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DISTRICT I

Amended as to date of order
October 17, 2024
October 16, 2024

To:

Hon. Brittany C. Grayson
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Brian Patrick Mullins
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Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1778-CR State of Wisconsin v. Briant Dwight Dickey (L.C. # 2016CF3605)
2022AP1779-CR State of Wisconsin v. Briant Dwight Dickey (L.C. # 2017CF1646)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders 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).

Briant Dwight Dickey appeals from judgments, entered upon a jury's verdicts, convicting him of a total of seven crimes in two cases that were joined in the circuit court and tried together. He also appeals from an order denying postconviction relief in the two cases. He claims that his trial counsel was ineffective in one of the cases because she failed to file a pretrial motion to suppress evidence; and that his trial counsel was ineffective in both cases because she failed to object to the prosecutor's closing argument regarding the credibility of the State's expert witness. The circuit court denied Dickey's claims after an evidentiary hearing. Based upon our review of

the briefs and records, we conclude at conference that these consolidated cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

In Milwaukee County Circuit Court case No. 2016CF3605, which underlies appeal No. 2022AP1778, the State alleged in a criminal complaint that on August 9, 2016, police stopped the car that Dickey was driving. During the stop, police smelled marijuana and searched the car. The search uncovered controlled substances, a firearm, and $2,000 in cash. The State charged Dickey with possessing a firearm while a felon and possessing not more than one gram of cocaine with intent to deliver. Dickey posted bail and was released from custody.

Dickey was awaiting trial on case No. 2016CF3605 when the State filed a criminal complaint in Milwaukee County Circuit Court case No. 2017CF1646, which underlies appeal No. 2022AP1779. In that complaint, the State alleged that on April 4, 2017, police in a marked squad car attempted to stop an Acura for an equipment violation. The Acura did not stop, but three officers in a second, unmarked squad car soon spotted the Acura in an alley. A person subsequently identified as Dickey was standing next to the Acura's open driver's-side door. After the unmarked squad car entered the alley, Dickey ran from the Acura and did not comply when a uniformed officer, Ryan Reagan, commanded: "Stop! Police!" Officers pursued Dickey on foot through streets and yards before taking him into custody. Police searched the Acura and found a firearm, cocaine, and heroin.

The State charged Dickey in case No. 2017CF1646 with numerous crimes. As relevant here, they were: (1) fleeing or eluding an officer, based on Dickey's alleged failure to stop the

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Acura; (2) obstructing an officer, based on Dickey's alleged failure to comply with police commands while fleeing on foot; (3) carrying a concealed weapon, specifically, a firearm; (4) possessing a firearm while a felon; (5) possessing with intent to deliver not more than forty grams of cocaine, as a second or subsequent offence; and (6) possessing not more than three grams of heroin with intent to deliver, as a second or subsequent offense.[2]

The 2016 and 2017 cases proceeded to a joint jury trial. The jury acquitted Dickey of fleeing an officer and convicted him of the seven remaining charges.

Dickey moved for postconviction relief. He claimed that police searched the Acura without either a warrant or a basis for a warrantless search, and therefore his trial counsel was ineffective for failing to pursue suppression of the evidence uncovered during the search. He also claimed that his trial counsel was ineffective for not objecting to the State's closing argument on the ground that the prosecutor vouched for the credibility of Detective Mitchell G. Ward, the State's expert witness on the use and distribution of illegal drugs.[3]

The circuit court conducted an evidentiary hearing at which Dickey's trial counsel testified. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (requiring a defendant who alleges ineffective assistance of counsel to preserve that counsel's testimony at a postconviction hearing). Trial counsel said that she did not pursue a motion to suppress the evidence found in the Acura because she concluded that Dickey had fled from

[2] The complaint in case No. 2017CF1646 also included six counts of bail jumping, all of which were dismissed before the case went to the jury.

[3] Dickey raised an additional claim in his postconviction motion, but he has expressly advised this court that he is not pursuing that claim here. Accordingly, we do not address it.

police and abandoned the vehicle and therefore could not prevail on the motion. Trial counsel further testified that she did not object to the State's closing argument regarding Detective Ward's credibility because she had objected to similar arguments in the past, and the presiding judges had "correct[ed]" her and ruled that the remarks were "just ... arguments."

The circuit court found trial counsel credible. Further, the court concluded that trial counsel had made reasonable choices in deciding both not to pursue suppression of the evidence found in the Acura and not to object to the State's closing argument. The court therefore denied postconviction relief. Dickey appeals.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

Whether trial counsel was ineffective is a mixed question of fact and law. ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93. Findings of fact include the circumstances of the case and trial counsel's conduct and strategy. ***Id.*** We review findings of fact deferentially, and we uphold those findings unless they are clearly erroneous. ***Id.***, ¶¶37-38. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law. ***Id.***, ¶¶38-39. We review such questions *de novo*. ***Id.***

We begin with Dickey's claim that trial counsel was ineffective for failing to move to suppress the evidence that police found in the Acura. We reject the claim. A lawyer does not perform deficiently by forgoing a motion that would have been denied. ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). A suppression motion would have been denied in this case because Dickey fled from the police and abandoned the Acura.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect the right to be free from unreasonable searches and seizures ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. Save for a single circumstance that is not implicated here, Wisconsin courts interpret the two constitutional provisions identically. *See* ***State v. Kramer***, 2009 WI 14, ¶18, 315 Wis. 2d 414, 759 N.W.2d. 598. Under both provisions, warrantless searches are *per se* unreasonable, subject to certain carefully drawn exceptions. ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Before a defendant can invoke the protections of these provisions, however, "he or she must establish a legitimate expectation of privacy in the object searched." ***State v. Roberts***, 196 Wis. 2d 445, 453, 538 N.W.2d 825 (Ct. App. 1995).

Pursuant to ***Roberts***, Dickey could not have successfully pursued suppression of the evidence that police found in the Acura unless he satisfied his burden to establish that he retained an expectation of privacy in the vehicle after he fled from it. ***Id.*** at 456. However, "[a] defendant does not have a reasonable expectation of privacy in an item once it has been abandoned." ***Id.*** at 453. As courts uniformly recognize, "a suspect fleeing police and leaving behind a vehicle does not have a legitimate expectation of privacy in the vehicle for Fourth Amendment purposes." ***Id.*** at 454 (collecting cases).

The records show that Dickey could not have carried his burden to establish that he had an expectation of privacy in the Acura following his flight. "If the driver of a car flees at the approach of the police, this is pretty good evidence that he's abandoned the car—that he doesn't want to be associated with it and therefore isn't going to reclaim it." ***United States v. Pittman***, 411 F.3d 813, 817 (7th Cir. 2005). That is the evidence here. Officer Reagan's trial testimony established that on April 4, 2017, Officer Reagan was in full police uniform when his squad car pulled into the alley behind the Acura. Dickey was outside the Acura, and its door was open. Dickey ran from the Acura and did not comply when Officer Reagan verbally identified himself as a police officer, displayed his badge, and ordered Dickey to stop running.

Dickey suggests that he could have overcome the evidence of abandonment with Officer Reagan's testimony about Dickey's state of mind. Specifically, Dickey relies on Officer Reagan's trial testimony that Dickey "would not have known" that Officer Reagan was a police officer until he got out of the squad car because it was an unmarked Ford Crown Victoria. However, a witness normally must have personal knowledge of a matter to testify about it. *See* WIS. STAT. § 906.02. Fact-finders, not witnesses, decide "what was going on in [another's] mind at the time of the [crime.]" ***State v. Richardson***, 189 Wis. 2d 418, 429, 525 N.W.2d 378 (Ct. App. 1994). The record does not establish that Officer Reagan had any personal knowledge regarding either when Dickey first realized that Officer Reagan was a police office or what

Dickey knew about Officer Reagan's status when the unmarked Ford Crown Victoria drove up to the Acura.[4]

Regardless, the test for abandonment is an objective one. "An actual, subjective expectation of privacy is not sufficient to create fourth amendment protection[.]" ***Roberts***, 196 Wis. 2d at 454; *see also* ***United States v. Edwards***, 34 F.4th 570, 583 (7th Cir. 2022) (holding that "[a]bandonment turns upon an objective test of 'the external manifestations of the defendant's intent as judged by a reasonable person possessing the same knowledge available to the government agents involved in the search'" (citation omitted)). Officer Reagan described the objective manifestations of Dickey's intent in this case. Specifically, Officer Reagan testified that he was in Dickey's line of sight and in full uniform with his badge displayed when he yelled "stop, police." In response, Dickey ran, leaving the Acura behind with its door open. Another officer joined the chase, but Dickey continued to run.

Thus, Dickey left his car and fled from the police, even assuming that he recognized the officers' status only after Officer Reagan got out of the unmarked squad. In ***Roberts***, the court concluded that a suspect who flees from his or her car when approached by police has abandoned the vehicle and consequently does not have a reasonable expectation of privacy in that vehicle. ***Id.***, 196 Wis. 2d at 453-55. Accordingly, the facts lead to that conclusion here.

We have additionally considered that, under facts similar to those in this case, the 7th Circuit Court of Appeals rejected a defendant's effort to suppress evidence found when police

[4] We observe that "a Ford Crown Victoria [is] the quintessential unmarked police car," and citizens seeing such a car may recognize its occupants as police officers. *See* ***Morrow v. May***, 735 F.3d 639, 640 (7th Cir. 2013).

searched a car that the defendant had been driving. *See* ***United States v. Vasquez***, 635 F.3d 889 (7th Cir. 2011). The ***Vasquez*** court described law enforcement's initial encounter with the defendant, stating that police approached his vehicle in "several unmarked cars," and six officers also approached on foot. ***Id.*** at 892. The defendant sped away in his vehicle, which the police located a few minutes later, "abandoned in a nearby Walmart parking lot." ***Id.*** A bystander reported seeing two men run from the car. ***Id.*** The defendant claimed that evidence subsequently found in the car should have been suppressed, but the ***Vasquez*** court held that "[t]he search issue is a dead-bang loser.... [T]he [car] was abandoned, and it's hard to see, under the circumstances here, how [the defendant] could argue with a straight face that he maintained an expectation of privacy in it after he ditched it and bolted off on the run." ***Id.*** at 894.

In the instant case, where the facts reflected Dickey's abandonment of the Acura, and the law indicated that a suppression motion was therefore a "dead-bang loser," *see* ***id.***, trial counsel exercised reasonable professional judgment by electing not to pursue a suppression motion that would have failed.[5] ***Jackson***, 229 Wis. 2d at 344. Because trial counsel's performance was thus

[5] Dickey suggested in his opening brief that the jury's verdict acquitting him of fleeing is relevant to the question of whether he abandoned the Acura. The State's response pointed out that the fleeing charge arose from Dickey's alleged efforts to avoid police while he was driving the Acura. The jury's decision to acquit Dickey of the fleeing charge thus has no apparent bearing on whether Dickey later abandoned the Acura when he left it in an alley and ran from police. Moreover, the question is whether trial counsel was ineffective, including whether she performed deficiently, when she concluded that a pretrial suppression motion would lack merit. We resolve that question in light of the facts viewed as of the time of counsel's conduct, ***State v. Marcum***, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992), and the jury's verdict clearly could not inform trial counsel's pretrial decision-making. We observe that Dickey's reply brief did not address the State's arguments regarding the irrelevance of the fleeing verdict or renew the suggestion that the fleeing verdict should be a consideration here. Accordingly, we take the State's arguments regarding the fleeing verdict as conceded and do not further discuss the matter. ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578.

not deficient, we need not consider the prejudice prong of the ***Strickland*** analysis. ***Id.***, 466 U.S at 697.

We turn to Dickey's claim that trial counsel was ineffective for not objecting when the prosecutor asserted during closing argument that Detective Ward, the State's expert witness, had "testified truthfully" in "seventy-five to one hundred" prior trials and "never said anything ... that is used later on to impeach him." At the ***Machner*** hearing, trial counsel acknowledged that the State did not present evidence to the jury that Detective Ward had never been impeached in prior trials. Trial counsel testified that she nonetheless elected not to object to the State's remarks because she had objected to similar comments in the past and the presiding judges had "correct[ed]" her and instructed the jurors that the remarks were merely argument. The circuit court concluded that trial counsel's strategic decision was reasonable, and therefore her performance was not deficient.

Decisions regarding trial strategy reasonably based on facts and law normally do not constitute ineffective assistance of counsel. ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). Moreover, we do not second-guess a matter of defense strategy if such strategy was found by the circuit court. ***State v. Mayo***, 2007 WI 78, ¶63, 301 Wis. 2d 642, 734 N.W.2d 115. Indeed, a circuit court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

No basis exists to depart from these principles here. Trial counsel decided that the best approach to the State's closing arguments about Detective Ward was to let them pass without drawing attention to them with an objection that, in counsel's experience, would lead to nothing

more than an instruction to the jury about how to assess the State's remarks. *See* ***State v. Cooks***, 2006 WI App 262, ¶44, 297 Wis. 2d 633, 726 N.W.2d 322 (concluding that counsel reasonably elected not to object "where the bell had been rung" and an objection would draw attention to the objectionable comment). Moreover, trial counsel indicated that any potential benefit of voicing an objection was not worthwhile in light of the risk that the judge would appear to "correct" her, potentially affecting her credibility when she gave her own summation. Trial counsel made a reasonable strategic decision. Accordingly, Dickey fails to show that she performed deficiently by not objecting to the State's closing remarks.

The circuit court addressed whether Dickey suffered any prejudice from trial counsel's decision not to object to the State's closing argument. Because we conclude that trial counsel's performance was not deficient, we need not and do not address the issue of prejudice. ***Strickland***, 466 U.S. at 697; *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (explaining that we resolve cases on the narrowest possible ground). For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals