COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1941-CR
97-1942-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NORMAN O. BROWN,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Dane County: MICHAEL B. TORPHY, JR., and JACK AULIK, Judges. *Affirmed in part; reversed in part and causes remanded with directions.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Norman Brown appeals two judgments[1] convicting him of six counts of being party to the crimes of forgery and theft, and also the orders denying him postconviction relief. He raises a number of issues relating to an adverse suppression ruling, his attempted plea withdrawal, and his sentence.[2] For the reasons discussed below, we affirm the trial court on the suppression issues and most of the plea issues, but remand for a hearing to establish the facts necessary to determine whether the prosecutor breached the plea agreement. We also modify Brown's sentence to reflect an additional two days of sentence credit.

According to the first complaint and police reports, Brown and Rita Jackson used a forged check to pay for groceries at Woodman's supermarket. The checker's suspicions were aroused by Brown's persistence that the transaction be speeded up. The supervisor who was called recognized the check as belonging to an account being used by a ring of people cashing stolen payroll checks. Supermarket employees detained Brown and Jackson and contacted the authorities.

Brown initially gave police a false name and date of birth. They arrested Brown for obstructing justice, located keys and the title to Jackson's car on his person, and searched the parking lot until they found the car. Observing through the car window a stack of yellow slips of paper the same size as the forged check, they towed the car and recovered more stolen checks from it. Additional

[1] The judgments include the disposition of two consolidated cases, 93-CF-1038 (appeal no. 97-1941-CR or "the Woodman's case") and 93-CF-1766 (appeal no. 97-1942-CR or "the Kohl's case").

[2] To facilitate discussion, we have consolidated and rearranged some of the appellant's arguments.

investigation linked Brown to a series of forged checks cashed at various Kohl's stores throughout Dane County.

Brown challenged the search of the car. The State then filed a second complaint charging Brown with the Kohl's offenses, and the cases were consolidated. After his initial suppression motion was denied, but while an additional motion to suppress evidence based on an unlawful arrest was still pending, Brown entered no contest pleas in both cases. He moved to withdraw the pleas before sentencing but withdrew his motion on the advice of counsel. The trial court then sentenced Brown to three consecutive five-year terms in prison, followed by a fifteen-year probationary period with sentence withheld on the other counts in the Kohl's case. The court imposed an additional sixteen-year term of probation in the Woodman's case, concurrent to the probationary sentences on counts six and seven of the Kohl's case. Brown renewed his plea withdrawal motion after sentencing.[3]

1. Suppression Issues

A. Standing to challenge seizure of automobile

The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution each prohibit unreasonable searches and seizures. ***State v. Drogsvold***, 104 Wis.2d 247, 264, 311 N.W.2d 243, 251 (Ct. App. 1981).[4] The test for determining whether an individual has the capacity, or standing, to raise a Fourth Amendment issue is "whether the person who claims

[3] Because Judge Torphy was injured in an accident while the motion was pending, Judge Aulik summarily denied the motion after the expiration of sixty days.

[4] Due to the similarity of these provisions, Wisconsin courts look to the Supreme Court's interpretation of the Fourth Amendment for guidance in construing the state constitution. ***State v. Roberts***, 196 Wis.2d 445, 452-53, 538 N.W.2d 825, 828 (Ct. App. 1995).

the protection of the Amendment has a legitimate expectation of privacy in the invaded place." ***Minnesota v. Olson***, 495 U.S. 91, 95 (1990) (citation omitted). A legitimate expectation of privacy is one which "society is prepared to recognize as reasonable." ***Id***. at 96 (citations omitted).

When we review a suppression motion, we will sustain the circuit court's findings of fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis.2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, we will independently determine if the facts establish standing as a question of law. ***State v. Rhodes***, 149 Wis.2d 722, 724-25, 439 N.W.2d 630, 632 (Ct. App. 1989). The proponent of a motion to suppress bears the burden of establishing the reasonableness of a subjective privacy expectation by a preponderance of the credible evidence. ***State v. Whitrock***, 161 Wis.2d 960, 972, 468 N.W.2d 696, 701 (1991).

Brown maintains that he had a legitimate expectation of privacy in Jackson's car because he had used the car in the past and stored his luggage and personal effects in the trunk. First, we note that there is a reduced expectation of privacy in an automobile. ***State v. Weber***, 163 Wis.2d 116, 138, 471 N.W.2d 187, 196 (1991). This limited privacy expectation is further attenuated where, as here, the person asserting an interest in the vehicle is not its owner and therefore lacks "complete dominion and control" over it. *See* ***Whitrock***, 161 Wis.2d at 974, 468 N.W.2d at 702. Taking into account the additional fact that Brown was not in the immediate vicinity of the car when he was taken into custody, we conclude that he had no reasonable privacy expectation in the car based upon past use of the car or association with its owner.

Brown also asserts that, as a bailee, he has standing to challenge the search of the car. *See* ***State v. Wisumierski***, 106 Wis.2d 722, 736-37, 317 N.W.2d 484, 491 (1982). He bases his assertion on the claim that Jackson gave him the keys and title to the car shortly before they entered the grocery store, and asked him to deliver it to a relative for him. The trial court, however, found that Brown did not knowingly accept the title and keys to the car since he never unfolded the slip of paper which Jackson handed him, and therefore, no bailment existed. While the evidence might also support a contrary determination, the trial court's finding was not clearly erroneous, and we will not disturb it. In light of our determination that Brown lacked Fourth Amendment standing, we need not address whether the seizure of the vehicle was supported by probable cause.

B. Probable cause for arrest

Every warrantless arrest must be supported by probable cause. ***Molina v. State***, 53 Wis.2d 662, 670, 193 N.W.2d 874, 878 (1972); U.S. CONST. amend. IV; WIS. CONST. art. I, § 11, § 968.07(1)(d), STATS. A law enforcement officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable 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). This is a practical test, based on "considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Drogsvold***, 104 Wis.2d at 254, 311 N.W.2d at 247 (citation omitted). The objective facts before the police 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). We will review whether the established facts constitute probable cause without deference to the decision of the circuit

court. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Here, the arresting officer knew that a group of individuals was involved in a stolen check ring and that the group was possibly responsible for millions of dollars in damages. He knew that Brown had been with Jackson when she attempted to pass a forged check linked to the ring, that the checker noted his restiveness, and that Brown had given a false name. The totality of the circumstances within the officer's knowledge would reasonably lead to the conclusion that Brown was more than possibly guilty of passing a fraudulent check, as well as obstruction of justice. The trial court properly denied Brown's suppression motion.

2. Plea Withdrawal Issues

Any fair and just reason, including a genuine misunderstanding of the consequences of a plea, may justify withdrawal of the plea prior to sentencing, so long as the prosecution has not been substantially prejudiced by reliance on the plea. ***State v. Shanks***, 152 Wis.2d 284, 288-90, 448 N.W.2d 264, 266-67 (Ct. App. 1989). Relief is appropriate after sentencing, however, only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, evidence that the plea was involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis.2d 241, 250-51, 471 N.W.2d 599, 602 (Ct. App. 1991).

A. Assistance of counsel

Brown alleges that counsel assisted him ineffectively by: (1) advising him that he could raise suppression issues after his no contest pleas;

(2) advising him to withdraw his motion for plea withdrawal and bring it later; (3) failing to object to the repeater allegations; and (4) approaching the prosecutor to discuss plea negotiations without his consent and leading him to believe that the prosecution could not penalize him if he rejected the plea offer.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides *de novo*. ***Id***. at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland,*** 466 U.S. at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). To satisfy the prejudice prong, the defendant usually must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id***. at 697.

We conclude that counsel did not perform deficiently by advising the defendant that he could raise his suppression issues on appeal after a no contest plea, because that is an accurate statement of the law. *See* § 971.31(10), STATS. Nor do we believe the facts of this case show that the defendant intentionally waived his right to a ruling on his pending suppression motion simply by entering a plea. *Cf.* ***State v. McDonald***, 50 Wis.2d 534, 537, 184 N.W.2d 886, 887 (1971) (holding that *deliberate* abandonment of suppression motion prior to trial constituted waiver). In any event, Brown was not prejudiced on this basis since we have in fact reviewed his suppression claims. Similarly, Brown was not prejudiced by counsel's advice that he withdraw his initial plea withdrawal motion, because that motion was based on the erroneous premise that he would be unable to challenge the suppression ruling on appeal. The first plea withdrawal motion would thus have been denied under either the fair and just reason or manifest injustice standard.

Brown could also not have been prejudiced by counsel's failure to challenge the applicability of the repeater allegations because the trial court did not impose any sentence greater than the maximum provided for any of the counts. *See* ***State v. Harris***, 119 Wis.2d 612, 619, 350 N.W.2d 633, 637 (1984) (holding a sentence which is within the term authorized by law for the prescribed crime does not invoke the repeater statute). Finally, it is standard practice, and not deficient performance by any stretch of the imagination, for a criminal defense attorney to inquire about possible plea agreements. The record shows that the defendant made a conscious choice to challenge the legality of his detainment, knowing that the State could choose to bring additional charges. None of these ineffective assistance allegations warranted a hearing. ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972) (holding that no hearing is necessary when a

defendant presents only conclusionary allegations or the record conclusively demonstrates that he is not entitled to relief).

B. Basis for plea

Before a circuit court may accept a no contest plea, it must determine: (1) the extent of the accused's education and general ability to comprehend; (2) the accused's understanding of the nature of the crimes charged and the potential punishments the court could impose; (3) the accused's understanding of the constitutional rights he is waiving; (4) whether promises or threats were made to the accused to obtain his plea; and (5) whether a factual basis existed to support conviction of the crime charged. ***State v. Bangert***, 131 Wis.2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986). Thus, the "[e]stablishment of a factual basis for a plea to the charged crime is separate and distinct from the requirement that the voluntariness of the plea be established to the trial court's satisfaction." ***State v. Harrington***, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994). Therefore, "[b]efore a trial court can accept a guilty plea it must personally determine that the conduct which the defendant admits constitutes the offense ... to which the defendant has pleaded guilty." ***State v. Johnson***, 200 Wis.2d 704, 708, 548 N.W.2d 91, 93 (Ct. App. 1996) (citation omitted). A circuit court's failure to establish a factual basis for the defendant's plea "is evidence that a manifest injustice has occurred, warranting withdrawal of the plea." ***Id***. at 709, 548 N.W.2d at 93 (citation omitted). This court will not disturb a circuit court's finding regarding the existence of a factual basis for accepting a plea unless it is clearly erroneous. ***Id***.

We have already rejected Brown's contention that his plea was unknowingly given in reliance upon his right to raise suppression issues after his conviction because such reliance was proper. We also reject his assertion that the trial court lacked a factual basis to accept his plea. The evidence adduced at the preliminary hearing showed that Brown was with Jackson when she attempted to pass the forged check. In addition, since we have determined that Brown's suppression motion was properly denied, the State presented ample evidence to connect Brown to the other forgeries. The evidence relied upon by the trial court to accept a plea need not rise beyond a reasonable doubt, and the trial court's finding that a factual basis existed here was not clearly erroneous.

C. Breach of plea agreement

To establish that a plea agreement has been breached, a defendant must show by clear and convincing evidence that: (1) the terms of the agreement were violated; and (2) the breach was material and substantial. The determination of what the parties agreed to is factual in nature, and we will defer to the trial court unless its findings were clearly erroneous. A material and substantial breach amounts to manifest injustice without a further showing of prejudice. ***Bangert***, 131 Wis.2d at 290, 389 N.W.2d at 33.

Brown claims that the prosecutor breached the agreement when she asked for a probation period of sixteen years for the Woodman's count in addition to incarceration on other counts. The State says the prosecutor agreed only "to an incarceration portion of the penalty no more than 18 years in the Wisconsin State Prison System." However, the notes of the plea agreement indicate that the State was "not free to argue for more than 25 years."

The trial court must hold an evidentiary hearing when the defendant alleges facts which, if true, would entitle the defendant to relief. ***Nelson***, 54 Wis.2d at 497, 195 N.W.2d at 633. If the terms of the agreement were that the State could not argue for more than twenty-five years combined incarceration and probation, Brown's claim would have merit. Because the trial court made no factual findings regarding the actual terms of the agreement, we are unable to further evaluate Brown's claim. Therefore, we must remand for an evidentiary hearing on this issue.

3. Sentence Credit

Brown was incarcerated in jail from June 19, 1993, to June 1, 1994, following his arrest on the present offense. A subsequent probation revocation on a prior offense accounted for 244 days of that period, leaving 102 days which the State concedes should have been granted as sentence credit in the instant case. Brown has already been granted 100 days of sentence credit. He is therefore entitled to an additional two days of credit.

By the Court.—Judgments and orders affirmed in part; reversed in part and causes remanded with directions.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5, STATS.