COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP2601-CR
2013AP2602-CR

Cir. Ct. Nos. 2011CF157
2011CM299

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACY L. KELLY,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Tracy Kelly appeals from judgments convicting him of possessing heroin with intent to deliver after a guilty plea and disorderly conduct after a no contest plea. Kelly also appeals from

the order denying his postconviction motion challenging probable cause for the search warrant for his residence,[1] seeking to withdraw his no contest plea to disorderly conduct, and alleging ineffective assistance of trial counsel. We are unpersuaded by Kelly's appellate arguments. We affirm.

¶2 The criminal complaint in the felony drug case alleged that law enforcement officers were conducting surveillance on Michael Burwell's residence and vehicle as part of a heroin investigation. Burwell picked up Jennifer Brueser and took her to Kelly's residence, which she entered. Brueser had heroin in her possession when she and Burwell returned to Burwell's residence. Burwell and Brueser told law enforcement officers that they had purchased the heroin from Kelly and that Burwell purchased heroin from Kelly twice every day from Kelly's large heroin supply. Law enforcement officers obtained a search warrant for Kelly's residence. A search of the residence located numerous bindles of heroin. Upon his arrest, Kelly denied possessing heroin with intent to deliver.

¶3 Kelly argues that the search warrant for his residence lacked probable cause. The search warrant and the testimony of the officers supporting the warrant application are not in the record on appeal. In lieu of a record of the presentation made to the warrant issuing judge, we use the parties' submissions on Kelly's motion to suppress.[2]

[1] Kelly's guilty and no contest pleas did not waive his right to contest the circuit court's denial of his motion to suppress. WIS. STAT. § 971.31(10) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] If the record is other than what we recite here, Kelly must bear the consequences of his failure to insure that materials germane to the appeal were included in the record before this court. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶4 In his motion to suppress, Kelly argued that the testimony offered to the warrant issuing judge did not create probable cause to issue the warrant. Kelly recited the following as the testimony before the warrant issuing judge. Officer Moertl was conducting surveillance of Burwell's residence, and he spoke with Burwell at his residence. During that encounter, Burwell told the officer that he and his friend had just purchased heroin from a male at Kelly's address. Deputy Noll testified that he followed Burwell to Kelly's residence, observed a woman identified as Brueser enter Kelly's apartment building, exit the building with Kelly, and enter Burwell's vehicle, which returned to Burwell's residence. Brueser told the deputy that she had purchased heroin from Kelly. In his motion to suppress, Kelly argued that there was no testimony that law enforcement officers observed a drug transaction between Kelly and either Brueser or Burwell. Kelly also complained that the credibility of Brueser and Burwell was questionable.

¶5 In opposing Kelly's suppression motion, the State added the following facts. Noll observed Brueser inside an apartment with Kelly, Brueser exited the apartment with Kelly, the deputy followed the vehicle containing Burwell and Brueser back to Burwell's residence, the vehicle stopped in the driveway, Brueser admitted to the deputy that she had just purchased sixteen or seventeen bindles of heroin from Kelly and that she makes such purchases from Kelly daily, Brueser had secreted the bindles in her bra and her purse and had given others to Burwell. The deputy recovered bindles from Brueser. Moertl stated that Burwell told him that he had just returned from purchasing heroin from Kelly and that Kelly had more heroin at his residence. The State argued that the statements of Brueser and Burwell corroborated each other and were corroborated by the observations of law enforcement officers.

¶6 After noting that the facts surrounding the issuance of the warrant were not in dispute, the circuit court denied the motion to suppress because the warrant was supported by probable cause based on the totality of the circumstances.

¶7 Postconviction, Kelly again sought relief relating to the allegedly defective search warrant which, he argued, was largely based on uncorroborated and incredible statements of Brueser and Burwell. Kelly further argued that the warrant issuing judge was not informed that Brueser and Burwell felt compelled to implicate Kelly after the law enforcement officers confronted them with their observations and suspicions of a drug transaction with Kelly. Kelly made an offer of proof that if called to testify at a postconviction hearing, Brueser would claim that when the police encountered her after she left Kelly's apartment building, the police told her they had been observing her, and they knew she purchased heroin from Kelly. Brueser would claim that she felt "compelled" to acquiesce in this version of events, i.e., she felt pressured to respond simply because the police phrased the inquiry in this fashion and the circumstances were inherently compelling. Kelly alleged that Burwell's testimony would be essentially the same. The postconviction court accepted Kelly's offer of proof but found that the proof did not undermine probable cause for the search warrant.

¶8 On appeal, Kelly renews his challenge to the search warrant. When reviewing the denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous, and we independently review the application of the law to those facts. ***State v. Gralinski***, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448. Kelly bore the burden of establishing insufficient probable cause to issue the warrants. ***Id.***, ¶14. Probable cause exists if the warrant issuing judge was "apprised of sufficient facts to excite an honest

belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***Id.*** (citation omitted). Whether probable cause exists depends upon a common-sense test and is determined based on the totality of the circumstances in the individual case. ***Id.***, ¶15.

¶9 Kelly relies heavily upon ***State v. Romero***, 2009 WI 32, 317 Wis. 2d 12, 765 N.W.2d 756, for his claim that Brueser's and Burwell's statements that he sold heroin and had a large amount of heroin in his apartment were hearsay, lacked independent verification and did not come from sources with an established record of reliability. ***Romero*** is distinguishable. ***Romero*** involved information provided in support of a search warrant application from a confidential informant who related the claim of a third, unidentified person that Romero had supplied the drugs for their transaction. ***Id.***, ¶9. Here, Brueser and Burwell implicated Kelly to law enforcement officers via their own first-person accounts, and they also implicated themselves in drug offenses. ***Id.***, ¶36 (statements against penal interest may establish the declarant's credibility). Furthermore, the statements of Burwell and Brueser were largely consistent with the observations of the law enforcement officers. ***Id.***, ¶35 (the observations of law enforcement officers can corroborate a declarant's assertions as reliable). The statements of Brueser and Burwell and the law enforcement officers' observations permitted "an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched," ***Gralinski***, 306 Wis. 2d 101, ¶14, along with reasonable inferences of Kelly's involvement in a heroin transaction, ***State v. Anderson***, 138 Wis. 2d 451, 470, 406 N.W.2d 398 (1987) (when someone approaches a residence, returns with drugs and states that a larger drug supply can be found in the residence, a reasonable inference is created

that the residence is the source of the drugs). We conclude that the search warrant for Kelly's residence was issued upon probable cause.

¶10 We turn to Kelly's attempts to withdraw his no contest plea to disorderly conduct. Kelly offers grounds for presentencing and postsentencing plea withdrawal. For presentencing plea withdrawal, Kelly argues that he received ineffective assistance from his trial counsel. For postsentencing plea withdrawal, Kelly claims that his no contest plea was not entered knowingly, voluntarily and intelligently.

¶11 We address Kelly's postsentencing plea withdrawal motion first. Postsentencing plea withdrawal requires a showing of a manifest injustice necessitating withdrawal of the plea. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A defendant can meet this burden by showing that he or she did not knowingly, intelligently and voluntarily enter the plea. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. Whether a plea was voluntarily, knowingly and intelligently entered presents a question of constitutional fact. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. ***Id.***

¶12 Kelly argues that his no contest plea to disorderly conduct was defective because there was no factual basis for the second element of the crime: that the defendant's conduct, under the circumstances, had a tendency to create or provoke a disturbance. WIS JI—CRIMINAL 1900.

¶13 The amended criminal complaint in the disorderly conduct case alleged that the children of Kelly and the victim were playing together. Kelly began yelling and cursing at the children, grabbed the victim, dragged her, and

punched her in the mouth. A witness supported the victim's description of the incident.

¶14 During the plea hearing, Kelly admitted that he understood the elements of disorderly conduct and that the complaint described his conduct toward the victim. The court found a factual basis in the complaint for Kelly's no contest plea.

