COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2087-CR **Cir. Ct. No. 2007CF6207**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY EDWARD LANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Troy Edward Lang appeals from a circuit court's judgment of conviction, entered after he pled guilty to multiple drug crimes and to receiving stolen property, and from a circuit court's order denying his postconviction motion for relief. He argues that he was denied the effective

assistance of his trial counsel because his trial counsel failed to file a motion to suppress evidence obtained pursuant to a search warrant that Lang believes was not based upon probable cause. We disagree and affirm.

BACKGROUND

¶2 On or about December 22, 2007, the State filed a criminal complaint against Lang, alleging that he participated in numerous drug crimes and received stolen goods. The charges arose following the execution of a search warrant on December 18, 2007, at Lang's residence at 5382 South 8th Street in Milwaukee. During the execution of the search warrant, the police seized marijuana, cocaine, scales, $3700 in cash, as well as numerous items police suspected were stolen, including: hand power tools, snow blowers, and bicycles.

¶3 Lang was present in the residence during the search. According to the criminal complaint, at some time during the search, Lang told police that the cocaine, marijuana, and cash located in a bedroom in the residence belonged to him, and that the property found in the basement of the residence was property that he had received in exchange for drugs. Lang said that he assumed the property was stolen.

¶4 The search warrant authorized the search of a premises located at 5382 South 8th Street and occupied by "Troy"—a white male, in his late twenties, about five feet and four inches tall, and weighing 140 pounds. The search warrant described the location as a single-family, ranch-style residence with tan siding and brown trim. The search warrant allowed police to search the residence for snow blowers, shovels, an ice auger, cocaine, scales, packaging items, drug paraphernalia and records, items showing control of the premises, weapons, and cell phones.

¶5 The search warrant was wholly based upon the affidavit of Milwaukee Police Detective Timothy Behning. According to Detective Behning's affidavit, a confidential citizen informant had been arrested in the forty-eight hours prior to December 18, 2007, in connection with a burglary at 1564 West Bolivar Avenue in Milwaukee. The informant had admitted his[1] own involvement in that burglary, as well as his involvement in at least five other garage burglaries in Milwaukee. The informant then told police that after each burglary he took the stolen property to a man named "Troy," who resided at 5382 South 8th Street in Milwaukee, and who gave him cocaine in exchange for the stolen goods. The informant described "Troy" as a white male, in his late twenties, five feet and four inches tall, weighing about 140 pounds. The informant said he had last received cocaine from "Troy" at the 8th Street address, less than twenty-four hours prior to talking to police.

¶6 The informant also told police that two of his prior burglaries had taken place at a garage on the 1500 block of West Bolivar Avenue in Milwaukee. The informant claimed that during the first burglary he removed a red Toro snow blower in addition to other items, and, during the second burglary, he returned to see if the snow blower had been replaced. The informant told police that he took the red Toro snow blower—as well as a red Craftsman snow blower and an ice auger retrieved from other burglaries—to "Troy" at the 5382 South 8th Street residence.

[1] The briefs and Detective Behning's affidavit do not identify the gender of the informant. However, for ease of writing, we refer to the informant as a man.

¶7 According to his affidavit, following the informant's admissions, Detective Behning located two open criminal complaints for burglaries that occurred at 1564 West Bolivar Avenue on December 17, 2007. In the first burglary, an unknown actor entered the unlocked garage and removed a red, five-horsepower snow blower and three snow shovels. In a second burglary at the same residence, an unknown actor forced open the side door to the garage, but nothing else was taken.

¶8 When discussing his involvement in two of the other burglaries, the informant admitted to removing an ice auger and an additional snow blower, respectively, both in the City of Milwaukee. According to his affidavit, further investigation by Detective Behning revealed a police report taken on December 18, 2007, in which an ice auger was reported stolen from a garage in Milwaukee.

¶9 Following the search of Lang's residence, the State filed a criminal complaint against Lang. Pursuant to a plea agreement, Lang pled guilty to: (count two) possession with intent to deliver more than 2500 grams but not more than 10,000 grams of marijuana, as party to a crime, second or subsequent offense; (count four) receiving stolen property, as party to a crime; and (count five) possession with intent to deliver more than fifteen grams but less than forty grams of cocaine, as party to a crime, second or subsequent offense. Keeping a drug house, as party to a crime, (count 1) was dismissed but read in for sentencing purposes.[2]

[2] The complaint also included charges against two co-defendants who lived with Lang. Count three of the complaint set forth charges against the co-defendants but not Lang.

