COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP942-CR **Cir. Ct. No. 2012CF1138**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD W. NOVAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Richard W. Novak appeals from a judgment of conviction for possession with intent to deliver in excess of forty grams of cocaine and an order denying his motion for postconviction relief vacating the conviction on the basis that trial counsel rendered constitutionally ineffective assistance by

failing to attack the warrant authorizing a search of Novak's residence as unsupported by probable cause. We conclude that the warrant was supported by probable cause and, consequently, on this basis Novak was not deprived of the effective assistance of counsel. Thus, we affirm the judgment and order.

Background

¶2 With the assistance of a confidential informant, a city of Milwaukee police detective conducted a "controlled buy" of a quantity of cocaine from Novak at a single family residence in the village of Menomonee Falls ("the residence"). Within seventy-two hours of that sale, the detective prepared a warrant for judicial authorization to search the residence. The detective's affidavit in support of the warrant recounted that prior to the controlled buy he had searched the informant for drugs and money, and found none. The detective then gave the informant a quantity of prerecorded U.S. currency and followed him to the residence where the detective observed the informant go inside. Five minutes later, the informant exited the residence with Novak and walked with him to a detached garage where the informant exchanged the prerecorded currency for drugs. The informant then left the residence, and the detective followed him to a predetermined location where the informant turned the drugs over to the detective.

¶3 Using a field test, the detective confirmed that what the informant recovered from Novak was cocaine. In his affidavit, the detective did not state the amount of drugs that were recovered or the amount of money that was given to the informant. In identifying the items to be seized from the residence, the detective identified, among other things, "U.S. currency," but without specifying by serial number or denomination the prerecorded buy money. The circuit court signed the warrant. Pursuant thereto, the police searched the residence and recovered, among

other things, in excess of 160 grams of cocaine. As a result, Novak was charged with four misdemeanors and the class C felony of possession with intent to deliver cocaine in excess of forty grams, the latter contrary to WIS. STAT. § 961.41(1m)(cm)4. (2013-14).[1]

¶4 Defense counsel filed a motion seeking the disclosure of the identity of the confidential informant for purposes of challenging his reliability. After the circuit court denied Novak's motion, he agreed to plead guilty to the felony count and have the misdemeanor counts read in. At sentencing, the circuit court imposed six years of imprisonment, consisting of three years of confinement and three years of supervision.

¶5 Subsequently, postconviction counsel filed a motion pursuant to WIS. STAT. RULE 809.30(2)(h) to vacate the judgment of conviction based on trial counsel's failure to challenge the warrant as unsupported by probable cause. Postconviction counsel argued that probable cause to search the residence was lacking because the detective did not state in the warrant the amount of money or cocaine exchanged, that the informant had observed any more drugs or evidence of drug dealing at the residence, or that the informant or anyone else had purchased drugs from Novak in the past. If probable cause was lacking, postconviction counsel argued, trial counsel's failure to advance that argument in support of a motion to suppress the evidence recovered from the residence made

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

trial counsel's performance constitutionally deficient, entitling Novak, following a ***Machner***[2] hearing, to withdraw his plea.

¶6 The State responded that the simple fact that after the exchange Novak went back inside the residence with the prerecorded buy money would give rise to probable cause to search the residence.

¶7 At a hearing on the motion, postconviction counsel responded to this contention by arguing that if probable cause was based on the prerecorded buy money, then the warrant violated the constitutional requirement that the items to be seized be specified with particularity. Postconviction counsel continued, "if that is really what the State is relying on to establish probable cause to search this residence, the fact that they could expect the buy money to be there, they have not satisfied the particularity requirement."

¶8 The circuit court denied the motion, concluding that while the affidavit supporting the warrant was "bare bones," it was still sufficient to support a finding that there was probable cause to believe that contraband or evidence of a crime would be found at the residence. The circuit court also concluded that the warrant sufficiently particularized what was being searched for at the residence. Novak appeals.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Applicable Law: Ineffective Assistance

¶9 A claim of ineffective assistance of counsel is a two-part inquiry: a defendant must show both that counsel performed deficiently and that the deficient performance prejudiced the defendant. ***State v. Jenkins***, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. A defendant is entitled to a ***Machner*** hearing when he or she makes a sufficient showing on the two elements of ineffective assistance of counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, where, as here, a defendant asserts that trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence, the failure to bring such a motion cannot be said to have been either deficient performance or prejudicial if it would have been denied under the facts and applicable law. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996); *see also* ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (stating that a postconviction motion may be denied without a ***Machner*** hearing if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief).

Applicable Law: Probable Cause for Issuance of a Search Warrant

¶10 Under the applicable law, a search warrant may be issued only upon "a finding of probable cause by a neutral and detached magistrate." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). "In deciding whether probable cause exists for the issuance of a search warrant," the reviewing court examines the totality of the circumstances as presented to the warrant-issuing court to determine whether that court "had a substantial basis for concluding that there was a fair probability that a search of the specified premises

would uncover evidence of wrongdoing." ***State v. Romero***, 2009 WI 32, ¶3, 317 Wis. 2d 12, 765 N.W.2d 756. The probable cause test is a "common-sense" one, requiring of the warrant-issuing court "simply to make a practical, common-sense decision." ***Id.***, ¶19 (citation omitted). While we independently review whether there was probable cause for the issuance of a search warrant, we will accord great deference to the determination made by the warrant-issuing court. ***State v. Tate***, 2014 WI 89, ¶14, 357 Wis. 2d 172, 849 N.W.2d 798; ***Romero***, 317 Wis. 2d 12, ¶18. This deferential standard of review is appropriate so as to further the strong preference, articulated in the Fourth Amendment, for searches conducted pursuant to a warrant. ***Romero***, 317 Wis. 2d 12, ¶18.

Analysis

¶11 Here, we agree with the circuit court that the detective's affidavit was sufficient to conclude by a fair probability that contraband or evidence of a crime would be found in the residence. In the affidavit, the detective recounted that through conversations with the informant and the detective's personal observations of him, the informant conducted a controlled buy of cocaine from Novak at the residence. The facts outlined in the detective's affidavit described "[a] rigorous controlled buy," which "satisfies the probable cause requirement for issuing a search warrant." ***State v. Hanson***, 163 Wis. 2d 420, 423, 471 N.W.2d 301 (Ct. App. 1991) (informant who told officer that cocaine could be purchased at defendant's residence made a controlled buy of cocaine from defendant); *see also* ***State v. Phillips***, 2009 WI App 179, ¶10, 322 Wis. 2d 576, 778 N.W.2d 157

(where undercover officer conducted a controlled buy, the parties did not dispute that probable cause for a search warrant existed).[3]

¶12 Novak argues that a "single transaction" without any indication of the amount of drugs or the purchase price is not enough to support "[a]n inference that additional drugs or evidence of drug dealing would be found" in the residence.[4] Novak would require, for example, observations of "other drugs in the residence" or "other evidence of drug dealing" in the residence. But, it is "common sense" to expect that when a drug sale occurs the police may find evidence of drug dealing such as, as described in the detective's affidavit, additional drugs, scales, written records or electronic communication devices in the area where the sale occurred, especially when it occurs in a home. *See* ***State v. Ward***, 2000 WI 3, ¶¶28, 30, 231 Wis. 2d 723, 604 N.W.2d 517 (stating that a "magistrate may make the usual inferences reasonable persons would draw from

[3] As both the State and Novak note, in ***State v. Hanson***, 163 Wis. 2d 420, 422, 471 N.W.2d 301 (Ct. App. 1991), the defendant's argument was that probable cause was lacking because this was the first time the informant had given information to the police. We disagree with Novak that this argument makes ***Hanson*** distinguishable because the challenge here is not to the informant's reliability but to the lack of detail in the detective's affidavit. The reliability or credibility of an informant is part of the assessment of the "totality of the circumstances" in determining whether there is probable cause to believe there is evidence of a crime inside a residence. In other words, what an informant must be reliable about is whether the police are likely to find evidence of a crime inside a residence. Thus, it would have been meaningless for us to have held in ***Hanson*** that the informant was reliable if that reliability did not bear on the question of whether there was a fair probability that evidence of a crime would be found inside the defendant's residence.

[4] As the State pointed out during the hearing on the motion, the revelation of such details in the warrant could result in the informant's identity being unwittingly revealed. *See* ***United States v. Wilburn***, 581 F.3d 618, 624 (7th Cir. 2009).

the facts presented," and that "[t]he test is whether the inference drawn is a reasonable one.")[5]

State v. Sloan

¶13 For support, Novak principally relies on ***State v. Sloan***, 2007 WI App 146, 303 Wis. 2d 438, 736 N.W.2d 189, but that case is distinguishable. In ***Sloan***, the defendant took a box to a UPS station to ship to himself overnight to Florida. ***Id.***, ¶2. He aroused the suspicion of the counter clerk because he did not want it inspected and because of the cost of the transaction. ***Id.*** After the clerk accepted the box, a security supervisor inspected it and thought a canister might contain marijuana. ***Id.***, ¶3. The supervisor contacted police who detected an odor of marijuana coming from the canister. ***Id.***, ¶¶3-4. An officer opened the canister and observed marijuana, which he confirmed by conducting a field test. ***Id.***, 4.

¶14 The officer further investigated the defendant discovering, among other things, that the residence listed on the return address of the box was the same as contained in Wisconsin department of transportation and utilities records for the defendant, although another person, Leslee Ericksen, who had previously used the surname Sloan and was possibly the defendant's mother or another relative, was the owner of the residence. ***Id.***, ¶5 n.3. Based on this information, the officer obtained a warrant to search the defendant's residence. ***Id.***, ¶6.

[5] As an example, postconviction counsel argued at the hearing on the motion that "[f]or all we know … [this was] a one-time transaction of a very small amount [between] two friends," which may have been a reasonable inference but it was not the only reasonable inference. *See* ***State v. Ward***, 2000 WI 3, ¶30, 231 Wis. 2d 723, 604 N.W.2d 517.

¶15 On appeal, the defendant challenged the warrant to search his residence as lacking probable cause. ***Id.***, ¶23. In concluding that probable cause was lacking, we held that there was no factual connection between the items recovered from the box and the residence that was searched. ***Id.***, ¶31. We noted that police surveillance of the residence did not suggest that any criminal activity was afoot. ***Id.***, ¶32. No one was observed at the residence, there was no claim of prior police reports of drug sales or other suspicious activity, and there was no evidence that the defendant had previously been involved with drugs. ***Id.*** The owner of the residence was not the defendant, and the police never interviewed the owner. ***Id.*** In short, there were no facts to show that the defendant acquired or packaged the drugs at the residence. ***Id.***

¶16 In contrast to ***Sloan***, here there was a "factual connection between the items that are evidence of the suspected criminal activity and the address to be searched," ***id.***, ¶31; namely, Novak sold the informant drugs from inside the residence. Thus, as the State argues, unlike the affidavit in ***Sloan***, the detective here provided facts to show that Novak had "engaged in … criminal activity at the residence to be searched," that "a crime had been … committed at the residence,"

and that someone had "seen him with [drugs] at [his] residence." ***Id.***, ¶¶31, 32, 34. As such, there was probable cause to search the residence.[6]

The Particularity Requirement

¶17 Novak goes on to argue that "[t]he buy money cannot *save* the warrant because authorizing a search for 'U.S. currency' does not satisfy the constitutional requirement that the warrant describe the objects of the search with particularity." (Emphasis added.) The particularity requirement prevents general searches, the issuance of warrants on less than probable cause, and the seizure of items other than those described in the warrant. ***State v. Sveum***, 2010 WI 92, ¶28, 328 Wis. 2d 369, 787 N.W.2d 317. As discussed above, the proof that the informant purchased drugs from Novak in exchange for the buy money at the residence in a controlled buy provided sufficient probable cause to justify the search of the residence.

¶18 To the extent Novak is now arguing that the description of "U.S. currency" was overbroad, we conclude that the warrant was sufficiently particularized. The "purpose of [the] search" here was not simply to recover the

[6] Novak relies on three other cases to support his assertion that probable cause requires proof "that the occupant of the residence had lots of other drugs in the home or was routinely dealing out of the home." ***Ward***, 231 Wis. 2d 723, ¶¶5-6, 29 (affidavit recounted that informant, who had been arrested while in possession of over three-thousand grams of marijuana, had told police that the defendant was his supplier); ***State v. Anderson***, 138 Wis. 2d 451, 455-56, 469-70, 406 N.W.2d 398 (1987) (affidavit recounted that in addition to quantity of marijuana that was purchased as a sample, the occupant of the residence told the informant that he had three pounds of marijuana for purchase); ***State v. Lopez***, 207 Wis. 2d 413, 421-24, 559 N.W.2d 264 (Ct. App. 1996) (affidavit recounted that defendant had thirty-five to forty pounds of marijuana, that informant had ordered one pound of marijuana, and that informant was told that a ten-pound deal would not be a problem). However, the fact that there might have been a greater probability of finding additional drugs or evidence of drug dealing in those three cases does not preclude us from concluding that the proof in this case was sufficient to meet at least the minimum requirement of a "fair probability."

prerecorded buy money in order to prosecute a single drug sale, but to uncover proof that Novak was delivering cocaine. *See* ***United States v. Bright***, 630 F.2d 804, 812 (5th Cir. 1980); *see also* ***United States v. Morris***, 977 F.2d 677, 681 (1st Cir. 1992) (stating that general descriptions in warrants are acceptable when the surrounding circumstances render it reasonable). Thus, just like in the detective's listing in the warrant of items such as drug paraphernalia, written records and electronic communication devices, which he sought to recover as proof of other drug dealing, the detective sought generic "U.S. currency" because it was potentially related to other drug sales.

¶19 In any event, even if the description of money was not sufficiently particular, which it is not, the remedy would be to suppress only that evidence.[7] *See* ***Sveum***, 328 Wis. 2d 369, ¶¶34-38. Had the money recovered from the residence been suppressed, and assuming trial counsel's failure to seek suppression of the money was objectively unreasonable, there is still no reasonable probability that Novak would not have pleaded guilty and insisted on going to trial in light of the drugs that would have been admissible into evidence and the inculpatory statements he gave to police. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶20 Therefore, since there was probable cause to justify the search of the residence, had trial counsel made a motion to suppress the evidence recovered from the residence on that basis, it would have been denied; thus, his failure to do so cannot be considered deficient performance or prejudicial. *See* ***State v. Harvey***,

[7] The parties' briefs and the record itself does not indicate if the police did recover U.S. currency during their search of the residence. Thus, we assume, for argument's sake, that some money was recovered.

139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) ("counsel reasonably concluded that pursuing the suppression motion would be fruitless").

By the Court.—Judgment and order affirmed.

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