-side window, a 9mm pistol.

¶6 Additionally, Officer Raymond Robakowski—who was in the neighborhood on other business, and who came upon the scene while Franklin was sitting by the curb and the other officers were by the van—testified that he too saw the white Target bag with suspected contraband inside. Officer Robakowski

walked up to the passenger door of the van and noticed the open window, the Target bag, and the suspected marijuana visible from an opening in the bag.

¶7 Testimony put on by the State also revealed that the only useable fingerprints recovered from the scene were prints found on the box of sandwich baggies inside the Target bag, and those prints belonged to Franklin.

¶8 Franklin insisted that the drugs and gun found in the van were not his and that he did not know where they came from:

> A. I can't tell you where it came from. I can't tell how it got there because, like I been saying before, I don't know…. I come to get the van and in the process before I even get to the van, I'm arrested…. I don't know how anybody got [into the van]. Before I could get to the van, I'm arrested.
>
> Q. So it's your testimony today that it was not yours, the gun[], the drugs or the cocaine?
>
> A. The drugs, the cocaine, the marijuana and the gun I'm saying is not mine.
>
> Q. Did you know it was in the van?
>
> A. No, I did not know it was in the van.

(Some formatting altered.)

¶9 Franklin disputed the officers' version of what happened. He testified that the car by which he was initially observed was parked in the parking lane, not in the middle of the street; that the driver of the car was his friend Fred; and that at no point did he shake hands with Fred, put his hand into Fred's car, or lean into Fred's car. Franklin claimed that his mother had lent the van to him sometime before 2:00 p.m. that afternoon, and that he had in turn lent the car to another man, who later gave the keys to a woman who finally returned the keys to Franklin shortly before Franklin encountered Officers Campbell and Lough.

Franklin said that the man he lent the van to was someone he had played basketball with, but that he could not remember the man's name. Franklin also could not recall how long he had known the man to whom he lent the van, saying, "it's been some years, but I can't say how many." Franklin also could not remember the name of the woman who returned the keys to him, although he could remember her address.

¶10 Franklin further testified that he did go to an unidentified store "a few times" that day, but that it was not Target, and he did not know where the Target bag came from. According to Franklin, his mother had asked him to buy baggies and fruit, which he did earlier in the day, and his brother removed some of those items from the van. Franklin did not dispute that the fingerprints found on the box of baggies were his.

¶11 Franklin's mother testified that she had in fact rented the van that Franklin was driving, but that she did not give him the keys until sometime between 3:00 and 3:30 p.m. that afternoon. She further testified that she had asked Franklin to buy some sandwich bags and some fruit for a family reunion she planned to attend.

¶12 After hearing all of the testimony, the jury found Franklin guilty on all three counts. Franklin then filed a postconviction motion, which was denied. He appealed, and this court, in May 2008, affirmed his conviction. *See* ***State v. Franklin***, No. 2007AP960-CR, unpublished slip op. (WI App May 20, 2008).

¶13 Several years later, in January 2013, Franklin filed a WIS. STAT. § 974.06 postconviction motion, alleging that there was newly-discovered evidence establishing that the officers who arrested him belonged to a group of rogue officers who beat and falsely arrested suspects, and that previous

convictions involving this group of officers had been overturned pursuant to ***State v. Missouri***, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595; in the alternative, Franklin argued that if the evidence regarding the rogue officers was not "newly-discovered" because trial counsel was negligent in discovering it, then trial counsel was ineffective.

¶14 The trial court denied Franklin's motion, and Franklin now appeals. Additional facts will be developed as necessary.

ANALYSIS

¶15 On appeal, Franklin renews the arguments made in his WIS. STAT. § 974.06 postconviction motion. He argues that he should be granted a new trial on the basis of newly-discovered evidence, or, in the alternative, on the basis that trial counsel was ineffective. We discuss each argument in turn.

1. Franklin is not entitled to a new trial because the evidence he proffers on appeal is not "newly discovered."

¶16 "'Motions for a new trial based on newly discovered evidence are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). Generally, we review the trial court's determination for an erroneous exercise of discretion, affirming the trial court so long as the decision has a reasonable basis and is made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). "However, as in this case, when a judge who decided such a motion did not hear the evidence at trial[,] this court on appeal starts from scratch and examines the record de novo so that it can consider the facts directly on which the legal issue raised by motion depends." ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

¶17 To obtain a new trial based on newly-discovered evidence, Franklin must establish, by clear and convincing evidence: "'(1) the evidence was discovered after conviction; (2) [he] was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If those four criteria have been established, we then determine "'whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted).

¶18 The newly-discovered evidence proffered by Franklin is information regarding a number of individuals who, between 2002 and 2005, were beaten and/or falsely arrested by a group of rogue police officers—including Officers Campbell and Lough. Specifically, Franklin seeks to admit evidence regarding:

(a) *Jermaine Cameron*: a man who claimed he was framed of cocaine possession by a number of Milwaukee police officers, including Officer Lough. According to Franklin, Lough was probably on the scene of Cameron's arrest and participated in the arrest and investigation. After Cameron was convicted, he appealed based on newly-discovered evidence. This court, in an unpublished opinion, reversed and remanded the case for a hearing. After remand, the parties reached a settlement where the conviction was vacated and Cameron entered a no contest plea to a misdemeanor and received time served.

(b) *Draylon Oliver*: a man who accused various Milwaukee police officers, including Officer Lough, of beating him during a 2003 arrest.

(c) *Raynard Jackson*: a man who claimed he was framed of being a felon in possession of a firearm, carrying a concealed weapon, and resisting arrest by several Milwaukee police officers, including Officer Lough. After Jackson was

convicted, he appealed based on newly-discovered evidence. This court, in an unpublished opinion, reversed and remanded the case for a hearing. After remand, the parties reached a settlement where the State agreed to dismiss the felon in possession of a firearm and carrying a concealed weapon charges.

(d) *Charles Griffin*: a soldier on leave from duty in Iraq who claimed that Officer Lough used excessive force against him and falsely arrested him.

(e) *Ronald Means*: a man who successfully moved to suppress drug evidence secured by police, including Officers Campbell and Lough, during a stop and subsequent search.

(f) *Walter T. Missouri*: a man who claimed that Milwaukee police beat and falsely arrested him. *See* ***Missouri***, 291 Wis. 2d 466, ¶3.

¶19 In response, the State does not contest Franklin's arguments that the evidence was discovered after his conviction, that he was not negligent in discovering it, and that it was not cumulative, but instead argues that Franklin's claim nevertheless fails because he cannot show that the evidence is material to an issue of the case, and because there is no reasonable probability that had the jury heard the evidence, it would have had a reasonable doubt as to Franklin's guilt.

¶20 We agree with the State. As we will discuss in more detail below, Franklin's proffered evidence is not material.

(a) *Jermaine Cameron*: The proffered evidence regarding Cameron is not material because, as the State points out and as Franklin does not dispute, there is no evidence that Officer Lough was in fact involved in Cameron's case. Officer Lough was not mentioned in any of the documents referring to police officers in Cameron's criminal complaint; Officer Lough was not identified by Cameron in

his signed probation/parole statement; Officer Lough did not testify at Cameron's trial, nor was Officer Lough named in Cameron's postconviction motion or the accompanying affidavit.

(b) *Draylon Oliver*: The proffered evidence regarding Oliver is not material because Franklin did not, at any point, claim that Officer Lough beat him.

(c) *Raynard Jackson*: The proffered evidence regarding Jackson is not material because Franklin did not argue at trial that police planted evidence upon him. Jackson, unlike Franklin, argued *at trial* that he had been framed by police. Accordingly, the evidence that the investigating officers, including Officer Lough, faced accusations of framing defendants in other cases was relevant to Jackson's defense. In contrast, Franklin did not claim that police had framed him. He never even suggested that police may have done so. Indeed, at no point did Franklin mention seeing police with any of the items found in the van or carrying anything suspicious at all. According to Franklin's testimony, only about twenty seconds passed between Officer Lough's initial entry into the van and his declaration that Franklin should be arrested. As the State points out, "if Franklin had seen [Officer] Lough carrying a large bag to the van [during that very short timeframe], he would have mentioned it in his trial testimony. It would have been incredible for him not to mention this fact…. Equally incredible is that [given Franklin's testimony about how the incident occurred] he would not have seen [Officer] Lough transferring this cargo if he had in fact done so." Rather, as detailed more fully above, Franklin repeatedly insisted at trial that he did not know how the drugs got into the van. His implicit theory, based on our review of his trial testimony, was that one of the acquaintances to whom he lent the van earlier that afternoon must have left the contraband in the van unbeknownst to him.

