COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2382-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and MICHAEL J. BARRON, Judges. *Reversed and cause remanded.*

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

¶1 PER CURIAM. James E. Thomas pled no contest to a charge of first-degree reckless homicide by use of a dangerous weapon, as a party to a crime. *See* §§ 940.02(1), 939.63, 939.05, STATS. He appeals from the trial court's order denying his postconviction motion to withdraw his plea. Thomas argues that he is

entitled to withdraw his plea because he received ineffective assistance of counsel. We reverse and remand.[1]

BACKGROUND

¶2 On March 30, 1996, Thomas and four other men went to a Milwaukee tavern. At the tavern, they got into a fight, which led to a shoot-out. A patron of the bar, Ramiro Luna, was killed during the shoot-out.

¶3 The police subsequently obtained a warrant for Thomas's arrest. On April 3, 1996, the police stopped Thomas's car and arrested him. The police told Thomas that he was being arrested for murder, and that they were going to search his car. Thomas responded that the police could go ahead and search his car because there wasn't anything in it. The police found a gun and a large quantity of cocaine in the engine compartment, under the hood of the car.

¶4 Thomas admitted to the police that the gun and the cocaine belonged to him. He also admitted that he had fired three or four shots inside the tavern during the shoot-out that had killed Luna. A ballistics expert determined that the bullet that killed Luna had been fired from Thomas's gun.

¶5 On July 24, 1996, pursuant to a plea bargain, Thomas pled no contest to a charge of first-degree reckless homicide by use of a dangerous weapon, as a party to a crime. In exchange, the State dismissed a charge of possession of cocaine with intent to deliver, while armed, and recommended that Thomas receive a sentence of twenty-five to thirty years. The trial court accepted

[1] Thomas also appeals from the judgment of conviction entered upon his no contest plea. The validity of Thomas's conviction, however, is contingent upon the resolution of the issue raised in his postconviction motion. We therefore do not reach the judgment of conviction at this time.

Thomas's plea, and entered judgment accordingly. The trial court imposed a thirty-five-year sentence.

¶6 Thereafter, Thomas filed a postconviction motion seeking to withdraw his no contest plea. Thomas argued, among other things, that his trial counsel was ineffective because he had failed to seek suppression of the gun and the cocaine found under the hood of Thomas's car. The trial court denied Thomas's motion without a hearing.

DISCUSSION

¶7 If a defendant files a postconviction motion alleging facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See* ***id.***

> "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (quoted source omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

¶8 After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A defendant has the burden of proving by clear and convincing evidence that a manifest injustice has occurred. *See* ***Bentley***,

201 Wis.2d at 311, 548 N.W.2d at 54. The manifest injustice test is satisfied by a showing that the defendant received ineffective assistance of counsel. *See* ***id.***

¶9 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.*** Counsel is strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.*** To show prejudice, Thomas must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled no contest and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

¶10 Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

¶11 In his postconviction motion to withdraw his plea, Thomas asserted that his counsel was deficient in failing to file a motion to suppress the gun and the

cocaine that the police found under the hood of his car. He argued that he did not consent to the warrantless search of his car, that the search went beyond the scope of a search incident to a lawful arrest, and that the police did not have probable cause to search under the hood of his car. Thomas further asserted that he was prejudiced by counsel's alleged deficiency because "without the items recovered from the vehicle the state would have been unable to prove the case against him." He asserted that, without his gun, the police would not have been able to identify him as the person who shot Luna because several others had also been involved in the shoot-out.[2]

¶12 The trial court denied Thomas's motion without a hearing, concluding that the search under the hood of Thomas's car was justified as a search incident to a lawful arrest. On appeal, the State requests that we affirm the trial court's decision on other grounds, arguing that the police had consent to search Thomas's car.[3] Alternatively, the State asks that we remand the case for a

[2] As noted, in order to establish ineffective assistance of trial counsel, Thomas must show that there is a reasonable probability that he would not have pled no contest and would have insisted on going to trial but for counsel's errors. *See* ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). Such a showing requires a specific explanation of why he would have insisted on going to trial rather than entering a plea. *See* ***id.***, 201 Wis.2d at 314, 548 N.W.2d at 55. Although Thomas did not explicitly allege in his postconviction motion that he would not have pled no contest if his attorney had sought to suppress the evidence seized from his car, his allegation that the State would have been unable to prove its case against him without that evidence leads to the logical inference that he would not have pled no contest if that evidence had been suppressed. That allegation also provides the specific explanation of why he would have insisted on going to trial rather than entering the plea.

