

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP1053-CR

Cir. Ct. No. 2011CF154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRON JAMES POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Kessler, Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 KESSLER, J. Tyron James Powell appeals a judgment of conviction, following a jury trial, of one count of fleeing and eluding an officer and one count of carrying a concealed weapon. Powell also appeals the order denying his motion for postconviction relief. We affirm.

BACKGROUND

Facts Leading up to Powell's Arrest.

¶2 According to the facts in the record, on the evening of January 8, 2011, three Milwaukee police officers were approached by an anonymous female who told the officers that an individual carrying a handgun entered a house at 1913 North 13th Street, Milwaukee. The officers knew that address to be a drug house. The female told the officers that the individual—later identified as Powell—exited a black Mitsubishi and was dressed in black pants and a black hoodie. The female also gave officers the Mitsubishi's license plate number. Following the tip, the officers returned to their district to retrieve an unmarked squad car.

¶3 The officers arrived in the vicinity of 1913 North 13th Street in plain clothes and in an undercover squad car. They located the black Mitsubishi near a neighboring home and set up surveillance of the drug house. Officer Mickal Chemlick, one of the plain clothes officers watching the house, testified¹ that four other police officers, in marked squad cars, stayed within a one to two block radius of the unmarked squad car.

¶4 After approximately two hours of surveillance, Powell, along with three other individuals, emerged from the house and proceeded towards the black Mitsubishi. The officers observed Powell conduct several “security checks” before getting into the car. A security check, according to Chemlick, “generally is an individual patting their side or an area of their body where they may be concealing a firearm.... If you're walking like Mr. Powell did, walked up the

¹ As we will explain, Powell was actually tried three times before he was convicted. His first two trials resulted in mistrials. The testimony cited to establish the facts leading up to Powell's arrest is taken from Powell's first and third trials.

curb, made a security check to his right side hip area, to us, to the different training that we've received, it alerts us that this guy has a firearm." The undercover officers could not actually see the firearm, but believed that Powell concealed the firearm under his clothes. Once Powell entered his vehicle, the undercover officers radioed the two other nearby squads to conduct a "field interview." A "field interview," according to Chemlick, required "the officers who were in uniform [to] come around the corner [to] stop them and find out who they were and what they were doing in the neighborhood and to see if the individual did have a firearm on them."

¶5 Powell was still inside his car when the backup officers activated their sirens and parked near the Mitsubishi. The officers approached Powell and ordered Powell to show his hands. Rather than obey the officers, Powell drove away, heading northbound on 13th Street and driving through a stop sign in the process.

¶6 Police officer Kenton Burch was one of the officers who attempted to conduct the field interview of Powell. Burch testified that when he approached Powell's car and ordered Powell to put his hands up, Burch went close to the driver's side door to see if Powell had anything in his hands. Burch then witnessed Powell put his car into drive, "stomp[] on the gas," and drive away. Burch stated that Powell stomped on the gas so hard that "the level of acceleration of the tires out-paced the vehicle's level of acceleration because the tires just spun ... before ... taking off." Burch "[r]an back to [his] squad car," along with his partner, and began pursuing Powell with the sirens on.

¶7 While in pursuit of Powell, Burch observed Powell "[make] a throwing motion" towards the passenger side of the vehicle, and saw an object fly

out of the Mitsubishi's passenger-side window. Eventually Powell stopped, but then continued to drive in a stop-and-go manner until Burtch was able to pull up in front of Powell and block Powell's car. Burtch ordered Powell out of the car and onto the ground, at which point Burtch "noticed there was a magazine [for a gun] underneath [Powell] that was not there previous to him getting out ... when he got up ... [a] second magazine fell and hit the ground." Following Powell's arrest, Burtch returned to the area where he observed the object fly out of Powell's window. Police recovered a loaded firearm.

¶8 Powell was charged with one count of attempting to flee or elude a traffic officer. An amended information added one count of carrying a concealed weapon.

The First Trial.

¶9 Powell's first jury trial began on January 9, 2012. During his opening statement, Powell's counsel told the jury that Powell suffered police brutality as a result of the underlying incident, stating that Powell was "blindfolded and hospitalized as a result of injuries he'd sustained when he was beaten by police officers." The defense's theory was that the charges against Powell were fabricated in an attempt to cover up an assault by police. The State told the court that it had only become aware of allegations of police brutality on the day before the beginning of trial. The State also argued that the defense had not complied with its discovery requests. The court ruled that the issue of police brutality was relevant to Powell's defense and ruled that any defense documents not previously given to the State would be inadmissible. The defense moved for a mistrial, telling the court that Powell had not given defense counsel the relevant

materials until the beginning of trial. The State did not object, and the court granted a mistrial.

