COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2123 **Cir. Ct. No. 2000CF1679**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SYLVESTER TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Sylvester Townsend appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. He raises seven issues

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of error: whether (1) his due process rights were violated when police officers unlawfully arrested him; (2) his Fourth Amendment rights were violated when he was denied a prompt probable cause hearing and whether his right to effective assistance of trial counsel was violated when his counsel failed to raise this issue; (3) his due process rights were violated when the police destroyed potentially discoverable material; (4) his due process rights were violated when irrelevant evidence was admitted into evidence at trial; (5) the State's closing argument was improper; (6) he was denied the effective assistance of trial and postconviction counsel; and (7) he was denied the right to a ***Machner*** hearing.[2] For reasons to be stated, we reject Townsend's claims of error and affirm the order of the trial court**.**

BACKGROUND

¶2 This is the second appeal by Townsend seeking to reverse his conviction by a jury of first-degree reckless homicide, and two counts of first-degree recklessly endangering safety, all as a party-to-a-crime. In the first appeal, we summarily affirmed the convictions holding that the State had produced sufficient evidence to support the guilty verdicts. *See* ***State v. Townsend***, No. 2002AP2941-CR, unpublished slip op. (WI App Nov. 11, 2003). For purposes of brevity, we shall forego iterating the complete factual background of this tragic incident, setting forth only factual information germane to the issues presented for this review.

¶3 During the investigation of this revengeful shooting which claimed the life of an innocent child and placed in jeopardy the well-being of two other

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

individuals who happened to be at the scene, police learned through a confidential informant that Townsend facilitated the execution of this revenge shooting by providing some of the guns and ammunition to the individuals who did all the shooting. A portion of the information obtained from the confidential informant was used as a basis to obtain a search warrant for the residence at 2408 North 33rd Street in the City of Milwaukee. As police officers were about to execute the warrant, they observed Townsend and two companions leave the residence and drive away in a Chevrolet Caprice. In short order, police stopped the car and arrested Townsend. It is this arrest and certain procedures and evidentiary rulings that Townsend now challenges in this appeal.

ANALYSIS

A. Unlawful Arrest.

¶4 Townsend's first claim of error relates to his arrest on March 28, 2000, at 2:50 p.m. after a traffic stop. He contends that the arresting officers did not have probable cause to arrest him. He maintains that no arrest warrant was issued for him when the search warrant was issued. He argues that the State's failure to demonstrate an independent cause for arresting him resulted in a violation of his Fourth Amendment rights. We are not persuaded as the record demonstrates a sufficient basis for the arrest.

STANDARD OF REVIEW AND APPLICATION OF LAW

¶5 In ***State v. Paszek***, 50 Wis. 2d 619, 184 N.W.2d 836 (1971), our Supreme Court declared:

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It

> is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

Id. at 624-25 (citations omitted).

¶6 "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the [accused] probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

¶7 It is undisputed that a confidential informant supplied investigating officers with sufficient information to justify the issuance of a search warrant for the residence at 2408 North 33rd Street to further investigate the retaliatory shooting incident of March 25, 2000, that precipitated the untimely death of eleven-year-old Rita Martinez by a stray bullet. Townsend was alleged to be living at the 33rd Street address. Information that Townsend was involved in the planning of the shootings, *i.e.*, supplying the guns and ammunition for the retaliatory action, provided an additional basis for the search. Police officers went to the 33rd Street address for the purposes of executing the search warrant. In addition to this information, police also had information from Townsend's wife, Ericka Joseph, which inculpated Townsend in the revenge shootings.

¶8 Before the police could execute the warrant, Townsend and two companions were observed leaving the same premises and were seen driving away in the Caprice automobile. The officers followed the Caprice and eventually

stopped it about six blocks away at 2673 North 29th Street. Townsend was arrested. The information provided by Townsend's wife, Ericka Joseph, was more than enough to provide a basis for probable cause to arrest. The fact that the search warrant was not executed until after the arrest does not alter the fact that the police had probable cause to arrest Townsend. Accordingly, the claim that Townsend's arrest was unlawful and violative of the Fourth Amendment fails.

B. Timeliness of Probable Cause Hearing.

¶9 Second, Townsend makes a two-part claim related to the timing of the court's probable cause determination. He contends his Fourth Amendment rights were violated when he was denied a prompt probable cause hearing and that his trial and postconviction counsel were ineffective for failing to investigate and interpose an objection to this violation of his due process rights. This claim of error is essentially an assertion by Townsend that his right to a prompt probable cause determination as guaranteed by ***Gerstein v. Pugh***, 420 U.S. 103 (1975) and ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991) was violated.

