COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1596-CR **Cir. Ct. No. 2007CF719**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENE E. WOLSKE, JR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Gene Wolske, Jr., appeals pro se from judgments[1] convicting him as a repeat offender of possessing cocaine, tetrahydrocannabinols

[1] Although Wolske's notice of appeal does not identify the judgments of conviction, we determine that this WIS. STAT. RULE 809.30 (2011-12) appeal is also taken from the judgments of conviction. All references to the Wisconsin Statutes are to the 2011-12 version.

and heroin with intent to deliver, possessing drug paraphernalia and maintaining a drug trafficking place. He also appeals from an order denying his postconviction motion. We are unpersuaded by any of Wolske's appellate arguments, and we affirm.[2]

¶2 A number of Wolske's arguments hinge on his claim that Shelley Witt, who directed the police to Wolske after she was arrested for presenting a forged prescription, lied to the police during her in-custody interview and lied to the court during her testimony. Wolske argues that because the search warrant application for a shed where incriminating evidence was found incorporated Witt's lies, there was no probable cause for that warrant or the subsequent warrant for his residence. Wolske claims that Sheboygan county police officers knowingly and intentionally omitted and misrepresented facts in the affidavit supporting the application for a search warrant for Wolske's residence.

¶3 Wolske's appellate arguments ignore that he moved the circuit court, both pretrial and postconviction, to suppress evidence found during the search of his residence and to dismiss due to outrageous governmental conduct. We do not decide these motions anew. Rather, we review the circuit court's findings of fact and conclusions of law. Because Wolske's briefs do not address the circuit court's rulings, we will address those rulings summarily.

[2] We dismissed Wolske's first direct appeal, ***State v. Wolske***, 2011AP1932-CRNM, in favor of further circuit court proceedings to be brought by Wolske pro se. This appeal is from those further proceedings.

Motion to Suppress

¶4 Based upon information provided by Witt, including her claim that she rented a shed from a commercial storage facility[3] for Wolske which he used for drug activity, a trained canine visited the shed and alerted on the shed, indicating that controlled substances were present. The police then applied for and obtained a search warrant for the shed. Based upon the evidence found in the shed, which included Wolske's identifiers, quantities of drugs and drug paraphernalia suggesting a drug dealing operation, police obtained a search warrant for Wolske's residence. In Wolske's residence and garage police found drug paraphernalia and evidence of drug dealing, including cash and packaging materials.

¶5 Pretrial, Wolske moved the circuit court to suppress evidence found in his residence because the search warrant application omitted facts that would have demonstrated that Witt was an incredible witness, she lied about Wolske's drug activities, and she acted alone in procuring drugs with false prescriptions. In the earlier portion of her police interview, Witt identified a nonexistent person as the person who was involved with her in drug activities. Twenty minutes into her interview Witt identified Wolske as an involved party.

[3] The shed Witt rented was located at a commercial storage facility, not on Wolske's property. The canine sniff of the shed was not a search within the meaning of the Fourth Amendment to the United States Constitution or article I, section 11 of the Wisconsin Constitution. *Cf.* ***State v. Arias***, 2008 WI 84, ¶¶14, 24, 311 Wis. 2d 358, 752 N.W.2d 748; *cf.* ***State v. Scull***, 2014 WI App 17, ¶21, 352 Wis. 2d 733, 843 N.W.2d 859 (***Arias*** holding that a dog sniff of a vehicle is not a search remains the law in Wisconsin), *review granted*, 2014 WI 50, 354 Wis. 2d 860, 848 N.W.2d 857.

¶6 Based upon the evidence adduced at the hearing on Wolske's motion to suppress, including the testimony of police officers involved in the investigation, the circuit court found that it could consider the shed search warrant affidavit when reviewing the probable cause showing made for the subsequent search warrant for Wolske's residence. The court found that whatever credibility Witt lacked, that lack of credibility was overcome by the canine alert on Witt's shed which corroborated her claim that drugs were in the shed. The drugs and identifiers for Wolske found in the shed provided probable cause to search Wolske's residence. The court found that even without Witt's claim that Wolske was involved in the false prescription scheme, there was sufficient evidence to support a probable cause determination for the search warrants for the shed and Wolske's residence. The court denied Wolske's motion to suppress.

¶7 When reviewing the denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous, and we independently review the application of the law to those facts. ***State v. Gralinski***, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448. Wolske bore the burden of establishing insufficient probable cause to issue the warrants for the shed and the residence. ***Id.***, ¶14. Probable cause exists if the warrant issuing judge was "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***Id.*** (citation omitted). Whether probable cause exists depends upon a commonsense test and is determined based on the totality of the circumstances in the individual case. ***Id.***, ¶15.

