COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP2335-CR **Cir. Ct. No. 2014CF2335**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAHNMAHN MARQUIS CARROLL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CAROLINA STARK, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Jahnmahn Marquis Carroll appeals from a judgment of conviction, entered upon his guilty pleas, on two counts of possession

with intent to deliver heroin and one count of possession of a firearm by a felon. Carroll also appeals from that portion of an order denying his postconviction motion to withdraw his pleas because of ineffective assistance of trial counsel. Carroll asserts that the circuit court erred when it declined to continue the postconviction motion hearing to take additional testimony. We reject Carroll's challenge and affirm the judgment and order.

BACKGROUND

¶2 On May 25, 2014, Detective Todd Kurtz of the West Allis Police Department "became aware" that Carroll was going to conduct a heroin sale in a Walmart parking lot on Capitol Drive around 3:30 p.m. This information came from a confidential informant, although the criminal complaint did not reflect that source. According to the criminal complaint, Kurtz was also informed that Carroll would be driving a gold Volvo S60. Investigators set up surveillance. At 3:20 p.m., Carroll, driving a gold Volvo, pulled into the parking lot behind an Oldsmobile and motioned for that car to follow him. Kurtz radioed officers to arrest Carroll.

¶3 As Kurtz approached Carroll, who was in the driver's seat, Kurtz observed that Carroll had his left hand in his pants pocket and was reaching for something. Kurtz ordered him to show his hands and take his hand out of his pocket. Carroll complied; Kurtz observed heroin in Carroll's hand. Kurtz ordered him to drop it, and Carroll complied. Carroll was searched and additional heroin was located in another pocket.

¶4 Kurtz interviewed Carroll after reading Carroll's ***Miranda***[1] rights to him. Carroll, who wanted to be cooperative, told police about an additional fifty grams of heroin and a firearm at a house on 17th Street. Carroll consented to police retrieving those items. Later, Kurtz interviewed Carroll again, and Carroll admitted that he planned to sell the heroin and that he had possessed the gun.

¶5 Carroll was charged with one count of possession with intent to deliver between ten and fifty grams of heroin as a second or subsequent offense, one count of possession with intent to deliver more than fifty grams of heroin as a second or subsequent offense, and one count of possession of a firearm by a felon.[2] Carroll pled guilty to the three offenses; the second-or-subsequent enhancer on the heroin charges was dropped as part of the plea agreement. The circuit court imposed sentences of thirteen years' initial confinement and ten years' extended supervision on each heroin charge and five years' initial confinement and five years' extended supervision on the firearm charge, concurrent to each other but consecutive to any other sentence.

¶6 Carroll then filed a postconviction motion seeking "plea withdrawal and suppression of the physical evidence and inculpatory statements, on grounds that he was denied the effective assistance of counsel as his attorney failed to

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] An amended information later included one count of keeping a drug house with use of a dangerous weapon as a second or subsequent offense, but the information was withdrawn the same day it was filed, and it does not appear that Carroll was ever arraigned on the additional charge. It is not evident whether withdrawal of the amended information was formally part of the plea agreement or whether the State withdrew the information so that a prior plea agreement could advance.

move to suppress this evidence."[3] Carroll asserted his arrest was illegal because it was "based solely on the assertion of [a] confidential informant who police have not shown to be reliable." He also claimed, for the first time, that he had been illegally interrogated in the Walmart parking lot without being advised of his ***Miranda*** rights.

¶7 The circuit court ordered briefing, then scheduled a ***Machner***[4] hearing. The circuit court effectively bifurcated the hearing, noting that it would first hear evidence on the deficient-performance prong of the ineffective-assistance claim before calendaring a second hearing on the prejudice prong if needed.

¶8 At the hearing, trial counsel testified that he has been a criminal defense attorney for about fourteen years and has worked on hundreds of criminal cases. According to his notes, he discussed Carroll's arrest and detention and the police reports with Carroll on at least two separate occasions. They discussed trial issues, plea issues, and the confidential informant. Counsel testified that he "certainly" would have filed a suppression motion if there were grounds to do so, but he did not file any motions in this case because he "would have believed them to be not meritorious or without basis."

