COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP51-CR
2014AP52-CR
2014AP53-CR

Cir. Ct. Nos. 2007CF1387
2008CF1208
2009CF1615

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM ARTELL LOCKE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In these consolidated appeals, Adam Artell Locke appeals pro se from judgments convicting him after a jury trial in case

no. 2007CF1387 of possession of THC and delivering THC to a minor and upon his guilty pleas to one count of felony bail jumping in each of case nos. 2008CF1208 and 2009CF1615. He also appeals from an order denying his motion for postconviction relief. We reject Locke's numerous arguments and affirm.

¶2 According to trial testimony, police officers assisted probation agents in a visit to Locke's home in October 2007. A police officer noted a partially raised garage door, heard voices inside the garage, and smelled the odor of burning marijuana. A second officer noted the same smell. Locke and his sixteen-year-old nephew, Deangelo McKinstry, were in the garage. Locke admitted that they were "smoking a little weed."[1] A bag of unsmoked marijuana and blunt papers were seized and Locke was charged.

¶3 The pretrial interval was prolonged by speedy trial requests and withdrawals, adjournment requests, hired, fired, re-hired, and withdrawing lawyers, and Locke picking up new criminal charges in 2008 and 2009. A bank robbery landed him in federal custody, complicating and delaying matters further.

¶4 Trial finally commenced on September 19, 2012. The jury found Locke guilty of possession of THC and delivering THC to a minor in the 2007 case; he entered guilty pleas to bail jumping in the 2008 and 2009 cases.

[1] McKinstry testified at trial it was his own marijuana, Locke did not know about it, Locke did not give him marijuana that day, and no one had been smoking any. Locke testified that the marijuana was not his (Locke's), and that he did not smoke any with or give any to McKinstry that day.

¶5 Locke moved pro se for postconviction relief. This court construed his motion as having been timely filed in regard to all three underlying cases. After a nonevidentiary hearing, the trial court denied his motion.[2] Locke appeals.

Alleged violation of right to speedy trial

¶6 Due to his federal indictment, Locke was in federal custody from February 2010 through June 2012 and did not appear in state court. He asserts that the twenty-eight-month delay in prosecution violated his constitutional right to a speedy trial. He alleges delay was due to the State's failure to try to bring him to state court and to ineffective representation by his counsel, Attorney Jon Spansail. He alleges Spansail failed to take action to resolve his state case as soon as possible in 2010 despite being "fully aware" that Locke wanted him to do so, and erroneously cited two detainer statutes in an August 8, 2012 letter to the court.[3]

¶7 "Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. To determine whether a defendant's right to a speedy trial has been violated, we consider the length of and reason for the delay, the defendant's

[2] The trial court's position that the postconviction motion regarding the 2008 and 2009 cases was untimely and thus not before it does not affect our review. The issues Locke raised regarding the 2008 and 2009 cases also were raised in his motion regarding the 2007 case. The trial court considered those issues. His postconviction concerns got a full airing.

[3] Locke provides as an exhibit in his appendix the court's response to Spansail's letter but the court's letter is not in the record on appeal. The trial court stated at the postconviction motion hearing that Locke's fifty-page postconviction motion comprised a twenty-one page motion plus appendices. We will assume that the letter included in Locke's appellate appendix was in the appendix to his postconviction motion.

assertion of his or her right, and prejudice to him or her. ***Id.*** Looking at the totality of the circumstances, we weigh the conduct of the prosecution and the defense and balance the right to bring the defendant to justice against his or her right to have that done speedily. ***Id.*** To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that the lawyer's representation was deficient and that he or she suffered resultant prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶8 Locke's speedy-trial claim fails. First, the State had no obligation to seek to try Locke while he was in federal custody awaiting trial on his federal bank robbery charges without Locke requesting or demanding it. *See* ***Foster v. State***, 70 Wis. 2d 12, 18, 233 N.W.2d 411 (1975). He does not show that he did. Rather, the record reflects that federal officials advised the prosecutor, Assistant District Attorney Sharon Riek, and Spansail that Locke declined to sign a waiver thought necessary to transfer him from federal to state court.

¶9 Second, Locke does not flesh out his ineffectiveness claim regarding Spansail's failure to take the case to trial in 2010. A defendant's motion must allege with specificity that counsel provided deficient performance and that the deficiency was prejudicial. ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). To satisfy the specificity requirement, a postconviction motion must allege who, what, where, when, why, and how. ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Locke does not say how, what, or when he told counsel he wanted to resolve the state case in 2010. We need not review the prejudice allegations in his brief because they were not contained in the four corners of his postconviction motion. *See* ***id.***, ¶27.

¶10 Third, Spansail's citation to the detainer statutes, erroneous or not, is irrelevant. Locke already had made a speedy trial demand on June 29, 2012. At an August 13, 2012, status conference the court noted Locke's demand and set trial for September 4, 2012. The letter did not impact the timing of the trial.

¶11 Finally, some of the delay can be laid at Locke's feet. He also churned through attorneys in federal court, causing delays and adjournments there that had repercussions in state court.

Alleged prosecutor misconduct

¶12 Locke contends Riek engaged in misconduct—in other words, that certain statements "so infected the [proceedings] with unfairness as to make the resulting conviction a denial of due process." ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted). He cites two examples. In the context of the entire proceeding, ***id.*** at 168, neither persuades us.

¶13 First, he contends Riek repeatedly represented to the court that he declined to sign the waiver allowing him to be returned to state custody when a waiver was never presented to him, nor was one even necessary.[4]

¶14 Even if the waiver information was inaccurate, Riek presented it in reliance on her sources for it, the U.S. Marshals Service and Locke's federal

[4] Locke provides an excerpt of a February 5, 2010 federal court hearing transcript as an exhibit in his appendix. *See supra* note 3. Locke suggests the excerpt shows a waiver was unnecessary. It may indicate that the federal authorities misapprehended certain facts, but it in no way establishes that they did not convey to Riek or Spansail either that Locke refused to sign a waiver or that a waiver was required for his transfer to state court.

attorney. Locke's state counsel confirmed that Locke's federal attorney told him the same thing.

¶15 Locke's second allegation of prosecutorial misconduct arose during voir dire. He claims Riek compared him to a sex offender and a child molester and then, saying how everyone hates child molesters, implied that everyone also should hate him. We consider the allegation in context.

¶16 Stating that the case involved marijuana, Riek asked if any jurors knew someone involved with controlled substances. "Juror Rogers" responded that having known LSD, heroin and cocaine users would be "an unforgettable thing" to her. Riek then made the remarks Locke challenges:

> Okay. Some people who have friends or relatives or family members that have been involved with drugs have had very negative consequences as a result of that person's involvement with drugs. If this were a case where Mr. Locke were accused of being a child molester—that is not true. That is not true. If he were accused of being a child molester, everybody in the world hates child molesters. There's a very visceral reaction to somebody who would abuse the trust of a child. And as a juror you would be asked to put aside those personal feelings and decide the case based upon the evidence.
>
> There may be people who could not—their personal experiences were such that they could not put those feelings aside and they would not be an appropriate juror for that kind of case.
>
> Now, for your situation, do you [Juror Rogers] believe you would be able to push those feelings aside—

¶17 Defense counsel objected that even to mention child molestation tainted the proceedings. The trial court overruled the objection, noting that Riek explained why she used that example. Riek questioned Juror Rogers further:

> Do you believe you—and I want to emphasize, I'm using this as an example just because people have such strong reactions to people who are child molesters.
>
> Do you believe that you would be able to put your personal feelings aside and decide this case based upon the evidence? Or do you believe that your personal experiences have been such where you could not be fair and impartial in this case?

Juror Rogers said she was not sure she could be impartial and the court dismissed her for cause.

¶18 That another analogy may have served does not make this one improper. Riek used it to emphasize the importance of deciding a case on its facts, not on personal feelings, however strong. She underscored that Locke was not an accused child molester. Locke has not shown misconduct in either example.

Alleged denial of right to counsel of choice

¶19 The trial court denied Locke's day-of-trial request to adjourn the trial so that a lawyer he retained just the day before could represent him. Locke claims the court deprived him of his right to have his counsel of choice.

¶20 "Decisions related to the substitution of counsel are within the sound discretion of the circuit court." ***State v. Prineas***, 2009 WI App 28, ¶13, 316 Wis. 2d 414, 766 N.W.2d 206. When balancing the constitutional right to counsel of choice and the efficient administration of justice, the court must consider factors such as the length of delay entailed; whether competent counsel is available; prior continuances; inconvenience to the parties and the court; and whether there is an improper purpose for the delay. ***Id.***, ¶13.

¶21 Locke purportedly wanted to discharge Spansail due to a lack of communication in the period between his federal arrest in February 2010 and his return to state court in June 2012. Locke did not apprise the court of his disgruntlement until the very day trial was to begin, despite having appeared in court twice in person and once by telephone in the five months leading up to trial. Also, he already had had five attorneys and was responsible for the adjournment of six trial dates. Eleventh-hour requests generally are frowned upon as a tactic to delay the trial. ***State v. Lomax***, 146 Wis. 2d 356, 361-62, 432 N.W.2d 89 (1988). Denying Locke's motion for new counsel and a continuance was not arbitrary or unreasonable. *See* ***Prineas***, 316 Wis. 2d 414, ¶15.

¶22 Locke also claims Spansail was ineffective for failing to notify the court until the day of trial that Locke wanted him to withdraw and was seeking private counsel. Locke does not say when he advised Spansail he was looking for private counsel, however. Without specifics, we cannot evaluate whether Spansail deficiently failed to timely inform the court of Locke's intent to change lawyers.

Challenges to jury array

¶23 Riek exercised a peremptory challenge striking "Mary C.," the sole African-American juror. Locke objected that the strike violated ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986) (prosecutor may not challenge potential jurors solely on account of race).

¶24 To succeed on a ***Batson*** claim, a defendant first must make a prima facie case that the prosecutor's peremptory challenge was solely race-based. ***State v. Lopez***, 173 Wis. 2d 724, 728, 496 N.W.2d 617 (Ct. App. 1992). If that showing is made, the burden shifts to the prosecutor to state a race-neutral explanation. ***Id.***

The trial court then must determine whether the defendant has proved purposeful discrimination. ***Id.*** We apply the clearly erroneous test to that finding. ***Id.*** at 729.

¶25 Here, Riek explained that she used a Racine county law enforcement program to do a name inquiry on Mary C. and the "couple of other" jurors about whom she had questions. Riek verified that the Mary C. referenced had the same address, date of birth, and telephone number that potential juror Mary C. had listed on the jury questionnaire. In regard to Mary C., the program referenced a suicide attempt, "at least four" entries listing her as a mental subject, and stated that she lists herself as being retired at age fifty-three. Riek said the information gave her concerns about Mary C.'s mental stability. The trial court's finding that Riek's explanation was race-neutral and credible is not clearly erroneous.[5]

¶26 Locke also argues, for the first time, that African-Americans were systematically excluded from the jury pool, contrary to ***Duren v. Missouri***, 439 U.S. 357 (1979). He has forfeited this claim for not raising it in a timely fashion. *See* ***Wilson v. State***, 59 Wis. 2d 269, 282-83, 208 N.W.2d 134 (1973) (defendant challenging jury composition or method of achieving it must do so before jury empaneled). He also has fallen far short of establishing a prima facie violation of the right to a representative jury. *See* ***Duren***, 439 U.S. at 364.

[5] At the postconviction motion hearing, Riek argued that there was no violation of ***Batson v. Kentucky***, 476 U.S. 79 (1986), because the juror was excused by the court for cause, not stricken by a peremptory challenge. The court agreed and found no ***Batson*** violation. As shown above, it was Juror Rogers the court excused for cause and Mary C. who Riek struck by a peremptory challenge. Despite the confusion, perhaps due in part to the fifteen months between the two proceedings, we affirm. *See* ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶7, 250 Wis. 2d 740, 642 N.W.2d 233 (affirm right result reached for wrong reason).

Alleged violation of WIS. STAT. § 906.09(2013-14)[6]

¶27 Locke next argues that the trial court erred when it allowed the State to go beyond the "counting rule" of WIS. STAT. § 906.09(1) and question McKinstry, who testified for the State, about pending charges. The prosecutor asked McKinstry if he currently was charged with a crime. McKinstry responded that he was charged with substantial battery. Asked if he expected any type of preferential treatment from the State as a result of his testimony, McKinstry answered, "No." Defense counsel did not object.

¶28 While we could say that Locke's claim is forfeited, it is more properly addressed under the rubric of ineffective assistance of counsel, which Locke does not argue. *See* ***State v. Carprue***, 2004 WI 111, ¶¶36, 47, 274 Wis. 2d 656, 683 N.W.2d 31. He would not have prevailed anyway. It is permissible to question a prosecution witness about whether he or she expects to receive favorable treatment as a result of testifying for the State. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 446-48, 247 N.W.2d 80 (1976). It is not ineffective to not pursue a losing argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Alleged inadmissibility of recorded jail phone conversation

¶29 A jail recording of a phone call between Locke and Laticia Locke, his sister and McKinstry's mother, was admitted at trial. The jury heard Locke tell Laticia the marijuana was his, he allowed McKinstry to smoke it, he told his

[6] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

probation agent the same thing, and she should tell McKinstry to tell his own probation agent he has a drug problem so he could get treatment and avoid jail. He later claimed he lied to Laticia in the phone call to help McKinstry.

¶30 Locke contends the recording was inadmissible under WIS. STAT. § 885.365 because there was no periodic tone emitted during the call. Counsel affirmatively declined to object to its admission, as a warning was given at the beginning that calls are recorded and could be monitored. Locke thus has waived any objection. *See* ***Carprue***, 274 Wis. 2d 656, ¶36. He does not claim the failure to object constitutes ineffective assistance of counsel. *See* ***id.***, ¶47.

¶31 Besides that, the claim fails on the merits. WISCONSIN STAT. § 885.365 expressly applies only to civil cases. It also contains an exception for recordings made under WIS. STAT. §§ 968.28 to 968.37, the Wisconsin Electronic Surveillance Control Law. Locke opted to go forward with the conversation after being warned it would be recorded. Use of the telephone in that circumstance constitutes consent to intercept the communication. *See* ***State v. Riley***, 2005 WI App 203, ¶13, 287 Wis. 2d 244, 704 N.W.2d 635.

Alleged inadmissibility of statement to probation officer

¶32 On cross-examination, Locke confirmed that he gave a statement to his probation officer that the marijuana was his and that the statement was a lie. Counsel objected that statements to probation agents "should not be used as evidence in state crimes." An off-the-record side bar was held. The record does not indicate how the court resolved the objection. Locke contends here the statement was inadmissible under ***Minnesota v. Murphy***, 465 U.S. 420 (1984), and ***State v. Mark***, 2006 WI 78, 292 Wis. 2d 1, 718 N.W.2d 90.

¶33 A defendant seeking to exclude prior statements based upon his or her Fifth Amendment privilege against self-incrimination first must establish that the statements at issue are testimonial, compelled, and incriminating. ***Mark***, 292 Wis. 2d 1, ¶16. The record does not reflect the circumstances under which Locke made his statement to his probation officer and Locke alleges no facts suggesting he was compelled to speak to his agent when he said the marijuana was his.

¶34 In any event, before Locke testified, the jury had heard the recorded phone call between Locke and his sister. So even if the statement to his probation agent was privileged, Locke forfeited the privilege by voluntarily disclosing to Laticia what he had told his probation agent. *See* ***State v. Solberg***, 211 Wis. 2d 372, 383-84, 564 N.W.2d 775 (1997).

Additional allegations of ineffective assistance of counsel

¶35 Locke contends Spansail ineffectively failed to obtain the testimony of Laticia, whom he subpoenaed but did not serve. Locke asserts his sister would have testified that her son admitted the marijuana was his, the jail phone conversation was designed to prevent the boy from being revoked and incarcerated, and that Locke was only trying to help his nephew.

¶36 Laticia said she was unable to be at trial due to a new job in North Carolina. Spansail concluded she was not a necessary witness, making her availability moot. Further, Locke has not shown that the failure to obtain Laticia's testimony was prejudicial. He does not state how she would have had personal knowledge of his motive to lie about the marijuana or, if someone told her that, how her testimony would not have been inadmissible hearsay. *See* WIS. STAT.

§§ 906.02, 908.01(3). Laticia's testimony also would have been cumulative to McKinstry's own testimony that the marijuana was his.

¶37 Counsel's failure to argue insufficiency of the evidence likewise was not deficient performance. Locke cites an Eleventh Circuit case that arose under Alabama law in which trial counsel's failure to challenge the sufficiency of the evidence at the end of the trial of an "extremely weak" case precluded challenging it on appeal. ***Holsclaw v. Smith***, 822 F.2d 1041, 1042, 1046-47 (11th Cir. 1987). In Wisconsin, sufficiency-of-the-evidence claims may be raised on appeal even if no motion was made in the trial court. *See* WIS. STAT. § 974.02(2).

¶38 Moreover, a challenge would have failed. Our review is extremely narrow. We may not substitute our judgment for the jury's "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). It is for the jury "to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." ***Id.*** at 503. The evidence here was not incredible as a matter of law and the jury could have drawn the appropriate inferences from it to find the requisite guilt. *See* ***id.*** at 507-08.

¶39 Finally, Locke asserts for the first time that Spansail ineffectively failed to object to a detective's response about why he handcuffed Locke. A claim of ineffective assistance of counsel not preserved by raising it by postconviction motion cannot be reviewed on appeal. ***State ex rel. Rothering v. Mc Caughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996).

By the Court.—Judgments and order affirmed.

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