COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP194-CR **Cir. Ct. No. 2009CF3918**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER E. MASARIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges. *Affirmed*.

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

¶1 BRENNAN, J. Christopher Masarik was convicted by a jury of first-degree reckless homicide and arson. He appeals from the judgment of conviction and an order denying his postconviction motion without a hearing. Masarik seeks a new trial on the grounds that the trial court erred when it denied

his suppression motion.[1] In the alternative, he seeks an evidentiary hearing on his claim that counsel was ineffective. He also argues that he is entitled to concurrent rather than consecutive sentences. His arguments are unpersuasive, and accordingly, we affirm the judgment of conviction and the postconviction motion.

BACKGROUND

¶2 On August 7, 2009, firefighters were called to an early morning fire at a duplex and found a man later identified as Michael Jansen unresponsive inside an upstairs bedroom. Efforts to revive him were unsuccessful. An autopsy determined that he had suffered extensive burns and died of smoke inhalation. Investigators concluded that the fire had resulted from the use of an accelerant poured outside the rear entry near the first floor porch. In the course of the investigation into the arson, police received information from J.K. regarding multiple statements Masarik had made to him admitting involvement in the fire and mentioning that he had used a gas can. Masarik was arrested, charged with arson and first-degree reckless homicide,[2] convicted, and sentenced to consecutive sentences of thirty-five and thirteen years for the crimes.

[1] The Honorable Kevin E. Martens presided over the trial. The Honorable Jeffrey A. Wagner presided over postconviction proceedings and denied Masarik's motion for an evidentiary hearing and motion in the alternative for sentence modification. The Honorable Jeffrey A. Conen presided over pre-trial motions and proceedings and denied the motion to suppress Masarik's statements.

[2] Masarik was initially charged with felony murder but the charge was later amended to first-degree reckless homicide and arson.

DISCUSSION

Voluntariness of the custodial statement

¶3 We review the denial of a motion to suppress under a two-part standard of review: we uphold the trial court's findings of fact unless they are clearly erroneous but review *de novo* whether those facts warrant suppression. ***State v. Hampton***, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901.

¶4 "[A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). '"If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.'" ***State v. Jennings***, 2002 WI 44, ¶¶29, 40, 252 Wis. 2d 228, 647 N.W.2d 142 (citation omitted) (holding that "I think maybe I need to talk to a lawyer" is not an unequivocal invocation of right). A review of a suppression motion under these circumstances "requires two distinct inquiries." ***State v. Conner***, 2012 WI App 105, ¶16, 344 Wis. 2d 233, 821 N.W.2d 267. "First, we must determine whether the accused actually invoked his right to counsel. Second, if the accused did indicate he wanted an attorney, we must determine whether he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." ***Id.*** (Internal citations omitted). Both inquiries are governed by the familiar two-part standard of review applicable to factual findings and legal conclusions. ***Id.***, ¶17.

¶5 On August 20, 2009, the day police arrested him, Masarik was interviewed by two detectives; the interview was recorded. Masarik was given a ***Miranda***[3] warning and waived his rights and agreed to the interview. About two hours into the interview, Masarik made the following statements: "I think I need an attorney, man," "I mean I want to talk to you but I want an attorney present," and "I just need a minute, I need to think." The detectives stopped the questioning, turned off the recorder at 11:47 p.m., and left Masarik alone in the interview room. When the detectives returned just after midnight, he told them he wanted to tell his side of the story. They retrieved the recorder and began recording again at 12:07 a.m. He was again given a ***Miranda*** warning and stated that he understood and wished to continue to speak with them. In a later interview, on August 22, he made incriminating statements about his involvement with the fire.

¶6 Masarik moved to suppress the statements on the ground that they had been unlawfully obtained. The trial court held a suppression hearing. At the hearing, Masarik testified, and he did not dispute that the detectives stopped the questioning when he mentioned a lawyer. Rather, he based his involuntariness argument on his testimony that the police made promises during a conversation that occurred prior to the re-starting of the interview: "[A]t some point in that time I was told that this would be viewed as an accident if I cooperated, and that if I didn't I would be charged with--I would be charged like a murderer and that they would testify on my behalf." Counsel asked whether the alleged promises were made during the break in questioning. Masarik answered, "I think so. I--It was

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

said. That's all I know." The detectives each testified that no such promises had been made.

¶7 The circuit court concluded that "the detectives seemed to be far more credible" and that "Mr. Masarik's testimony here was not the most clear." The trial court found that Masarik did not unequivocally invoke his right to counsel:

> [T]he invocation of that right has to be unequivocal. It's got to be absolute and unequivocal …. And what I am hearing here is Mr. Masarik basically equivocating. However, the detectives went the extra mile and viewed it as a request for a lawyer. They stopped the questioning. There was a 15-minute break for Mr. Masarik to think, because that was what he said, that was part of the recorded testimony is he needed some time to think; again, making it not unequivocal ….

¶8 We agree that Masarik's statements are not an unequivocal invocation of his right to counsel, both because he said "I think I need an attorney" and because he asked the detectives for time to think. *See* ***Jennings***, 252 Wis. 2d 228, ¶¶29, 44. The former statement is certainly equivocal and the latter plainly asks to be left alone to think—a request that the detectives respected. And even if we did consider this an unequivocal invocation, we would still conclude that there was nothing unlawful: the trial court found that Masarik started talking about the case again when the detectives returned to the room, and the recording showed that Masarik was then re-***Mirandized*** as required before questioning resumed.

¶9 The trial court did not find Masarik's testimony about the promises of the detectives credible. We defer to the trial court's credibility finding because the record shows that they were not clearly erroneous. Suppression is not required where a defendant initiates further discussions with the police and knowingly and

intelligently waives the right he had invoked. *See* ***Conner***, 344 Wis. 2d 233, ¶16. The denial of the suppression motion was therefore not error.

Ineffective assistance of counsel

¶10 A postconviction motion alleging ineffective assistance of counsel does not automatically trigger the right to a ***Machner*** hearing.[4] ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***Id.***, ¶17. Whether a motion alleges sufficient facts entitling the defendant to relief is a question of law that we review independently. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

¶11 To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the motion must allege with factual specificity both deficient performance and prejudice. ***Id.***, ¶¶20, 40. To establish deficient performance, it would not be enough for Masarik to prove that his attorney's performance was "imperfect or less than ideal." ***Id.***, ¶22. Counsel is strongly presumed to have rendered reasonably competent assistance. ***Id.***, ¶¶25, 27. To succeed on the prejudice prong, Masarik had to prove a reasonable probability that he would have received a more favorable outcome at trial but for counsel's deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, Masarik must prove that the suppression motion would have succeeded had it been

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

brought. *See* e.g., ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

¶12 Both of Masarik's challenges to counsel's performance relate to alleged deficiencies in the manner counsel argued the suppression motion.

¶13 First, he argues that counsel failed to argue that the inculpatory statements stemmed from an unlawful arrest. A defendant's statements are inadmissible where detention was unsupported by probable cause and "[n]o intervening events broke the connection between petitioner's illegal detention and his confession." ***Dunaway v. New York***, 442 U.S. 200, 219 (1979). Probable cause to arrest exists where the facts before the police officer lead to the conclusion that "guilt is more than a possibility." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶14 J.K. was a citizen who went to the police August 20, 2009, with information. He provided his name and exposed himself to liability for the parts of his statement that admitted marijuana use. He reported to the police the following:

- That he and Masarik were both friends of Jansen.
- That Masarik told him on August 7, 2009, at work, that he put a piece of paper inside Jansen's lawn mower and set it on fire.
- That on August 14, 2009, Masarik told him after they smoked marijuana that he would burn down J.K's house if J.K. repeated what Masarik had previously told him about setting the Jansen fire.

- That on August 14, 2009, he saw a gas tank in the back of Masarik's van which Masarik told him was what he "used on Mike's house."

- That on August 18, 2009, Masarik told J.K. that he poured gasoline in Jansen's backyard, lit it, and left.

¶15 The police had already investigated the arson and homicide and knew that someone started the fire at the rear landing of Jansen's house in the early morning hours of August 7, 2009, with a liquid accelerant near where the lawn mower was located and then left. This corroborated exactly what J.K. reported that Masarik told him. The circuit court concluded that probable cause supported the arrest and that Masarik's argument was without merit. We agree.

¶16 The police had "reasonable grounds to believe" Masarik committed arson and homicide. *See* WIS. STAT. § 968.07(1)(d) (2013-14).[5] Masarik's statements to J.K. implicating himself in the arson were corroborated by the evidence of the victim's body, the determination that the location where the fire started was at the rear of the house, the manner of death, the evidence of the accelerant obtained at the crime scene, and the fact that J.K. saw the gas can Masarik said he used. These objective facts, together with J.K.'s statement of Masarik's confessions, made guilt "more than a possibility" and established probable cause for the arrest. *See* ***Paszek*** at 625. A challenge to admissibility on these grounds would have been without merit, and counsel is not ineffective for failing to bring meritless challenges. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶17 Masarik's second ineffective assistance argument is that counsel was ineffective for failing to make an argument that Masarik's poor mental health made him unable to withstand the coercive tactics of the police.

¶18 A defendant's statement is voluntary if it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***Id.***, ¶37. In determining whether a statement was voluntary, we consider the totality of the circumstances. ***Id.***, ¶38. This test requires balancing the personal characteristics of the defendant against the pressures and tactics employed by law enforcement officers. ***Id.***, ¶39.

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id., ¶39 (internal citation omitted).

¶19 To the extent that it sheds light on his state of mind at the time of questioning, his mental health history would be a factor to consider, but it is not dispositive. "[A] defendant's mental condition, by itself and apart from its relation

to official coercion," does not "dispose of the inquiry into constitutional 'voluntariness.'" ***Colorado v. Connelly***, 479 U.S. 157, 164 (1986).

¶20 Basically, Masarik argues on appeal that the police coerced his confession with promises and exploitation of his mental health difficulties. The circuit court rejected his argument by concluding that Masarik had presented insufficient evidence of mental health impairments at the time of the questioning to warrant a hearing on his claim that counsel was ineffective for failing to make this particular argument. The circuit court also concluded that based on the recording of the interrogation, his statements were "uncoerced and voluntary." We agree.

¶21 The first problem with Masarik's argument is one of insufficient proof of any mental health difficulties *at the time of* his confession to police. In his postconviction motion he relies on Dr. Robert Rawski's December 9, 2013 postconviction competence report, which makes no connection to mental health problems on or near the time of the August 2009 confession. Dr. Rawski's report admittedly noted that Masarik had a history of mental health issues that included past diagnoses of anxiety disorder, schizotypal personality disorder, and polysubstance abuse, but he offered no opinion of any connection to the time frame of the August 2009 confessions. Additionally, the report presents no support for Masarik's conclusory argument of a causal relationship between the alleged mental illness and police tactics. *See* ***Connelly***, 479 U.S. at 164 ("[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law").

¶22 Beyond the absence of any forensic proof, Masarik's second problem with his argument is that his personal characteristics show intelligence and experience in the criminal process—presumably factors that would assist in balancing police pressure. At the time of questioning, Masarik was thirty-one years old. He had completed his HSED while incarcerated. On a standardized reading test administered by the PSI writer, Masarik scored "above high school reading level." The trial court, at sentencing, noted that Masarik is intelligent. Masarik had a significant amount of prior police interaction. At the time of the questioning, he had three prior convictions as an adult (for stealing a car, criminal damage to property, and battery) and had previously served a prison sentence after a revocation. Masarik offers no rebuttal to the fact that these personal characteristics all weigh in favor of a finding of voluntariness.

¶23 Masarik offers his own postconviction affidavit and his own conclusory statements of his mental health difficulties, but even those are not linked in any way to the actions of the police in August 2009. It is his burden to show specific factual allegations supporting his motion. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶20, 40. Neither the audio of the confession nor the transcript in the record discloses any indication of distress, though Masarik later characterized his emotional state during that time as "frightened" and "terrorized" and argues generally that "severe mental health deficiencies" affected his ability to resist police pressure at the time of questioning.

¶24 The next flaw in Masarik's involuntariness argument is the absence of any evidence of coercive or improper police tactics. Even if he had produced sufficient evidence of mental illness, a defendant's mental illness does not render his statements involuntary *absent proof of coercive conduct by police*. *See* ***Connelly***, 479 U.S. at 164 ("[a]bsent police conduct causally related to the

confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law"). Masarik fails to show any improper police conduct.

¶25 In his postconviction motion, Masarik identifies three types of tactics that he believes rendered his confession involuntary.

¶26 First he argues the police made overt or implied promises to him. Although Masarik testified at the suppression hearing that he was coerced by promises that the arson would be viewed as an accident and by promises that the detectives would testify on his behalf at trial, there is no credible evidence to support his allegations. The detectives testified at the hearing that no such promises had been made. The interviews were recorded and at least one was transcribed, and Masarik has not identified any evidence in the recordings that supports his claim.[6]

¶27 The trial court concluded that Masarik had not proven the timing of any such promises, even if they did occur, because Masarik testified he could not remember if the alleged promises occurred before he reinitiated the interview or at another time. He does not rebut that testimony here.

¶28 Second, he claims that the "pressures and tactics" used by police to obtain his statements improperly were physical factors such as "the extended hours of being in a relatively small interrogation room, … at least four separate

[6] Some audio recordings and partial transcripts of the interviews are in the record, but others have not been made part of the record. "[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

interrogations conducted over multiple days," and an allegation that "the police fed information to him." But the record shows that he was given frequent bathroom breaks and he was permitted to smoke as he requested. The fact that there were multiple interrogations over several days is not in itself indicative of coercive tactics. *See* ***State v. Agnello***, 2004 WI App 2, ¶¶21-22, 269 Wis. 2d 260, 674 N.W.2d 594 (multiple interviews are not coercive where defendant received "breaks both during and between interrogation sessions and at least one of the changes in interrogation teams was due to a shift change"). The recording reflects normal conversational volume and no raised voices or threatening tone. He does not allege that he was deprived of sleep, food, or water. *See* ***id.***, ¶22. The tactics employed here are "tactics that courts commonly accept." *See* ***State v. Moore***, 2015 WI 54, ¶¶58-64, 363 Wis. 2d 376, 864 N.W.2d 827.

¶29 Third, belatedly, Masarik argues for the first time in his postconviction motion that "during the police interrogations," officers referred to a previous incident where he was "grabbed and restrained" while being admitted for mental health treatment a few days before his arrest, and that officers implied that he would be subjected to the same treatment if he "did not tell the officers what they wanted to hear." Masarik fails to develop any argument how this allegation supports his contention that his trial counsel was ineffective for failing to argue his mental health issues. It is an argument consistent with the "improper promises" argument his trial counsel did make at the suppression hearing but with a twist to "implicit threat." He offers no reason why he did not testify at the suppression hearing to these allegedly improper threats. And again, there is no support on the tape or in the record for these claimed threats.

¶30 Considering the totality of the circumstances and balancing Masarik's personal characteristics against the pressures of the police tactics, we

conclude that Masarik's statements were voluntary because the pressures placed on him by interrogation did not exceed his ability to resist. *See* ***Hoppe***, 261 Wis. 2d 294, ¶36.

¶31 Because we conclude that under the totality of the circumstances the statements were voluntary, we also conclude that counsel was not ineffective for failing to make this argument. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

Consecutive sentences

¶32 Masarik argues in the alternative that the circuit court erred in denying his motion seeking concurrent sentences. He relies on ***State v. Carlson***, 5 Wis. 2d 595, 93 N.W.2d 354 (1958), which he takes to mean that a person convicted of charges stemming from the same conduct cannot be subject to consecutive sentences. ***Carlson*** does not stand for that proposition; rather, it holds that it is not proper to bring separate charges for felony murder and for the underlying crime. ***Id.*** at 608. In that case, our supreme court vacated one of the convictions; it did not order the sentences served concurrently. ***Id.*** at 609. As the circuit court correctly noted, ***Carlson*** is inapplicable because Masarik was not convicted of felony murder and an underlying crime but two separate crimes. Masarik also argues that the pre-sentence investigation (PSI) recommended concurrent sentences, but it is well established that "the recommendations in a PSI are not binding on the court." ***State v. Greve***, 2004 WI 69, ¶10, 272 Wis. 2d 444, 681 N.W.2d 479. Accordingly, we conclude that Masarik is not entitled to have his sentences run concurrently.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.