COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2637 **Cir. Ct. No. 2008CF694**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DENNIS C. VAN CAMP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Dennis Van Camp, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. He argues his postconviction/appellate counsel was ineffective for failing to raise various claims on direct appeal. We reject Van Camp's arguments and affirm.

BACKGROUND

¶2 The State charged Van Camp with: possession with intent to deliver more than forty grams of cocaine, as party to a crime, second or subsequent offense; possession of cocaine, second or subsequent offense; possession of an electric weapon; and possession of drug paraphernalia.[2] At trial, Juan Salinas testified that, in July 2008, he was a confidential informant working with officer Michael Wanta of the Brown County Drug Task Force. According to Salinas, he had a conversation with Van Camp about purchasing a quarter kilogram of cocaine from Salinas. Salinas told Wanta about the conversation, and, at Wanta's instruction, Salinas agreed to meet Van Camp at a Walgreens parking lot in Green Bay on July 11 to complete the transaction.

¶3 On July 11, Wanta searched Salinas, provided Salinas with a bag containing approximately 252 grams of cocaine, and outfitted Salinas with an audio recording device. Salinas then drove alone in his car to the Walgreens and waited about ten minutes for Van Camp to arrive. When Van Camp arrived in a red Durango, Salinas exited his car and got into the Durango's passenger seat.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The State also charged Van Camp with possession of THC as a second or subsequent offense. However, the State moved to dismiss that charge during trial, and the court granted the State's request.

Salinas testified he gave Van Camp the cocaine in exchange for $5,500 in cash. After Salinas exited the Durango, police immediately arrested Van Camp and recovered the bag containing the cocaine. Police also found an additional five bags of cocaine on Van Camp's person and an electronic stun gun and digital scale in Van Camp's vehicle.

¶4 Van Camp testified in his defense. He admitted knowing Salinas and knowing that Salinas might be a source for cocaine. Van Camp testified Salinas called him repeatedly and offered to sell him cocaine, but he said he was not interested. Van Camp also admitted meeting Salinas on July 11, but stated he did not know exactly why they were meeting. During the meeting, Salinas handed him a bag, which Van Camp opened and saw what he believed was cocaine. Van Camp weighed the cocaine on a scale he had in the vehicle. He believed it was "short," so he only gave Salinas $5,500 instead of $6,500. However, Van Camp testified the cocaine admitted into evidence was not the same cocaine he purchased from Salinas. He explained the cocaine he purchased from Salinas was a solid brick with "no shake."

¶5 Van Camp's theories of defense focused mainly on the cocaine charges. In regard to the charge of possession with intent to deliver more than forty grams of cocaine, Van Camp asserted the affirmative defense of entrapment. During closing argument, Van Camp argued the State induced him to purchase the cocaine through Salinas' repeated phone calls.[3] Van Camp's attorney also emphasized the State needed to prove beyond a reasonable doubt that the

[3] Salinas testified he called Van Camp several times to arrange delivery of the cocaine Van Camp wished to purchase.

substance Van Camp purchased and possessed was cocaine. Counsel argued the State had not met its burden because it had not offered a believable explanation for the discrepancies in the weights of the different packages of cocaine.[4] Counsel argued the weight discrepancies could not be explained by evaporation, by residue left inside previous containers, or by typographical error. The jury, however, found Van Camp guilty of all counts.

¶6 On direct appeal, Van Camp's appellate counsel argued the circuit court erred by denying Van Camp's request for a jury instruction on chain of custody. *See* ***State v. Van Camp***, No. 2011AP388-CR, unpublished slip op. (WI App Dec. 28, 2011). Counsel asserted a chain of custody instruction was necessary because police provided Salinas with 252 grams of cocaine, but the cocaine seized from Van Camp weighed only 249.09 grams, and because the weights of the five smaller bags of cocaine found on Van Camp's person following his arrest differed from the weights of the five bags of cocaine introduced into evidence at trial. ***Id.***, ¶1. We concluded the circuit court properly exercised its discretion by denying the request for the chain of custody instruction because the other instructions fully and fairly informed the jury of the applicable

[4] Specifically, the cocaine sold to Van Camp had been weighed by the State Crime Laboratory in 2004 and, at that time, the laboratory recorded the cocaine's weight at a little less than 252 grams. However, after the reverse sting, police recorded the weight of the cocaine seized from Van Camp's vehicle at 249.09 grams. Forensic scientist John Nied explained the weight of the material could change over time as moisture evaporated and stated that some amount of the material would have adhered to the inside of the original containers whenever the material was transferred into new containers.

Further, police weighed the contents of each small bag found on Van Camp's person and recorded the weights as 1.8 grams, 3.38 grams, 1.07 grams, 1.29 grams, and 1.19 grams. However, the crime laboratory reported that the contents of each bag weighed .94 grams, 1.04 grams, 1.02 grams, 1.06 grams, and 1.18 grams, respectively. Evidence sergeant David Poteat admitted there was a two-gram discrepancy in the weight of one of these baggies. He believed the discrepancy was the result of a mistake or error.

law. ***Id.***, ¶12. Moreover, we observed that, despite refusing to give the chain of custody instruction to the jury, the circuit court allowed Van Camp to argue the chain of custody issue to the jury, which counsel did. ***Id.***, ¶14.

¶7 Van Camp subsequently filed a WIS. STAT. § 974.06 postconviction motion arguing his postconviction/appellate counsel was ineffective for failing to raise certain claims in regard to his entrapment defense and for failing to address the admissibility of the cocaine. The circuit court denied Van Camp's motion without a hearing.

DISCUSSION[5]

¶8 Van Camp renews his argument that he is entitled to relief under WIS. STAT. § 974.06 because his postconviction/appellate counsel rendered ineffective assistance.[6] *See* ***State v. Balliette***, 2011 WI 79, ¶¶18, 36-37, 336 Wis. 2d 358, 805 N.W.2d 334 (defendant moving for relief under WIS. STAT. § 974.06 must show "sufficient reason" why claims were not made on direct appeal); *see also* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (Ineffective assistance of postconviction counsel may

[5] Van Camp's arguments in support of why his postconviction/appellate counsel was ineffective are generally difficult to decipher and misstate many facts. Any arguments we do not explicitly address is denied for being inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not address inadequately developed arguments).

[6] In his brief-in-chief Van Camp argued both his trial and postconviction/appellate counsel rendered ineffective assistance. However, in his reply brief, Van Camp stated, "To clarify for the record, all claims of ineffective assistance of counsel, both trial and appellate, are ineffective assistance of appellate counsel claims …." Accordingly, we will not consider any claims with respect to trial counsel.

constitute "sufficient reason as to why an issue which could have been raised on direct appeal was not.").

¶9 To prove postconviction/appellate counsel was ineffective, Van Camp must prove counsel's performance was deficient and the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***Balliette***, 336 Wis. 2d 358, ¶28 (A WIS. STAT. § 974.06 motion for relief "based on ineffective assistance of postconviction counsel must lay out the traditional elements of deficient performance and prejudice to the defense."). To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A lawyer is not ineffective for failing to make claims that would have been denied. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 228, 769 N.W.2d 110. Further, "'[p]ostconviction counsel is entitled to exercise reasonable professional judgment in winnowing out even arguable issues in favor of others perceived to be stronger.'" ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶4, 269 Wis. 2d 810, 676 N.W.2d 500 (citation omitted).

¶10 To demonstrate prejudice, "[t]he 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." ***Strickland***, 466 U.S. at 694. If a defendant fails to satisfy one prong of the analysis, we need not address the other. ***Id.*** at 697.

I. Entrapment

¶11 Van Camp first argues his postconviction/appellate counsel was ineffective for failing to raise certain claims in regard to his entrapment defense.

Entrapment is an affirmative defense available to a defendant when law enforcement induces the defendant to commit an offense the defendant was not otherwise disposed to commit. ***State v. Bjerkaas***, 163 Wis. 2d 949, 954, 472 N.W.2d 615 (Ct. App. 1991). Stated another way, a defendant is entrapped when the criminal design originated with the government agent, and the defendant would not have committed the crime except for the urging of authorities. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999).

¶12 Establishing the defense is a two-step process. ***Bjerkaas***, 163 Wis. 2d at 954. First, the defendant must show by the great weight of credible evidence that he or she was induced to commit the crime. ***State v. Saternus***, 127 Wis. 2d 460, 472, 381 N.W.2d 290 (1986). If the defendant meets that burden of persuasion, the burden falls on the State to prove beyond a reasonable doubt that the defendant was not entrapped. ***Id.*** at 474. The State meets this burden by proving either: the inducement was not excessive or the defendant was predisposed to commit the crime before being induced. ***State v. Hilleshiem***, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992).

¶13 Van Camp argues his postconviction/appellate counsel was ineffective for failing to argue he was entrapped as a matter of law. Van Camp asserts that, because the State engaged in its own crime by selling him cocaine, the officers' conduct shows he was entrapped as a matter of law. We understand Van Camp's argument to be that he wishes us to apply the "objective" test of entrapment. The objective entrapment test focuses only on the conduct police used to induce the crime and does not consider whether the defendant was predisposed. *See* ***Saternus***, 127 Wis. 2d at 470-71. However, our supreme court has rejected the "objective" test and "chose[n] to follow the subjective approach," which focuses instead on "whether the police conduct affected or changed the

particular defendant's state of mind." ***Id.*** at 470. Because Wisconsin law does not use the objective test for entrapment, postconviction/appellate counsel was not ineffective for failing to raise that claim. *See* ***State v. Johnson***, 2007 WI 32, ¶14 n.4, 299 Wis. 2d 675, 729 N.W.2d 182; *see also* ***Hilleshiem***, 172 Wis. 2d at 9 ("In the context of narcotics transactions, merely seeking or offering to buy drugs is not the kind of inducement which establishes entrapment.").

¶14 Van Camp also faults postconviction/appellate counsel for failing to raise claims with respect to certain telephone logs and medical records that he asserts prove he was entrapped. Van Camp contends the telephone logs prove he was induced to purchase cocaine and not predisposed. However, Van Camp's telephone logs were admitted into evidence and a summary of those logs that showed the calls between Van Camp and Salinas was published to the jury. It is unclear what claim Van Camp's postconviction/appellate counsel allegedly failed to raise in regard to the telephone logs.

¶15 In any event, we observe Van Camp testified that each time he called Salinas it was to discuss something related to Van Camp's repair business and that it was Salinas who repeatedly called him to pressure him to buy cocaine. However, Salinas testified he never discussed Van Camp's work with him, Van Camp wanted to purchase cocaine from him, Van Camp had purchased cocaine from Salinas on three prior occasions, and, after Van Camp stated he wanted to buy the cocaine at issue in this case, Salinas only called Van Camp several times to arrange the delivery. The jury, by virtue of its guilty verdict, did not find the phone calls between Salinas and Van Camp constituted entrapment. *See* ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993) (Weighing testimony and evaluating credibility of witnesses are matters for the

jury.). Postconviction/appellate counsel was not deficient for failing to ask us to disregard the jury's determination.

¶16 As for the medical records, Van Camp moved to admit medical records showing he shot himself in the head almost ten years earlier and had difficulty hearing. The circuit court disallowed the medical records, reasoning the records were irrelevant. However, the circuit court did allow Van Camp to testify the injury impacted his hearing and, on the day of the reverse sting, he had received treatment at the hospital and came from the hospital to meet Salinas. Van Camp argues his postconviction/appellate counsel was ineffective in regard to his entrapment defense because the medical records "would show there was no predisposition for intent to deliver. Rather they would show the drugs were for personal use."

¶17 However, what Van Camp planned on doing with the cocaine after he purchased it has no bearing on whether the State entrapped him into purchasing the cocaine. In any event, the State charged Van Camp with possession of more than forty grams of cocaine with intent to deliver. In support of the "intent to deliver" portion of the charge, officer Mark Hackett testified that, based on his training and experience, a purchase of 250 grams of cocaine would be consistent with distribution as opposed to personal use. Further, sergeant Poteat testified that, based on his narcotics training, 250 grams of cocaine equaled approximately 2,500 uses. Van Camp offers no explanation in support for his assertion that these medical records would show the 250 grams of cocaine was only for his personal use. Accordingly, we conclude postconviction/appellate counsel was not ineffective for failing to raise an argument regarding Van Camp's "intent to deliver."

¶18 Van Camp next argues postconviction/appellate counsel was ineffective because the circuit court gave erroneous jury instructions. Specifically, Van Camp asserts the court gave the entrapment jury instruction that had been withdrawn by the Wisconsin Criminal Jury Instructions Committee in 2001 and the jury was erroneously instructed that it should automatically conclude he had an intent to deliver cocaine. These contentions are unsupported by the record. The record reflects the circuit court used WIS JI—CRIMINAL 780 (2002) when instructing the jury, which is the current entrapment instruction, and the court never instructed the jury it must automatically conclude Van Camp had an intent to deliver the cocaine.

II. Admissibility of Cocaine Evidence

¶19 Van Camp argues his postconviction/appellate counsel was ineffective for "not challenging the admissibility and chain of custody of the drugs properly." Before the cocaine in this case could be admitted into evidence, the State needed to authenticate and identify the cocaine with "evidence sufficient to support a finding that the matter in question is what its proponent claims." *See* WIS. STAT. § 909.01. The law with respect to chain of custody requires proof sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). "A perfect chain of custody is not required." ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54. "Alleged gaps in a chain of custody "'go to the weight of the evidence rather than its admissibility.'" ***Id.*** (quoting ***United States v. Lott***, 854 F.2d 244, 250 (7th Cir. 1988)).

¶20 Van Camp argues the cocaine should not have been admitted into evidence because the cocaine tested by the crime laboratory before the reverse sting weighed a little less than 252 grams while the cocaine seized from him weighed a little more than 249 grams. He contends this weight discrepancy means the evidence should not have been admitted.

¶21 We disagree. First, sergeant Poteat and officers Wanta and Hackett all testified the cocaine admitted into evidence at trial was the same cocaine used in the reverse sting operation. Second, the State established a sufficient chain of custody to allow the evidence to be admitted. *See* ***McCoy***, 298 Wis. 2d 523, ¶9. State crime analyst Nied testified that, after determining the 252 grams of substance from a 2004 case was cocaine, he returned the cocaine to the Brown County Drug Task Force. Evidence sergeant Poteat testified that, upon its return from the State Crime Laboratory, the cocaine from the 2004 case remained in the locked evidence room until Poteat gave the cocaine to Wanta to use in this case. Wanta, in turn, testified he gave the cocaine to Salinas after searching Salinas for contraband. Salinas testified he sold the cocaine to Van Camp and was searched by Wanta after the sale. Hackett testified he found the cocaine in Van Camp's vehicle and then returned it to the evidence locker.

¶22 Given this testimony, the less than three-gram weight discrepancy is de minimis and not enough to have rendered the cocaine inadmissible as a matter of law. *See* ***B.A.C.***, 135 Wis. 2d at 290. Further, Nied explained the weight of material may change over time as moisture evaporates or if some adheres to the inside containers when the material is transferred. Postconviction/appellate counsel was not ineffective for failing to challenge the admissibility of the cocaine based on the weight discrepancy.

¶23 Van Camp further asserts the cocaine should not have been admitted into evidence because the cocaine he purchased was a solid brick of cocaine, yet the officers testified they put six pieces of cocaine together when making the package for him to purchase. He contends six pieces of cocaine cannot create a solid brick of cocaine. This argument, however, goes to the weight the jury accords the evidence as opposed to the evidence's admissibility. *See* ***McCoy***, 298 Wis. 2d 523, ¶9. Again, Poteat, Wanta, and Hackett testified the cocaine admitted into evidence was the same cocaine used in the reverse sting operation. Moreover, we observe that, of the six pieces of cocaine, one piece was substantially larger than the others, weighing 224 grams, while the others had a combined weight of twenty-five grams.

¶24 Finally, Van Camp argues that, with respect to the additional bags of powder cocaine found on his person when he was arrested, the cocaine should not have been admitted into evidence because there was a discrepancy between what the officers said that cocaine weighed and what the crime laboratory said it weighed. However, similar to the weight discrepancy in the cocaine used in the reverse sting operation, the weight discrepancies in the cocaine found on Van Camp's person goes to persuasiveness rather than admissibility. *See* ***id.*** The State established a sufficient chain of custody in regard to the cocaine found on Van Camp's person and the cocaine was identified at trial as being the cocaine found on Van Camp's person. Further, the weight discrepancies were brought out at trial. The jury heard four of the five bags of cocaine each had less than a one-gram weight discrepancy, and, although the crime laboratory stated the remaining bag weighed approximately 2.3 grams less than what the police initially reported, Poteat testified the amount of cocaine in that bag looked the same and he believed a mistake had been made when that bag was weighed. Postconviction/appellate

counsel was not ineffective for failing to challenge the admissibility of the cocaine found on Van Camp's person.

¶25 In sum, postconviction/appellate counsel did not render deficient performance by failing to raise Van Camp's aforementioned claims on direct appeal. Accordingly, Van Camp has not established counsel rendered ineffective assistance. In any event, we also conclude Van Camp has not shown that his defense was prejudiced by any of counsel's alleged deficiencies. Because Van Camp's counsel did not render ineffective assistance, we conclude the circuit court did not err by denying Van Camp's WIS. STAT. § 947.06 motion.

By the Court.—Order affirmed.

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