COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP997-CR **Cir. Ct. No. 2013CF7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY D. VOIT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lafayette County: JAMES R. BEER, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Troy Voit appeals a judgment of conviction for four counts of burglary of a motor home or trailer home, party to a crime, contrary

to WIS. STAT. §§ 943.10(1m)(e) and 939.05 (2013-14), and an order denying his postconviction motion to withdraw his plea. Voit contends that the court erred in denying his motion to withdraw his plea, arguing that his motion should have been granted because he received ineffective assistance of counsel. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Voit was charged with six counts of burglary, one count of possession of burglarious tools, eight counts of misdemeanor theft, and six counts of criminal damage to property, all as party to a crime, in violation of WIS. STAT. §§ 943.10(1m)(e), 943.12, 934.20(1)(a) and (3)(a), 943.01(1), and 939.05 (2013-14). The charges against Voit stemmed from burglaries at Mound View RV, a recreational vehicle (RV) dealership located in Belmont, at approximately 9:30 p.m. on January 28, 2013, in which several televisions and electronic devices were reportedly stolen, and followed a multi-jurisdiction investigation into similar burglaries at RV dealerships throughout Wisconsin.

¶3 In the course of law enforcement's investigation into the statewide burglaries, law enforcement officers obtained the license plate number of a suspect vehicle, a 2000 Lexus RX 300, and eventually obtained a warrant to place a global positioning tracking device (GPS device) on that vehicle. The Lexus, which belonged to Voit's daughter, was shown by the GPS tracking device to be in the area of the Mound View RV around the time of the January 28, 2013, burglaries, and the vehicle was observed by a law enforcement officer leaving the Belmont area while the Mound View RV burglaries were being investigated. The Lexus was stopped by police later that night, and three suspects, including Voit, were taken into custody. A search warrant was obtained to search the Lexus, and

located in the vehicle were seven televisions, other electronic devices, various tools, maps with specific areas circled, and a note with addresses of numerous RV locations throughout Wisconsin, including Mound View RV. Except for two televisions, all of the electronic devices found in the Lexus were confirmed as having been taken during the burglaries at Mound View RV.

¶4 Pursuant to a plea agreement, Voit pled no contest to four counts of burglary and the remaining charges were dismissed and read in at sentencing. After sentencing, Voit filed a motion to withdraw his pleas on the ground that he was denied effective assistance of counsel. Voit alleged that his trial counsel was ineffective for failing to investigate and inform Voit that there existed a meritorious basis to suppress the evidence seized when the Lexus was searched on January 28, 2013, namely that the GPS warrant was invalid. Following an evidentiary hearing on Voit's ineffective assistance of counsel claim, the circuit court denied Voit's motion. Voit appeals.

DISCUSSION

¶5 Voit contends that the circuit court erred in denying his postconviction motion to withdraw his no contest pleas. A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. LeMere***, 2016 WI 41, ¶22, 368 Wis. 2d 624, 879 N.W.2d 580. Ineffective assistance of counsel is one type of manifest injustice. ***Id.***, ¶23. Whether trial counsel provided ineffective assistance of counsel presents a mixed question of fact and law. ***Id.*** We will uphold the circuit court's factual findings unless they are clearly erroneous, but review de novo the legal question of whether counsel's

performance satisfies the constitutional standard for ineffective assistance of counsel. ***Id.***

¶6 To establish that his or her trial counsel was not effective, a defendant must show both that trial counsel's performance was deficient, and that counsel's deficient performance prejudiced the defendant's defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate 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." ***Id.*** at 694. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground without addressing the other ground. ***Id.*** at 697.

¶7 Voit contends that his trial counsel was deficient in failing to investigate the validity of the warrant authorizing the placement of the GPS tracker on the Lexus and to seek suppression of the evidence obtained during the January 28 search of the Lexus. Voit argues that he was prejudiced by counsel's deficient representation because had his trial counsel investigated and pursued a challenge of the GPS warrant, the circuit court would have concluded that the warrant was unlawful and all evidence obtained during the January 28 search of the Lexus would have been suppressed. Voit argues that if that evidence had been suppressed, he would not have entered a plea when he did, and/or the case likely would have been dismissed.

