COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2009AP2174-CR **Cir. Ct. No. 2006CF1954**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT EDWIN BURKHARDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Robert Edwin Burkhardt, pro se, appeals a judgment of conviction entered against him on six counts of possession of child

pornography, contrary to WIS. STAT. § 948.12(1m) (2009-10),[1] and one count of felony bail jumping, contrary to WIS. STAT. § 946.49(1)(b). Burkhardt also appeals orders denying his motion for postconviction relief without an evidentiary hearing. For the reasons we explain below, we affirm.

BACKGROUND

¶2 The following facts are taken from Burkhardt's motion for postconviction relief and other material submitted in support of the motion. In April 2006, a detective and two police officers from the City of Milwaukee police department appeared at Burkhardt's residence and informed him that they were investigating a cyber tip that he was operating a child pornography website. The detective asked for Burkhardt's consent to search the computer belonging to his significant other, to which Burkhardt had full access, for evidence that he was operating a child pornography website. Burkhardt avers that the police officers told him that, if he refused to consent to the search, they would obtain a search warrant. Burkhardt signed a form consenting to the search of the computer. In the course of the search, numerous images of child pornography were discovered. Following the search, the police officers seized the computer and arrested Burkhardt. Relevant to the bail jumping charge, at the time of his arrest, Burkhardt was released on bail pending possession of child pornography charges in Ozaukee County.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 After his arrest, Burkhardt was taken to jail, where he received ***Miranda***[2] warnings and confessed that he purchased a membership to a child pornography site containing images of girls approximately ten to fifteen years of age. Burkhardt estimated that he visited child pornography websites approximately seven to eight times per week. Burkhardt stated to police that he was in need of professional treatment for his problem with child pornography.

¶4 The State filed a criminal complaint, charging Burkhardt with six counts of possession of child pornography and one count of felony bail jumping. The complaint recites Burkhardt's admissions regarding his use of the computer to view images of child pornography and his problem with child pornography summarized above. The six counts of possession were based on six images found on the computer hard drive. The complaint states that the images represented only a small percentage of the total number of images of child pornography found on the computer.

¶5 Burkhardt pled guilty to all seven counts, and the court entered a judgment of conviction against him. Burkhardt subsequently filed a motion for postconviction discovery, seeking the results of a forensic examination of the computer. The circuit court denied the motion.

¶6 Burkhardt subsequently filed a postconviction motion requesting permission from the court to withdraw his guilty pleas. The court denied Burkhardt's motion in part but ordered additional briefing regarding Burkhardt's contention that he did not "knowingly" possess the images of child pornography

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

for which he was charged. After receiving the requested briefing, the court adopted the State's brief as its decision and denied the remainder of the postconviction motion without an evidentiary hearing. Burkhardt appeals. Additional facts are provided below as needed.

DISCUSSION

¶7 Burkhardt contends that he is entitled to withdraw his guilty pleas on various grounds or, at a minimum, that he is entitled to an evidentiary hearing on those grounds. We organize our discussion as follows. First, we address whether Burkhardt has alleged sufficient facts in his postconviction motion to entitle him to an evidentiary hearing on whether his counsel provided ineffective assistance of counsel by failing to challenge the search of the computer. Second, we address whether there was an insufficient factual basis in the criminal complaint to establish that he "knowingly" possessed the images of child pornography. Third, we address whether Burkhardt is entitled to postconviction discovery of a computer forensic examination report that was not disclosed to him.

¶8 Before reaching Burkhardt's arguments, we review the relevant law. The general rule in Wisconsin is that a guilty plea "waives all nonjurisdictional defects, including constitutional claims." ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (citation omitted). After sentencing, a defendant is entitled to withdraw a guilty plea only when the defendant demonstrates by clear and convincing evidence that a manifest injustice has occurred. ***State v. Wesley***, 2009 WI App 118, ¶22, 321 Wis. 2d 151, 772 N.W.2d 232. A manifest injustice occurs when a plea is not entered knowingly, intelligently, and voluntarily. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A plea is entered involuntarily, for example, when the facts admitted do not fit within the definition

of the crime. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997); ***State v. Lampe***, 26 Wis. 2d 646, 648-49, 133 N.W.2d 349 (1965).

¶9 Manifest injustice may also occur when a defendant receives ineffective assistance of counsel. ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110. To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A court deciding an ineffective assistance claim is not required to "address both components of the inquiry if the defendant makes an insufficient showing on one." ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold a circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law that we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶10 To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. There is a strong presumption that a defendant received adequate assistance. ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364. To prove prejudice, the defendant must establish a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability exists when the error undermines confidence in the outcome. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

A. Consent

¶11 We begin by addressing Burkhardt's contention that he is entitled to an evidentiary hearing under ***Nelson/Bentley*** on whether the police violated his Fourth Amendment right to be free from unreasonable searches and seizures in searching his computer. *See* ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). As we have stated, the guilty plea waiver rule ordinarily operates as a waiver of constitutional challenges. *See* ***Kelty***, 294 Wis. 2d 62, ¶18. Here, defense counsel did not move to suppress the evidence found on the computer, and, therefore, the suppression exception to the guilty plea waiver rule, WIS. STAT. § 971.31(10), does not apply. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 124-25, 332 N.W.2d 744 (1983). Burkhardt, however, also complains that defense counsel provided ineffective assistance by failing to move for suppression.

¶12 Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to an evidentiary hearing under ***Nelson/Bentley*** is a mixed question of law and fact. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine whether a defendant's postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief as a matter of law. ***Id.*** When the postconviction motion raises such facts, a defendant is entitled to an evidentiary hearing. ***Id.*** However, if the defendant's motion "fails to allege sufficient facts entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief," a court has discretion to grant or deny an evidentiary hearing. ***State v. Howell***, 2007 WI 75, ¶79, 301 Wis. 2d 350, 734 N.W.2d 48. We uphold a discretionary decision unless clearly erroneous. ***Id.***

¶13 Accordingly, the question is whether Burkhardt's postconviction motion alleges sufficient facts which, if true, demonstrate that defense counsel was ineffective for failing to move for suppression. We conclude that it does not.

¶14 The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. U.S. CONST. amend. IV. In general, a search conducted without a warrant is unreasonable. ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. However, a warrant is not needed when the defendant consents to the search. ***Id.*** To determine whether the defendant gave valid consent to a search, we consider: (1) whether the defendant gave consent in fact by words, gestures, or conduct; and (2) whether the defendant gave consent voluntarily. ***Id.***, ¶30. Because Burkhardt concedes that he gave consent in fact, our inquiry focuses on whether his consent was voluntary.

¶15 The test for voluntariness is whether the defendant gave consent in the "absence of actual coercive, improper police practices designed to overcome the resistance of a defendant." ***State v. Giebel***, 2006 WI App 239, ¶12, 297 Wis. 2d 446, 724 N.W.2d 402 (citation omitted). In determining whether Burkhardt's consent was voluntary, "no single factor is dispositive." ***State v. Hughes***, 2000 WI 24, ¶41, 233 Wis. 2d 280, 607 N.W.2d 621. Instead, courts examine the totality of the circumstances, placing emphasis on the circumstances surrounding the consent. ***Giebel***, 297 Wis. 2d 446, ¶12.

¶16 Burkhardt alleged in his postconviction motion that his consent to the search of the computer was not voluntary because police told him that if he did not consent they would obtain a warrant and search the computer without his consent. Thus, according to Burkhardt, his counsel was ineffective for failing to move to suppress the computer evidence. We conclude that these facts are

insufficient to warrant relief because it is well established that, "[t]hreatening to obtain a search warrant does not vitiate consent if 'the expressed intention to obtain a warrant is genuine … and not merely a pretext to induce submission.'" ***Artic***, 327 Wis. 2d 392, ¶41 (quoting ***United States v. White***, 979 F.2d 539, 542 (7th Cir. 1992)). The police have a genuine intent to obtain a search warrant when it is arguable that there is probable cause for a search warrant. *See* ***State v. Kiekhefer***, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997). Burkhardt does not assert facts showing that police lacked an intention to obtain a warrant or that there was not an arguable basis to obtain one. Indeed, as we briefly explain below, police possessed substantial information that Burkhardt affirmatively reached out for and viewed images of child pornography.

¶17 In March 2006, a Milwaukee police detective received a cyber tip forwarded through the National Center for Missing and Exploited Children that an identified website contained images of suspected child pornography. The detective determined that the website was hosted by Yahoo. Yahoo provided documents showing that Burkhardt was a subscriber to the child pornography website and had made purchases with a debit/credit card. A subpoena was served on the bank that issued the card. The bank disclosed documents showing that Burkhardt was the holder of the card. This information would have easily supported a search warrant of the computer at issue here.

¶18 In what appears to be a distinct argument, Burkhardt complains that the police were not candid with him about their intention when they sought his consent for the search, and misled him by saying they were investigating a tip that he was operating a child pornography website. The distinction Burkhardt attempts to draw is meaningless. Plainly, whether suspected of simply possessing child

pornography or, additionally, operating a child pornography website, the police were concerned that Burkhardt was in possession of child pornography.

¶19 Accordingly, we conclude that Burkhardt's postconviction motion fails to allege sufficient facts which, if true, would show that defense counsel was ineffective for failing to move to suppress. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583 (providing that "[c]ounsel does not render deficient performance for failing to bring a suppression motion that would have been denied").

B. Sufficient Factual Basis

¶20 We next address Burkhardt's contention that there was not a sufficient factual basis to support his guilty pleas. Burkhardt pled guilty to six counts of possession of child pornography after stipulating to the facts in the criminal complaint. Under WIS. STAT. § 948.12(1m), a person is prohibited from possessing a photograph or recording of a child engaged in sexually explicit conduct when the person knows he or she possesses the material. Whether the complaint establishes a sufficient factual basis that the defendant committed the crimes charged is a question of law subject to de novo review. ***State v. Payette***, 2008 WI App 106, ¶14, 313 Wis. 2d 39, 756 N.W.2d 423.

¶21 Under WIS. STAT. § 971.08(1)(b), a circuit court must, before accepting a defendant's guilty plea, "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." When the conduct to which a defendant pleads guilty does not constitute the offense charged, the guilty plea is not entered knowingly and intelligently. ***State v. Lackershire***, 2007 WI 74, ¶35, 301 Wis. 2d 418, 734 N.W.2d 23. This requirement "protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the

charge but without realizing that his conduct does not actually fall within the charge." ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted).

¶22 A sufficient factual basis for a guilty plea exists when it is probable that the defendant committed the crime charged. ***Payette***, 313 Wis. 2d 39, ¶7. While guilt must be inferable from the criminal complaint, there is no requirement that guilt be the only inference that may be drawn from the criminal complaint or that guilt be established beyond a reasonable doubt. ***Id.*** Accordingly, "[w]here reasonable inferences may be drawn establishing probable cause to support a charge and equally reasonable inferences may be drawn to the contrary, the criminal complaint is sufficient." ***State v. Grimm***, 2002 WI App 242, ¶15, 258 Wis. 2d 166, 653 N.W.2d 284.

¶23 Burkhardt argues that there is an insufficient factual basis to support his guilty pleas because the criminal complaint does not allege sufficient facts to establish that: (1) Burkhardt possessed the particular images for which he was charged; and (2) Burkhardt had the computer skills to know that the images would be stored in the hard drive of the computer.[3]

[3] Burkhardt also appears to argue that his guilty pleas were entered unknowingly because defense counsel failed to advise him, in Burkhardt's words, that "the mere presence of the images on the computer hard drive did not necessarily establish that he 'knowingly possessed' those images." We simply note here that, if Burkhardt means to pursue on appeal the contention that he received ineffective assistance with respect to advice regarding knowing possession, the argument is meritless. Regarding whether the mere presence of the child pornographic images may establish "knowing possession," the facts here show that Burkhardt confessed to repeatedly using a computer to affirmatively pull up and view images of child pornography and that he needed professional treatment for his problem with child pornography. The advice that Burkhardt claims was omitted would not have made a difference.

¶24 The flaw in both arguments is that Burkhardt fails to appreciate that, for purposes of establishing a factual basis for his pleas, the facts alleged in the criminal complaint need only establish probable cause that Burkhardt knowingly possessed the particular images charged in counts one through six. *See* ***Payette***, 313 Wis. 2d 39, ¶7. We conclude that probable cause was supplied by three alleged facts: (1) Burkhardt admitted that he purchased a membership to a child pornography website containing images of girls approximately ten to fifteen years of age; (2) Burkhardt admitted that he visited child pornography websites approximately seven to eight times per week; and (3) the six charged images represented only a small percentage of the total number of images of child pornography found on the computer. These facts permit the inference that Burkhardt repeatedly used his computer to reach out for and view images of child pornography, including the images described in counts one through six. *See* ***State v. Mercer***, 2010 WI App 47, ¶29, 324 Wis. 2d 506, 782 N.W.2d 125 ("[C]ourts are more concerned with how the defendants got to the website showing child pornography, than what the defendants actually did with the images. In all of the cases, the defendant *reached out* for the images.").

¶25 Burkhardt contends that federal cases, such as ***United States v. Tucker***, 305 F.3d 1193 (10th Cir. 2002), require evidence that the defendant knew the pornographic images would be *stored* on the computer. We doubt that the storage of images, much less knowledge of storage, is necessary for a conviction, but need not decide the issue. It is sufficient to note that ***Tucker*** and other cases brought to our attention involve challenges to the sufficiency of the evidence to support a conviction. Here, in contrast, the question is whether the facts in the complaint are sufficient to show *probable cause* that Burkhardt knowingly possessed the images. *See* ***Payette***, 313 Wis. 2d 39, ¶7. Under this standard, we

conclude that the evidence recounted above is sufficient to provide a reasonable inference that Burkhardt knew that the computer he used to view images of child pornography was storing the images in the hard drive.

¶26 Finally, we address Burkhardt's argument that count three is different from the other counts because it involves a "pop-up" image. According to the criminal complaint, count three relates to "an image of an advertising for a child pornography web site, which has been made part of the hard drive." Burkhardt argues there is an insufficient factual basis with respect to this count because this advertisement was a "pop-up" as that term is used in our ***Mercer*** decision. We are not persuaded.

¶27 We first observe that the criminal complaint does not describe the advertisement as a "pop-up" and Burkhardt does not demonstrate that advertisements are always "pop-ups" as that term is used in ***Mercer*** and other cases on the topic.

¶28 Further, even if we assume that the advertisement described in count three was a "pop-up," we do not believe that the ***Mercer*** decision supports Burkhardt's contention. First, ***Mercer*** teaches that, a defendant who affirmatively pulls up images of child pornography also knowingly possesses the child pornographic images that the defendant views on the computer as a result. *See* ***Mercer***, 324 Wis. 2d 506, ¶¶27-32. Second, the defendant in ***Mercer*** argued, in part, that he should not be criminally responsible for some of his viewing because images popped up in an "endless loop[]" in which he tried to exit by "hitting th[e] small X button," which in turn caused more pop-ups to appear. ***Id.***, ¶38. We rejected the proposition that this endless loop of pop-ups could not constitute possession of child pornography by pointing out that, although the defendant said

he could only "get out of the loop by restarting the computer," the evidence showed that he did not do so. ***Id.*** Thus, contrary to Burkhardt's assertion, we do not read ***Mercer*** to hold that "pop-ups" may not form the basis of knowing possession. Moreover, the facts in the complaint support the inference that Burkhardt repeatedly used the computer to pull up and view images of child pornography. It is disingenuous for Burkhardt to argue that he did not reach out for the type of child pornography advertisement described in count three.[4]

C. Postconviction Discovery

¶29 In his postconviction motion, Burkhardt alleges that the circuit court erred in denying his prior motion for postconviction discovery of a computer forensic examination report that Burkhardt alleges exists. In the prior motion, Burkhardt contended that, after a search warrant was issued authorizing a forensic examination of the seized computer, a return was filed stating, "examination in progress." In Burkhardt's view, the return demonstrates that a forensic examination report exists that is "necessary for an objective evaluation of the strength and nature of the evidence against him." The circuit court denied the motion on the ground that, pursuant to ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999), Burkhardt had not demonstrated a reasonable probability that a different result would have been obtained if the forensic examination report

[4] Because we conclude that there is a sufficient factual basis that Burkhardt knowingly possessed images of child pornography, we also conclude that there was a sufficient factual basis to establish that Burkhardt is guilty of felony bail jumping, contrary to WIS. STAT. § 946.49(1)(b). The criminal complaint provides that, at the time Burkhardt committed these offenses, he was out on bail pending a case in Ozaukee County charging him with possession of child pornography. It further provides that Burkhardt intentionally violated the conditions of his bond by possessing these images of child pornography. *See* ***State v. Taylor***, 226 Wis. 2d 490, 500, 595 N.W.2d 56 (Ct. App. 1999) (providing that the bail jumping law prohibits an individual who has been released pending disposition of criminal charges from violating the conditions of his or her bond).

had been disclosed to him. Burkhardt did not appeal the court's order denying his motion for postconviction discovery.

¶30 In his postconviction motion for relief, Burkhardt repeats his assertion that he is entitled to the alleged forensic examination report. Burkhardt contends that, without the report, he is unable to "evaluate and investigate the State's case against him." Burkhardt requests an evidentiary hearing on whether defense counsel was ineffective for failing to obtain the results of the computer forensic examination and asserts that, had he been aware that a computer forensic examination report existed, he would not have entered his guilty pleas. The circuit court denied this part of Burkhardt's postconviction motion for the same reason as set forth in its earlier decision denying Burkhardt's motion for postconviction discovery.[5]

¶31 The flaw in Burkhardt's argument is that he fails to explain why it is reasonable to believe that the forensic examination report would contain consequential evidence that probably would have prevented him from entering guilty pleas. *See* ***id***. We understand Burkhardt to be arguing that the forensic examination report might establish that he did not "knowingly" store the images of child pornography on the hard drive of his computer and that therefore his conduct does not fall under our definition of "knowing possession." However, as we have explained, Burkhardt confessed in a post-arrest statement to police that he purchased a membership to a child pornography website and repeatedly viewed

[5] The circuit court treated Burkhardt's renewed request for postconviction discovery as a motion for reconsideration and decided the issue on the merits. The State does not argue on appeal that Burkhardt forfeited appellate review of this issue by failing to appeal the court's first order denying the postconviction motion for discovery. Accordingly, we assume the issue is properly before this court.

images of child pornography on the computer. In other words, Burkhardt, for all practical purposes, confessed that he "knowingly possessed" the child pornographic images. Therefore, there is no reason to believe that Burkhardt would have refrained from entering his guilty pleas even if a forensic examination report existed and that report were disclosed to him prior to entering his guilty pleas. Indeed, the allegation in the criminal complaint that the images for which Burkhardt was charged represent only a minimal percentage of the images found on the computer suggests that the computer forensic examination report would have supported the State's theory.

CONCLUSION

¶32 For the reasons explained above, we affirm the circuit court.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.