COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1121 **Cir. Ct. No. 2009CF5594**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT R. SHALLCROSS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Scott R. Shallcross, *pro se*, appeals an order denying him relief under WIS. STAT. § 974.06 (2013-14).[1] He also appeals the order denying reconsideration. Shallcross seeks to withdraw his guilty pleas to two counts of homicide by intoxicated use of a motor vehicle. He claims he received ineffective assistance from his trial lawyer and from the lawyer who represented him in his direct postconviction challenge under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. We reject his contentions and affirm.

BACKGROUND

¶2 A Honda Civic struck a pickup truck in Milwaukee, Wisconsin, at approximately 12:28 a.m. on November 27, 2009. According to witnesses, the Honda was traveling at speeds of 85-100 miles per hour just before the collision. The pickup truck caught fire, and the two people inside the truck died at the scene. First responders found two people alive in the Honda: Shallcross, who was in the back seat, and D.G., who was seatbelted into the front passenger seat with his knees trapped under the dashboard. No one was in the driver's seat. Firefighters cut the roof off the Honda to reach Shallcross and D.G., and a medical unit brought them to the hospital.

¶3 Police interviewed D.G. in the trauma center soon after he arrived at the hospital. He said that he and Shallcross spent the evening talking and drinking in a tavern. According to a police report, D.G. added: "[w]hen they were getting ready to leave, a person they were talking with told them that [D.G.] []and his

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

friend were too drunk to drive and he would drive them home." D.G. told police that he could not identify the person who made this offer.

¶4 The police next approached Shallcross in the trauma center at 3:03 a.m. on November 27, 2009, and requested a blood sample for testing purposes. An officer documented Shallcross's consent to a blood draw on a hospital trauma center form that includes the officer's "attestation of arrest." The form, titled Consent for Legal Blood Draw, shows Shallcross gave verbal consent to the blood draw and two nurses signed as witnesses to his consent. Medical personnel then drew Shallcross's blood. The blood test results revealed that Shallcross had a blood alcohol content of .158.

¶5 Meanwhile, at the accident scene, a witness told investigators that after sheriff's squads arrived, the witness "saw someone cross in front of the suspect vehicle and then head westbound." Police investigated the possibility that someone other than Shallcross or D.G. was driving the Honda at the time of the crash. The police were unable to find such a person, however, and none of the area hospitals that officers contacted had treated any potential suspects.

¶6 Police re-interviewed D.G. in the evening of November 27, 2009. In this interview, he told police that "Shallcross wanted [D.G.] to say that there was someone else, a third person, in the car that was driving at the time of the accident." D.G. said that, in fact, Shallcross was driving at the time of the accident and "immediately after the accident [D.G.] observed Shallcross crawling into the back seat from the driver's seat."

¶7 Police interviewed Shallcross in the hospital on November 29, 2009, and he admitted he was driving the Honda at the time of the accident. In a supplemental interview the next day, he provided additional details, including a

description of the amount of alcohol he drank before the accident and an explanation of how he got into the back seat of the car after the crash.

¶8 Pursuant to a plea bargain, Shallcross pled guilty to two counts of homicide by intoxicated use of a motor vehicle. The circuit court imposed two consecutive eighteen-year terms of imprisonment, each bifurcated as twelve years of initial confinement and six years of extended supervision.

¶9 Shallcross retained new counsel after sentencing and filed a postconviction motion alleging his trial lawyer was ineffective for: (1) failing to take certain investigative steps; (2) conducting other investigation in an untimely fashion; and (3) failing to seek suppression of his inculpatory statements. The circuit court denied the motion, and we affirmed. *See* ***State v. Shallcross***, No. 2011AP2432-CR, unpublished slip op. (WI App Oct. 23, 2012) (***Shallcross I***).

¶10 Proceeding *pro se*, Shallcross next filed the postconviction motion underlying the instant appeal. He again alleged his trial counsel was ineffective, and he contended his postconviction counsel was ineffective in turn for inadequately challenging trial counsel's effectiveness. The circuit court rejected Shallcross's claims without a hearing, and this appeal followed.

DISCUSSION

¶11 "We need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A defendant therefore is barred from pursuing claims under WIS. STAT. § 974.06 that could have been raised in an earlier postconviction motion or direct appeal absent a sufficient reason for not raising the claims previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Postconviction counsel's ineffectiveness may, in some circumstances, constitute a

sufficient reason for an additional postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A convicted defendant, however, may not merely allege that postconviction counsel was ineffective but must "make the case" of postconviction counsel's ineffectiveness. *See* ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334.

