COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1042-CR **Cir. Ct. No. 2009CF4615**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE B. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and JONATHAN D. WATTS, Judges. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Antoine B. Lee, *pro se*, appeals a judgment entered upon his guilty pleas to one count of armed robbery and one count of armed burglary, both as a party to a crime. He also appeals an order denying

postconviction relief.[1] He seeks plea withdrawal based on allegations that his trial counsel was ineffective for failing to challenge the admissibility of custodial statements that he and his co-defendant made to police. We reject his claims and affirm.

BACKGROUND

¶2 The State filed a criminal complaint alleging that, on September 9, 2009, Lee and Douglas Mallett committed two armed robberies and then burgled a home. Police arrested Mallett that same day as he ran from a car taken in one of the armed robberies. He gave a statement inculpating himself and Lee. When police later arrested Lee, he too gave an inculpatory statement.

¶3 Lee, represented by counsel, resolved the charges against him with a plea bargain and pled guilty to committing an armed robbery and an armed burglary as a party to each crime. *See* WIS. STAT. §§ 943.32(2), 943.10(2)(a), 939.05 (2009-10).[2] The circuit court imposed an aggregate thirty-year term of imprisonment.

¶4 Lee elected to proceed *pro se* in postconviction proceedings, and he moved for plea withdrawal, alleging that he received ineffective assistance from his trial counsel. He asserted that his trial counsel should have sought to suppress his custodial statement on the ground that police arrested him illegally. He further

[1] The Honorable Daniel L. Konkol presided over the guilty plea and sentencing proceedings and entered the judgment of conviction. The Honorable Jonathan D. Watts considered Lee's postconviction motion and entered the order denying postconviction relief.

[2] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

alleged that his trial counsel should have sought to suppress Mallett's custodial statement on the grounds that police did not make an audio recording of the entirety of Mallett's interrogation and may have coerced Mallett's confession. The circuit court denied Lee's claims without a hearing, and he appeals.

DISCUSSION

¶5 A defendant who wishes to withdraw a guilty plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "Ineffective assistance of counsel can constitute a 'manifest injustice.'" ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110 (citation omitted).

¶6 The two-pronged test for claims of ineffective assistance of trial counsel requires a defendant to prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must identify specific acts or omissions by trial counsel that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other prong. ***Id.*** at 697. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law for our independent review. ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

¶7 To earn a hearing on a postconviction motion, a defendant must allege sufficient material facts that, if true, would entitle him or her to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion includes allegations that are sufficient to require a hearing presents an additional question of law for our *de novo* review. *See* ***id.*** If, however,

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court may in the exercise of its legal discretion deny the motion without a hearing.

Nelson v. State, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We review a circuit court's discretionary determinations with deference. ***Allen***, 274 Wis. 2d 568, ¶9.

¶8 Lee asserts that his trial counsel was ineffective for failing to seek to suppress his confession, because, Lee claims, the confession was the fruit of an illegal arrest. *See* ***State v. Carroll***, 2010 WI 8, ¶19, 322 Wis. 2d 299, 778 N.W.2d 1 (exclusionary rule requires suppression of evidence obtained by exploiting illegal seizure). He offers two theories in support of his claim.

¶9 Lee first contends that statements on a form prepared by a law enforcement officer are irreconcilably inconsistent and therefore indicate that his arrest was tainted by some impropriety. The form, which appears in the record only as an attachment to Lee's postconviction motion, is signed by the officer under oath and includes a description of Mallett's arrest on September 9, 2009, Mallett's custodial confession admitting that he committed armed robberies with Lee, and Lee's subsequent arrest on September 10, 2009. Lee believes that the form reveals unlawful police action because the form goes on to include the

officer's statements both that Lee was arrested "without a warrant," and that his "[p]arole [a]gent had placed a warrant out for his arrest." In Lee's view, the officer's statements about a warrant are in conflict, suggesting that his arrest was illegal. Lee shows no conflict, however, and thus he shows no resultant illegality.

¶10 Police officers may make a constitutionally valid arrest without a warrant pursuant to WIS. STAT. § 968.07(1)(d) if the officers have probable cause to believe that the arrested person has committed a crime. *See* ***State v. Nieves***, 2007 WI App 189, ¶¶10-11, 304 Wis. 2d 182, 738 N.W.2d 125. Additionally, a corrections agent supervising an offender in the community may, for investigative, disciplinary, or prophylactic purposes, issue an apprehension request for the offender. *See* WIS. ADMIN. CODE § DOC 328.22 (Dec. 2006);[3] *see also* ***State v. Fitzgerald***, 2000 WI App 55, ¶11, 233 Wis. 2d 584, 608 N.W.2d 391 (discussing application of the administrative rule to probationers). Nothing in Lee's submission demonstrates that these two bases for detention are mutually exclusive. Accordingly, Lee fails to show any inconsistency in the officer's statements on the form describing his arrest.

