COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1959

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEPHEN LAVERT GRANT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Stephen Lavert Grant appeals *pro se* from an order denying him postconviction relief under § 974.06, STATS. Grant appealed his judgment of conviction for possession of cocaine while armed, possession of a weapon by a felon, and carrying a concealed weapon, all counts subject to the sentencing enhancer for habitual criminality, arguing that the trial court

erroneously denied his motion to suppress the gun and cocaine which were found in his vehicle during a traffic stop. This court affirmed, finding that the stop was proper,[1] the arrest was supported by probable cause, and his suppression motion was, therefore, properly denied.

Grant now appeals from an order denying his postconviction motion, claiming that police reports not disclosed until the time of his subsequent arrest for several sexual assaults contain descriptions of sexual assault suspects different from the descriptions the police claimed to have relied on when arresting him on these underlying charges. He argues that because of these differences in description and because the reports reveal another man was thought to have been a suspect, these reports undermine the trial court's denial of his motion to suppress, as there was no probable cause to arrest him and search his automobile, which led to the discovery of the cocaine and handgun.[2] Because the officers had probable cause to arrest Grant, and the additional reports do not cast doubt on the propriety of the arrest, we affirm.

I. BACKGROUND.

[1] This court concluded that Grant's illegal right turn from the far left lane, Grant's lack of license plates, and the information the officers had matching Grant's behavior to the events surrounding the sexual assaults for which he became a suspect that evening, justified the stop. *See* ***State v. Grant***, No. 93-2250-CR, unpublished slip op. (Wis. Ct. App. Jul. 5, 1994).

[2] Grant also argues that the cocaine and handgun were unlawfully seized on December 9, 1990, by Milwaukee police as products of a violation under ***Miranda v. Arizona***, 384 U.S. 436 (1966). Grant claims that Police Officer Lipski should have given him his ***Miranda*** warnings before asking him if he owned the car he was driving, because this question was likely to elicit an incriminating response.

At the suppression motion hearing, Grant did not raise the ***Miranda*** violation issue as a grounds for suppression or exclusion of evidence. Failure to apprise the court of the specific grounds on which the motion to suppress evidence is based constitutes waiver of review. ***State v. Peters,*** 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). Grant thus has waived his right to review of the suppression motion on the ***Miranda*** issue.

On Sunday, December 9, 1990, at approximately 12:55 a.m., City of Milwaukee Police Officers Zygmunt Lipski and Frank Heinrich were patrolling the southeast side of Milwaukee, and were at the intersection of First and Orchard Streets when they observed three vehicles driving southbound on First Street. The first vehicle had a man and a woman in it, the second, a lone white female, and the third, which was directly behind the second vehicle, a black male who turned out to be Grant. The officers had previously been informed that a series of sexual assaults had been committed in the area and that the suspect was a black male, aged twenty-five to thirty, approximately five feet eight inches tall with a medium build, wearing dark clothes, high top tennis shoes, and sometimes wearing a baseball cap, with a bushy hairstyle. The officers had also been informed that the modus operandi of the suspect was to follow lone, white females on weekend nights, between the hours of 12:30 and 2:30 a.m., find out where they lived, or where they were going, and when they arrived at their destination, sexually attack them. The officers had also previously viewed a composite sketch of the sexual assault suspect.

After observing the vehicles and noticing that Grant's appearance was similar to that of the suspect in the composite sketch, the officers followed Grant in a marked police car. While following him, the officers observed Grant looking into his rear view mirror and they ultimately witnessed him make a right turn from the far left lane. Additionally, they observed that the car driven by Grant had no license plates. As a consequence, the officers stopped Grant's vehicle and asked Grant for his driver's license. Grant supplied it and told the officers the reason the car did not have plates was because he had just bought it. In response to the officers' questions, Grant also told the officers he had previously been arrested for sexual assault and robbery. The officers asked Grant

to remain seated in his vehicle while they called the officer in charge of the investigation of the sexual assaults to the scene.

Officer Lipski testified that Detective Gregory Nowakowski arrived at the scene within ten minutes of his call. Detective Nowakowski confirmed Grant's resemblance to the sketch and instructed Officer Lipski to arrest Grant, which he did. Grant's car was then searched and the gun and cocaine were discovered.

Grant now claims that information contained in additional police reports, which Grant obtained when he was later charged with several sexual assault crimes, casts doubt on the propriety of his arrest.

II. ANALYSIS.

Grant asserts that the police reports he received in January 1995, when he was charged with numerous sexual assaults, undermine the propriety of his arrest and the ensuing search that produced the handgun and the cocaine. Grant contends that the reports, which include various descriptions of the suspect given by the sexual assault victims and which document that another man was stopped as a suspect in the sexual assault due to his resemblance to the composite sketch, contain evidence that the police lied when claiming he fit the description of the suspect. Implicit in his argument is his apparent belief that the descriptions of the assailant in the newly discovered police reports differs substantially from the description of the assailant relied upon by the police when arresting him. He argues that had these reports been available to him at the suppression motion hearing, the information in the reports would have refuted the probable cause finding.

