COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2467-CR **Cir. Ct. No. 2009CF2578**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY JAVON LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anthony Javon Lee appeals from a judgment, entered upon a jury's verdict, convicting him of one count of possession with intent to deliver between one and five grams of cocaine, as a second or subsequent offense. He also appeals from an order denying without a hearing his

postconviction motion for a new trial, which alleged ineffective assistance of trial counsel. We agree with the circuit court's conclusion that Lee has not been prejudiced by trial counsel's performance. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 Lee agreed, over the phone, to sell cocaine to undercover police officer Tara Ferguson. They met in a Walgreens parking lot, with Ferguson walking up to Lee's car. As Ferguson looked in, she noted that Lee was holding a Newport cigarette pack. Lee indicated he did not want to complete the transaction in the parking lot because there were too many people around, and suggested that they go around the corner. After Ferguson confirmed that Lee had the drugs for her, she agreed to meet him at the new location. While Lee drove to the new location, Ferguson called for her backup to stop his car.

¶3 Police officer Rodolfo Alvarado was driving the vehicle that attempted to stop Lee. He activated his lights and siren, but Lee did not immediately stop. Lee disregarded at least one stop sign, repeatedly reached toward his center console, and was weaving as he drove. When Lee finally stopped the car, he continued to reach for the console.

¶4 Lee was arrested. Officers searched the car and the ground nearby, finding several items on the ground outside the passenger door. The items included empty corner cuts, a balled-up Newport cigarette pack with suspected crack cocaine, and a balled-up napkin with three bags of a substance also believed

to be cocaine.[1] When interviewed, Lee admitted he had taken a phone call from a woman he did not know and that he agreed to meet her at Walgreens, but denied that he agreed to sell anyone cocaine; admitted that he saw police trying to stop him and ran a stop sign; and admitted that he smoked Newport cigarettes.

¶5 At trial, the State's theory was that Lee had possessed the cocaine but threw it out the passenger window after he was pulled over. Lee's defense was that although the police found cocaine, he never possessed it or intended to deliver it, and the reason he did not immediately pull over and was reaching for his center console was that he had food in his lap and was trying to prevent a soda from spilling.[2]

¶6 The jury convicted Lee. The circuit court sentenced him to six years and three months of initial confinement and four years and two months of extended supervision. Lee moved for a new trial, alleging ineffective assistance of trial counsel. He contended that trial counsel had prejudicially failed to make four specific challenges to the evidence against him. The circuit court concluded there was no prejudice and denied the motion without a hearing. Lee appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶7 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433.

[1] The State Crime Laboratory later confirmed that the substance was cocaine.

[2] Lee did not testify himself.

Merely asserting a claim, like ineffective assistance of counsel, is not sufficient to warrant a grant of relief. ***Id.***

¶8 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defense. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶9 To prove deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Love***, 284 Wis. 2d 111, ¶30. However, we are highly deferential to counsel's performance and we strongly presume that his or her conduct fell within the wide range of reasonable professional assistance. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. We make every effort to avoid the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time. ***Id.*** To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. ***Love***, 284 Wis. 2d 111, ¶30. Here, Lee challenged his trial attorney's performance in four specific scenarios. We address each in turn.

I. Failure to Attack an Officer's Credibility

¶10 The cocaine that police found near Lee's car after it was stopped was found on the passenger side of the car. The State theorized Lee had thrown it out the passenger window as he was being stopped, even though no one saw him toss it. At trial, Officer Robert Morrison testified that both the driver and the passenger windows were down partially at the time of the stop. Officer Alvarado testified

that both windows were fully down. On cross-examination, defense counsel asked Alvarado whether his police report mentioned the windows; Alvarado confirmed it did not. On redirect, Alvarado testified that he generally does not write down every detail in his reports.

¶11 Lee alleges that counsel was deficient "because he did not cross examine Officer Alvarado more in depth regarding the writing of his report." He posits that counsel should have explored the training that officers receive on how to write reports, and the fact that officers ought to know that a defense attorney's job is to find weakness in those reports. Lee also contends that counsel should have cross-examined Alvarado about how he knew that the windows were down if he did not include that information in his report seven months earlier. Lee argues these failures are prejudicial because a "complete cross-examination" would have highlighted "sloppy police work" and affected Alvarado's credibility.

¶12 Defense counsel *did* challenge Officer Alvarado's testimony compared to his police report. Counsel successfully elicited Alvarado's admission that he did not write down every detail in his report. Even without extensive cross-examination on report-writing, the jury was already free to question Alvarado's attention to detail and the propriety of leaving key details out of a police report. The circuit court ruled that additional cross-examination would not have changed the outcome in this case, and we agree. Further, as the circuit court pointed out, Officer Morrison had also testified that the windows were rolled

down, but Lee does not challenge that testimony. We discern neither deficient performance nor prejudice.[3]

II. Failure to Effectively Cross-Examine Officers about Food

¶13 Some of the cocaine was found in a wadded-up napkin ball. Officer Morrison described the napkin as white, "like something you would get at a food stand or a fast food restaurant[.]" He later testified that there was food in the center console of Lee's car, either "a hamburger or French fries, but it was some type of fast food[.]"[4]

¶14 The main issue in Lee's postconviction motion, though, is that counsel asked Officer *Alvarado* if it was "accurate to say it was McDonald's food." Alvarado said yes. Lee asserts this was deficient because there is no proof the food was from McDonald's. By calling it such, Lee complains that trial counsel lent credibility to a conclusion that if Lee had fast food, and the officers found the cocaine in a fast food napkin, then the cocaine and the napkin had belonged to Lee. Lee asserts, "If the State had not been able to tie the napkin to the food, the jury would not have had as much evidence to rely on that Mr. Lee possessed the napkin in his car before it was allegedly thrown out the window."

[3] On appeal, Lee contends that defense counsel also should have highlighted Officer Ferguson's testimony that she had opened the car door in the Walgreens parking lot to talk to Lee. He contends that she must have opened the passenger door, and the window on that side must have been up or the officer would have merely leaned in through the window. However, the state of the car in the parking lot has no bearing on the state of the car at the time of the stop.

[4] Officer Morrison did not include this information in his report.

¶15 The circuit court concluded that the jury did not need a reference to McDonald's to connect the fast food napkin to the fast food in the car, so there was no reasonable probability that the reference affected the verdict. We agree.

¶16 First, Lee had admitted he was eating a hamburger when he left the Walgreens parking lot. He never asserted that he brought the hamburger from home, so there is a reasonable inference to be made that the hamburger was, in fact, fast food. Second, the existence of the food itself cannot be ignored—it was a necessary component of Lee's defense. He wanted the jury to believe that he failed to immediately stop for police because of the food in his lap, not because he was disposing of cocaine. Third, a reasonable jury would have been able to "tie the napkin to the food" without the "McDonald's" or even the "fast food" descriptors. Finally, Lee overlooks that the cocaine in the napkin ball was found next to the Newport wrapper with cocaine, a circumstantial connection far more damaging to his case than whether his hamburger and napkins came from McDonald's.

III. Failure to Object to Inconsistencies in the Evidence

¶17 There were inconsistencies between the police reports and officers' testimony over whether the napkin ball was made of one or two napkins. The circuit court, looking at the exhibit, concluded there were two paper objects comprising the ball. However, this discrepancy is not so great that it would undermine anyone's credibility. As the State points out, the significant fact was the ball's contents, not the number of paper layers on the outside. We discern no prejudice.

IV. Failure to Object to Improper Closing Argument

¶18 Lee complains that the prosecutor told the jury, "Officer Ferguson asked the defendant and had the defendant assure her that he had the two dubs on him."[5] Lee contends that Ferguson never directly testified to that exact conversation between them. That is, Ferguson never said that Lee said he had the drugs on him, only that he had them.

¶19 In a closing argument, the State "may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citing ***Embry v. State***, 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970)). "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***Draize***, 88 Wis. 2d at 454.

¶20 Officer Ferguson testified as follows:

> [OFFICER]: I asked him if he had my dubs, my two dubs, which is a term for 20 dollar quantities of cocaine.
>
> [STATE]: Is that a common word that you use in your practice as an undercover officer?
>
> [OFFICER]: Yes.
>
> [STATE]: How did the defendant react to your using that word?

[5] "Two dubs" refers to the twenty-dollar bags of cocaine Ferguson was attempting to buy.

> [OFFICER]: He said that he had them for me. He assured me that he had them. He just didn't want to do the transaction in the lot.
>
> [STATE]: Is that what the defendant said?
>
> [OFFICER]: Not to that extent, he just said I don't want to do it here. Meet me around the corner[.]
>
> [STATE]: What did he say in relation to having it?
>
> [OFFICER]: He assured me that he had it.
>
> [STATE]: Did you observe anything about the defendant at that time?
>
> [OFFICER]: I observed that he was holding a Newport cigarette pack in his left hand.

¶21 The State, in its closing argument, did nothing more than argue a conclusion based on the evidence. As the circuit court ruled, even though Lee did not expressly state that he had the drugs on his person, "this was a reasonable inference for the jury to draw from his conversation with Officer Ferguson while he was holding the Newport cigarette pack in his hand – the same type of cigarette pack that was found outside his vehicle with cocaine inside." The argument was not improper, so any objection would have been meritless. There is no ineffective assistance of counsel for failure to pursue a meritless objection. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶22 The postconviction motion here failed to sufficiently allege or demonstrate prejudice from any of the alleged errors. Therefore, the circuit court properly denied the motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).