COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP164-CR **Cir. Ct. No. 2006CF3286**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER DONNELL JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK and JEAN W. DIMOTTO, Judges.[1] *Affirmed*.

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

[1] The Honorable Timothy M. Witkowiak initially presided over Jones's case and issued the judgment of conviction. Following judicial rotation, the case was transferred in October 2009 to the Honorable Jean W. DiMotto, who denied Jones's motion for postconviction relief.

¶1 CURLEY, P.J. Christopher Donnell Jones appeals the judgment convicting him of heroin delivery and possession. He also appeals the order denying his postconviction motion. Jones contends the trial court erred in denying his postconviction claim for an evidentiary hearing and a new trial because his postconviction claim sufficiently alleged that his trial counsel was ineffective. Specifically, Jones argues that: (1) trial counsel was ineffective for failing to introduce the arrest detention report and supplemental incident report and for failing to cross-examine the authors about the contents of these reports; (2) trial counsel was ineffective for failing to investigate Jones's case further and introduce additional evidence; (3) trial counsel was ineffective for failing to object to prejudicial hearsay testimony; and (4) the trial court erred by not addressing the cumulative effect of trial counsel's deficient conduct. We affirm.

I. BACKGROUND.

A. Jones's First Jury Trial

¶2 On October 18-20, 2006, Jones was tried by a jury on two charges. He was charged with delivery of heroin, contrary to WIS. STAT. §§ 961.14(3)(k) and 961.41(1)(d) (2005-06),[2] arising from a transaction with undercover Milwaukee Police Officer Wardell Dodds. He was also charged with drug possession, contrary to WIS. STAT. § 961.41(3g)(am) (2005-06), for heroin discovered in a crawl space in the bedroom where police found him shortly after the transaction. The case resulted in a hung jury, and a second trial took place on February 12-13, 2007.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

B. Jones's Second Jury Trial and Postconviction Motion

¶3 At Jones's second trial, Officer Dodds testified that while working undercover on June 22, 2006, he told someone on the street that he was looking for heroin. That person gave Dodds the number of a potential dealer. Dodds called the number and spoke with a man who told him to come to 2650 North 19th Street. Dodds went there and saw Jones standing at the top rear porch with another, unknown man. Dodds told Jones that he wanted two ten-dollar quantities of heroin. Jones told him to call back later. Dodds then left, and briefly conferred with his partner, Officer Zebedee Wilson, before going back to make the purchase.

¶4 After he had initially contacted Jones and conferred with Wilson, Dodds returned to the house on North 19th Street, where he noticed a green Pontiac parked behind the residence. As Dodds approached the Pontiac, a man phoned him and asked where he was located. Jones then exited the rear passenger seat of the Pontiac, gave Dodds two foil-wrapped folds of suspected heroin in exchange for a twenty-dollar bill, and began walking back to the car. Dodds did not see Jones get back into the car, however, because Dodds walked away from the scene.

¶5 Dodds then left the area and briefed Wilson on what had occurred, giving Wilson a physical and clothing description of Jones. Jones was taken into custody minutes later. After Jones was in custody, Dodds returned to the scene and positively identified Jones as the person who had sold him the suspected heroin.

¶6 Dodds's partner, Officer Wilson, observed the buy. Wilson stationed himself about seventy-five feet away from the where the transaction took place. He observed Dodds have a brief conversation with Jones, then saw Dodds

walk to the rear of the residence and make a hand-to-hand transaction with him. Once Wilson saw Jones go into the residence, he called the take-down team, gave them Jones's physical and clothing description, and told them which door of the residence Jones had gone into. After the take-down team went into the residence, Wilson went in and confirmed that Jones was the man that he saw sell the drugs to Dodds.

¶7 Officer John Bryda recovered the buy money. Bryda testified that he and another officer stopped the Pontiac after Dodds completed the transaction. There were two people in the car, a man and a woman. Jones was not there. There was money on the center console in plain view, which Bryda recovered. The serial number on the bill matched the prerecorded serial number of the bill that Dodds used for the transaction. According to Bryda, the two occupants were released and drove away after police spoke with them and a warrant check was run. Bryda testified that the two occupants denied that the money belonged to them.

¶8 Officer Jay Jackson helped secure the residence that Jones went into after the buy. Jackson testified that after he received a signal, he ran into the house on North 19th Street. Jackson found Jones, who was wearing clothing that matched the given clothing description, sleeping or pretending to sleep in a bedroom. Jackson immediately searched Jones and placed him into custody. He then returned to the bedroom where he had found Jones and located three foil-wrapped folds of suspected heroin in a small crawl space behind a hatch on the wall. He gave the folds to Officer Wilson.

¶9 Jackson also took Jones to jail for booking. Jackson testified that during the booking process Jones said—without prompting—that he was going to

get the charges on the "three little things" found in the house knocked down to possession, and bragged about having a Milwaukee police handgun and a bulletproof vest.

¶10 Wilson gave the suspected heroin Jackson recovered from the crawl space to Officer Laura Litwin for testing. Litwin's preliminary testing was positive for heroin, which was confirmed by State Crime Lab testing. The State Crime Lab also tested the substance that Dodds bought from Jones and determined that it was heroin.

¶11 The jury convicted Jones on both counts. On March 6, 2008, the trial court sentenced Jones to six years of imprisonment on count one (three years' initial confinement and three years' extended supervision) and two years of imprisonment on count two (one year of initial confinement and one year of extended supervision), to be served concurrently with count one.

¶12 Jones then filed a WIS. STAT. RULE 809.30 postconviction motion requesting a new jury trial. The court denied Jones's postconviction motion, and Jones now appeals.

II. ANALYSIS.

¶13 On appeal, Jones challenges the trial court's refusal to hold a ***Machner***[3] hearing on his ineffective assistance of counsel claims from his postconviction motion. He also argues that the cumulative effect of his three ineffective assistance claims warrants a ***Machner*** hearing.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Standard of Review

¶14 The specific question before this court is whether the trial court properly denied Jones's ineffective assistance claim without first holding an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."). In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if 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.

Id., 274 Wis. 2d 568, ¶9 (emphasis added; citations omitted).

¶15 Because the issue of ineffective assistance of counsel is intertwined with this issue, Jones must also allege a *prima facie* claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To establish deficient performance, Jones must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***id.*** To

demonstrate prejudice, Jones "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." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). If a defendant fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶16 With these standards in mind, we consider Jones's arguments concerning trial counsel's ineffectiveness.

A. Trial counsel was not ineffective for failing to introduce the arrest detention report and the supplemental police report, or for failing to cross-examine the officers about the contents of these reports.

¶17 Jones argues that trial counsel was ineffective for failing to introduce Officer Wilson's arrest detention report and Officer Dodds's supplemental incident report and for failing to question the authors about facts that do not appear in the reports. Specifically, Jones points out that the arrest detention report does not mention a number of facts that police testified to at trial, including: (a) contacting Jones by cell phone; (b) seeing Jones on the porch; (c) observing a green Pontiac with two other occupants; (d) approaching the Pontiac and conducting warrant checks and interviews with the individuals inside; and (e) recovering prerecorded buy money from a green Pontiac and then placing it in inventory. Jones also notes that Dodds's supplemental incident report does not mention: (a) seeing Jones on the porch; (b) observing two other occupants in the Pontiac; or (c) conducting warrant checks and interviews with the individuals inside. Jones argues that trial counsel's decision not to admit these reports was deficient because the fact that the reports have none of the above-mentioned facts undermines the officers' trial testimony. According to Jones, these deficiencies

were prejudicial because, had the reports been introduced, it is likely that the jury would not have believed the officers' testimony and therefore would not have convicted him. In support of this contention, Jones cites ***State v. Richards***, 21 Wis. 2d 622, 631, 124 N.W.2d 684 (1963) ("The omission from the reports of facts related at the trial … [is] … relevant to the cross-examining process of testing the credibility of a witness' trial testimony.").

¶18 We disagree. The omission of these reports did not prejudice Jones's case. This is not a case where, as noted in ***Richards***, "conflict between the reports and the testimony" or even "omission from the reports of facts related at the trial" would have been "relevant and material to [Jones's] case." *See* ***id.*** (some quotation marks omitted). The arrest detention report, for example, only summarized the most basic facts about the incident. Indeed, by its very nature—including the fact that the space for the officer's narrative was quite limited—one can plainly see that it was not intended to contain every detail of every fact observed by every on-scene officer. Similarly, Dodds's report reads more like a summary than a detailed account of the events, and the facts omitted from them had nothing to do with the actual transaction.

¶19 Moreover, even if the reports had been admitted, and even if the officers had been cross-examined regarding the reports' omissions, the best that trial counsel might have done would have been to show that the police reports were not very thorough. Counsel would not have overcome the strong evidence of guilt in this case, including eyewitness testimony from two officers of a hand-to-hand transaction, drugs obtained from the hand-to-hand transaction, and a defendant who later inculpated himself during booking. In other words, the record conclusively demonstrates that Jones was not prejudiced by trial counsel's failure

to introduce and cross-examine the officers on the reports. *See* ***Strickland***, 466 U.S. at 694.

B. Trial counsel was not ineffective for failing to conduct additional investigation and to introduce additional evidence.

¶20 Jones next argues that counsel was ineffective for failing to conduct an investigation that would have yielded: (1) two computer automated dispatch logs; (2) the arrest detention report and supplemental police report; and (3) Milwaukee Police property inventory #333541. According to Jones, these documents—if read together—would have shown that police: (a) may have mistakenly tested and linked to Jones suspected heroin recovered from *another* defendant arrested the same day; and (b) falsified reports to cover their mistake. Jones grounds his theory in the fact that the Crime Lab report regarding property inventory #333541[4]—which refers to a recovered substance determined to be heroin—links the heroin to two suspects, Jones and the other June 22, 2006 arrestee. He also points out that there are at least two police incident numbers on reports related to Jones's June 22, 2006 arrest.

¶21 We are not persuaded. First, Jones's allegations about falsified reports are completely unsubstantiated by any evidence in the record and we will not consider them. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 (Court of Appeals "may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record."). Second, while Jones correctly notes that the lab report regarding inventory #333541 does

[4] Jones does not refer us to the actual property inventory in this instance. He refers only to the Crime Lab report discussing this particular property inventory.

link a quantity of heroin to Jones and an unrelated arrestee, he omits the fact that at least three other property inventories connect him to evidence of the charged crimes. For example, property inventory #333544 and the related crime lab report describe—consistent with Dodds's testimony—two folds each containing heroin. Dodds's supplemental incident report indicates that this was the heroin from the hand-to-hand transaction. Similarly, property inventory #333547 describes—consistent with Jackson's testimony about what he found in the crawl space and what Jones told him at booking—three folds, each containing heroin. Unlike the inventory that Jones discusses, the crime lab report regarding inventory #333547 links the heroin to Jones's case, and only Jones's case. Finally, property inventory #332922 describes the twenty dollar bill recovered after the hand-to-hand transaction containing the same serial number as the bill Dodds used to buy heroin from Jones. Weighed against this evidence, and the eyewitness testimony of two officers who either saw or participated in the hand-to-hand transaction, neither Jones's unsubstantiated suspicions about multiple report numbers nor his arguments about a potential lab mix-up rise to a level of "probability sufficient to undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694. Therefore, Jones was not prejudiced by trial counsel's performance.

C. Trial Counsel was not ineffective for failing to object to Officer Bryda's testimony regarding two suspects in the green Pontiac.

¶22 Jones argues that trial counsel failed to move to strike, as non-responsive and as hearsay, Bryda's testimony that the occupants of the green Pontiac denied that the money was theirs. He also argues that trial counsel failed to object on hearsay grounds to the prosecutor's question on redirect examination and Bryda's response regarding whether the vehicle's occupants denied that the money was theirs. At the first trial, counsel objected to this question and the court

sustained the objection. According to Jones, these failures to object were deficient and prejudicial because harmful evidence that should not have been admitted was in fact admitted. The occupants' denial of ownership of the money made it more likely that the money belonged to Jones, who was the third person in the vehicle. Had the jury not heard that the other two occupants denied ownership of the money, it would have likely not linked the buy money to Jones, and would not have found him guilty.

¶23 We disagree. The record conclusively demonstrates that the admission of this testimony was not prejudicial. By the time this testimony occurred, the jury had already heard that Officer Bryda ultimately released the two occupants of the green Pontiac and that they were free to leave. Reasonable jurors would have known that, had these individuals claimed ownership of the prerecorded money found in the car—money that had minutes earlier been exchanged in a controlled drug buy—the police would not have let them leave. Thus, trial counsel's failures to object were not "sufficient to undermine confidence in the outcome" and therefore were not prejudicial to Jones. *See* ***id.***

D. The trial court did not err by not addressing the cumulative effect of trial counsel's deficient conduct.

¶24 Jones claims that the cumulative effect of all of the foregoing instances of trial counsel's alleged ineffectiveness sufficiently warrants a ***Machner*** hearing. We disagree. Lumping together failed ineffectiveness claims does not create a successful claim. As our supreme court has often repeated, "adding them together adds nothing. Zero plus zero equals zero." *See, e.g.*, ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) (some capitalization omitted); ***Allen***, 274 Wis. 2d 568, ¶35.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.