COURT OF APPEALS
DECISION
DATED AND FILED

August 08, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1344 **Cir. Ct. Nos. 2000CF4448**
2000CF4862

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IRVING TROMAC WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

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

¶1 KESSLER, J. Irving Tromac Washington appeals from judgments of conviction for several drug-related charges in two circuit court cases that were consolidated for trial and remain consolidated on appeal. He also appeals from an order denying his motion for postconviction relief. On appeal, Washington

presents argument only with respect to charges in circuit court case number 2000CF4862. We therefore affirm without discussion the conviction in circuit case number 2000CF4448.

¶2 Washington argues that his conviction for possession with intent to deliver cocaine and for failing to purchase a tax stamp should be reversed because the State failed to preserve a windbreaker jacket for DNA testing. Because Washington never filed a direct appeal, these arguments come to us in the context of a postconviction motion alleging ineffective assistance of trial and postconviction counsel. We reject his arguments and affirm the judgments and order.

BACKGROUND

¶3 These cases involve incidents that occurred on August 29, 2000, and October 19, 2000. On August 29, 2000, officers Brent Miscichoski and Andrew Deptula arrested Washington on a Milwaukee street for a prior fleeing incident. They found in Washington's pockets baggies containing two chunks of crack cocaine. Washington managed to flee from the officers after being arrested.[1]

¶4 The second incident, which involved the charges Washington challenges on appeal, took place on October 19, 2000. According to Miscichoski and Deptula, they saw Washington playing dice in an alley. Miscichoski testified that he saw Washington take off a gray windbreaker jacket, throw it to the ground and run off. Miscichoski started to run after Washington, but was stopped almost

[1] Information on the August 29, 2000 incident is included to provide background on the officers' prior contact with Washington. Because Washington has not challenged his conviction related to the August 29 incident, we do not discuss those charges further.

immediately when he encountered pitbulls in a yard. He returned to the jacket and retrieved it from the ground. Miscichoski estimated that he picked up the jacket within thirty seconds after Washington threw it to the ground.

¶5 Miscichoski testified that he found inside the jacket a cell phone and a plastic baggie that contained seventy-five individually packaged corner cuts of crack cocaine, as well as some large chunks of crack cocaine. He also recovered some dice that the men were using to play the game. All of these items, including the jacket, were retained by the police.

¶6 A criminal complaint was issued. Washington was arrested about two weeks later. After a preliminary hearing, Washington was bound over for trial. The August 29, 2000 and October 19, 2000 charges were joined for trial.

¶7 On October 1, 2001, the parties appeared for trial. However, they reached a plea agreement and Washington entered guilty pleas to all charges. The trial court found him guilty and scheduled sentencing for December 11, 2001. A presentence investigation report was ordered.

¶8 On December 11, 2001, sentencing was adjourned, apparently based on a scheduling conflict. Sentencing was rescheduled for March 4, 2002.

¶9 On March 4, 2002, Washington appeared for sentencing with trial counsel. However, trial counsel told the trial court that Washington wanted to withdraw his guilty pleas. The reason for withdrawal was based on the parties' mistaken belief that Washington would be eligible for the Felony Drug Offender Alternative to Prison Program ("FDOATP"). Counsel indicated that Washington had learned from talking with the presentence investigation report writer that he was not eligible for FDOATP due to his juvenile record. Washington also

indicated that he wanted new trial counsel. Trial counsel was allowed to withdraw and sentencing was again adjourned.

¶10 On April 22, 2002, Washington, acting through new trial counsel, moved to withdraw his guilty pleas. The State did not oppose the motion. The motion was granted and the case proceeded to trial.

¶11 Prior to trial, Washington's trial counsel sought an opportunity to examine the inventoried evidence. The State learned that the dice, cell phone and jacket had been destroyed on February 22, 2002. Washington moved to dismiss the October 19, 2000, charges based on the destruction of the phone and the jacket, asserting that his due process rights were denied because he would not have an opportunity to conduct fingerprint and other testing on the phone or DNA testing on the jacket in order to find proof that the items did not belong to him.

¶12 The trial court held a hearing to determine why the evidence had been destroyed. Miscichoski testified that on about October 22, 2001, he received a property control form that asked whether the property control section should hold, dispose of, or release certain evidence being held.[2] Miscichoski said he circled the option "dispose" for the phone, jacket and dice because he believed the case was over. Miscichoski explained that he knew Washington had pled guilty because Miscichoski was in court the day of the plea, prepared to testify at

[2] Another witness testified that it is standard procedure for property control to send out a form one year after the property is inventoried to determine if it should be retained, disposed of or released.

It does not appear that the form asked whether the cocaine should be destroyed. It could be that illegal drugs are kept separately from other inventory. In any event, the cocaine was not destroyed and was made available to the defense for inspection.

Washington's trial. A lieutenant signed off on the request on December 22, 2001, and a captain authorized the destruction in February 2002.

¶13 The trial court found Miscichoski's testimony credible and that he had not acted in bad faith when he told the property control section that the evidence could be destroyed. The trial court noted that although it thought the evidence should have been preserved because sentencing had not yet occurred, there had been "no bad faith, no malice, no intentional wrongdoing on the part of the officer." The trial court denied Washington's motion to dismiss the charges.

¶14 The cases proceeded to trial. Washington was found guilty on all counts. He was sentenced on February 28, 2003. He filed a notice of intent to pursue postconviction relief and counsel was appointed. However, no motions or appeal were ever filed.

¶15 Two years later, on April 20, 2005, represented by new postconviction counsel, Washington filed a motion for postconviction relief. He asserted that he was denied due process when the trial court denied his motion to dismiss the charges based on the State's destruction of the jacket.[3] He also argued that his numerous trial counsel provided ineffective assistance by failing to test the jacket and not effectively arguing the motion to dismiss based on the destruction of evidence. Further, he argued that his first postconviction counsel provided ineffective assistance by failing to bring a motion for postconviction relief and pursue an appeal.

[3] Washington did not allege in his postconviction motion that the destruction of the cell phone or the dice denied him due process.

¶16 The trial court denied Washington's motion without a hearing.[4] This appeal followed.

DISCUSSION

¶17 This appeal comes to us in the context of an ineffective assistance of counsel claim because Washington did not pursue a direct appeal. In order to prove ineffective assistance, a defendant must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶18 In this case, Washington's ineffective assistance claims all hinge on whether the charges against him should have been dismissed because the jacket was destroyed.[5] We elect to consider that issue on the merits. Because we conclude Washington was not denied due process, we conclude that he cannot show he was prejudiced by the failure of numerous counsel to make certain arguments and file motions concerning the destruction of evidence. Therefore, Washington was not denied the effective assistance of counsel. *See* ***id.*** We affirm the judgments and order.

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[4] The decision and order denying the postconviction motion were issued by the Hon. Jeffrey A. Wagner. The Hon. Clare Fiorenza presided over the plea hearing, jury trial and sentencing.

[5] Washington also states twice that his attorneys should have "made a Motion for Scientific testing of the coat at issue here." He provides no authority or additional explanation with respect to that statement, and we therefore decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not address issues inadequately briefed and inadequately supported by legal authority).

¶19 We have recognized that:

> A defendant's due process rights are violated by the destruction of evidence (1) if the evidence destroyed was apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; or (2) if the evidence was potentially exculpatory and was destroyed in bad faith.

State v. Parker, 2002 WI App 159, ¶14, 256 Wis. 2d 154, 647 N.W.2d 430. Whether a defendant's due process rights were violated presents a question of law that we decide *de novo*. ***Id.***, ¶8; *see also* ***State v. Greenwold***, 189 Wis. 2d 59, 66-67, 525 N.W.2d 294 (Ct. App. 1994) ("***Greenwold II***").

¶20 In this case, the trial court found that the evidence had not been destroyed in bad faith. Washington does not challenge that finding, asserting instead that bad faith is irrelevant because the evidence was "apparently exculpatory" and was not available by other reasonable means. In light of Washington's argument, we do not review the trial court's finding that the evidence was not destroyed in bad faith. Thus, our analysis centers on whether the evidence destroyed was apparently exculpatory, and was of such a nature that Washington would be unable to obtain comparable evidence by reasonable means. *See* ***Parker***, 256 Wis. 2d 154, ¶14.

¶21 The State focuses its argument on whether the evidence was "apparently exculpatory," providing only a two-sentence argument on Washington's ability to obtain comparable evidence by reasonable means. We likewise focus on whether the jacket was apparently exculpatory. Because we conclude it was not, we do not consider whether Washington could have obtained comparable evidence elsewhere.

¶22 In ***Arizona v. Youngblood***, 488 U.S. 51 (1988), the Supreme Court differentiated evidence that is apparently exculpatory from that "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." ***Id.*** at 57. The Court explained that the Due Process Clause did not impose "on the police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable significance in a particular prosecution." ***Id.*** at 58. ***Youngblood*** also held that "the exculpatory value of the evidence must be apparent '*before* the evidence [is] destroyed.'" ***Id.*** at 56 n.* (citation omitted; emphasis in ***Youngblood***).

