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DISTRICT IV

January 23, 2020

To:

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Circuit Court Judge
Jefferson County , Branch 4
311 S. Center Ave.
Jefferson, WI 53549

Hon. Randy R. Koschnick
Circuit Court Judge
Jefferson County Courthouse
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Jefferson, WI 53549

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

2018AP1908-CR State of Wisconsin v. Equinees A. Boyles (L.C. # 2015CF425)

Before Fitzpatrick, P.J., Blanchard and Kloppenburg, 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).

Equinees Boyles appeals a judgment of conviction and an order denying his motion for postconviction relief.[1] Based upon our review of the briefs and record, we conclude at

[1] The Hon. Randy Koschnick presided over the trial and entered the judgment of conviction. The Hon. Bennett J. Brantmeier entered the order denying the defendant's postconviction motion.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] The issue is whether his trial counsel was ineffective by not pursuing a suppression issue. We affirm.

Boyles pled no contest to one count of possession of cocaine with intent to deliver. In his postconviction motion he sought to withdraw his plea on the ground that his trial counsel was ineffective at the suppression hearing by not seeking suppression of a statement Boyles made at the police station after his arrest. After hearing argument and reviewing a video recording of what took place at the police station, the circuit court denied the motion.

The State makes two arguments that we should not reach the merits. They are based on the fact that Boyles obtained a new attorney after entering his no contest plea and before sentencing. Neither argument is well developed, and we reject both.

The State argues that Boyles forfeited his ineffective assistance claim against his first attorney because he did not move to withdraw his plea before sentencing. The State cites no legal authority for the proposition that the lack of a plea withdrawal motion before sentencing may operate as a forfeiture of ineffective assistance claims that are based on events that occurred before the plea. While the plea itself is generally held to be a forfeiture of nonjurisdictional defenses and defects, ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886, we are not aware of law to the effect that a guilty or no contest plea, or the failure to move to withdraw such a plea, forfeits postconviction claims of ineffective assistance. Instead,

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

postconviction motions seeking plea withdrawal based on ineffective assistance that occurred before the plea are commonplace.

The State also argues that Boyles' claim of ineffective assistance is incomplete because he does not also allege that his *second* attorney was ineffective by not recognizing the alleged error by the first attorney and taking steps to correct it. This argument appears to be founded on an unstated assumption that second counsel had a duty to review decisions made by prior counsel, such that it would be deficient performance for second counsel not to conduct that review, or to fail to recognize first counsel's earlier error. However, the State has not developed a legal argument that such a duty exists.

Turning to the merits, Boyles argues that his trial counsel should have sought suppression of a statement that Boyles made at the police station after his arrest. The circuit court did not hold an evidentiary hearing, but instead reviewed a video of pertinent events at the station and concluded that Boyles' statement was not made in response to the functional equivalent of interrogation, and therefore a suppression argument would have failed.

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because there was no evidentiary hearing, on appeal we consider whether Boyles was entitled to such a hearing because his motion alleged facts which, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). This is a question of law we review without deference to the circuit court. ***Id.***

On appeal, the parties do not dispute that at the time of his statement Boyles was in custody but had not been given a ***Miranda*** warning. *See* ***Miranda v. Arizona***, 384 U.S. 436

(1966). They also agree that in such a situation the legal test is whether "the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect." ***State v. Cunningham***, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988).

Boyles argues, and the State does not dispute, that we may review the police video de novo. We do so.[3]

The statement at issue occurred while an officer was conducting a search of Boyles at the police station. Early in the search the officer found a bag in Boyles' shirt pocket. Later, the officer found another bag in Boyles' pants pocket. While placing the second bag on a nearby counter, the officer said words to the effect of "got another one there." Boyles responded several seconds later by saying "we bought 25 of them."

The officer's statement about finding another bag was clearly not itself a question, in a linguistic sense. It was a statement that described an observed event as it occurred. The officer's tone did not have the vocal indicators that are often related to the asking of a question. The officer's tone was calm and even, and not different from their previous exchanges. The officer's tone was not confrontational. The officer did not hold the bag up for Boyles to see, and did not make eye contact with Boyles in a way that suggested he was seeking a response from Boyles. The officer did not pause what he was doing, as if waiting for a response, but instead he continued to search.

[3] The State argues that we should accept the circuit court's findings because Boyles did not include the video recording in the appellate record. The State is incorrect. The DVD containing the video is in the record as item number 32.

We conclude that the officer's statement and related conduct were not reasonably likely to elicit an incriminating response. The officer only made an observation. And, while words of the type used might plausibly have the force of a question if accompanied by a tone or other conduct that show a desire by the officer for the person to respond to the observation, no such tone or conduct was present here.

Boyles argues that we must view this exchange in the context of the exchanges before it, in which the officer made observations about the situation and Boyles responded. In that light, Boyles argues, it is reasonable to think Boyles would have responded again when the officer made the observation at issue. However, this argument fails because the test is whether the officer's words and conduct were likely to elicit an *incriminating* response, not just any response. Boyles' earlier responses were not incriminating, and there is nothing about the specific exchange at issue that reasonably suggests Boyles would begin to make incriminating responses at that point.

Accordingly, we conclude that Boyles has not alleged facts which, if true, entitle him to relief. Even if his attorney had moved to suppress the above statement, such a motion would have failed, and therefore Boyles was not prejudiced by his trial counsel's performance and is not entitled to relief.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* 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