¶8 Because Wolske offers no argument in relation to the circuit court's ruling on his motion to suppress, we summarily address the court's ruling. The

circuit court's findings of fact are supported in the record, and the court applied the proper legal standard to conclude that the warrants were supported by probable cause.

Motion to Dismiss: Outrageous Governmental Conduct

¶9 Wolske also moved the circuit court to dismiss due to outrageous governmental conduct arising from Witt's lack of credibility and her role in the prosecution. The motion was heard at the same time as the motion to suppress. The court denied Wolske's motion to dismiss because the State did not assist Witt with any criminal conduct, and Wolske's remedy was to challenge Witt's court testimony.

¶10 Outrageous governmental conduct and the Due Process Clause of the Fifth Amendment are implicated when the State's conduct is so enmeshed in criminal activity that prosecution of the defendant would be repugnant to the criminal justice system. ***State v. Steadman***, 152 Wis. 2d 293, 301, 448 N.W.2d 267 (Ct. App. 1989); ***State v. Givens***, 217 Wis. 2d 180, 188, 580 N.W.2d 340 (Ct. App. 1998). The defendant has the burden to show that the prosecution violated fundamental fairness and due process. ***State v. Albrecht***, 184 Wis. 2d 287, 297, 516 N.W.2d 776 (Ct. App. 1994) (citation omitted).

¶11 As with the suppression motion, Wolske offers no argument in relation to the circuit court's ruling on his motion to dismiss. We summarily conclude that the circuit court's finding of fact that the State did not assist Witt with any criminal conduct is not clearly erroneous on the record created at the hearing on the motion to dismiss.

Postconviction Proceedings on Suppression and Motion to Dismiss

¶12 Postconviction, Wolske discharged his appointed appellate counsel. In his pro se postconviction motion, Wolske reasserted his grounds for suppression and for dismissal due to outrageous governmental conduct.

¶13 In denying Wolske's postconviction motion, the circuit court ruled as follows. During the warrant issuing process, the court was aware that Witt was allegedly involved in criminal activity (prescription fraud), and this involvement bore on her credibility. However, the court was also aware from evidence presented that Wolske had a history of drug offenses as a user and a dealer and that the canine had alerted on Witt's shed. The search of the shed yielded evidence that tied Wolske to the shed and the drugs and paraphernalia found therein. That evidence, in turn, supported the search warrant for Wolske's residence. The court was not aware of Witt's lies to police at the outset of her interrogation, but those lies would not have precluded issuance of the search warrants given the probable cause information before the court. Because there was sufficient, objective evidence supporting probable cause that did not depend upon Witt's credibility, the court concluded that Wolske could not establish outrageous governmental conduct in procuring the search warrants. The court further found that the government neither suborned perjury nor participated in any other outrageous governmental conduct.

¶14 We address the circuit court's postconviction rulings summarily because Wolske does not offer argument in relation to these rulings. On the record created both before and after his conviction, the court's findings of fact are not clearly erroneous. Wolske did not meet his burden to show that the search

warrants for the shed and residence were issued without probable cause or that the government engaged in outrageous conduct.

Sufficiency of the Evidence

¶15 Wolske argues that the evidence was insufficient to convict him. We review whether the evidence, viewed in the light most favorable to the State, is so insufficient in probative value and force that as a matter of law no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The jury evaluates the credibility of the witnesses; inconsistencies in the testimony do not render the testimony incredible as a matter of law. ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). "If more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law." ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). The jury is charged with assessing the witnesses' nonverbal attributes. ***Id.*** We do not reweigh the evidence on appeal or substitute our view of the evidence for the jury's view. ***State v. Barksdale***, 160 Wis. 2d 284, 290, 466 N.W.2d 198 (Ct. App. 1991).

¶16 Postconviction, the circuit court concluded that the evidence was sufficient to convict Wolske. The court recited the theory of defense:

> The defense theory is essentially—was essentially at trial that the controlled substances found in the shed were substances that could have been Shelley Witt's. After all, the shed was in her name. Mr. Wolske only kept a few items in the shed. And that when Ms. Witt named Mr. Wolske as the person using that shed for drug-related purposes, she was only doing so to save herself. That's essentially the defense theory.

¶17 The circuit court noted that drug paraphernalia found in the shed matched paraphernalia found in Wolske's residence along with other evidence that Wolske possessed drugs with intent to deliver. Wolske's DNA was found on cocaine-tinged syringes in the shed and on a false bottom can used to hide controlled substances. Witt's DNA was not found on these items. The court concluded that the evidence was sufficient to support the convictions.[4]

¶18 In support of his challenge to the sufficiency of the evidence, Wolske selectively offers evidence he contends was not sufficient to convict him, and he places particular emphasis on Witt's allegedly perjured testimony. Witt testified at trial, she was extensively cross-examined, and her credibility was placed before the jury. Inconsistencies between trial testimony and previous statements do not, in and of themselves, render a witness wholly incredible. ***State v. Smith***, 2002 WI App 118, ¶20, 254 Wis. 2d 654, 648 N.W.2d 15. Witt's credibility was for the jury to determine. ***Nabbefeld***, 83 Wis. 2d at 529. We agree with the circuit court that the evidence was sufficient to convict Wolske.