¶23 Applying ***Youngblood*** on at least two occasions, this court has held that evidence was not "apparently exculpatory." In ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994) ("***Greenwold I***"), the defendant asserted that the police failed to preserve or collect samples of blood spots on a car's interior after the vehicle was involved in an accident that killed an occupant. ***Id.*** at 882-83. We held that the exculpatory nature of the blood samples was not apparent and that, as in ***Youngblood***, "'this evidence was simply an avenue of investigation that might have led in any number of directions.'" ***Id.*** at 885 (quoting ***Youngblood***, 488 U.S. at 56 n.*).

¶24 In ***Parker***, we considered whether an audiotape of an alleged drug purchase for which the defendant was charged was apparently or potentially exculpatory. 256 Wis. 2d 154, ¶¶1, 14-18. We concluded that the tape could "hardly be said to be 'apparently exculpatory'" because before it was destroyed, both the defendant and his attorney had reviewed the tape and had declined to introduce it as evidence at trial. ***Id.***, ¶15.

¶25 In this case, Washington asserts that he never wore the jacket from which drugs were recovered. He contends that the jacket could have been subjected to scientific testing for the presence of his DNA. He explains that if he was wearing the jacket, as the police claimed,

> and if Mr. Washington did, in fact, hurriedly divest himself of the coat while running from the police, exemplars of his DNA could, and should, have been found somewhere on that coat. If, on the other hand, the coat had been tested and found to be devoid of Mr. Washington's DNA, the absence of [his] DNA would have conclusively refuted the testimony of the police linking Mr. Washington to possession of the coat and the items found in its pockets.

Washington asserts that under the circumstances, it "was, or ought to have been, clear to the State that if, as Mr. Washington alleged, he was never wearing the coat, the coat, (or more precisely the DNA that it might or might not contain), must be said to have possessed a clear and obvious exculpatory value." Washington further claims, without reference to authority, that the State, which has been using DNA evidence for years,

> must be held to the by now common knowledge that an individual's DNA will be found on anything that is in close proximity to his or her body. Contrariwise, a sample of an individual's DNA will not, and cannot, be found on an item that has not been in contact with that individual's body.
>
> Thus, if the State claimed, as here, that Mr. Washington was wearing the coat when he was spotted by the police and discarded the coat while being chased by them, the State must be held to the knowledge that Mr. Washington's DNA would be found on that coat—if in fact he was wearing it.

¶26 In response, the State asserts that it is "purely speculative" whether: Washington would have left biological material on the jacket on October 19, 2000; the material would have remained on the jacket two years later when Washington first asked to examine the jacket; the material would have been capable of DNA

testing; DNA testing would have excluded Washington as the donor of that material; and Washington could overcome the eyewitness testimony of the two officers who positively identified Washington as the last person wearing the jacket.

¶27 The State provides sources for its assertions that there is no guarantee that DNA would be found on the jacket, and that DNA testing of samples such as shed hair and skin cells provides usable results in less than twenty percent and thirty-to-sixty percent of cases, respectively. While we note that Washington has not provided sources in support of his assertion that an absence of his DNA would "conclusively refute[]" the police testimony, we decline to attempt to determine the likelihood that the jacket would contain usable DNA. At issue is whether the *exculpatory nature* of the evidence was *apparent* at the time it was destroyed. *See* ***Youngblood***, 488 U.S. at 56 n.*. We conclude that it was not.

¶28 As the State notes, the two officers who already knew Washington and saw him wearing the jacket would be more likely to conclude the jacket would provide *inculpatory* evidence that Washington wore it. Because the record does not establish a significant likelihood that any biological samples would have been found on the jacket either shortly after Washington's arrest or at the time of trial, or that any biological samples had a reasonable likelihood of exculpating Washington, the jacket provided Washington no more than "an avenue of investigation that might have led in any number of directions." *See* ***id.*** We are unconvinced that any potential exculpatory value of the jacket was "apparent" to

the officers—at least one of whom was present when Washington pled guilty—at the time the jacket was destroyed.[6]

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

[6] We do not suggest that it is prudent for the State to make a regular practice of destroying evidence as soon as a guilty plea is entered or before the time for appeal has expired. How long evidence and other property collected by the police should be retained is not an issue we need to resolve in this appeal, and we decline to do so. However, given the confusion the trial court and the parties expressed over when evidence can be destroyed, we encourage the State and those involved in maintaining evidence and other property to carefully consider their policies in light of emerging technology, and consider whether the policies have been clearly communicated to the appropriate parties.