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DISTRICT II

March 3, 2021

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

2019AP102-CR State of Wisconsin v. Charles Brown (L.C. #2014CF375)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Charles Brown appeals from a judgment convicting him of possessing heroin with intent to deliver and from an order denying his postconviction motion.[1] Based upon our review of the

[1] We deem the appeal to be taken from the December 11, 2014 judgment of conviction and the January 2, 2019 circuit court order denying postconviction relief.

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] We affirm.

Brown pled guilty to possessing with intent to deliver heroin found on his person during a traffic stop. After sentencing, Brown filed two WIS. STAT. RULE 809.30 postconviction motions. The first motion alleged ineffective assistance of trial counsel for failing to file a motion to suppress because the traffic stop was unreasonably extended to conduct a canine sniff and the deputy's frisk was unlawful because he lacked reasonable suspicion that Brown was armed. The circuit court denied the motion after an evidentiary hearing.

Brown's second postconviction motion argued that his trial counsel was ineffective for the reasons discussed above, and he added an additional ground: the scope of the frisk was unreasonably extended to his crotch, where he had hidden the heroin. Citing ***Brady v. Maryland***, 373 U.S. 83 (1963), Brown also argued that the State intentionally withheld exculpatory evidence in the form of Officer Swart's incident report from the traffic stop. The circuit court denied the second postconviction motion without an evidentiary hearing because the court had already rejected Brown's ineffective assistance of trial counsel claim based on counsel's failure to file a motion to suppress.[3] On appeal, Brown argues that he should have had an evidentiary hearing on his second postconviction motion.

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

[3] Brown did not argue his ***Brady v. Maryland***, 373 U.S. 83 (1963), claim to the circuit court at the second postconviction motion hearing. The circuit court did not address the claim when it denied the motion.

The circuit court had the discretion to deny the postconviction motion without a hearing if the motion was legally insufficient. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Allen, 274 Wis. 2d 568, ¶12 (footnote omitted).

We agree with the circuit court that Brown's ineffective assistance of trial counsel claim relating to the motion to suppress was raised and rejected on the merits in his first postconviction motion. After an evidentiary hearing, the circuit court found that trial counsel was credible, counsel discussed a motion to suppress with Brown, but Brown elected to cooperate with law enforcement in the hope of obtaining consideration and a reduced bond. The circuit court determined that Brown made a strategic decision to forego a motion to suppress.[4] Therefore, the second postconviction motion, which added another ineffective assistance of trial counsel claim relating to the motion to suppress, was merely an attempt to relitigate an issue already decided. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding" even if rephrased). Because the record conclusively demonstrated that Brown was not entitled to relief on the ineffective assistance of trial counsel claim made in his second postconviction motion, the

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[4] "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

circuit court properly exercised its discretion when it denied the claim without an evidentiary hearing.

We turn to Brown's claim that the State's failure to disclose Officer Swart's report constituted a ***Brady*** violation. As stated, Brown did not argue the ***Brady*** violation at the hearing on his second postconviction motion, and the circuit court did not address the claim when it denied the motion. Furthermore, the police report is not included in the record before this court,[5] hindering our ability to review the circuit court's decision to reject the claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider matters outside the record). Brown's appellant and reply briefs do not counter the State's argument that the absence of Officer Swart's report from the record places it outside our review. We assume Brown concedes the defect in the record and the consequences for his argument to this court. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (where a party on appeal does not address an issue raised by the opponent, we assume the party concedes the issue).

Even if the ***Brady*** claim were properly before this court and assuming without deciding that the police report says what Brown contends it says, we would conclude that the report was neither material nor exculpatory, hallmarks of the ***Brady*** analysis. ***State v. Lock***, 2012 WI App 99, ¶93, 344 Wis. 2d 166, 823 N.W.2d 378. As the State persuasively argues from the police report appearing in the appendix to its brief, the report recounts that the responding deputy had

[5] We acknowledge that the State includes the report in the appendix to its respondent's brief. However, Brown's argument relating to this report is not supported by record references as required by the Rules of Appellate Procedure. WIS. STAT. RULE 809.19(1)(d) and (e) (2017-18).

safety concerns and when he patted Brown down, the deputy felt something "suspicious" in Brown's crotch that "could very well be a weapon." The deputy unzipped Brown's pants to retrieve the suspicious item and Officer Swart, who was wearing gloves, then offered to remove the large, wrapped object from Brown's crotch. The wrapped object was heroin. The report reinforces that the deputy decided to conduct a pat-down search due to safety concerns during the traffic stop. The report cannot be characterized as exculpatory. ***Lock***, 344 Wis. 2d 166, ¶93.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to 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