COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1552 **Cir. Ct. No. 2015CV2**

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

STATE OF WISCONSIN EX REL. DON M. SUMMERS,

PETITIONER-APPELLANT,

V.

JON E. LITSCHER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Barron County: MAUREEN D. BOYLE, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Don Summers appeals an order denying his petition for a writ of habeas corpus following revocation of his probation and

extended supervision. Summers argues the attorney who represented him at his revocation hearing provided ineffective assistance. We disagree and affirm.[1]

BACKGROUND

¶2 In Barron County case No. 2005CF18, Summers was convicted of one count of manufacturing or delivering less than three grams of heroin and one count of manufacturing or delivering up to one gram of cocaine. Summers received concurrent sentences of four years' initial confinement and four years' extended supervision. He was released to extended supervision in relation to these charges on February 29, 2008.

¶3 Thereafter, Summers was convicted in Barron County case No. 2009CF223 of one count of manufacturing or delivering up to 200 grams of tetrahydrocannabinols, as a party to a crime. Sentence was withheld, and Summers was placed on probation for three years, concurrent to his extended supervision in case No. 2005CF18.

¶4 In November 2011, the Department of Corrections (DOC) recommended revocation of Summers' extended supervision in case No. 2005CF18 and his probation in case No. 2009CF223. As the basis for that

[1] As an alternative basis to affirm the circuit court's decision, the State argues Summers' habeas petition was time-barred under the doctrine of laches. Because we conclude Summers has not met his burden to show ineffective assistance, we need not address the State's alternative argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

recommendation, the DOC alleged Summers had violated his rules of supervision by participating in a drug transaction on October 26, 2011.[2]

¶5 A revocation hearing was held on December 13, 2011. At the hearing, the DOC submitted two Barron County Sheriff's Department drug enforcement case activity reports dated October 24, 2011—two days before the alleged violation. The author of the reports, detective Ron Baures, stated Curtis Duke contacted the Barron County Sheriff's Department on October 24, alleging that Summers and his cousin, Benjamin Burnett, were the "main person[s]" involved in the distribution of heroin and cocaine in the area, and that Frank Chandler acted as their "enforcer." Duke claimed he was providing this information because Chandler had been threatening Duke regarding an outstanding drug debt of $140. Duke denied owing that money, but he admitted purchasing cocaine from Burnett twenty to thirty times between February and October 2011. Duke alleged Burnett obtained the cocaine from Summers.

¶6 At about 3:05 p.m. on October 24, Baures and another detective had Duke arrange to purchase cocaine from Chandler in a controlled buy. They provided Duke with $300, which included $150 to buy the cocaine and $140 to pay off Duke's alleged debt. The detectives also gave Duke a covert video camera and placed an audio transmitter in his vehicle.

[2] As a separate ground for revocation, the DOC alleged Summers had violated his rules of supervision by possessing drug paraphernalia. The administrative law judge (ALJ) who presided over Summers' revocation hearing concluded the evidence was insufficient to support a finding that Summers possessed drug paraphernalia. We therefore do not further address this second alleged violation.

¶7 Later that day, Duke agreed to "ride in Chandler's Jeep to meet [Summers] to purchase cocaine." Chandler drove Duke from Rice Lake to Cameron, where he dropped Duke off at a gas station. Chandler then drove to a nearby residence on Arlington Avenue. About five minutes later, Chandler picked Duke up from the gas station, and they drove back to Duke's residence in Rice Lake. After Chandler left, Duke gave detectives chunks of an off-white material that field-tested positive for cocaine. When detectives later drove past the Arlington Avenue residence in Cameron, they observed that one of the three vehicles parked outside, a gray Saturn, was registered to Summers' girlfriend, Whitney Davis.

¶8 According to other law enforcement reports introduced at the revocation hearing, Duke again contacted detectives on the morning of October 26, 2011, alleging that Burnett had called him and asked to borrow his vehicle "to go to Eau Claire to meet Don Summers to pick up an unknown quantity of cocaine and heroin." Duke agreed to allow Burnett to use his vehicle to drive to Eau Claire. Detectives provided Duke with an "electronic transmitter to record [his] contact with Burnett when they exchanged vehicles."

¶9 After Duke and Burnett exchanged vehicles, officers followed Burnett to a residence on Eddy Street in Eau Claire. Shortly after noon, Duke called Burnett to order $150 worth of cocaine, which Burnett confirmed "would be available for [Duke] to purchase." At 12:18 p.m., officers observed a "heavy set white female" leave the Eddy Street residence and drive away in the Saturn registered to Davis. At 12:29 p.m., the Saturn returned to the residence, driven by the same female, followed by a burgundy Jeep registered to Chandler. Shortly thereafter, Chandler's Jeep left the residence, and Burnett drove away in Duke's vehicle.

¶10 Both Chandler and Duke drove to Chandler's residence in Barron, and Burnett then continued to Duke's residence in Rice Lake, where he again exchanged vehicles with Duke. Officers could not hear what occurred during that exchange because the audio transmitter they had placed in Duke's vehicle earlier that morning had run out of batteries and was no longer transmitting. Duke subsequently told detectives that Burnett had heroin bindles in his hand when they exchanged vehicles, but he did not have any cocaine.

¶11 At about 3:20 p.m., Duke reported to law enforcement that Burnett had offered to take him to Chetek to meet Summers to get cocaine. Detectives again met with Duke to prepare him for a controlled buy, providing him with "a covert digital audio/video recorder and $150 in pre-recorded money."

¶12 Duke picked Burnett up at his residence at about 4:30 p.m., and they drove to a Kwik Trip in Bloomer. Detectives were unable to hear what was happening inside Duke's vehicle because the audio transmitter in the vehicle "had reached its recording capacity during the previous operation." However, while Burnett was inside Kwik Trip purchasing food, Duke contacted detectives and reported that Summers would be delivering the cocaine to Duke and Burnett at Kwik Trip.

¶13 Shortly thereafter, Davis' vehicle arrived at the Bloomer Kwik Trip and parked next to Duke's vehicle. Burnett exited Duke's vehicle and got into the back seat of Davis' vehicle. Burnett returned to Duke's vehicle two minutes later, and Burnett and Duke then drove away. After Duke's vehicle left, Davis' vehicle pulled up to a gas pump, and detectives saw Summers pumping gas into the vehicle. Detectives later determined based on surveillance video that, at some

point, Davis had exited the vehicle and entered Kwik Trip; however, the officers conducting surveillance at the time did not notice Davis leaving the vehicle.

¶14 While following Duke's vehicle after it left the Bloomer Kwik Trip, detectives contacted Duke via text message to ask if he had received the cocaine, and Duke responded in the affirmative. Detectives then stopped Duke's vehicle and secured Burnett in a squad car. At that point, Duke reported that Burnett had received cocaine from Summers at Kwik Trip, but Burnett was planning to keep the cocaine until he and Duke arrived in Rice Lake. Duke further reported that, while they were driving, Burnett removed the cocaine from its plastic baggie; smashed it into a powder on Duke's vehicle owner's manual; put half of the cocaine in each corner of the baggie; pulled the corners containing cocaine off of the baggie; and then threw the remainder of the baggie out the window. According to Duke, when the vehicle was pulled over, Burnett stated he was going to put the cocaine in his mouth.

¶15 After thoroughly searching both Duke's vehicle and Burnett, detectives failed to discover any drugs. No evidence of a baggie or cocaine was found in Burnett's mouth. Burnett was taken to a hospital, where he declined blood work or treatment and denied swallowing cocaine. An x-ray of Burnett's stomach showed no abnormalities.

¶16 Davis' vehicle was also stopped on October 26, shortly after it left the Bloomer Kwik Trip. A report authored by detective David Kuffel indicates that, when Summers was arrested and searched, officers found inside his pocket "approximately $150 in cash that [Kuffel] was informed to be controlled buy money that was verified through Detective Baures." In a subsequent statement to law enforcement, Summers denied being involved in the distribution of drugs and

specifically denied selling anyone cocaine or heroin on October 26. He asserted he and Davis had stopped at the Bloomer Kwik Trip to buy food and drinks, and he denied meeting anyone there.

¶17 Burnett told officers that, on the morning of October 26, Summers purchased one-quarter ounce of cocaine, four grams of heroin, and twenty-five ecstasy tablets "along Eddy Lane" in Eau Claire. Burnett conceded he was a heroin addict and admitted to "'middling' cocaine and heroin deals through … Summers" in order to "get free heroin for his own personal use."

¶18 Burnett further admitted he "unwittingly 'middled' the cocaine controlled buy between [Duke] and [Summers]" on October 26. According to Burnett, after Duke called him that day asking for cocaine, Burnett called Summers, who agreed to meet Burnett at the Bloomer Kwik Trip "to sell cocaine to Burnett which was going to be sold to [Duke]." When Burnett got into the back seat of Davis' vehicle at Kwik Trip, Davis was in the driver's seat, and Summers was in the passenger seat. Davis handed Burnett the cocaine, and Burnett gave Davis the money he had received from Duke. After Burnett and Duke left Kwik Trip, Burnett unwrapped the cocaine, threw the bag out the window, and then used Duke's vehicle owner's manual to "place[] the cocaine into a cigarette," which he and Duke smoked.

¶19 Davis told detectives she did not know what happened between Summers and Burnett at the Bloomer Kwik Trip because she was inside the store buying snacks for her son at the time. She denied being involved in or witnessing any drug transaction at Kwik Trip. She also denied being aware that Summers was involved with the distribution of controlled substances.

¶20 Chandler admitted to law enforcement that he was involved in the distribution of cocaine. He specifically admitted selling cocaine to Duke on two occasions. However, Chandler denied "being 'heavily' involved in the distribution of controlled substances with Don Summers and Ben Burnett."

¶21 Burnett's girlfriend, Ashley Miller, told detectives she was babysitting Davis' son on October 26 and had watched the child "on a couple of occasions" before that date. Miller stated Davis and Summers "usually want[ed] her to babysit for them when they want[ed] to go out and use drugs."

¶22 The DOC also submitted into evidence at the revocation hearing statements that probation agent Miranda Simpkins obtained from Summers and Burnett on November 3, 2011. In his statement to Simpkins, Summers claimed he and Davis stopped at the Bloomer Kwik Trip on October 26 because Burnett had called and said he needed to talk to Summers. Summers further claimed that, when Burnett got into Davis' car at Kwik Trip, he gave Summers $150 and asked Summers to hold onto that money temporarily because Burnett wanted to steal Duke's money as punishment for Duke making advances toward Burnett's girlfriend.

¶23 Burnett told Simpkins he arranged to meet Summers and Davis in Bloomer after Duke called him about purchasing cocaine. As in his statement to police, Burnett asserted that, after he entered Davis' vehicle, "[she] passed [him] the drugs and [he] gave [her] the money [and] then left." Burnett stated he and Duke then "rolled up two cocaine cigarettes and smoked them" before being pulled over by police. However, Burnett also stated, "I was going to beat [Duke] for his money cause [sic] he just was trying to have sex with my girl and that was going to be my payback to him for that act. I never sold any cocaine to [Duke]."

¶24 In addition to the law enforcement reports and statements summarized above, three witnesses testified at the revocation hearing: Baures, Simpkins, and Summers.[3] Baures testified regarding the October 26 controlled buy and law enforcement's subsequent investigation. Simpkins testified about Summers' November 3 statement to her; his behavior on supervision; and the investigation regarding his alleged violations. Consistent with his statement to Simpkins, Summers testified he did not provide any drugs to Burnett or Duke on October 26, and he merely agreed to hold Duke's money to help Burnett "play [Duke] for his money" because of advances Duke had made toward Burnett's girlfriend.

¶25 In a written decision, the ALJ found that Summers had "conspired with Frank Chandler and Benjamin Burnett to sell cocaine," using Chandler as an intermediary on October 24, and Burnett as an intermediary on October 26. The ALJ found that Chandler dropped Duke off at a gas station on October 24 after promising to obtain cocaine for him and then "drove directly to Summers' residence," after which Chandler returned to the gas station and delivered cocaine to Duke. The ALJ described the evidence connecting Summers to the October 24 transaction as "circumstantial, but … clear and compelling."

¶26 With respect to the October 26 controlled buy, the ALJ acknowledged there were "problems" with that transaction—specifically, that Duke's audio transmitter stopped working at some point during the day, and that Duke's vehicle was stopped before Duke received any cocaine, which gave

[3] Davis asserted her Fifth Amendment privilege against self-incrimination and did not testify.

Burnett the opportunity to dispose of or conceal it. However, the ALJ emphasized that, when Summers was arrested following the controlled buy, law enforcement found the buy money on his person. The ALJ expressly found incredible Summers' testimony that he was in possession of the buy money only because he had agreed to hold it for Burnett.

¶27 Ultimately, the ALJ stated:

> The common aspect of … the transaction on October 24, 2011 and the transaction on October 26, 2011, is that they both involve the use of intermediaries who shielded Summers from direct contact with the police informant and police surveillance. Summers['] words are never heard and the police did not see Summers do anything unlawful. Unfortunately for Summers, the police were able to follow each of the drug transactions to Summers' doorstep or to this car and the circumstantial evidence creates a reasonable inference of drug trafficking.
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> ….
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> When I look at the two transactions … I am satisfied that both transactions involved the sale of cocaine.