The Second Trial.

¶10 Following the mistrial, the State obtained Powell’s medical records in anticipation of Powell alleging police brutality at his second trial. However, during the second trial, although Powell testified, neither Powell nor his defense counsel raised the issues of police brutality or of an alleged cover-up. The trial resulted in a hung jury and the trial court declared a mistrial.

The Third Trial.

¶11 At the final pretrial conference prior to the third trial, the trial court addressed the State’s pretrial motion to prevent Powell from testifying that he was assaulted after his arrest. The court ruled that Powell could introduce testimony related to the alleged police brutality, but if Powell did so, “his testimony in the [second] trial becomes relevant” “[a]nd it was not presented” “during the second trial when he did testify,” making it relevant to “a recent fabrication.” Defense counsel² moved for a preemptive mistrial following the trial court’s ruling. The court denied the mistrial motion, but clarified that Powell’s allegation of police brutality was relevant only to Powell’s credibility because the issue of a civil rights violation was not before the jury. Accordingly, the trial court concluded that a jury instruction would be necessary to inform the jury of the purpose of the evidence.

² At this time Powell was represented by a different attorney than his attorney from his first and second trials.

¶12 The parties stipulated that Powell had three prior convictions. The court ruled “that if Mr. Powell chooses to testify and is asked regarding his prior convictions, that a proper answer is three.” Powell was present for the stipulation and the court’s ruling.

¶13 Powell’s third trial began on November 26, 2012. Powell testified in his own defense, but did not raise the issues of police brutality or an alleged cover-up by police. Instead, he told the jury that when the police officers initially approached his car and ordered him to show his hands, Powell “didn’t know what was going on.” He stated that he initially thought he was being robbed and his first reaction was “[t]o get out of there.” When Powell noticed the police lights behind him, he “rolled [his] window down,” to “let them see me place my gun out the window” and that he “was driving ... away from the gun.” Powell stated that he “didn’t feel safe because it was still dark,” and continued to drive until he found a well-lit area, where he pulled over.

¶14 On direct examination, defense counsel asked Powell whether he had ever been convicted of a crime. Powell responded, “[o]f a crime, yes. Of a felony no.” Defense counsel asked whether Powell had been convicted of three crimes, to which Powell responded, “Yes.” During cross-examination, the State sought to elicit testimony regarding the nature and years of Powell’s convictions. Defense counsel objected; however, his objection was overruled because the court found that Powell “went beyond” the answer he was supposed to give, thereby opening the door to additional questions about his prior convictions. The court said, “the right answer was three.... He was advised at the final pre-trial, the questions are limited.... He volunteered, ‘no felonies.’” Powell then told the jury that he was previously convicted: (1) in 1999 for carrying a concealed weapon; (2) in 2002 for obstructing an officer; and (3) in 2008 for carrying a concealed

weapon. The trial court instructed the jury that Powell's prior convictions were not "proof of guilt of the crimes now charged."

¶15 The jury convicted Powell of both charges. Following sentencing, Powell filed a postconviction motion arguing: (1) the trial court prejudiced Powell by ruling that the State could use Powell's silence on the issue of police brutality at his second trial to impeach his credibility if he raised the issue at his third trial; (2) the trial court prejudiced Powell by allowing the jury to hear information about Powell's prior convictions; and (3) trial counsel was ineffective for failing to move to suppress the firearm Milwaukee police seized unlawfully. The postconviction court denied Powell's motion. This appeal follows.

DISCUSSION

¶16 Powell now raises the same issues raised in his postconviction motion. We address each issue in turn. Additional facts are included as relevant to the discussion.

Impeachment.

¶17 Powell argues that the trial court erroneously ruled that the State could use Powell's lack of police brutality testimony at his second trial to impeach him if he raised the issue at his third trial. Powell argues that the court's ruling was prejudicial because the issue was relevant to his defense, but he did not raise it for fear of impeachment.

¶18 "In reviewing evidentiary rulings, the question on appeal is whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." *State v. C.V.C.*, 153 Wis. 2d 145,

161, 450 N.W.2d 463 (Ct. App. 1989). We will not find an erroneous exercise of discretion if there is a reasonable basis for the determination. *Id.*

¶19 Here, Powell's allegation of police brutality was investigated, but not substantiated, prior to his second trial. Neither Powell, nor his counsel, raised the issue in the second trial. Prior to the third trial, the trial court ruled that if Powell discussed an alleged police assault, the issue would be relevant to the credibility of the testifying officers; however, Powell's silence on the issue in the second trial would be relevant to Powell's credibility.

