COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2367-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKY A. BRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 NETTESHEIM, J. Ricky A. Bright appeals from a judgment of conviction for the unlawful possession of cocaine with intent to deliver pursuant to

WIS. STAT. § 961.41(1m)(cm)2 (1997-98)[1] and from an order denying postconviction relief.[2] The judgment followed a jury trial at which Bright was found guilty. On appeal, Bright complains that a police officer testified about inadmissible hearsay statements made by a confidential informant that Bright was dealing drugs. Alternatively, Bright argues that even if the testimony was admissible, it nonetheless violated his right to confront his accusers under the state and federal constitutions.

¶2 Because Bright did not object to the officer's testimony at the jury trial, he argued in his postconviction motion that the evidence was plain error and that his trial counsel was ineffective for failing to object. On appeal, however, Bright does not renew these claims. Instead, he directly challenges the evidence as if the issue had been preserved by a proper and timely objection. We hold that Bright has abandoned his only available appellate arguments concerning the disputed testimony, and we reject his attempt to raise the issue in a different context on appeal. We affirm the judgment and the postconviction order.

Facts and Procedural History

¶3 City of Racine Police Officer William Chesen received information from a confidential informant that Bright "was selling cocaine, crack cocaine from 1123½ Washington Avenue." The informant also reported that Bright was "dealing out of that house and that he was using a second house around the corner … as a storage facility where he literally warehoused his drugs." This information led to the issuance of search warrants for the Washington Avenue residence and

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Bright was convicted as a habitual criminal pursuant to WIS. STAT. § 939.62.

the other residence, located at 1301 East 11th Street, where Bright's sister, Latoya Bright, lived.

¶4 Bright and others were present at the 1123½ Washington Avenue address when the search warrant for that location was executed. The police discovered cocaine on the premises but did not find any drugs on Bright's person. However, he did have $440 in currency and a pager. The search at the 11th Street address also turned up cocaine and cocaine-related paraphernalia. Latoya signed an affidavit stating that the cocaine belonged to Bright, that she had observed him leave packaged cocaine at her residence and that "he has been selling drugs for several months."

¶5 Based on this evidence, the State charged Bright with possession of cocaine with intent to deliver. At the jury trial, the State asked Chesen on direct examination why two search warrants were issued. Chesen responded by reciting the incriminating information provided by the confidential informant. Bright's trial counsel did not object. Instead, at the conclusion of Chesen's direct examination, counsel moved for a mistrial. However, the mistrial request did not focus on the hearsay or confrontation aspects of the evidence. Rather, counsel argued that Chesen's testimony was a surprise based upon the State's responses to counsel's pretrial discovery demands. The trial court denied the mistrial motion.

¶6 On cross-examination, Chesen elaborated on the confidential informant's role, testifying that two or three hours prior to the execution of the search warrant against the Washington Avenue address, the confidential informant had made a drug purchase from Bright. The jury found Bright guilty.

¶7 Postconviction and represented by new counsel, Bright challenged Chesen's testimony. Because trial counsel had not objected to the testimony,

Bright cast his argument under the law of plain error and ineffective assistance of trial counsel, contending that the evidence violated his right to confront his accusers under the state and federal constitutions.[3]

¶8 The trial court denied Bright's motion. The court ruled that Chesen had testified as an expert witness, that the confidential informant's statements were a basis for Chesen's opinion and that the testimony was therefore admissible pursuant to WIS. STAT. § 907.03. The court also ruled that Chesen's testimony was admissible under the residual exception to the hearsay rule, WIS. STAT. § 908.03(24). Because the testimony was admissible, the court ruled that trial counsel was not ineffective for failing to object. Bright appeals.

Discussion

¶9 Bright's appellate brief-in-chief does not renew his postconviction claims that his trial counsel was ineffective or that Chesen's testimony constituted plain error. Instead, Bright challenges Chesen's testimony as if the issue had been preserved in the trial court by a proper and timely objection. As a result, the State's first response is that Bright has abandoned his trial court claims. The State cites to ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 782 n.3, 601 N.W.2d 287 (Ct. App. 1999), where this court said that issues raised in the trial court but not argued in a party's appellate brief are deemed abandoned and will not be considered. We view this rule as a corollary of the principle that a party will not be heard to raise an issue on appeal that was not raised in the trial court. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995). On this threshold basis, the State asks that we affirm.

[3] Bright did not challenge the trial court's rejection of his mistrial motion.

¶10 Bright answers in his reply brief that he is entitled to directly attack Chesen's testimony because the State argued for the admissibility of the testimony under the rules of evidence at the postconviction hearing. Bright states, "Never once did counsel for the State argue that this issue was to be viewed in the context of 'plain error' or ineffective assistance of counsel." From this, Bright concludes that the State is judicially estopped from making its "abandonment" argument. Alternatively, Bright contends that we should permit his direct challenge to the disputed testimony because the trial court's postconviction ruling reveals that any objection would have been futile. Bright asks that we review the issue under the law of plain error.