¶12 A familiar two-prong test governs claims that counsel was constitutionally ineffective. The defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may address either deficient performance or prejudice first, and if the defendant fails to satisfy one prong, we need not address the other. *See* ***id.*** at 697.

¶13 To prove deficiency, a defendant must show that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To prove prejudice, "[t]he 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." ***Id.*** at 694. Therefore, when, as here, a defendant alleges that postconviction counsel was ineffective by failing to conduct an adequate challenge to the effectiveness of trial counsel, the defendant cannot prevail without establishing that trial counsel was, in fact, ineffective. *See* ***State v. Ziebart,*** 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶14 A defendant alleging ineffective assistance of counsel in a postconviction motion must carry an additional burden: the motion must be sufficiently detailed and specific as to satisfy "the five 'w's and one 'h' test, 'that

is, who, what, where, when, why and how.'" *See* ***Balliette***, 336 Wis. 2d 358, ¶59 (citation and some punctuation omitted). Further, when the motion is grounded on claims that postconviction counsel was ineffective in challenging trial counsel's effectiveness, the motion must demonstrate not only the who, what, when, where, why, and how of trial counsel's alleged errors, but also must address those same questions in regard to postconviction counsel's alleged errors, including "*why* it was deficient performance for postconviction counsel not to raise" the disputed issues, *see* ***id.***, ¶65, and how the alleged deficiency resulted in actual prejudice. *See* ***id.***, ¶70. The sufficiency of a postconviction motion is a question of law. ***Id.***, ¶18.

¶15 Finally, to earn a hearing on a postconviction motion, a person is required to allege sufficient material facts that, if true, would entitle the person to relief. *See* ***id.***, ¶¶18, 79. If, however, "the motion does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,'" the circuit court may deny the motion without a hearing. *See* ***id.***, ¶18 (citation omitted). With these standards of review in mind, we turn to the issues.

¶16 Shallcross first contends police unlawfully arrested him in the hospital trauma center without a warrant and without probable cause before his blood was drawn. *See* ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551 ("A warrantless arrest is not lawful except when supported by probable cause."). Therefore, he says, the blood draw cannot be justified as a search incident to a lawful arrest. *Cf.* ***State v. Padley***, 2014 WI App 65, ¶23 and n.6, 354 Wis. 2d 545, 849 N.W.2d 867 (explaining that the Fourth Amendment to the United States Constitution and article I, section II of the Wisconsin Constitution, require that searches be conducted pursuant to a warrant, subject to

certain exceptions including, *inter alia*, some searches incident to a lawful arrest). In his view, trial counsel was ineffective for failing to challenge his arrest with the objective of suppressing his blood alcohol content, and he claims his postconviction counsel was ineffective in turn for failing to pursue his trial counsel's alleged error.

¶17 We need not and will not decide when officers arrested Shallcross or when they first had probable cause to do so. *See* ***State v. Berggren***, 2009 WI App 82, ¶20, 320 Wis. 2d 209, 769 N.W.2d 110 (unnecessary to address non-dispositive issues). Assuming without deciding both that the police arrested Shallcross before the blood draw and that they lacked probable cause for arrest at that time, we agree with the State that Shallcross does not show any prejudice from counsel's alleged deficiency in foregoing a motion to challenge the arrest. Regardless of Shallcross's custodial status, the officers could take and test his blood pursuant to the implied consent statute, WIS. STAT. § 343.305.

¶18 As Shallcross emphasizes, the hospital trauma unit's Consent for Legal Blood Draw form reflects that he consented to the blood draw "in accordance with [§] 343.305 of the Wisconsin Statutes." At the time of the accident in this case, the statute provided, in pertinent part:

> If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person, and a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, the law enforcement officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose [of testing].... If a person refuses to take a test under this paragraph, he or she may be arrested under [another statutory subsection].

See WIS. STAT. § 343.305(3)(ar) (2007-08).[2] The statute thus permitted police to ask the operator of a vehicle for a blood sample if the person was involved in a fatal accident and the police detected any presence of alcohol. The subject's custodial status did not dictate the applicability of § 343.305(3)(ar), which neither required nor forbade an arrest preceding the request for a blood sample.

