COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1712 **Cir. Ct. No. 1994CF944928**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANKIE GROENKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 FINE, J. In 1995, a jury convicted Frankie Groenke of one count of armed burglary and one count of armed robbery, both as a party to a crime, for

robbing Michael Grosse on June 18, 1994, and one count of armed robbery, as a party to a crime, for robbing Grosse on August 16, 1994. We affirmed on Groenke's direct appeal. *See* ***State v. Groenke***, No. 96-3324-CR, unpublished slip op. (Wis. Ct. App. Nov. 4, 1997). The supreme court denied review.

¶2 Groenke appeals *pro se* from an order denying his WIS. STAT. § 974.06 postconviction motion. He claims that: (1) 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), and (2) he is entitled to a new trial in the interest of justice. We affirm.

I.

¶3 Grosse testified at Groenke's trial that in June of 1994 two men with guns, one of whom he identified in court as Groenke, invaded his home, held him, his mother, and his girlfriend at gun point, and took, as material, a cellular telephone, a pager, a Sega Genesis console, and a video game. According to Grosse, during the robbery, Groenke "put[] a gun to my head and … [told] me that he would kill me if I made any kind of move." Grosse also testified that in August of 1994, he was at a friend's house when the same two men ran in and took, among other things, Grosse's keys, money, and a pager.

¶4 Detective Fred Krenzke testified that, after the robberies, he interviewed Anthony Kane, who was in custody at the Pewaukee Police Department for unrelated crimes. Kane told Krenzke that he and Groenke had robbed Grosse. Krenzke testified that the police then got a search warrant and searched Groenke's house:

> Q In this case was there a search warrant, ah, effectuated to obtain any potential physical evidence?

A Yes, there was one.

Q Where was it executed?

A At the 58th Street [Groenke's] address.

….

Q As a result of the search warrant execution, were any objects recovered?

A Yes, there were.

The prosecutor then asked Krenzke if he "displayed these items, or [was] present when these items were displayed to Michael Grosse," and Groenke's lawyer objected:

> [Groenke's Lawyer]: Judge, I'm going to object. I think there's been an improper foundation that's been laid relative to this information about a search warrant. Um, it has not been established that this officer has any firsthand knowledge of a search warrant, or the execution of the search warrant. I think that this is improper the way it's being presented.
>
> THE COURT: You want to put some more foundation in then?
>
> [The Prosecutor]: Well, it's untimely, that information. We're well past that.
>
> [Groenke's Lawyer]: I'm moving to strike it, Your Honor.
>
> THE COURT: The Court's not going to strike it. If you want to ask some additional questions then -- subsequently, ask the next question, the Court's going to allow you to do so.[1]

[1] We affirmed the trial court's decision to admit Krenzke's testimony about the search warrant on Groenke's first appeal. *See* ***State v. Groenke***, No. 96-3324-CR, unpublished slip op. at 4–5 (Wis. Ct. App. Nov. 4, 1997).

(Footnote added.) Krenzke then testified that the police showed the items from Groenke's house to Grosse. According to Krenzke, Grosse identified as his a Sega Genesis console, a video game, and a pager.

¶5 Groenke's WIS. STAT. § 974.06 motion, the denial of which underlies this appeal, claims that his trial and postconviction lawyers were ineffective. *See* ***State ex rel. Rothering v.*** McCaughtry, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction counsel may be a sufficient reason for failing to have previously raised the issues). The trial court denied the motion without a ***Machner*** hearing.

II.

A. *Alleged Ineffective Assistance of Counsel.*

¶6 Groenke claims that the trial court erred when it denied his ineffective-assistance-of-counsel claims without a ***Machner*** hearing. *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). 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, 576, 682 N.W.2d 433, 437. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Ibid.*** 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 circuit court has the discretion to

grant or deny a hearing." ***Ibid.*** Groenke's WIS. STAT. § 974.06 motion does not pass ***Allen*** muster.[2]

¶7 First, Groenke's WIS. STAT. § 974.06 motion contends that his postconviction lawyer should have claimed that his trial lawyer "fail[ed] to investigate the circumstances of the search." Groenke claims that had his trial lawyer investigated, he would have discovered that "there was no 'search warrant,' … and evidence was seized without probable cause." Groenke thus argues that his trial lawyer "should of [*sic*] filed a motion to suppress" the evidence linking Groenke to the crimes. In support of his contention, Groenke attached the following to his § 974.06 motion: (1) a supplemental police report showing that the police had a warrant to arrest Kane; (2) a warrant to search Kane's car for stereo equipment; and (3) a form signed by Groenke's mother consenting to the police search of their house for "any stolen stereo equipment or contraband." Groenke does not in his § 974.06 motion challenge the validity of the arrest warrant or the consent. Accordingly, Groenke has not alleged facts sufficient to show that, had his lawyer filed a motion to suppress, he would have prevailed. *See* ***Payton v. New York***, 445 U.S. 573, 602–603 (1980) (police may enter arrestee's home if they have an arrest warrant for him); ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973) (consent well-established exception to requirements of a warrant and probable cause).

[2] Any sub-issue mentioned by Groenke in his briefs and not discussed in this opinion was inadequately briefed. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed").

¶8 Groenke's WIS. STAT. § 974.06 motion does claim, however, that the police exceeded the scope of his mother's consent when they "seized everything of value from the Groenke residence," including a telephone, game system, and pager. We disagree. As we have seen, Groenke's mother consented to a search of the house for "any stolen stereo equipment *or contraband*." (Emphasis added.) Contraband includes items that are illegally acquired. *See* ***Jones v. State***, 226 Wis. 2d 565, 593–594, 594 N.W.2d 738, 751 (1999). The police conducting the consented-to search had reason to believe that the items that were not "stereo equipment" may have been stolen from Grosse, and were, therefore "contraband." Moreover, although the Record on this appeal does not indicate whether the police searching Groenke's house had a search warrant in addition to his mother's consent, our earlier opinion indicated that the police did have a search warrant, the precise contours of which were not explained. ***Groenke***, No. 96-3324-CR, unpublished slip op. at 3–6.

¶9 Second, Groenke's WIS. STAT. § 974.06 motion contends that his postconviction lawyer was ineffective by not claiming that his trial lawyer should have objected on hearsay grounds to Detective Krenzke's testimony that the police had a warrant to search Groenke's house. We disagree.

¶10 Although Krenzke did not apparently have personal knowledge about whether the police had a search warrant, and thus his testimony could be looked at as based on what he was told by others, his testimony about the search warrant was material only to explain to the jury where the items Grosse claimed were stolen from him were found. In other words, whether the police had or did not have a search warrant was not at issue then, and, as we have seen, Groenke is not claiming that the search was improper except insofar as he contends that seizure of the items that were not "stereo equipment" exceeded the scope of his

mother's consent. Thus, Krenzke's testimony was not for "the truth of the matter asserted," and was thus, by definition, not hearsay. *See* WIS. STAT. RULE 908.01(3).

¶11 Third, Groenke's WIS. STAT. § 974.06 motion asserts that his postconviction lawyer should have claimed that his trial lawyer "fail[ed] to investigate the circumstances of [Groenke's] initial detention" and failed to "challenge the existence of probable cause for [Groenke's] arrest." The Record establishes however, that any such challenge would have been without merit, and Groenke does not allege any facts that, if true, would demonstrate otherwise. Police reports attached to Groenke's § 974.06 motion show that Groenke was taken into custody for questioning as a "burglary suspect" after the police found in his house "numerous stereo items in the attic, along with the living room and the bedroom area." This was sufficient to provide the police with probable cause to believe that Groenke was involved in a burglary. *See* ***State v. McAttee***, 2001 WI App 262, ¶8, 248 Wis. 2d 865, 872, 637 N.W.2d 774, 778 (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).

¶12 Fourth, Groenke's WIS. STAT. § 974.06 motion claims that his postconviction lawyer should have asserted that the sentencing court erroneously exercised its discretion when it sentenced Groenke to a total of seventy years in prison.[3] Groenke's contention has two parts.

[3] The trial court sentenced Groenke to thirty-five years in prison for the armed burglary, thirty-five years in prison for the first armed robbery, concurrent to the burglary sentence, and thirty-five years in prison for the second armed robbery, consecutive to the burglary and first armed robbery sentences.

¶13 Groenke first claims that the sentencing court erroneously exercised its discretion because it did not "explain" why it did not impose the lesser sentences recommended by the prosecutor and the presentence-investigation-report writer. As Groenke acknowledges in his motion, however, a sentencing court is not bound by sentencing recommendations. *See* ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990) (court need not explain why its sentence differs from any particular recommendation as long as discretion exercised).

¶14 Groenke also contends that the sentencing court did not adequately consider his age and maturity. Pointing out that he was sixteen when he committed the crimes, Groenke argues that he was therefore less culpable than the sentencing court assessed because, as he puts it in his WIS. STAT. § 974.06 motion, "[a]dolescent brains are physiologically less developed that those of adults." That may very well be, but this does not make his contention any less conclusory and undeveloped, or show that the sentencing court erroneously exercised its discretion. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51–52, 538 N.W.2d 546, 549 (Ct. App. 1995) (allegations must be "factual-objective," as opposed to "opinion-subjective," to warrant an evidentiary hearing).

¶15 Finally, Groenke's WIS. STAT. § 974.06 motion claims that his postconviction lawyer should have argued that his trial lawyer failed to assert that Groenke was sentenced on inaccurate information. A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate, and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. Groenke has not alleged facts sufficient to show that the sentencing court relied on inaccurate information.

¶16 Groenke asserts that the sentencing court erroneously concluded in its sentencing comments that he had a "violent past":

> You have committed a number of different felonies as a juvenile … including short barrel shotguns and a number of things up to this -- to this point where you are being sentenced [for] terrorizing citizens of this community by the use of weapons and home invasion.

Groenke claims that this was wrong because he was charged with possessing a short-barreled rifle, not a short-barreled shotgun. This is of *de minimis* significance in the context of this case. *See* ***Allen***, 2004 WI 106, ¶22, 274 Wis. 2d at 584, 682 N.W.2d at 441 ("A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'") (quoted source omitted; brackets in original).

¶17 Groenke also contends that the sentencing court relied on inaccurate information when it characterized his crimes as "horrific." To support this claim, Groenke points to two alleged inconsistencies in Grosse's testimony:

- At the trial, Grosse testified that during the June of 1994 home-invasion robbery Groenke put a gun to his head and threatened to kill him, but "in police reports a year earlier … never mentioned this happening."

- At the sentencing hearing, Grosse testified that during the August of 1994 robbery Groenke hit him with a gun, but, according to a police report, told the police that Kane hit him with a gun.

Again, in the context of this case, these are minor inconsistencies at best and Groenke does not explain how or why this prejudiced the accuracy of the sentencing court's analysis. *See* ***State v. Harris***, 174 Wis. 2d 367, 378, 497 N.W.2d 742, 747 (Ct. App. 1993) (sentencing court resolves alleged

inconsistencies in the Record). Indeed, our earlier summary of what Groenke and his accomplice Kane did to Grosse and Grosse's mother and girlfriend during the June 1994 home invasion supports the sentencing court's "horrific" assessment:

> On June 18, 1994, two armed men accosted Michael Grosse at 10:15 p.m. They forced him into his home at 1635 North 52nd Street in Milwaukee, where they ransacked his room and stole clothes, a cellular telephone, a video game and a pager. During this time, they also held at gunpoint Grosse's mother, Susan, and his girlfriend, Stephanie Preisler, who were in the home.

Groenke, No. 96-3324-CR, unpublished slip op. at 2.

B. *Interest of Justice.*

¶18 Groenke claims that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. We decided a similar contention on his direct appeal. ***Id.***, No. 96-3324-CR, unpublished slip op. at 8. He has presented nothing to us on this appeal other than a rephrasing of arguments that he has already made. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976) (repackaging of rejected contentions does not entitle defendant to a new trial in the "interest of justice").

By the Court.—Order affirmed.

Publication in the official reports is not recommended.