¶10 Lang filed a timely motion for postconviction relief, claiming ineffective assistance of counsel because his trial counsel did not file a motion to suppress evidence seized during the search on the grounds that the search warrant was issued without probable cause. In his motion, Lang requested a ***Machner*** hearing,[3] as well as an order to suppress all evidence seized during the search and Lang's statements made during the search.

¶11 The circuit court denied Lang's motion and his request for a ***Machner*** hearing, finding "that the search warrant was supported by probable cause under the circumstances and that even if probable cause was lacking, the good faith exception … appli[ed]." Lang appeals.

STANDARD OF REVIEW

¶12 A defendant asserting an ineffective assistance of counsel claim must demonstrate that: (1) trial counsel's performance was deficient; and (2) trial counsel's deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a successful ineffective assistance of counsel claim requires that the defendant show both deficiency and prejudice, the court need not address both components of the inquiry if the defendant fails to make a sufficient showing on one. ***Id.*** at 697.

[3] "Under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), a hearing may be held when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance. At the hearing, trial counsel testifies as to his or her reasoning on challenged action or inaction." ***State v. Thiel***, 2003 WI 111, ¶2 n.3, 264 Wis. 2d 571, 665 N.W.2d 305.

¶13 To satisfy a showing of deficient performance, a defendant must allege specific acts or omissions of trial counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. In other words, counsel must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. The right to effective counsel is not a right to the perfect or even best possible defense, but rather it is a right to reasonably effective professional representation given all of the circumstances. ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). There is "a strong presumption that counsel acted reasonably within professional norms," ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990), and we grant great deference to counsel when reviewing claims of ineffective assistance, ***Strickland***, 466 U.S. at 689.

¶14 To prove prejudice, the defendant must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, "[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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶15 Whether counsel's performance constitutes ineffective assistance is a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will uphold any factual findings by the trial court unless the findings are clearly erroneous. ***Id.*** However, the ultimate conclusion of whether counsel's performance was deficient and prejudicial, such that it constitutes ineffective assistance, is a question of law that we review independently of the trial court. ***Id.*** at 128.

DISCUSSION

¶16 Lang argues that his trial counsel was ineffective because: (1) trial counsel acted deficiently by failing to file a motion to suppress the evidence obtained by police during the search of his residence; and (2) Lang was prejudiced by counsel's deficient performance because had the evidence been suppressed there is a reasonable probability that he would not have pled guilty. Because we conclude that trial counsel's performance was not deficient, we need not determine whether that performance prejudiced Lang. *See* ***Strickland***, 466 U.S. at 697.

¶17 "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Lang asserts a motion to suppress evidence obtained during the search of his residence would have merit on the grounds that the affidavit supporting the search warrant "was based on the uncorroborated, conclusory statements of a previously unknown informant." We disagree.

¶18 It is well-established that a "search warrant may issue only on probable cause."[4] ***State v. Romero***, 2009 WI 32, ¶16, 317 Wis. 2d 12, 765 N.W.2d 756. "Probable cause supporting a search warrant is determined by the totality of the circumstances." ***State v. Jones***, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305.

[4] "'We have consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to the law developed by the United States Supreme Court under the Fourth Amendment.'" ***State v. Duchow***, 2008 WI 57, ¶18 n.14, 310 Wis. 2d 1, 749 N.W.2d 913 (citation omitted).

> The task of the issuing [court commissioner] is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. (quotation marks and citation omitted).

¶19 "This court 'accords great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause.'" ***Romero***, 317 Wis. 2d 12, ¶18 (brackets and citation omitted). "The defendant bears the burden of proving insufficient probable cause when challenging a search warrant." ***Jones***, 257 Wis. 2d 319, ¶11.

¶20 To determine whether a confidential informant is a reliable source on which to base probable cause, an issuing judicial officer must "'consider all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information.'" ***Id.***, ¶13 (citation omitted). Here, the totality of the circumstances supports the court commissioner's conclusion that the confidential informant was reliable and, therefore, that probable cause existed to support the search warrant.