¶20 We agree with the trial court. If Powell testified about an alleged police assault, Powell's silence on the issue at his second trial becomes relevant because it raises the possibility that Powell fabricated the assault, thus impeaching his credibility. The jury was entitled to consider relevant impeachment evidence. The trial court's ruling was not an erroneous exercise of discretion.

Prior Convictions.

¶21 Powell also contends that the trial court erroneously allowed the jury to hear information about the nature and years of his prior convictions, resulting in prejudice to his case.

¶22 The introduction of evidence with respect to prior convictions lies within the discretion of the trial court. *See State v. Pitsch*, 124 Wis. 2d 628, 639, 369 N.W.2d 711 (1985). When we review a discretionary decision, we consider only whether the trial court properly exercised its discretion, not whether we would have made the same ruling. *See State v. Smith*, 203 Wis. 2d 288, 295, 553 N.W.2d 824 (Ct. App. 1996). A court properly exercises its discretion when it

correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. *See id.*

¶23 Prior to trial, the parties stipulated that Powell had three prior convictions. The trial court told Powell to simply answer “three” when asked about his convictions. Instead, when asked if he had ever been convicted of a crime, he responded: “[o]f a crime, yes. Of a felony no.” By effectively telling the jury that he was convicted of three misdemeanors, Powell hinted to the jury that his prior convictions were less significant than felony convictions. Powell called attention to the nature of his previous crimes when he volunteered information in an attempt to minimize his prior convictions to the jury. The prosecutor was then entitled to clarify the exact crimes. *See Nicholas v. State*, 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971) (when answers regarding prior convictions on direct examination are inaccurate or incomplete, the correct and complete facts may be brought out on cross-examination). We agree that Powell opened the door to further questioning about his prior convictions.

¶24 The record does not support Powell’s contention that he was prejudiced by the information about his prior convictions. The trial court told the jury that evidence of Powell’s previous crimes was not proof that Powell was guilty. The jury is presumed to follow all instructions given. *State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

Ineffective Assistance of Counsel.

¶25 Powell contends that his trial counsel was ineffective for failing to move to suppress evidence. He also contends that the trial court should have

granted a *Machner*³ hearing on the issue. Powell argues that defense counsel failed to move to suppress the handgun Powell discarded while being followed by police. The handgun was central to the State's allegation that Powell was carrying a concealed weapon. The postconviction court denied Powell's postconviction motion, concluding that officers had reasonable suspicion to stop Powell for carrying a concealed weapon.

¶26 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Powell's allegation of ineffective assistance of counsel rests on his assertion that police officers approached his car without reasonable suspicion. The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, guarantee citizens the right to be free from unreasonable searches and seizures. Although it has been held that an investigative stop is a "seizure" under the Fourth Amendment, a police officer may, under appropriate circumstances, conduct an investigative stop when a lesser degree of suspicion exists. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The standard required for this exception is reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Whether suspicion is reasonable depends upon the totality of the circumstances and looks to whether the "facts available to the officer at the moment of the seizure ... 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate." *State v.*

³ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Richardson, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (citation and one set of quotation marks omitted).

¶27 The facts support the postconviction court’s finding of reasonable suspicion to approach Powell’s car. First, Milwaukee police received an anonymous tip that a man carrying a gun entered a house the officers knew to be a drug house. The anonymous woman described Powell’s attire and his car. After watching the area, police witnessed Powell exit the house and saw Powell conduct what the officers considered “security checks.” The officers were familiar with the “security check” gesture from their training and experience. Based on the totality of the circumstances, officers had sufficient reasonable suspicion to stop Powell to investigate whether he was carrying a concealed weapon. When the officers approached the car, Powell fled; he continued to drive while police were pursuing him and sirens were blaring behind him. In the process, he discarded his firearm. The officers then had probable cause to arrest Powell for fleeing. Any evidence recovered was lawfully obtained. The postconviction court accepted the testimony of the multiple officers who testified at Powell’s trials. It was the postconviction court’s role to assess credibility and weigh the evidence. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). We defer to the court’s findings of fact. *See State v. Patton*, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347.

¶28 Because the firearm was lawfully seized, defense counsel cannot be found ineffective for failing to file a motion to suppress the weapon. As the postconviction court noted, even if Powell had brought a motion to suppress the firearm, under the facts presented, the motion would have been denied. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless claim).

¶29 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

