COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP381 **Cir. Ct. No. 1998CF137**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIN A. GRUENBERG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Darrin Gruenberg appeals an order which denied most of his postconviction claims for relief under WIS. STAT. § 974.06 (2005-06).[1] We affirm the order for the reasons discussed below.

¶2 In May 1999, Gruenberg entered no-contest pleas to three counts of burglary to a building or dwelling, as a repeat offender, in exchange for the dismissal of several other counts. The State offered the statements and reports of the police as set forth in the complaint as a factual basis for the pleas, and the court found that the record supported the crimes charged.

¶3 In July 2006, Gruenberg filed a WIS. STAT. § 974.06 motion with several supplements seeking to set aside his convictions on multiple grounds. He claimed there was no factual basis to support counts 2 and 4; that the plea colloquy was defective in that the court misinformed him about the maximum penalty for count 6 and failed to advise him either that he could refuse counsel or that a lawyer might find defenses he was unaware of; and that counsel provided ineffective assistance by failing to challenge the timeliness of the initial appearance and the violation of his ***Miranda***[2] rights.

¶4 At the hearing, Gruenberg attempted to argue the last two points on their own merits, rather than within the framework of ineffective assistance. He argued that counsel was ineffective for allowing him to enter pleas on charges for which there was no factual basis shown in the complaint. Gruenberg also made several requests for the appointment of counsel, which were denied. The trial

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

court vacated count 4,[3] but denied Gruenberg's other claims for relief and reconsideration, and Gruenberg now appeals.

¶5 First, Gruenberg claims that he was improperly denied counsel on his postconviction motion. However, the United States Constitution guarantees counsel in a criminal case only through an appeal as of right. *See* ***Douglas v. California***, 372 U.S. 353, 356-357 (1963). There is no right to counsel for a postconviction motion brought under WIS. STAT. § 974.06, after the right to a direct appeal has expired. *See* ***State v. Alston***, 92 Wis. 2d 893, 895, 288 N.W.2d 866 (Ct. App. 1979).

¶6 Second, Gruenberg asserts that he was never advised of his ***Miranda*** rights, which he further contends rendered his arrest unlawful. As the State correctly points out, however, Gruenberg waived the right to challenge any nonjurisdictional defects by entering his guilty pleas. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Neither a ***Miranda*** violation nor an unlawful arrest constitutes a jurisdictional defect. Rather, they are typically grounds for a suppression motion. Nor can Gruenberg raise this issue in the context of ineffective assistance of counsel at this stage, because he did not preserve it at his postconviction hearing by asking counsel about his failure to raise the issue.

[3] We note that Gruenberg asked the trial court to set aside the entire negotiated plea agreement upon the vacation of count 4, and to reinstate all of the charges. The court told him that was not an available option. However, under ***State v. Robinson***, 2002 WI 9, 249 Wis. 2d 553, 638 N.W.2d 564, *abrogated on other grounds by* ***State v. Kelty***, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2d 886, and ***State v. Roou***, 2007 WI App 193, 738 N.W.2d 173, a defendant's successful attack on one count of a multicount conviction entered pursuant to a negotiated plea may be viewed as a breach of the entire plea agreement if it deprives the State of a meaningful portion of what it bargained for. Because the issue has not been raised on appeal, we do not address whether that is still an available remedy here.

¶7 Third, Gruenberg argues that the search of his apartment was unlawful due to a defective warrant. This suppression issue was also waived by the entry of his pleas, and was not preserved in the context of an ineffective assistance of counsel claim.

¶8 Fourth, Gruenberg argues that counts 2 (the Ready Mix count) and 6 (the Monroe Construction count) were unsupported by a factual basis. Because these contentions go to the validity of the pleas, they are not waived by the pleas. *See generally* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). However, Gruenberg failed to preserve his challenge to the factual basis for count 6, because he challenged only the factual bases for counts 2 and 4 at his postconviction hearing. With regard to count 2, the record contained the allegation in the complaint that Ready Mix had been burglarized, and an affidavit stating that a credit card which had been reported stolen from the business had been recovered on Gruenberg's person. In addition, Gruenberg had blue fingers from detection powder which linked him to the robbery of Monroe Construction right around the corner from Ready Mix. These facts were sufficient to create an inference that Gruenberg had committed the Ready Mix burglary as well as the Monroe Construction burglary. Contrary to Gruenberg's apparent belief, it was not necessary for the facts in the complaint to prove beyond a reasonable doubt that he had committed the Ready Mix burglary. He waived his right to have the State produce evidence rising to that level of proof by entering his plea. The information before the court was sufficient to satisfy the lower standard of providing a simple factual basis to believe that Gruenberg had in fact committed the charged crimes.

¶9 Fifth, Gruenberg makes a related claim that the allegations in the complaint were insufficient to establish the elements of burglary. He points out

that a complaint which fails to allege all of the elements of a crime known to law is jurisdictionally void and that such a jurisdictional problem cannot be waived. We note, however, the complaint in this case *did* allege each element of burglary with respect to each count.[4] Any insufficiency could only be in the subsequent factual portion of the complaint, and a challenge to the factual sufficiency of the complaint can be waived, as it was here, by the entry of a plea.

¶10 Sixth, Gruenberg argues that he was unconstitutionally detained for an unreasonably long period before having a probable cause determination made at his initial appearance. However, the record shows that he did, in fact, have a judicial probable cause determination made within twenty-four hours after his arrest and that his subsequent appearance a few days later was only to set the amount of bail. Moreover, Gruenberg also waived this issue by the entry of his pleas.

¶11 Seventh, Gruenberg claims there was no valid arrest warrant. Like issues two and three above, this claim may have given rise to a suppression motion, but does not affect the court's jurisdiction. Again, this issue was waived by the plea-waiver rule, and was not preserved in the context of ineffective assistance of counsel.

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[4] Specifically, with respect to count 2, the complaint alleged that Gruenberg did:

> Feloniously and intentionally enter a building without the consent of the person in lawful possession thereof and with intent to steal, to wit: Did on or about November 20, 1998, at the office building of Green Valley Ready Mix, located at 1207 18th Street, in the City of Monroe, Green County, Wisconsin, enter said building of Green Valley Ready Mix with intent to steal without the consent of the manager/owner David Flynn, or any other personnel of Green Valley Ready Mix.

¶12 Gruenberg claims counsel was ineffective for allowing him to enter pleas to counts which lacked a factual basis in the complaint. However, counsel testified that Gruenberg told him he had committed all of the crimes charged. Counsel advised Gruenberg that the State might not be able to prove all of the counts at trial, but that Gruenberg was unlikely to prevail on more counts than the State was willing to dismiss. Gruenberg made the choice to enter a plea to be in the best position to argue for a lesser sentence. Gruenberg maintains counsel was lying, but that was a credibility question for the trial court, which is not reviewable on appeal. ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238. Given counsel's testimony, which was accepted by the trial court, counsel did not provide ineffective assistance by advising Gruenberg to enter pleas, even to counts for which the factual basis in the complaint may have been weak or insufficient, knowing that his client had actually committed all of the crimes charged and that if the matter went to trial, the State was likely to obtain convictions on more counts.

¶13 Finally, Gruenberg contends that trial counsel was ineffective for failing to identify any appellate issues on his behalf—pointing out that the trial court did, in fact, vacate one of his counts. However, it was postconviction counsel's responsibility to review the matter for appellate issues, not trial counsel's. In any event, such postconviction review does not affect the validity of the pleas.

By the Court.—Order affirmed.

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