¶11 The potential ineffective assistance of counsel aspect of this case will not long detain us because it is a nonissue. As noted, Bright's brief-in-chief does not raise any ineffective assistance of counsel claim. And, unlike his plain error argument, Bright does not ask us in his reply brief to take up this issue if we reject his direct attack on Chesen's testimony. Clearly, Bright has abandoned this potential issue and we do not address it further.

¶12 Bright's brief-in-chief squarely raises the question of the admissibility of Chesen's testimony. He contends that he should be permitted to directly challenge this evidence on appeal because the State argued for the admissibility of the testimony under the rules of evidence at the postconviction hearing.

¶13 However, Bright glosses over the focus of the postconviction proceedings. It was Bright's postconviction motion, not the State's response, which set the scene in the trial court. There, Bright argued that his trial counsel was ineffective for failing to make a proper and timely objection to Chesen's

testimony and that the testimony otherwise represented plain error under the rules of evidence. Obviously, Bright could not prevail on either of these claims if the testimony was, in fact, admissible under the rules of evidence. Thus, it is not surprising that the State's threshold response to both of Bright's postconviction claims was that the testimony was admissible. We disagree that the State's trial court response permits Bright to argue on appeal as if the issue had been properly preserved at trial by a proper and timely objection. We hold that the State is not estopped on appeal from arguing that Bright has abandoned his only available potential issues.

¶14 Bright also argues that we should accept his direct appellate challenge to Chesen's testimony because a timely and proper objection would have been futile. Bright bases this argument on the trial court's postconviction ruling that the testimony was admissible as expert testimony under WIS. STAT. § 907.03 and the residual exception to the hearsay rule under WIS. STAT. § 908.03(24).[4] In support, Bright cites to ***Douglas v. Alabama***, 380 U.S. 415 (1965), and ***Schueler v. City of Madison***, 49 Wis. 2d 695, 183 N.W.2d 116 (1971). However, in both of those cases, the trial court had *previously* ruled on the issue in dispute. *See* ***Douglas***, 380 U.S. at 421-22; ***Schueler***, 49 Wis. 2d at 707. Thus, the appellate courts held that a further objection was not necessary to preserve the issue for purposes of review. *See* ***id***.

[4] In its alternative argument, the State does not defend the trial court's ruling that Chesen testified as an expert witness. The State, however, does defend the trial court's ruling that Chesen's testimony was admissible under the residual exception to the hearsay rule. Because we accept the State's threshold argument that Bright has abandoned his only potential appellate issues, we need not address these questions.

¶15 That is markedly different from the posture of this case in which Bright seeks to use a *subsequent* ruling of the trial court to demonstrate that he should be excused from not making a timely and proper objection. Bright cites to no authority which holds that an objection is not necessary in this type of situation. In fact, persuasive authority on this question is against Bright. In ***United States v. Thompson***, 27 F.3d 671 (D.C. Cir. 1994), the defendant first raised a claim in a motion for a new trial that unduly suggestive identification procedures were used during his trial. *See* ***id***. at 673. The trial court denied the motion, and the defendant appealed. The Court of Appeals for the District of Columbia refused to review the issue as a direct challenge. The court said:

> [The defendant] … argues that we should review the issue *as if* he had raised a timely objection, because the trial court ruled on the issue in the context of the post-verdict motion. For purposes of determining our standard of review of an alleged error in admission of evidence, however, a post-verdict motion for a new trial is not the same as a timely objection: the delay eliminates any chance that the judge could correct the error without a duplicative trial, and according review as if a timely objection had been raised virtually invites strategic behavior by defense counsel. Thus we review only for plain error.

Id. (citation omitted).

¶16 Here, the facts are stronger than those in ***Thompson***. There, the postconviction court's analysis of the issue mirrored that which the court would have performed had a timely objection been raised at trial. Here, however, the postconviction issues were whether trial counsel was ineffective and whether the admission of Chesen's testimony was plain error. While the disputed testimony was at the core of both issues, the analyses of those issues was different than those that would apply if Bright had made a proper and timely objection during the trial. In the postconviction proceeding, the trial court was not responding to a claim that

it had erred by admitting the disputed evidence at trial. Rather, the court was responding to Bright's claims of plain error and ineffective assistance of counsel.[5]

Conclusion

¶17 We hold that Bright has abandoned his only potential appellate issues and that he is appealing on grounds different than those raised in the trial court. We affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[5] Although ***United States v. Thompson***, 27 F.3d 671, 673 (D.C. Cir. 1994), says that the issue would be reviewed only under the law of plain error, here Bright does not raise any plain error argument until his reply brief. We do not review issues raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).