¶15 Postconviction, Kelly sought to withdraw his no contest plea because the court did not elicit a factual basis for the second element of disorderly conduct. The court denied the motion without a hearing after determining that the record indicated that Kelly understood the elements of disorderly conduct and the complaint recited sufficient facts for that offense.

¶16 We agree with the State that Kelly's admission that he engaged in "loud, boisterous, violent or otherwise disorderly" conduct, the first element of disorderly conduct, WIS JI—CRIMINAL 1900, was the same conduct necessary for the second element: Kelly engaged in conduct that, under the circumstances, had a tendency to create or provoke a disturbance. ***Id.*** There was a factual basis for the disorderly conduct plea. Kelly did not establish a manifest injustice warranting plea withdrawal.

¶17 Postconviction, Kelly also offered a presentencing ground for withdrawing his disorderly conduct plea: his belief, developed at the beginning of the sentencing hearing, that the disorderly conduct victim was not available to testify at trial. This belief caused Kelly to doubt the advisability of his no contest plea, and he told trial counsel he wanted to withdraw his plea. Kelly claimed that his trial counsel declined to assist him with a presentencing motion to withdraw his plea based on this belief. The transcript of the sentencing hearing reveals that

in response to an inquiry from the circuit court regarding compliance with the victim's rights requirements, the State advised that the victim, Jennifer Y., did not respond to the victim rights materials sent to her.

¶18 The circuit court held a postconviction evidentiary hearing on Kelly's ineffective assistance of counsel claim premised on counsel's failure to assist him with plea withdrawal before he was sentenced. Kelly testified that he believed he learned at sentencing that the disorderly conduct victim was not available which, in turn, led him to believe that he could escape conviction for that offense.[3] Trial counsel deflected Kelly's attempt to get his attention during sentencing for the purpose of discussing plea withdrawal.

¶19 Trial counsel testified that he and Kelly spoke after sentencing. Counsel testified that Kelly misunderstood the State's reference to the victim's absence from sentencing. Counsel was also concerned that Kelly would lose the benefit of his plea agreement if he sought plea withdrawal. At the postconviction motion hearing, the State advised that there was no indication in the State's file that the victim could not be located.[4]

¶20 A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason to withdraw the plea. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d

[3] The amended criminal complaint identified a witness to the disorderly conduct incident who supported Jennifer's description of the incident. Further, Kelly admitted to the police that he had a confrontation with the victim, grabbed and dragged the victim, and struck the victim, although he claimed that she struck him first.

[4] The State never attempted to locate Jennifer for trial because Kelly reached a plea agreement and entered his pleas on June 19, 2012. Sentencing occurred on August 9, 2012.

111 (1995). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). Here, Kelly's proffered fair and just reason is ineffective assistance of trial counsel.

¶21 To establish ineffective assistance of counsel, "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 (citations omitted). We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.***, ¶27. Whether trial counsel's performance was deficient and prejudicial presents a question of law that we review independently. ***Id.*** We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶22 The circuit court, as the finder of fact at the postconviction motion hearing, was charged with assessing the credibility of the witnesses at that hearing. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. The court made the following findings. Kelly did not proclaim his innocence before sentencing, he admitted his conduct at the plea hearing, there was another witness who would have appeared at trial to support the battery count (the original charge before the plea agreement reduced the charge to disorderly conduct), the reference to the disorderly conduct victim at sentencing had to do with victim notification, not availability for trial, and the court would not have permitted plea withdrawal under the circumstances alleged at the postconviction motion hearing. The court determined that Kelly did not show a fair and just reason for a presentencing motion to withdraw his disorderly conduct plea, and he

was not prejudiced by his trial counsel's representation because the court would not have granted plea withdrawal had counsel made the motion before sentencing. ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (the result of the proceeding would not have been different had trial counsel filed a plea withdrawal motion). The circuit court's findings are supported in the record, and the court did not err in rejecting Kelly's ineffective assistance of trial counsel claim.

By the Court.—Judgments and order affirmed.

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