

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 8, 2006

Cornelia G. Clark
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. 2005AP1015

Cir. Ct. No. 1994CF944268

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LLOYD EDWIN SELLERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lloyd Edwin Sellers appeals from an order denying his petition for writ of *habeas corpus* requesting relief from a conviction for first-degree intentional homicide while armed with a dangerous weapon, contrary to WIS. STAT. §§ 940.01, 939.63 (1994-95). Sellers claims that the trial

court erred when it denied his ineffective assistance of counsel claims without a hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). He asserts that he received ineffective assistance at trial and on appeal because: (1) trial and appellate counsels did not seek to suppress Sellers' confession, which he claims was obtained in violation of his Fourth and Fourteenth Amendment rights; and (2) trial counsel failed to impeach a witness who placed Sellers at the scene of the crime. Because Sellers failed to allege what action trial and appellate counsel should have taken, and how these actions would have altered the outcome of his case, his claims do not warrant a *Machner* hearing. We affirm.

BACKGROUND

¶2 On July 10, 1995, a jury convicted Sellers of first-degree intentional homicide while armed with a dangerous weapon. The conviction stemmed from the killing of Debra Syvock, who was stabbed to death at her residence in the late evening of October 28, 1994, or early morning of October 29, 1994. The trial court sentenced Sellers to life imprisonment with parole eligibility in 2065.

¶3 On August 15, 1995, Sellers filed a *pro se* motion in the trial court, asserting discovery violations. Sellers asserted that a temporary felony warrant issued for his arrest¹ falsely stated that a blood-stained coat was recovered from him; however, at trial it was determined that a third-party, Leslie Richardson, had given the coat to the police. Sellers further asserted that the police did not have

¹ The police teletype of October 30, 1994, which indicated that Sellers was wanted as a suspect in the killing of Debra Syvock, stated that a "temporary felony warrant" had been issued for Sellers' arrest. In fact, no arrest warrant had been issued by a detached judicial officer at the time of Sellers' arrest on October 31, 1994.

probable cause to arrest him when he voluntarily turned himself in after learning that he was sought by the police. In addition, Sellers referred to a discrepancy between the trial testimony of Tracie Davis and the police report of an interview with Carla Davis.² Sellers was subsequently sentenced on September 15, 1995.

¶4 Sellers appealed, and this court affirmed his conviction on July 22, 1997. On October 21, 1997, after Sellers' petition for review was denied by the Wisconsin Supreme Court, this court issued an order denying Sellers' *pro se* motion for reconsideration and request to file a supplemental brief because his appeal was finished. On November 18, 1997, Sellers filed another *pro se* motion reasserting that the police lacked probable cause for his arrest when he was taken into custody on October 31, 1994. In this motion, Sellers again referenced the discrepancy between the testimony of Tracie Davis, and the police report detailing the interview with Carla Davis. The trial court denied Sellers' motion.

¶5 On June 11, 2001, the State of Wisconsin Public Defender's Office—Appellate Division appointed Sellers' present counsel to examine possible claims of ineffective assistance of trial and appellate counsel. After completing an investigation and review of Sellers' case, his present counsel closed the file on October 14, 2002. On December 22, 2003, the State of Wisconsin Public Defender's Office—Appellate Division again appointed present counsel to

² At trial, Tracie Davis, the fiancée of Sellers' brother Joseph, testified that Sellers had called their home at approximately 10:21 p.m. on the night of October 28, 1994. Although she did not answer the call, she used the "star 69" feature to call back the number which called her house. Sellers answered the "star 69" callback at Debra Syvock's apartment. Sellers noted in postconviction motions that Carla Davis stated in a police interview on October 29, 1994, that she was the one who had used the "star 69" to call back the Syvock residence and spoke with Sellers. Carla Davis is the younger sister of Tracie Davis. Both Carla Davis' statement to the police, and Tracie Davis' testimony, established that Sellers was present in Syvock's apartment, and answered a "star 69" callback at approximately 10:21 p.m. on October 28, 1994.

consider Sellers' ineffective assistance of counsel claims in light of the recent United States Supreme Court decision in *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam).³ Upon review of this decision, Sellers filed a petition for writ of *habeas corpus* with the trial court on November 19, 2005, seeking postconviction relief. In his petition, Sellers alleged that he had received ineffective assistance of counsel for two reasons.

¶6 First, Sellers contended that his arrest constituted an illegal search and seizure in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution. He based this conclusion on the fact that no warrant had been issued for his arrest, and that facts known to the police at that time did not support probable cause for the arrest. Sellers argued that, because his arrest violated his constitutional rights, the confession which he gave to police shortly thereafter should have been suppressed at trial. Sellers claimed that the failure of trial counsel to raise this issue with the trial court constituted ineffective assistance of counsel.

¶7 Second, Sellers argued that the failure of trial counsel to impeach the testimony of Tracie Davis constituted ineffective assistance of counsel. Sellers asserted that Tracie Davis' testimony, which placed him at Syvock's apartment at the time of the homicide, led directly to his conviction. Further, Sellers contended that he was prejudiced by trial counsel's failure to impeach this testimony with Carla Davis' statement to the police on October 29, 1994.

³ The Court's decision in *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam), does not appear to be relevant to the issues raised by Sellers in this appeal. In *Kaupp*, the State conceded that the police did not have probable cause to arrest the defendant. *Id.* at 630. Here, the State makes no such concession. Further, *Kaupp* does not address the issue of witness impeachment.

¶8 In the petition, Sellers further asserted that appellate counsel was ineffective for failing to raise these claims of ineffective assistance of trial counsel on appeal.