STANDARD OF REVIEW AND APPLICATION OF LAW

¶10 A suspect detained pursuant to a warrantless arrest has a Fourth Amendment right to a prompt judicial determination of whether probable cause existed for the arrest. Absent extraordinary circumstances, "prompt" means within forty-eight hours. *See* ***Koch***, 175 Wis. 2d at 696. Whether a detainee's Fourth Amendment rights were violated raises an issue of constitutional fact that we review independently. *See* ***State v. Woods***, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

¶11 Townsend contends he "was introduced to the Court for the purpose of setting bail … seven days after the arrest … and five days past the allowable time for a Gerstein Hearing." The record belies this claim. Townsend was arrested on March 28, 2000, at 2:50 p.m. The "show-up" report attests that on March 30, 2000, at 10:50 a.m., the Honorable Jeffrey A. Wagner found probable cause existed for Townsend's arrest. Thus, the time between arrest and the court's probable cause determination was less than forty-eight hours. Accordingly, there was neither a violation of ***Riverside*** nor ***Koch***. Because there was no ***Riverside*** violation, there is no basis to assert an ineffective assistance of counsel claim. Thus, Townsend's second claim of error fails.

C. Destruction of Police Notes.

¶12 Third, Townsend claims his due process rights under the Fourteenth Amendment were violated when the Milwaukee Police Department destroyed potentially discoverable material. He argues that "[t]his destroyed evidence by the detective was crucial material … and should have been preserved[.]"

¶13 In addressing this claim we note that Townsend, in his postconviction *pro se* motion, asserted that "a Milwaukee Police Detective … destroyed exculpatory evidence or investigation statements that may have le[d] to the defendant's conviction or acquittal." In rejecting this claim the trial court stated:

> During the trial, Detective Gregory Schuler testified for the State that he interviewed Selika Hamilton about the shooting incident. He asked her to identify people in photographs and to explain their involvement. Detective Schuler testified that Hamilton identified the defendant from a photograph as having been at 2408 N. 33rd Street (where the retaliatory shooting was planned). On cross-examination, Detective Schuler stated that he took handwritten notes of his interview with Hamilton, and then

> destroyed those notes after he had typed them up in a report. The defendant's assertion that Detective Schuler testified to destroying exculpatory evidence misstates his testimony. Moreover, his suggestion that Detective Schuler left exculpatory information out of his report amounts to nothing more than wishful thinking and need not be considered further.

¶14 Upon close examination, Townsend's claim is broader than the trial court characterized it. He claims not only a ***Brady v. Maryland***, 373 U.S. 83 (1963) violation, but also a more comprehensive due process violation for the mere destruction of the initial interview notes. The reasoning of the latter theory is that by the destruction of the notes, he was foreclosed from any attempts to test the consistency of the filed typewritten interview report with the initial notes taken at the time of the interview.

¶15 From our review of the record, the former assertion of a ***Brady*** violation cannot succeed because Townsend failed to show that any *exculpatory* information was withheld from him. ***Id.*** As for the broader due process claim, it is now well recognized that error may arise from the failure to preserve original interview notes, ***United States v. Harris***, 543 F.2d 1247, 1251-53 (9th Cir. 1976) (citing ***United States v. Harrison***, 524 F.2d 421 (D.C. Cir. 1975)), but it is also recognized that such a claim is subject to a harmless error analysis, ***Harris***, 543 F.2d at 1253.

¶16 The record reveals that three witnesses—Ericka Joseph, Rose Townsend and Selika Hamilton—in their interviews with police detectives, all implicated Townsend as being the leader in planning the revenge shooting.[3]

[3] All three witnesses changed their testimony at trial and denied making statements inculpating Townsend.

Townsend himself, on two separate occasions, admitted that he supplied guns and ammunition for the planned attack and that he knew for what purpose the guns and ammunition were to be used. Furthermore, in Townsend's direct appeal to this court, we concluded, based upon his testimony, that there was sufficient evidence to convict him of the three alleged crimes. *See* ***Townsend***, No. 2002AP2941-CR, unpublished slip op. at 2-3. Therefore, we conclude that no substantial rights of Townsend have been affected by the destruction of the initial interview notes and that any error that might have occurred was harmless.

D. Evidentiary Admission.

¶17 Fourth, Townsend claims his due process rights were violated when the State presented certain evidence, *i.e.*, a yellow and black racing jacket and a semi-automatic rifle, which had no relevance to Townsend or his case.

STANDARD OF REVIEW AND APPLICATION OF LAW

¶18 In a WIS. STAT. § 974.06 motion, a defendant may only raise constitutional or jurisdictional issues and cannot challenge the sufficiency of the evidence, jury instructions, evidentiary rulings or procedural matters. ***State v. Evans***, 2004 WI 84, ¶33, 273 Wis. 2d 192, 682 N.W.2d 784.

¶19 Townsend's fourth claim of error was raised pursuant to a *pro se* WIS. STAT. § 974.06 motion and should not be cognizable in this appeal because, in substance, it challenges evidentiary rulings. Despite this prohibition, because part of Townsend's appeal, as referenced later in this opinion, is based upon rubrics enunciated in ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), we shall consider this claim of error on the merits.

¶20 Detective Gregory Schuler testified that Selika Hamilton told him that one of the co-actors who met at the 2408 North 33rd Street address to plan the revenge shooting wore a yellow and black racing jacket. At trial, Hamilton denied giving such a statement. When two of the many co-actors were arrested, a jacket matching the description was found in their home. As argued by the State in its brief, this piece of evidence substantiated a portion of the statement that Hamilton had given to Schuler identifying one of the co-actors and the existence of the plan to seek revenge. Doubtless, the jacket and testimony about it, was relevant in identifying who was present at the revenge meeting.

¶21 Townsend also claims error in admitting into evidence a semi-automatic, 12-gauge, Mac-90 rifle. His claim is essentially that the rifle's admission was irrelevant and thus, had a prejudicial effect on the jury. The charges lodged against Townsend were of a party-to-a-crime nature. The theory of the State's prosecution required demonstrating to the jury Townsend's efforts to contribute to the revenge shooting. To assist in this plan, evidence was presented showing that Townsend offered four different types of guns, plus ammunition to accomplish the plan. Among these weapons was the Mac-90 rifle that was introduced into evidence without objection. From a reading of the record, it is evident that all of the guns supplied by Townsend were recovered, but only the Mac-90 was introduced into evidence.

APPLICABLE LAW

¶22 "'In determining a dispute concerning the relevancy of proffered evidence, the question to be resolved is … whether there is a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been made an issue in the case.'" ***State v. Alsteen***, 108 Wis. 2d 723,

729-30, 324 N.W.2d 426 (1982) (citation omitted). Stated otherwise, relevancy is the exercise of determining whether the evidence under examination "tends to make the existence of a material fact more probable or less probable than it would be without the evidence." ***Michael R.B. v. State***, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993) (internal quotation marks, brackets and citation omitted). Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

¶23 Although the record is silent as to the reason for offering the Mac-90 into evidence, it can be reasonably inferred that its introduction into evidence was for the purpose of presenting one of the guns that was intended to assist the co-actors in reaping revenge. Whether the gun was actually used is beside the point because the focus of the allegations was on Townsend's participation in the plan seeking revenge. Townsend had indicated in his initial statement to the police that this rifle was one of the weapons he had provided to the co-actors to use in the revenge shooting. Thus, its introduction served also to corroborate Townsend's statements to police.

¶24 Turning to any prejudice that the introduction of the Mac-90 may have had, we note that during cross-examination of the State's expert firearms witness, Roger Templin, trial counsel was able to extract a response that no spent casings from a shotgun were found at the scene of the shootings. Trial counsel emphasized this admission very effectively in his closing argument. Thus, the introduction of the rifle did not generate prejudice and we reject this claim of error.

E. Closing Argument.

¶25 Fifth, Townsend claims his due process rights were violated when, during closing argument, the State vouched for the credibility of some of the State's witnesses and characterized defense witnesses as liars. He argues that the remarks of the prosecutor in closing argument went beyond reasoning from the evidence and suggests that the jury should draw a conclusion aside from the evidence presented. We are not convinced.

STANDARD OF REVIEW AND APPLICATION OF LAW

¶26 "The line between permissible and impermissible final argument is not easy to [delineate] and is charted by the peculiar circumstances of each trial. Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial." ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The line of demarcation to which we refer is thus "drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "Argument on matters not in evidence is improper." ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980) (footnote omitted). The prosecutor, however, may comment on the credibility of witnesses as long as the comment is based upon evidence presented. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998)

¶27 The basis for Townsend's claim is two-fold. First, during closing argument the prosecutor referred to Renee Harris, Townsend's girlfriend, as "not credible." Next the prosecutor opined:

> So why should you listen to their testimony at all? Frankly, I don't think you should believe their testimony. I think they were bad liars on the witness stand, but you should believe the initial statements that they gave to the police officers. Those initial statements are internally consistent with one another. They are consistent with the defendant's statement. They are consistent with the physical evidence ….

¶28 A complete reading of the State's final argument, however, reveals that Townsend has been far too selective in establishing a basis for his claim of error. Renee Harris had denied being Townsend's girlfriend. This assertion was controverted by Townsend's wife, Erika Joseph. This is a factual dispute of an evidentiary nature. The record further reveals that witnesses for both the State and Townsend contradicted themselves in police interviews and their trial testimony. These contradictions were also of an evidentiary nature. With these testimonial disputes in mind, the prosecutor pointed to those instances of evidence that were consistent with one another to suggest to the jurors why the trial testimony of several witnesses was not believable. These consistencies were both physical and testimonial. In addition, the prosecutor asked the jurors (as they were instructed they could do) to consider any apparent motives arising from the evidence that might influence witness testimony. The record is clear the prosecutor did not ask the jurors to draw conclusions by reasoning beyond the evidence presented. Rather, the prosecutor's comments were fairly based upon the evidence.

F. Effective Assistance of Counsel.

¶29 Sixth, Townsend claims his Sixth Amendment right to effective assistance of trial and postconviction counsel was violated. He bases this claim of error on trial counsel's failure to: (1) argue there was no probable cause for his arrest, (2) object to portions of the prosecutor's final argument suggesting that certain witnesses were liars, (3) object to misconduct on the prosecutor's part

when it submitted inadmissible evidence, (4) conduct pre-trial discovery, and (5) file a suppression motion. His claim of ineffective postconviction counsel is based on the failure to raise the same issues against trial counsel.

APPLICABLE LAW

¶30 Within the rubrics established by ***Rothering***, a defendant may bring a claim under WIS. STAT. § 974.06 before the trial court alleging that postconviction counsel was ineffective in failing to preserve issues for appellate review. *See* ***Rothering***, 205 Wis. 2d at 681. Postconviction counsel's failure to preserve issues for appellate review may be sufficient reason under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), to excuse the failure to previously raise an issue. Normally, both § 974.06(4) and ***Escalona*** require a defendant to raise all issues in the original postconviction motion or appeal. Thus, our review of Townsend's assertions is limited to the context of the ***Rothering*** dictates.

¶31 Trial counsel's failure to bring a meritless motion does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Similarly, trial counsel's failure to present a legal challenge is not prejudicial if the defendant cannot establish that the challenge would have succeeded. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). We shall now address each instance of claimed error as the circumstances of this appeal require.

¶32 Townsend's claims of ineffective assistance of counsel based upon failure to argue lack of probable cause for his arrest; failure to object to portions of the State's final argument suggesting that certain witnesses were liars; and failure to object to misconduct on the State's part when it submitted inadmissible

evidence have all been analyzed on the basis of their merits and found to be unavailing. Thus, in these respects, trial counsel was not ineffective in his assistance.

¶33 Townsend also raises two other instances of alleged ineffective assistance of counsel, *i.e.*, failure to file a suppression motion and failure to conduct pretrial discovery.

¶34 Townsend's claim of failure to file a suppression motion is unsustainable for two reasons. First, trial counsel did file a motion for a ***Miranda-Goodchild***[4] motion relating to the statements Townsend gave to police detectives. This motion is generically a motion to suppress if certain norms of performance are not met or if undue influence is exerted upon a suspect. Prior to the commencement of the jury trial, trial counsel indicated that the defense did not intend to pursue this motion. The trial court conducted a thorough colloquy with Townsend in which he approved a waiver of his right to the motion. Second, Townsend supplies this court with no further information other than the bald statement that his trial counsel was ineffective for failing to file a suppression motion. We have not been provided with the slightest clue of the purpose for which he filed this claim nor its dimension. We are not obligated to consider undeveloped claims and eschew the opportunity to do so in this instance. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶35 Townsend also claims, for the first time, ineffective assistance of counsel for failure to conduct pretrial discovery. He did not raise this issue in his

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

WIS. STAT. § 974.06 motion before the trial court. For that reason, we deem this claim of error waived. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981).

¶36 In summary, on the merits, not one of the claims of error attributed to trial counsel has any merit. That being the case, trial counsel cannot be charged with ineffective assistance of counsel for failing to raise the issues in the trial court. Consequently, there is no merit for the claim that postconviction counsel was ineffective for not challenging trial counsel's failure to raise these issues.

G. Machner Hearing.

¶37 Finally, Townsend claims his due process rights were violated when the postconviction court denied him a ***Machner*** hearing. We reject this claim.

APPLICABLE LAW

¶38 A hearing on a defendant's postconviction motion is not required if the defendant fails to allege sufficient facts in the postconviction motion to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In such cases, the trial court may, in the exercise of its legal discretion, deny the motion without a hearing. ***Id.***

¶39 For all the reasons stated earlier in this opinion rejecting Townsend's claims, the record in this case conclusively demonstrates that he is not entitled to summarily denying Townsend's postconviction motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.