COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1570 **Cir. Ct. No. 2009CF825**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. ROGSTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Hruz and Sherman, JJ.

¶1 PER CURIAM. Matthew Rogstad, pro se, appeals an order denying his WIS. STAT. § 974.06 motion.[1] Rogstad presents numerous issues, all of which we reject. Accordingly, we affirm.

BACKGROUND

¶2 On December 14, 2009, at 12:14 a.m., officers received a report that an SUV crashed into a garage.[2] Upon arriving to investigate, police noticed one set of footprints led from the abandoned vehicle toward the mobile home park where Rogstad lived, about one mile away. The vehicle was registered to Marilyn Salzmann, Rogstad's mother, who told police Timothy Matousek drove her car that night. She stated Matousek could be found at a nearby mobile home park at lot 14.

¶3 Deputy Ian O'Connell went to lot 14 in search of Matousek at 1:07 a.m., and Gina Wilson answered the door. Wilson informed O'Connell that Rogstad told her he drove into a garage and that he was sleeping on the couch. However, Rogstad apparently moved to the bedroom after O'Connell arrived, so Wilson led O'Connell back to the bedroom to talk to Rogstad. O'Connell entered the bedroom and rousted Rogstad, who had glassy eyes, a strong odor of intoxicants, slurred speech, and a small cut on his lip with dried blood on his chin.

¶4 Rogstad denied driving his mother's car that night. Rather, he claimed he was alone at his nearby mobile home for two to three hours before

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

[2] Rogstad's statements of the facts and of the case lack citation to the record, in violation of WIS. STAT. RULE 809.19(1)(d) (2013-14).

coming to Wilson's home. O'Connell did not believe Rogstad, and he handcuffed Rogstad and transported him to the station for field sobriety tests, which Rogstad failed. Blood testing showed Rogstad's blood alcohol level at 2:45 a.m. was .242. Further investigation revealed Rogstad had been at the Red Zone tavern earlier in the evening and left around midnight.

¶5 The State charged Rogstad with fifth-offense OWI, operating after revocation, and misdemeanor bail jumping, and Rogstad obtained counsel. Following a preliminary hearing, the circuit court bound Rogstad over for trial. Rogstad moved to: (1) dismiss the charges, challenging the court's bind-over conclusion; (2) modify the complaint because he did not have an attorney in one of his prior OWI cases; and (3) exclude the physical evidence seized, including his blood or blood test results.

¶6 After a hearing, the circuit court denied Rogstad's motion to dismiss for reasons stated on the record.[3] The court determined after a subsequent hearing that O'Connell had probable cause to arrest Rogstad at Wilson's home. Rogstad then withdrew the motion collaterally attacking a prior OWI conviction. The parties filed formal discovery demands on December 16, 2010, and Rogstad pled no contest to fifth-offense OWI five days later.

¶7 The court withheld sentence and placed Rogstad on probation for three years. Rogstad's probation was later revoked, and he received a six-year sentence. He did not file a postconviction motion or notice of appeal. However, Rogstad later filed a pro se WIS. STAT. § 974.06 motion alleging ineffective

[3] The transcript of the motion hearing does not appear in the record.

assistance of counsel, judicial bias,[4] and failure by the State to disclose exculpatory evidence.

¶8 At the hearing on Rogstad's motion, his trial attorney, Laurie Osberg, testified regarding the ineffective assistance claims. Ultimately, the court denied the motion, and Rogstad appeals.

DISCUSSION

¶9 Rogstad presents numerous issues in his pro se brief. We address the issues as grouped in the State's brief.

¶10 Rogstad contends the circuit court should have dismissed the case based on insufficient evidence. However, Rogstad's no contest plea constitutes a waiver of nonjurisdictional defects, including alleged violations of constitutional rights. *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986); ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Indeed, on his plea questionnaire form, Rogstad checked the box next to the statement, "I give up my right to make the State prove me guilty beyond a reasonable doubt." Thus, Rogstad waived his insufficiency claim.

¶11 Rogstad raises a jurisdictional claim that the criminal complaint was not signed. The circuit court reviewed the case file and observed that the original complaint in the court record was signed, and that it was simply Rogstad's copy that did not have a signature. This claim is thus without merit.

[4] Rogstad does not adequately develop a judicial bias argument on appeal. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed."). Regardless, he merely requests that any proceedings on remand occur before a substitute judge. Because we affirm, there will be no further proceedings.

¶12 An exception to the guilty-plea waiver rule permits appellate review of suppression motions. WIS. STAT. § 971.31(10). In the circuit court, Rogstad argued probable cause did not support his arrest and detention for field sobriety tests. Probable cause exists when an officer has reasonable grounds to believe the person has probably committed a crime. ***State v. Popke***, 2009 WI 37, ¶14, 317 Wis. 2d 118, 765 N.W.2d 569. We conclude the police had probable cause to believe Rogstad committed the crime of OWI when they took him into custody at Wilson's home.

¶13 Deputy O'Connell knew a vehicle crashed into a garage around 12:14 a.m. His investigation led him to Wilson's home, where Wilson reported Rogstad had arrived around 12:35 a.m. and told her he drove into a garage. When Wilson led O'Connell to the bedroom, he observed Rogstad had glassy eyes and slurred speech, smelled of intoxicants, and had a cut lip with dried blood on his chin. These facts were more than adequate to create probable cause.

¶14 Next, we address Rogstad's request for plea withdrawal due to ineffective assistance of counsel. This requires that Rogstad demonstrate both deficient performance and resulting prejudice. *See* ***State v. Burton***, 2013 WI 61, ¶47, 349 Wis. 2d 1, 832 N.W.2d 611 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). If a defendant fails to prove one prong, a court need not address the other. ***Strickland***, 466 U.S. at 697. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, a defendant must show 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." ***Burton***, 349 Wis. 2d 1, ¶49. "To establish prejudice

in the context of a postconviction motion to withdraw a guilty plea based upon ineffective assistance of counsel, the defendant must allege that 'but for the counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.'" ***Id.***, ¶50 (citation omitted).

¶15 In the circuit court, Rogstad claimed attorney Osberg provided ineffective assistance by: (1) withdrawing his collateral attack motion; (2) filing a late discovery motion; (3) failing to interview and subpoena Gina Wilson and Jay Rogstad; (4) not sufficiently preparing for the suppression hearing; and (5) not filing an appeal.[5]

¶16 Prior to Rogstad's plea hearing, Osberg moved to collaterally attack a prior OWI conviction and modify the criminal complaint because Rogstad did not have an attorney in the prior case. The court scheduled a hearing, but Osberg told the court she withdrew the collateral attack motion because it would not prevail. At the ***Machner***[6] hearing, Osberg testified that to prevail on the motion, Rogstad needed to file an affidavit stating he did not know he had the right to an attorney and how an attorney could assist him. After she investigated and discussed the issue with Rogstad, Osberg determined she could not ethically submit such an affidavit to the court. She did not perform deficiently by withdrawing a meritless collateral attack motion.

[5] Rogstad's claims in his appellate brief do not match the claims made in the circuit court. Like the State, we address only those claims made in the circuit court, because we do not address claims raised for the first time on appeal. *See* ***State v. Berggren***, 2009 WI App 82, ¶49 n.10, 320 Wis. 2d 209, 769 N.W.2d 110.

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

¶17 Rogstad also argues Osberg was ineffective for failing to file a timely discovery motion. He was arrested on December 14. An oversight by Osberg led to nearly a one-year delay in filing a formal demand. However, she had requested discovery from the State on December 16 by memo, as was customary practice in her office at the time. She received discovery quickly and forwarded it to Rogstad on December 21. She also received blood test results and a report on the confession Rogstad made to the owner of the garage, after each was received by the State. Accordingly, Rogstad cannot demonstrate he was prejudiced by the delayed filing of the discovery motion.

¶18 Rogstad further argues Osberg was ineffective for failing to interview and subpoena his brother, Jay, and Wilson. He asserts an investigation would have revealed a defense that Jay drove the car into the garage, and Wilson would have provided an alibi by testifying that Rogstad drank alcohol in his home across the street from Wilson's home at the time of the crash.

¶19 Rogstad confessed to both the garage owner and Osberg. Thus, Osberg had no reason, much less any obligation, to further investigate whether other parties could support a factual defense or alibi. She therefore did not perform deficiently. In any event, the circuit court concluded Jay's story, which lacked critical details, was "absolutely preposterous." Wilson likewise would not have aided Rogstad's defense. Patrons at the Red Zone tavern reported Rogstad was present until around midnight. Further, Wilson did not know where Rogstad was before he arrived at her home. The only testimony she could have offered was that she discovered a half-full drink with ice cubes in Rogstad's home after he called her from the police station. While that may have shown Rogstad was home immediately before arriving at Wilson's home, it could not show how long he had

been at his home. Accordingly, Rogstad was not prejudiced by any failure to investigate.

¶20 Rogstad contends Osberg was ineffective for failing to cite case law concerning exigent circumstances for the warrantless entry into Wilson's home. However, because Wilson consented to the entry, any discussion of exigent circumstances would have been irrelevant. Thus, Osberg did not perform deficiently.

¶21 Finally, Rogstad complains that Osberg did not file an appeal on his behalf. Osberg testified she did not file an appeal after Rogstad pled no contest because he did not request an appeal. Regardless, Rogstad has not identified any meritorious appellate issues. Accordingly, he has not demonstrated deficient performance or prejudice.[7]

By the Court.—Order affirmed.

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

[7] To the extent Rogstad raises any issues we have not addressed, we deem those arguments incomprehensible or insufficiently developed to warrant consideration. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).