¶19 Shallcross responds that the blood draw in this case did not satisfy the terms of WIS. STAT. § 343.305(3)(ar). He contends that the statute permits the police to request a blood sample only from a person who "emits the presence of alcohol." Relying on this argument, he asserts that the police reports do not show he smelled of alcohol after the accident, and therefore, he says, he did not fit within the requirements of the statute. Shallcross, however, erroneously describes the statutory language. It provides that law enforcement officers may request a blood sample when police "detect[] any presence of alcohol," not when a subject "emits" something. The police detected alcohol here when D.G. told them in the trauma center that he and Shallcross spent the evening drinking in a tavern where another patron advised D.G. that "he []and his friend were too drunk to drive." Moreover, the hospital admission notes, made at 1:36 a.m. on November 27, 2009, show that emergency medical personnel and Shallcross himself reported Shallcross had consumed alcohol that evening.[3] Thus, at a suppression hearing,

[2] WISCONSIN STAT. § 343.305(3)(ar) no longer exists. Effective March 29, 2010, that provision was amended and replaced with WIS. STAT. §§ 343.305(3)(ar)1. and 343.305(3)(ar)2. *See* 2009 Wis. Act 163; WIS. STAT. § 990.11. All further references to § 343.305(3)(ar) are to the 2007-08 version.

[3] Although Shallcross asserts "no one detected alcohol on him," the hospital admission notes reflect information "provided by the patient and the EMS personnel" including: "last meal/drink: midnight ...+etoh this evening." "Etoh" is an abbreviation for alcohol, used in medical records to denote consumption. *See* THOMAS LATHROP STEDMAN, STEDMAN'S MEDICAL ABBREVIATIONS, ACRONYMS AND SYMBOLS 307 (5th ed. 2013).

the officers could have demonstrated that they detected the presence of alcohol before requesting a blood draw.

¶20 Shallcross next asserts the blood draw did not satisfy the terms of WIS. STAT. § 343.305(3)(ar) because, at the time of the procedure, police had not established he was the operator of a car involved in an accident. He is wrong.

¶21 WISCONSIN STAT. § 343.305(3)(ar) permitted a law enforcement officer to ask for a blood sample from a motor vehicle operator who was involved in a fatal accident, but the statute did not prescribe a standard governing the officer's action. Effective March 29, 2010, however, the legislature renumbered and amended § 343.305(3)(ar) and created WIS. STAT. §§ 343.305(3)(ar)1.-2. *See* 2009 Wis. Act 163; WIS. STAT. § 990.11. The amended statute provides that, after a fatal traffic accident, law enforcement officers may request a blood sample from a person if they have "reason to believe that the person violated any state or local traffic law." *See* WIS. STAT. § 343.305(3)(ar)2. Although the legislature amended § 343.305(3)(ar) after the accident in this case, a statutory revision may be accorded weight in interpreting earlier legislative enactments. *See* ***McGarrity v. Welch Plumbing Co.***, 104 Wis. 2d 414, 427, 312 N.W.2d 37 (1981); *see also* 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49:10 at 129 (7th ed. 2007) ("Where a legislature amends a former statute, or clarifies a doubtful meaning by subsequent legislation, such amendment or subsequent legislation is strong evidence of the legislative intent behind the first statute."). In this case, the revised statute, by it terms, illuminates the standard for requesting a blood draw after a fatal accident. Further, the amendment is consistent with case law requiring officers to act reasonably in applying § 343.305. *See* ***State v. Piddington***, 2001 WI 24, ¶¶28, 33, 241 Wis. 2d 754, 623 N.W.2d 528. Accordingly, we are satisfied § 345.305(3)(ar) required

police to have no more than "reason to believe" that a person was an operator of a vehicle before requesting a blood sample following a fatal accident.

