COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2262 **Cir. Ct. No. 2004CF2459**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEXTER WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. In 2005, a jury found Dexter Williams guilty of possession of a firearm by a felon, maintaining a drug-trafficking place, as party to a crime, and possession of cocaine with intent to deliver, as party to a crime. *See* WIS. STAT. §§ 941.29(2)(a), 961.42(1), 961.41(1)(cm)2., and 939.05. We affirmed

the judgment of conviction on direct appeal. *See* ***State v. Williams***, No. 2005AP2783-CR, unpublished slip op. (WI App June 27, 2006). In 2009, Williams filed a WIS. STAT. § 974.06 motion for postconviction relief, claiming that his trial and postconviction lawyers were ineffective. The circuit court denied Williams's motion without a hearing. Williams appeals; we affirm.

BACKGROUND

¶2 On May 5, 2004, several City of Milwaukee police officers executed a no-knock search warrant directed at a house at 2908 West Burleigh Street. The search warrant was issued upon the affidavit of Officer Richard Sandoval. In the affidavit, Officer Sandoval averred that he had spoken with an informant who "has been proven reliable in the past and provided … information in the past, which has been corroborated by other sources." The affidavit further described the informant as a "citizen witness with prior criminal convictions [who] is not currently under indictment in Milwaukee County for any criminal charges and [who] is not providing the information in exchange for any consideration from law enforcement." After describing the information provided by the informant, Officer Sandoval went on to state that two officers, together with the informant, conducted surveillance of the target house. The officers observed a man exit the house, walk to a vehicle, and make a hand-to-hand exchange—actions consistent with a drug sale. The informant identified the man as Williams.

¶3 Jimi Thornton is the informant referred to in the affidavit. At trial, Thornton testified that he contacted the police about Williams and the drug dealing at the Burleigh Street house "in retaliation for them having my home broken into and all of my possessions stolen." Thornton also testified that he had never cooperated with the police before that time.

¶4 Williams testified at trial, and he denied living at the Burleigh Street house. He testified that DuJuan Roberts "stayed" in a bedroom on the first floor and that Roberts's grandfather, Clarence Ingram, lived upstairs. Williams admitted going to the house occasionally with "girls, just have a little fun or something." When he was at the house, he stayed mostly in the living room and kitchen on the first floor. Williams testified that he never went into the upstairs or the basement of the house. He denied knowing anything about the several guns found by police during the search, and he denied ever selling drugs from the house. Williams denied having keys to the house, stating that he always came with Jeff Calhoun.

¶5 In his WIS. STAT. § 974.06 postconviction motion, Williams argued that his trial attorney was ineffective because he did not call two "alibi" witnesses—Ingram and Carey Roberts, Ingram's daughter and DuJuan Roberts's mother. Williams asserted that both witnesses would have testified that Williams did not live at the house and did not have control over the house. Williams attached to the motion a copy of a police report summarizing Ingram's statement to police. Ingram told police that Carey Roberts had lived in the house until late 2003 and that DuJuan Roberts continued to live on the first floor of the house. Ingram told police that shortly thereafter, Calhoun moved into the back bedroom of the first floor. Ingram told police that "several other younger people from their mid[-]teens to their mid[-]20's hang out on the first floor a lot, but he does not think that they are living there." Ingram identified a picture of Williams, and he told police that Williams "is often in the lower unit of the residence." Ingram told police that he "sees a lot of young people hanging out on the first floor" but he did not know if any drug dealing was going on. Ingram thought that they "might be involved in stealing clothes or something like that, but not selling drugs."

DISCUSSION

¶6 In his postconviction motion, Williams argued that his trial and postconviction lawyers were ineffective. Williams is not precluded from raising that argument in a WIS. STAT. § 974.06 motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681–682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction counsel may be a sufficient reason for failing to have previously raised an issue). Therefore, we will address the merits of Williams's arguments, focusing on his claims that his trial attorney provided ineffective assistance of counsel.[1]

A. Search Warrant.

¶7 Williams first contends that Sandoval's affidavit contained an intentionally false statement and his trial attorney should have challenged the search warrant under ***Franks v. Delaware***, 438 U.S. 154 (1978), and sought the suppression of the evidence obtained in the search.

¶8 Under ***Franks***, a defendant challenging the veracity of statements made in the affidavit submitted in support of a search warrant must first make a "substantial preliminary showing" that a false statement in the affidavit was made knowingly and intentionally, or with reckless disregard for the truth, and that the false statement was necessary to the finding of probable cause. ***Id.***, 438 U.S. at 155–156. Material omissions may be considered to be deliberately false within

[1] In his appellate brief-in-chief, Williams lists seven issues for this court's review. In reality, Williams makes only two discrete arguments: (1) that the search warrant was invalid under ***Franks v. Delaware***, 438 U.S. 154 (1978) and that his trial attorney was ineffective for not moving to suppress the evidence seized during the search; and (2) that his trial attorney was ineffective for not calling two witnesses at trial.

the meaning of ***Franks***. *See* ***State v. Mann***, 123 Wis. 2d 375, 385–386, 367 N.W.2d 209, 213–214 (1985). An omitted fact may be the equivalent of a deliberate falsehood or reckless disregard for the truth if it is both an undisputed fact and critical to the determination of probable cause. *See* ***id.***, 123 Wis. 2d at 388, 367 N.W.2d at 214.

¶9 Williams focuses on the statement in the affidavit that the informant had provided reliable information to police previously, and contrasts that statement with Thornton's trial testimony that he had not previously provided information to the police. Williams also argues that the omission from the affidavit of Thornton's motivation for going to the police, namely, retaliation, constituted a ***Franks*** violation. For the following reasons, we are not persuaded.

¶10 Williams's postconviction motion and attachments submitted to the court do not contain any factual allegation that would support a conclusion that Williams's trial attorney could have established that any error or omission in the affidavit was made deliberately or with reckless disregard for the truth. Because the motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or … the record conclusively demonstrates that … [Williams] is not entitled to relief," the circuit court properly denied Williams's motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437.

¶11 Further, for purposes of securing a search warrant, the information provided by Thornton was reliable. The affidavit contained considerable detail describing Thornton's familiarity with the premises, the drug dealing conducted from the premises, and the persons involved in the drug dealing, including

Williams. A high level of detail suggests reliability. *See* ***State v. Jones***, 2002 WI App 196, ¶17, 257 Wis. 2d 319, 332, 651 N.W.2d 305, 311 ("an untruthful informant is best served by providing only general information").

¶12 Most importantly, the affidavit contained sufficient facts to establish probable cause, even if the statement that Thornton had provided reliable information in the past were removed. Determining whether probable cause supports a search warrant involves making a "'practical, commonsense decision whether, given all the circumstances set forth in the affidavit … there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 735, 604 N.W.2d 517, 522 (citation omitted). When determining whether probable cause exists, all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of the person supplying hearsay information, must be considered. ***Ibid.*** Independent corroboration of the information provided can establish an informant's veracity and basis of knowledge. *See* ***Jones***, 2002 WI App 196, ¶15, 257 Wis. 2d at 331, 651 N.W.2d at 311.

¶13 Thornton told police that he had been inside of the house on several occasions, and that he had seen Williams both possessing guns and participating in the selling of drugs from the house. Much of the information provided by Thornton was corroborated by police during the surveillance of the premises, conducted within forty-eight hours of the application for the search warrant. *See* ***State v. Lopez***, 207 Wis. 2d 413, 426, 559 N.W.2d 264, 269 (Ct. App. 1996) ("[i]ndependent police corroboration of the informant's information imparts a degree of reliability"). The affidavit contained ample probable cause for the issuance of the search warrant.

B. Failure to Call Witnesses.

¶14 Williams next contends that his trial attorney was ineffective for not calling Carey Roberts or Ingram to testify at trial. Williams claims that both witnesses would have said that he did not live at the house, had no keys to the house, and exercised no control over the house. Williams characterizes the trial as a "credibility test," and he argues that his attorney should have presented witnesses who would have corroborated his testimony.

¶15 The circuit court denied Williams's motion without an evidentiary hearing. A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief.[2] ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Ibid.*** If, however, "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 circuit court has the discretion to grant or deny a hearing." ***Ibid.***

¶16 The circuit court did not err when it denied Williams's motion without a hearing. When a defendant is claiming that his trial attorney was deficient for failing to present testimony from a witness, the defendant must allege *with specificity* what the witness would have said if called to testify. *See* ***State v. Flynn***, 190 Wis. 2d 31, 49, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (emphasis

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

added). In his motion, Williams asserted that Carey Roberts would have testified that Williams did not live at the house. That assertion, however, is conclusory.

¶17 As for Ingram, as noted above, Williams provided the postconviction court with a copy of the police report in which Ingram said that DuJuan Roberts and Calhoun lived on the first floor and that Williams was one of several young persons that he had seen "hang[ing] out" at the house. Even assuming that Ingram would have testified to those facts if called to testify at trial, we agree with the State's observations that Ingram's testimony "did not expressly state that Williams did not live at the house" and that

> [i]t was not at all necessary for Williams to live at the house in order for him to possess firearms when he was in the house, or to be a party to the crime of possession of cocaine with intent to deliver or to be party to a crime to being a keeper of a drug house.

¶18 To prove deficient performance, Williams must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." *See* ***Strickland v. Washington***, 466 U.S. 688, 690 (1984). With respect to the prejudice prong, Williams must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *See* ***id.***, 466 U.S. at 687. In other words, Williams "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." ***Id.***, 466 U.S. at 694. Given that Ingram's statements to police contribute little to the determination of whether Williams was guilty of the charged offenses, the failure to call Ingram as a witness was neither deficient performance nor prejudicial.

By the Court.—Order affirmed.

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