

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 2010

A. John Voelker
Acting 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. 2009AP2456-CR

Cir. Ct. No. 2008CF1767

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVIN D. GREER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marvin D. Greer appeals from a judgment of conviction on one count of possession with intent to deliver between five and fifteen grams of cocaine, and from orders denying his postconviction motions without a hearing. Greer asserts that his motions alleged sufficient facts to entitle

him to a hearing, so the trial court erred when it denied his motions without a hearing. We conclude that the record conclusively establishes that Greer is not entitled to relief, so we affirm.

BACKGROUND

¶2 Detective Timothy Graham observed Greer conducting what appeared to be hand-to-hand drug transactions: while Greer was seated in his parked car, individuals would come up to the driver's window briefly, then depart. Graham never saw drugs or money change hands, but he attempted to have an undercover officer conduct a buy. However, a passenger got into Greer's car, and Greer departed, before the undercover officer could approach. Graham directed two other officers to stop Greer's vehicle.

¶3 Officers Christopher Navarette and David Bublitz conducted the traffic stop. Navarette later testified that the vehicle was playing music audible from more than fifty feet, a violation of city ordinances. Greer was arrested and, during a search incident to arrest, Navarette detected what felt like a knotted baggie near Greer's buttocks. Navarette was unable to remove the item at the scene. At the police station, Officer Jose Viera searched Greer and retrieved a bag containing fifty-five corner cuts of cocaine from Greer's backside.

¶4 Greer moved to suppress the cocaine, alleging that officers lacked sufficient probable cause for the traffic stop and had conducted an unlawful body cavity search.¹ Detective Graham, Officers Navarette and Viera, and Greer

¹ "No person other than a physician, physician assistant or registered nurse licensed to practice in this state may conduct a body cavity search." WIS. STAT. § 968.255(3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

testified at the suppression hearing. The trial court, the Honorable Jeffrey A. Kremers, presiding, denied the motion.² It concluded that while Graham's pre-stop observations alone might not sufficiently justify the stop, the stop was nevertheless lawful because Greer could be arrested for the noise violation that Navarette heard. In particular, Navarette testified that even if he were not following Graham's directive to stop Greer's vehicle, he probably would have done so anyhow because of the loud music.

¶5 The trial court further concluded that the search was not a body cavity search, nor even a strip search.³ The officers testified that Greer's underwear remained on and his anus and buttocks were never visible during the search. The court also noted Greer's own testimony, which the court found was "devoid of any description of what [Greer] claims occurred that constituted a body cavity search."

¶6 Greer subsequently moved for reconsideration based on new evidence—witnesses Diane Scott and Georgette Harley, who would ostensibly testify that Greer was not playing loud music, and a medical report detailing Greer's rectal bleeding that counsel asserted proved the cavity search. The trial court denied the motion. It determined that proffered testimony of the two witnesses proved nothing and did not cause the court to reconsider its ruling on the stop. The court also concluded that the medical report did not help prove a cavity

² Judge Kremers presided over the suppression and reconsideration hearings. The case was then assigned to the Honorable Rebecca F. Dallet, as the successor court, for subsequent proceedings, including the trial and postconviction motions.

³ A strip search is "a search in which a detained person's genitals, pubic area, buttock or anus ... is uncovered and either is exposed to view or is touched by a person conducting the search." WIS. STAT. § 968.255(1)(b).

search had been performed because the report was dated six days after the search. After the court denied his motions, Greer opted for a court trial on the cocaine charge, and the court convicted him.

¶7 With new counsel, Greer filed two postconviction motions. The first motion alleged that trial counsel was ineffective for failing to call Scott and Harley at the suppression hearing. Greer claimed he had made trial counsel aware of these witnesses well before the suppression hearing. Greer also claimed the witnesses would have corroborated his testimony, bolstered his credibility, and “made a difference in the disposition of the [suppression] motion.” Thus, Greer asserted, trial counsel’s performance was both deficient and prejudicial.

¶8 Greer’s second motion pointed out that Officer Bublitz’s trial testimony differed from the other officers’ trial and suppression hearing testimony. Whereas Graham and Viera had testified that the bag of cocaine was retrieved by manipulating the bag over Greer’s clothing, Bublitz testified that Viera had to spread Greer’s buttocks to retrieve the bag. Greer’s motion observed that even though Bublitz offered different testimony from the other officers, “no one took notice” or bothered to pursue a reconsideration or “any other type of dispositive motion.” Greer requested a hearing to “to resolve the conflicting testimony[.]”

¶9 The trial court denied both motions without hearings. Denying the first motion, the court explained that Judge Kremers had already considered the two witnesses’ potential contributions and ruled that they offered no reason to reconsider the suppression ruling in light of Navarette’s credible testimony. Based on those earlier rulings, the court concluded there was no prejudice from counsel’s failure to call the witnesses, so Greer was not entitled to relief.

