

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2018

Sheila T. Reiff
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. 2017AP2162-CR

Cir. Ct. No. 2016CM1546

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROYCE O. BERNARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. HANRAHAN, Judge. *Affirmed.*

¶1 BRASH, J.¹ Royce O. Bernard appeals from his judgment of conviction, entered by the circuit court upon accepting his guilty plea to one count

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of carrying a concealed weapon, and from an order denying his motion for postconviction relief without granting an evidentiary hearing.

¶2 In his postconviction motion, Bernard argued that his trial counsel was ineffective because he failed to challenge the credibility of the police officer who testified at the hearing on Bernard's motion to suppress. The circuit court found that Bernard had not raised sufficient facts to warrant an evidentiary hearing. We affirm.

BACKGROUND

¶3 This matter stems from an incident that took place on May 1, 2016, just after 2:00 a.m. Two Milwaukee police officers were on patrol in the area of North 18th Street and Burleigh Street when they received information over their radio regarding a possible stolen vehicle located at North 13th Street and West Locust Street. The vehicle was still running.

¶4 Shortly after that broadcast, the patrol officers observed three juveniles walking in the middle of North 13th Street toward Burleigh. Due to the close proximity of the juveniles to the location where the possible stolen vehicle had just been discovered, the officers made contact with the juveniles.

¶5 One of the juveniles, later identified as Bernard, was wearing a blue hooded sweatshirt with his hands in the front pocket. One of the patrol officers, Officer Nicolas Romeo, asked Bernard how old he was; Bernard replied that he was seventeen. Officer Romeo also asked Bernard what his address was after Bernard stated that he was coming from his house; however, Bernard said that he did not know the address because he had just moved there.

¶6 Officer Romeo then asked Bernard if he had any weapons on him, to which Bernard responded by taking two steps backwards from the officer, with his hands still in the pocket of his sweatshirt. Officer Romeo then ordered Bernard to take his hands out of the pocket, but Bernard did not comply. Out of concern for officer safety, Officer Romeo removed Bernard's hands from his pocket and conducted a pat down for weapons.

¶7 Officer Romeo felt a hard object in Bernard's waistband concealed under the sweatshirt that he believed was a firearm. He then removed a .22 caliber sawed-off rifle from the waistband of Bernard's pants. At that point, Bernard stated, "man I literally just bought that thing." Bernard was charged with carrying a concealed weapon and possession of a dangerous weapon by a person under the age of eighteen.

¶8 Bernard filed a motion to suppress all evidence on grounds that the officers did not have reasonable suspicion to stop him, and therefore had violated his Fourth Amendment rights against unreasonable search and seizure. An evidentiary hearing was held on August 2, 2016, at which Officer Romeo testified.

¶9 During his testimony, Officer Romeo stated that he and his partner saw Bernard and the other two juveniles within approximately ten seconds after hearing the broadcast about the possible stolen vehicle. He explained his reasons for making contact with Bernard and the other two individuals: their proximity to the possible stolen vehicle, the time of night, the fact that there was no one else in the area, and their apparent ages, based on his presumption that they were juveniles. Officer Romeo also stated that his reason for patting down Bernard after he refused to remove his hands from his sweatshirt pocket was because an individual who is involved in stealing a vehicle may have a screwdriver in his or

her possession which can be used as a weapon. Furthermore, he testified that the .22 rifle that he discovered in the waistband of Bernard's pants was loaded.

¶10 Defense counsel elicited testimony from Officer Romeo that no description of any possible suspects had been broadcasted with the information regarding the possible stolen vehicle. Additionally, it was later discovered that the suspected stolen vehicle was not stolen.

¶11 The circuit court found that the officers had reasonable suspicion to stop Bernard. The court based its decision on the totality of the circumstances: that the juveniles were walking down the street in close proximity to where the officers believed a crime had just recently been committed, placing particular significance on the fact that the vehicle in question was still running and thus likely had been left there within a short time frame, and that there was no one else in the general area. The court also noted that it was late at night and that the area where the stop occurred is known for having problems with crime, including vehicle theft.

¶12 After the denial of his motion to suppress, Bernard pled guilty to both charges of carrying a concealed weapon and possession of a dangerous weapon by a person under the age of eighteen. He was sentenced to six months in the House of Correction for the concealed weapon charge, and to probation for possessing a firearm.

¶13 Bernard then filed a postconviction motion. He argued that there was no factual basis supporting his conviction for possession of a dangerous weapon by a person under the age of eighteen. The State conceded, and that judgment and sentence was accordingly vacated by the circuit court.

¶14 Bernard also argued that his trial counsel was ineffective in his cross-examination of Officer Romeo with regard to certain inconsistencies in Officer Romeo’s testimony. The circuit court concluded that none of the inconsistencies pointed out by Bernard “would have been sufficient to call Officer Romeo’s credibility into question.” The court therefore found that Bernard’s trial counsel was not ineffective, and denied his motion without a hearing. This appeal follows.

DISCUSSION

¶15 On appeal, Bernard reiterates his ineffective assistance of counsel claim relating to the failure to challenge Officer Romeo’s credibility. Specifically, Bernard asserts that Officer Romeo’s testimony could have been successfully challenged by his trial counsel to change the outcome of the suppression hearing for the following reasons: (1) the route of travel that Officer Romeo described in his written report regarding the incident could not have been accurate due to the location of a cemetery in that area; (2) the timeline cited by Officer Romeo between hearing the report of a possible stolen vehicle and his contact with Bernard—approximately ten seconds—would have taken closer to three minutes; (3) Officer Romeo stated that he followed all traffic rules when he made contact with Bernard, but according to the route he described, he would have had to go the wrong way down a one-way street; (4) Officer Romeo testified that he thought Bernard was a juvenile, even though Bernard is six feet tall and 160 pounds, and is actually seventeen years old—an adult for purposes of being charged under the criminal code; and (5) the computer aided dispatch (CAD) report regarding the incident states that the reporting officer described it as a “traffic hazard,” not a stolen vehicle.

¶16 To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). “Wisconsin applies the two-part test described in *Strickland* ... for evaluating claims of ineffective assistance of counsel.” *State v. Roberson*, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111.

¶17 “To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness.” *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. “To prove constitutional 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.” *Id.* (citations and internal quotation marks omitted). If a defendant fails to satisfy one component of the analysis, a court need not address the other. *Strickland*, 466 U.S. at 697.

¶18 In our review of an ineffective assistance of counsel claim, “[w]e review *de novo* the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding.” *Roberson*, 292 Wis. 2d 280, ¶24 (citation omitted; italics added).

¶19 A defendant who alleges ineffective assistance of counsel must seek to preserve counsel's testimony at a postconviction hearing. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). However, a defendant is not automatically entitled to a hearing upon filing a postconviction motion. The circuit court must grant a hearing only if the postconviction motion contains

allegations of material fact that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶20 Whether the allegations necessitate a hearing presents another question of law for our independent review. *Id.* If the defendant is not entitled to a hearing—either because the defendant does not make sufficient allegations that, if true, entitle him or her to relief, or the allegations are merely conclusory, or the record conclusively shows that the defendant is not entitled to relief—the circuit court then has the discretion to deny a postconviction motion without a hearing. *Id.* We will uphold a discretionary decision of the circuit court if it “has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Hefty v. Strickhouser*, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (citation omitted).

¶21 The circuit court found that none of the credibility challenges that Bernard argues his trial counsel should have raised were sufficient to demonstrate ineffective assistance of counsel. Thus, the State contends, the circuit court properly denied the postconviction motion without a hearing because Bernard failed to allege sufficient material facts to support his ineffective assistance of counsel claim and trigger the requirement for an evidentiary hearing. We agree.

¶22 The first three challenges set forth by Bernard focus on the accuracy of Officer Romeo’s testimony with regard to the timeline and route of travel of the officers after hearing the broadcast about the possible stolen vehicle. Officer Romeo testified that he and his partner were on their way back to the district when they heard the call, and that it was only about ten seconds after hearing the call that they saw Bernard and the others with him. Bernard argues that the time frame

and route described by Officer Romeo could not be true and accurate. The circuit court, however, found that the officers' exact location and route were not material since the CAD report of the incident confirms that the officers must have been in close proximity to the possible stolen car and to Bernard: the entire incident—from the time of the call about the possible stolen car to the time that Bernard was taken into custody—took place in four minutes and thirty-five seconds.

¶23 “[A] defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.” *State v. Provo*, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272 (citation omitted). Bernard does neither; regardless of whether Officer Romeo’s testimony was precisely accurate about the time frame and his route, the fact remains that he was in the vicinity of the possible stolen vehicle at the time that the information was broadcasted, and found Bernard in close proximity to that area.

¶24 Bernard next challenges Officer Romeo’s testimony regarding his initial observation of Bernard: that he and the others he was with “appeared to be ... juveniles” and that he would have guessed that they were “around fifteen.” Bernard states this testimony is incredible because of Bernard’s physical appearance—six feet tall and 160 pounds—and the fact that he was seventeen years old at the time of his arrest.² The circuit court pointed out that it was dark at

² We note that, at the age of seventeen, Bernard was considered an adult for purposes of being charged under the criminal code. See WIS. STAT. § 938.02(1). Additionally, the Milwaukee City Ordinance regarding curfew was not applicable to Bernard at the time of this incident since he was seventeen. See MILWAUKEE, WIS., CODE OF ORDINANCES § 106-23 (2014). Otherwise, he was still considered to be a juvenile since he was under the age of eighteen.

the time of the incident, and that Officer Romeo was “not standing face to face” with Bernard when he made his initial assessment. The court further stated that a challenge by Bernard’s trial counsel regarding the slight discrepancy in Officer Romeo’s estimate of Bernard’s age “would not have affected the court’s assessment of the officer’s credibility.” Again, Bernard fails to show how this argument would have altered the outcome of the motion hearing if his trial counsel would have presented that challenge. *See id.*

¶25 Finally, we turn to Bernard’s argument that his trial counsel should have raised the issue that the CAD report did not reference a possible stolen vehicle, but rather a “traffic hazard” when describing the vehicle that was found running on Locust Street. Bernard introduced the CAD report in a supplement to his reply brief for his postconviction motion.

¶26 The CAD report consists of basic information regarding the incident, such as the time and location where the vehicle was found, the make and model, and the license plate number. There does not appear to be room to input extraneous information, such as the fact that the vehicle was running when it was found. According to Officer Romeo, that information was included when the discovery of the vehicle was broadcasted over the radio.

¶27 The circuit court found Officer Romeo’s testimony credible. As police officers are aware, and as recognized by the circuit court, a vehicle that has been left running can be indicative of a stolen vehicle that has just been abandoned. The court also took into consideration that this incident took place late at night in a high-crime area that includes vehicle theft. Based on all of those factors, the court found that the officers had reasonable suspicion to stop Bernard.

¶28 “When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony” because the court “had the opportunity to observe the witnesses and their demeanor.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. In making its determination on Bernard’s postconviction motion, the circuit court noted that the majority of the CAD report supported Officer Romeo’s testimony with regard to the time of the report and the location where the vehicle was discovered; the court afforded less weight to the fact that the CAD report only referenced the vehicle as a “traffic hazard.” “When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Id.*

¶29 In short, the circuit court did not find the contradictory information in the CAD report to be a material fact sufficient to warrant an evidentiary hearing. *See Allen*, 274 Wis. 2d 568, ¶9. Based on the court’s reasoning described above, we find that this was not an erroneous exercise of its discretion. *See Hefty*, 312 Wis. 2d 530, ¶28. As a result, Bernard’s argument that his trial counsel was ineffective for not raising this issue fails. *See State v. Jacobsen*, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365 (“An attorney does not perform deficiently by failing to make a losing argument”).

¶30 In sum, Bernard has failed to prove that any of the challenges to his trial counsel’s performance satisfy either prong of the *Strickland* test for ineffective assistance of counsel. *See id.*, 466 U.S. at 687. We therefore affirm.

By the Court.—Judgment and order affirmed.

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