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[3] Ordinarily, a guilty plea waives nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. However, "[a]n order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant," had such motions been filed, would be appealable notwithstanding Carroll's guilty pleas. *See* WIS. STAT. § 971.31(10) (2015-16).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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

¶9 Carroll also testified. He disputed counsel's testimony that they reviewed the police reports and discovery materials. He said he told counsel he "didn't believe that there was a [confidential informant] involved" in his case because he "never made any contact with anyone" in the parking lot before his arrest. Carroll also discussed wanting to try to ascertain the identity of someone referenced in the police reports as "Cam." Detective Kurtz did not testify, but the parties and the circuit court relied on Kurtz's report, which Carroll had attached to his motion.

¶10 After hearing testimony, the circuit court proceeded to rule on Carroll's motion. It noted that, to withdraw his plea because of ineffective assistance of counsel, Carroll had to show "[f]irst, that the trial attorney's performance was deficient; and second, that the defendant was prejudiced as a result of that deficient performance."

¶11 The circuit court limited its decision to the performance prong and found the following facts about trial counsel's performance. Trial counsel had been practicing law since 2002 and represented clients in hundreds of criminal cases. He "received and reviewed the discovery materials" and "had two different meetings with the defendant where they discussed topics including his arrest and detention, the information in the police reports, the basis for the stop, [and] whether law enforcement had probable cause to arrest him based on the confidential informant's information." The circuit court found that trial counsel "evaluated the information he had from the State and the defendant for potential motion issues.… [He] concluded that no merit existed for a motion challenging the stop and/or arrest and the admissibility of evidence attenuated to it."

¶12 The circuit court next explained the standard of review applicable to trial counsel's performance:

> [T]he defendant must establish, by clear and convincing evidence, facts from which a Court could conclude that [counsel's] representation was below the objective standard of reasonableness. The facts must show that the defendant did not receive representation equal to that which an ordinarily prudent lawyer, skilled and versed in criminal law would give to a client.

Stated another way, the circuit court said it had to answer the question, "Would an ordinarily prudent attorney, skilled and versed in criminal law, have pursued a motion to suppress evidence based upon lack of probable cause to arrest?"

¶13 The circuit court then made factual findings related to the stop and arrest, which it determined were undisputed and which we will discuss in more detail below. It stated that it could evaluate whether a motion to suppress for lack of probable cause would be successful based on those undisputed facts and ultimately determined "that an ordinarily prudent lawyer, skilled and versed in criminal law, could conclude that, based upon those undisputed facts, law enforcement had probable cause to arrest the defendant and that no meritorious legal argument could be made to the contrary[.]" Accordingly, the circuit court denied the motion for plea withdrawal.[5]

¶14 On appeal, Carroll "does not challenge the circuit court's fact-findings concerning his attorney's conclusions or their discussions," nor does he raise the ***Miranda*** issue. Rather, "the only question is whether Mr. Carroll is entitled to the remainder of the ***Machner*** hearing to determine whether he was

[5] Although it denied the motion for plea withdrawal, the circuit court did award Carroll additional sentence credit. Carroll does not challenge that portion of the circuit court's order.

denied the effective assistance of counsel when his attorney failed to file a motion to suppress the evidence obtained and derived from his illegal arrest."

DISCUSSION

¶15 Carroll contends that because trial counsel had no strategic reason for failing to file a suppression motion beyond his conclusion that the suppression motion was meritless,[6] the circuit court was required to determine whether trial counsel was correct in that conclusion. Carroll further contends that the circuit court's finding of probable cause was erroneous because Kurtz's police report—the only information counsel and the court had to rely on—does not, in Carroll's view, establish probable cause. Thus, Carroll reasons, counsel performed deficiently, the circuit court erred in ending the hearing, and the matter must be returned to the circuit court for additional testimony relating to prejudice.

I. Standards for plea withdrawal and ineffective-assistance claims.

¶16 "A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***Id.***

¶17 A defendant alleging ineffective assistance of counsel must prove two components. *See* ***State v. Artic***, 2010 WI 83, ¶24, 327 Wis. 2d 392, 786 N.W.2d 430; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant

[6] This argument seems to imply that trial counsel should have filed a suppression motion despite his conclusion that such motion would be frivolous. This is unpersuasive. Attorneys have a professional obligation to refrain from "knowingly advanc[ing] a claim or defense that is unwarranted under existing law[.]" *See* SCR 20:3.1(a)(1).

must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 11.

¶18 To establish deficient performance, the defendant must show that counsel's "representation fell below objective standards of reasonableness." ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. The court determines whether, under the circumstances, counsel's acts or omissions "'were outside the range of professionally competent assistance.'" *See* ***id.*** (citation omitted). When we evaluate the reasonableness of counsel's performance, we must be "'highly deferential,'" as an attorney "is 'strongly presumed to have rendered adequate assistance.'" *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted); ***Guerard***, 273 Wis. 2d 250, ¶43 (citation omitted). We must further "make 'every effort … to eliminate the distorting effects of hindsight … and to evaluate the conduct from counsel's perspective at the time.'" ***Carter***, 324 Wis. 2d 640, ¶22 (citation omitted; first set of ellipses in ***Carter***). "[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate." ***Id.***

¶19 To prove prejudice, the defendant must show "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Artic***, 327 Wis. 2d 392, ¶24 (citation omitted). Because both prongs are required, if the defendant fails to prove one of them, we need not address the other. *See* ***State v. Reed***, 2002 WI App 209, ¶14, 256 Wis. 2d 1019, 650 N.W.2d 885.

¶20 Questions of ineffective assistance present mixed questions of fact and law. *See* ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. We defer to the circuit court's findings of historical fact unless clearly erroneous. *See* ***id.*** Whether those facts demonstrate deficient performance or prejudice is a question of law we review *de novo*. *See* ***id.***

II. Standards for probable cause.

¶21 "A warrantless arrest is not lawful, except when supported by probable cause." ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause to arrest exists when, at the time of the arrest, an officer has within his or her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person's belief that the suspect has committed or is committing a crime." ***State v. Sanders***, 2007 WI App 174, ¶11, 304 Wis. 2d 159, 737 N.W.2d 44. "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, common-sense measure of the plausibility of particular conclusions about human behavior.'" ***Lange***, 317 Wis. 2d 383, ¶20 (citation omitted).

¶22 "Probable cause to arrest may be based on hearsay information that 'is shown to be reliable and emanating from a credible source.'" ***State v. McAttee***, 2001 WI App 262, ¶9, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted). "Thus, information from a confidential informant may supply probable cause to arrest if police know the informant and 'from their own direct knowledge know the informant to be reliable.'" ***Id.*** (citation omitted).

¶23 "When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law" we determine independently but benefitting from the circuit court's analysis. *See* ***Lange***, 317 Wis. 2d 383, ¶20. In determining whether probable cause exists, we apply an objective standard, considering information available to police and their training and experience. *See* ***id.*** Whether a confidential informant's information is sufficient to establish probable cause "depends on the totality of the circumstances, including the informant's 'veracity, reliability, and basis of knowledge.'" ***McAttee***, 248 Wis. 2d 865, ¶9 (citation omitted).

III. Analysis of Carroll's claims.

¶24 We begin by reviewing the circuit court's conclusion that Kurtz had probable cause to arrest Carroll.[7] The circuit court specifically made eight factual findings that it determined were undisputed:

> One, that on May 28, 2014, Detective Kurtz met with a person registered as a Wisconsin HIDTA confidential informant number DGTF 14-034.
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> Two, that this CI gave law enforcement information that a male the CI knew as old man would conduct a heroin sale later that day.
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> Three, that law enforcement showed the CI a booking picture of the defendant taken in February of 2013 and the CI identified the person in the picture as the person they knew as old man.
>
> Four, that the CI told Detective Kurtz that old man would meet a person named Cam around 3:30 p.m. that day

[7] The circuit court indicated that for purposes of the motion, it was considering Carroll to have been arrested immediately in the parking lot and, thus, was not going to consider whether police had reasonable suspicion to conduct an investigatory stop. *See* ***State v. Dumstrey***, 2016 WI 3, ¶17, 366 Wis. 2d 64, 873 N.W.2d 502.