¶28 Based on these findings, the ALJ concluded the DOC's allegation that Summers violated his rules of supervision by participating in a drug transaction on October 26 was "true." The ALJ therefore revoked Summers' extended supervision in case No. 2005CF18 and his probation in case No. 2009CF223. The ALJ's decision was affirmed on administrative appeal.

¶29 Summers subsequently filed a petition for a writ of habeas corpus in the circuit court, alleging his attorney at the revocation hearing provided ineffective assistance. Following an evidentiary hearing, the circuit court denied Summers' habeas petition, concluding Summers had failed to show that his revocation attorney was ineffective. The court stated there was no evidence to

support a finding that revocation counsel's decisions "were not made in accordance with a valid strategy." Alternatively, even assuming revocation counsel performed deficiently, the court stated Summers had not met his burden to show it was reasonably probable the outcome of the revocation hearing would have been different absent counsel's alleged errors. Summers now appeals.

DISCUSSION

¶30 A defendant's claim that he or she received ineffective assistance of counsel at a revocation hearing is reviewable by habeas corpus. *See* ***State v. Ramey***, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). Whether counsel rendered ineffective assistance is a mixed question of fact and law. ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. We will not reverse the circuit court's factual determinations unless they are clearly erroneous. ***Id.*** However, whether the facts meet the legal standard for ineffective assistance is a question of law that we review independently. ***Id.***

¶31 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶32 Summers argues his attorney at the revocation hearing was ineffective for two reasons. First, Summers argues revocation counsel was ineffective by failing to adequately object to the "unconfronted hearsay statements allegedly made by Duke; Burnett; Chandler; and Ashley Miller; and reports made by Kuffel."[4] Because these individuals did not testify at the revocation hearing, Summers contends the admission of their statements violated his due process right to confront and cross-examine adverse witnesses. In the alternative, Summers argues revocation counsel should have called the hearsay declarants to testify at the revocation hearing in order to confront them regarding inconsistencies in their statements.

¶33 Second, Summers argues revocation counsel was ineffective by failing to object to the ALJ's "admission of and reliance on" evidence regarding the October 24 controlled buy. Because the DOC did not notify him prior to the revocation hearing "that these allegations were part of the basis for seeking revocation," Summers argues the admission of this evidence violated his due process right to notice of the alleged violations. *See* ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 584, 326 N.W.2d 768 (1982) ("One of the requisites of due process is that the parolee or probationer receive proper notice of alleged violations.").

¶34 Assuming without deciding that revocation counsel performed deficiently in these respects, we nevertheless conclude Summers is not entitled to

[4] As both parties note, revocation counsel *did* object to the admission of these statements, and the ALJ overruled that objection. However, Summers asserts counsel's objection was inadequate because he failed to specifically argue that admission of the statements violated Summers' due process right to confrontation.

relief because he has failed to demonstrate he was prejudiced by counsel's claimed errors. Specifically, he has failed to show that, absent the alleged errors, it is reasonably probable the result of the revocation proceedings would have been different.

¶35 Summers contends he was prejudiced by revocation counsel's failure to exclude the unconfronted hearsay statements because, without those statements, there was no evidence connecting him to any drugs. However, Summers fails to acknowledge the ALJ's key finding that Summers was in possession of the buy money when he was arrested on October 26. That finding did not depend on any of the hearsay statements that Summers now argues should have been excluded. Rather, Baures expressly testified at the revocation hearing that Summers was arrested following the October 26 controlled buy with "$150 of the pre-recorded buy money that had been previously photographed and provided to [Duke] as part of the control buy for the purpose of buying cocaine." That Summers was arrested with the buy money supports a reasonable inference that he was involved in a drug transaction. Baures' testimony therefore provided a basis for the ALJ to conclude, by a preponderance of the evidence, that Summers participated in a drug transaction on October 26. *See* ***id.*** at 585 (DOC has burden to prove alleged violations by preponderance of the evidence at revocation hearings). Given Baures' testimony, it is not reasonably probable the ALJ would have reached a different conclusion had the hearsay statements been excluded.

¶36 Summers insists he offered an alternative explanation for his possession of the buy money—namely, that he agreed to hold the money for Burnett as part of Burnett's plan to retaliate against Duke for making advances toward Burnett's girlfriend. However, the ALJ expressly found that Summers' testimony in that regard was not credible. It would be pure speculation for us to

conclude that, absent the hearsay statements Summers argues should have been excluded, the ALJ would have instead found Summers credible and accepted his alternative explanation for his possession of the buy money. *See* ***State v. O'Brien***, 214 Wis. 2d 328, 347, 572 N.W.2d 870 (Ct. App. 1997) ("A showing of prejudice requires more than speculation; rather, the defendant must affirmatively prove prejudice." (citation omitted)), *aff'd*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999).