[3] The State concedes that ***New York v. Belton***, 453 U.S. 454 (1981), and ***State v. Fry***, 131 Wis.2d 153, 388 N.W.2d 565 (1986) (adopting ***Belton*** rule for the interpretation of protections under Article I, Section 11 of the Wisconsin Constitution), "hold, by negative implication, that a search of an automobile incident to arrest is limited to the passenger compartment of the car." Brief of Plaintiff-Respondent at 6.

Machner hearing if we conclude that the record does not support a finding that Thomas consented to the search.[4]

¶13 "The Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution both protect against unreasonable searches and seizures." ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998).[5]

> But for a few inconsequential differences in punctuation, capitalization, and the use of the singular or plural form of a word, the texts of the Fourth Amendment and art. I, § 11 are identical. "This court has consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the United States Supreme Court under the fourth amendment." We have therefore concluded that the standards and principles surrounding the Fourth Amendment are generally applicable to the construction of art. I, § 11.

Id. (citations omitted).

---

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

[5] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 11 of the Wisconsin Constitution provides:

> **Searches and Seizures.** SECTION 11. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

1. Consent

¶14 Warrantless searches "are per se unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967) (footnotes omitted). One such exception is consent. *See* ***id.***, 389 U.S. at 358 n.22; ***Phillips***, 218 Wis.2d at 196, 577 N.W.2d at 801. When the State seeks to justify a warrantless search on the basis of consent, the State bears the burden to prove by clear and convincing evidence that the defendant's consent was voluntary. *See* ***Phillips***, 218 Wis.2d at 197, 577 N.W.2d at 802. "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." ***Id.*** "We make this determination after looking at the totality of the circumstances, considering both the circumstances surrounding the consent and the characteristics of the defendant." ***Id.***, 218 Wis.2d at 198, 577 N.W.2d at 802 (citations omitted).

¶15 Whether a defendant voluntarily consented to a search is a question of constitutional fact, subject to a two-step standard of review. *See* ***id.***, 218 Wis.2d at 195, 577 N.W.2d at 801. We will not reverse the trial court's findings of historical fact unless they are against the great weight and clear preponderance of the evidence. *See* ***id.*** "We will, however, independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met." ***Id.***

¶16 Thomas attached to his postconviction motion the police report regarding his arrest and the subsequent search of his car. The police report reads, in relevant part:

> I handcuffed James with several other officers standing beside us. At this point James asked me[,]

> "What's this all about[?"] I told him, "I have been told you are wanted for murder[."] James made no response at first, then stated, "Man–I don't know nothin' about that[."] I then told him, "Listen to me–we're going to search you're [sic] auto–if there's anything in it tell me now[."] James stated[,] "Go ahead and search it–ain't nothin' in there."
>
> The officers then went thru [sic] the auto and discovered the gray purse under the hood containing the Mac-11 and the cocaine and masks–which the[y] called over to me saying they found. Hearing this James lowered his head saying "Shit." I said, "James–did you think we were kidding[?"] He made no response and I placed him in the rear seat of our squad.

Under ***Bentley***, we must accept the facts alleged in Thomas's motion as true in determining whether Thomas was entitled to a hearing. *See* ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53. Therefore, we must determine whether the facts alleged in Thomas's motion, if true, demonstrate that Thomas voluntarily consented to the search of his car.

¶17 The facts alleged in Thomas's postconviction motion, if true, show that the search of Thomas's car was not conducted pursuant to Thomas's consent. The police did not seek consent to search Thomas's car; rather, the police informed Thomas, upon arresting him, that they were going to search his car. The fortuitous fact that Thomas told them to go ahead and do what they said they intended to do may or may not transform the search into a consensual search, depending on the circumstances. *Cf.* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 233–234 (1973) (consent given only in response to false claim of lawful authority to search is invalid); ***Bumper v. North Carolina***, 391 U.S. 543, 548–549 (1968) (burden to establish voluntary consent to warrantless search "cannot be discharged by showing no more than acquiescence to a claim of lawful authority").

2. Search incident to a lawful arrest

¶18 The trial court concluded that the search of Thomas's car was justified as a search incident to his lawful arrest.

> [A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence.

New York v. Belton, 453 U.S. 454, 457 (1981) (second set of brackets in original). The scope of a search incident to a lawful arrest "must be strictly tied to and justified by the circumstances which rendered its initiation permissible." ***Id.*** (internal quotation marks and quoted source omitted). Thus, a search incident to a lawful arrest "may not stray beyond the area within the immediate control of the arrestee." ***Id.***, 453 U.S. at 460. Items within the passenger compartment of an arrestee's automobile are generally "within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" ***Id.*** (brackets in original) (quoted source omitted). Accordingly, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Id.*** (footnotes omitted). The police may not, however, search areas outside the passenger compartment that are not immediately accessible to the arrestee. *See* ***id.***, 453 U.S. at 460 n.4 ("Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk."); ***State v. Fry***, 131 Wis.2d 153, 181, 388 N.W.2d 565, 577 (1986) ("In ***Belton***, which involves a search incident to an arrest, the Court held that there must be a contemporaneous or immediate search of the automobile, not including the

trunk.") (distinguishing scope of search incident to arrest from scope of search based on probable cause); *accord* ***United States v. Riedesel***, 987 F.2d 1383, 1389 (8th Cir. 1993) (search of trunk is beyond scope of search incident to lawful arrest).

¶19 As noted, the State concedes that the search under the hood of Thomas's car exceeded the scope of a search incident to a lawful arrest. Thus, unless the record conclusively shows that the police had probable cause to search Thomas's car, Thomas's motion raises an issue of fact regarding whether his counsel was ineffective in failing to file a motion to suppress.

3. Probable cause

¶20 Police may conduct a warrantless search of a vehicle if they have probable cause to believe that the vehicle contains contraband. *See* ***United States v. Ross***, 456 U.S. 798, 799–800 (1982); ***State v. Friday***, 147 Wis.2d 359, 375–376, 434 N.W.2d 85, 91 (1989). "'If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.'" ***Wyoming v. Houghton***, 119 S. Ct. 1297, 1301 (1999) (quoting ***Ross***, 456 U.S. at 825); *see also* ***State v. Pallone***, 228 Wis.2d 272, __, 596 N.W.2d 882, 886 (Ct. App. 1999). "[T]he permissible scope of a warrantless car search 'is defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" ***Houghton***, 119 S. Ct. at 1301 (quoting ***Ross***, 456 U.S. at 824). "'The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.'" ***Id.*** (quoting ***Zurcher v. Stanford Daily***, 436 U.S. 547, 556 (1978)).

Whether a given set of facts provides probable cause for a search is an issue of law that we determine *de novo.* *See* ***State v. Gaines***, 197 Wis.2d 102, 110, 539 N.W.2d 723, 726 (Ct. App. 1995).

¶21 Four days after the shoot-out at the tavern, the police stopped Thomas's car to arrest him pursuant to an arrest warrant. The arrest warrant was issued on information that Thomas was involved in the shoot-out. The record, however, does not disclose the information upon which the arrest warrant was based. The record also does not disclose whether the officers who arrested Thomas had other information which led them to believe that his car contained evidence pertaining to the shoot-out or to any other crime. We therefore cannot determine on the present record whether the search of Thomas's car was supported by probable cause.[6]

CONCLUSION

¶22 The allegations in Thomas's postconviction motion for plea withdrawal, if true, may, depending on the further circumstances revealed by an evidentiary hearing, entitle Thomas to withdraw his no contest plea. The record does not conclusively demonstrate that Thomas is not entitled to relief. We therefore reverse the order summarily denying Thomas's postconviction motion for plea withdrawal and remand this case for a ***Machner*** hearing.

[6] Significantly, the State did not respond to Thomas's argument that the record does not support a finding that the police had probable cause to search his car. The State thereby implicitly concedes that the record does not support such a finding. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

By the Court.—Order reversed and cause remanded.

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