> in the Walmart parking lot at 401 east Capitol Drive in Milwaukee, Wisconsin to sell 20 grams of heroin and that old man drives a gold Volvo S60 with Wisconsin registration 867-VBF.
>
> Five, that at approximately 3:20 p.m. Detective Kurtz, K-U-T-Z [sic] saw a gold Volvo with Wisconsin registration 867-VBF drive past him in the Walmart parking lot and he saw that the defendant was the driver.
>
> Six, that at approximately 3:21 p.m. the CI was with Detective Kurtz and pointed out to Kurtz that the gold Volvo S60 with Wisconsin registration 867-VBF had pulled into the parking lot and that this was the car old man was using to deliver heroin to Cam.
>
> Seven, that at approximately 3:22 p.m. Detective Kurtz saw the gold Volvo stop behind a white Oldsmobile in the parking lot and saw the defendant motion to the Oldsmobile to follow him.
>
> And eight, that Detective Kurtz instructed law enforcement on scene to move in and arrest the defendant, which they did.

The circuit court also later reiterated that "the confidential informant was not only known to law enforcement but was registered as a confidential informant" and "there are several pieces of informant the confidential informant gave law enforcement, predicted to law enforcement, that law enforcement observed to be accurate[.]"

¶25 As noted, Carroll does not dispute the circuit court's factual findings, only its conclusion that probable cause existed for his arrest. He complains that "at the time police swarmed [his] car," the only information they had was from the confidential informant, but Kurtz's affidavit fails to establish the informant's reliability. While Carroll acknowledges the police corroborated several details provided by the informant, he contends "the observations fail to corroborate *illegal* behavior."

¶26 "The reliability of the informant may be shown by corroboration of details[.]" ***State v. Romero***, 2009 WI 32, ¶21, 317 Wis. 2d 12, 765 N.W.2d 756. There is no qualification about the kind of details that must be confirmed; indeed, "police corroboration of *innocent*, although significant details of an informant's tip lend reliability to the informant's allegations of criminal activity." *See* ***State v. Robinson***, 2010 WI 80, ¶27, 327 Wis. 2d 302, 786 N.W.2d 463 (emphasis added).

¶27 The facts known to police at the time were sufficient for probable cause to arrest. The informant was known to police and given a registration number, from which one might infer a track record of reliability; presumably, police do not bother to register informants who provide no useful assistance. *See* ***State v. Marten***, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991) ("[O]fficers are entitled to the support of the usual inferences which reasonable people draw from facts."). The informant made allegations of who (Carroll), where (this Walmart parking lot), when (3:30 p.m.), and how (in a gold Volvo with a particular license plate). These allegations were all independently confirmed by police observation. The informant also apparently had some familiarity with Carroll, identifying his "Old Man" alias and selecting him from booking photos. The informant had also alleged the what—a heroin sale. Although police were not able to independently confirm this by mere observation, they did notice Carroll signal to another driver to follow him, suggesting something other than a shopping trip to Walmart was afoot.

¶28 Because we agree with the circuit court that Kurtz had probable cause to arrest Carroll, we further agree with its conclusion that an ordinarily prudent attorney could conclude that a motion to suppress based on a lack of probable cause would have lacked merit. This means counsel was not deficient for failing to file such a motion. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d

595, 698 N.W.2d 583. If counsel was not deficient, then it is not necessary to address the prejudice prong of an ineffective-assistance claim. *See* ***Reed***, 256 Wis. 2d 1019, ¶14. We therefore conclude that the circuit court in this case did not err by refusing to take additional evidence on prejudice.[8] Additional proceedings are not warranted.

By the Court.—Judgment and order affirmed.

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

[8] Although we conclude that the circuit court did not err in this case when it essentially bifurcated the ***Machner*** hearing, our opinion does not necessarily mean we believe the practice is advisable. In most instances, when a hearing is granted, a complete hearing that allows the movant to address both aspects of an ineffective-assistance claim will produce a better record for future review by a court at any level.