COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2315-CR **Cir. Ct. No. 2011CF3984**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN RAYMONT EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kevin Evans appeals from a judgment convicting him, after a jury trial, of possession with intent to deliver cocaine (>5-15g) and from an order denying his motion for postconviction relief. We reject his claims

that defense counsel was ineffective and that a police officer's testimony, allowed to be admitted as expert testimony, did not pass muster under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). We affirm.

¶2 A confidential informant (CI) of proven reliability told police that, within the past seventy-two hours, he had seen marijuana and a revolver in Evans's possession at 3831 N. 10th Street in Milwaukee. Lois Mixon, a friend of Evans's, owned the residence. Police executed a no-knock search warrant for, among other things, marijuana and weapons. The warrant did not list cocaine.

¶3 The search yielded no marijuana but over eleven grams of crack cocaine. Police found 2.71 grams in twenty-six "corner-cut" baggies in one bedroom and, in a Christmas tin in another bedroom, three corner-cuts weighing 8.44 grams. They also found boxes of baggies and two scales, but no crack pipes or other smoking paraphernalia. A tote bag of men's clothes and three pieces of mail bearing Evans's name, one addressed to him at 3831 N. 10th Street, were in the bedroom with the Christmas tin. Evans's fingerprints were lifted from boxes of baggies and the underside of the Christmas tin lid. Mixon's fingerprints were not on any of the seized items.

¶4 Evans filed a "Motion to Suppress Affidavit/***Franks***[1] Motion" and to disclose the name of the CI. The State argued that Evans did not have standing to challenge the search and that Evans failed to show that the CI was not credible or reliable. Defense counsel conceded the State's argument on standing and withdrew the suppression motion.

[1] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978).

¶5 The State informed the court that it intended to call a Milwaukee police officer as an expert witness to testify that the amount and packaging of the cocaine and other seized evidence was consistent with an intent to deliver the cocaine, rather than for personal use. After a ***Daubert*** hearing, the court concluded that the officer's testimony was admissible. The jury found Evans guilty of possession with intent to deliver cocaine.

¶6 Evans moved for postconviction relief on grounds his attorney provided ineffective assistance for failing to attack the credibility of Officer Rodriguez, who was the search-warrant affiant, one of the officers who executed it, and the officer who found the largest stash of cocaine in the Christmas tin and arrested Evans. She should have done so, Evans asserts, by investigating Rodriguez's disciplinary history.[2] The court denied Evans's motion without a ***Machner***[3] hearing, concluding that the allegations of misconduct were impermissible other-acts evidence.

¶7 After this court rejected Evans's no-merit appeal, his WIS. STAT. RULE 809.30 (2013-14)[4] rights were reinstated. New counsel filed a supplemental postconviction motion and, later, an amended postconviction motion reflecting the withdrawal of an issue that was clarified. The court denied the motion.

[2] Evidence of an OWI conviction was admitted at trial. Postconviction counsel argued that trial counsel also should have unearthed and presented evidence of a false statement Rodriguez made to police in the OWI incident and of his one-day suspension for underage drinking at Summerfest and the associated false claim that he was holding the beer for a friend.

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

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

Ineffective Assistance of Counsel

¶8 On appeal, Evans argues defense counsel was ineffective. He first contends that counsel's failure to assert standing in the motion to suppress and then withdrawing the motion forfeited a suppression hearing and that, had there been one, the seized evidence likely would have been suppressed. Second, he contends that if counsel had revealed to the jury that Mixon pled guilty to maintaining a drug-trafficking place as a result of the search of her house, it would have cast doubt on his guilt as to cocaine possession.

¶9 To prevail on an ineffective-assistance-of-counsel claim, a defendant must demonstrate both that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct [fell] below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. To prove prejudice, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶10 "A motion claiming ineffective assistance of counsel does not automatically trigger a right to a ***Machner*** testimonial hearing." ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. In the context of an ineffective-assistance claim, the motion must allege facts that, if true, establish that counsel's performance was both deficient and prejudicial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 312, 548 N.W.2d 50 (1996). If the motion on its face alleges facts that would entitle the defendant to relief, the trial court has no

discretion and must hold an evidentiary hearing. ***Id.*** at 310. If the motion fails to allege sufficient facts, the court may deny the motion without a hearing. ***Id.*** at 310-11. To be non-conclusory, the motion should present "who, what, where, when, why, and how" with sufficient particularity to allow the trial court to meaningfully assess the claim. ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges facts which, if true, would entitle a defendant to relief is a question of law we review de novo. ***Bentley***, 201 Wis. 2d at 309-10.

a. Standing

¶11 Evans's postconviction motion alleged that trial counsel should have asserted standing in the suppression motion, shored it up with information showing that he resided at 3831 N. 10th Street, and not withdrawn the motion, as he believes it is reasonably probable the court ultimately would have found the CI not credible or reliable and would have suppressed the seized evidence.