Consequently, without an allegation at trial that police framed him, the proffered evidence is not material.

(d) *Charles Griffin*: The proffered evidence regarding Griffin is not material because it is too vague. As the State points out, and as Franklin does not refute, Griffin's complaint against Milwaukee police "fails to specify what [Officer] Lough, in particular, did to Griffin."

(e) *Ronald Means*: The evidence regarding Means is not material because in that case there was no accusation that police planted evidence.

(f) *Walter T. Missouri*: The proffered evidence regarding Missouri is not material because it does not directly link Officer Lough to any police misconduct. The opinion written by this court indicates that "Milwaukee Police Officer Jason Mucha, together with Officer Paul Lough, went to a residence at 2013 North 36th Street to conduct a drug investigation. They observed a male exit the … residence and run toward a white four-door sedan." *See* ***Missouri***, 291 Wis. 2d 466, ¶2. Then, "Officers Brad Westergard and Mucha"—*not Lough*—"began searching the area for the vehicle in an unmarked squad." *See* ***id.*** The officers found Missouri seated in the front passenger seat of the sedan about five blocks away. ***Id.*** All of the alleged bad acts in ***Missouri***—the threat, the beating, and the planted evidence—followed the officers' discovery of Missouri in the car. ***Id.***, ¶¶2-3. The opinion does not suggest that Officer Lough was present; rather, it seems to imply that Officer Lough was still back at 2013 North 36th Street conducting the drug investigation. ***Id.*** Moreover, this court directed the trial court to give Missouri an evidentiary hearing at which other alleged victims of *Officer Mucha* would testify. ***Id.***, ¶¶21-25. Once again, the evidence is not material to Franklin's claim.

¶21 While Franklin argues that the proffered evidence of the officers' misconduct supports his theory that "someone other than himself was responsible" for putting the contraband into the van, at best, this evidence would only serve to impeach the officers' credibility. However, "evidence which merely tends to impeach the credibility of a witness does not warrant a new trial upon the ground of newly-discovered evidence." *See* ***State v. Debs***, 217 Wis. 164, 166, 258 N.W. 173 (1935); *see also* ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968). Therefore, because Franklin's proffered evidence is not material, we need not consider the other factors regarding whether the evidence is "newly discovered." *See* ***Edmunds***, 308 Wis. 2d 374, ¶13 (all four factors must be present). Nor need we determine "'whether a reasonable probability exists that a different result would be reached in a trial.'" *See* ***id.*** (citation omitted). The evidence is not newly discovered, and consequently Franklin is not entitled to a new trial.

2. Trial counsel was not ineffective.

¶22 Franklin next argues, in the alternative, that even if we determine that counsel *was* negligent in failing to discover the evidence about the Milwaukee police officers' misconduct during 2002-2005, trial counsel was ineffective. To succeed on this claim, Franklin must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Franklin must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "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." *See* ***Strickland***, 466 U.S. at 694. The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶23 Assuming without deciding that trial counsel had in fact been negligent in failing to discover the aforementioned information about the police officers' misconduct, Franklin cannot show that trial counsel was ineffective because he cannot show prejudice. For all of the reasons explained above, it would not have mattered if counsel had in fact discovered and set forth this information because it is not material to Franklin's case. *See, e.g.*, ***Edmunds***, 308 Wis. 2d 374, ¶13; ***Strickland***, 466 U.S. at 694. Thus, counsel's alleged failure was not prejudicial and consequently did not constitute ineffective assistance.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.