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March 19, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2294 State of Wisconsin v. Ladarius Marshall (L. C. No. 2008CF4185)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ladarius Marshall appeals an order denying a WIS. STAT. § 974.06 (2017-18)[1] postconviction motion to withdraw his guilty pleas due to the ineffective assistance of his trial

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

and postconviction counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The underlying facts of this case were discussed at length in Marshall's direct appeal, and we shall not discuss them again in detail. *See* ***State v. Marshall***, No. 2012AP140-CR, unpublished slip op. (WI App July 2, 2013). In summary, Marshall was sixteen years old when he was interviewed five times while in police custody, and he eventually admitted to his involvement in a murder on North 37th Street in Milwaukee. Marshall moved to suppress his statements, arguing that police did not honor his right to cut off questioning, and that his statements were not voluntary. Following a two-day evidentiary hearing, the circuit court denied the motion based on the testimony in the hearing, and Marshall pleaded guilty to a reduced homicide charge.

On direct appeal, we affirmed the judgment of conviction. We stated:

> The circuit court found that Marshall never unequivocally and unambiguously invoked his right to remain silent. The Record supports the circuit court's finding. Although Marshall said he would not make a statement, he agreed to answer questions. Detectives Petropoulos and Braunreiter reasonably interpreted this to mean that Marshall would talk to them in a question and answer format but would not give a narrative. When Marshall told them that he was done talking, the detectives left and did not return until Marshall asked for them. They stopped when Marshall said he had nothing more to say. Marshall then resumed the interviews by asking to talk to Braunreiter alone. That interview ended, not because Marshall said he wanted to stop talking, but because he said he needed to use the restroom. When detectives Heier and Goldberg took over after the shift change, they left the room when Marshall said he would not make a statement. Then, they came back only to tell Marshall that they were moving on to the next step in processing. He responded by saying he wanted to talk to them more.

Marshall petitioned our supreme court for review, which was denied.

Marshall subsequently filed a postconviction motion 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). Marshall argued his trial counsel was ineffective for failing to evaluate the accuracy of the transcripts and admit into evidence the recordings and transcripts of the police interviews at the suppression hearing. According to Marshall, there is a reasonable probability that, had the transcripts and recordings been entered into evidence, the circuit court would have granted the suppression motion. Marshall further argued that his direct appeal counsel was ineffective for not raising trial counsel's failure to admit the transcripts and recordings. The circuit court denied Marshall's postconviction motion. Marshall now appeals.

In the present appeal, Marshall reiterates his ineffective assistance claim based on counsel's failure to admit into evidence the recordings and transcripts of the custodial interviews. Marshall argues that "[b]ecause the suppression court lacked as evidence the transcript or recording of Marshall's statement, it was unable [to] truly assess the totality of the circumstances relevant to the voluntariness of Marshall's statement." Thus, Marshall contends, "the fact-finder never learned of glaring inconsistencies between the officers' testimony [at the suppression hearing] and what actually happened."

However, Marshall's complaint that the transcripts were not considered in the prior proceedings is mistaken. That the transcripts of the interviews were not admitted into evidence or considered at the suppression hearing is of no consequence because the appellate record contained the transcripts. Under WIS. STAT. RULE 809.15(1)(a)9., the appellate record includes

"[e]xhibits whether or not received in evidence."[2] Our decision on direct appeal shows that we examined the interview transcripts and extensively quoted from them concerning Marshall's interactions with the detectives. *See* ***Marshall***, No. 2012AP140-CR, ¶¶3-10. Our decision also quoted extensively from the testimony at the suppression hearing. ***Id.***, ¶¶12-17.

In affirming the circuit court's decision, we concluded the appellate record, including the transcripts, supported the court's factual findings showing the detectives "scrupulously honored Marshall's requests." ***Id.***, ¶25. We noted the court used special caution when it applied the proper factors and balancing test, as required by ***State v. Jerrell C.J.***, 2005 WI 105, ¶20, 283 Wis. 2d 145, 699 N.W.2d 110. We stated at paragraph 23 of our opinion:

> The circuit court found that the police did not use any coercive tactics, threats, or other pressures. It also found that Marshall appeared to the officers to be alert, that he responded to them appropriately, and that he did not have any mental health or cognitive issues that prevented him from knowingly and voluntarily waiving his rights. Finally, it found that Marshall's statements were "the product of a free and unconstrained will, reflecting a deliberateness of choice as opposed to the result of a conspicuously unequal confrontation." These findings are supported by the testimony of the detectives and [psychologist] Dr. Collins. The findings are thus not clearly erroneous.

[2] Marshall's trial counsel had the recordings of Marshall's interviews transcribed and counsel filed the transcripts with the Milwaukee County Clerk of Courts. The transcripts were not received into evidence at the suppression hearing. Trial counsel never presented the audio recordings to the circuit court. During the direct appeal, we granted counsel's motion to supplement the record with the hearing exhibits (noting that no exhibit five was marked or admitted at the hearing). We further noted that the four transcripts of Marshall's interviews were already part of the record and that supplementation of the record with those items was unnecessary. Finally, we determined that supplementation of the record with the audio recordings did not appear to be appropriate because there was no indication they were played or otherwise presented during the suppression hearing; however, we stated that counsel could renew his supplementation request if he believed that the recordings were necessary. Counsel did not renew his request, the recordings were not included in the appellate record, and we did not review the recordings on direct appeal.

Our determination that the record on appeal supported the denial of Marshall's suppression motion is the law of the case. *See* ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783. The law of the case doctrine binds the circuit court and appellate court to apply a decision on a legal issue in subsequent proceedings in the circuit court or on later appeals. ***Novell v. Migliaccio***, 2008 WI 44, ¶64, 309 Wis. 2d 132, 749 N.W.2d 544. Marshall cannot successfully claim his counsel was ineffective for failing to admit into evidence the very transcripts we reviewed on appeal and which we concluded supported the circuit court's denial of Marshall's suppression motion.

A court may disregard the law of case doctrine when "extraordinary circumstances" exist, such as where the initial decision was clearly erroneous and would work a manifest injustice. ***State v. Stuart***, 2003 WI 73, ¶29, 262 Wis. 2d 620, 664 N.W.2d 82. However, Marshall has failed to show extraordinary circumstances justifying the reversal of our judge-authored opinion that was based on a full review of the record on appeal. After reviewing the evidence of record, including the transcripts, we concluded the circuit court properly denied Marshall's suppression motion. Thus, even if Marshall's ineffective assistance claim were not barred under the law of the case doctrine, it would fail because Marshall cannot prove he was prejudiced by trial counsel's failure to secure admission of the transcripts. *See* ***Strickland v. Washington***, 466 U.S. 668, 693 (1984).

Marshall argues that "[e]ven if the law of case doctrine were applicable, it can and should be disregarded here because, with all due respect, this Court's review of the transcripts as fact was in error." Marshall contends we are precluded from making any factual determinations where the evidence is in dispute, and "[t]his limit to appellate jurisdiction effectively mandates it

is beyond the constitutional authority of the court of appeals to engage in any kind of fact finding."

Again, Marshall is mistaken. The suppression motion was thoroughly litigated in the circuit court. The circuit court's findings of fact were based on witness testimony and other nontranscript documents at the suppression hearing. Those were the findings at issue on direct appeal. We affirmed the court's decision that the police did not violate Marshall's right to remain silent and that his statements were voluntary. In doing so, we relied in part upon the very transcripts Marshall claims the circuit court should have considered. Any facts contained in the transcripts not elicited during testimony at the hearing were nevertheless considered by this court in reviewing the denial of the suppression motion. However, we did not review the record to find facts. Instead, we concluded the record on appeal supported the court's findings of fact. We determined the record showed the circuit court's findings were not clearly erroneous and, therefore, the fact the court did not have the transcripts at the time of the suppression hearing did not affect the outcome of the hearing. Marshall was not prejudiced by counsel's failure to introduce the transcripts at the suppression hearing, nor by appellate counsel's failure to claim Marshall's trial counsel provided deficient performance for that reason.

Furthermore, Marshall fails to develop a nonconclusory argument that the recordings of the interviews—as distinct from the transcripts—were inaccurate or that inclusion of any portion of the recordings would have made a difference. We will not abandon our neutrality to develop arguments and we will not consider conclusory arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

In his reply brief, Marshall argues a few minor differences between the transcripts and recordings, but they are nothing of significance to the suppression determination. For example, Marshall illustrates in his reply brief a purported inaccuracy between the transcript of the interview and the recording: "The transcript reads: '[w]hen they going to be able to take me up to that [indecipherable]' but the audio recording reveals that Marshall asked when he would be taken to 'Watertown Plank Road.'" However, Marshall fails to indicate how this minor difference was of any significance to the suppression determination. Marshall also contends in his reply brief that "[t]he recordings differed from what the suppression court heard, and contained facts clearly showing police violated Marshall's rights." However, in support of this contention Marshall merely cites generally to multi-page documents such as "R98," which is a twenty-page circuit court document entitled "Motion to Withdraw Guilty Plea." We are unable to discern from this document specific instances in which the recordings of the interviews—as distinct from the transcripts—were inaccurate. In any event, we are not required to fish through voluminous documents for evidence to support a party's arguments. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127. Appellate briefs must give references to pages of the record on appeal for each statement and proposition made in appellate briefs. *See* WIS. STAT. RULE 809.19(1)(d), (e) and (4)(b). In addition, Marshall fails to point to any portion of the recordings where tonal or demeanor issues support his suppression claim. Thus, Marshall cannot demonstrate the alleged errors in failing to admit the transcripts or recordings were prejudicial, and his claim of ineffective assistance would fail even if it were not barred by the law of the case doctrine.

Because we conclude Marshall's claim is barred by the law of the case doctrine, we need not reach other issues raised. These issues include Marshall's claim that the State is judicially

estopped from arguing that this court considered the transcripts because it previously argued in a federal court habeas proceeding that "the transcripts were not in the record so that the habeas court could not consider them …." In addition, we need not reach Marshall's contention that he was entitled to an evidentiary hearing on his postconviction motion. We also need not reach the State's argument that Marshall's attempt to relitigate his suppression claims under the rubric of ineffective assistance of counsel is barred by ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991).

Therefore,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals