COURT OF APPEALS DECISION DATED AND FILED

August 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2252

Cir. Ct. No. 99-CF-320

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SYLVESTER NEASMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Sylvester Neasman appeals pro se from an order denying his WIS. STAT. § 974.06 (1999-2000),[1] motion for postconviction relief.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Claiming he was denied the effective assistance of trial counsel, Neasman sought to withdraw his guilty plea. We conclude that he was not denied effective counsel either prior to entry of his plea or before sentencing. We affirm the order denying postconviction relief.

¶2 Neasman was charged with four counts arising out of the armed robbery of a grocery store. Attorney Domingo Cruz was appointed to represent Neasman. Attorney Cruz filed motions to suppress identification evidence, including the results of a photographic lineup, to suppress statements made by Neasman, to suppress evidence obtained from Neasman's residence prior to issuance of a search warrant, and to suppress the search warrant under ***Franks v. Delaware***, 438 U.S. 154 (1978), because the warrant was based on false information. Without obtaining a ruling on the motions, Neasman entered a guilty plea to armed robbery and possession of a firearm by a felon. Prior to sentencing, a motion to withdraw the guilty plea was filed because Neasman did not intend to comply with the plea agreement.[2] Attorney Cruz withdrew from representation and Attorney Douglas Pachucki was appointed as successor counsel. After consultation with new counsel, Neasman withdrew his motion to withdraw his plea and proceeded to sentencing on the original plea agreement.

¶3 Neasman's conviction was affirmed in a no merit appeal. ***State v. Neasman***, No. 00-2577-CRNM, unpublished order (Wis. Ct. App. Feb. 21, 2001). On April 2, 2001, Neasman filed a pro se motion for postconviction relief under WIS. STAT. § 974.06. He alleged that the photographic lineup was improper and

[2] As part of the plea agreement, Neasman agreed to testify truthfully against his co-defendant. Neasman indicated that he would not testify.

prejudicial, that the police lacked probable cause to arrest him, and that Attorney Cruz was ineffective for not pursuing the suppression motions. An evidentiary hearing was conducted on the motion at which the trial attorneys and police investigators testified. The motion was denied.

¶4 We first note that in this appeal Neasman essentially renews the claims he made in response to the no merit report—challenges to the underlying warrant, search, and identification, and a claim that trial counsel was ineffective for not pursing the suppression motions. As explained in the earlier appeal, by entry of his guilty plea, Neasman waived the right to consideration of these issues. *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986). Also, Neasman's claim that trial counsel was ineffective for not pursuing the suppression motions is controlled by our decision in the first appeal. There we concluded that the record did not support a meritorious claim that trial counsel was ineffective for not pursuing the suppression motions.[3] "A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts." ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 784 (Wis. Oct. 23, 2001) (Nos. 00-2852, 00-2853). Because Neasman specifically waived his right to have the suppression motions heard, he foreclosed counsel from proceeding on the motions and there is no conduct to examine for alleged deficiencies.

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[3] We found that the claim of ineffective assistance of counsel lacked arguable merit because in response to the trial court's specific inquiry, Neasman knowingly and voluntarily waived his right to have the suppression motions heard. ***State v. Neasman***, No. 00-2577-CRNM, unpublished order at 3 (Wis. Ct. App. Feb. 21, 2001).

¶5 Neasman has one argument that is a slight variation on the themes played out in the first appeal. He claims that his plea was based on inaccurate information from trial counsel about the likely disposition of the suppression motions. *See* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992) (inaccurate legal information may render a plea an uninformed one and compromise the voluntariness of the plea). He asserts that Attorney Cruz advised him that there was no likelihood of success on the motions. As prejudice, Neasman argues that he would have received relief on the suppression motions and the prosecution would have dropped the case.

¶6 In order to establish ineffective assistance of counsel, the defendant must demonstrate both deficient performance of counsel and prejudice to his defense resulting from the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Here we move directly to the prejudice prong. If the suppression motions would have been unsuccessful, trial counsel is not deficient for advising Neasman that the motions would be unsuccessful. *Cf.* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."); ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, trial counsel is not deficient for not filing it).

¶7 The test for determining whether an out-of-court photographic identification was proper has two prongs: "First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court

identification was reliable, despite the suggestiveness of the procedures." ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). Neasman claims the photographic array was suggestive because he was the only suspect in the array with long hair and because the suspects were not wearing glasses, a feature mentioned by the identifying witness. The trial court found that the array was not impermissibly suggestive with respect to the photographs used or how the array was presented by the investigating officer. It concluded that the witness's identification was in fact reliable. These findings by the trial court are not clearly erroneous. Hair length was not an identifying factor since the witness indicated that the robber was wearing a hat. Also, it was an advantage to Neasman that the photographs did not depict glasses since his glasses were described by the witness as distinctively thick prescription glasses. Even if, as Neasman asserts, it is necessary to consider the ***Bigger***[4] factors, the witness's identification was reliable because of the adequate time she had to observe the robber and her recognition of his eyes and glasses from seeing him in a certain neighborhood. The identification evidence was not subject to suppression.

¶8 Neasman wanted to argue that officers lacked probable cause for his arrest. Had such a motion been filed, it would not have been successful. Probable cause for arrest exists where the totality of the circumstances known to the officer would lead a reasonable police officer to believe that the suspect probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

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[4] ***Neil v. Biggers***, 409 U.S. 188, 199 (1972). In determining whether under the totality of the circumstances the identification was reliable even though the identification procedure was suggestive, ***Biggers*** identifies the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." ***Id.***

Probable cause need not rest on evidence sufficient to prove guilt. ***Id.*** Within hours of the robbery, Neasman was identified from the photographic array. Despite Neasman's claim that the witness's description was inaccurate, it was sufficient to support the identification. When officers arrived at his last known address, they observed a car similar to one described by witnesses. The hood of the car was still warm to the touch. A prudent police officer, armed with this information, would have a reasonable suspicion that Neasman was likely to be one of the robbers. Neasman's arrest was supported by probable cause.

¶9 We turn to the search issues. Neasman argues that the warrantless entry into his home was improper and that the search warrant was based on false information.[5] A warrantless in-home entry is permissible when there is probable cause to arrest and exigent circumstances. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). Exigent circumstances exist when: (1) an arrest is made in "hot pursuit," (2) a threat to the safety of a suspect or others is present, (3) there is a risk that evidence would be destroyed, or (4) there is a likelihood that the suspect would flee. ***Id.*** at 229. The warrantless entry into Neasman's residence was justified by the need to preserve the safety of officers who intended to secure the residence while a search warrant was obtained. Neasman had lied to police about the presence of another male in the residence. Weapons had been used in the commission of the crime. The police were entitled to verify that there were no other occupants in the residence while they secured it for a search. It was a

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[5] Neasman's WIS. STAT. § 974.06 motion did not claim that trial counsel had given him inaccurate information about the likelihood of success on the motions to suppress evidence recovered from Neasman's residence. He did not argue the search issues at the motion hearing. While we generally will not consider an issue raised for the first time on appeal, ***State v. Rogers***, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995), we do not apply waiver in order to put an end to Neasman's repetitious claims.

protective sweep. *See* ***Maryland v. Buie***, 494 U.S. 325, 333 (1990). Also, entry to ensure that all occupants were removed was justified to prevent the possible destruction of evidence.

¶10 Neasman's challenge to the accuracy of the information in support of the search warrant is again based on the weaknesses he perceives in the witness's identification. The fact remains that the witness identified Neasman from the photo array. The officer's assertion in the affidavit in support of the warrant that an identification was made was not false or misleading. A motion to suppress the search warrant and evidence obtained by its execution would not have been successful. *See* ***State v. Marshall***, 92 Wis. 2d 101, 112, 284 N.W.2d 592 (1979) (if defendant makes a substantial preliminary showing that a false statement was knowingly and intentionally included in the warrant affidavit, then he or she is entitled to a hearing).

¶11 We conclude that the suppression motions would not have been successful. Thus, Neasman was not prejudiced by trial counsel's advisement that they would not win the motions. No basis exists to permit plea withdrawal because Neasman was not denied the effective assistance of counsel with respect to the entry of his plea.

¶12 Neasman asserts that Attorney Pachucki's performance was also deficient regarding whether to pursue the motion to withdraw his plea. He points to Attorney Pachucki's failure to hire a private investigator and failure to review the photographic array. The claim is inadequately briefed on appeal. We do not address appellate issues presented in such summary fashion. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Not only did Attorney Pachucki testify that he did not have time to hire an investigator and did not know

what purpose it would have served, Neasman has failed to establish what information, if any, an investigator would have discovered to aid his defense. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). The photographic array was not suggestive and therefore, Neasman was not prejudiced by Attorney Pachucki's failure to view the photographs.

By the Court.—Order affirmed.

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