COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2557 **Cir. Ct. No. 2003CF805**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARSHALL JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Marshall Jones appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that he should be allowed to withdraw his plea because the trial court should have granted his pretrial motion to suppress.

Because we conclude that the evidence presented supported the trial court's decision, we affirm the judgment and order.

¶2 Jones pled guilty to two counts of first-degree intentional homicide. The State dismissed four additional counts related to the incident and recommended that the court give him two life sentences with the possibility of parole after thirty-five years. The court sentenced him to two life sentences without the possibility of parole. Jones moved to withdraw his pleas.[1] The court held a hearing on the motion and denied it.

¶3 Jones argues that the court should have granted the pretrial suppression motion because the police did not have a reasonable suspicion that he had committed a crime so the initial stop was not valid, the police search of his pockets was overreaching, and his initial detention was actually an arrest unsupported by probable cause. He also argues that he received ineffective assistance of counsel because his trial counsel did not challenge the validity of the stop in the pretrial motion, that the trial court's alternate decision not to suppress because of inevitable discovery was invalid because the initial stop was invalid, and that he should be allowed to withdraw his plea because the trial court relied on false police testimony when deciding the suppression motion.

[1] Jones contends in his brief to this court that the circuit court "rejected" the plea agreement. This is not so. The plea agreement establishes the sentence that the State will recommend. In this case, the State followed its agreement. The sentencing court is not bound by this agreement, and in this case, explained this to Jones before accepting his plea. The court first asked Jones if he understood that the sentence the State recommended was a "recommendation" and that the court was not compelled to follow the recommendation. Jones answered yes. The court then asked him: "Do you understand that the Court is free to sentence you to the maximum permitted under the law for each of these crimes and could include imprisonment for life without parole?" The defendant responded: "Yes."

¶4 The underlying incident occurred when two people were shot to death at a tavern in Racine during a robbery. Around the same time, a police officer saw Jones running "at full speed" down the street in the area of the tavern and not dressed "for a jog." Jones was ultimately stopped by officers. One of the officers, believing that Jones had a weapon in his pocket, reached into Jones's pocket and found a lighter, some cash, and a check made out to someone else.

¶5 After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). A defendant has the burden of proving a manifest injustice by clear and convincing evidence. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. ***Id.***

¶6 Jones argues that he received ineffective assistance of trial counsel because his counsel did not raise in the suppression motion the issue of whether the police officers had probable cause to stop him. At the preliminary hearing and the hearing on the suppression motion, the police officer who initially stopped Jones testified that he had received a description of the tavern shooter from the dispatcher before he actually stopped Jones. Jones contends that the police officer lied when he gave this testimony.

¶7 In support of his argument, Jones relies on the Computer Assisted Dispatch Incident Report (CAD), which is prepared contemporaneously as the dispatcher receives and makes calls, a cassette tape recording of these calls that is spliced together, and a transcript of the calls on the tape. The CAD also records the times the calls are made. Jones argues that these pieces of evidence establish unequivocally that the officer did not have a description of Jones prior to stopping

him. Without the description, Jones argues, the officer did not have probable cause and the stop was invalid.

¶8 At the postconviction motion hearing, the Director of Emergency Services, responsible for overseeing records and communications, explained how the tape and transcript were prepared. He testified that the cassette tape of the calls is spliced together because calls come in on two different channels. If calls are overlapping, the calls on the tape are spliced so that the calls make sense. The transcript is prepared from the tape and does not indicate when the calls have been spliced together. The transcript shows that the officer who stopped Jones received the description after he had stopped Jones. The officer testified that he received the information about the shooting before he stopped Jones. The CAD shows the times of the calls and supports the officer's testimony.

¶9 We conclude that these pieces of evidence create a factual ambiguity about when the officer received the description of Jones. In such a case, it is the job of the trial court to resolve the ambiguity by making a credibility determination. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). When the trial court has made a credibility determination, "it is the ultimate arbiter of the credibility of the witnesses and the weight given to each witness's testimony." ***State v. Peppertree Resort Villas***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted). And we must sustain a trial court's findings of fact unless they are clearly erroneous. ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991).

¶10 In denying the motion, the circuit found that the evidence, including the officer's testimony, established that

> at the time of the seizure of the defendant the Officer had reasonable suspicion based upon the proximity of the location of the initial sighting of the defendant and the location of Ron's Tavern the time of night, the general local [sic] of Ron's Tavern, the flight actions of the defendant, the Officer's information that there was a shooting insider the tavern premises, which latter fact also alerted the Officer to a personal safety concern. The inference which is drawn from the whole of the testimony of the Officer is that the defendant was never out of sight of the Officer from the initial sighting to the seizure. The Officer was familiar with the area in which the initial sighting of the defendant took place and he was familiar with the area in which Ron's Tavern is located. All of these facts were articulated by the Officer and it is concluded that a man of reasonable caution would believe that the action taken was appropriate.

¶11 We conclude that the facts presented support the circuit court's determination that the police officers had probable cause to stop Jones based on the information available to them at the time. Because we have concluded that the stop was legal, Jones's trial counsel was not ineffective for failing to raise the issue in the suppression motion. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to make meritless arguments). Further, because the police officers had probable cause to stop Jones, the subsequent search of his pockets was incident to a lawful arrest and also valid. *See* ***State v. Sykes***, 2005 WI 48, ¶34, 279 Wis. 2d 742, 695 N.W.2d 277. And because we conclude that there was a lawful arrest and the search was performed pursuant to a lawful arrest, there is no need to address the inevitable discovery rule. *See* ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

¶12 Jones's final argument is that the trial court relied on false police testimony when it denied the pretrial suppression motion, and this is a manifest injustice that entitles Jones to withdraw his plea. Jones has not established that the

officers' testimony was false, nor that such false testimony would create a manifest injustice entitling him to withdraw his plea. We reject this argument as well. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).