COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP855 **Cir. Ct. No. 2003CF2972**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOWANKA S. KING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Towanka S. King appeals from an order denying his WIS. STAT. § 974.06 (2005-06)[1] motion for postconviction relief. He alleged that his trial and postconviction attorneys were ineffective: (1) by failing to challenge the legality of his arrest; and (2) by inadequately challenging the search of his apartment. We conclude that a motion challenging King's arrest would have lacked merit, and that a challenge to the apartment search is barred as previously litigated pursuant to ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). We affirm.

Background

¶2 King pled guilty to possession of cocaine with intent to deliver. *See* WIS. STAT. § 961.41(1m)(cm)4 (2003-04). We summarize here the facts surrounding his arrest and conviction, which are more fully related in our first opinion in this matter, ***State v. King***, No. 04-2523-CR, unpublished slip op. (WI App Oct. 4, 2005) (***King I***). On May 16, 2003, police were conducting surveillance in the 7000 block of North 67th Street, Milwaukee, pursuing a confidential informant's tip that a drug dealer would be in the area with four and one-half ounces of cocaine. The officers observed Martago Hicks driving a vehicle in which King was the passenger. The two men exited the vehicle, but returned after five minutes and drove away. Police followed, eventually stopping the vehicle for speeding. When officers patted down Hicks, they found cocaine in his pocket. Hicks stated that he had received the cocaine from King. King was arrested.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Hicks provided additional information about King's drug possession and police searched King's home, where they found almost 300 grams of cocaine. King unsuccessfully moved to suppress that evidence. King then entered a guilty plea and appealed the denial of his suppression motion to this court. We affirmed in ***King I***.

¶4 King next filed a postconviction motion pursuant to WIS. STAT. § 974.06. He alleged first that he received ineffective assistance from his trial and postconviction attorneys, who failed to pursue the issue of whether King's arrest was supported by probable cause.[2] He further alleged that his trial attorney was ineffective in selecting the wrong strategy for challenging the legality of the search of King's home; he claimed that his postconviction attorney was in turn ineffective for failing to raise that issue. The motion was denied, and this appeal followed.

Discussion

¶5 Generally, appellants must raise all grounds for relief in one postconviction motion or direct appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). Absent "sufficient reason" for not raising the claim, litigants are barred from raising grounds for relief that have not been raised in prior WIS. STAT. § 974.06 motions or on direct appeal. ***Escalona-Naranjo,*** 185 Wis. 2d at 185, 517 N.W. 2d at 164. A claim of ineffective assistance of postconviction or appellate counsel, however, may overcome the

[2] King was represented by three trial attorneys in this matter. The third trial attorney also handled King's first postconviction motion and direct appeal. For purposes of resolving the instant claims, the specific identity of the attorney handling each component of the litigation is not significant. Therefore, we identify the lawyers only by their roles as trial or postconviction advocates.

Escalona bar. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681–682, 556 N.W.2d 136, 139 (Ct. App. 1996). Because King is alleging ineffective assistance of postconviction counsel, his claims under ***Escalona-Naranjo*** are not barred.

¶6 King claims both that his attorneys were ineffective and that the trial court improperly denied his claims without a hearing. We must apply two standards of review to the issues he presents.

¶7 We review a circuit court's decision to deny a postconviction motion without first holding a hearing under the standard set out in ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts to entitle the defendant to relief is a question of law that we review *de novo*. ***Id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. If the motion alleges such facts, the circuit court must hold a hearing. ***Ibid.*** "[I]f the motion does not raise facts sufficient to entitle the movant 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." ***Ibid.*** We review this determination under the deferential erroneous exercise of discretion standard. ***Id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437.

¶8 We review claims of ineffective assistance of counsel under the two-prong test of ***Strickland v. Washington***, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a defendant must show both that his attorney's performance was deficient and that the deficiency was prejudicial. ***Id.*** at 687. If the defendant fails to prove one prong, the court need not address the other. ***Id.*** at 697.

¶9 To demonstrate deficiency, the defendant must show that his attorney did not function as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** at 687. 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." ***Id.*** at 694. An attorney is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).

¶10 Here, King contends that his attorneys were ineffective in failing to claim that his arrest was without probable cause. "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993). Probable cause is a "'measure of the plausibility of particular conclusions about human behavior'—conclusions that need not be unequivocally correct or even more likely correct than not." ***State v. Pozo***, 198 Wis. 2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995) (citations omitted). The objective facts before the officer need only lead to the conclusion that "'guilt is more than a possibility.'" ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830, 838 (1990) (citation omitted).

¶11 The police had probable cause to arrest King under the totality of the circumstances. The officers observed both King and Hicks during a stake-out, after learning from a confidential informant that a drug dealer would be in the area carrying four and one-half ounces of cocaine. The men left their vehicle for only five minutes, then returned and drove away. The vehicle was properly stopped following observation by police of traffic infractions, including excessive speed. Hicks, the driver, was patted down and found to have a quantity of cocaine in his

pocket. Hicks then stated that he had received the cocaine from King and King was arrested.

¶12 A reasonable officer could sensibly conclude under these circumstances that King had probably committed the crime of delivery of cocaine. King and Hicks behaved as predicted by the informant. When Hicks was found in possession of cocaine, he inculpated his companion. King's accuser was on the scene with his identity exposed, and made his accusation under circumstances where he could expect negative consequences if it proved untrue. *See* ***State v. Rutzinski***, 2001 WI 22, ¶32, 241 Wis. 2d 729, 747, 623 N.W.2d 516, 525.

¶13 King's attorneys were not ineffective in foregoing a challenge to the arrest under these facts. The challenge would not have prevailed. Because the record conclusively demonstrates that King is not entitled to relief, the circuit court properly exercised its discretion in denying King's postconviction motion without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶14 King next claims that his trial attorney was ineffective in his selection of an approach for litigating the motion to suppress evidence. King contends that his postconviction attorney was ineffective in turn by failing to challenge the strategic choice. This claim is precluded. We held in ***King I*** that the circuit court properly denied the motion to suppress evidence seized in the search of King's home. King may not have this issue addressed again by repackaging it as a claim of ineffective assistance of counsel. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***Witkowski***, 163 Wis. 2d at 990.

¶15 Were we to disregard the ***Witkowski*** mandate, we would nonetheless deny King's claim. King faults his trial attorney for rejecting the arguments

prepared by a predecessor lawyer and proceeding on a different theory in aid of suppressing the evidence found in King's home. "A lawyer has a right to select from the available defense strategies." ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651, 657 (1979). Representation is not deficient merely because the chosen strategy failed. ***Ibid.***

By the Court.—Order affirmed.

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