COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2210-CR **Cir. Ct. No. 2002CF227**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS E. BARNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Dennis Barnes appeals from a judgment convicting him of burglary and possession of burglarious tools as a repeat offender, and from orders denying his motions for postconviction relief and reconsideration. He challenges: (1) the denial of his motion to dismiss; (2) the denial of his

suppression motion; (3) the amendment of the complaint at a status conference; (4) the refusal to dismiss a juror for cause; (5) the court's consideration and response to jury questions when Barnes was present only by videoconference and was unable to communicate with counsel; (6) the denial of his motion for a new trial based on ineffective assistance of counsel and failure to try the real controversy; and (7) the denial of his second postconviction motion without a hearing. We reject each of Barnes' arguments and affirm. For convenience, we will discuss the facts relevant to each issue along with that issue.

Motion to Dismiss

¶2 Upon arresting Barnes on July 22, 2002, the Sauk County Sheriff's Department issued him two forms entitled "Citation/Notice of Court Appearance," which set forth the statutes Barnes was alleged to have violated, the time and place of the violations, and the date that he was to appear before the intake branch of the Sauk County Circuit Court. The forms followed the design of the uniform traffic citation, which is sometimes used in misdemeanor actions. A standard criminal complaint was then filed on July 23, 2003, when Barnes appeared in court.

¶3 Barnes moved to dismiss the case. He claimed that the initial citation/notice forms were insufficient to initiate a felony action and give the circuit court jurisdiction under WIS. STAT. §§ 968.01, 968.02, and 968.04 (2005-06),[1] because they were issued by the police rather than the district attorney and did not qualify as a warrant and summons. Barnes relied upon an attorney general's opinion suggesting that a default judgment on a felony entered following

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

the failure to appear as notified on such a misdemeanor citation form would be invalid. *See* 63 Wis. Op. Att'y Gen. 540 (1974).

¶4 We agree that the citation forms would have been insufficient, in and of themselves, to serve as either formal charging documents for a felony or a warrant and summons. As the State pointed out, however, the Wisconsin Supreme Court has held that jurisdiction in a criminal case does not depend upon the issuance of a warrant and summons, but upon the defendant's physical appearance before a court or magistrate to hear the charges set forth in the complaint. ***Pillsbury v. State***, 31 Wis. 2d 87, 92, 142 N.W.2d 187 (1966). It is unnecessary to file a warrant and summons for a defendant who is already in lawful custody. ***Id.***; ***State v. Jennings***, 2003 WI 10, ¶1, 259 Wis. 2d 523, 657 N.W.2d 393.

¶5 Here, Barnes had already been lawfully arrested when he was notified of a court date, then was brought before a magistrate the following day to hear the charges set forth in a formal complaint. We agree with the State and the trial court that no warrant or summons was required in these circumstances and that it was the complaint, not the citation forms, which initiated the criminal action and provided the circuit court with jurisdiction. In essence, the citation forms were superfluous. They simply provided additional notification to Barnes of when he would be making his initial appearance.

Motion to Suppress

¶6 Barnes moved to suppress verbal and written statements he had made to police on the grounds that he had not been properly advised of his ***Miranda***[2] rights, and had not knowingly and voluntarily waived his rights.

¶7 At the suppression hearing, Detective Sergeant Joseph Welsch testified that he had been one of several officers to respond to a reported burglary, and that he had participated in the apprehension of Barnes, who was lying in weeds or brush near the scene. Welsch said he read Barnes his ***Miranda*** rights from a form shortly after handcuffing him and placing him in a squad car. Barnes then agreed to answer questions, but did not sign the form because he was handcuffed. Welsch did not detect the odor of intoxicants or notice that Barnes had any difficulty in responding to questioning.

¶8 Detective Aaron Kirby heard Welsch advise Barnes of his rights. Barnes said he understood his rights and agreed to answer questions. No threats or promises were made, and Barnes did not ask for counsel or raise any complaints during questioning. After Barnes was transported to the county jail, Kirby re-read him his ***Miranda*** rights before questioning him again. This time, Barnes signed the form, although the police misplaced it.

¶9 Barnes did not testify at the suppression hearing, and the trial court accepted the officers' account that Barnes had been fully advised of his ***Miranda*** rights and had voluntarily waived them. Credibility determinations by a trial court acting as the factfinder are not reviewable by this court. ***State v. Oswald***, 2000 WI

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

App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238. Based on the officers' testimony, the trial court properly found Barnes' statements to be voluntary and denied the suppression motion.

Amended Information

¶10 The citation forms advising Barnes of his initial court date stated that the alleged offenses were committed in the Village of Blackhawk. The formal complaint issued the next day stated the offenses were committed in the Village of Spring Green. The initial information filed after Barnes waived his preliminary hearing stated that the offenses were committed in the City of Baraboo. Testimony at the suppression hearing indicated that the offenses occurred in the Village of Blackhawk.

¶11 At a status conference held on the morning that the matter was scheduled for trial, the court noted the discrepancy between the information and the suppression hearing testimony regarding the location of the offenses. The State then moved to amend the information to state that the burglary had occurred in the Town of Troy. Barnes objected on the grounds of prejudice, claiming that he had waived his preliminary hearing and prepared to defend against a charge of having committed a burglary in Baraboo, and might have challenged the information or subpoenaed other witnesses to defend against a charge in Troy. The trial court permitted the amendment, but set the trial date back to allow Barnes to gather any additional witnesses he felt he needed.

¶12 A court may permit the State to amend an information at any point before trial so long as the defendant's rights are not prejudiced. ***Whitaker v. State***, 83 Wis. 2d 368, 373, 265 N.W.2d 575 (1978). An amended information is prejudicial when it provides insufficient notice to allow the defendant to prepare

and defend against the charge. ***State v. Neudorff***, 170 Wis. 2d 608, 619, 489 N.W.2d 689 (Ct. App. 1992).

¶13 We are not persuaded that Barnes was prejudiced by the amendment of the information in this case. To begin with, there was never any change in the address of the house which Barnes was charged with burglarizing. The only discrepancy concerned which municipality actually covered that address. Since each of the alleged municipalities was in Sauk County, there was never any question as to venue. Moreover, since Barnes was caught near the scene, this was not an alibi case. In short, we do not see how Barnes would have prepared for trial any differently merely because the house he was charged with burglarizing was actually within the boundaries of the Town of Troy rather than the City of Baraboo, Village of Blackhawk or Village of Spring Green.

Motion to Strike Juror

¶14 During voir dire, potential juror Thomas Greves indicated that he thought the defendant "should have to testify" and that if the defendant were really innocent, he should "be able to prove himself while speaking his mind on the subject." After the court explained that a defendant had a constitutional right not to testify, Greves stated, "yeah, I know there's the law that says he doesn't have to testify, but I gave you my feeling." After the court further explained that the State had the burden of proof, and that the defendant had no obligation to prove anything, Greves agreed that he could listen to the State's evidence and decide whether it had proved its case beyond a reasonable doubt. The trial court refused to strike Greves for cause, but Barnes used a preemptory strike to remove him from the jury pool.

¶15 Barnes contends that requiring him to use a preemptory strike to correct the trial court's failure to strike Greves for cause constituted a due process violation under ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997). However, ***Ramos*** has been overruled by ***State v. Lindell***, 2001 WI 108, ¶111, 245 Wis. 2d 689, 629 N.W.2d 223. ***Lindell*** held that the exercise of a single preemptory strike to correct a trial court error does not affect the substantial rights of the defendant. ***Id.***, ¶113. Therefore, even assuming for the sake of argument that the trial court should have struck Greves for cause, the error was harmless and does not entitle Barnes to a new trial.

Response to Jury Questions Outside Barnes' Physical Presence

¶16 After the jury began its deliberations, Barnes was returned to the law enforcement center. The jury subsequently notified the court that it had several questions. These included: a request to see the burglary tools Barnes was found carrying and pictures of the door showing marks of forced entry; a request for two police reports; a request for a copy of an officer's testimony; a request to see Barnes' booking photo; and an inquiry as to what would happen if they were only able to agree on one of the charges. The court reconvened in the presence of defense counsel, with Barnes linked by video. The court was unable to accommodate Barnes' request to confer privately with counsel regarding whether to object to some of the juror's requests during the proceedings. However, it did have Barnes brought back into court before giving standard jury instruction 520 regarding what to do if the jury could not agree.

¶17 A defendant has a constitutional and statutory right to be present "whenever any substantive step is taken" in a criminal case, including during any communications between the court and the jury. ***State v. Anderson***, 2006 WI 77,

¶¶39-43, 291 Wis. 2d 673, 717 N.W.2d 74 (citation omitted). Similarly, a defendant "has the right to be represented by counsel at all critical stages of the trial," again including during any communications between the court and the jury. ***Id.***, ¶¶67-69. However, both rights are subject to a harmless error analysis. ***Id.***, ¶¶45, 75-76.

¶18 Here, we need not address whether Barnes' appearance by video was sufficient to satisfy his right to be present during a substantive step of his trial, or whether his inability to privately confer with counsel during the court's consideration of the jury's questions deprived him of his right to counsel during a critical stage of the trial, because we are satisfied that the State has met its burden of showing that Barnes was not prejudiced by either event.

¶19 As the State notes, the court had already discussed with the parties—in the physical presence of both Barnes and counsel—which, if any, exhibits would be allowed to go to the jury. The only exhibit to which defense counsel objected at that time was the booking photo of his client. Counsel's responses to the subsequent jury requests were in accordance with the position he had already taken in the physical presence of his client.

¶20 In any event, the trial court's rulings were all proper. The court allowed the jury to see the burglary tools, crime scene photos, and Barnes' booking shot, which had all been entered into evidence; and did not allow it to see the police reports, which had not. It also denied the request for the officer's testimony, advising the jury to rely upon their collective recollection. There is no reason to believe any of these rulings would have been different had Barnes been physically present instead of linked by video, or had been able to confer privately with counsel while the court was considering the requests.

First Postconviction Motion

¶21 Barnes filed a postconviction motion alleging that counsel was ineffective for failing to request a jury instruction on withdrawal from conspiracy and for failing to fully impeach prosecution witness Todd Diske, claiming that the real controversy had not been tried as a result. At the ***Machner***[3] hearing, postconviction counsel withdrew the first contention, explaining that upon reflection there appeared to be good strategic reasons for not requesting the withdrawal instruction.

¶22 Barnes testified at trial that Diske had planned the robbery of his own parents' house, and that Barnes and Goodman were supposed to break in and open a safe which Diske had described to them. Barnes claimed that after Diske dropped him and Goodman off near the house they had a falling out, whereupon Barnes left without breaking in and encouraged Goodman to also abandon the plan. During closing argument, defense counsel simply argued that Barnes had not committed the crime because he did not go into the house or garage, without discussing a withdrawal from a conspiracy.

¶23 In support of the defense theory, Barnes' brother testified that Barnes, Goodman and Diske had gathered at the Barnes' home the weekend before the burglary, and that a jacket recovered by police actually belonged to Goodman. A police officer testified that Barnes had told him that Diske had planned the crime and dropped him off at his parents' house. Virginia Diske was

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

shown a picture of Goodman at trial, and testified that his hair was similar to that of the suspect she had seen fleeing the house.

¶24 Diske denied at trial that he had met with Barnes or Goodman the weekend before the burglary , or that he had in any way participated in planning the burglary. Diske admitted that he knew his parents had a safe on their property, and he had helped install it. However, Diske had told police that he did not know if his father had a safe at home. Defense counsel did not ask Diske about his prior statement. Barnes claims that it could have shown that Diske had lied to police to cover his involvement.

¶25 At the ***Machner*** hearing, defense counsel testified that he thought it was ambiguous whether there was an actual contradiction, because Diske testified at trial that his parents had a safe in their garage, and told police he didn't know if they had one "at home." However, he could not think of a strategic reason for failing to pursue the issue.

¶26 The trial court noted that defense counsel's performance does not need to be perfect, merely objectively reasonable. The court concluded it was not necessary for counsel to impeach Diske on his knowledge of the safe, because counsel had already impeached Diske's testimony on another issue, and pushing the safe issue too far could have given Diske the opportunity to rehabilitate his testimony.

¶27 The court further concluded that the failure to impeach on the safe issue was not prejudicial because there was strong evidence disputing Barnes' claim that Diske had dropped him off that morning. We agree that the failure to impeach on the safe issue was not prejudicial because it would not have been likely to lead to a different result given the other evidence at trial. Furthermore,

the real controversy was fully tried because the jury was given an opportunity to hear both Barnes' and Diske's testimony, and to judge their relative credibility for themselves.

Second Postconviction Motion

¶28 Postconviction counsel filed a notice of appeal after Barnes' first postconviction motion was denied. However, Barnes complained to this court that counsel had waived Barnes' challenge to counsel's failure to request the jury instruction without his approval, and failed to preserve other issues he wished to raise on appeal. We permitted Barnes to discharge postconviction counsel, dismissed the appeal without prejudice, and reinstated Barnes' postconviction rights to allow him to go back and preserve his issues for appeal. We said: "The circuit court can evaluate for itself whether any of Barnes' additional allegations are sufficient to warrant another hearing, or may be ruled upon based on the record already established."

¶29 Barnes raised a host of issues in his supplemental, pro se postconviction motion. Because some of these issues overlap, we have consolidated and rearranged several of them. In addition to the issues which we have already discussed, which were preserved by contemporaneous objections or litigated at the ***Machner*** hearing, Barnes raised the following claims for the first time: (1) the State failed to disclose a list of witnesses to be called at trial, including Todd Diske; (2) the State suppressed evidence by failing to call the officer who had interviewed Diske; (3) the State failed to turn over exculpatory materials in the form of Officer Kirby's interview notes (that were destroyed after he prepared his report), which Barnes contends would show that he was also interrogated about drug dealers; (4) the State failed to turn over Barnes' booking

photo—limiting Barnes' ability to alternately use the photo at his suppression hearing or challenge its authenticity at trial—and counsel failed to object to the booking photo as not having been turned over during discovery; (5) the State did not turn over all of the crime scene photos that were introduced at trial and counsel failed to move to exclude exhibits that were not disclosed during discovery; (6) counsel failed to compare crime scene photos of the tool marks and the tools recovered from Barnes; (7) counsel failed to compare Barnes' boots with photos of the footprints found by the scene; (8) the court should have struck potential juror Dennis Giebel for believing that a defendant should testify, and Barnes should not have had to use a preemptory strike; (9) Barnes was denied an impartial jury because juror Wilkinson knew Todd Diske; (10) Barnes was denied an impartial jury because there was some nonverbal interaction between jurors and the Diskes and other witnesses during breaks; (11) the victims had no statutory right to be present at his status hearing; (12) Barnes was improperly denied his right to counsel at the status hearing, because he waived the right to counsel under the false belief that the matter was going to trial that day; (13) counsel failed to ask or inform Barnes that he was going to waive reading of the complaint; (14) the preliminary hearing was scheduled beyond the deadline; (15) the trial court failed to make an independent probable cause determination to bind Barnes over; (16) counsel failed to ask or inform Barnes that he was going to waive the preliminary hearing; (17) Barnes did not validly waive his preliminary hearing because he was undergoing severe drug withdrawal and distress over his brother's death; (18) counsel failed to challenge the erroneous crime location in the information; (19) counsel deficiently advised Barnes that he did not need to testify at the suppression hearing; (20) counsel failed to obtain an expert witness to discuss the effect of Barnes' drug dependency at the suppression hearing; (21) counsel failed to interview witnesses at the weekend gathering where Barnes

claims the robbery was planned; (22) counsel failed to investigate witnesses who could have substantiated that Diske and Goodman were involved in drug trafficking, which could have been used to impeach Diske's testimony that he hardly knew Goodman and provided motive for Diske to set up the burglary to pay off his drug debt; (23) counsel failed to make use of a cassette tape on which Barnes and his brother were discussing the possibility that Todd Diske had killed Casey Goodman over a drug trafficking dispute shortly after the burglary; (24) counsel failed to request a "withdrawal from conspiracy" instruction, leaving the real controversy untried; and (25) counsel failed to raise an intoxication defense at trial. Barnes contends that the trial court improperly denied this postconviction motion without a hearing.

¶30 As the trial court correctly noted, however, no hearing is required on a postconviction motion when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A non-conclusory allegation is one which allows the court to meaningfully assess a claim. ***State v. Allen***, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433. We agree that Barnes' allegations were insufficient to show that he was entitled to relief on any of his postconviction claims.

¶31 First, the State was not required to disclose Todd Diske as a witness because it did not call him during its case-in-chief. It only called him as a rebuttal witness after Barnes had testified that Diske was involved in planning the robbery of his parents' house.

¶32 Second, the State had no obligation to call the officer who had interviewed Diske. Barnes could have called the officer himself if he wished to have his testimony.

¶33 Third, there is no obligation that an officer preserve the personal notes he takes to assist in writing a report, and the State has no subsequent obligation to turn over materials which do not exist.

¶34 Fourth, Barnes waived any objection to the State's alleged failure to turn over the booking photo during discovery by failing to challenge its admission. We are not persuaded that counsel's failure to object to the admission of the booking photo was prejudicial, because there was already evidence of what Barnes was wearing when he was arrested in the record. We are also not persuaded that the photo demonstrates that Barnes was high at the time of his arrest, as he contends.

¶35 Fifth, Barnes does not identify specifically which crime scene photographs he claims were not turned over during discovery. Since many of the photographs showed similar things and Barnes concedes that some photos were turned over, his allegations are insufficient to evaluate whether he was prejudiced by the alleged discovery violation.

¶36 Sixth, counsel's alleged failure to compare the crime scene photos of tool marks on the door with the tools recovered from Barnes does not demonstrate ineffective assistance absent any additional allegation that there is some objective information that the marks did not in fact match the recovered tools.

¶37 Seventh, counsel's alleged failure to compare Barnes' boots with photos of footprints found near the scene does not demonstrate ineffective

assistance of counsel absent any additional allegation that there is some objective information that the footprints did not in fact match Barnes' boots.

¶38 Eighth, the same analysis we applied to Juror Greves applies to Juror Giebel.

¶39 Ninth, the record does not demonstrate that Juror Wilkenson's slight acquaintance with Diske or his parents would make her unable to remain impartial in the case.

¶40 Tenth, Barnes' allegations regarding "interactions" between jurors, witnesses, parties, and court personnel during breaks does not contain any description of what, if any, words were exchanged. Therefore, the allegations provide no basis to conclude that the jury was actually provided with any extraneous information about the case, much less that it relied upon such information during deliberations.

¶41 Eleventh, the question is not whether the court was required by the victim's rights statute to allow the victims to be at the status conference, but whether they were somehow prohibited from being there. Barnes has provided no authority that would bar the court from allowing their attendance.

¶42 Twelfth, the court engaged in an extended colloquy to ensure that Barnes was knowingly and voluntarily waiving his right to counsel at the status hearing. Barnes repeatedly insisted that he was. Whether or not the State subsequently amended the information does not affect the validity of Barnes' decision to proceed without counsel at that point.

¶43 Thirteenth, regardless whether counsel did or did not discuss with Barnes in advance waiving the formal reading of the criminal complaint, the

record shows that the court personally advised Barnes of the charges against him at the initial appearance. Since Barnes was well aware that he was being charged with burglarizing the Diskes' house, we see no prejudice even if he did not personally authorize waiving a formal reading of the complaint.

¶44 Fourteenth, there was no error in scheduling the preliminary hearing beyond the deadline, because Barnes personally informed the court that he was willing to waive the deadline.

¶45 Fifteenth, Barnes' allegation that counsel failed to ask or inform Barnes that he was going to waive the preliminary hearing is directly contradicted by the record, which includes a signed preliminary hearing waiver form, which Barnes affirmed in open court that he understood and had had sufficient time to review.

¶46 Sixteenth, Barnes' claim that his waiver was involuntary because he was undergoing severe drug withdrawal and distress over his brother's death is conclusory because Barnes does not identify any information which he actually failed to understand.

¶47 Seventeenth, counsel's failure to challenge the erroneous crime location in the complaint or initial information did not result in any prejudice because the information would simply have been amended sooner.

¶48 Eighteenth, contrary to Barnes' contention, the record shows that the trial court *did* make a probable cause determination to bind Barnes over for trial after he waived his preliminary hearing. The fact that the determination was made based upon the erroneous location set forth in the original complaint is irrelevant because a bindover determination is not reviewable after trial. *See* ***State v. Webb***,

160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) (a valid conviction cures any defect in the preliminary hearing).

¶49 Nineteenth, Barnes' allegation that counsel advised him that he did not need to testify at the suppression hearing because the State did not have any signed waiver forms does not demonstrate ineffective assistance of counsel. There are always serious risks to having a defendant testify, and counsel's performance at the suppression hearing shows that he was following a reasonable alternate strategy for suppressing Barnes' statements.

¶50 Twentieth, Barnes' allegation that counsel failed to obtain an expert witness to discuss the effect of Barnes' drug dependency at the suppression hearing is conclusory because he has not provided any documentation that such an expert would have anything helpful to say.

¶51 Twenty-first, Barnes' allegation that counsel failed to interview witnesses at the weekend gathering where Barnes claims the robbery was planned is conclusory because Barnes has not provided statements from any of those people that would show they would have provided any helpful testimony to the defense.

¶52 Twenty-second, Barnes' allegation that counsel failed to investigate witnesses who could have substantiated that Diske and Goodman were involved in drug trafficking is also conclusory because Barnes has again failed to produce statements from anyone that would show they would actually have provided testimony he claims they would have.

¶53 Twenty-third, Barnes' allegation that counsel failed to make use of a cassette tape on which Barnes and his brother were discussing their belief that

Todd Diske had killed Casey Goodman over a drug trafficking dispute shortly after the burglary does not demonstrate ineffective assistance of counsel because there is no basis to believe that such a tape would have been admissible.

¶54 Twenty-fourth, counsel's decision not to request a "withdrawal from conspiracy" instruction does not demonstrate ineffective assistance of counsel where the State was not arguing that there was a conspiracy and no conspiracy instruction was given. If the jury had believed Barnes' story that it was actually Goodman who entered the house, Barnes could have gained an outright acquittal.

¶55 Twenty-fifth, counsel's failure to raise an intoxication defense at trial does not demonstrate ineffective assistance of counsel where there was no objective evidence to show that Barnes was, in fact, intoxicated.

¶56 Barnes has also argued several variations of the above issues throughout his brief. Any such additional arguments are deemed denied without further discussion. *See* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments unless they have "sufficient merit to warrant individual attention").

By the Court.—Judgment and orders affirmed.

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