¶37 Summers also emphasizes that, although Kuffel's initial report states the buy money was found in Summers' pocket, Kuffel's supplemental report indicates the only money taken into evidence following the stop of Davis' vehicle was $208 found in Davis' purse. Summers further observes that the record does not contain a list of the serial numbers from the buy money or the money found in Summers' pocket, or photocopies of those bills. However, despite these deficiencies, the ALJ expressly found that Summers was arrested with the buy money following the October 26 transaction. The ALJ apparently credited Baures' testimony that the money found in Summers' pocket was "the same money that was given to [Duke] for the purpose of buying $150 worth of cocaine." Again, it would be pure speculation for us to conclude the ALJ would have made a different finding regarding the buy money had the challenged hearsay statements been excluded.

¶38 Summers next argues he was prejudiced because counsel's failure to call the hearsay declarants as witnesses deprived him of the opportunity to undermine their credibility by "confronting them with inconsistencies within their own statements and inconsistencies between one declarant's statement and another's." However, it is undisputed that the statements in question were part of

the record before the ALJ. There is no basis for us to conclude the ALJ was unaware of the inconsistencies cited by Summers.[5] Moreover, as noted by both the State and the circuit court, even though revocation counsel did not call Duke or Burnett to testify, he undermined their credibility by introducing CCAP reports regarding their criminal histories. In addition, Summers does not claim to know what other testimony the hearsay declarants would have provided had they been called to testify at the revocation hearing; it is therefore possible their testimony, on the whole, would actually have been damaging to Summers' case. On this record, we cannot conclude it is reasonably probable the result of the revocation hearing would have been different had revocation counsel called any of the hearsay declarants as witnesses.

¶39 Finally, Summers argues he was prejudiced by revocation counsel's failure to object to the admission of evidence regarding the October 24 controlled buy. Summers contends the admission of this evidence violated his due process right to notice of the alleged violations. However, Summers' supervision was not revoked because of any violation that may or may not have occurred on October 24. The DOC alleged Summers violated his rules of supervision by engaging in a drug transaction on October 26, and the ALJ found that allegation to

[5] In his reply brief, Summers asserts "[p]roduction of the witnesses would have revealed these inconsistencies to the ALJ instead of leaving them buried in a paper record." However, Summers' argument that he was prejudiced by the introduction of the hearsay statements is premised on the idea that the ALJ relied on the hearsay statements when reaching his decision. Specifically, Summers asserts that, although the ALJ acknowledged problems with the October 26 controlled buy during the revocation hearing, the ALJ's "tone changed substantially in his written decision—after reviewing the police reports containing a substantial amount of unconfronted hearsay." Summers cannot have it both ways; either the ALJ reviewed the unconfronted hearsay statements before issuing his decision, in which case he would have been aware of their inconsistencies, or he did not, in which case the statements would not have affected his decision.

be "true." Although the ALJ's decision highlighted similarities between the October 24 and 26 transactions, the decision overall does not indicate the ALJ revoked Summers' supervision based on any conduct that occurred on October 24.

¶40 To the extent Summers intends to argue the ALJ could not properly rely on evidence regarding the October 24 transaction when considering whether Summers committed a violation on October 26, we reject that argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Summers baldly asserts evidence related to the October 24 transaction was "irrelevant" to whether he participated in a drug transaction on October 26. However, Summers does not explain why that is the case. Although not expressly stated in the ALJ's decision, it is clear the ALJ concluded the October 24 transaction was relevant to provide context for the October 26 transaction and to establish a common modus operandi. Moreover, even if it was improper for the ALJ to consider the October 24 transaction, evidence regarding that transaction had no effect on the ALJ's key finding that Summers was in possession of the buy money when he was arrested on October 26. In light of that key finding, it is not reasonably probable the result of the revocation hearing would have been different absent the admission of evidence regarding the October 24 transaction.

¶41 For all the foregoing reasons, we cannot conclude that, absent revocation counsel's alleged errors, it is reasonably probable the result of Summers' revocation hearing would have been different. *See* ***Strickland***, 466 U.S. at 694. Stated differently, the cumulative effect of the alleged errors does not undermine our confidence in the hearing's outcome. *See* ***id.***; *see also* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 395 ("[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies."). We

therefore conclude, as a matter of law, that Summers has failed to demonstrate he was prejudiced by counsel's alleged errors. Accordingly, we affirm the order denying Summers' petition for habeas relief.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3) (2015-16).