Ineffective Assistance of Trial Counsel

¶19 Wolske next argues that his trial counsel[5] was ineffective because counsel did not impeach Witt at the preliminary examination or at trial, counsel did not seek to bar Witt's testimony for all purposes, and counsel did not seek

[4] The jury did not have to accept Wolske's defense theory that the drug evidence found in the storage shed actually belonged to Witt and that Witt accused Wolske of drug offenses to avoid criminal liability for herself.

[5] Wolske had different counsel for the preliminary examination and the trial.

interlocutory review of the circuit court's orders denying his motions to suppress and dismiss and binding him over for trial.

¶20 At the postconviction motion hearing, Wolske questioned the attorney who represented him at the preliminary examination at which he contends Witt provided false testimony. Counsel testified that at the time of the preliminary examination, he had no information that Witt had given inconsistent statements after her arrest, and he was aware that the circuit court's decision to bind over for trial is based upon plausibility, not credibility of the witnesses. Counsel did not seek leave to appeal from the circuit court's order denying the motion to dismiss due to outrageous governmental conduct because counsel did not believe that this court would have granted leave to appeal.

¶21 The circuit court concluded that preliminary examination counsel did not perform deficiently because credibility is not an issue at the preliminary examination[6] and counsel "aggressively" cross-examined Witt.

¶22 The lawyer who represented Wolske at trial testified that he was aware of Witt's testimony at the preliminary examination, and the trial transcripts would show how he handled Witt's trial testimony. Counsel recalled that he cross-examined Witt about her inconsistent statements. Wolske questioned counsel about why he did not use Officer Kurt Zempel's affidavit to Wolske's advantage at trial. Zempel investigated Witt for obstruction of justice.

[6] The bindover standard is "whether there is probable cause that some felony has been committed by the defendant." ***State v. Williams***, 198 Wis. 2d 479, 490, 544 N.W.2d 400 (1996). The preliminary hearing "is intended to be a summary proceeding to determine essential or basic facts as to probability." ***State v. Dunn***, 121 Wis. 2d 389, 396-97, 359 N.W.2d 151 (1984). The court does not delve into a witness's credibility. ***Id.*** at 397-98.

¶23 The court concluded that trial counsel did not perform deficiently. Counsel "aggressively" cross-examined Witt about her various prior statements and preliminary examination testimony, her motives for testifying, her lies to police, and her own criminal history. The court found no evidence that Witt perjured herself at trial.

¶24 To establish ineffective assistance of counsel, "a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance." ***State v. Kimbrough***, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.***, ¶27. Whether trial counsel's performance was deficient and prejudicial presents a question of law that we review independently. ***Id.*** We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶25 Wolske argues that his preliminary examination counsel was not credible in his postconviction motion testimony. This argument is unavailing. The circuit court, as the finder of fact at the postconviction motion hearing, was charged with assessing the credibility of the witnesses at that hearing. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶26 We agree with the circuit court that Wolske did not establish ineffective assistance of counsel. First, Wolske was not prejudiced by counsel's failure to seek interlocutory review of the denial of his motions to suppress and dismiss because we have affirmed the circuit court's decisions on these motions.

State v. Cummings, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel not ineffective for failing to pursue an issue lacking merit).

¶27 Second, Wolske was not prejudiced because preliminary examination counsel did not move to dismiss due to insufficient evidence to bind him over for trial or seek interlocutory review of that order. In addition to Witt's testimony, the evidence at the preliminary examination included testimony from Zempel regarding the evidence found in the shed. Preliminary examination counsel aggressively cross-examined Witt. The evidence adduced at the preliminary examination met the requisite probable cause standard, ***State v. Williams***, 198 Wis. 2d 479, 490, 544 N.W.2d 400 (1996), and was sufficient to bind Wolske over for trial. There was no likelihood of success on appeal from the order binding Wolske over for trial. ***State v. Webb***, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

¶28 Third, the circuit court's findings regarding trial counsel's approach to Witt at trial are not clearly erroneous. Wolske was not prejudiced by trial counsel's approach to Witt's testimony.

¶29 Wolske was not prejudiced by the performance of his trial lawyers. We affirm the circuit court's rejection of Wolske's ineffective assistance of counsel claims.

¶30 We affirm the judgments of conviction and the order denying postconviction relief.[7]

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").