COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2011

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. 2009AP2720

Cir. Ct. No. 1995CF954869

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND D. SHAW,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Raymond D. Shaw, *pro se*, appeals an order denying his WIS. STAT. § 974.06 (2009-10) motion for postconviction relief.[1]

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

Shaw asserts that the postconviction counsel who represented him on his direct appeal was ineffective for failing to raise claims of trial counsel's ineffectiveness. Shaw contends that his trial counsel provided ineffective assistance by failing to: (1) argue that Shaw was arrested without probable cause; (2) argue that Shaw was denied a ***Riverside*** hearing, *see* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991); and (3) investigate an alibi defense. We disagree and affirm.

BACKGROUND

¶2 A jury found Shaw guilty of one count of first-degree intentional homicide and one count of armed robbery, both as a party to the crimes. The context of the crimes was set forth in our prior decision resolving Shaw's direct appeal:

> On November 1, 1995, Shaw and his seventeen-year-old friend, M.B., decided to rob a drug dealer, Edwynn White.[[2]] Shaw's pistol was used. After the robbery, White was shot twice in the head and died from the gunshot wounds. Shaw claimed in a statement to the police that M.B. was the shooter. M.B. claimed that Shaw was the shooter. The State contended at trial that Shaw did the shooting, but that even if M.B. had shot White, Shaw was still guilty under the party to a crime theory.

See ***State v. Shaw***, No. 1996AP3327-CR, unpublished slip op. at 2 (Wis. Ct. App. Feb. 3, 1998).

¶3 In his direct appeal, Shaw argued that the trial court erred in refusing to instruct the jury on the lesser-included offense, felony murder, and that the trial court erroneously exercised its discretion in declining to give the jury the

[2] We note that throughout the record, the victim's name is spelled as both Edwynn and Edwin.

withdrawal from a conspiracy jury instruction. ***Id.*** We concluded that there was no reasonable basis in the evidence to give either instruction and affirmed his convictions. ***Id.***

¶4 In 2009, Shaw, *pro se*, filed a motion seeking postconviction relief pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (per curiam). The court denied Shaw's motion without holding a hearing. He now appeals. Additional facts are set forth below.

LEGAL STANDARDS

¶5 It is well-settled that WIS. STAT. § 974.06 requires criminal defendants "to consolidate all their postconviction claims into *one* motion or appeal." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). If a defendant's grounds for relief were finally adjudicated, waived, or not raised in a prior postconviction motion or appeal, they may not form the basis for a new postconviction motion unless the defendant has a sufficient reason for failing to raise the issue previously. *See* ***State v. Fortier***, 2006 WI App 11, ¶16, 289 Wis. 2d 179, 709 N.W.2d 893. The ineffective assistance of postconviction counsel may "in some circumstances" constitute a sufficient reason for not raising an issue. *See* ***Rothering***, 205 Wis. 2d at 682.

¶6 Shaw asserts that his current claims of ineffective assistance of trial counsel were not previously raised because postconviction counsel failed to raise them. *See* ***id.*** at 677-78. When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prevail on

a claim of ineffective assistance of trial counsel, Shaw must show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶7 To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant 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.*** at 694.

¶8 Whether Shaw's postconviction motion alleges sufficient facts entitling him to a hearing is subject to a mixed standard of review. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first evaluate the motion on its face to determine whether it alleges sufficient material facts that, if true, would entitle him to relief. *See* ***id.*** We review this question of law *de novo*. ***Id.*** If the motion raises such facts, the postconviction court must grant an evidentiary hearing. ***Id.*** "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 [postconviction] court has the discretion to grant or deny a hearing." ***Id.*** We

review the postconviction court's discretionary decisions for an erroneous exercise of discretion. ***Id.***

DISCUSSION

¶9 At issue is whether Shaw's postconviction counsel was ineffective for failing to allege that his trial counsel's conduct was ineffective in several ways. We will address each claim of trial counsel error in turn.

1. Probable Cause

¶10 Shaw asserts that his arrest was not based upon probable cause and that as a result, his trial counsel rendered ineffective assistance when he failed to raise the issue and seek to suppress the evidence and statements that were subsequently obtained. We conclude that trial counsel's performance was not deficient because the record demonstrates that the police had probable cause to arrest Shaw.

¶11 "Every lawful warrantless arrest must be supported by probable cause." ***State v. Nieves***, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. ***Nieves*** explained:

> Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. An arrest is legal when the officer making the arrest has reasonable grounds to believe that the person has committed or is committing a crime. *See* WIS. STAT. § 968.07(1)(d).

Nieves, 304 Wis. 2d 182, ¶11 (citation omitted). Further,

> [i]n determining whether probable cause exists, the court applies an objective standard and is not bound by the officer's subjective assessment or motivation. The court is

> to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department. When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.

State v. Kutz, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660 (citations omitted).

¶12 Here, the pertinent facts are:

- Police learned from White's girlfriend that prior to his death, White had returned a page that he received from Shaw.
- The police went to Shaw's apartment, based on their belief that White was headed there prior to his death, to find out whether White ever arrived; what his purpose was for going there; and who might have been at the residence if he got there.
- Shaw expressed no emotion when he was told that White was found murdered.
- The statement Shaw gave to police was at odds with that provided by his girlfriend in that Shaw did not tell the police he was in the company of M.B. when White was to have arrived at the apartment. Upon learning of this and other inconsistencies in the statements made by Shaw and his girlfriend, the police placed Shaw under arrest based on their conclusion that he was withholding information.

¶13 At issue is whether the police had probable cause to arrest Shaw at that time. In light of the foregoing, we conclude that they did. Though Shaw directs us to a version of the facts that he contends falls short of establishing probable cause, we remind him that even if we were to conclude that his version creates a reasonable competing inference, "[w]hen a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." *See* ***id.*** Consequently, a motion challenging Shaw's arrest on probable cause grounds would not have been successful, and thus, would not have served as a basis for suppressing the evidence and statements subsequently obtained. We conclude trial counsel was not deficient for failing to challenge the legality of the arrest, and postconviction counsel was not deficient for not asserting trial counsel ineffectiveness on this basis.

2. *Riverside* Violation

¶14 Shaw next claims that he was held without a probable cause hearing for more than forty-eight hours, in violation of ***County of Riverside v. McLaughlin***. ***Riverside*** held that a judicial determination of probable cause to support a warrantless arrest must be made within forty-eight hours of the arrest. ***Id.***, 500 U.S. at 55-56. Shaw contends that he was arrested on November 2, 1995, and was not presented to a magistrate for a probable cause determination until six days later at the time of his initial appearance.

¶15 The postconviction court properly concluded that Shaw delayed too long in bringing this claim because the State had no ability to resurrect whatever

record might have existed given that the relevant records were retained for only seven years.[3] Moreover, the State filed affidavits from two detectives supporting the conclusion that a probable cause determination was made within forty-eight hours. One of the detectives averred that Shaw was accepted by the Milwaukee County Jail as an inmate on November 4, 1994, and both submitted that based on their training and experience, the jail would not have accepted Shaw as a prisoner unless a magistrate had made a probable cause finding.[4]

¶16 Shaw goes on to assert that even if a probable cause determination was made before his initial appearance, a ***Riverside*** violation nevertheless occurred because he was held for the sole purpose of gathering evidence to justify the arrest. We are not convinced.

¶17 "When a probable cause determination is made within 48 hours of the arrest, the burden is on the arrested individual to prove that the probable cause

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[3] Shaw contends that the postconviction court erred in imputing the delay in bringing this claim to him given that it was his postconviction counsel who should have raised the ***Riverside*** violation in a timely fashion. Shaw's direct appeal was decided in February 1998; yet, he did not file the instant WIS. STAT. § 974.06 motion until July 2009. To the extent this delay may have been the result of Shaw's ignorance of the law, we remind him that although we grant *pro se* criminal defendants considerable latitude, every person is presumed to know the law and cannot claim ignorance as a defense. *See* ***State v. Jensen***, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W.2d 230 ("Ignorance of the law is no defense."). Thus, the postconviction court properly attributed the delay in bringing this claim to Shaw.

[4] Shaw claims that the detectives' affidavits are contradictory. He points out that one detective avers that probable cause determinations are made *prior to* arrestees being admitted into the Milwaukee County Jail or else the jail would not accept the arrested individual (i.e., this is an allegation that a ***Riverside*** violation cannot occur). Meanwhile, the other detective avers that an Arrest/Detention Report is conveyed *along with* the individual to the jail where the staff at the Milwaukee County Jail would then present the report to a magistrate for a probable cause determination. By our reading, Shaw points out a distinction without a difference. There is nothing in the latter detective's averment that makes the ultimate conclusion drawn by both detectives—that a probable cause finding would have been made within forty-eight hours of Shaw's arrest—inconsistent.

determination was delayed unreasonably." ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993). An example of an unreasonable delay is a delay "'for the purpose of gathering additional evidence to justify the arrest.'" ***Id.*** at 696-97 (citation omitted). In the absence of any relevant records, the exact time of the probable cause hearing in this matter is unknown. Consequently, it is wholly unclear (1) whether there was an unreasonable delay; and (2) if so, what the purpose or reason for the delay was. Shaw offers only conclusory allegations to support his position, which are insufficient to warrant an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Consequently, Shaw did not meet his burden of establishing that trial counsel was ineffective for failing to pursue a motion to dismiss based on a ***Riverside*** violation.

3. Alibi Defense

¶18 As his final argument, Shaw asserts that his trial counsel rendered ineffective assistance when he failed to investigate an alibi defense. Shaw faults his trial counsel for not interviewing or calling Anthony Balsamo as a witness and for not investigating Shaw's alibi defense. He contends that Balsamo would have directly refuted the testimony of M.B. that Shaw was present in White's van and that Shaw was the shooter. Shaw also references a statement by Balsamo that Balsamo believed it was M.B. who gave Maurice Ware the plastic bag containing, among other things, the key to the van where White's body was found—which is contrary to Ware's testimony that Shaw gave him the bag.

¶19 Although he did not submit an affidavit from Balsamo, Shaw submits that Balsamo's statement as set forth in the police report "contained pertinent information that placed Mr. Shaw in his own apartment with Anthony Balsamo during the time when the homicide of Edwin White would have

occurred, and the [postconviction] court should have accepted the police report as sufficient material facts as to what Anthony Balsamo specifically said." *See* ***State v. Love***, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62. Even taking into account Balsamo's statement to the police, we agree with the State's assessment that Balsamo's statement does not provide Shaw with an alibi. In this regard, the State points out:

> Shaw's claim is based almost entirely on the assertion that Balsamo came to his apartment at the time the murder was being committed and thus he, Shaw, could not have been there. This is a ludicrous claim because Shaw admitted in one of his statements that he was at the murder scene with [M.B.], and that Balsamo came over after they had returned and Shaw was showering.

Given that Balsamo's statements to police are at odds with Shaw's own statements, the failure to call Balsamo as a witness was neither deficient performance nor prejudicial.

¶20 In addition, we agree with the State's conclusion that because the theory of the case advanced by Shaw in his first appeal—though the admission of his fifth statement to the police—was that M.B. was the primary actor and Shaw merely drove M.B. and White to the site of the murder, he cannot now claim that he was nowhere near the scene and had an alibi defense. *See, e.g.*, ***State v. Robles***, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990) ("If a defendant selects a course of action, that defendant will not be heard later to allege error or defects

precipitated by such action. Such an election constitutes waiver or abandonment of the right to complain." (citation omitted)). Accordingly, we affirm.[5]

By the Court.—Order affirmed.

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

[5] Shaw submits that his postconviction counsel failed to obtain or read discovery materials and consequently, did not raise ineffective assistance of trial counsel. Because we conclude that there was no ineffective assistance of trial counsel, we agree with the State that we cannot conclude that postconviction counsel rendered ineffective assistance on this basis. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.