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DISTRICT I

July 25, 2023

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

2022AP18-CR State of Wisconsin v. Telvin C. Voss (L.C. # 2017CF5460)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Telvin C. Voss, *pro se*, appeals a judgment of conviction entered upon his pleas of no contest to two counts of second-degree reckless homicide as a party to a crime. He also appeals an order denying postconviction relief. Voss alleges that he was selectively prosecuted and that his trial counsel was ineffective for failing to raise that claim. Upon review of the briefs and

record, we conclude that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

Cody Hein, the victim of one of the homicides, obtained heroin with the assistance of his friend, Aaron, a fellow drug user.[2] Aaron purchased the heroin from Voss and shared the drugs with Hein; Hein overdosed and died. Following Hein's death, Aaron participated in a controlled buy of narcotics from Voss. Police then arrested Voss, who was found with more than fifteen grams of a narcotics mixture that included heroin and more than ten grams of cocaine. At the time of the arrest, laboratory results had not yet determined the precise cause of Hein's death, and the State, therefore, charged Voss solely with delivery and possession of controlled substances. Voss posted bail and was released from confinement, while the investigation into Hein's death continued.

Approximately two months after posting bail, Voss was selling narcotics to Andrew, a drug user, when Daniel Freeb approached and asked to purchase heroin. Andrew vouched for Freeb, who handed some money to Andrew. Andrew passed Freeb's money to Voss, and in exchange, Voss handed a packet of purported heroin to Andrew. Andrew passed the packet to Freeb, who later consumed the drugs and died.[3] Following Freeb's death, Andrew participated in several controlled buys of narcotics, including a buy from Voss. Police subsequently re-arrested Voss,

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] We refer to the homicide victims by their full names. *Cf.* WIS. STAT. RULE 809.86. We refer to the drug users who survived by their first names alone.

[3] The record reflects that Freeb died due to acute fentanyl intoxication.

and the State charged him, as a party to a crime, with two counts of first-degree reckless homicide in violation of WIS. STAT. § 940.02(2)(a), often referred to as the "Len Bias" law.[4]

Represented by trial counsel, Voss resolved his case with a plea agreement, pursuant to which he pled no contest to two reduced charges of second-degree reckless homicide as a party to a crime.[5] Voss then pursued postconviction relief *pro se*. As relevant here, Voss claimed that he was selectively prosecuted in light of the fact that the State did not bring criminal charges against either Aaron or Andrew; and Voss claimed that his trial counsel was ineffective for failing to assert selective prosecution on his behalf. The circuit court denied Voss's claims without a hearing. Voss appeals.

As a preliminary matter, we explain our analytical approach. "'A selective-prosecution claim is ... an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.'" ***State v. Kramer***, 2001 WI 132, ¶15, 248 Wis. 2d 1009, 637 N.W.2d 35 (citation omitted). However, a defendant's guilty or no-contest plea normally results in a forfeiture of all nonjurisdictional defects, including alleged constitutional violations. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. We, therefore, analyze Voss's selective prosecution claim under the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

[4] The legislature enacted WIS. STAT. § 940.02(2), after a student athlete, Len Bias, died from a cocaine overdose. *See* ***State v. Patterson***, 2010 WI 130, ¶37, 329 Wis. 2d 599, 790 N.W.2d 909. Pursuant to the statute, anyone who provides a fatal dose of a controlled substance may be prosecuted for first-degree reckless homicide. *See* ***id.***

[5] Pursuant to the plea agreement, additional charges of delivery of narcotics and bail jumping were dismissed.

We assess claims of ineffective assistance of counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The test requires the convicted person to show both a deficiency in counsel's performance and prejudice as a result. *See* ***id.*** at 687. To satisfy the deficiency prong, the person must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To satisfy the prejudice prong, the person "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

A defendant claiming ineffective assistance of counsel must seek to preserve counsel's testimony at an evidentiary hearing, *see* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998), but the defendant is not automatically entitled to a hearing, *see* ***State v. Allen***, 2004 WI 106, ¶¶13-14, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, a circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, "sufficient material facts that if, true, would entitle the defendant to relief." *See* ***id.***, ¶¶14, 27. This presents a question of law for our independent review. *See* ***id.***, ¶9. If, however, the postconviction motion does not include sufficient allegations of material fact that, if true, entitle the defendant to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review discretionary decisions with deference. *See* ***id.***

A court may begin its review of an ineffectiveness claim by first considering either the deficiency prong or the prejudice prong of the ***Strickland*** test, and if the defendant has failed to make a sufficient showing as to one prong, the court need not discuss the other. *See* ***Strickland***, 466 U.S. at 697. Here, we start with the deficiency prong, which in this case is determinative.

Because trial counsel does not perform deficiently by failing to bring a meritless motion, *see* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16, Voss was required to set forth, within the four corners of his postconviction motion, sufficient material facts to show that his selective prosecution claim had merit. *See* ***Allen***, 274 Wis. 2d 568, ¶¶14, 27. He did not do so.