¶22 Whether police had "reason to believe" that Shallcross was driving at the time of the accident is a question of law. *See* ***Padley***, 354 Wis. 2d 545, ¶¶17, 81. The standard is low, requiring only that the officer have "minimal suspicion." *See* ***id.***, ¶77. The record here plainly supports a minimal suspicion that Shallcross was driving at the time of the accident; indeed, the record does not permit a meritorious argument to the contrary. Following the crash, D.G. was wearing a seat belt and pinned in the passenger seat of the Honda. Shallcross was the only other person found in the car. Rescue workers had to cut the car apart to extract its occupants. Assuming, as Shallcross does, that these facts permit the possibility that an unidentified third person drove the car at the time of the accident, then somehow got out unaided and disappeared, the facts nonetheless are more than sufficient to support a "minimal suspicion" that Shallcross was the driver. Police need not rule out alternative theories favoring innocence in order to harbor a minimal suspicion and may reach one conclusion even though another conclusion is also possible. *See* ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

¶23 Finally, Shallcross asserts he did not consent to the blood draw. The record shows, however, that he did consent. Two witnesses, both medical personnel, signed the trauma center's Consent for Legal Blood Draw form to attest that he gave his consent. Accordingly, the police could conduct the search. A search conducted pursuant to consent that is freely and voluntarily given constitutes an exception to the warrant requirement of the Fourth Amendment. *See* ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998).

¶24 Shallcross nonetheless argues he "couldn't voluntarily consent because he was unlawfully arrested." Assuming without deciding—as we do throughout this opinion—that Shallcross was unlawfully arrested before the blood draw, nonetheless, a Fourth Amendment violation does not itself vitiate consent. ***Id.*** at 204-05. To the contrary, a multi-factor analysis governs whether consent is valid. *See* ***id.*** at 205. The factors include the temporal relationship between the police conduct and the search, the presence of intervening circumstances, and the purpose and flagrancy of police misconduct. *See* ***id.*** An examination of these factors must take into account numerous additional considerations. *See* ***id.*** at 206-13. Shallcross has not conducted this fact-intensive analysis.

¶25 A defendant cannot obtain postconviction relief based on conclusory assertions. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. In this case, Shallcross did not dispute in his circuit court submissions that he gave consent in fact to the blood draw, nor did he examine the totality of the factors, as required by ***Phillips***, to show they invalidated the consent he gave.[4] Shallcross's conclusory statements in his appellate brief asserting that his consent was invalid are insufficient to meet his burden to produce "material facts" in support of his claim. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶26 In sum, regardless of Shallcross's custodial status, the blood draw was lawful pursuant to WIS. STAT. § 343.305(3)(ar) because: (1) police detected

[4] In the context of a criminal prosecution, the State has the burden to show consent where the evidence is allegedly seized following a Fourth Amendment violation. *See* ***State v. Phillips***, 218 Wis. 2d 180, 204, 577 N.W.2d 794 (1998). In the context of a postconviction motion alleging ineffective assistance of counsel, however, the offender has the burden to show prejudice as a consequence of counsel's failure to pursue an issue. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

the presence of alcohol; (2) police had reason to believe Shallcross was operating a vehicle involved in a fatal collision; and (3) Shallcross consented. A challenge to the lawfulness of the arrest thus would not have led to suppression of the blood test results. Therefore, Shallcross does not demonstrate any prejudice flowing from his trial counsel's failure to mount such a challenge. Absent prejudice, a convicted person cannot demonstrate ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687. Because Shallcross does not show that trial counsel was ineffective, he cannot show that postconviction counsel was ineffective by foregoing a challenge to the effectiveness of trial counsel on this issue. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15. The claim thus earns him no relief.

¶27 Shallcross next seeks relief based on allegations that his trial counsel was ineffective for failing to pursue suppression of his statements. In ***Shallcross I***, he also alleged trial counsel was ineffective for failing to pursue a suppression motion but he now offers new legal theories he believes his trial counsel should have developed, and he asserts postconviction counsel was ineffective for not challenging trial counsel's failure to present the new theories he has identified. We conclude, however, that these claims are unavailable to Shallcross. In ***Shallcross I***, we rejected his claim that trial counsel was ineffective for failing to pursue suppression of evidence because, at sentencing, his trial counsel explained Shallcross chose to accept responsibility rather than file a suppression motion. *See* ***id.***, No. 2011AP2432-CR, ¶¶15-18. As discussed in ***Shallcross I***, the decision to forego a suppression motion rested with Shallcross, and his lawyer did not act deficiently by complying with Shallcross's wishes. *See* ***id.***, ¶18. Our conclusion is the law of the case and governs subsequent litigation in this matter. *See* ***State v. CGIP Lake Partners***, 2013 WI App 122, ¶32, 351 Wis. 2d 100, 839 N.W.2d 136.

¶28 During the postconviction proceedings underlying the instant appeal, Shallcross attempted to dodge the law of this case by claiming his postconviction counsel's ineffectiveness prevented him from showing that trial counsel misrepresented his wishes during the sentencing proceeding. Shallcross argued that, if allowed an evidentiary hearing to pursue his most recent postconviction claims, his trial counsel would be required to testify and might "tell the truth. That truth being that this was a strategy to mitigate the sentencing by arguing the defendant want[ed] to accept responsibility in an attempt to show good character." The rule is well-settled, however, that a lawyer's rational strategic decision will not support a claim of ineffective assistance of counsel. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Moreover, Shallcross was present in the courtroom during sentencing and did not object to his lawyer's remarks. He may not contend that he previously permitted his trial counsel to make false statements in an effort to obtain an advantage but now wishes to fault his trial counsel for pursuing that strategy. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971) (defendant who acquiesces to trial counsel's strategic choice is bound by that decision); *see also* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (appellate court will not review error invited by appellant).

¶29 Shallcross next claims his trial counsel erred by failing to allege an unreasonable delay in charging him with a crime following his arrest. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). Pursuant to ***Riverside***, the State is required to obtain a judicial determination of probable cause within forty-eight hours of an arrest. *See* ***State v. Koch***, 175 Wis. 2d 684, 693-94, 499 N.W.2d 152 (1993). In this case, Shallcross made an initial court appearance on December 6, 2009. He asserts that, even assuming police arrested him on November 28, 2009,

as the State maintains, his initial appearance fell outside the timeframe ***Riverside*** requires.[5] Shallcross concludes that his trial counsel was ineffective for failing to seek relief for him based on this violation and his postconviction counsel was ineffective in turn for failing to challenge trial counsel's inaction. We cannot agree.

¶30 "There is no settled law on the remedy for non-compliance with ***Riverside***." ***Koch***, 175 Wis. 2d at 699. Shallcross expressly acknowledges: "there is very little jurisprudence on ***Riverside*** issues, and the law is not clear on what the remedy or the standard is for such a violation."

¶31 A defendant alleging ineffective assistance of counsel may not merely speculate that counsel's inaction might have prejudiced the defense by depriving the defendant of some uncertain and undefined remedy. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272. Rather, the defendant must demonstrate precisely how the omitted action would have altered the outcome of the proceeding. *See* ***id.*** Shallcross is unable to demonstrate how foregoing a ***Riverside*** claim altered the outcome of the proceeding here. He therefore cannot show that his lawyers were ineffective for failing to pursue the claim. Ineffective assistance of counsel claims are limited to circumstances where the law is clear. *See* ***State v. Maloney***, 2005 WI 74, ¶29, 281 Wis. 2d 595, 698 N.W.2d 583.

[5] The circuit court found, based on a police report, that officers arrested Shallcross on November 28, 2009, one day after the blood draw. We do not review the circuit court's finding because the timing of Shallcross's arrest has no impact on our analysis of any issue presented. *See* ***State v. Berggren***, 2009 WI App 82, ¶20, 320 Wis. 2d 209, 769 N.W.2d 110.

¶32 Shallcross next asserts he is entitled to a postconviction hearing on his claims and appointed counsel to pursue them. A hearing is unnecessary, however, because the record conclusively shows that Shallcross is not entitled to relief. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. Moreover, Shallcross misunderstands the law he cites in claiming he has a statutory right to appointed counsel for pursuit of a motion under WIS. STAT. § 974.06. He has no such right. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998) (appointment of counsel is discretionary for proceedings under § 974.06).

¶33 Finally, Shallcross alleges bias on the part of the circuit court that presided over the WIS. STAT. § 974.06 motion underlying this appeal. As he acknowledges, he raises this claim for the first time in this court. Accordingly, we will not address it.[6] *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (arguments raised for the first time on appeal generally deemed forfeited). For all of these reasons, we affirm.

By the Court.—Orders affirmed.

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

[6] In the reply brief, Shallcross highlights his complaint that the circuit court erroneously found he "smelled of alcohol" at the time of the blood draw. He asserts the record contains no evidence that he smelled of alcohol and asks us to review the circuit court's finding for an erroneous exercise of discretion. Because the circuit court's finding on this point is irrelevant to our resolution of the appeal, we do not address the matter. *See* ***Berggren***, 320 Wis. 2d 209, ¶20.