COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3264

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARRY A. BULLARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Barry Bullard appeals a judgment of conviction, entered after a jury trial, on eight drug charges and an order denying postconviction relief. Bullard argues (1) that portions of the second amended information should be dismissed because there was no preliminary hearing; (2) that counts 1 and 2 are multiplicitous; (3) that he was denied effective

assistance of counsel; (4) that the trial court erred by allowing inadmissible hearsay; and (5) that insufficient evidence supports the identity and quantities of marijuana in this case. We disagree with Bullard's contentions and affirm the judgment and order.

BACKGROUND

¶2 The following evidence was adduced at trial. Bullard gave or sold marijuana to his brother-in-law, William Woodington, on three occasions during the summer of 1998. First, Bullard gave Woodington marijuana at an Exel Inn. Next, at a Ramada Inn at a later date, Bullard smoked marijuana with Woodington before he gave him some out of a large cooler. Finally, on a third occasion, Woodington purchased a pound of marijuana from Bullard at the Exel Inn.

¶3 In late August 1998, Bullard delivered marijuana to the home of Tammy Solfest. Susanne Ottum saw Bullard give Solfest about a quarter pound of marijuana. Ottum also saw that Bullard had additional marijuana remaining in the trunk of his car. Additionally, Bullard supplied Solfest with marijuana on September 11, 1998. Police found the marijuana in her home during a search on September 18.

¶4 Additionally, Karen Hibbard testified that around Labor Day 1998, Bullard asked her to sell a "couple of pounds" of marijuana. He gave her marijuana from the trunk of his car, and she sold it for $1,100 a pound and returned all but $300 to Bullard.

¶5 Kristin Clark saw Bullard bringing marijuana to Solfest's house "a couple times." On one occasion, Clark helped Bullard package marijuana into bags at Solfest's home. Also, Terrence Kennedy purchased three and one-half

pounds of marijuana from Bullard for $3,900 after smoking marijuana with Bullard on numerous occasions before the sale.

¶6 On September 18, 1998, the Eau Claire Police Department stopped Bullard's car and executed a warrant for his arrest. The police searched Bullard and his car, and recovered drugs and $2,000 in cash. Bullard was charged with several drug offenses.

¶7 A jury found Bullard guilty of the eight counts with which he had been charged in the second amended information. He was sentenced to nine years probation consecutive to nine years in prison. Bullard subsequently filed several motions for postconviction relief. After a hearing, the trial court denied Bullard's motions for postconviction relief.

DISCUSSION

I. SECOND AMENDED INFORMATION

¶8 Bullard argues that counts four through eight of the second amended information should be dismissed because there was no preliminary examination on the charges. He also contends that those counts were not transactionally related to the charge on which a preliminary examination was held. Despite what he claims on appeal, Bullard did not object to the second amended information, and therefore the trial court did not err in the manner claimed. Both waiver and judicial estoppel preclude this argument on appeal.

¶9 In most instances, a defendant must object to an error when it occurs or waive his right to complain by failing to preserve his objection. The waiver rule "exists to cultivate timely objection," which in turn promotes efficiency and fairness through timely error correction. ***State v. Erickson***, 227 Wis. 2d 758,

766-67, 596 N.W.2d 749 (1999). The common law waiver rule keeps a party from "sitting silently by while error occurs and then seeking reversal if the result is unfavorable." ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶10 Bullard remained silent while the amended information was read and said nothing that could be construed as an objection to the information. Bullard acquiesced to the amended information and thereby waived any later objection. Moreover, even if waiver of a preliminary examination requires the defendant's personal consent, that consent was granted here when Bullard was present and did not object to his attorney's conduct. We conclude that Bullard waived this issue by failing to raise it in the trial court and, further, that the doctrine of judicial estoppel precludes him from raising it now.

¶11 Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings. ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). Bullard cannot advocate a certain position in the trial court (bargaining for additional trial preparation time in exchange for waiving a preliminary hearing) and a contrary position on appeal (that the counts should have been dismissed because there was no preliminary hearing). *See* ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987). The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from playing "fast and loose" with the courts. ***Harrison v. LIRC***, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994).

¶12 Neither Bullard nor his attorney objected to the prosecutor's motion to amend the information. Bullard's attorney even noted: "[I]t makes sense if we

can do without a preliminary hearing ...." Bullard did not object or exhibit disagreement with his attorney in any way. Counsel negotiated to receive additional preparation time in exchange for not demanding a preliminary hearing or contesting the amendment of the information. Counsel believed that the counts in the amended information would be found transactionally related to the prior charges, and he made a reasonable strategic choice to forego a preliminary hearing.[1] The doctrines of waiver and judicial estoppel both prevent Bullard from pursuing this argument on appeal.

II. MULTIPLICITY

¶13 Bullard argues that counts one and two of the second amended information are multiplicitous. Count one alleges that Bullard delivered 500 grams or less of marijuana to Solfest in late August 1998. Count two alleges that, during the same time period, Bullard possessed 500 grams or less of marijuana with intent to deliver. The State, however, maintains that the counts are different in both law and fact. We agree that the counts are different in fact and, therefore, we need not address whether they are legally distinct.

¶14 The double jeopardy clauses of our federal and state constitutions protect against multiple punishments for the same offense. ***State v. Derango***, 2000 WI 89, ¶26, 236 Wis. 2d 721, 739, 613 N.W.2d 833. In ***Derango***, our supreme court recently reiterated the two-part test that guides this court's review of multiplicity challenges:

> The first part consists of an analysis under ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to determine

[1] For this reason, counsel provided effective assistance of counsel for Bullard.

> whether the offenses are identical in law and fact. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." ***Blockburger***, 284 U.S. at 304. The second part, which we reach if the offenses are not identical in law and fact, is an inquiry into legislative intent.
>
> The ***Blockburger*** test requires us to consider whether each of the offenses in this case requires proof of an element or fact that the other does not If, under this test, the offenses are identical in law and fact, then charging both is multiplicitous and therefore unconstitutional. If under the ***Blockburger*** test the offenses are different in law or fact, a presumption arises that the legislature intended to permit cumulative punishments for both offenses. This presumption can only be rebutted by clear legislative intent to the contrary.

Id. at ¶¶29-30 (citations omitted). A challenge concerning the proper unit of prosecution for criminal conduct presents a question of law subject to our de novo review. *See* ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶15 Offenses are different "in fact" if they are separated by time, significantly different in nature, or involve separate volitional acts. ***State v. Davis***, 171 Wis. 2d 711, 717, 492 N.W.2d 174 (Ct. App. 1992). Separate volitional acts occur when the offender has sufficient time between acts to reflect on his or her actions and to recommit to the criminal conduct. ***Id.*** at 717-18. The fact that proof of one count may be, in many respects, the same as proof of other counts does not necessarily render the counts multiplicitous. ***State v. Anderson***, 219 Wis. 2d 739, 750-52, 580 N.W.2d 329 (1998).

¶16 The charges do not violate any restriction against multiplicity. Both counts do relate to Bullard's activities on a single day. However, they charge two distinct acts: his actual delivery of marijuana to Solfest and his continued

possession of residual marijuana for later delivery. Solfest and Ottum testified that one amount of marijuana was delivered to Solfest in late August 1998. Ottum also testified that a residual quantity of marijuana remained in Bullard's trunk after the delivery to Solfest.

¶17 These are not multiplicitous charges. Because the counts are factually dissimilar, we need not consider whether they are legally distinct. As a result, Bullard's attorney did not provide ineffective assistance of counsel for not filing a motion challenging the second amended information on multiplicity grounds because it would have failed. *See* ***Stone v. Farley***, 86 F.3d 712, 717 (7th Cir. 1996).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

¶18 Bullard argues that he was denied effective assistance of counsel. Our review of an ineffective assistance of counsel claim is a mixed question of fact and law. *See* ***Erickson***, 227 Wis. 2d at 768. The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** "However, the ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law which this court reviews independently of [the trial court]." ***Id.***

¶19 To determine the validity of an ineffective assistance of counsel claim, Wisconsin employs the two-prong test set forth by the United States Supreme Court. ***Id.***; *see also* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to succeed on his claim, Bullard "must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him …." *See* ***Erickson***, 227 Wis. 2d at 768. Proof of either the deficiency or the prejudice prong presents a question of law that this court reviews de novo. ***State***

v. Pitsch, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). If we conclude that Bullard has not proved one prong, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶20 To prove deficient performance, a defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, the defendant must show a reasonable probability that, absent the error, the outcome of the proceeding would have been different. ***Id.*** at 694.

¶21 Bullard argues that his trial counsel was ineffective for failing to pursue a motion to quash the bindover. Counsel testified at the postconviction motion hearing that he did not believe the motion to quash would succeed. Counsel reasonably believed he would retain more credibility with the court if he did not pursue frivolous motions.

¶22 The witness at the preliminary hearing provided a plausible account that Bullard committed a felony. Therefore there would have been nothing gained by bringing the motion. Attorneys are not deficient for failing to pursue a meritless position. *See* ***Stone***, 86 F.3d at 717 ("Failure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel.").

¶23 Bullard also complains that his trial counsel was ineffective for failing to move to suppress the evidence seized during the warrantless search of his vehicle on September 18, 1998. Bullard maintains that the marijuana found in the trunk of his car was inadmissible and that a proper motion would have resulted in its suppression. He also argues that he was prejudiced by the admission of the marijuana discovered in the trunk of his car.

¶24 The State contends that because such a motion would have failed, Bullard's trial counsel acted reasonably and was effective. It offers four reasons why Bullard was not prejudiced by counsel's failure to file a motion to suppress the marijuana found in Bullard's trunk: (1) Bullard misperceives the prosecutor's closing argument and reliance on the marijuana found in the trunk; (2) the police found the marijuana during an inventory search and by that time had probable cause to search the trunk; (3) he has not shown, by clear and convincing evidence, that the trial court would have granted a suppression motion if made; and (4) any error in the pursuit of a motion to suppress was harmless. While we agree with all of the State's arguments on this issue, we conclude that counsel acted reasonably because there was probable cause to search the trunk and a motion to suppress necessarily would have failed. *See* ***State v. Stankus***, 220 Wis. 2d 232, 235, 582 N.W.2d 468 (Ct. App. 1998).

¶25 Whether a given set of facts provides probable cause for a search is an issue of law that we determine de novo. ***State v. Gaines***, 197 Wis. 2d 102, 110, 539 N.W.2d 723 (Ct. App. 1995). The police had a statement from Ottum that the trunk would contain marijuana. This statement created a fair probability that evidence would be found in Bullard's trunk and gave the police probable cause to search. *See* ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). No prejudice to Bullard resulted from counsel's failure to file a suppression motion because the police had probable cause to search the vehicle and any such motion would have been denied.

¶26 Finally, Bullard argues that the trial court's grant of use immunity to four witnesses in the presence of the jury was reversible error and that his attorney was deficient when he did not object. However, counsel testified at the postconviction hearing that he and Bullard considered the strongest strategy for the defense. They concluded that, rather than object to the four witnesses'

testimony, they would attempt to portray the witnesses as hostile toward Bullard and as attempting to receive more favorable treatment in the prosecution of their own criminal cases. We conclude that Bullard's attorney made a reasonable strategic decision. Strategic decisions are virtually unassailable. ***Strickland***, 466 U.S. at 690-91.

¶27 Bullard's other claims of ineffective assistance of counsel will be addressed throughout the opinion.

IV. HEARSAY

¶28 Bullard argues that the trial court erred by admitting prejudicial and inadmissible hearsay.[2] While the State claims waiver on the statements of one witness and maintains that the other hearsay "flows" from counsel's reasonable trial strategy, we decide this issue on the basis of harmless error.

¶29 Under ***State v. Dyess,*** 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985), an error is harmless if there is no reasonable possibility that the error contributed to the conviction. Only if the error contributed to the conviction must a reversal and new trial result. *See* ***id.*** The burden of establishing that there is no reasonable possibility that the error contributed to the conviction is on the State. *See* ***id.*** No such possibility exists here. Even without the statements Bullard

[2] Bullard argues that the trial court admitted highly prejudicial and inadmissible hearsay. He cites the testimony of Hibbard, Ottum and deputy sheriff Wilson as to Solfest's out-of-court statements about Bullard and his role in her receipt of drugs. Bullard also challenges Solfest's statements about Bullard's activities, as well as Wilson's testimony as to what Ottum said as a police informant. He further contends that Wilson's testimony about statements made to him by Woodington, Kennedy and Hibbard was hearsay. Finally, Bullard argues that most of Clark's testimony is hearsay. However, he cites as hearsay only statements Clark herself made and then testified to at trial.

challenges, the jury heard a considerable amount of eyewitness testimony. The eyewitness accounts of Bullard's offenses support the jury's determination of guilt on each charge. Any error the trial court may have made by admitting hearsay was harmless.[3]

V. SUFFICIENCY OF THE EVIDENCE

¶30 Where the sufficiency of the evidence is challenged, we may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is the jury's function to decide credibility issues, to weigh the evidence and to resolve conflicts in the testimony. ***Id.*** at 506. We must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. *See* ***id.*** at 506-07.

¶31 Bullard argues that, except for count three, insufficient evidence was introduced at trial identifying the alleged marijuana because the trial court failed to designate the witnesses as lay experts to identify the marijuana. Bullard does not identify any rule requiring a trial court to make an unsolicited pronouncement of a witness' qualification to give an opinion. WISCONSIN STAT. § 907.01[4] permits opinion testimony by lay witnesses if the opinions are rationally based on the

[3] For this reason, there was no ineffective assistance of counsel for failing to the object to the admission of this testimony.

[4] All references the Wisconsin Statutes are to the 1997-1998 version unless otherwise noted.

witness' perception and are helpful to the determination of a fact in issue. The witnesses at trial all demonstrated sufficient experience with marijuana to give lay opinions that the substance was marijuana.

¶32 Bullard also contends that insufficient evidence was introduced at trial to carry the State's burden of proof beyond a reasonable doubt as to the amounts of marijuana involved in count eight of the information. Under the applicable standard for sufficiency of the evidence to support a jury verdict, there was enough. *See* ***Poellinger***, 153 Wis. 2d at 501. Hibbard testified that she sold "a couple pounds," and that she sold it "for $1,100 a pound." Bullard concedes that 500 grams is a little more than a pound. Thus the jury, from the evidence it heard, reasonably could conclude that Hibbard sold more than a pound of marijuana.

By the Court.—Judgment and order affirmed.

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