COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2145-CR **Cir. Ct. No. 2014CF300**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. LUMPKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed in part; reversed in part and caused remanded.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. James Lumpkin appeals a judgment of conviction and an order denying his postconviction motion. We reverse on one count due to ineffective assistance of counsel, but we affirm as to other counts.

¶2 Lumpkin was convicted after a jury trial of possession of cocaine and heroin, both with intent to deliver; delivery of heroin; and possession of THC. He filed a postconviction motion that the circuit court denied after an evidentiary hearing.

¶3 Lumpkin's arguments are all based on a theory of ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶4 We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶5 Lumpkin first argues that his trial counsel was ineffective by not filing a motion to suppress evidence. The suppression motion would have been based on the ground that the search warrant affidavit included certain statements from an informant without also including other statements the informant made to police that were inconsistent with the affidavit statements.

¶6 The inconsistent statements that Lumpkin relies on related to the amount of heroin the informant bought from Lumpkin, who else was with her at that time, whether she had used any of it, and how much remaining heroin police would find in her motel room. Lumpkin argues that if these statements are included, they reduce the informant's credibility so much that the court should disregard those points on which she apparently was not inconsistent, such as having purchased heroin from Lumpkin earlier that day at his residence, and having purchased heroin from Lumpkin on more than twenty earlier occasions in the prior month.

¶7 The parties agree that a suppression motion on this ground would have been denied if the search warrant affidavit would still have shown probable cause even with the inconsistent statements included. We conclude that trial counsel's performance was not deficient, and Lumpkin was not prejudiced, because here the affidavit would still show probable cause even if the inconsistent statements were included.

¶8 The probable cause in the affidavit lies mainly in the assertion that a purchase was made, and in the informant's prior history with Lumpkin. The fact that the informant made inconsistent statements about some of the related details of her actions that day is not a sufficient basis to compel the conclusion that *all* of the information was lacking credibility. These kinds of inconsistencies can reasonably be expected from a person who is using a substance and responding to a stressful situation.

¶9 Lumpkin next argues that his trial counsel was ineffective by failing to cross-examine the informant effectively at trial. Lumpkin argues that there were several ways the cross-examination could have been more effective. We address the argument in two parts.

¶10 As to the first part, Lumpkin argues that his trial counsel's performance was deficient because counsel did not cross-examine the informant with the inconsistencies in her statements to police that we described above. Lumpkin contends that these inconsistencies could have been used to cast doubt on the truthfulness of her entire story, including that she had made a purchase from Lumpkin. And, if these inconsistencies were combined with admission of other evidence suggesting that the informant had herself been selling drugs, he asserts that there may also have been a basis for Lumpkin to argue that she had a motive to falsely accuse Lumpkin, so as to take police pressure off herself. And, he further argues that it was possible to argue that any transaction between Lumpkin and the informant was actually a *purchase* by Lumpkin, rather than a sale, as charged.

¶11 The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Here, we conclude that the lack of cross-examination in the above manner was not objectively unreasonable. Trial counsel could reasonably believe that attempting to delve into these areas would be time consuming and difficult to explain, and could run the risk of bringing out additional information that would not be favorable to Lumpkin, such as testimony by the informant about previous transactions with Lumpkin.

¶12 In the second part of Lumpkin's cross-examination argument, we address other ways that his trial counsel could have cross-examined the informant. One of those would be to bring out evidence that could be used to suggest that the informant was willing to lie to police after she was arrested. During a recorded

interview, the informant said to police: "What can I possibly do to get out tonight?" and "I will do anything to get out tonight."[1]

¶13 These statements could have been used to argue that the informant was desperate to please police, and in that desperation she manufactured a story about making a purchase from Lumpkin. It appears that these statements could have been brought out without opening a door to further discussion of her other contacts or activities with Lumpkin. The State, on appeal, does not specifically address these statements. It is not apparent to us that there was a reasonable strategic reason for not using these statements in cross-examination. We conclude that this was deficient performance.

¶14 In addition, Lumpkin argues that counsel should have brought out the fact that the informant had, at that time, pled no contest to three criminal counts that would have been usable as convictions for impeachment purposes. The circuit court concluded that counsel's failure to use the convictions in cross-examination was deficient performance. The State concedes as much on appeal.

¶15 Furthermore, on two of those counts the informant had been placed on probation, and on the third count no sentence had been imposed yet due to a diversion agreement that could ultimately lead to dismissal of that felony count. The fact that the informant was under supervision by the State in these ways, and thus potentially subject to revocation, could have been used by the defense to argue that the informant continued to have a motive to testify in a way that would

[1] Lumpkin's brief quotes these statements from a DVD exhibit that was part of the record. The State does not dispute that these are accurate quotations.

please the State. The circuit court found that this was deficient performance. The State does not address this point in the appeal.

¶16 We agree with Lumpkin and the circuit court that counsel's performance was deficient by not using the informant's convictions and status on supervision with a diversion agreement. These points were low hanging fruit that it appears could have been used without great consumption of time and with low risk that other information potentially damaging to Lumpkin would be admitted. There does not appear to be a reasonable strategic basis to avoid these topics, in the context of a cross-examination strategy that was already based on making the witness appear not credible.

¶17 We next turn to prejudice. Although the parties mainly argue prejudice as to all counts as a group, we conclude that an analysis specific to individual counts is necessary.

¶18 We begin with the two counts of possession with intent to deliver. Lumpkin argues that effective cross-examination of the informant could have led to a different outcome on those two counts. He contends that the informant's testimony that she made a purchase from Lumpkin was a large part of the evidence that would have led the jury to find that he intended to deliver the substances he possessed.

¶19 We conclude that there is no prejudice on these counts. Even if the jury were to disbelieve the informant's testimony entirely, we are sufficiently confident that the jury would still have convicted on these counts. Although it is true that certain common physical indicia of intent to deliver were not found in this case, we conclude that it is highly likely that the jury would still have inferred that intent from the way the substances were packaged and the significant amount

of cash Lumpkin was carrying. Accordingly, there is no reasonable probability that the jury would have had a reasonable doubt as to Lumpkin's guilt.

¶20 We reach a different conclusion as to the count charging that Lumpkin actually delivered heroin to the informant. Unlike many such convictions, the evidence on this count was not obtained through a controlled buy. It was based almost entirely on the informant's assertion that, before her contact with police, she had made such a purchase. If the jury were to entirely discredit her testimony, which appears to be one reasonable view under the circumstances, the remaining evidence on this count is sufficiently sparse and ambiguous that our confidence in the likelihood of a guilty verdict is undermined.

¶21 The State argues that there was no prejudice from failure to cross-examine about the informant's convictions because her "criminal conduct" was described at trial. This argument is not persuasive because mere description of the conduct would not lead to an instruction explaining to the jury the credibility purpose for which the convictions could be used.

¶22 In summary, we reverse the judgment of conviction and order denying postconviction relief as to count three, but otherwise affirm the judgment and order.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).