COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2212-CR **Cir. Ct. No. 2013CF205**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWAYNE T. CANDLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. On March 26, 2013, police received a tip that Dwayne T. Candler and another person drove to Chicago in a third person's vehicle to buy heroin and were on their way back to Plymouth, Wisconsin. The vehicle was soon located and stopped due to a suspended registration; Candler was in the passenger seat. After a drug-detection dog alerted to the presence of

contraband, the officers searched the vehicle and later found heroin on the driver's person. A probation hold was placed on Candler during the stop, and he was subsequently charged and convicted of possession of heroin with intent to deliver. On appeal, Candler claims that his counsel was ineffective for failing to argue that the canine sniff was a search requiring probable cause and that his detention on a probation hold was unreasonable. We disagree and affirm.

Background

¶2 At approximately 2:00 p.m. on the day in question, Officer Brian Bastil received a tip that Candler and "Ashley" Weber were driving to Chicago in a car owned by Candler's girlfriend—Elizabeth Blad—to pick up heroin. The tipster advised Bastil that Candler and Weber were on their way back to Plymouth. Bastil was familiar with all three parties. He had been advised that Blad and Weber had allowed drug sales from their respective homes, and Candler was allegedly responsible for some of the sales at Blad's residence. Bastil passed the tip on to Investigator Justin Daniels.

¶3 Daniels informed Plymouth Police Officer Matthew Starker of the tip and advised him to look for Blad's vehicle. Starker parked where he would expect a vehicle coming from the south to be heading and, a few minutes later, located and stopped the car due to a suspended registration. As he was pulling over the car, Starker noticed "[a] lot of movement in the vehicle." The stop occurred about five blocks from Blad's home in Plymouth. Daniels was informed of the stop and requested that a canine unit respond. Starker was able to identify the passenger as Candler and the driver as "Angela" (not "Ashley") Weber.

¶4 After the canine unit arrived, Weber and Candler were ordered to exit the vehicle. The dog then alerted to the presence of drugs on Weber and the

driver's door of the car. Based on the alert, the officers searched the vehicle. The officers did not find any contraband in the vehicle, but did find an empty bag that smelled like marijuana and a package of Dormin—a sleep aid commonly used to cut heroin. Upon being informed that the dog alerted to drugs on her person, Weber admitted to smoking marijuana a few hours earlier and was arrested. Later, at the station, the officers eventually discovered a package of heroin hidden underneath Weber's clothing.

¶5 During the stop, the officers also searched Candler but found no drugs or other contraband. At the time of the stop, Candler was on probation for a previous heroin possession charge and had a prior record related to heroin dealing. Daniels contacted a probation agent he knew and informed the agent of the traffic stop, the anonymous tip, and the Dormin found in the vehicle. The agent then contacted Candler's probation agent. Based on the information given by Daniels, Candler's agent authorized a probation hold. The officers arrested Candler based on the hold and seized his cell phone. From the cell phone carrier's records, police were able to determine the phone had traveled to Chicago that day.[1] Police also recovered several incriminating text messages. Based on this information and the heroin found on Weber, Candler was charged with one count of possession of heroin with intent to deliver.

¶6 Candler's attorney moved to suppress the evidence obtained as a result of the vehicle search, arguing that the length of the traffic stop was unreasonable. Counsel additionally argued that the probation hold and arrest was

[1] At trial, Candler testified that he did not go to Chicago but had lent his phone to Weber on March 26, 2013.

unreasonable. The circuit court denied the motion, and the case proceeded to trial.[2] The jury found Candler guilty. He then moved for postconviction relief, which the circuit court denied, and he now appeals.

Discussion

¶7 Candler claims his counsel was ineffective for failing to argue that the canine sniff was a search requiring probable cause. He also argues there was not enough evidence to justify his arrest on the probation hold. He does not, however, challenge the validity of the traffic stop or the propriety of the search incident to his arrest on the probation hold. Nor does he claim that the dog's alert was insufficient to create probable cause to search the vehicle. Thus, our review is confined to (1) whether his attorney was ineffective for failing to challenge the canine sniff as a search and (2) whether his arrest on a probation hold was reasonable. We conclude that Candler's attorney was not ineffective and that his arrest was reasonable.

A. Ineffective Assistance

¶8 Candler claims that his attorney should have argued, but did not, that the canine sniff was a search subject to the Fourth Amendment's probable cause requirement. Failure to do so, in Candler's mind, constituted constitutionally deficient performance.

¶9 To prove ineffective assistance, Candler must show (1) that counsel's performance was deficient and (2) that the deficient performance was

[2] The court did not expressly address the probation hold but it clearly denied the motion to suppress in its entirety.

prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The question of whether counsel's conduct is deficient and prejudicial is a question of law we review de novo. ***State v. Littrup***, 164 Wis. 2d 120, 135, 473 N.W.2d 164 (Ct. App. 1991). An attorney's performance is not deficient unless it falls "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** To prove prejudice, Candler must demonstrate that counsel's mistakes were so grave that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶10 We conclude that Candler's attorney was not deficient because a canine sniff during a lawful traffic stop is not a search under the Fourth Amendment. The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Article I, section 11 of the Wisconsin Constitution provides substantively identical protections.[3] Government action is a search when (1) it violates a person's reasonable expectation of privacy or (2) there is a physical intrusion of a constitutionally protected area. ***United States v. Jones***, 132 S. Ct. 945, 949-50 & n.3 (2012); *see also* ***Florida v. Jardines***, 133 S. Ct. 1409, 1414 (2013).

[3] Our courts generally construe the Wisconsin provision consistently with its federal counterpart. ***State v. Arias***, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748.

¶11 The United States Supreme Court has authoritatively addressed the precise issue Candler believes his attorney should have raised here. In ***Illinois v. Caballes***, 543 U.S. 405, 409-10 (2005), the Court explained as follows:

> [T]he use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view"—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement…. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Id. (citation omitted). Relying on ***Caballes***, the Wisconsin Supreme Court reached an identical result three years later, concluding:

> [T]he occupant of an auto parked in a public place cannot contend that he has a reasonable expectation of privacy in the air space around the exterior of the vehicle. Accordingly, because of the limited intrusion resulting from a dog sniff for narcotics and the personal interests that Article I, Section 11 were meant to protect, we conclude that a dog sniff around the outside perimeter of a vehicle located in a public place is not a search under the Wisconsin Constitution.

State v. Arias, 2008 WI 84, ¶24, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted).

These cases have not been overruled and remain binding. Under ***Caballes*** and ***Arias*** then, a challenge by Candler's trial attorney to the dog sniff would have failed.[4]

¶12 However, Candler claims that the United States Supreme Court's recent decision in ***Jardines*** upset the applecart and "overturned 40 years of precedent" by holding—or at least strongly implying—that a canine sniff was a search under the Fourth Amendment.[5] He maintains that ***Jardines*** is logically inconsistent with the Supreme Court's previous decisions holding that a canine sniff does not violate a person's reasonable expectation of privacy. But ***Jardines*** did not expressly or impliedly overrule ***Caballes*** or any state cases relying on it. *See* ***Jardines***, 133 S. Ct. at 1417. In fact, the majority, concurrence, and dissent explicitly cited ***Caballes***, and no one called the continued vitality of that case into question. *See* ***Jardines***, 133 S. Ct. at 1417, 1419 n.1, 1424. Rather, ***Jardines*** was based on property rights, and the fact that—unlike the public spaces surrounding a vehicle—the curtilage of a home is a constitutionally protected area. ***Id.*** at 1414. "[P]hysically entering and occupying" a constitutionally protected area "to engage in conduct not explicitly or implicitly permitted by the homeowner," the Court held, is a search under the Fourth Amendment. ***Id.*** at 1414-15. Basing its decision on the property rights guaranteed in the text of the Fourth Amendment, the court explicitly declined to address the issue through a reasonable expectation

[4] Of course, if the stop is unreasonably prolonged, that would constitute a seizure in violation of the Fourth Amendment. *See* ***Illinois v. Caballes***, 543 U.S. 405, 407-08 (2005); *see also* ***Arias***, 311 Wis. 2d 358, ¶¶24-26.

[5] ***Jardines*** was decided on March 26, 2013, the same day Candler was stopped. *See* ***Florida v. Jardines***, 133 S. Ct. 1409, 1411-12 (2013).

of privacy analysis. ***Id.*** At 1417.[6] In short, nothing in ***Jardines*** undermines the continued vitality and authority of ***Caballes*** and ***Arias***. Again, any challenge by Candler's counsel on the grounds that the dog sniff was a search would have failed. His counsel was not constitutionally deficient for failing to give such an effort the old college try.

¶13 Furthermore, even if it were true that ***Jardines*** creates some tension with ***Caballes*** and other previous decisions, Candler's ineffective assistance claim would still fail. Candler's attorney had no obligation to make a novel legal argument or one based on unsettled law. *See* ***Ronald J.R. v. Alexis L.A.***, 2013 WI App 79, ¶11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments); *see also* ***State v. Jackson,*** 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance."). On this point, Candler practically concedes his entire ineffective assistance argument by recognizing he is raising a novel argument. He argues that ***Jardines*** is conceptually incompatible with ***Caballes***, but admits that "there has yet to be a case which had to squarely decide whether ***Jardines*** and ***Caballes*** are conceptually compatible." He notes that "[s]everal recent federal cases … concluded that ***Caballes*** remains good law." *See, e.g.*, ***United States v. Winters***, 782 F.3d 289, 305 (6th Cir. 2015) (concluding that ***Jardines*** "did not call into question the continued vitality of" ***Caballes***). He even admits that the Supreme

[6] The concurring opinion went further and concluded that a canine sniff violated the defendant's reasonable expectation of privacy. ***Jardines***, 133 S. Ct. at 1418-19 (Kagan, J., concurring). But we are bound by the majority opinion, the Supreme Court's previous holding in ***Caballes***, and our own supreme court's decision in ***Arias*** until such time as either court decides to revisit the question.

Court in ***Rodriguez v. United States***, 135 S. Ct. 1609, 1612, 1615 (2015), cited both ***Caballes*** and ***Jardines*** with approval—an extremely odd move if, as he maintains, ***Jardines*** overruled ***Caballes***. Counsel's performance in failing to pursue this novel argument was not deficient.

B. Probation Hold

¶14 Candler additionally argues that the circuit court should have suppressed the evidence obtained from his cell phone because it was the fruit of an unlawful detention.[7] He claims that "there was nothing of any substance that provided reason to believe [he] was violating … his probation." Therefore, he concludes, the detention and resulting search was unreasonable. Again, we disagree.

¶15 Although a person on probation enjoys significant liberty, that liberty "is conditioned on his or her adhering to the conditions of probation." ***Wagner v. State***, 89 Wis. 2d 70, 77, 277 N.W.2d 849 (1979). Thus, probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only … conditional liberty.'" ***Griffin v. Wisconsin***, 483 U.S. 868, 874 (1987) (citation omitted) (alteration in original). One of the many conditions of probation is that the probationer must not commit any crimes. ***Wagner***, 89 Wis. 2d at 77. Consistent with this conditional liberty, a probationer, like Candler, may be taken into custody for "investigation of an alleged violation of a rule or condition of supervision." WIS. ADMIN. CODE DOC § 328.27(2) (June 2013); *see also* ***State v. Goodrum***, 152 Wis. 2d 540, 545-46, 449 N.W.2d 41 (Ct. App. 1989). The

[7] Candler initially argued in his brief-in-chief that his counsel was ineffective for failing to raise this argument, but conceded in his reply brief that his counsel had raised the issue.

probation agent may place a probation hold if—based on information communicated to the agent—he or she has "reason to believe" that the probationer has committed a violation. *See* ***Goodrum***, 152 Wis. 2d at 545-48. Whether Candler was lawfully detained on a probation hold is a question of reasonableness: the touchstone of our Fourth Amendment analysis. ***Id.***; *see* ***State v. Purtell***, 2014 WI 101, ¶21, 358 Wis. 2d 212, 851 N.W.2d 417. If the facts are undisputed, whether a probation hold is reasonable is a question of law we review de novo. *See* ***Goodrum***, 152 Wis. 2d at 545-46.

¶16 We conclude that the probation hold and Candler's subsequent arrest were reasonable. Candler's probation agent was already aware of Candler's previous heroin offense and was informed of a tip accusing Candler of taking a trip to Chicago to obtain heroin. The circumstances of the stop corroborated the tipster's account. The officers found Candler when and where the tip indicated he would be: in Blad's vehicle heading back to Plymouth. In fact, the only detail that was not precisely in line with the tip was that the driver's name was "Angela" Weber, not "Ashley." During the stop, the drug-detecting dog had alerted to the presence of contraband, and the officers found a substance commonly used to cut heroin in the vehicle. From this information, the agent had reason to believe that Candler was involved—either directly or indirectly—with possession or distribution of heroin in violation of his probation. Thus, Candler's arrest was consistent with the Department of Corrections regulation permitting such a detention for "investigation of an alleged violation." WIS. ADMIN. CODE DOC § 328.27(2)(a). And once in custody, it is well established that officers may search a suspect incident to arrest. *See* ***State v. Sykes***, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277 (explaining that "a warrantless search of a person incident to a lawful arrest does not violate constitutional search and seizure

provisions"). Therefore, we conclude that the court correctly denied Candler's motion to suppress.

By the Court.—Judgment and order affirmed

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