Because Grant previously appealed directly, he must demonstrate a "sufficient reason" why he did not raise his discovery violation allegation on direct appeal. Section 974.06(4), STATS.; *see* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 181-82, 517 N.W.2d 157, 160 (1994). Grant had a sufficient reason in that he did not realize the alleged discovery violation until after his direct appeal.[3] His current appeal is cognizable under § 974.06, STATS.,[4] because Grant's allegation of a discovery violation implicates due process. *See* ***Brady v. Maryland***, 373 U.S. 83, 86 (1963).

A defendant's right in a criminal trial to due process is "the right to a fair opportunity to defend against the State's accusations." ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973). This right to defend includes the right to obtain "access to evidence necessary to prepare his or her case for trial." ***State v. Maday***, 179 Wis.2d 346, 354, 507 N.W.2d 365, 369 (Ct. App. 1993). Thus, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment …." ***Brady***, 373 U.S. at 87. *See also* ***United States v. Bagley***, 473 U.S. 667, 675-76 (1985) (holding that impeachment evidence as well as

[3] Grant also claims the discovery violation was not raised due to ineffective assistance of postconviction counsel. Because we reject the discovery argument, we conclude there was no ineffective assistance of counsel.

[4] Section 974.06, STATS., in pertinent part, reads as follows:

> **Postconviction Procedure. (1)** After the time for appeal or postconviction remedy … has expired, a prisoner in custody under sentence of a court … claiming the right to be released upon the ground that sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

exculpatory evidence falls within the ***Brady*** rule); ***State v. Nerison***, 136 Wis.2d 37, 54, 401 N.W.2d 1, 8 (1987) (due process requires the prosecutor to disclose all exculpatory evidence including impeachment evidence).

A ***Brady*** violation is established if the defendant shows: (1) that the prosecution failed to disclose evidence that was favorable to the accused, and (2) that the evidence was material to the determination of the defendant's guilt or punishment. *See* ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Bagley***, 473 U.S. at 682.

"Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense." ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Here, the trial court concluded there was probable cause to make the arrest, even before Detective Nowakowski arrived at the scene.[5] This court agreed with the trial court on direct appeal.

We reject Grant's argument that the additional police reports cast doubt on the determination of probable cause. The additional reports include a report of an incident where police officers stopped another individual, suspecting him of the same sexual assault crimes, and reports containing descriptions of the

[5] To support his ***Miranda*** violation claim, which has been waived, Grant asserts that he was in custody before Detective Nowakowski arrived and instructed the officers to arrest him.

assailant in the sexual assault crimes given by the victims. Although Grant contends that this information shows that there was no probable cause to arrest him, he fails to specify why this is so. He appears to be arguing that the police officers who testified must have lied, with the State's knowledge, when they gave descriptions of the suspect at his suppression motion hearing and at the application for a search warrant, because the descriptions given in testimony were different from those contained in the newly obtained discovery information. We do not agree.

The fact that Milwaukee police stopped another individual in connection with the sexual assault crimes has no significance in the determination of probable cause to arrest Grant on December 9, 1990. We note that the descriptions of the suspect given by the victims to the police are not, in fact, all exactly the same. While some minor discrepancies exist, these discrepancies are not enough to defeat the probable cause determination. Further, they do nothing to show that the police officers lied at the suppression hearing. The testimony given by Detective Nowakowski and Officer Lipski as to the assailant's description match the overall descriptions given by the victims. The officers, when testifying, did not list or identify each description by each victim. Rather, they gave a composite description of the suspect. The police witnesses all testified that Grant matched the sketch they had seen of the suspect. Coincidentally, the trial court noted while referring to the sketch, "It's remarkable how much that composite looks like the defendant."[6] Grant gives no specific reason why the additional reports invalidate the sketch. The State argues, and we agree:

[6] The sketch is not part of the record available to this court.

> [Grant's] argument rests upon the assumption that Milwaukee police had created a serial rapist profile that did not fit the information provided by the multiple sexual-assault complainants. The documents provided by defendant, however, do not support that assumption, and they do nothing to defeat the conclusion that the defendant's behavior and appearance on December 9, 1990, sufficiently fit the serial rapist profile to enable Milwaukee police to lawfully arrest him.

At the time of the arrest, the officers had knowledge of facts and circumstances sufficient for them to believe Grant had committed an offense. Since these additional reports do not cast any doubt on the propriety of the arrest, the reports would not have produced a different result at the suppression motion hearing. Accordingly, under ***Brady***, the additional reports are not material to the determination of Grant's guilt or punishment. We, therefore, find that Grant's current postconviction motion was properly denied.

By the Court.—Order affirmed.

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