COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP76 **Cir. Ct. No. 2000CF137**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILL P. MARQUARDT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bill Marquardt appeals orders denying his WIS. STAT. § 974.06[1] postconviction motion, a motion for reconsideration and various

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

other requests for access to materials. He argues he is entitled to a new trial based on newly discovered evidence and ineffective assistance of counsel. We reject these arguments and affirm the orders.

BACKGROUND

¶2 Marquardt was a suspect in the death of his mother, a crime for which he was ultimately acquitted. During the investigation, police searched Marquardt's cabin on three occasions. During the first search, they found a .22 rifle and the remains of three dogs and three rabbits that had been shot and had their necks cut. The dogs' remains were found stacked on top of each other down the hole of an outhouse, on top of a gun case for a 9mm handgun. Bullet fragments showed the dogs were shot by a .22 caliber gun. In a storage shed, deputies found a .22 caliber bullet casing and a blood stained tarpaulin.

¶3 At the time of the second search three days later, Marquardt was arrested at the cabin after teargas was used. During that search, officers found a box of .22 caliber bullets in a backpack in the bedroom. They were the same brand of bullets as the casings found in the storage shed. Eleven bullets were missing from the box. The backpack had not been in the cabin three days earlier. Deputies also found a live 9mm bullet on the kitchen floor.

¶4 Eleven days later, deputies conducted a third search and moved a refrigerator, finding a 9mm handgun lodged beneath it along with two boxes of bullets. The crime lab later determined the 9mm handgun had been used to kill a neighbor's dog during a burglary.

¶5 The jury found Marquardt guilty of seven counts of mistreatment of animals, two counts of possession of a firearm by a felon, and one count of

aggravated burglary. On the State's stipulation, Marquardt was found not guilty by reason of mental disease or defect and was committed to institutional care for a period not to exceed seventy-five years.

NEWLY DISCOVERED EVIDENCE

¶6 Following his initial direct appeals and state and federal habeas corpus petitions, Marquardt filed a motion under WIS. STAT. § 974.06 alleging newly discovered evidence and ineffective assistance of counsel. Marquardt contends new evidence would show the 9mm handgun and boxes of bullets found when officers moved the refrigerator were planted there because they would have been seen by the officers and Marquardt's father, Alfred, during earlier inspections of the cabin.

¶7 The new evidence consists of a videotape taken by Alfred showing that the cooling coils pushed a box of bullets out when the refrigerator was moved and the box stayed visible after the refrigerator was returned to its original position. Other newly discovered evidence consists of a police report and photographs describing the officers' removal of a window that was partially blocked by the refrigerator, Alfred's statement that he moved the refrigerator out to replace the window between the second and third searches, a photograph showing a can of air freshener touching the edge of the refrigerator and Alfred's statement regarding the can of air freshener. Marquardt contends this evidence proves the 9mm handgun and boxes of bullets were not under the refrigerator at the time of the second search and, because Marquardt was incarcerated at the time they were placed under the refrigerator, someone planted evidence to incriminate him.

¶8 To obtain a new trial based on newly discovered evidence, Marquardt must show by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) he was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative; and (5) a reasonable probability exists that a different result would be reached on retrial. ***State v Love***, 2005 WI 116, ¶¶43-44, 284 Wis. 2d 111, 700 N.W.2d 62. Newly discovered evidence does not include new appreciation of the importance of evidence previously known but not used. ***State v. Fosnow***, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 624 N.W.2d 883.

¶9 The circuit court correctly concluded Marquardt failed to establish newly discovered evidence because the proffered evidence is not new and it would not likely lead to acquittal. Although the videotape prepared by Marquardt's father did not exist at the time of trial, it merely demonstrates evidence that could have been presented at trial. Alfred testified that he moved the refrigerator exposing some but not all of the floor under the refrigerator. He saw no gun on the floor. Sheriff's detective Mark Christopher said he did not look under the refrigerator and there was a lot of clutter on the floor in the area consisting of garbage, clothing, and an overturned chest of drawers. Special agent John Rehrauer testified he had to kneel to see the 9mm handgun under the refrigerator and saw it only after two bullet boxes were removed. At a postcommitment hearing, Marquardt's trial counsel, Robert Rusch, testified he personally examined the scene and believed the handgun and bullets could have been under the refrigerator. Even when the refrigerator was moved, it obscured a portion of the floor. Rusch concluded from his personal observations that it was not necessarily true that anyone moving the refrigerator would have seen these items on the floor and he recalled speaking with Alfred on that very point. The

circuit court correctly concluded this evidence was available at the time of trial. The evidence was not presented because it was not persuasive.

¶10 Likewise, the evidence regarding a can of air freshener does not meet the test for newly discovered evidence. This evidence could have been derived from Alfred's testimony and existing photographs that could have been discovered prior to his trial. In addition, the significance of a can of air freshener depends on Marquardt's bizarre theory that, while he was in jail suspected of killing his mother, someone broke into his cabin and planted evidence of lesser crimes under his refrigerator and placed a can of air freshener on the floor to draw attention to that area. The circuit court properly concluded presentation of that evidence would not create a reasonable doubt that Marquardt killed his neighbor's dog during a burglary and unlawfully possessed the handgun.

¶11 Marquardt next contends pictures of the cabin's interior depicting areas that were spray painted silver constitutes newly discovered evidence. Marquardt was personally aware of the painted light fixture and doorknob. After trial, he had his father take pictures of the painted areas. Although the photographs did not exist at the time of trial, they do not constitute newly discovered evidence. The photographs merely document previously known damage.

¶12 Marquardt next argues letters from Jason Fitts constitute newly discovered evidence. Marquardt contends the letters threaten retaliation against him because he refused to smuggle marijuana and LSD into prison for Fitts. He argues the letters would show Fitts' motive for killing Marquardt's animals and framing Marquardt for killing the neighbor's dog. Admissibility of the letters is questionable. Evidence that a third party committed a crime must be based on

something more than suspicion. *See* ***State v. Denny***, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). In addition, although Marquardt did not have copies of the letters, he had received them and knew their contents. The letters themselves do not appreciably add to that possible defense. Furthermore, it is highly improbable that a jury would acquit Marquardt based on a belief that Fitts would frame Marquardt for these crimes in retaliation for refusing to supply him with drugs after Marquardt had been taken into custody.

¶13 Marquardt next argues newly discovered evidence would show Alfred told special agent Rehrauer that Marquardt possessed the .22 rifle only after sheriff sargeant John Vogler told Alfred they found the rifle at the cottage. Marquardt contends the rifle was not at the cottage and Alfred only believed it was because the suggestion had been made by Vogler. That evidence does not constitute newly discovered evidence because it was not new. The evidence could have been elicited from Alfred at the trial. In fact, on cross-examination, Alfred admitted he could not recall seeing Marquardt handle any firearm after his felony conviction. In addition, the evidence would not likely result in acquittal. Bullets for a .22 caliber gun were found in Marquardt's backpack, the same brand of casing found in the storage shed with a blood stained tarpaulin. Eleven bullets were missing from the box found in Marquardt's backpack. We conclude it is highly unlikely a jury would doubt Marquardt's possession of the .22 caliber rifle based on evidence that Vogler first suggested to Alfred that the weapon had been found at the cabin.

EFFECTIVE ASSISTANCE OF COUNSEL

¶14 Marquardt alleges ineffective assistance of trial and postcommitment counsel based on their failure to present four issues: (1) counsel failed to pursue a

claim under ***Franks v. Delaware***, 438 U.S. 154 (1978), that the search warrant application was misleading; (2) counsel failed to argue that shooting rabbits and dogs does not constitute cruelty; (3) counsel failed to challenge the length of his commitment to a mental institution; and (4) counsel failed to argue that the jury never considered whether the sentence enhancer for repeat offenders should apply. To establish ineffective assistance, Marquardt must show deficient performance and prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Failure to pursue a meritless motion does not constitute deficient performance. ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶15 Marquardt has not established ineffective assistance of counsel for failure to request a ***Franks*** hearing because no ***Franks*** violation occurred. A defendant alleging a ***Franks*** violation must make a substantial preliminary showing that a false statement in support of the search warrant was made knowingly or with reckless disregard for the truth and the statement was necessary to the finding of probable cause. ***State v. Mitchell***, 144 Wis. 2d 596, 604-05, 424 N.W.2d 698 (1988). The same burden applies when a defendant claims the affidavit reflects a critical omission. *See* ***State v. Mann***, 123 Wis. 2d 375, 386, 367 N.W.2d 209 (1985). In Marquardt's previous appeal, the Wisconsin Supreme Court determined that law enforcement officers acted in good faith in procuring the initial search warrant. Therefore, the ***Franks*** claim is relevant only to whether the alleged violation was sufficient to defeat the conclusion that the officers acted in good faith.

¶16 Under the good faith doctrine, evidence obtained through a search warrant is admissible if the officers acted in "objectively reasonable" reliance on it. ***United States v. Leon***, 468 U.S. 897, 919 (1984). The inquiry is confined to

the objectively ascertainable question whether a reasonable well-trained officer would have known the search was illegal despite the magistrate's authorization. ***Id.*** at 922 n.23. The Wisconsin Supreme Court concluded the officers acted in good faith because the warrant affidavit allowed a reasonable inference that Marquardt's absence was suspicious and that Alfred thought Marquardt might be involved in his mother's death. Marquardt argues the magistrate was misled by false or incomplete information because the warrant omitted Alfred's statements that would have provided an innocuous explanation for Marquardt's absence. The affidavit also omitted evidence regarding the placement of Marquardt's mother's body that Marquardt interprets to show that she answered the doorbell when she was killed, refuting the inference that she knew the killer.

¶17 As a threshold matter, the statements in the warrant affidavit were accurate. The record does not support Marquardt's argument that Investigator Price intended to mislead the magistrate by suggesting that Marquardt's absence was suspicious. A reasonable magistrate would recognize that Marquardt's unavailability could be due to a variety of possible reasons other than involvement in the homicide. Price was accurate to the extent he sought to convey the impression that Alfred believed his son may have been in the area at the time of the homicide. At a postcommittment hearing, Alfred testified that Marquardt had been at his residence two days before the homicide. Alfred said Marquardt had keys to their residence. Nothing in the residence had been broken into or disturbed.

¶18 In addition, the Wisconsin Supreme Court observed in Marquardt's direct appeal that the warrant affidavit contains other indicia of probable cause whose accurate presentment had not been challenged, indicative of the good faith effort on the part of the warrant applicants. ***State v. Marquardt***, 2005 WI 157,

¶¶39-44, 286 Wis. 2d 204, 705 N.W.2d 878. Moreover, at the time the application was made, officers possessed other information omitted from the warrant application that supported the inference Marquardt was in the area at the time of the homicide, but failed to contact his family despite widespread publicity. Investigator Price testified that Alfred said Marquardt's mother had attached a phone message for Marquardt to the refrigerator. The note was found a day or two after the homicide under a jewelry box in the bedroom, suggesting that Marquardt had been in the house on the day of the homicide. From this record, Marquardt's attorneys did not provide deficient performance by failing to challenge the search warrant by claiming the magistrate was misled.

¶19 Counsel was also not deficient for failing to argue that shooting Marquardt's three dogs and three rabbits constituted humanely destroying them. The jurors were instructed that "cruel" means causing unjustifiable injury or death. The record contains no evidence that the animals "needed to be put down." The puppies had been purchased only days before they were killed and there was no indication the animals needed to be euthanized. In addition, presenting the alternative "humane killing" defense would have undermined Marquardt's theory that a third party killed his animals.

¶20 Marquardt's attorneys were not deficient for failing to argue that his seventy-five year commitment to a mental institution constitutes cruel and unusual punishment. Marquardt faced commitment of more than 131 years for the offenses for which he was found guilty. The nature of his offenses and his mental condition support the trial court's determination that a lengthy potential commitment is necessary to protect the public. Furthermore, commitment for institutional care is not punishment subject to the Eighth Amendment prohibition against cruel and unusual punishment. ***State v. Mahone***, 127 Wis. 2d 364, 376,

379 N.W.2d 878 (Ct. App. 1985). In addition, an insanity acquitee enjoys the right to semi-annual re-examination by petitioning the court for conditional release. Marquardt had previously been found incompetent to stand trial.

¶21 Finally, Marquardt was not entitled to a jury determination of the repeater allegation. ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000). The basis for the repeater enhancement, Marquardt's previous drug conviction, was established at the commitment hearing by introduction of a judgment of conviction, a conclusive judicial record. ***Shepard v. United States***, 544 U.S. 13, 25 (2005).

By the Court.—Orders affirmed.

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