¶8 As explained below, we conclude that Voit has not established that he was prejudiced by counsel's alleged deficient performance because the evidence obtained through the GPS warrant was admissible at trial under the good faith exception. Therefore, Voit has failed to show that his trial counsel was ineffective.

¶9 In order for a warrant to be lawful, the Warrant Clause of the Fourth Amendment requires the following: (1) prior authorization by a neutral, detached magistrate; (2) a demonstration upon oath or affirmation that there is probable cause to believe that the evidence sought will aid in a particular conviction for a particular offense; and (3) a particularized description of the place to be searched and the items to be seized. ***State v. Sveum***, 2010 WI 92, ¶¶19-20, 328 Wis. 2d 369, 787 N.W.2d 317. At issue here is the second requirement, which requires that "'the officer seeking a warrant [] demonstrate upon oath or affirmation probable cause to believe that 'the evidence sought will aid in a particular apprehension or conviction' for a particular offense." ***Id.***, ¶22 (quoting ***State v. Henderson***, 2001 WI 97, ¶19, 245 Wis. 2d 345, 629 N.W.2d 613); *see also* WIS. STAT. § 968.12 (2015-16).

¶10 According to Voit, the affidavit did not show probable cause because it established only that Voit had possession and control of the Lexus, which was owned by Voit's daughter, that Voit had a criminal history, and that surveillance equipment collected images of the Lexus in the area of Quietwoods RV, which was the scene of a burglary. Voit argues that the affidavit is insufficient to establish probable cause because the affidavit does not specify when the burglaries at Quietwoods RV occurred, or whether the images of the Lexus at Quietwoods RV were collected when the burglary there was being committed or within a limited and relevant time frame before or after the burglary. Voit argues that there

is not a commonsense basis to infer that the suspect vehicle was involved in a crime at Quietwoods RV, and, therefore, the affidavit is insufficient.

¶11 The State argues that the evidence before the issuing judge was sufficient to establish probable cause to support the warrant, but that even if it was not, the evidence was nevertheless admissible at trial under the good faith exception. Assuming, without deciding, that the affidavit in support of the warrant for placement of the GPS tracker did not establish probable cause, we agree with the State that the evidence obtained through that warrant on January 28, 2013, was nevertheless admissible at trial under the good faith exception.

¶12 When evidence is obtained through an unlawful means, for example, a search not supported by a valid warrant, the evidence may be suppressed at trial. *See* ***State v. Blackman***, 2017 WI 77, ¶68, ___ Wis. 2d ___, 898 N.W.2d 774. This is referred to as the exclusionary rule and its purpose is to "'deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.'" ***Id.*** (quoted source omitted). The exclusionary rule is a remedy, however, not a right, and for the rule to apply, "'police conduct must be sufficiently deliberate that exclusion [of evidence] can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.'" ***State v. Dearborn***, 2010 WI 84, ¶36, 327 Wis. 2d 252, 786 N.W.2d 97 (quoted source omitted).

¶13 The exclusionary rule is subject to a number of exceptions. Relevant here is the good faith exception, which was adopted by our supreme court in ***State v. Eason***, 2001 WI 98, ¶¶28, 74, 245 Wis. 2d 206, 629 N.W.2d 625. Under the good faith exception, where law enforcement officers act in objectively reasonable reliance on a warrant that a reviewing court later concludes was not supported by

probable cause, evidence obtained through the facially valid warrant is nevertheless admissible at trial. ***Id.***, ¶¶55, 74. Our supreme court explained that in this situation, applying the exclusionary rule would have no deterrent effect because officers did not engage in abuse or misconduct. ***Id.***

¶14 The present case, where the issuing magistrate erroneously concluded (we have assumed) that there was probable cause to support the warrant, is exactly the situation where the good faith exception might apply. *See* ***id.,*** ¶55. The question then is whether law enforcement officers' reliance on the warrant was objectively reasonable. ***Id.***, ¶¶73-74.

¶15 Objective reasonableness requires that the police officer have a reasonable knowledge of what the law prohibits. ***Id.***, ¶36. Thus, an officer cannot be said to have reasonably relied upon a warrant that was based upon "a deliberately or recklessly false affidavit, or, a bare bones affidavit that she or he reasonably knows could not support probable cause or reasonable suspicion," or an affidavit that was "'so facially deficient' that she or he could not 'reasonably presume it to be valid.'" ***Id.*** (quoted source omitted). An officer can also not be said to objectively have reasonably relied upon a warrant that was "issued by a magistrate that 'wholly abandoned his [or her] judicial role.'" ***Id.*** (quoted source omitted). In addition, the State must show that "the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause … or a knowledgeable government attorney." ***Id.***, ¶74.

¶16 Here, there is no contention that the circuit court judge who issued the warrant was not detached or neutral. In the affidavit supporting the GPS warrant application, Detective Craig Quick's averments that he had been

employed as a detective with the Winnebago County Sheriff's Office for twelve years, and had received special training in burglary investigations, support the inference that Detective Quick had reasonable knowledge of what the law prohibits and the requirements of probable cause. *See* ***id.***, ¶¶36, 74. There is no indication that the affidavit in support of the warrant was false, and it is not so "bare bones" or "facially deficient" that an officer would reasonably know it could not support probable cause. *See* ***id.***, ¶36.

¶17 Finally, the affidavit in support of the GPS warrant demonstrated that the application for the warrant followed a significant investigation by a specially trained and experienced officer. As stated in the affidavit in support of the GPS warrant, Detective Quick averred that covert photography equipment had been positioned in the area of a burglary at Quietwoods RV and that images collected from that equipment on January 4, 2012 at 5:55 p.m. and again at 7:41 p.m. depicted a vehicle consistent with a 2000 Lexus RX 300, which displayed Wisconsin registration plate number 199SFW. Detective Quick averred that an investigation into the Wisconsin Department of Transportation records indicated that the vehicle was owned by Leah Voit-Ostricki, and that a search of Milwaukee County Sheriff records indicated that Voit-Ostricki was at that time incarcerated and had been since October 2012. Detective Quick averred that an employee with an automotive shop located in Deforest had advised law enforcement that the suspect vehicle had come into its possession as an impound tow initiated by the Wisconsin State Patrol on October 6, 2012, and that the vehicle was released to Voit on October 12, 2012. Detective Quick further averred that a review of the telephone calls recorded at the location where Voit-Ostricki was incarcerated indicated that the suspect vehicle was in possession of Voit as recent as January 9, 2012. Detective Quick also averred that an investigation into Voit's criminal

history revealed that Voit has a prior criminal history, including convictions for theft.

¶18 Voit's argument against application of the good faith exception focuses on the gaps in the warrant that support his probable cause argument. However, consistent with the case law cited above, our inquiry extends beyond those gaps. Based on that inquiry, detailed above, we conclude that law enforcement officers acted in objectively reasonable reliance on the GPS warrant. Thus, the good faith exception applies and any evidence obtained from that warrant, including evidence obtained during the January 28, 2013 search of the Lexus, was admissible at trial even if the GPS warrant was invalid because the warrant was not supported by probable cause.

¶19 In sum, Voit has failed to demonstrate that he was prejudiced by his trial counsel's failure to investigate and challenge the validity of the GPS motion, because such an investigation would have established that the evidence was admissible under the good faith exception. Consequently, we conclude that Voit has failed to establish that his counsel was ineffective, and we affirm the circuit court's denial of his motion to withdraw his plea on that basis.

CONCLUSION

¶20 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).