COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2858-CR **Cir. Ct. No. 2009CF1337**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY JOE CANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL GUOLEE and WILLIAM S. POCAN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Billie Joe Cannon, *pro se*, appeals a judgment entered after he pled guilty to one count of possessing a firearm while a felon. He

also appeals an order denying postconviction relief.[1] We reject his claims and affirm.

BACKGROUND

¶2 The State charged Cannon with one count of possessing a firearm as a felon, one count of furnishing a firearm to a felon as a party to a crime, and one count of conspiracy to deliver cocaine. The parties stipulated to severing the firearm counts from the narcotics count. The latter count proceeded to trial, and the jury acquitted Cannon. He then pled guilty to possessing a firearm while a felon, and the trial court dismissed and read in the remaining charge. At sentencing, the trial court imposed a four-year term of imprisonment, evenly bifurcated between initial confinement and extended supervision.

¶3 Cannon filed a *pro se* postconviction motion seeking plea withdrawal on the ground that his trial counsel was ineffective in various ways.[2] He also alleged that the State violated its discovery obligations and violated the laws governing electronic surveillance. The trial court conducted an evidentiary hearing and then entered a written order denying Cannon's claims. He appeals.

[1] The Honorable Michael D. Guolee accepted Cannon's guilty plea, imposed sentence, and entered the judgment of conviction in this matter. The Honorable William S. Pocan entered the postconviction order underlying this appeal.

[2] The motion seeking postconviction relief discussed in this opinion is Cannon's second postconviction motion. Cannon first filed a *pro se* postconviction motion seeking resentencing, asserting that the sentencing court had a conflict of interest. The Honorable Stephanie Rothstein denied relief on the ground that Cannon filed the motion *pro se* while he was represented by counsel. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996) (defendant may not proceed both with counsel and *pro se*). Cannon subsequently elected to proceed *pro se*, but did not further pursue his conflict of interest claim.

ANALYSIS

¶4 We begin with Cannon's claim that he is entitled to withdraw his guilty plea because his trial counsel was ineffective. A defendant who seeks 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).

¶5 A defendant who claims that his or her trial counsel was ineffective must prove that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "'[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.' Thus, we will not reverse the [trial] court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (citations and footnote omitted). Whether trial counsel's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. *See* ***id.*** at 634.

¶6 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must generally preserve trial counsel's testimony in a postconviction hearing conducted pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). *See* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). In this case, the trial court conducted a ***Machner*** hearing and then entered an order denying Cannon's

claims "[b]ased upon the testimony and evidence given in court, and for the reasons set forth on the record." The transcript of the ***Machner*** hearing, however, is not included in the appellate record.

¶7 An appellant is responsible for ensuring that the record on appeal contains the material necessary for this court to review the issues. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Because the appellate record lacks the postconviction hearing transcript, the record is incomplete, and when an appellate record is incomplete in regard to an issue raised by the appellant on appeal, we will assume that the missing material "supports every fact essential to sustain the trial court's [decision]." *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986); *see also* ***State v. Holmgren***, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999).

¶8 Based on the foregoing well-settled principles, we assume that the missing postconviction hearing transcript fully supports the trial court's decision to deny Cannon's claims of ineffective assistance of counsel. We conclude that no basis exists to disturb Cannon's guilty plea.[3]

¶9 Cannon next claims that the State failed to comply with its discovery obligations by neglecting to produce exculpatory evidence, and that the State

[3] In the reply brief, Cannon asserts that his guilty plea is invalid because the trial court never asked him if he pled guilty, and therefore he never "verbally" entered a guilty plea. We normally do not consider issues raised for the first time in a reply brief. *See* ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188. We will not depart from that rule here, particularly because Cannon does not identify any portion of his postconviction motion in which he alleged a defect in the articulation of his guilty plea. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (we do not address issues raised for the first time on appeal).

violated a variety of his constitutional and statutory rights when a confidential informant secretly recorded a conversation with Cannon. Cannon did not preserve those claims for appeal. "The general rule is that a guilty ... plea 'waives all nonjurisdictional defects, including constitutional claims.' Courts refer to this as the guilty-plea-waiver rule."[4] ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (citations, footnote and brackets omitted). Because Cannon did not preserve his claims relating to discovery and surveillance, we will not review those claims.