¶11 Lee next argues that his arrest was tainted because the police used his supervising agent as a "stalking horse." "A 'stalking horse' is 'something used to cover one's true purpose; a decoy.'" ***State v. Hajicek***, 2001 WI 3, ¶22, 240 Wis. 2d 349, 620 N.W.2d 781 (citation and one set of brackets omitted). Citing ***Hajicek***, Lee suggests that his supervising agent '"help[ed] the police evade the

[3] Effective July 1, 2013, WIS. ADMIN. CODE DOC ch. 328 was repealed and recreated. *See* Wisconsin Administrative Register, June 2013, No. 690 (eff. July l, 2013). Provisions comparable to those appearing in WIS. ADMIN. CODE § DOC 328.22 (Dec. 2006), are now found in WIS. ADMIN. CODE § DOC 328.27 (July 2013).

Fourth Amendment's warrant requirement.'" *See* ***id.*** (citation and two sets of brackets omitted).

¶12 Lee's contentions are entirely conclusory. To the extent Lee implies that the police wrongly took him into custody pursuant to his agent's apprehension request, Lee fails to offer any allegations of fact showing that the agent made the apprehension request improperly. Lee therefore does not demonstrate that police acted illegally in detaining him pursuant to that request. *Cf.* ***State v. Pittman***, 159 Wis. 2d 764, 766-67, 772, 465 N.W.2d 245 (Ct. App. 1990) (police may seize alleged parole violator pursuant to an administrative apprehension request). To the extent Lee instead suggests that police arrested him without probable cause to believe he committed a crime, he fails to shoulder the burden of explaining the basis for that position. *See* ***Allen***, 274 Wis. 2d 568, ¶15 (stating that "a postconviction motion for relief requires more than conclusory allegations"). Indeed, Lee's own postconviction submission appears to contravene any suggestion that police lacked probable cause to arrest him, because the materials show that the arrest followed Mallett's custodial statement incriminating Lee. An accomplice's statement is sufficient to provide probable cause for a warrantless arrest. ***Laster v. State***, 60 Wis. 2d 525, 532, 534-35, 211 N.W.2d 13 (1973).

¶13 In sum, Lee fails to demonstrate that he was unlawfully taken into custody. Accordingly, he fails to show that his trial counsel performed deficiently by foregoing a motion to suppress his custodial statements based on a claim of wrongful arrest. No attorney is ineffective for failing to make meritless motions. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996).

¶14 We turn to Lee's contention that his trial counsel was ineffective for failing to seek suppression of Mallett's custodial statement. According to a police report that Lee submitted with his motion, Mallett asked police to turn off a recording device during a portion of his custodial interview, and the police complied. Lee believes that Mallett's statement therefore could be challenged on the basis that it was not recorded in its entirety.

¶15 Lee bases his argument on WIS. STAT. § 968.073(2). The statute recognizes that, in most circumstances, "[i]t is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony." *See* ***id.*** The statute, however, "does not require suppression of evidence obtained from an unrecorded interview of an adult."[4] ***State v Townsend***, 2008 WI App 20, ¶1, 307 Wis. 2d 694, 746 N.W.2d 493. Lee therefore does not show that his trial counsel was deficient by failing to seek suppression of Mallett's statement based on the alleged statutory violation.[5]

¶16 Lee also believes that his trial counsel should have challenged Mallett's statement on the basis that it was coerced. A defendant may seek suppression of a third party's statement upon a showing that the police coerced the statement by egregious misconduct. *See* ***State v. Samuel***, 2002 WI 34, ¶46, 252 Wis. 2d 26, 643 N.W.2d 423. Nothing in Lee's postconviction motion, however, supports a claim of coercion, let alone suggests egregious police misconduct. To

[4] The record shows that Mallett was an adult at the time of his arrest and interrogation.

[5] The statutory remedy for a violation of WIS. STAT. § 968.073(2) is a jury instruction, given upon the defendant's request, permitting the jury to "consider the absence of an audio ... recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case." *See* WIS. STAT. § 972.115(2)(a). Here, however, Lee elected to plead guilty and to forego a jury trial.

the contrary, the circuit court found that Mallett himself pled guilty to the crimes underlying the charges in this case without challenging his custodial statement as involuntary or coerced, and Lee acknowledges that he does not know whether "coercive measures may have been taken" to secure Mallett's confession. "'A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.'" ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515 (citation omitted). Because Lee offers nothing to support his speculative suggestion that the police coerced Mallett's confession, he fails to show that his trial counsel was ineffective by failing to pursue such a claim. *See* ***id.***

¶17 A postconviction hearing "is not a fishing expedition.... Both the court and the State are entitled to know what is expected to happen at the hearing, and what the defendant intends to prove." ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334 (emphasis omitted). We are satisfied that Lee offers only conclusory allegations and speculative theories in support of his request for postconviction relief. Accordingly, the circuit court properly exercised discretion by denying his claims without a hearing. *See* ***Nelson***, 54 Wis. 2d at 497-98. We affirm.

By the Court.—Judgment and order affirmed.

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