COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1272-CR **Cir. Ct. No. 2008CF3645**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OLTON LEE DUMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Olton Lee Dumas appeals from a judgment of conviction for taking and driving a motor vehicle without the owner's consent as a

repeat offender. WIS. STAT. § 943.23(2) (2007-08).[1] Dumas argues that: (1) the circuit court was deprived of competency because the complaint was insufficient, and did not confer jurisdiction on the court to proceed with a preliminary hearing; (2) there was insufficient evidence at the preliminary hearing to support the charge; (3) the district attorney failed to examine all the facts and circumstances at the preliminary hearing before filing the information; (4) the district attorney did not properly exercise discretion before filing the information; and (5) the circuit court applied the wrong standard of review when it denied Dumas' motion to dismiss the information. Because we conclude that none of Dumas' arguments have merit, we affirm the judgment of conviction.

BACKGROUND

¶2 Dumas was charged with, among other things, having taken and driven a car owned by Saundra Pounds. At the preliminary hearing, Pounds testified that at about 1:30 a.m. on December 2, 2008, her boyfriend went outside of her home in Beloit to start her car. Pounds' boyfriend left the car running and unlocked in the driveway. Within about four or five minutes, Pounds looked outside and saw that the car was gone. She immediately called 911 to report the car stolen. Shortly afterwards, a sheriff's deputy saw the car being driven in Janesville, and stopped it. Dumas was driving. Dumas pled guilty to the charge.[2] As part of the plea agreement, additional charges were dismissed and read-in.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Dumas also pled no contest to a charge of operating after revocation as a fourth offense. He does not challenge that conviction in this appeal.

DISCUSSION

¶3 The State first argues that Dumas waived his right to bring these challenges when he entered the plea. Although we agree with the State that Dumas waived his right to challenge many of the issues he raises when he entered his plea, *see* ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) (generally, a guilty or no contest plea waives all non-jurisdictional defects and defenses), we nonetheless choose to address the issues he raises on the merits.

Sufficiency of the Complaint

¶4 Dumas first argues that the circuit court lacked competency to proceed because the complaint against him was insufficient. The sufficiency of a complaint is a question of law that we review *de novo*. ***State v. Jensen***, 2004 WI App 89, ¶95, 272 Wis. 2d 707, 681 N.W.2d 230 (citation omitted). A criminal complaint must "set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable." ***Id.*** (citation omitted). The facts alleged in the complaint must be sufficient to show probable cause, "not in a hypertechnical sense but in a minimally adequate way through a common-sense evaluation by a neutral judge making a judgment" that a crime has been committed. ***Id.*** (citation omitted). "The complaint is sufficient if it answers the following questions: What is the charge? Who is charged? When and where is the offense alleged to have taken

place? Why is this particular person being charged? Who says so?" ***Id.*** (citation omitted). The complaint issued in this case meets this test.[3]

¶5 Dumas argues that the complaint was defective in two general ways: (1) the officer who swore out the complaint did not have personal knowledge of the events; and (2) the complaint contained false statements of fact, and the police omitted some true statements. Dumas contends that if the false statements had been omitted, and the true statements had been included, the complaint would have shown that Pounds' boyfriend consented to allowing Dumas to use Pounds' car.[4]

¶6 Dumas argues first that the complaint is insufficient because the person who signed it did not have personal knowledge of the events. "[A] non-eyewitness complainant can swear to the truthfulness and reliability of an eyewitness's unsworn statement, provided the complainant can establish the personal and observational reliability of the eyewitness." ***State v. Smaxwell***, 2000 WI App 112, ¶9, 235 Wis. 2d 230, 612 N.W.2d 756 (citation omitted). The complainant in this case relied on information provided by two law enforcement officers based on their discussions with the victim of the crime and their own

[3] The complaint alleges that on December 2, 2008, in the City of Beloit, Dumas took and drove a car without the consent of the owner, Pounds. The probable cause section of the complaint states: that an officer spoke with Pounds at 1:26 a.m. on December 2, 2008; she said she had left her unlocked vehicle running in the driveway, and when she returned, the car was gone; that Deputy Shaw reported that shortly afterwards he saw the car being driven in Janesville so he pulled the car over, and that Dumas was driving. These facts are sufficient to establish probable cause that Dumas committed the crime of taking and driving a vehicle without the owner's consent.

[4] Dumas makes a number of challenges to the sufficiency of the complaint. To the extent that we have not addressed a specific issue, it is because the issue was insufficiently developed to warrant individual attention. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

observations. This was sufficient to establish "the personal and observational reliability" of their statements.

¶7 Second, citing to ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), Dumas argues that the complaint contains two "malicious" false statements, as well as an omitted material fact. When "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." ***Mann***, 123 Wis. 2d at 384 (quoting ***Franks***, 438 U.S. at 155-56). The principles of ***Frank*** also apply to "an omission of critical material where inclusion is necessary for an impartial judge to fairly determine probable cause." ***Mann***, 123 Wis. 2d at 385-86.

¶8 Dumas argues that the false statements in the complaint are that Pounds left the car running in the driveway, when it really was Pounds' boyfriend who left the car running in the driveway; and the car was a 1995 Buick, when it really was a 1997 Buick. The omitted fact is a statement from Pounds' boyfriend that would have established that he gave Dumas permission to drive the car in exchange for $50.

¶9 Pounds said at the preliminary hearing that she was uncertain whether the car was a 1995 or a 1997 Buick. Dumas has not shown that the identification in the complaint of the car as a 1995 was false. Pounds also testified that her boyfriend, and not she, went outside to start the car. Although the statement in the complaint was not accurate, Dumas has not shown that it was made knowingly, intentionally or recklessly, nor has he shown that the statement

was necessary to finding probable cause. The question of who actually started the car was irrelevant to the probable cause determination. What mattered for probable cause is that once the car was started, someone took it and drove it without Pounds' permission.

¶10 Dumas also alleges that the complaint omits statements from Pounds' boyfriend that he gave Dumas permission to take the car. Dumas asserts that these statements were destroyed by law enforcement officials. Dumas has offered nothing to support his claim that Pounds' boyfriend told officers that he agreed to allow Dumas to take the car.[5] More importantly, Pounds' boyfriend was not the owner of the car. This alleged omission also does not affect probable cause. At best, Dumas's assertion that Pounds' boyfriend let him use the car may have provided a defense at trial to the charge. Dumas waived this defense, however, when he entered his plea. *See* ***Kazee***, 192 Wis. 2d at 219. Dumas has not established that the complaint was defective on this basis. None of the allegedly false or omitted statements affected the determination of the probable cause.

Sufficiency of the Evidence at the Preliminary Hearing

¶11 Dumas's next argument is that there was insufficient evidence at the preliminary hearing to bind him over for trial. The purpose of a preliminary hearing is to determine whether there is probable cause to believe that a felony was committed and that the defendant committed a felony. ***State v. Dunn***, 121 Wis. 2d 389, 394, 359 N.W.2d 151 (1984). The duty of the judge at the

[5] In fact, the questions defense counsel asked Pounds at the preliminary hearing suggested that someone named "Jenny" took Pounds' car and rented it to Dumas.

preliminary hearing is to determine whether the facts and the reasonable inferences drawn from those facts support the conclusion that the defendant probably committed a felony. ***Id.*** at 397-98. "[A] preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the State's evidence against evidence favorable to the defendant. That is the role of the trier of fact at trial." ***Id.*** at 398 (citation omitted). Probable cause is satisfied "when there exists a believable or plausible account" that the defendant committed a felony. ***Id.***

¶12 The evidence at the preliminary hearing was sufficient to support the conclusion that Dumas probably committed a felony. Dumas argues that the court did not consider that when he was stopped, he told the police officer that he had borrowed the car for $50. The preliminary hearing, however, is not the forum for choosing between conflicting facts or inferences. The evidence at the hearing was that Pounds' car was taken from her driveway without her permission. Deputy Shaw subsequently saw a car weaving in its lane and crossing the center line, "ran the plate," learned that the car was stolen, and stopped it. Dumas was driving the stolen car. This was sufficient to find that Dumas had probably committed a felony.

The Information

¶13 Dumas asserts that he was denied due process and equal protection because the prosecutor did not comply with the requirements of WIS. STAT. § 971.01(1) before filing the information. Specifically, Dumas argues that the district attorney did not examine all of the facts and circumstances from the preliminary hearing before filing the information, and erroneously exercised discretion by issuing charges without first examining whether there was sufficient

evidence at the preliminary hearing to support the charge. Although Dumas raises these as two separate issues in his brief, they are related and we address them together.

¶14 Once probable cause has been found, the question of what charges to issue is within the prosecutor's discretion. *See* ***State v. Burke***, 153 Wis. 2d 445, 451, 451 N.W.2d 739 (1990). To determine whether a prosecutor properly exercised his or her charging discretion, we "look to the record of the preliminary examination to determine if the charge recited in the information was within the confines of and not wholly unrelated to the facts and circumstances testified to at that hearing." ***Id.*** at 455 (citation omitted). "The challenge to a prosecutor's charging discretion in the information is not a second opportunity to dispute whether probable cause exists to believe the defendant committed a felony." ***Id.*** at 456 (citation omitted).

¶15 Dumas argues that there is a statutory requirement that the prosecutor review the transcript of the preliminary hearing before filing the information. Dumas argues that the statute requires the prosecutor to "weigh and examin[e] the written testimony received at the preliminary [hearing]," and that the prosecutor could not have examined the transcripts because the information was filed before the transcripts of the hearing were prepared and filed.[6]

¶16 Dumas has misstated the statutory requirements. The statute provides:

> The district attorney shall examine all facts and circumstances connected with any preliminary examination

[6] The preliminary hearing was conducted on two separate days.

> touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03(10), shall file an information according to the evidence on such examination subscribing his or her name thereto.

WIS. STAT. § 971.01(1). While the statute requires that the prosecutor examine all the facts and circumstances connected with the preliminary hearing, there is simply no requirement in the statute, or in the case law, that a district attorney wait for the transcript of the preliminary hearing to be prepared before filing an information. We reject this argument.

¶17 It is not completely clear how Dumas's second challenge to the information is different from his first. The State argues that Dumas's second challenge is that the information was improperly signed by an assistant district attorney, rather than by the "constitutional officer," the district attorney. The State responds that an assistant district attorney has the statutory authority to perform any duty required by law to be performed by the district attorney. WIS. STAT. §§ 978.03(3) and 978.04. If indeed, this was the substance of Dumas's argument, then we agree with the State that there is no merit to it.

¶18 We believe, however, that Dumas's second challenge is that the prosecutor did not properly exercise discretion because the ADA who filed the information was not present on both days of the preliminary hearing, and consequently could not have properly examined the facts and circumstances of the hearing without the written transcript. This argument also lacks merit.

¶19 There is, as we have discussed, no requirement that the prosecutor review the transcript of a preliminary hearing before filing an information, nor is there any specific requirement that the person who signs the information actually have attended the preliminary hearing (although in this case he did attend one of

the two days of the hearing). The statute does not identify any mandatory procedure for prosecutors to follow when examining "all facts and circumstances connected with any preliminary examination."

¶20 Rather, our review of whether the prosecutor properly exercised discretion when issuing charges is whether the charge was within the confines and not wholly unrelated to the facts testified to at the hearing. We have already explained that the charge issued against Dumas was supported by the facts and testimony at the preliminary hearing. Dumas has not established that the prosecutor erroneously exercised his discretion when filing the information.

Dumas's Motion to Dismiss

¶21 Dumas's final argument is the circuit court erroneously exercised its discretion when it denied his motion to dismiss the information. Specifically, Dumas argues that the court applied the wrong standard of review. The State responds to this by stating that the court applied the correct standard of review, and that the standard of review Dumas advocates is a less stringent, or more deferential, standard of review than the one the circuit court actually used. We conclude that no matter which standard of review the circuit court applied, it properly denied the motion to dismiss the information. As we have already concluded, there was sufficient evidence at the preliminary hearing to find probable cause that Dumas committed the felony stated in the information.

¶22 For these reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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