COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP396
2009AP397

Cir. Ct. Nos. 1990CF517
1990CF566

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE H. PETERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. George Peters appeals an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief. He was convicted in 1991 on two counts of armed robbery and two counts of felon in possession of a firearm, as a repeat offender on all counts. His rights to seek postconviction relief under WIS. STAT. RULE 809.30 were exhausted in 1995 after an appeal to this court and a petition to the supreme court. He contended in his § 974.06 motion that he received ineffective assistance from postconviction counsel in his RULE 809.30 proceeding because counsel failed to raise various meritorious issues concerning the circuit court proceeding and his representation by trial counsel during that proceeding. He contends on appeal that the trial court erred by denying the motion without a hearing. We affirm.

¶2 Peters was a passenger in a car stopped by police. The police discovered a firearm in Peters' suitcase following a search of the vehicle pursuant to the driver's arrest. After a criminal records check revealed that he had felony convictions, he was arrested as a felon in possession of a firearm. He was subsequently tried and found guilty by a jury on the two armed robbery and two possession charges and was sentenced and convicted as a repeat offender. He received consecutive thirty-year sentences for the robberies, and ten- and four-year sentences on the firearm possessions, the former concurrent to the robbery sentences and the latter consecutive to them.

¶3 The WIS. STAT. § 974.06 motion Peters filed in 2008 alleged that trial counsel and/or postconviction counsel were ineffective because they failed to

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

pursue the following issues: (1) he was arrested without probable cause for possessing a handgun as a felon, because the information police had about his felony record was incorrect; (2) he was sentenced on inaccurate information because the circuit court considered the same incorrect information about his record at sentencing; (3) the court sentenced him to ten years in prison on one of the firearm possession charges when the maximum sentence allowed by statute was eight years; and (4) the court sentenced him to four years as a repeater without first imposing the maximum underlying two year sentence on the other possession charge.

¶4 The court acknowledged that Peters' ten-year sentence exceeded the maximum, but denied relief because he had already finished serving that sentence. The court otherwise denied relief, without a hearing, because the error in the sentencing information about Peters' felony record was merely a technical defect, the officer who arrested Peters had information on other felony arrests as well, and the sentencing court was not required to impose a maximum sentence on the underlying offense before sentencing Peters as a repeater. On appeal Peters contends that each of his claims warrants a hearing.

¶5 The circuit court need not hold a hearing on a claim of ineffective counsel if the defendant fails to allege facts that, if true, would entitle the defendant to relief, or the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient facts is a question of law. ***Id.*** If the court determines that the record conclusively demonstrates that the defendant is not entitled to relief, we review whether the court erroneously exercised its discretion in making that determination. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (citation omitted).

¶6 There is no dispute, and never has been, that Peters was convicted of armed robbery, in a Michigan court, in 1977. There is also no dispute that the complaint the State filed in this matter misidentified the date and county of the conviction, and that the error was never corrected during the proceeding. The only dispute is whether the misidentification provides any grounds for relief in this proceeding, and the trial court properly determined that it did not. It was the fact of the armed robbery conviction, and not its exact date or location, that gave the police probable cause to arrest Peters as a felon, even assuming that police had the same incorrect date and location that appeared in the complaint, which is not a known fact at this time.

¶7 In addition, even assuming he was illegally arrested, his arrest did not lead to any evidence that was arguably suppressible because of the arrest. The handgun that Peters seeks to suppress was discovered while the deputy was searching the vehicle Peters' friend was driving pursuant to the friend's arrest. That is, the weapon's discovery was not related to Peters' arrest for possessing the handgun as a felon. Thus, even if police did not have probable cause to arrest Peters, the record conclusively demonstrates that trial counsel had no reason to pursue the issue, because the State either discovered the evidence used to convict Peters before the arrest, or independent of the arrest. *See* ***State v. Anderson***, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991) (illegal arrest does not lead to suppression of evidence obtained by means sufficiently attenuated from the arrest).[2]

[2] For reasons that are unclear, the State's brief asserts that Peters' Fourth Amendment challenge to the search that revealed the firearm is an issue that he finally litigated in his first appeal, and cannot now litigate again. That is true but beside the point. The issue he raises in this appeal is not the legality of the search, but the legality of his subsequent arrest.

¶8 It was also the fact of the conviction, and not the date and venue, that was material to his sentencing. Consequently, there would have been no benefit to Peters had trial counsel raised the matter at sentencing. The error would have been subject to correction, and nothing more. *See* WIS. STAT. § 971.26 (non-prejudicial, technical errors in the complaint have no effect on proceedings). In short, the record conclusively demonstrates that neither counsel performed ineffectively by failing to raise this issue, either in the suppression or sentencing context.

¶9 There is no requirement in Wisconsin law that the sentencing court, when sentencing the defendant as a repeater, must first pronounce the maximum underlying sentence, and then impose the repeater portion of the sentence. In fact, the preferred practice is to impose a unified sentence, as the sentencing court did here. *See* ***State v. Kleven***, 2005 WI App 66, ¶18 n. 4, 280 Wis. 2d 468, 696 N.W.2d 226 (court should impose sentence "*without* allocating any portions of the confinement imposed among the base offense and enhancers. Such allocation is not required by statute or case law, and in fact, appears to not only be contrary to the rationale of WIS. STAT. § 973.12(2), but may lead to unnecessary confusion or claims of error …."). Consequently, Peters cannot reasonably contend that postconviction counsel should have challenged the sentence on these grounds.

¶10 Peters no longer has a viable claim regarding the unlawful ten-year sentence imposed on the other firearm possession count. Under WIS. STAT. § 973.13, the time imposed over the maximum is voided and the sentence commuted to the maximum eight years, which Peters finished serving in 1999. No other remedy is now available and, in any event, because the sentence has expired, Peters can no longer challenge it under WIS. STAT. § 974.06. *See* WIS. STAT. § 974.06(1).

By the Court.—Order affirmed.

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