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DISTRICT II

March 6, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2011AP1144-CR State of Wisconsin v. Brian J. Conaway (L.C. # 2008CF412)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Brian J. Conaway appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his suppression motion and motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgment and order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

In October 2007, the police departments of Walworth and Rock counties were jointly investigating a series of burglaries along the county border. As part of that investigation, the police received tips regarding a “Robin’s egg blue” or teal “Pontiac Grand Prix or Grand Am” in the vicinity of several of the burglaries. Eventually, a citizen was able to give a license plate number for the vehicle. The car’s license plates had expired in August 2007.

On October 5, 2007, the police initiated a traffic stop of a blue Pontiac with the license plate number given by the citizen. The police later admitted that it was a “pretextual stop” for the purpose of installing a Global Position System (GPS) device on the car. Once the car pulled over, police discovered that both of its occupants—Conaway and an individual named James Brereton—also had revoked driver’s licenses. In addition, the police discovered that the car’s vehicle identification number did not correspond to the license plates displayed on the car. The police removed the occupants from the car and took them to a nearby store. Then, the car was towed to an impound lot. After a warrant was obtained, police opened the hood and installed the GPS device. Eventually, the car was returned to where it had been stopped, and its occupants were never notified that it had been moved.

The GPS device was able to track the car’s whereabouts in real time and send police text message updates. Four days after the device was installed, police obtained the information they needed—the car was tracked to the site of a reported burglary. Based on the tracking, police were able to stop the car and arrest Conaway and Brereton.

After an unsuccessful motion to suppress, Conaway pled guilty to five counts of burglary to a building or dwelling as a party to a crime. He subsequently filed a motion for postconviction relief based upon his trial counsel’s failure to challenge his bindover following a

second preliminary hearing.² The circuit court denied the motion without an evidentiary hearing. This appeal follows.

On appeal, Conaway first contends that the circuit court erred when it denied his suppression motion. He argues that the car in which he was a passenger was unlawfully seized and that the police unreasonably executed the warrant authorizing them to place a GPS device on the car so as to provide real-time tracking.

Conaway's first argument is foreclosed by the Wisconsin Supreme Court's recent decision in his codefendant's case, which addressed the same issues. See *State v. Brereton*, 2013 WI 17, ___ Wis. 2d ___, ___ N.W.2d ___. There, the court held that the seizure of the car in question was supported by probable cause and was therefore permissible under the Fourth Amendment. *Id.*, ¶2. The court further held that the police's execution of the warrant so as to provide real-time tracking was not unreasonable. *Id.*, ¶3. In light of these holdings, we conclude that the circuit court did not err when it denied Conaway's suppression motion.

Conaway next contends that the circuit court erred when it denied his postconviction motion without an evidentiary hearing. Again, Conaway's motion was based upon his trial counsel's failure to challenge his bindover following a second preliminary hearing.

Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion alleges

² Conaway was originally charged in Walworth county case No. 2008CF150. The circuit court dismissed that case after a preliminary hearing where it found no probable cause to believe that Conaway had committed a felony.

sufficient facts that, if true, would entitle the defendant to relief. *Id.* This is a question of law that we review de novo. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.* However, if the motion does not raise facts sufficient to entitle the defendant to relief, “or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Allen*, 274 Wis. 2d 568, ¶9. We review the court’s discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

We conclude that the circuit court properly denied Conaway’s postconviction motion without an evidentiary hearing for two reasons. First, by pleading guilty, Conaway forfeited the right to challenge his bindover. See *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (a plea of guilty forfeits all nonjurisdictional defects, including constitutional claims). Second, even if we were to look past this forfeiture, Conaway has not shown that there was any basis for successfully challenging the bindover. Here, the State presented a substantial amount of new or unused evidence at the second preliminary hearing. We are satisfied that this evidence was sufficient to support Conaway’s bindover. Accordingly, counsel’s failure to challenge the bindover cannot constitute deficient performance. See *State v. Wheat*, 2002 WI App 153, ¶30, 256 Wis. 2d 270, 647 N.W.2d 441 (defense counsel not ineffective for failing to bring meritless motion).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed,
pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals