COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1831 **Cir. Ct. No. 1997CF971255**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES DONTAE WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 KESSLER, J. James Dontae Williams, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief. Williams asserts that the postconviction counsel who represented him on his direct appeal was ineffective for failing to raise claims of trial counsel's ineffectiveness. We conclude trial counsel was not ineffective, which means postconviction counsel was not ineffective for failing to so allege. Therefore, we affirm the order.

BACKGROUND

¶2 In 1997, when he was seventeen years old, Williams was convicted of first-degree intentional homicide as a party to a crime, contrary to WIS. STAT. §§ 940.01(1) and 939.05 (1997-98). He appealed and we affirmed the conviction. *See* ***State v. Williams***, No. 98-0462-CR, unpublished slip op. (Wis. Ct. App. June 17, 1999). We summarized the facts of the case as follows:

> Williams's [thirteen-year-old] girlfriend, Lat[a]sha Armstead,[2] decided to kill her grandmother's nurse, Charlotte Brown, because she wanted Brown's car. Armstead devised a plan to kill Brown, and enlisted Williams's assistance. Armstead asked Brown for a ride. Armstead rode in the front seat with Brown, while Williams sat behind Brown. Armstead directed Brown to turn into an alley. Once in the alley, Williams looped a telephone cord around Brown's neck and pulled the cord for several minutes until she stopped breathing and went limp. While Williams strangled Brown, Armstead stabbed her with a steak knife. The cause of Brown's death was strangulation.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The first name of Williams's girlfriend appears in the record as both Latosha and Latasha. According to Wisconsin Circuit Court Access (CCAP) records, the correct spelling is Latasha. In this opinion we will refer to her by her last name, Armstead.

> The jury was instructed on, but rejected the lesser included offense of first-degree reckless homicide, as a party to the crime. The jury found Williams guilty … [and] the [trial] court imposed a life sentence with parole eligibility in 101 years.

Id. at 2.

¶3 In his direct appeal, Williams challenged the sufficiency of the evidence, arguing he had not intended to kill Brown. We rejected this argument, concluding the verdict was supported by sufficient evidence to convict Williams. *See* ***id.*** at 3-4.

¶4 In July 2008, Williams, acting *pro se*, filed the postconviction motion that is the subject of this appeal. He alleged that he had been denied the effective assistance of postconviction counsel because postconviction counsel failed to allege that his trial counsel provided ineffective assistance by failing to: (1) investigate and then challenge Williams's illegal arrest and his inculpatory statement to the police;[3] and (2) present evidence and witnesses to support trial counsel's statement at opening argument that Williams "was a follower." The trial court denied Williams's motion in a written order, without a hearing. This appeal follows.

LEGAL STANDARDS

¶5 WISCONSIN STAT. § 974.06 "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended

[3] Prior to trial, the trial court conducted a ***Miranda-Goodchild*** hearing. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). The trial court found that Williams's confession was admissible. In his postconviction motion, Williams did not challenge that ruling. Rather, he alleged that his confession should have been suppressed as fruit of the illegal arrest.

motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A motion brought under § 974.06 is procedurally barred, if a defendant was afforded a direct appeal, unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in the motion preceding the first appeal. *See* ***Escalona***, 185 Wis. 2d at 185. Ineffective assistance of postconviction or appellate counsel may constitute a "sufficient reason" for not previously raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate ineffective assistance of postconviction counsel and overcome the procedural bar, Williams must show that his trial counsel was ineffective.

¶6 To prove ineffective assistance of counsel, a defendant must show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because the defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶7 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500, 329 N.W.2d 161 (1983) (citation omitted).

¶8 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. ***Id.***, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

¶9 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶10 When a defendant raises an ineffective assistance claim in a postconviction motion, the following legal standards apply:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. 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 that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

DISCUSSION

¶11 At issue is whether Williams's postconviction counsel was ineffective for failing to allege that his trial counsel's conduct was ineffective in several ways. We conclude that the trial court did not erroneously exercise its discretion when it denied Williams a hearing because "the record conclusively demonstrates" that Williams is not entitled to relief. *See* ***id.*** Specifically, Williams's postconviction motion fails because his trial counsel did not provide ineffective assistance and postconviction counsel was therefore not ineffective for failing to allege trial counsel ineffectiveness.

A. Challenge to the arrest.

¶12 We begin with Williams's argument that his trial counsel should have challenged what Williams terms his "illegal arrest." We conclude trial counsel's performance was not deficient because the record demonstrates that the police had probable cause to arrest Williams.

¶13 "Every lawful warrantless arrest must be supported by probable cause." ***State v. Nieves***, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. ***Nieves*** explained:

> Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. An arrest is legal when the officer making the arrest has reasonable grounds to believe that the person has committed or is committing a crime. *See* WIS. STAT. § 968.07(1)(d).

Nieves, 304 Wis. 2d 182, ¶11 (citation omitted). Further,

> [i]n determining whether probable cause exists, the court applies an objective standard and is not bound by the officer's subjective assessment or motivation. The court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department. When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, 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 (citations omitted).

¶14 The pertinent facts are undisputed.[4] The police found Brown's body in a vacant lot at about 6:15 p.m. on a Monday night. She had been killed earlier in the day. Just after midnight on Thursday morning, the police pulled over Armstead's mother, Renee Armstead ("Renee"), who was driving Brown's vehicle. Renee gave a statement to the police in which she told them how she came to be driving the vehicle. She said that on Tuesday, she went to the home of her mother, Emily Armstead ("Emily"), with whom Armstead lived. Emily told Renee that Armstead had not been there since Monday. While Renee was there, Armstead called the house. Renee asked her to come home. When Armstead and Williams arrived at the home, Renee spoke to both of them, asking where they had been. According to the police report, Renee told the officers that after she asked

[4] Williams does not allege that the police report from which many of these statements are taken was inaccurate or false. Rather, he argues that the facts in the police report, which were what the police knew at the time of Williams's arrest, did not give the police probable cause to arrest him.

Armstead and Williams questions, "[Armstead] went to her bedroom and [Williams] followed and they were whispering. Renee told [Armstead] to come here and said ['] what's goin' on.['] At that point [Armstead] said[, 'Y]ou know what mama … I got a car.[']" Renee told the police that Armstead said her father gave her the car, which Renee questioned because Armstead was only thirteen years old.

¶15 Renee told police that she continued to talk to Armstead about the car. The police report stated: "Renee asked her where was the car. [Armstead] said it's parked down the block. Renee said[, 'I]f it's your car why do you park it down the block[?'] [Armstead] said[, 'Williams] told me to park it down the block.[']" Renee added that "they [Armstead and Williams] kept wanting to put the car in the garage."

¶16 Renee told the police that she and Armstead went and looked at the car. After Renee let Armstead drive the car for a short time, they parked it in Emily's driveway. Later in the day, Renee, Armstead, Williams and Armstead's sister went to the store in the vehicle. Afterward, Renee drove the car to her home and kept it overnight. At noon the next day, she spoke with Emily. Emily told Renee that Williams wanted Renee to bring the car home because he did not want her to use it. Renee decided to keep driving the car and was pulled over later that night.

¶17 After interviewing Renee, the police went to Emily's house to locate Armstead and Williams. Emily directed the police to the rear bedroom. Both Armstead and Williams came out of the bedroom and were immediately arrested.

¶18 At issue is whether the police had probable cause to arrest Williams at that time. We conclude that they did. They had information that: (1) the car

belonged to a woman who had been murdered; (2) Williams drove or rode in the car on Tuesday when Williams and Armstead brought the car to the area near Emily and Armstead's home, and again when they went shopping in it; (3) Armstead and Williams acted furtively when Renee asked them about where they got the vehicle; (4) Armstead and Williams did not want to park the car by Emily and Armstead's home unless it was in the garage; and (5) Williams told Emily that he did not want Renee driving the car. We agree with the State that:

> [f]rom all of these circumstances, under a common sense, non-technical approach, a reasonable police officer would draw the reasonable inference that both Williams and [Armstead] had been in possession of Brown's stolen car. There was probable cause to believe that both Williams and [Armstead] probably had committed a crime involving the murder victim's stolen car.

¶19 We conclude a motion challenging Williams's arrest on probable cause grounds would have been unsuccessful. Therefore, trial counsel was not deficient for failing to challenge the legality of the arrest, and postconviction counsel was not deficient for not asserting trial counsel ineffectiveness on this basis.

B. Defense theory that Williams was a follower.

¶20 Williams argues that his trial counsel performed deficiently because he told the jury in opening statements that it would "hear testimony that [Williams] was always a follower," but then failed to pursue this theory of defense. We reject this argument for two reasons.

¶21 First, the record reveals that trial counsel *did* present evidence and argue that Williams had followed Armstead's lead. Specifically, Williams testified at trial that: the plan to kill Brown was Armstead's idea; the car was

obtained for Armstead; Armstead told Williams exactly what to do; and when the time came to put the cord around Brown's neck, Williams hesitated and was confused, but he then used it to strangle Brown because Armstead was looking right at him. In closing, trial counsel focused on the control Armstead had over Williams, arguing that it was Armstead who instigated and planned the crime, and that Williams was the follower. Thus, trial counsel did present evidence to support the opening statement.

¶22 Second, Williams asserts that his trial counsel should have called additional witnesses "because these witnesses[']testimony could have helped raise reasonable doubt on the premeditation." However, Williams has not identified any witnesses who could have testified, and he has not provided specific information about what they would say. What these unidentified witnesses would have said, whether they would have been credible and how their testimony would have contradicted other evidence in the case is purely speculative.

¶23 For these reasons, we conclude that Williams has not shown that his trial counsel performed deficiently with respect to the defense theory that Williams was a follower.

CONCLUSION

¶24 We conclude that the trial court did not erroneously exercise its discretion when it denied Williams's postconviction motion without a hearing. The record conclusively demonstrates that Williams is not entitled to relief. He has not shown that his trial counsel was ineffective, and therefore his postconviction counsel was not ineffective for failing to allege trial counsel ineffectiveness. We affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.