¶10 WISCONSIN STAT. § 971.31(10) (2011-12)[5] states an exception to the rule set forth in ***Kelty***. Pursuant to that statute, a person who has pled guilty may nonetheless appeal an order denying a motion to suppress evidence. Here, Cannon contends that the trial court erroneously denied his motion to suppress his custodial statements to police. We turn to that contention.

¶11 During pretrial proceedings, Cannon sought to suppress his custodial statements on the grounds that he made the statements involuntarily and that the State did not "fully advise Cannon as to his options under ***Miranda*** [***v. Arizona***, 384 U.S. 436, 478-79 (1966)]."[6] Following a series of evidentiary hearings, the

[4] "Waiver" generally refers to the intentional relinquishment of a known right, while "forfeiture" refers to a loss that occurs by operation of law. *See* ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886. The supreme court has therefore observed that a more accurate label for the guilty-plea-waiver rule would be the guilty-plea-forfeiture rule. *See* ***id.***

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

[6] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

trial court rejected Cannon's arguments and determined both that he received proper ***Miranda*** warnings and that he gave his statements knowingly and voluntarily. On appeal, Cannon does not challenge those conclusions. Rather, Cannon argues that the trial court should have suppressed his statements because the State violated WIS. STAT. § 972.115(5).

¶12 WISCONSIN STAT. § 972.115(5) provides that a recording of a custodial statement "shall not be open to public inspection under [WIS. STAT. §§] 19.31 to 19.39 before" either: (1) "[t]he person interrogated is convicted or acquitted of an offense that is a subject of the interrogation"; or (2) "[a]ll criminal investigations and prosecutions to which the interrogation relates are concluded." *See* § 972.115(5). Cannon believes that the State violated § 972.115(5) by disclosing his custodial statements to his trial counsel during the discovery process and that the statements therefore should have been suppressed.

¶13 A litigant forfeits appellate review of any grounds to suppress evidence that he or she does not present to the trial court. *See* ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991). We determine whether a litigant timely presented a ground for suppressing evidence by examining any written pretrial suppression motions and by reviewing the suppression hearing. *See* ***State v. Caban***, 210 Wis. 2d 597, 604-06, 563 N.W.2d 501 (1997).

¶14 Our review here shows that Cannon never argued during pretrial proceedings that the trial court should suppress his custodial statements because the State disclosed them to his counsel during discovery. Moreover, Cannon does not direct our attention to any portions of either the written suppression motion or the suppression hearings that include this argument. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (we will not scour the record

seeking support for appellant's claim). It appears that Cannon first suggested in his postconviction reply brief that WIS. STAT. § 972.115(5) requires suppression of his statement. Accordingly, the claim is untimely made. *See* ***State v. Santiago***, 206 Wis. 2d 3, 26, 556 N.W.2d 687 (1996) (litigant timely raises basis for suppressing statement by including argument in a written motion or raising the argument during State's presentation of evidence during suppression hearing). Because Cannon did not timely raise his claim, he is not entitled to pursue it in this court.[7] *See* ***Peters***, 166 Wis. 2d at 174. For all of the foregoing reasons, we affirm.[8]

By the Court.—Judgment and order affirmed.

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

[7] Although we have dignified Cannon's argument based on WIS. STAT. § 971.115(5) by explaining why Cannon is procedurally barred from pursuing it, we nonetheless observe here that his claim is absurd. *See* WIS. STAT. § 971.23(1)(a) (requiring that, upon demand, the State disclose to defendant or defendant's counsel during discovery "[a]ny written or recorded statement concerning the alleged crime made by the defendant").

[8] Cannon suggests that he can raise issues otherwise forfeited by his guilty plea because the errors he alleges flow from exploitation of his custodial statements and therefore are "fruit of the poisonous tree." This contention is meritless. Cannon has not demonstrated that the State improperly obtained his statements, and therefore he has not shown any basis for suppressing evidence derived from use of those statements. *See* ***State v. Knapp***, 2005 WI 127, ¶24, 285 Wis. 2d 86, 700 N.W.2d 899 (explaining that the fruit-of-the-poisonous-tree doctrine is, broadly speaking, a "'device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity'") (citation omitted).