¶9 On March 14, 2005, the trial court denied Sellers' petition for writ of *habeas corpus* without holding a *Machner* hearing, stating that his claims were inadequately pled. The trial court concluded that the police had probable cause to arrest Sellers and that trial counsel's failure to impeach the testimony of Tracie Davis was not prejudicial.

¶10 This appeal followed.

DISCUSSION

A. *Machner* Hearing.

¶11 Sellers claims that the trial court erred when it denied his petition for writ of *habeas corpus* without a *Machner* hearing to determine whether he had received ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result). We disagree.

¶12 A trial court must hold a *Machner* hearing if the defendant alleges facts 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. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. *Id.* If, however, “the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial]

court has the discretion to grant or deny a hearing.” *Id.* Sellers was not entitled to a *Machner* hearing on his ineffective assistance of counsel claims, and those claims are, as a matter of law, without merit.

B. Probable Cause.

¶13 Sellers contends that he was arrested without probable cause and that, as a result, his subsequent confession was inadmissible at trial. *See State v. Taylor*, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). He further asserts that trial counsel’s failure to seek the suppression of this confession constituted ineffective assistance. We hold that Sellers did not receive ineffective assistance of counsel because the failure of trial counsel to seek suppression of the confession did not constitute deficient performance as a motion to suppress would likely have been denied. *See State v. Maloney*, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

¶14 This court has previously summarized the law regarding probable cause:

In order to be lawful, an arrest must be based on probable cause. *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). Probable cause for arrest exists when the totality of the circumstances within the arresting officer’s knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). While the information must be sufficient to lead a reasonable officer to believe that the defendant’s involvement in a crime is “more than a possibility,” it “need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *Secrist*, 224 Wis. 2d at 212. Probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior. *State v. Petrone*, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991).

State v. Kutz, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. Further, when considering whether probable cause existed at the time of arrest, the totality of the information possessed by the police department must be considered—it is not necessary that the arresting officer(s) personally possessed the requisite knowledge to establish probable cause. *Johnson v. State*, 75 Wis. 2d 344, 349-50, 249 N.W.2d 593 (1977).

¶15 Sellers bases his contention that there was no probable cause for his arrest on the fact that the bloody coat obtained by the police was recovered from a third-party, and not directly from Sellers. Because of this, Sellers asserts that the police teletype of October 30, 1994, was founded on incorrect information and, as such, it was insufficient to show probable cause for his arrest. The totality of the information possessed by the police department at the time of Sellers' arrest, however, was sufficient to establish probable cause.

¶16 The statement given to police by Carla Davis on October 29, 1994, regarding the “star 69” call with Sellers established him as the last person known to be in Syvock's apartment before she was killed. On that same date, an interview of Sidney Sellers, Syvock's fiancée and Sellers' brother, established that Syvock knew Sellers and that she would have let him into her apartment. In an interview with Sellers on the morning of October 30, 1994, Sellers indicated that he was aware that Syvock and Sidney had been trafficking large amounts of cocaine out of their apartment. As a result, the doors were usually locked and Syvock would not admit anyone except known friends, customers, and those who had made prior arrangements through Sidney. The police found no sign of forced entry into Syvock's apartment. Sellers further stated that he left Syvock's apartment at 9:00 p.m. on October 28, 1994, a fact he claimed to remember because he left shortly after viewing a television news story regarding a fire. In

fact, the news story was not reported until 10:18 p.m. that evening. Finally, on October 30, 1994, police recovered Sellers' blood-stained coat from Leslie Richardson.

¶17 The totality of these circumstances established probable cause for Sellers' arrest. Because the police had probable cause, the arrest did not constitute a violation of Sellers' rights under the Fourth and Fourteenth Amendments. Thus, Sellers' claim that his resulting confession should have been suppressed as the fruit of an illegal arrest is without merit, and trial counsel's performance was not deficient for failing to seek the suppression of this confession. Finally, because trial counsel's performance was not deficient, Sellers is not entitled to relief on a claim that appellate counsel was ineffective for failing to allege ineffective assistance of trial counsel.

C. Failure to Impeach.

¶18 Sellers asserts that trial counsel was ineffective for failing to cross-examine Tracie Davis or impeach her testimony with Carla Davis' statements to police. The trial court denied relief on this claim without a *Machner* hearing because Sellers failed to allege facts sufficient to demonstrate that he was prejudiced by these failures. We agree.

¶19 To prevail in a claim of ineffective assistance of counsel, a defendant "cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense." *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). "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). The defendant would need to allege what the witness would have said, how the witness knew that information, and why that information would have been relevant to the defense. *See Allen*, 274 Wis. 2d 568, ¶30.

¶20 Here, Sellers fails to allege, with sufficient specificity, facts which would support his claim that trial counsel was ineffective for failing to cross-examine Tracie Davis, or impeach her testimony. Sellers does not specify how counsel would have used the prior statement of Carla Davis to impeach the testimony. Further, Sellers does not provide the responses Tracie Davis would have given if impeached with Carla’s statement, nor any basis for supporting such expected responses. Finally, even assuming that Tracie Davis was to have admitted that Carla actually placed the “star 69” call in question, this admission would not have cast doubt on the key fact of Tracie Davis’ testimony—that Sellers was present at Syvock’s apartment at 10:21 p.m. on October 28, 1994, the night Syvock was killed.

¶21 For these reasons, Sellers has failed to demonstrate that he was prejudiced by his trial attorney’s failure to cross-examine Tracie Davis. Because Sellers did not receive ineffective assistance of counsel at trial, appellate counsel was similarly not ineffective for failing to allege ineffective assistance of trial counsel on appeal.

By the Court.—Order affirmed.

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

