COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP2739 **Cir. Ct. No. 2004CF2202**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR T. CONNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: R.A. BATES, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Arthur Conner appeals a circuit court order that denied his motion for postconviction relief from a criminal drug conviction. We

withdrew a previously issued decision in this matter to allow supplemental briefing.[1] We now affirm for the reasons discussed below.

¶2 The circuit court accepted Conner's guilty plea and placed him on probation in 2005. Conner did not file a direct appeal from his conviction. After his probation was revoked, however, Conner filed a postconviction motion under WIS. STAT. § 974.06 (2007-08),[2] claiming that counsel had provided ineffective assistance by failing to adequately pursue a suppression motion on Conner's behalf. The circuit court denied the motion without a hearing on the theory that it was untimely and that Conner was barred from attempting to challenge his original conviction after his probation was revoked. Conner appeals that determination.

¶3 The State first contends that Conner's postconviction motion, which it correctly characterizes as a plea withdrawal motion, should be procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because counsel did not raise the issue on a subsequent challenge to Conner's sentence following revocation, or in the no-merit proceeding that followed. The State's contention is flawed.

¶4 First, ***Escalona-Naranjo*** holds that any constitutional claim that could have been raised in a prior direct appeal or postconviction motion cannot be the basis for a *subsequent* postconviction motion under WIS. STAT. § 974.06 unless there was a sufficient reason for failing to raise the claim earlier. ***Escalona-***

[1] Because our first opinion was withdrawn, we repeat our analysis of the threshold procedural issue here before proceeding to the merits of the appeal, which were further addressed in the supplemental briefing.

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

Naranjo, 185 Wis. 2d at 185. Here, although the court rendered a decision on the post-revocation sentence challenge filed by counsel before ruling on Conner's pending pro se plea withdrawal motion, the plea withdrawal motion was actually the first postconviction motion filed in this matter. Therefore, there was no prior postconviction proceeding in which Conner could have raised the issue. Furthermore, it is well established that a challenge to a sentence following revocation does not bring the validity of the underlying conviction before the court.[3] *See* ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). The fact that Conner *could not* have challenged his plea within the context of his challenge to his post-revocation sentence or the no-merit proceeding relating to that sentence would have provided a sufficient reason for failing to do so, even if the post-revocation sentence motion had been filed before the plea withdrawal motion.

¶5 We therefore proceed to consider the merits of this case—namely, whether Conner was entitled to a hearing on his plea withdrawal motion.

¶6 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required, though, when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***,

[3] We presume this is the rule the circuit court was referring to when it reasoned that Conner should be barred from attempting to withdraw his plea after having his probation revoked. We note, however, that ***State v. Drake***, 184 Wis. 2d 396, 515 N.W.2d 923 (Ct. App. 1994), merely limits the scope of what can be raised in a postconviction motion filed under WIS. STAT. RULE 809.30 following the revocation of probation. It does not prevent a defendant from filing a separate motion under WIS. STAT. § 974.06 to challenge the underlying conviction, which is what Conner did here.

54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We review the sufficiency of a postconviction motion *de novo*, based on the four corners of the motion. ***Allen***, 274 Wis. 2d 568, ¶¶9, 27.

¶7 Here, the record includes the transcript of a suppression hearing at which a Beloit police detective testified that he observed Conner reach into his pocket and then extend a closed fist to the hand of another individual, who gave Conner a bill of unknown denomination in exchange for whatever was in Conner's fist. Based on his experience and the high number of drug arrests made in the area, the detective believed he had witnessed a drug buy. When the uniformed detective approached Conner in a marked squad car, Conner turned around, looked at the detective, and then fled. Conner did not respond to the detective's yelled command to stop. The detective and a fellow officer chased and caught Conner, handcuffed him, and discovered money and cocaine in Conner's pocket. At the conclusion of the hearing, the circuit court granted defense counsel's request to allow the parties to file briefs. However, it appears from the docket entries and from the lack of any additional references to the suppression motion at subsequent status proceedings that no briefs were ever filed, and that Conner proceeded to enter a plea before the court ruled on his suppression motion.

¶8 Conner alleged in his postconviction motion that he had "personal knowledge" that there were "no objects exchanged" that would create sufficient reasonable suspicion to stop him, and that he "was not aware of the detective's interest to question him" at the time he ran. Conner then claimed that counsel had provided ineffective assistance by failing to file a brief on the suppression motion to establish that Conner had been unlawfully arrested and illegally searched.

¶9 In order to obtain plea withdrawal based on a claim of ineffective assistance of counsel, a defendant must demonstrate both: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). We conclude that the allegations in the plea withdrawal motion are insufficient to warrant a hearing because, even if they are true, they would not establish the prejudice prong of an ineffective assistance claim.

¶10 Conner did not testify at the suppression hearing. Therefore, even if counsel had filed a brief following the suppression hearing, counsel would have had no factual basis to assert that the object in Conner's hand was something other than drugs. More to the point, Conner's factual assertion does not contradict the officer's observation of movements consistent with a drug transaction. The issue at the suppression hearing was not whether in fact Conner passed an illegal substance to the other person, but whether it was reasonable for a police officer to believe that he had. Further, Conner's assertion does not undermine the officer's observation that Conner fled when he saw a uniformed police officer. Thus, Conner has not identified any meritorious argument that counsel could have included in a post-hearing brief. It follows that he has not demonstrated that prejudice resulted from counsel's failure to file a brief.

¶11 Even if we liberally construe Conner's arguments to also include a claim that counsel should have strongly urged him to take the witness stand at the suppression hearing, we still conclude there was no prejudice. That is, we are satisfied that the detective's testimony established reasonable suspicion for an investigative stop and probable cause for a subsequent arrest. As explained above, even if Conner had testified, it would not have conflicted with the officer's

observations that Conner appeared to have exchanged something in his hand for money and that he fled when he saw the police.

¶12 The question of what constitutes reasonable suspicion is a common sense test that asks what a reasonable police officer would reasonably suspect in light of his or her training and experience under all of the facts and circumstances present. ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). Here, the detective's observations of someone running away from police in an area of high drug activity, directly after being seen apparently exchanging something from his pocket for money, would lead any reasonable officer to believe that he had witnessed a drug deal. That suspicion would justify an investigative stop, even if further investigation might have revealed an innocent explanation for the observed conduct.

¶13 Once an officer has reasonable suspicion of criminal activity, he has lawful authority to detain an individual to investigate that suspicion. *See* ***State v. Young***, 2006 WI 98, ¶57, 294 Wis. 2d 1, 717 N.W.2d 729. When a subject of reasonable suspicion fails to comply with a lawful directive to submit to an investigative stop, and instead flees, there is probable cause to arrest the subject for obstructing an officer. ***Id.***, ¶¶73-77; *see also* WIS. STAT. § 946.41 (obstruction statute); ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993) (a police officer has 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). Here, Conner plainly provided the detective in this case with probable cause to arrest him for obstruction when he fled.

¶14 We therefore conclude that the circuit court properly denied Conner's plea withdrawal motion without a hearing, although we do so on different grounds than those cited by the court.

By the Court.—Order affirmed.

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