COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP526-FT **Cir. Ct. No. 2006JV13**

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

IN THE INTEREST OF MAXWELL P.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MAXWELL P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

¶1 NEUBAUER, J.[1] Maxwell P., a person under the age of seventeen, appeals from an order denying his motion to vacate a dispositional order of delinquency resulting from a no contest plea to possession of tetrahydrocannibinols (THC), contrary to WIS. STAT. § 961.41(3g)(e). Maxwell's postdisposition motion alleges ineffective assistance of counsel. Maxwell argues that the circuit court erred in denying his postdisposition motion without a hearing and requests remand for an evidentiary hearing. We conclude that Maxwell's motion failed to allege sufficient material facts that, if true, would entitle him to relief. We therefore conclude that the circuit court did not erroneously exercise its discretion in denying Maxwell's motion without an evidentiary hearing. We affirm the order.

BACKGROUND

¶2 On March 3, 2006, the State filed a delinquency petition under WIS. STAT. ch. 938 alleging that Maxwell had possessed THC. The petition stemmed from a police investigation on February 20, 2006, during which Maxwell was arrested at a friend's house. On March 30, 2006, Maxwell's trial counsel filed a generic one-page motion to suppress any and all evidence derived from the search and arrest of Maxwell as the result of an unlawful search unsupported by probable cause, consent or a warrant.

¶3 The circumstances surrounding Maxwell's arrest, as adduced at the April 21, 2006 suppression hearing, are as follows. Detective Vahsholtz, a juvenile officer with the Cedarburg Police Department, testified that on February

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

20, 2006, he went to a residence in the city of Cedarburg at the request of the owner. The owner was concerned that her teenage son and his friends were smoking cigarettes or engaged in drug use at the home in her absence during the lunch hour or after school, and had asked Vahsholtz to periodically check the home to see if her son or any other students were there. The owner stated to Vahsholtz that she prohibited such activity, her son was not to leave school during lunch, and his friends were not to be at the house when she was not home. Vahsholtz, in his official capacity, had past contact with the owner relating to her son.

¶4 Upon arrival, Vahsholtz identified two vehicles, one parked in the driveway and one "out front" of the home. He confirmed that one of the vehicles was connected to a high school student. Vahsholtz contacted the homeowner by phone and informed her that he believed students were at her house, at which point he received consent to go onto the property and investigate. After the arrival of Sergeant John Stroik and another officer as requested backup, two officers entered the garage through an open side door.

¶5 Vahsholtz noticed a strong smell of tobacco and discovered three juveniles in the garage. Vahsholtz detained the juveniles in the garage and asked the juveniles to empty their pockets, at which time two produced marijuana and drug paraphernalia. The access door to the house was open. Stroik saw Maxwell in the house. Stroik directed Maxwell, who was in his socks, to put on shoes and come out to the garage with the other juveniles. Stroik subsequently discovered soda cans, cigarettes and a bag of what he believed to be marijuana in the basement, along with an active television and stereo.

¶6 Maxwell and the other juveniles were questioned in the garage. Maxwell was jumpy, loud and uncooperative, and Stroik had to repeatedly warn Maxwell to keep his hands out of his pockets—approximately six times. During this time, the officers told Maxwell that they were conducting an investigation and all of the juveniles who were present were trespassing. Partly due to Maxwell's disruptive actions, Vahsholtz decided to arrest and transport all of the juveniles for trespassing in the home and ordered Stroik to search and handcuff Maxwell. Stroik then advised Maxwell that he was going to be placed under arrest and handcuffed. Stroik stated at the suppression hearing that he assumed all the juveniles were going to be taken into custody. Vahsholtz testified that with a drug investigation, there was the possibility that anybody who had drugs on their person may have a weapon.

¶7 During the subsequent search, Stroik first discovered $400 on Maxwell; he then located a second object which he thought might be more money. Stroik extracted this object and discovered it to be a pack of cigarettes and a small bag with contents later identified as marijuana. Stroik did not recall at the hearing in what order he searched and handcuffed Maxwell. Stroik stated that in an investigation like this he would defer to Vahsholtz who, as the main investigator, would manage the movements of individuals and decide when to take individuals into custody.

¶8 At the close of testimony, the circuit court denied the motion on grounds that the pat-down was justified under a ***Terry***[2] stop analysis. The court also noted that Maxwell was agitated and kept putting his hands in his pockets,

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

and that he was going to be taken into custody for trespassing. The State asserted that the search was also valid as incident to arrest.[3] The court stated that this was a valid point and concluded that there were "multiple bases for finding that [the search] was constitutional." Following denial of the motion, Maxwell entered a plea of no contest, was adjudicated delinquent, and placed on one year of supervision with thirty days of secure detention imposed and stayed.

¶9 On November 26, 2007, Maxwell filed a motion to vacate the dispositional order based on ineffective of assistance of counsel, pursuant to WIS. STAT. RULE 809.30(2)(h). Maxwell alleged that the motion to suppress filed by trial counsel failed to argue (1) that he was not trespassing, as he was in the home with the permission of the homeowner's son; (2) that Maxwell was frisked because Vahsholtz ordered it and not because of any safety concern; and (3) that Stroik searched in his pocket and found marijuana when he thought he felt money, and not because he suspected a weapon. The State filed a motion for summary denial.

¶10 Citing ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, the circuit court denied Maxwell's postdisposition motion without a hearing on grounds that the factual allegations were conclusory and did not warrant a hearing. It further determined that the record taken as a whole showed that Maxwell's trial counsel's performance was objectively reasonable and that

[3] No specific challenges to the search were stated in the motion and the State subsequently complained about the lack of specificity at the suppression hearing on April 21, 2006. The State interpreted the motion to mean a challenge to a "probable cause frisk or a ***Terry*** frisk," and Maxwell's trial counsel and the circuit court agreed with this interpretation.

Maxwell was not prejudiced or entitled to relief from the delinquency order. Maxwell brought this timely appeal.

DISCUSSION

¶11 *Ineffective Assistance of Counsel, Standards.* In order to prevail on a claim that defense counsel's assistance was so defective as to require reversal of a conviction, a defendant must show both that the attorney's performance was deficient and that the deficient performance prejudiced the defense. ***Id.***, ¶26 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). An attorney's performance is deficient if, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992) (citation omitted). "The defendant must also show the performance was prejudicial, which is defined as 'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***Allen***, 274 Wis. 2d 568, ¶26.

¶12 On appeal, Maxwell contends that the circuit court erred in denying his motion without a ***Machner***[4] hearing because he had alleged specific instances of deficient performance that were prejudicial. However, defined sufficiency standards must be met before an evidentiary hearing is granted. ***Allen***, 274 Wis. 2d 568, ¶10. A circuit court has the discretion to deny a motion for relief on grounds of ineffective assistance of counsel without a ***Machner*** hearing "if the motion fails to allege sufficient facts to raise a question of fact, presents only

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (Where a legally sufficient ineffective assistance of counsel claim is raised, trial counsel's presence is required at any hearing in which counsel's conduct is challenged.).

conclusory allegations, *or if the record conclusively demonstrates that the defendant is not entitled to relief*." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citations omitted).

¶13 *Standard of Review.* We determine de novo whether the defendant's postconviction motion alleging ineffective assistance of counsel on its face alleged sufficient material facts that, if true, would entitle the defendant to relief. ***Allen***, 274 Wis. 2d 568, ¶9. If the motion raised such facts, the circuit court must hold an evidentiary hearing. ***Id.***, ¶¶9, 12; ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief, the circuit court has discretion to grant or deny a hearing. ***Allen***, 274 Wis. 2d 568, ¶9; ***Roberson***, 292 Wis. 2d 280, ¶43 (citations omitted). We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. ***Allen***, 274 Wis. 2d 568, ¶9.

¶14 Maxwell contends that trial counsel was ineffective because the motion to suppress did not recite three facts that would have resulted in suppression of the evidence or a stronger record on appeal: (1) that Maxwell was not trespassing in violation of WIS. STAT. § 943.14[5] because he was in the home with the son's permission; (2) that Stroik frisked Maxwell at the direction of Vahsholtz and not because Stroik was concerned for his personal safety; and (3)

[5] WISCONSIN STAT. § 943.14, governing criminal trespass to dwellings, provides: "Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A misdemeanor."

that Stroik believed he felt money in Maxwell's pocket and not contraband or a weapon. Maxwell claims that "[i]f a more detailed a [sic] specific motion were filed, the … motion for suppression would have either been successful or at least stronger for appeal purposes." After review of the record, we disagree.

¶15 *Nature of the Search.* At the outset, we address the nature of the search underlying Maxwell's motion to suppress. The record contains discussion of both a ***Terry*** search and probable cause.[6] The suppression motion filed by trial counsel was a general challenge, seeking suppression of any and all evidence as the fruits of an unlawful search unsupported by probable cause, consent or a warrant. The circuit court, Maxwell's trial counsel, and the State all agreed on the transcript that the hearing was a challenge to "a probable cause frisk or a ***Terry*** frisk." Facts going to both standards were developed at the hearing. The circuit court concluded that the pat-down search was justified under a ***Terry*** analysis (reasonable suspicion), but added that because Maxwell was about to be "taken into custody for trespassing," it was also justified as search incident to arrest (probable cause), and could be held constitutional on "multiple bases."

¶16 Maxwell's motion for postdisposition relief and his appeal identify three facts that he contends would defeat a conclusion that the search was supported by reasonable suspicion or probable cause. However, in its written decision denying Maxwell's motion, the circuit court clearly identifies the issue as one of probable cause. We therefore address the issue in these terms as well.

[6] The law of ***Terry*** and the Wisconsin statutes codifying investigatory stops is that of reasonable suspicion, which is not interchangeable with probable cause. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996).

¶17 *Search Incident to Arrest.* The circuit court determined that the issues Maxwell raised did not warrant an evidentiary hearing because the search was supported by probable cause to arrest Maxwell for trespassing and possession of marijuana. A law enforcement officer may arrest someone when there are reasonable grounds to believe that the person is committing or has committed a crime. WIS. STAT. § 968.07(1)(d). "Reasonable grounds" is synonymous with probable cause. ***Johnson v. State***, 75 Wis. 2d 344, 348, 249 N.W.2d 593, 595 (1977). There is probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest 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)**.** The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility. ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990). The evidence need not "be sufficient to establish guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not." ***Koch***, 175 Wis. 2d at 701 (citation omitted). Whether probable cause existed to support an arrest is an objective question. "As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal." ***State v. Baudhuin***, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987).

¶18 Search incident to arrest is authorized by statute. WIS. STAT. § 968.10(1). In the case of a "lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." ***United States v. Robinson***, 414 U.S. 218, 235 (1973); *see also* ***State v. Fry***, 131 Wis. 2d 153, 168, 388 N.W.2d 565 (1986); ***State v. Sykes***, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695

N.W.2d. 277. A search may immediately precede a formal arrest so long as the fruits of the search are not necessary to support the arrest. *See* ***id.***, ¶¶2, 16 (A contemporaneous arrest must follow, and it may be for a different crime so long as probable cause existed to arrest for a crime prior to the search.).

¶19 We conclude that the three facts cited by Maxwell in his postdisposition motion, if true, would not entitle Maxwell to a hearing as they are not material to the lawfulness of the search. A "material fact" is "[a] fact that is significant or essential to the issue or matter at hand." ***Allen***, 274 Wis. 2d 568, ¶22 (citation omitted).

¶20 Maxwell's actual guilt (or innocence) of criminal trespass is not the standard for the existence of probable cause. Rather, the evidence need only lead to the conclusion that guilt is more than a possibility. Police are not obligated to resolve reasonable competing inferences when considering probable cause; rather, the officer is entitled to rely on the reasonable inference justifying arrest. ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. Maxwell's contention that he was there with permission, if true, presents at most a competing inference.[7] The police officers had received clear, reliable information from the identified owner of the property that any juveniles located would be trespassers and had been given consent to investigate for exactly that reason. Maxwell was discovered inside the house as one of a group of juveniles on the property. We are satisfied that the information in the possession of the officers at the time would lead a reasonable police officer to conclude that Maxwell was probably guilty of

[7] At the suppression hearing, the only testimony about Maxwell's actual *communication* to the police about the tacit consent to his presence by the homeowner's son were statements Maxwell made that he had done nothing wrong and that the police had no right to detain him.

trespass. Thus, any alleged tacit consent by the son, even if communicated to the police, would not entitle Maxwell to relief.

¶21 Moreover, the circuit court also held that the police, after finding marijuana in the house, had probable cause to believe that Maxwell was guilty of possession of marijuana. Maxwell was in the house, in his socks. The fact that marijuana, soda, cigarettes, and an active television and stereo were all located in the lower level of the house made it more likely that Maxwell possessed the marijuana. We are satisfied that the information in the possession of the officers at the time supported the search of Maxwell based on an objective conclusion that his possession of marijuana was more than a possibility.

¶22 Whether the search was motivated by a concern for personal safety (or a weapons frisk) is immaterial to a search incident to arrest.[8] ***Robinson***, 414 U.S. at 234-35. Whether a "plain touch" search was warranted when Stroik searched inside Maxwell's pocket after feeling what he believed to be money is also immaterial to a search incident to arrest. Maxwell's postdisposition motion, on its face, failed to allege sufficient material facts that, if true, would entitle him to a hearing.

¶23 Moreover, while the motion to suppress generally asserted that the search was not lawful for lack of probable cause, consent or warrant, Maxwell raised all three of the above facts at the suppression hearing. Namely, the court heard Maxwell's testimony that he was on the property with the tacit consent of the son of the homeowner, Stroik's testimony that he conducted his search of

[8] As the circuit court also correctly noted, the motion failed to show why the pat-down at the request of the lead investigating officer was improper.

Maxwell at Vahsholtz's direction, and Stroik's testimony that he thought he felt money when he patted down Maxwell. That these facts were not set forth in the written suppression motion does not establish that Maxwell's trial counsel's performance was outside "the wide range of professionally competent assistance" and thus deficient. ***Guck***, 170 Wis. 2d at 669.

¶24 Wisconsin is a notice pleading state. ***State v. Caban***, 210 Wis. 2d 597, 605, 563 N.W.2d 501 (1997). While movants in Wisconsin must "[s]tate with particularity the grounds for the motion," WIS. STAT. § 971.30(2), they are only required to recite sufficient facts to merit a hearing; they need not recite every fact that serves their interests in a written motion. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). Here, the motion served the purpose of securing a hearing, and each of the facts now claimed erroneously omitted from the written motion were, in fact, raised at the suppression hearing and considered by the circuit court. Thus, not only did the postdisposition motion fail to set forth facts to show any deficient performance, the record as a whole shows there is no prejudice. The circuit court properly exercised its discretion in determining that the record as a whole demonstrates that Maxwell is not entitled to relief.

¶25 We conclude the circuit court properly exercised its discretion in determining that the postconviction motion failed to allege on its face sufficient material facts that, if true, would entitle Maxwell to relief, set forth conclusory allegations, and that the record as a whole conclusively demonstrates that Maxwell is not entitled to relief. The three omitted facts in the motion were addressed at the suppression hearing, and were not material to the court's determination that the record as a whole supported a finding of probable cause. We are satisfied that the circuit court's decision was a proper exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.