COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1039 **Cir. Ct. No. 2011CF829**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHADELL D. RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Khadell D. Richardson appeals from an order denying him postconviction relief. We conclude that Richardson waived his right to challenge his conviction on double jeopardy grounds and that Richardson's counsel did not provide ineffective assistance of counsel in failing to raise Fourth

Amendment claims that were without merit. We affirm the circuit court's decision denying Richardson's motion seeking to withdraw his plea.

BACKGROUND

¶2 A reliable confidential informant (CI) told police that he had observed a man with a street name of "Ray" selling crack cocaine near a particular intersection "a couple hours earlier, between 5 pm and 6 pm" on June 28, 2011, in the area of 10th Street and Washington Avenue. The CI told police that "Ray" "sells crack daily and keeps it on him." The CI described "Ray" as a "black male, average height and weight with dark skin and a short beard." The CI stated that "Ray" was wearing a white T-shirt and dark blue shorts. The police later received information from the CI that "Ray" had moved to the 1300 to 1400 block of 9th Street.

¶3 Police found a man, later identified as Richardson, fitting the description the CI gave, sitting on a concrete retaining wall near the location the CI had described. Richardson was the only person on the street or sidewalk within a block east or west of where he was sitting. Two police officers approached Richardson, identified themselves, and asked Richardson if he had any identification on him.[1] Richardson said no and verbally identified himself. Officer Freidel told Richardson that he matched the description of someone the police were looking for and that he wanted to pat him down to see if he had any

[1] Officer Hanns Freidel wrote the report attached to the complaint and indicates that he was with Officer M. Keland. Freidel also related that he and M. Keland contacted Officers S. Keland and Boeck to help them look for "Ray." There is no mention of S. Keland and Boeck in the contact with Richardson. At the end of his report Freidel indicates that S. Keland and Boeck "were out with us on 9th Street, acting as cover officers."

identification in his pocket. Richardson said okay and put his cell phone down on the ledge next to the grass/weeds. Freidel conducted a pat-down search and found $342 in Richardson's back right pocket. Freidel looked through the money for hidden narcotics and also looked in both of Richardson's shoes for narcotics but did not find any. While his partner was getting Richardson's name and address, Freidel went over to the ledge where Richardson was sitting when they stopped him and picked up Richardson's cell phone. Underneath the cell phone were two individually packaged chunks of crack cocaine.

¶4 Richardson was charged with one count of possession with intent to deliver cocaine, as a repeater, second and subsequent offense. The parties negotiated an agreement to amend the single count of possession with intent to deliver to two separate counts of possession of cocaine, second and subsequent offense. The factual basis for the new charge was that there were two bags of cocaine. This amended information reduced Richardson's exposure from twenty and one-half years' imprisonment to seven years' imprisonment. On the day of trial, the court heard the State's motion to amend the information to reflect the agreement. The court questioned Richardson as to his understanding of the change. Richardson indicated that he understood that the amendment would be to two separate counts of possession of cocaine. The court engaged Richardson in the guilty-plea colloquy. As part of that colloquy, the court went through the elements of possession of cocaine as a second and subsequent offense. Richardson said he understood that he was admitting to facts that would establish all these elements and that he "did in fact possess two separate quantities of the substance." The court went on:

> All right, Mr. Richardson, you acknowledged before that you understood and read the complaint. Do you understand that for purposes of determining whether to

> accept your pleas the court is going to assume that the facts here stating that you were in possession of two quantities of this substance are in fact accurate and correct, do you understand that?

Richardson responded, "Yes, I do." The court concluded that there was a factual basis for the two counts charged, based on the "two separate baggies, two separate quantities of substance." The court imposed three years' probation with an imposed and stayed sentence of three years' confinement and four years' extended supervision.

