COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2431-CR **Cir. Ct. No. 2002CF6222**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANDRE BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Deandre Brown appeals from a judgment of conviction for one count of kidnapping, and five counts of first-degree sexual assault, all as party to a crime, contrary to WIS. STAT. §§ 940.31(1)(b),

940.225(1)(c), and 939.05 (2003-04).[1] He also challenges the trial court's ruling denying his suppression motion based on the lack of probable cause for his arrest and an order denying a postconviction motion claiming ineffective assistance of trial counsel. Because probable cause for his arrest did exist and the record conclusively demonstrates that Brown's claim of ineffective assistance lacks merit, we affirm.

BACKGROUND

¶2 The essential historical facts supplying the background for this appeal are not in dispute. On October 30, 2002, at approximately 12:30 a.m., Police Officer Rodney Young, while patrolling alone in a police squad car, was dispatched to the area of 2134 North 15th Street in the City of Milwaukee to investigate a reported sexual assault in progress. He was joined, almost immediately, by Officer Christopher Ottoway. The two officers then began to search the area. In the alley behind 2139 North 15th Street, Officer Young witnessed the sexual assault of a woman later identified as C.D.G. by five black men. When Officer Young announced his presence, four of the five men began to flee. The fifth later fled. Officer Young radioed his observations of what was transpiring including two descriptions. The participant who acted as lookout was wearing a red shirt with a Fat Albert design on it. Another wore a black or gray jacket with white or gray sleeves and dropped his jacket as he was running away. Officer Young recovered the jacket and found the state identification card of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Deandre Brown in one of the pockets. This occurred between 12:40 and 12:45 a.m.

¶3 At approximately 1:00 a.m., Police Officer Aaron Berken was summoned to the area between 20th and 15th Streets, North Avenue to Lloyd Street, as an additional backup relating to a foot pursuit. Officer Berken heard the description of a fleeing suspect in the sexual assault. Shortly thereafter, he observed a person matching the description. When that person, who was walking, saw the squad car, he began to run. Berken and his partner chased after him in their squad and shortly thereafter apprehended a person wearing a blue jacket who later was identified as Givante McGee. Within ten minutes of apprehending McGee, Officer Berken heard over the dispatch of another foot-chase headed in his direction. Berken saw a subject matching the description running southbound across Fond du Lac Avenue into an open park area. Berken apprehended the suspect with his squad. The suspect proved to be Deandre Brown whose I.D. card had been found at the scene of the assault. His arrest took place in the 2100 block of North 18th Street, about five or six blocks away from the scene of the assault. The arrest occurred at 2:30 a.m. Subsequently, the State jointly charged three of the five participants: Brown, Gary Harris, and McGee. The other two suspects were juveniles.

¶4 Brown claimed he was unlawfully arrested and thus moved to suppress all the evidence that had been obtained as a result of the arrest. After conducting a hearing on the suppression motion, the trial court denied the motion. Brown then pled guilty to the six charges. The trial court sentenced Brown to eighteen years' confinement and ten years' extended supervision on each of the six convictions, to operate concurrently with each other, but consecutive to any existing sentence.

¶5 Brown filed a postconviction motion to withdraw his guilty pleas claiming ineffective assistance of trial counsel. The trial court denied the motion. Brown now appeals.

ANALYSIS

A. Motion to Suppress.

¶6 Brown first claims the trial court erred in denying his motion to suppress the evidence resulting from his arrest because there was not a sufficient basis to conclude that probable cause existed that he committed a crime. He offers two reasons to support his assertion. First, neither the police officer who witnessed the assault nor the victim who viewed Brown at an on-the-scene showup could identify Brown as a participant in the assault. Second, the discovery of Brown's state identification card was too attenuated to provide evidentiary support for the conclusion of probable cause to arrest. We reject Brown's claims.

STANDARD OF REVIEW AND APPLICABLE LAW

¶7 In ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660, we declared that for an arrest to be lawful, it must be based upon probable cause. The required probable cause exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***Id.*** The standard to be applied is "objective," independent of an officer's subjective assessment. ***Id.***, ¶12.

¶8 From a quantitative perspective, probable cause requires information indicating that the defendant's involvement in a crime is "'more than a

possibility,'" but it "'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" ***Id.***, ¶11 (citation omitted).

¶9 From a qualitative perspective, probable cause "is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior." ***Id.*** In determining whether probable cause exists:

> The court is to consider the information available to the [arresting] officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account…. The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department.

Id., ¶12 (citations omitted). Importantly, "[w]hen a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." ***Id.***

¶10 "In reviewing an order granting or denying a motion to suppress evidence, we uphold the trial court's findings of fact unless they are clearly erroneous." ***Id.***, ¶13. As indicated earlier in this decision, there were no significant disputes in the evidence presented at the motion hearing.

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¶11 In arriving at its findings of fact and conclusions of law that Officer Young had probable cause to arrest Brown, the trial court made the following explication:

> First of all I'm going to find these facts. I believe that Officer Young saw what a reasonable person would believe was a sexual assault…. I agree, therefore … that there is probable cause to believe that a crime was committed, and the issue I have to decide is whether there's probable cause to believe that one or both of the defendants before me committed that crime or any part of it.

Officer Young relayed a broadcast that had two specific pieces of information in it. One specific piece of information in it was the direction in which the defendants were going, at least some of the defendants …. And he gave descriptions of some but not all of the offenders.

In particular he said that three of the offenders were headed westbound toward 16th Street. He also said that one of the perpetrators was wearing a blue and white jacket which was then later described in almost similar terms by one of the arresting officers. At the scene Officer Young found Mr. Brown's I.D., looked at it, saw it, identified it … the fact of the matter is that at the time that this search for these suspects was going on[,] the police in their collective knowledge knew that Deandre Brown's I.D. was at the scene of this incident.

….

The only other facts that I think we can add to what we know now are that approximately ten minutes after the incident, I guess I can use the CAD report to say exactly.… 12:42 and 15 seconds. And Officer Berken reports that they have a subject in custody with a blue and white top at one minute past 1:00 …. And Officer Berken made that arrest after seeing Mr. McGee walking in the same direction that the police car was traveling. They made eye contact. Mr. McGee looked over his shoulder to see the police car and upon seeing it he fled…. he was apprehended by the police…. he was put in handcuffs, he was put in the car and that began a period of time during which Mr. Brown was detained.

At 2:27, so, almost an hour and a half after Mr. McGee was arrested Mr. Brown is arrested by squad 335. At 2:27:41 he was running across Fond du Lac and based on the fact that he was running the officers arrested -- I should say apprehended him, put him in the squad car, and that began a long detention for him that culminated in the penile swab.

My conclusions of law that I draw about these are as follows.

….

I think in this case the police had probable cause to arrest each of these defendants. With regard to Mr. Brown I think two factors add up to provide probable cause. A very powerful factor is that his I.D. is at the scene. Now,

> that could be a coincidence, but it is such an unusual coincidence that it prevents me from finding that it could only be a coincidence. Mr. Brown, if that was only a coincidence that your I.D. was found there, in other words if I.D.'s were some of the things we found littering around like bubblegum wrappers, and Taco Bell wrappers, and newspapers, then I would say that this is only a coincidence. But an I.D. is something people hold onto. They don't leave lying in an alley. And for somebody's I.D. to be found at the scene of the crime is a very powerful piece of evidence linking that person to the crime in some way, shape or form. That combined with the fact that you were in the vicinity of the crime and running I think gave the police probable cause to arrest you.
>
> It was an hour and a half after Mr. McGee was arrested, it was two hours after the crime was reported. I don't think the running by itself would have provided the police with grounds to conduct a temporary detention. In fact the running itself might not have been sufficient even if it had only been minutes after, absent other factors. But when the running is combined with your identity on an I.D. card found at the scene, I think that it's fair for the police, and I guess in fact it's even more powerful than that, now that I think about it, because the I.D. was taken from a jacket which was then later either taken from the scene or at least somebody attempted to take it from the scene.
>
> Now, there's a lot of different explanations for who might have come to take it from the scene. But I don't think the police were prevented from considering whether Mr. Brown was the person who came back to the scene to get his jacket with his I.D. in it. Those factors together I think gave the police probable cause to arrest Mr. Brown.

¶12 From this review of the trial court's examination of the evidence, it is clear that the court was quite circumspect in its analysis. It candidly considered the options that were presented by the evidence. It carefully considered the possible inferences that a reasonable police officer could draw under the circumstances presented, and then discarded the least likely. It gave added weight to the recovery of the suspect's personal identification card and how possession of such a card is considered most dear in our current society. Through its own questioning, the court took into account the site of the assault and the flight of the

suspects in the described constricted area of investigation before eventual apprehension. The trial court's findings have not been questioned and clearly are not erroneous.

¶13 From a quantitative and qualitative standpoint, we conclude that the convergence of circumstances as set forth in the trial court's findings was of such a nature to provide a reasonable police officer with a sufficient basis to reasonably conclude that there was probable cause to believe that Brown participated in the criminal sexual assault of the victim.

B. Ineffective Assistance Claim.

¶14 Brown also seeks plea withdrawal based on his claim that he was denied effective assistance of trial counsel. He contends that his trial counsel misrepresented the terms of the plea negotiations upon which he relied in that his counsel informed him that the State would recommend ten years as initial confinement, rather than "substantial initial confinement." He asserts that if this misrepresentation had not occurred, he would not have accepted the plea negotiations. He also claims that the trial court erroneously denied his motion to withdraw without a hearing. We reject Brown's contentions.

STANDARD OF REVIEW AND APPLICABLE LAW

¶15 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A court need not address both

components of this inquiry if the defendant does not make a sufficient showing on one. ***Strickland*** at 697.

¶16 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id.*** at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of a defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶17 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief, is a question of law to be reviewed independently by this court. ***Id.*** at 310.

¶18 As a further aid for analysis purposes, we note that not all defendants who state that they did not earlier understand their plea are entitled to withdraw their pleas. ***State v. Canedy***, 161 Wis. 2d 565, 585, 469 N.W.2d 163 (1991). "Because the reason offered must be genuine, the circuit court must determine

whether the defendant's reason is credible or plausible or believable." ***State v. Kivioja***, 225 Wis. 2d 271, 291-92, 592 N.W.2d 220 (1999).

¶19 If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Bentley***, 201 Wis. 2d at 318.

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¶20 We conclude that Brown has failed to prove he received ineffective assistance of trial counsel. A review of the record reveals that the term of sentence was broached twice before it was actually imposed. On March 11, 2003, the date scheduled for trial, Brown decided to change his plea to guilty. The following colloquy took place:

> MR. LIEGEL: Chris Liegel appears on behalf of the State.
>
> MR. MORGAN: Mr. Brown appears in person by Jeff Morgan.
>
> THE COURT: Have there been negotiations?
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> MR. LIEGEL: Yes, Your Honor. The State -- I'm not sure I would say there's been negotiations, but the State has given an offer to the defense that upon the defendant's plea to the charges as charged in the information the State would recommend substantial imprisonment with substantial initial confinement, arguing the facts and circumstances of the case at sentencing.
>
> THE COURT: Mr. Morgan, does that correctly state the offer that was made to Mr. Brown by the State?
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> MR. MORGAN: Yes. And that's in written form that I received, and I also reviewed that with Mr. Brown.

¶21 No objection was made by Brown to the recommendation. Then, on July 2, 2003, the date of sentencing, the State iterated the same recommendation:

> THE COURT: And does the State make any specific recommendation as to the sentences in these cases?
>
> MR. LIEGEL: No. The State indicated it would be recommending -- I just want to make sure I word this correctly -- substantial imprisonment with substantial confinement time.

Again, Brown made no objection. Brown was in court on both occasions. If, in fact, trial counsel had communicated to him that the State would recommend ten years, rather than "substantial time," Brown had ample opportunity to object prior to the actual imposition of his sentence. In rejecting the plausibility of Brown's ineffective assistance claim, the trial court made the following observation:

> I find it curious that the affidavit filed in support of the motion states that "Mr. Brown … would not have pled guilty to the Criminal Information based upon the deal as represented to the trial court." But in fact that is precisely what he did. Indeed, I believe that if in fact Mr. Brown had his heart set on the State recommending only ten years in prison, he would have objected to the way the prosecutor made his less specific recommendation at the guilty plea hearing and at the sentencing hearing. Mr. Brown did not, and I believe, therefore, he should be held to his plea.

¶22 We concur with the analysis of the trial court. The record as a whole conclusively demonstrates that his claim of ineffective assistance of trial counsel lacks merit. Therefore, the trial court did not erroneously exercise its discretion in rendering a decision without the aid of a hearing.

CONCLUSION

¶23 In sum, we hold that the officers had probable cause to arrest Brown based on the factors properly assessed by the trial court, and that Brown has failed to demonstrate that his trial counsel provided ineffective assistance. Accordingly, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.