¶12 A challenger to the reasonableness of a search and seizure under the Fourth Amendment must have standing. ***State v. Fox***, 2008 WI App 136, ¶10, 314 Wis. 2d 84, 758 N.W.2d 790. One has standing under the Fourth Amendment "when he or she 'has a legitimate expectation of privacy in the invaded place.'" ***Id.*** (citation omitted). An expectation of privacy is legitimate if it is "one that society is willing to recognize as reasonable." ***State v. Bruski***, 2007 WI 25, ¶23, 299 Wis. 2d 177, 727 N.W.2d 503. Whether a person has standing is a question of law that we review de novo. ***Fox***, 314 Wis. 2d 84, ¶8.

¶13 Factors relevant to determining whether an accused has an expectation of privacy that society is willing to recognize as reasonable include:

> (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; (6) whether the claim of privacy is consistent with historical notions of privacy.

State v. Dixon, 177 Wis. 2d 461, 469, 501 N.W.2d 442 (1993). "This list of factors is not controlling or exclusive. The totality of the circumstances is the controlling standard." ***Id.***

¶14 We agree with the State that counsel was not ineffective for failing to pursue Evans's standing to challenge the search, as we question whether he had standing to challenge the search. Evans himself asserted in his motion to suppress that it was his position that:

> he was not present in the home [at 3831 N. 10th Street] within the past 72 hours prior to the execution of the warrant. There was no indication that Mr. Evans was a permanent and/or casual visitor to the premises. He was not in the home at the time of the execution of the warrant. He was not arrested until sometime following the raid on the home. He didn't reside in the home. The home was the property of Lois Mixon. Mr. Evans was an occasional visitor and would spend the night there sporadically.

¶15 The parties agree that Evans did not own the house and was not on the premises during the execution of the warrant. He was not at the address on the approximately five occasions Rodriguez looked for him between June 16, 2001, the date of the search, and July 9, 2001, the date of his arrest. He does not claim in his postconviction motion or appellate brief that he had a property interest in the residence, complete dominion and control over it, the right to exclude others, that he took any precautions to protect a privacy interest in it, or that he was anything but a "sporadic[]" visitor. Further, counsel stated in closing arguments: "And

what links him to those drugs? Nothing. Nothing of substance.… He never lived at 3831 North Tenth St."

¶16 Evans distanced himself from the premises by his own suppression motion and theory of defense. Under the totality of the circumstances, it is highly questionable that he had an expectation of privacy in Mixon's home that society is willing to recognize as reasonable.

¶17 If he did have standing, it is not reasonably probable that a suppression hearing would have worked to his benefit. The trial court stated at the postconviction motion hearing that, regardless, it would have denied the suppression motion on the merits. A reviewing court accords great deference to a warrant-issuing magistrate's decision. *See* ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). One challenging a magistrate's decision to issue a search warrant must establish that the facts were "clearly insufficient" to support a finding of probable cause. ***Id.*** The search-warrant affidavit here established probable cause to believe evidence of a crime would be discovered.

¶18 To succeed on a motion to suppress evidence under ***Franks v. Delaware***, 438 U.S. 154 (1978), a defendant must prove by a preponderance of the evidence that a statement necessary to the finding of probable cause for the challenged warrant was false and that the affiant included it in the warrant affidavit "knowingly and intentionally, or with reckless disregard for the truth." ***Id.*** at 155-56; ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). Proof that a challenged statement was made innocently or negligently is insufficient. ***Anderson***, 138 Wis. 2d at 463. The attack must be more than conclusory. ***Id.***

¶19 Evans claimed the warrant was improperly issued under ***Franks***, as the CI told Rodriguez he saw Evans in possession of marijuana and a revolver at 3831 N. 10th Street, but did not mention crack cocaine, and so was not credible or reliable. The trial court found, however, that Evans made "absolutely no showing" that it was unreasonable for Rodriguez to rely on the informant or that Rodriguez made a false statement knowingly and intentionally or with reckless disregard for the truth. It ruled "merely conclusory" Evans's assertion that a reasonable probability existed that it would have found the CI's information sufficient to warrant a hearing. We agree.

¶20 Evans has not overcome the presumption that the affidavit is valid. ***Franks***, 438 U.S. at 171; ***Anderson***, 138 Wis. 2d at 463. Further, his motion does not satisfy ***Bentley*** and he could not have prevailed on his suppression motion. He thus has not established ineffectiveness due to counsel's failure to press the standing issue. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996) (failure to bring motion not deficient or prejudicial if it would have been denied under facts and applicable law).

b. Information Regarding Mixon's Role in Drug Possession

¶21 Evans argues that his attorney was ineffective for failing to tell the jury about Mixon's role in the possession of the contraband found in her house. He contends there is no rule against introducing evidence of a coactor's guilty plea to create doubt about his own guilt. He cites no authority affirmatively supporting that proposition.

¶22 Evans fails to explain how that evidence could have been presented to the jury. The court sustained an objection to trial counsel's effort to offer evidence that Mixon had a prior federal narcotics conviction. It reasoned that no

hearsay exception allowed admission of the evidence, that Evans could not impeach Mixon without having her testify, and that, even if she did testify, she could be impeached only as to the number of prior convictions. Evans does not allege sufficient facts or cite law establishing either how the evidence would have been admissible or how failing to present inadmissible testimony is deficient.

¶23 The court found that it was not reasonably probable that the jury would have acquitted Evans if it heard evidence of Mixon's knowledge about the seized items in her home or of her drug-related conviction in this case or her prior federal one. The jury heard that Mixon's fingerprints were not found on any of the seized items but that Evans's were. It was instructed that possession may be shared with another person and that both may exercise similar control over the substance. The jury thus could have believed Evans possessed the cocaine with intent to deliver even if it believed Mixon was involved.

¶24 As with the standing issue, we agree with the trial court that counsel was not ineffective in this regard. A ***Machner*** hearing was not warranted.

II. Police Officer Testifying as Expert

¶25 After a ***Daubert*** hearing, the court allowed Milwaukee Police Officer Bodo Gajevic to testify as an expert witness that the drugs found in the residence had been possessed for the purpose of distribution rather than for personal use.

¶26 Admissibility of expert testimony is governed by WIS. STAT. § 907.02, which codifies the ***Daubert*** standard. Section 907.02(1) provides in relevant part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

¶27 The court's gate-keeper function under ***Daubert*** "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***State v. Giese***, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Id.***, ¶19. "[W]hether to admit or exclude expert testimony is reviewed under an erroneous exercise of discretion standard." ***State v. Chitwood***, 2016 WI App 36, ¶30, 369 Wis. 2d 132, 879 N.W.2d 786.

¶28 Gajevic did not investigate this case but relied on information in the police reports. He testified he has worked undercover in narcotics for fifteen of his twenty-seven years with the department, been involved in "thousands" of narcotics investigations, and, from that experience, developed a three-prong methodology to determine the purpose for which the suspect has the drugs. He looks at the amount of drugs recovered, their appearance and the surroundings—how they are packaged and what type of paraphernalia is present—and the actions of the suspect upon arrest. Considering these factors, he opined that the cocaine recovered here was for distribution.

¶29 Based on Gajevic's credentials and his experience-based method for evaluating the evidence, the court concluded his testimony was admissible as expert testimony. It noted that his testimony would assist the jury in determining a material issue, as drug dealing is not within the ken of the average juror.

¶30 Gajevic's testimony was based on a reliable foundation and was relevant to the material issue of whether Evans intended to deliver the cocaine. He was qualified to discuss the subject matter and he had special expertise by training and experience.[5] WISCONSIN STAT. § 907.02 expressly contemplates admission of testimony by experts whose knowledge is based on experience. Admitting his testimony as an expert was not an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

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

[5] The State points out that federal courts have concluded that a police officer's training and experience in the field of drugs and drug trafficking satisfies Fed. R. Evid. 702, the federal equivalent to WIS. STAT. § 907.02, and meets the ***Daubert*** standard. *See, e.g.*, ***United States v. Schwarck***, 719 F.3d 921, 923-24 (8th Cir. 2013) (permitting police officer to give expert testimony concerning modus operandi of drug dealers to rebut defendant's claim that he was only user and not trafficker); ***United States v. West***, 671 F.3d 1195, 1201 n.6 (10th Cir. 2012) (upholding police officer's expert opinion that items found in defendant's apartment consistent with distribution of marijuana); ***United States v. Garcia***, 447 F.3d 1327, 1335 (11th Cir. 2006) (recognizing that experienced narcotics officer may provide expert testimony to help jury understand significance of certain conduct or methods of operation unique to drug-distribution business); ***United States v. Parra***, 402 F.3d 752, 757-58 (7th Cir. 2005) (allowing DEA agent to testify about use of counter-surveillance in drug transactions). Wisconsin courts look to federal cases interpreting and applying analogous federal rules of evidence as persuasive authority. ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 527-28, 579 N.W.2d 678 (1998).