¶21 First, we conclude that the fact that the information the informant provided to police was made against his penal interests supports the court commissioner's probable cause finding. "When a declarant makes statements against his penal interest that are closely related to the criminal activity being investigated … such statements may be taken as establishing the declarant's credibility and thus his veracity." ***Romero***, 317 Wis. 2d 12, ¶36 (footnotes omitted). Here, the information provided by the informant on Lang's criminal

activities was directly related to the informant's subsequent admission that he had participated in at least five burglaries and possessed cocaine. Presumably, the informant's motive in providing the police information regarding Lang's criminal activities was to curry favor with respect to his own pending charges. If so, the informant had "'a strong incentive to provide accurate and specific information rather than false information.'" *See* ***United States v. Olson***, 408 F.3d 366, 371 (7th Cir. 2005) (citation omitted). Providing false information to the police would only reflect poorly on the informant.

¶22 Second, we note that the confidential informant personally observed the incriminating information that he relayed to Detective Behning, thereby demonstrating a reliable basis for the information. According to the informant, he knew that the police would likely find drugs and stolen property at the address he provided because the informant had personally delivered the stolen goods to "Troy" and exchanged them for cocaine within the last twenty-four hours. Both his personal knowledge and the short period of time between his personal observations and his interview with police weigh in favor of the information's reliability. *See* ***Scott v. State***, 73 Wis. 2d 504, 512, 243 N.W.2d 215 (1976) (holding that because "it was established that the informant had personally observed the presence of allegedly illegal substances in the apartment … the trial court was correct in denying the motion to suppress); ***United States v. Mykytiuk***, 402 F.3d 773, 776 (7th Cir. 2005) (stating that a court may look to "the interval of time between the events and application for a warrant" to determine the credibility of a confidential informant).

¶23 Third, the informant gave a detailed statement of: his own crimes, the items that would likely be found in "Troy's" residence, the location of the residence, and "Troy." Such detailed "information is not of the type a confidential

informant is likely to supply without a basis in fact. To the contrary, an untruthful informant is best served by providing only general information." *See* ***Jones***, 257 Wis. 2d 319, ¶17.

¶24 Finally, the police were able to independently corroborate many of the details provided by the confidential informant. *See* ***Romero***, 317 Wis. 2d 12, ¶21 ("The reliability of the information may be shown by corroboration of details; this corroboration may be sufficient to support a search warrant."). Detective Behning personally drove by a residence at the address provided by the informant, verifying its existence, and located police reports verifying that burglaries had taken place in the previous forty-eight hours with items missing that matched those that the informant stated that he had stolen and taken to "Troy's" residence. "If a declarant is shown to be right about some things, it may be inferred that he is probably right about other facts alleged." ***Id.***

¶25 We reject Lang's assertion that the search warrant was not based upon probable cause because: (1) "[t]he affidavit did not contain any specific detail regarding the storage of 'stolen goods' or drugs within the residence"; (2) "[t]he affidavit contained no information to establish that the informant had provided reliable information in the past"; (3) "[t]here was no evidence that the informant appeared in person before the magistrate issuing the warrant"; (4) "[t]he police did not independently corroborate any of the information obtained from the 'confidential citizen informant' as it pertained to 'Troy' or the residence at 5382 S[outh] 8[th] Street"; and (5) the facts of this case are "strikingly similar" to those in ***Mykytiuk*** and ***United States v. Koerth***, 312 F.3d 862 (7th Cir. 2002), in which the Seventh Circuit Court of Appeals held that search warrants based on information obtained from confidential informants were not sufficiently supported by probable cause. We address each assertion in turn.

¶26 First, we re-emphasize that whether an affidavit sets forth probable cause on which to issue a search warrant is based upon the totality of the circumstances. *See* ***Jones***, 257 Wis. 2d 319, ¶10. In other words, it does not matter if some facts do not weigh in favor of probable cause, just so long as there are enough facts that do to create "'a fair probability that contraband or evidence of a crime will be found in a particular place.'" ***Id.*** (citation omitted). As we have already established, we conclude that enough facts existed on which the court commissioner could reasonably find that there was "'a fair probability'" police would uncover "contraband or evidence of a crime" at "Troy's" residence. *See* ***id.*** And, therefore, we are unconvinced by Lang's efforts to persuade us that the informant was unreliable simply because it was his first time as an informant, he did not appear before the court commissioner in person, and he did not provide specific information regarding the storage of the stolen goods in the residence. The other facts we mentioned previously support the court commissioner's conclusion that the affidavit set forth probable cause.

¶27 Second, we conclude that, when combined with the other evidence demonstrating the informant's reliability, Detective Behning's corroboration of some of the facts provided by the informant was enough to demonstrate the informant's reliability. Again, we note that "[i]f a declarant is shown to be right about some things, it may be inferred that he is probably right about other facts alleged." ***Romero***, 317 Wis. 2d 12, ¶21. Here, Detective Behning verified that the informant was involved in several of the burglaries he admitted to and had provided accurate details on the items taken during those burglaries; Detective Behning was also able to verify that the address the informant had given him existed and was in fact a residence. In this case, given the other facts indicating the informant was reliable, we conclude it was unnecessary for the police to also

corroborate information directly pertaining to "Troy" or other information pertaining to the residence itself.

¶28 Finally, we are unpersuaded that this case is sufficiently similar to either ***Mykytiuk*** or ***Koerth*** to conclude that the warrant lacked probable cause. In both ***Mykytiuk*** and ***Koerth***, officers obtained search warrants based solely upon information retrieved from an informant. ***Mykytiuk***, 402 F.3d at 774-75; ***Koerth***, 312 F.3d at 867. In both cases, the informants gave statements against their own penal interests regarding the criminal activities of another. ***Mykytiuk***, 402 F.3d at 774-75; ***Koerth***, 312 F.3d at 867. And in each case, the Seventh Circuit Court of Appeals concluded (and notably, in each case the government conceded) that there was no probable cause on which to obtain a search warrant. ***Mykytiuk***, 402 F.3d at 775-77; ***Koerth***, 312 F.3d at 867-68. Lang argues that these facts alone demonstrate that ***Mykytiuk*** and ***Koerth*** are sufficiently similar to this case to necessitate that we conclude no probable cause existed here.

¶29 However, this case differs from both ***Mykytiuk*** and ***Koerth*** in at least one important way—in neither of those cases did the police corroborate or provide foundation for any of the information provided to them by the confidential informants. *See* ***Mykytiuk***, 402 F.3d at 776; ***Koerth***, 312 F.3d at 868. Accordingly, in those cases, the Seventh Circuit Court of Appeals concluded that, because the information was uncorroborated, the informants' statements were conclusory, and therefore, on their own, they could not form the basis of probable cause. ***Mykytiuk***, 402 F.3d at 776-77; ***Koerth***, 312 F.3d at 868. Those are not the facts before us. Here, Detective Behning was able to corroborate several of the facts set forth by the confidential informant—that the informant had participated in multiple burglaries in the area, the detailed descriptions of the items stolen, and

that a residence existed at the address provided. That corroboration distinguishes this case from both ***Mykytiuk*** and ***Koerth***.[5]

¶30 In sum, the specificity of the informant's statements, which were based upon his own personal observations and made against his own penal interest, and which were independently corroborated by police, imparted a high degree of reliability to the information. Accordingly, the facts alleged in Detective Behning's affidavit are sufficient to support the conclusion that the confidential informant provided reliable information and thereby set forth sufficient probable cause to support the search warrant. Therefore, Lang's trial counsel did not act deficiently by failing to file a motion to suppress. *See* ***Wheat***, 256 Wis. 2d 270, ¶23.

¶31 As a final matter, Lang argues that the circuit court erred when it denied his postconviction motion outright without holding a ***Machner*** hearing. "If the [circuit] court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief," as is the case here, "our review … is limited to whether the court erroneously exercised its discretion in making this determination." *See* ***State v. Winters***, 2009 WI App 48, ¶29, 317 Wis. 2d 401, 766 N.W.2d 754. We do not conclude that the circuit court erred in this instance.

[5] Because we conclude that the search warrant was properly based upon probable cause, we do not address Lang's argument that the circuit court erred in determining that even if the search warrant was not based upon probable cause, the warrant was executed in good faith. We note, however, that in both ***Mykytiuk*** and ***Koerth*** the Seventh Circuit Court of Appeals upheld the searches under the good faith exception to the Fourth Amendment. ***United States v. Mykytiuk***, 402 F.3d 773, 777 (7th Cir. 2005); ***United States v. Koerth***, 312 F.3d 862, 868 (7th Cir. 2002).

¶32 "[I]f the record conclusively shows the [defendant] is not entitled to relief, the [circuit] court may deny the motion without an evidentiary hearing." ***Id.*** Here, as we demonstrated above, regardless of why trial counsel failed to file a motion to suppress, the motion would not have been granted. The record clearly demonstrated that an ineffective assistance claim on the ground alleged could not stand. The circuit court, therefore, did not err in denying the request for a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.