COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP941-CR **Cir. Ct. No. 2010CF589**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY C. FRANKLIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Tony C. Franklin appeals pro se from a judgment convicting him after a jury found him guilty of armed robbery as a repeater. He also appeals from an order denying his motion for postconviction relief. Franklin

contends his trial counsel was ineffective for failing to challenge the propriety of the investigative stop and to seek suppression of statements he made to police. Even given a generous reading, his arguments are unpersuasive. We affirm the judgment and order.

¶2 At morning roll call, City of Racine Police Department officers viewed the surveillance video of an armed robbery of a food mart. It showed an approximately six-foot-tall, medium-complected black male with a thin goatee wielding a handgun. The man wore a brown knit stocking cap under a dark, zippered, hooded jacket bearing a white emblem or insignia on the left breast and distinctive striping on the sleeves and across the bottom.

¶3 A few days later, Officer Scott Keland spotted a man walking in the general area of the food mart. The man's physical appearance and unique attire matched that of the robbery suspect Keland had seen on the video. As he was involved in another matter, Keland alerted Officer Joseph Spaulding, who was investigating the armed robbery, and another officer. Both also had seen the video at roll call. When they responded, the man identified himself as Franklin. Spaulding said he needed to speak with him about "an incident that occurred" but mentioned no specific event. He asked Franklin only if he had any weapons. Franklin said he had a BB gun. Spaulding handcuffed him. Franklin then asked him, "[I]s everything okay, was there a robbery or something?" Spaulding told Franklin he was being detained for questioning. Advised of his ***Miranda***[1] rights before being questioned at the station, Franklin waived his rights and signed a written waiver.

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

¶4 Franklin was charged with armed robbery. A jury found him guilty. Franklin moved pro se for postconviction relief, alleging that his trial counsel, Attorney Carl Johnson, was ineffective in several ways. After a hearing at which the trial court gave Franklin's motion careful attention, the court concluded that a ***Machner***[2] hearing was unwarranted and denied the motion. This appeal followed.

¶5 Franklin first argues Johnson was ineffective for failing to challenge the investigative stop. He contends Johnson should have argued that the officers lacked reasonable suspicion to stop him on the street and failed to ask him to identify himself or to explain his conduct before frisking him. Franklin also complains that Johnson presented a defense with no "discernible trial strategy."

¶6 To prevail on a claim of ineffective assistance of counsel, a defendant must prove that defense counsel's actions were deficient and prejudicial to the defense. ***Strickland v. Washington***, 466 U.S 668, 687 (1984); ***State v. Hubanks***, 173 Wis. 2d 1, 24-25, 496 N.W.2d 96 (Ct. App. 1992). On appeal, the question of effective assistance of counsel is one of both fact and law. ***Strickland***, 466 U.S at 698. The trial court's findings of fact will not be reversed unless clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's actions were deficient and prejudicial are questions of law to be determined independently by the reviewing court. ***Id.***

¶7 It does not offend the Fourth Amendment's prohibition against unreasonable searches and seizures for a police officer to stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

supported by articulable facts that criminal activity "may be afoot." ***State v. Vorburger***, 2002 WI 105, ¶74, 255 Wis. 2d 537, 648 N.W.2d 829 (citing ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). A reasonable suspicion exists if the facts and circumstances would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the person has committed, was committing, or is about to commit a crime. ***State v. Post***, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. That is, "would the facts available to the officer at the moment of the seizure or the search 'warrant [a person] of reasonable caution in the belief' that the action taken was appropriate?" ***Terry***, 392 U.S. at 21-22.