A prosecutor has "almost limitless" discretion regarding whether and what to charge. *See* ***State v. Kenyon***, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978). Nonetheless, there are some constitutional limitations on prosecutorial discretion. *See* ***County of Kenosha v. C & S Mgmt., Inc.***, 223 Wis. 2d 373, 400, 588 N.W.2d 236 (1999). "The decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion,' or the exercise of protected statutory or constitutional rights." ***Id.*** at 400-01 (citing ***Wayte v. United States***, 470 U.S. 598, 608 (1985)). Under ***Wayte***, we evaluate a claim of selective prosecution under ordinary equal protection standards. *See* ***County of Kenosha***, 223 Wis. 2d at 401. These standards require the defendant "to show that the prosecution 'had a discriminatory effect and was motivated by a discriminatory purpose.'" ***Id.*** at 401 (citation and ellipsis omitted).

To show discriminatory effect, a defendant must demonstrate that he or she was singled out for prosecution and that others who were similarly situated were not prosecuted. *See* ***Kramer***, 248 Wis. 2d 1009, ¶20. "Defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making prosecutorial decisions with respect to them." ***Id.*** (citations, brackets, and quotations marks omitted).

Voss failed to demonstrate that he was situated similarly to Aaron and Andrew. First, Voss sold drugs for profit. He did not show that either Aaron or Andrew similarly did so. Second, Voss

reaped a benefit from the transactions with Hein and Freeb. By contrast, Voss did not show that either Aaron or Andrew benefitted in any way from those transactions. Third, the record shows that Aaron assisted police by participating in a controlled buy of narcotics and that Andrew assisted police by participating in several such controlled buys. Voss did not show that he provided any similar assistance to law enforcement. Fourth, Voss was responsible for two deaths. He did not show that either Aaron or Andrew was similarly involved in serial homicides. Fifth, Voss continued to engage in criminal activity, while on bail for drug-related charges. Voss did not demonstrate that either Aaron or Andrew was similarly incorrigible. Accordingly, Voss was situated differently from Aaron and Andrew.

Voss disagrees, contending that no meaningful differences distinguish his circumstances from those of Aaron and Andrew. In support, Voss points to ***State v. Johnson***, 74 Wis. 2d 169, 246 N.W.2d 503 (1976), a case involving prosecutions for prostitution. Voss misunderstands ***Johnson*** and the applicable analysis.

Johnson involved review of a circuit court order that dismissed charges against two female prostitutes on the ground that the State had violated equal protection by failing to charge their male client. *See* ***id.*** at 171. As a component of the analysis, our supreme court acknowledged that "[w]hile an argument can be made that a prostitute and the patron are not similarly circumstanced because of the commercial aspects, we do not believe that fact standing alone can be controlling." ***Id.*** at 173. Rather, "[t]he principal fact is that both parties have violated a sexual morality statute. If women prostitutes are consistently prosecuted and men patrons are consistently not prosecuted, without valid prosecutorial discretion, the equal protection clause is violated." ***Id.*** The ***Johnson*** court ultimately reversed the circuit court's order dismissing the charges against the women and remanded for a hearing, concluding that the "isolated facts of this case [were] insufficient" to

warrant dismissal of the charges and explaining that, to warrant relief for the women, "[t]here must be some showing of persistent failure to prosecute men as well as women involved in prostitution." ***Id.*** at 175.

Voss fastens on to the ***Johnson*** court's recognition that distinctions based on the commercial aspects of an illicit transaction, standing alone, are insufficient to demonstrate that the participants in the transaction are not similarly circumstanced. Voss misunderstands this principle to mean that a prosecutor cannot consider such distinctions. Therefore, he reasons, because he, Aaron, and Andrew all participated in delivering narcotics, the State violated equal protection principles by prosecuting only the "for-profit drug dealer." Voss is wrong.

The State does not run afoul of the equal protection clause by differentiating between the roles played by participants to a criminal transaction. To the contrary:

> There may be valid prosecutorial reasons for prosecuting a prostitute and not the patron under given circumstances such as organized commercial prostitution, immunity from prosecution to testify, and others. Nor can one or few isolated incidents of failure to prosecute both [the payee and the payor] be sufficient grounds to escape prosecution for a criminal act upon equal protection grounds.

Id. at 174. Accordingly, to escape prosecution based on the State's failure to prosecute another person, the defendant must "show[] that the failure to prosecute was selective, persistent, discriminatory and without justifiable prosecutorial discretion." ***Id.***

The record here, however, reveals multiple reasons justifying the prosecutor's discretionary decision to bring charges against Voss, but not against Aaron and Andrew. As we have discussed, Voss alone among the three men profited from the fatal drug transactions, was implicated in serial deaths, and did not provide assistance to law enforcement. Each of these

factors is a legitimate basis for a district attorney's exercise of prosecutorial discretion. *See* ***Thompson v. State***, 61 Wis. 2d 325, 329 n.1, 212 N.W.2d 109 (1973) (noting that the extent of the harm caused and the cooperation of the subject in the apprehension or conviction of others are among the factors for a prosecutor's exercise of discretion); ***State v. Annala***, 168 Wis. 2d 453, 474, 484 N.W.2d 138 (1992) (emphasizing that protection of the public at large and the best interests of the community are compelling factors in the decision to prosecute).

Further, Voss failed to demonstrate that the State was "persistent" in electing to prosecute "for profit" drug dealers, but not drug users such as Aaron and Andrew. *See* ***Johnson***, 74 Wis. 2d at 174. Rather, Voss has directed our attention to an opinion—ordered published after briefing in this matter was complete—describing circumstances where the State obtained homicide convictions against both a drug trafficker who sold lethal narcotics and against a person involved in noncommercial aspects of the delivery. *See* ***State v. Hibbard***, 2022 WI App 53, ¶¶4-5, 404 Wis. 2d 668, 982 N.W.2d 105.[6] Thus, as Voss's post-briefing submission shows, the State's charging decisions have varied with the facts of the crimes. *Cf.* ***United States v. Monsoor***, 77 F.3d 1031, 1034 (7th Cir. 1996) (reflecting that an allegation that others similarly situated were not prosecuted is defeated by evidence of similar prosecutions in other cases).

[6] Pursuant to WIS. STAT. RULE 809.19(10), Voss cited ***State v. Hibbard***, 2022 WI App 53, 404 Wis. 2d 668, 982 N.W.2d 105, after briefing was complete. We have considered that citation, his arguments regarding the case, and the State's response. We add, however, that we have not considered this court's unpublished *per curiam* opinions that Voss cited in his appellate briefs. Unpublished *per curiam* opinions of this court may not be cited except for certain limited purposes that are not applicable here. *See* WIS. STAT. RULE 809.23(3)(a)-(b). Further, we have not considered the affidavits, purportedly from convicted drug traffickers describing the circumstances of their prosecutions, that Voss included in his appellant's appendix. Those affidavits were not submitted with Voss's postconviction motion, but rather, were filed as attachments to his later circuit court reply brief. We determine the sufficiency of Voss's postconviction motion by examining only the four corners of that motion, not any subsequent briefs and attachments. *See* ***State v. Allen***, 2004 WI 106, ¶¶23, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

Voss also failed to show that his prosecution was "discriminatory." *See* ***Johnson***, 74 Wis. 2d at 174. Voss contends that the State "target[ed]" him for prosecution based on his membership in a specific class: "for-profit [drug] supplier." As the State correctly explains, however, while a prosecutor may not base a charging decision "on an impermissible consideration such as race, religion or another arbitrary classification," *see* ***Kramer***, 248 Wis. 2d 1009, ¶18, Voss has not shown that consideration of his role as a for-profit drug supplier was "impermissible." Criminals are not a protected class, *see* ***United States v. Hook***, 471 F.3d 766, 774 (7th Cir. 2006), and the State thus needed only a rational basis for differentiating between Voss in his role as a "for-profit [drug] supplier" on one hand, and Aaron and Andrew in their roles as drug users and intermediaries on the other,[7] *see* ***State v. K.E.K.***, 2021 WI 9, ¶35, 395 Wis. 2d 460, 954 N.W.2d 366. "'The test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification.'" ***Locklear v. State***, 86 Wis. 2d 603, 611, 273 N.W.2d 334 (1979) (citations omitted). A reasonable basis existed here. Voss, a persistent drug trafficker who realized a financial gain from twice selling lethal narcotics, was more culpable and presented a greater threat to the community than the drug users who purchased his supply. *See* ***Thompson***, 61 Wis. 2d at 329 n.1; ***Annala***, 168 Wis. 2d at 474.

Before concluding our discussion, we note that Voss describes himself as black and Aaron and Andrew as white. Voss's appellate briefs, however, do not develop any argument that this distinction influenced the charging decisions. To the contrary, Voss explicitly relies on his contentions that "for-profit suppliers were selectively prosecuted under Len Bias law," and that

[7] Heightened equal protection scrutiny is afforded to classifications by race, alienage, national origin, gender and illegitimacy. *See* ***City of Cleburne v. Cleburne Living Ctr.***, 473 U.S. 432, 440-41 (1985).

the State is "blindly charging only drug dealers." Accordingly, we do not consider any potential claim that the prosecutorial decisions in this case were based on race. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (explaining that we cannot serve as both advocate and judge, and therefore, we do not craft arguments for parties). Similarly, we do not consider Voss's veiled suggestions that his prosecution was somehow tainted because agents with the High Intensity Drug Trafficking Area task force were involved in the investigation. We are unable to discern a cognizable legal theory as to why such involvement was constitutionally suspect. *See* ***id.***

In sum, Voss failed to show that he had a meritorious basis for challenging the charges against him based on selective prosecution. He, therefore, failed to show that his trial counsel was ineffective for not pursuing a motion based on that meritless theory. *See* ***Sanders***, 381 Wis. 2d 522, ¶29. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of conviction and the postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals