COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2659 **Cir. Ct. No. 2010CF1603**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE ALLEN BRIDGES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Andre A. Bridges, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2013-14)[1] motion without a hearing. He also appeals from an order denying his motion for reconsideration. We affirm the orders.

BACKGROUND

¶2 In 2011, a jury convicted Bridges of possession with intent to deliver cocaine, possession with intent to deliver heroin, possession with intent to deliver ecstasy, and possession of a firearm by a felon. The trial court sentenced Bridges to concurrent and consecutive sentences totaling ten years' initial confinement and five years' extended supervision. On direct appeal, Bridges challenged the circuit court's denial of a suppression motion. We affirmed. *See* ***State v. Bridges***, No. 2013AP350-CR, unpublished slip op. (WI App Jan. 27, 2015).

¶3 In October 2015, Bridges filed a WIS. STAT. § 974.06 motion in the circuit court, alleging his postconviction attorney was ineffective for failing to allege ineffective assistance of trial counsel for trial counsel's failure to raise the issues in Bridges' motion. Specifically, Bridges claimed that there had been insufficient probable cause for his arrest, that the trial court was without jurisdiction because he was not "produced before a judicial officer" within forty-eight hours of his warrantless arrest, and that trial counsel should have presented a particular witness for a suppression hearing. The circuit court rejected these arguments on their merits and denied the motion without a hearing. It also denied Bridges' motion for reconsideration. Bridges appeals.

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

DISCUSSION

¶4 To be entitled to a hearing on his motion, Bridges had to allege sufficient material facts which, if true, would entitle him to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. Whether the motion alleges such facts is a question of law. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. However, if the motion is conclusory, or if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may, in the exercise of discretion, deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The trial court has the discretion to deny "even a properly pled motion … without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *See* ***State v. Sulla***, 2016 WI 46, ¶30, 369 Wis. 2d 225, 880 N.W.2d 659. A trial court's discretionary decisions are reviewed for an erroneous exercise of that discretion, a deferential standard. *See* ***id.***, ¶23.

¶5 "[A]ny claim that could have been raised on direct appeal" or in in a prior postconviction motion is barred from being raised in a WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Whether a procedural bar applies is also a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 In some instances, ineffective assistance of postconviction counsel may constitute a "sufficient reason." *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant claiming postconviction counsel was ineffective for not challenging trial counsel's

effectiveness must establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Demonstrating ineffectiveness requires a showing that counsel performed deficiently and that the deficiency was prejudicial. *See* ***Allen***, 274 Wis. 2d 568, ¶26. These, too, are questions of law. *See* ***Ziebart***, 268 Wis. 2d 468, ¶17.

I. Probable Cause

¶7 Bridges complains that he was arrested without probable cause, and neither trial nor postconviction counsel raised the issue. "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.*** "Probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior." ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660.

¶8 We uphold a circuit court's findings of fact unless clearly erroneous, but we independently review the application of constitutional principles to those facts. *See* ***State v. Blatterman***, 2015 WI 46, ¶16, 362 Wis. 2d 138, 864 N.W.2d 26. Thus, whether there was probable cause for an arrest is a question subject to our independent review. *See* ***id.***

¶9 In determining whether probable cause exists, we apply an objective standard. *See* ***Kutz***, 267 Wis. 2d 531, ¶12. We "consider the information available to the officer from the standpoint of one versed in law enforcement,

taking the officer's training and experience into account." *See* ***id.*** The officer's belief may be predicated in part on hearsay information, and may rely on the collective knowledge of the entire police department. *See* ***id.*** If there are two reasonable competing inferences, the officer may rely on the reasonable inference that justifies arrest. *See* ***id.***

¶10 The record here more than adequately establishes probable cause for officers to arrest Bridges. Milwaukee police had been surveilling a duplex on West Appleton Avenue during February and March 2010, based on a tip that a man was selling ecstasy for someone in the building. *See* ***Bridges***, No. 2013AP350-CR, unpublished slip op. ¶2. On one date in February, officers watched a man park his car, enter the duplex door that led to Apartments 1 and 2, and leave a short time later. *See* ***id.*** Officers conducted a traffic stop, and the man told them he had bought cocaine at Apartment 1 from "Dre," who shares the apartment with a man named Fred. *See* ***id.*** The man also told police that Dre drives a burgundy Buick Roadmaster; police had noted the ongoing presence of such a vehicle, registered to Bridges with an address on North 7th Street, at the duplex during their surveillance. *See* ***id.***

¶11 A few weeks after that traffic stop, an informant advised police that on March 4, 2010, Raymond Golden would be purchasing ecstasy at the suspected apartment. *See* ***id.*** On March 4, police observed Golden arrive, enter the building door for Apartments 1 and 2, and leave shortly thereafter. *See* ***id.***, ¶3. When police attempted to make contact with Golden, he fled, dropping a bag of twenty-five ecstasy pills. *See* ***id.***

¶12 Police returned to the apartment building. The tenant from Apartment 2 let officers into the building and permitted them to search his

apartment to exclude it as the source of the drugs. *See* ***id.*** Officers then went to apartment 1, where they knocked loudly and announced, "Milwaukee Police." *See* ***id.*** No one answered, but officers could hear movement inside like someone moving items around. *See* ***id.*** The officers knocked and announced themselves again, but there was still no answer while the sounds of movement continued. *See* ***id.*** At that point, police suspected that those inside might be destroying evidence or arming themselves, so the officers kicked in the door with guns drawn. *See* ***id.***

¶13 After entering the apartment, the police saw Bridges standing near the couch, and they did a protective sweep of the apartment for their safety. *See* ***id.***, ¶4. They found Frederick Mallory, the apartment's tenant, in his bedroom. *See* ***id.*** An officer explained to Mallory what the police were doing, and Mallory gave permission for the officers to search the apartment. *See* ***id.*** In the kitchen, police found corner-cut baggies, a scale, and a measuring cup with a white residue later identified as cocaine powder.[2] *See* ***id.***

¶14 It is not clear at what point Bridges was actually arrested although for purposes of this appeal, it suffices to assume the arrest occurred after the search of Mallory's kitchen. However, in denying the postconviction motion, the circuit court opined that police had probable cause to arrest Bridges based merely on the February encounter wherein the cocaine buyer identified his seller as Dre

[2] Police were also able to search the building's basement, where they found a tool box with 341 ecstasy pills, 48.74 grams of heroin, 22.72 grams of cocaine, two loaded guns, and ammunition. A fingerprint on the box was later matched to Bridges. *See* ***State v. Bridges***, No. 2013AP350-CR, unpublished slip op. ¶4 (WI App Jan. 27, 2015).

Additionally, when police asked Bridges where he lived, he provided his mother's address on North 7th Street. Police went to the home, and Bridges' mother consented to a search. In Bridges' bedroom, police found a loaded firearm magazine and unfilled cartridges of the same brand and manufacturer as the guns found in Mallory's basement. *See* ***id.***, ¶4 n.2.

from apartment 1 who drove the burgundy Buick. Bridges argues that the circuit court actually relied on erroneous facts in denying his motion because the order incorrectly identified Golden as the source of that information.

¶15 We agree that the circuit court appears to have misidentified Golden as the February source. However, that factual error is inconsequential: it does not alter the "quantum of evidence within the arresting officer's knowledge at the time" Bridges was arrested. *See* ***Secrist***, 224 Wis. 2d at 212. The information from the February traffic stop, the informant's accurate predictions about Golden, and the drug paraphernalia found in the apartment that the February buyer said Dre shared with Fred combined for probable cause to believe Bridges had a role in some drug offenses for which arrest was appropriate.

¶16 Bridges also complains that Golden had identified "Cliff" as the source of his drugs and that police did not observe him (Bridges) with guns or drugs in his possession, thus negating probable cause. These arguments ignore the totality of the information available to police at the time of the arrest and ignore the rule that officers faced with competing inferences may rely on the one supporting arrest. Further, Golden's naming of his source and the items that were or were not in Bridges' possession would have been relevant matters for cross-examination, as they may go to the ability of a jury to find guilt beyond a reasonable doubt, but probable cause for an arrest does not require such certainty. *See* ***Secrist***, 224 Wis. 2d at 212 (evidence supporting probable cause to arrest need not even reach "more likely than not" level of proof).

¶17 As there was sufficient probable cause for an arrest, any challenge by trial counsel to that arrest would have been unsuccessful, as would postconviction counsel's challenge to trial counsel's failure to raise the issue.

Attorneys are not ineffective for failing to pursue meritless issues. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

II. ***Riverside*** *Violation*

¶18 Bridges complains that he was not brought before a judicial officer within forty-eight hours of his arrest. This is a potential violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991), which held that there must be a probable cause determination made within forty-eight hours of a warrantless arrest. *See* ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993) (adopting ***Riverside*** in Wisconsin). Bridges says he was arrested on March 4, 2010, but that he did not see a judge or other judicial officer until April 1, 2010.[3]

¶19 The circuit court determined that Bridges had been put on a probation or supervision hold following his arrest, so he was lawfully in custody under that detention, invalidating any potential ***Riverside*** challenge. *See* ***State v. Harris***, 174 Wis. 2d 367, 377, 497 N.W.2d 742 (Ct. App. 1993) ("***Riverside*** does not apply to persons already in the State's lawful custody."). If in fact a hold was imposed on March 4, 2010, then the circuit court's analysis is correct.

¶20 But Bridges disputes that there was a probation hold. Although the record supports a conclusion that Bridges eventually had probation or supervision revoked, neither the circuit court's decision nor the State's brief identifies any specific evidence in this record that confirms there was a hold on Bridges that was effective as of March 4, 2010.

[3] We observe that the complaint is dated March 29, 2010.

¶21 However, it is unnecessary for us to resolve any factual dispute over whether or when any hold might have been imposed because Bridges asserts that the ***Riverside*** violation deprived the trial court of jurisdiction over him, and that claim is simply wrong. A ***Riverside*** violation is not a jurisdictional defect. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994).

¶22 Further, the remedy for a ***Riverside*** violation may be suppression of the evidence obtained as a result of the violation—that is, evidence obtained after the point at which the delay in determining probable cause became unreasonable. *See* ***Golden***, 185 Wis. 2d at 769. Bridges does not claim any evidence was obtained as the result of a ***Riverside*** violation.[4] Dismissal of charges for a ***Riverside*** violation is not required unless the State intentionally delays and hampers the defendant's ability to prepare a defense. *See* ***Golden***, 185 Wis. 2d at 769. Bridges does not claim any intentional delay or adverse impact on his ability to prepare a defense. Thus, even if there were a ***Riverside*** violation, it does not appear that any challenges to that violation would have succeeded, so his attorneys were not ineffective for failing to raise a ***Riverside*** challenge. *See* ***Maloney***, 281 Wis. 2d 595, ¶37.

III. Failure to Call a Witness to the Suppression Hearing

¶23 Bridges also complains that trial counsel should have called "'Mr. Honeycutt'" to testify at a pretrial suppression hearing held regarding officers' warrantless entry to the apartment building. Thiron Honeycutt is the neighbor

[4] Bridges appears to note that the evidence obtained from the basement was processed during the alleged period of delay. However, there is no dispute that the evidence itself was collected contemporaneously with Bridges' arrest. The evidence would not have been processed or tested until after Bridges' arrest regardless of when the probable cause decision was made.

from Apartment 2 of the duplex. Bridges believes Honeycutt would demonstrate that police testified falsely.

¶24 The circuit court rejected this argument, explaining that while Bridges claimed that Honeycutt's testimony would have contradicted officers' testimony, "[n]o affidavit from Honeycutt exists to support these assertions, and without sufficient factual support, the defendant cannot rest on what he believes Honeycutt would say." Thus, neither trial nor postconviction counsel was ineffective because Bridges did not establish he was prejudiced by trial counsel's failure to subpoena Honeycutt.

¶25 Bridges complains that the circuit court erred in requiring an affidavit from Honeycutt. He argues Honeycutt's testimony would have been "very relevant" as to whether police entry into the building was lawful and, had counsel presented Honeycutt at the suppression hearing, Honeycutt would have "clearly contradicted" the officers' testimony. Bridges claims:

> that if, "Mr. Honeycutt's" was presented and allowed to testify, it would have supported that the officers initial entry into the building was in fact without consent and unlawful. Appellant state[s] had trial counsel presented this said witness *and the statements given by this witness to the police, which is supported by the police report, would of clearly supported what this witness would have testified to*, therefore the Circuit Court was in error determining that this Appellate needed an [affidavit.]

(Emphasis added.)

¶26 However, the police reports in Bridges' appendix all indicate that Honeycutt was cooperative with police. Thus, Bridges' claims that Honeycutt would have "clearly contradicted the testimony" of police and "supported that the officers initial entry to the building was in fact without consent and unlawful" are

conclusory, unsupported, and insufficiently pled: nowhere does Bridges identify any of the details to which Honeycutt would have testified that would have undermined police assertions that Honeycutt freely consented to admitting police to the duplex. *See* ***Allen***, 274 Wis. 2d 568, ¶23 (recommending defendants allege "who, what, where, when, why, and how" to provide "the kind of material factual objectivity" one needs for meaningful review of claims). Bridges therefore fails to show any prejudice from a failure to call Honeycutt at the suppression hearing, so neither trial counsel nor postconviction counsel was ineffective for failing to pursue the issue. *See* ***Maloney***, 281 Wis. 2d 595, ¶37.

¶27 Based on the foregoing, we conclude the circuit court properly exercised its discretion to deny the WIS. STAT. § 974.06 motion without a hearing. We are further unpersuaded that reconsideration of that denial was warranted, so we conclude the circuit court also properly denied the motion for reconsideration.

By the Court.—Orders affirmed.

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