¶5 Richardson filed a postconviction motion, alleging various grounds for relief, including those asserted here on appeal. Trial counsel testified at the hearing on the motion, as some of Richardson's grounds for relief were based on ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). When asked by Richardson, proceeding pro se, why they had not discussed multiplicity, counsel testified:

> It was a negotiated resolution, and my recollection is it was one that we resolved late on in the case.… I'll concede it was unusual to sort of split things up like that. I didn't think that there was a problem because we had two separate packages or two separate bindles of cocaine, and so I thought that there was a legal basis for that. And … it was a non-prison recommendation, and so it was basically a compromise. And I think we discussed the offer and kind of the pros and cons of that. I don't recall specifically talking about whether it was multiplicitous. Certainly if it had been something that had been initially charged that way, it might have been something that we'd gone into, but this was basically a negotiated resolution.

The State argued, reasoning under ***United States v. Broce***, 488 U.S. 563, 566 (1989), that a defendant who pleads guilty to two counts with factual allegations of distinct offenses concedes that he has committed two separate crimes. Regarding Richardson's claim of ineffective assistance of counsel, the State argued that trial

counsel's negotiated plea had reduced Richardson's exposure from "something like twenty-and-a-half years of imprisonment to three-and-a-half years," further noting that the total exposure would have been seven.

¶6 Discussing Richardson's multiplicity challenge, the circuit court said, "But where the subdivision or the amendment was made pursuant to a negotiated plea agreement and where there is a sufficient factual basis to show that there were two separate quantities, that is not an improper subdivision by the State as part of a charging decision." The circuit court also rejected Richardson's claims of ineffective assistance of counsel based on alleged Fourth Amendment violations. The court denied Richardson's motion.

DISCUSSION

Waiver of Double Jeopardy Claim

¶7 Richardson argues that the two counts of possession of cocaine were identical in law and fact, that they were therefore multiplicitous, and that he was charged in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution. Richardson points out, and the State agrees, that under ***State v. Kelty***, 2006 WI 101, ¶38, 294 Wis. 2d 62, 716 N.W.2d 886, this court "will consider the merits of a defendant's double jeopardy challenge *if* it can be resolved on the record as it existed at the time the defendant pled." In other words, by pleading guilty, the defendant has relinquished his or her right to a fact-finding hearing on his or her double jeopardy challenge, but has not waived a claim that a charge, on its face, is unconstitutional. ***Id.***, ¶¶38-39.

¶8 Under the guilty-plea-waiver rule, a guilty plea waives all nonjurisdictional claims, including constitutional claims. ***Id.***, ¶18. Whether a defendant's guilty plea relinquishes the right to appeal an alleged double jeopardy violation "implicates questions of waiver and what effect a guilty plea has upon the right to be free from double jeopardy," which are questions of law we review de novo. ***Id.***, ¶13.

¶9 Richardson waived his ability to obtain a review of the merits of his double jeopardy claim when he negotiated the change from one count to two and knowingly pled guilty to the amended information. In ***Kelty***, the allegedly multiplicitous counts for intentionally causing great bodily harm were charged in the original complaint. ***Id.***, ¶5. In Richardson's case, the allegedly multiplicitous counts were only charged as part of, and the result of, Richardson's plea agreement. Richardson agreed to plead guilty to the two counts of possession in exchange for the State amending the charges from one count of possession with intent to deliver. By agreeing to the amendment from the one count to the two counts, Richardson reduced his exposure from twenty and one-half years' imprisonment to seven years' imprisonment. Richardson cannot now come before this court and seek to undo his plea on multiplicity grounds when he himself negotiated the two counts instead of one to reduce his exposure. ***Kelty*** recognizes that defendants who negotiate a favorable plea agreement should not be allowed to "attempt gamesmanship or seek two kicks at the cat." ***Id.***, ¶40.

¶10 Richardson also alleges that his trial counsel was ineffective in not objecting to the allegedly multiplicitous charges. To show ineffective assistance of counsel, Richardson must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether Richardson has made this showing is a mixed

question of fact and law, with the court's findings of fact reviewed under a clearly erroneous standard of review and the legal conclusions regarding deficiency and prejudice reviewed de novo. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115.

¶11 As stated above, Richardson's counsel testified that he did not consider arguing multiplicity because Richardson's exposure was considerably reduced under the amended information with the two counts of possession. Pleading to the two counts was part of Richardson's strategy. A valid strategy is not deficient performance, ***State v. Libecki***, 2013 WI App 49, ¶25, 347 Wis. 2d 511, 830 N.W.2d 271, and Richardson has not shown that trial counsel's decision not to argue multiplicity constituted deficient performance. Furthermore, Richardson has not shown prejudice; indeed, the negotiated plea was to Richardson's advantage.

Failure to Challenge Stop and Search

¶12 Richardson's next argument is his trial counsel was ineffective for not challenging the stop and search that led to his arrest. He contends that there was no reasonable suspicion that he was selling drugs because the information from the CI was stale and the CI's tip was too vague. He also argues that his consent to the search was not voluntary and that the police exceeded the permissible scope of the search.

¶13 As stated above, to show ineffective assistance of counsel, Richardson must show deficiency and prejudice. ***Strickland***, 466 U.S. at 687. Our review is mixed, with findings of fact reviewed on a clearly erroneous standard and conclusions of law reviewed de novo. ***Mayo***, 301 Wis. 2d 642, ¶32. It is not deficient performance for counsel to fail to raise an argument that would

have failed on the merits. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Reasonable Suspicion for Stop

¶14 Richardson argues that counsel was ineffective for failing to object to his stop because the CI did not provide enough information to support a reasonable suspicion to stop Richardson. At 7:15 p.m., the CI told police that "Ray" sells crack daily and that the CI observed "Ray" selling crack earlier between 5:00 and 6:00 p.m. in the area of 10th Street and Washington Avenue. The CI described "Ray" as a black male, average height and weight, with dark skin and a short beard, wearing a white T-shirt and dark blue shorts. Later, the CI told police that "Ray" was in the 1300 to 1400 block of 9th Street. Police went to that area and saw a suspect matching the description, and no one else was within a block of where the suspect was sitting. The suspect was later identified as Richardson.

¶15 The CI provided enough information to justify an investigatory stop of Richardson. The police did not need to be certain that Richardson had committed a crime in order to conduct an investigatory stop. *See* ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Rather, reasonable suspicion only requires that the police officer has, under the totality of the circumstances, specific and articulable facts supporting a reasonable belief that criminal activity is afoot. ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. Not only had the CI observed the sale of crack cocaine, he had given a detailed initial description of Richardson, and he had updated Richardson's location; the tip was not stale. *See* ***State v. Rutzinski***, 2001 WI 22, ¶33, 241 Wis. 2d 729, 623 N.W.2d 516 (tipster's observations of suspect's contemporaneous behavior can show

reliability of information). Freidel indicated that the CI has given reliable information in the past. The officers were able to corroborate the CI's details about Richardson's physical description, clothing, and location. *See* ***State v. Romero***, 2009 WI 32, ¶¶21-22, 317 Wis. 2d 12, 765 N.W.2d 756 (corroboration of innocent details one way reliability of tipster's knowledge can be established). The CI's information gave police reasonable suspicion to stop Richardson. Counsel was not deficient for failing to move to suppress on the ground that there was no reasonable suspicion to stop Richardson.

Consent to Search

¶16 Richardson also argues that it was ineffective assistance of counsel for counsel not to move to suppress because the search was unreasonable. Richardson claims that his consent to the search was tainted by the police show of authority; if his consent was freely given, police exceeded the scope of that consent; and "police exceeded the scope of an investigative stop when conducting an exploratory or inventory search for narcotics."

¶17 While warrantless searches are per se unreasonable under the Fourth Amendment, there is an exception for searches conducted with a voluntarily given consent. ***State v. Luebeck***, 2006 WI App 87, ¶7, 292 Wis. 2d 748, 715 N.W.2d 639. "For a search pursuant to consent to be constitutionally permissible, the consent must be voluntary under the totality of the circumstances and not the product of duress or coercion, express or implied." ***State v. Stankus***, 220 Wis. 2d 232, 237, 582 N.W.2d 468 (Ct. App. 1998).

¶18 In the police report attached to the complaint, Freidel indicates:

> I asked Richardson if he had any ID on him. Richardson said no and then verbally identified himself. We informed

> Richardson that he matched the description of a party we were looking for. I told Richardson that I wanted to pat him down to see if he had an ID in his pocket. Richardson said okay and put his cell phone down on the ledge next to the grass/weeds.

Counsel testified that he did not challenge consent because the facts as alleged in the complaint showed consent, that whether there was consent might be a grey area, and that there was no contraband found on Richardson's person during the consent search. Richardson contends:

> [B]eing approached by four police officers in both directions; being told he was a person they were looking for and an official command (I told Richardson) as opposed to asking for permission to search, rises to a level of intimidation or exercise of authority sufficient to implicate the Fourth Amendment such that a reasonable person would not feel free to walk away.

¶19 The number of police officers, in itself, does not necessarily create a coercive situation. ***Id.*** at 239-40. Here, as in ***Stankus***, there is nothing to indicate that the officers had their weapons drawn, they did not make any promises or threats to gain Richardson's consent, and there is no indication that they raised their voices or subjected Richardson to repeated intimidating questioning. *See* ***id.*** at 241. And, importantly, Richardson's response to the request to search was not equivocal; he said "okay." *See* ***id.*** Counsel was not deficient in his decision not to challenge consent.

Scope of Search for Identification

¶20 Richardson also argues that, even if his consent was voluntary, the scope of the officer's search went beyond his consent and his counsel was deficient for not moving to suppress on this ground. Richardson states that Freidel "did not confine his search strictly to what was minimally necessary to discover identification." It was while Freidel was searching Richardson's person for

identification that Freidel found a large wad of money in Richardson's pants pocket, which Freidel considered to be incriminating evidence.

¶21 Even when the sole object of a search is identification, an officer is not required to look the other way when he inadvertently discovers incriminating evidence. ***State v. Applewhite***, 2008 WI App 138, ¶18, 314 Wis. 2d 179, 758 N.W.2d 181. Counsel was not deficient in his decision not to challenge the scope of the consensual search.

Looking Underneath Cell Phone

¶22 Finally, Richardson argues that his counsel was deficient for failing to raise a Fourth Amendment challenge to the seizure of the cocaine under Richardson's phone. While searching Richardson for identification, after finding the money, and while another officer was getting Richardson's full name and date of birth, Freidel went to the ledge where Richardson had put down his cell phone, picked up the cell phone, and found two plastic bags of crack cocaine underneath the cell phone.

¶23 Freidel's lifting up Richardson's cell phone was part of the consensual search for Richardson's identification. In upholding an officer's removal of a person's wallet from his pants pocket during a search for identification, our supreme court has noted that "whether police conduct is constitutionally reasonable in a given case must be made by application of 'what is essentially an indeterminate and flexible test.'" ***State v. Flynn***, 92 Wis. 2d 427, 445, 285 N.W.2d 710 (1979). Here, Richardson had denied having identification, and a search of his person had not turned up any identification. It was reasonable for Freidel to suppose that Richardson might have placed his identification

underneath his cell phone on the ledge. Once Freidel lifted Richardson's cell phone, the baggies of cocaine were in plain view.

CONCLUSION

¶24 Richardson would not have prevailed on a Fourth Amendment challenge to the search of his person and the seizure of the cocaine under his cell phone. Therefore, Richardson's claim for ineffective assistance of counsel fails. Regarding Richardson's challenge to his guilty plea on double jeopardy grounds, Richardson waived his ability to challenge his convictions by agreeing to a very favorable negotiated plea. For these reasons, we affirm Richardson's conviction and the circuit court's denial of Richardson's postconviction motion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).