¶10 Denying the second motion, the trial court explained that it had already resolved the alleged inconsistencies, considering the officers' testimony in rendering the verdict. The court had observed that only Bublitz was uncertain as to whether Greer's underwear had been up or down during the search; the other officers were clear that the underwear remained on, and Graham and Viera testified consistently with their suppression hearing testimony. Based on the totality of the officers' testimony—as well as Judge Kremers' prior ruling that there had been no cavity or strip search—the court concluded that no evidentiary hearing was necessary because there was no unresolved credibility question. Greer appeals.

DISCUSSION

¶11 Whether a defendant's postconviction motion is sufficient to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion on its face alleges sufficient material facts that, if true, entitle the defendant to relief is a question of law that we review *de novo*. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion sufficiently raises such facts, the trial court is required to hold an evidentiary hearing. *See id.* at 310. However, if the motion does not raise sufficient facts or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court in its discretion may grant or deny a hearing. *Id.* at 310-11. The trial court's discretionary decisions are reviewed for an erroneous exercise of that discretion. *Allen*, 274 Wis. 2d 568, ¶9.

¶12 Greer's first postconviction motion, while it challenges the traffic stop, is ultimately an ineffective-assistance claim based on counsel's failure to call

Scott and Harley to rebut the officers' claim of probable cause for the stop. To prevail on an ineffective assistance claim, Greer must show that counsel performed deficiently and that this deficiency prejudiced Greer. *See State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Showing prejudice requires Greer to show that there is a reasonable probability that, but for counsel's deficiency, there would have been a different result. *See Love*, 284 Wis. 2d 111, ¶30. A reasonable probability is one that undermines our confidence in the outcome. *Id.* Assuming without deciding that counsel performed deficiently in failing to call the witnesses at the suppression hearing, we conclude that the record reveals no prejudice.

¶13 First, the trial court, on the original motion for reconsideration, ruled that the witnesses' potential testimony presented "no basis for reconsidering the decision." While Greer argued with the court that there was no testimony that his music was loud enough to disturb the neighbors, the court pointed out that, in fact, "[t]he officer testified as to how loud the noise was and how he could hear it from the car going, after it had gone well past." In other words, the court ruled that Navarette's testimony that he had heard noise constituting an ordinance violation remained credible even with the additional proffered testimony. The trial court relied on this earlier finding to reject Greer's postconviction motion. As both conclusions rely on credibility decisions that are not clearly erroneous, we see no basis for disturbing the court's rulings.

¶14 Further, we note that the trial court actually did reconsider the original suppression ruling in light of one of the witnesses' testimony, although the postconviction ruling does not specifically highlight this fact. Scott, who lived

near where Greer's vehicle was stopped, testified at trial that she heard no music from his car.⁴ After she testified, Greer again challenged the stop.

¶15 The trial court, although of the opinion that Judge Kremers had already determined the stop was valid, nevertheless reconsidered Greer's original challenge in light of Scott's testimony and the suppression hearing transcripts. The court ruled that "even if [the testimony is] believed, even if it's credible, even if she doesn't have reason to lie ... even if I give her the credibility you want me to give her ... I don't think it rebuts the officers' testimony[.]" Thus, the court reaffirmed that the stop was valid because the proffered witness testimony did not undermine Navarette's testimony that Greer was violating an ordinance. Accordingly, counsel's failure to call either witness was not prejudicial, and the record conclusively establishes Greer was not entitled to relief on his first postconviction motion.

¶16 As to the second postconviction motion, the motion merely highlights how Bublitz's testimony regarding conditions of the in-station search differed from his fellow officers' testimony.⁵ The trial court, in its findings, specifically observed that while Bublitz equivocated on whether Greer's boxer shorts were up or down, the other three officers testified with certainty that they

⁴ The other witness, Harley, was allegedly Greer's passenger. It appears she told counsel she would testify at trial, then told Greer she would not be there. Further, her "signed statement" that Greer was not playing music in the car is not a sworn statement. We thus question whether she would actually have been available had counsel called her. We also note that Greer had testified that "Gina" was in the car with him, yet his postconviction motions do not appear to establish that Gina and Georgette Harley are the same person.

⁵ The court revisited and discussed the issue at the end of trial even though, having been previously resolved, the legality of the search is not an element of the possession-with-intent charge.

remained up. The court was fully aware of Bublitz's testimony to the extent it differed from the others' testimony, and chose to disregard the conflicting portions, thereby resolving the differences.

¶17 We conclude that the record conclusively establishes Greer is not entitled to relief. The trial court considered and rejected the offers of proof regarding the two witnesses, determining that even with their testimony, its ruling would be unchanged. The court then let one of the witnesses testify and was still unmoved. In addition, the "credibility hearing" that Greer's second postconviction motion seeks for resolving discrepancies in testimony is more commonly called a "trial," which Greer has already received. The fact that the discrepancies were not resolved in his favor is not a basis for relief. The court properly exercised its discretion in denying Greer's motions without a hearing.

By the Court.—Judgment and orders affirmed.

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

