COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP106-CR **Cir. Ct. No. 2007CF609**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. MARSHALL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. David Marshall appeals an order denying his pro se postconviction motion in which he challenged his convictions on two counts of second-degree recklessly endangering safety as a repeater. He argues that his trial counsel was ineffective for failing to assert a violation of Marshall's Fourth

Amendment rights when two law enforcement officers attempted to effect a ***Terry*** stop,[1] and for failing to cross-examine the officers with prior inconsistent statements. He also argues prosecutorial misconduct for presenting perjured testimony. We reject these arguments and affirm the order.

¶2 Marshall was charged with recklessly endangering the safety of the officers as they were attempting to stop him to investigate suspicious activity in a store and parking lot. A store security officer, after he had been alerted about an incident at another store, summoned the police when he observed Marshall and a woman selecting random items and placing them in a shopping cart rather than actually shopping. After putting many items in the shopping cart, Marshall left the cart unattended in the store and exited the building without purchasing anything. Marshall then entered a vehicle in the parking lot and moved the car to another parking spot, next to a car and an unattended shopping cart with items in it. That cart belonged to a woman who was selling brats at the store for her daughter's Girl Scout troop. She had packed the cart with items from the brat sale and gone back to retrieve more items.

¶3 The officers and store security watched as Marshall exited his vehicle and walked to the passenger's side near the unattended shopping cart. He then opened and closed the passenger door of his vehicle. At that point, the officers ran from the store to investigate because they believed Marshall had committed or was about to commit a crime. As the uniformed officers approached the car, they began yelling "Stop," and an officer attempted to open the passenger door as Marshall was backing out of his parking spot. Marshall continued to back

[1] ***Terry v. Ohio***, 392 U.S. 1 (1968).

up, forcing an officer to move out of the way to avoid being struck by the open door. Marshall then accelerated in the direction of the other officer, who drew his gun and fired three rounds at the vehicle, injuring Marshall. Marshall then fled from the parking lot, but was apprehended shortly thereafter.

¶4 The court appropriately denied Marshall's postconviction motion without a hearing because the motion fails to allege sufficient material facts that, if true, would entitle Marshall to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Marshall's motion does not establish deficient performance or prejudice from his trial counsel's performance, *see* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), and his claim that the officers committed perjury based on the minor inconsistencies in their testimony is frivolous.

¶5 Apparently believing that he was privileged to endanger the officers' safety if they lacked sufficient grounds to perform a ***Terry*** stop, Marshall argues that his trial counsel was ineffective for failing to file a motion to vindicate his Fourth Amendment rights. The trial court correctly rejected that argument, concluding the officers had sufficient grounds to attempt to stop Marshall in the parking lot. Marshall's pretending to be shopping and abandoning the full cart, his carrying a coat on a warm July day, moving the car from one parking spot to another and approaching the unattended shopping cart in the parking lot constitute sufficient suspicious behavior to allow the police to temporarily detain him. *See* ***State v. Anderson***, 155 Wis. 2d 77, 83, 454 N.W.2d 763 (1990). Because any Fourth Amendment challenge to the officers' conduct would have failed, Marshall has established neither deficient performance nor prejudice from his counsel's failure to raise that issue. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶6 Marshall also failed to establish deficient performance or prejudice from his counsel's failure to impeach the officers' trial testimony with inconsistent statements made at the preliminary hearing and in earlier police reports. The inconsistencies relate to whether the officers saw Marshall remove something from the cart in the parking lot or whether they merely saw him approach the shopping cart. The trial court correctly concluded that the discrepancies constituted slight variations consistent with failed memory during the long delay before trial. The jury heard testimony from numerous witnesses and viewed videotape footage from the surveillance camera. In addition, counsel did specifically introduce the officers' numerous statements and pointed out some inconsistencies. Pointing out additional minor inconsistencies would not have benefitted the defense. ***State v. DeLeon***, 127 Wis. 2d 74, 85, 377 N.W.2d 635 (Ct. App. 1985).

¶7 Finally, the officers' allegedly inconsistent testimony did not qualify as perjury, and therefore the trial court correctly rejected Marshall's claim that the State engaged in prosecutorial misconduct. The inconsistencies in the officers' statements do not show that the officers did not believe in the truth of their testimony. *C.f.* ***State v. Rivest***, 106 Wis. 2d 406, 424, 316 N.W.2d 395 (1982) (perjury requires proof of scienter).

¶8 Finally, Marshall argues that the officers engaged in outrageous government conduct. He appears to raise this issue to support his request to have the charges dismissed rather than to obtain a new trial in the event any of his issues would be found meritorious. Because his issues are not meritorious, we need not address that issue. In any event, we would agree with the trial court that the doctrine of outrageous government conduct does not apply because there is no evidence that the government itself was so enmeshed with criminal activity that

prosecution of Marshall would be repugnant to the American criminal justice system. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 297, 516 N.W.2d 776 (Ct. App. 1994).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).