¶8 The validity of an investigative stop presents a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We review the trial court's findings of historical fact, upholding them unless clearly erroneous. ***Id.*** We review the determination of reasonable suspicion de novo. ***Id.***

¶9 This aspect of Franklin's ineffectiveness claim fails for several reasons. First, Franklin alleges deficient performance but fails to explain how his defense was prejudiced; he must do both. *See* ***Strickland***, 466 U.S. at 687. Second, he does not flesh out his assertion that Johnson lacked a "discernible trial strategy." We need not address conclusory and undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. Third, Franklin was not frisked but was searched only after being taken into custody when he volunteered that he had a BB gun. Even so, a police officer is not required to make inquiries of the person he or she

has stopped before commencing a frisk. *See* WIS. STAT. § 968.24 (2011-12);[3] *see also* ***State v. Williamson***, 113 Wis. 2d 389, 403-04, 335 N.W.2d 814 (1983). Finally, the ***Terry*** stop was supported by reasonable suspicion. From a distance of about twenty feet, Keland saw a person whose physical characteristics and clothing, particularly the distinctive jacket, matched what Keland had seen on the security video. Spaulding, too, thought that Franklin's jacket as well as some uncommon features of the gun were identical to what he had seen on the video. Challenging the reasonableness of the stop would have failed. Not pursuing a meritless motion or argument does not constitute deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶10 Franklin next asserts that his query, "[I]s everything okay, was there a robbery or something?" was the product of a custodial interrogation such that, as he had not yet been ***Mirandized***, the trial court erroneously ruled it admissible.

¶11 "'[I]nterrogation' under ***Miranda*** [***v. Arizona***, 384 U.S. 436 (1966)] refers not only to express questioning" but also to its "functional equivalent"—that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." ***State v. Hambly***, 2008 WI 10, ¶46, 307 Wis. 2d 98, 745 N.W.2d 48 (quoting ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980)). "'Interrogation' … must reflect a measure of compulsion above and beyond that inherent in custody itself." ***Innis***, 446 U.S. at 300.

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

¶12 Volunteered statements of any kind are not barred by the Fifth Amendment, however. ***Miranda***, 384 U.S. at 478. Even if in custody, when there is no interrogation and the arrestee volunteers inculpatory statements, ***Miranda*** warnings are not needed. ***Innis***, 446 U.S. at 299-300. Coercive police conduct is a necessary predicate to finding that a statement is not voluntary. ***State v. Ward***, 2009 WI 60, ¶33, 318 Wis. 2d 301, 767 N.W.2d 236. Whether a suspect was subject to interrogation is a question of constitutional fact. ***Hambly***, 307 Wis. 2d 98, ¶49. We will not upset the trial court's findings of evidentiary or historical fact unless they are clearly erroneous. ***Id.*** Whether the facts satisfy the legal standard is a question of constitutional law we decide de novo. ***Id.***

¶13 Spaulding testified at the suppression hearing and again at trial that when he approached Franklin on the street, he said that he wanted to speak with Franklin about "an incident that occurred" and asked Franklin a single question: whether he had any weapons. Spaulding also testified that neither he nor any of the other officers present specifically referenced or asked Franklin any questions about the armed robbery and that Franklin spontaneously offered his "was there a robbery" response.

¶14 The trial court found that the comment was "volunteered," was not connected to the question about weapons, and was not the result of interrogation. These findings are not clearly erroneous. Even if Franklin was in custody at that time, we conclude his "robbery" statement was not elicited by coercion.

¶15 Franklin next argues that the custodial statements he made at the police station were the fruit of his illegal seizure, such that Johnson ineffectively failed to move to suppress them. This claim fails right out of the gate. His seizure was not illegal and he already had been ***Mirandized***. More importantly, the

statements were not used at trial, so even if his statements were "poisonous fruit," he cannot show prejudice. *See* ***Strickland***, 466 U.S. at 687.

¶16 Finally, Franklin hints that Johnson should have moved to suppress his statement that he had a BB gun in his pocket. The State promised at the suppression hearing that it would not ask about Franklin's admission, making a suppression motion unnecessary. Consistent with its promise, the State asked Spaulding only whether any weapons were located on Franklin, not whether Franklin admitted to having one. On cross-examination, however, Spaulding answered in the affirmative when Johnson asked him, "And [Franklin] actually told you that he had a BB gun on him, correct?" If this was improper, the defense opened the door. Furthermore, any error was harmless because the gun seized from Franklin was introduced into evidence and the jury saw it in the surveillance video they viewed during deliberations.

By the Court.—Judgment and order affirmed.

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