COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1383-CR **Cir. Ct. No. 2013CF55**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORNELIUS A. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Cornelius Green appeals pro se from a judgment convicting him of second-degree reckless homicide as party to the crime and from an order denying his postconviction motion alleging ineffective assistance of counsel. We affirm.

¶2 At the plea hearing, Green pled guilty to second-degree reckless homicide as party to the crime. Green agreed that the amended complaint stated the facts of his offense, which he admitted were true: Green supplied heroin to Richard Ronkoski who then supplied it to the victim. The victim died as a result of heroin toxicity.

¶3 Green's postconviction motion sought plea withdrawal and a new trial because his trial counsel did not move to suppress his inculpatory statements to police and did not take his case to trial even though Green had a viable defense. The circuit court held a postconviction motion hearing at which Green and his trial counsel testified. The circuit court made findings, including credibility findings, and denied Green's postconviction motion.

¶4 On appeal, Green argues that his inculpatory statements to police were made in violation of his right to counsel and his trial counsel should have moved to suppress his inculpatory statements. Green's claims are at odds with the circuit court's findings of fact at the postconviction motion hearing, which findings are not clearly erroneous based on this record.

¶5 "To establish an ineffective assistance of counsel claim, 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, 246 Wis. 2d 648, 630 N.W.2d 752. We will uphold a circuit court's factual findings unless they are clearly erroneous. ***Id.***, ¶27. "[W]e review the two-pronged determination of trial counsel's effectiveness independently as a question of law." ***Id.*** The circuit court "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v.***

Peppertree Resort Villas, Inc., 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶6 Based on the testimony at the postconviction motion hearing, the circuit court concluded that counsel did not perform deficiently because there would have been no merit to a motion to suppress Green's inculpatory statements.

¶7 The following evidence was adduced at the postconviction motion hearing. After the police contacted Green regarding the victim's death, Green claimed that his trial counsel advised him to turn himself in. The circuit court did not find credible Green's claim about counsel's advice. Green reported to the Milwaukee office of the High Intensity Drug Trafficking Agency (HIDTA) and spoke with detectives from the City of West Bend. Green testified that until the detectives produced the ***Miranda***[1] waiver of rights form, he did not believe he was under arrest, he never asked or tried to leave the interview room, and he was not restrained in any way. Green testified that he asked for counsel at the outset of the interview.

¶8 The circuit court rightly pointed out that even if Green asked for counsel at the outset of the interview, his own testimony substantiated that he was not in custody at the time he made that request.[2] Because Green was not in custody, the right to counsel did not apply. ***State v. Lonkoski***, 2013 WI 30, ¶¶23-

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] "Custody" is an objective test focusing on "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." ***State v. Lonkoski***, 2013 WI 30, ¶27, 346 Wis. 2d 523, 828 N.W.2d 552 (citation omitted). A person is in custody for ***Miranda*** purposes if "a reasonable person would not feel free to terminate the interview and leave the scene." ***Lonkoski***, 346 Wis. 2d 523, ¶27 (citation omitted).

24, 346 Wis. 2d 523, 828 N.W.2d 552 (a precustody anticipatory invocation of the right to counsel is not effective).

¶9 Later in the interview, the detectives gave Green his ***Miranda*** rights, he waived those rights, did not ask for counsel, and confessed to selling heroin to Ronkoski while Ronkoski's girlfriend, the victim, waited in Ronkoski's vehicle.

¶10 Trial counsel was unable to confirm that Green asked for counsel. As the circuit court stated, Green may have asked for counsel before the right to counsel accrued, but he did not ask for counsel after the right to counsel accrued (when such a request arguably would have been effective under ***Lonkoski***). Counsel informed Green that he would not file a motion to suppress unless Green insisted, which he did not.

¶11 The record supports the circuit court's rejection of Green's ineffective assistance claim. We agree with the circuit court that trial counsel did not perform deficiently when he concluded that a motion to suppress would lack merit.[3]

¶12 Green next argues that his trial counsel denied him a trial. Green testified that he asked his trial counsel for a trial, but trial counsel refused to take the case to trial. Trial counsel testified that Green agreed to enter a guilty plea after reviewing the evidence,[4] counsel never refused to take Green's case to trial, and if Green had wanted a trial, counsel would have taken the case to trial, even

[3] Counsel does not perform deficiently if counsel declines to file a motion lacking merit. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis.2d 270, 647 N.W.2d 441.

[4] The plea agreement reduced the charge from first-degree reckless homicide as party to the crime to second-degree reckless homicide as party to the crime.

though counsel believed that a trial would be a "bad choice." The circuit court found trial counsel's testimony credible. We are bound by the circuit court's credibility determination. Green's appellate argument is not supported by the record.

¶13 Green next alleges that he did not understand aspects of the plea process or the consequences of pleading guilty, and the circuit court did not explain party to the crime liability. This claim was not raised in the circuit court, and we do not address issues raised for the first time on appeal. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (appellant must preserve issue by raising it in the circuit court).[5]

¶14 Finally, Green argues that he had a viable defense. He learned from another inmate, Joshua Dobberphul, that Ronkoski and the victim had access to another supply of heroin which Green believes caused the victim's death. Trial counsel testified at the postconviction motion hearing that he and Green discussed possible defenses, including whether Ronkoski had another supply of heroin to which the victim may have gained access and whether other drugs in the victim's system might have been the substantial factor in her death. The latter, other drug use defense was undermined by a defense expert who opined that heroin alone was sufficient to cause the victim's death. The strength of other potential defenses was undermined because Ronkoski consistently stated that Green supplied heroin that he and the victim used, and Ronkoski would probably testify against Green. Counsel opined that a defense premised on access to another heroin supply was

[5] Even if we were to address these issues, we would note that the plea colloquy record indicates that the circuit court explained party to the crime liability and the elements of the crime. Green indicated that he understood the explanation.

unlikely to be successful. Counsel described Green as actively involved in the plea negotiation, which reduced his possible sentence by ten years.

¶15 The circuit court found that Green was aware of the other heroin supply defense,[6] but he agreed to forego this defense in favor of a plea to a lesser charge. The court further found that the other heroin supply defense was weak given the evidence that Ronkoski purchased heroin from Green, and Ronkoski and the victim used that heroin supply more than once before the victim died. The record does not support a claim that trial counsel was ineffective on the question of whether to take the case to trial or accept a plea to a lesser charge.

¶16 We agree with the circuit court that Green did not establish any basis for obtaining relief from his guilty plea and conviction.

By the Court.—Judgment and order affirmed.

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

[6] The defense investigator investigated Joshua Dobberphul's claim that Ronkoski had another supply of heroin about which the victim was aware. Even though Green argued at sentencing that Ronkoski had more than one supply of heroin, Green conceded at sentencing that his conduct (selling heroin to Ronkoski) was a substantial factor in the victim's death, and he took responsibility for his role in the victim's death. Green's concession at sentencing is inconsistent with Green's postconviction claim that he had a viable defense.