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DISTRICT I

August 6, 2024

To:

Hon. Mark A. Sanders
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Donald V. Latorraca
Electronic Notice

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

2023AP95-CR	State of Wisconsin v. Javier O. Batista-Cabrera (L.C. # 2019CF5208)
2023AP96-CR	State of Wisconsin v. Javier O. Batista-Cabrera (L.C. # 2019CF5574)

Before Donald, P.J., Geenen and Colón, 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).

In these consolidated appeals, Javier O. Batista-Cabrera appeals judgments convicting him of burglary while armed with a dangerous weapon as a party to a crime, first-degree reckless homicide with use of a dangerous weapon, and possessing a firearm after having been convicted of a crime elsewhere that would be a felony if committed in this state. He also appeals the order denying his motion for postconviction relief.[1] Based upon our review of the briefs and the

[1] The Honorable Stephanie Rothstein denied Batista-Cabrera's pretrial suppression hearing, presided over his trial, and sentenced him. The Honorable Mark A. Sanders denied Batista-Cabrera's postconviction motion.

records, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[2] We affirm.

Background

A jury found Batista-Cabrera guilty of multiple crimes in connection with Joemil Rios-Santana's shooting death at a Milwaukee residence.[3] Before trial, and later in his postconviction motion, Batista-Cabrera asserted that officers violated his constitutional rights when they executed a search warrant at a residence where he lived with his girlfriend, Sylvia Irizarry. Inside the residence, officers found paperwork bearing Batista-Cabrera's name, and, in garbage bins outside the residence, bloody clothing and two unfired .40 caliber rounds.

Batista-Cabrera subsequently sought to suppress evidence seized during the execution of a search warrant at Irizarry's residence. At a pretrial hearing, Batista-Cabrera confirmed through counsel that he lived at the residence. Batista-Cabrera identified sweatpants and unfired bullets as the items that he wanted suppressed. He agreed that two unfired .40 caliber rounds and the sweatpants were found outside the residence in two garbage bins on the property. Batista-Cabrera clarified during the hearing that he was not seeking to suppress anything from inside the residence, including the documents bearing his name found in a bedroom.

The State represented that it only intended to use the evidence found in the garbage bins outside and did not plan to use any evidence seized from inside the residence other than

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

[3] The underlying cases against Batista-Cabrera arose out of the same home invasion and shooting incident. The cases were joined for trial.

paperwork bearing Batista-Cabrera's name. The State argued that even if an unlawful search occurred before the warrant's execution, the warrant's supporting affidavit was not based on anything the officers saw inside.

The circuit court determined that the warrant itself was valid. Because the State did not intend to use evidence seized from inside the residence, the court concluded there was nothing to suppress in that regard. With respect to the evidence that the State intended to use, i.e., the .40 caliber rounds and sweatpants found in the outside garbage bins, the court denied the motion.

In a postconviction motion, Batista-Cabrera sought reconsideration of the ruling on his pretrial suppression motion. Noting that the warrant only authorized a search of the residence, the basement, and "any storage space belonging to [the] W. Silver Spring" residence, Batista-Cabrera argued that the search of the garbage bins exceeded the scope of the search warrant. Batista-Cabrera additionally argued that the discarded items in the garbage bins were not abandoned property and he still had a reasonable expectation of privacy because the garbage bins had not been placed at the curb for pickup. Finally, in seeking reconsideration of the court's pretrial suppression order, Batista-Cabrera requested an evidentiary hearing.

The court denied the postconviction motion without an evidentiary hearing. This appeal follows.

Discussion

Batista-Cabrera argues the circuit court erred when it denied both his pretrial suppression motion and his postconviction motion asking the court to reconsider its earlier denial.

A. Search of Irizarry's Residence

On appeal, Batista-Cabrera argues that evidence obtained from a search that occurred prior to obtaining a search warrant should have been suppressed. When reviewing the denial of the pretrial suppression motion, we apply a two-step standard of review: (1) we first review the circuit court's findings of fact, and will uphold them unless they are clearly erroneous; and (2) we then "review the application of constitutional principles to those facts *de novo*." ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

In his pretrial suppression motion, Batista-Cabrera broadly asserted that officers conducted a search of Irizarry's residence before the warrant was issued. However, Batista-Cabrera did not identify with sufficient particularity any items of physical evidence located inside the residence that should have been suppressed due to the officers' alleged conduct, nor did he identify any information in the warrant's supporting affidavit that derived from the officers' allegedly unlawful search. *See* WIS. STAT. § 971.30(2)(c) (requiring a motion to "[s]tate with particularity the grounds for the motion and the order or relief sought"); *see also* ***State v. Radder***, 2018 WI App 36, ¶8, 382 Wis. 2d 749, 915 N.W.2d 180. The circuit court's finding that there was no evidence seized inside the residence that required suppression was not clearly erroneous.

Insofar as Batista-Cabrera contends the circuit court erred when it did not provide him with an opportunity to develop a record, this claims fails because Batista-Cabrera was not entitled to an evidentiary hearing. We have explained that not all motions warrant evidentiary hearings:

> Requiring particularity in a defendant's pretrial motion practice … conserves "scarce judicial resources by eliminating unnecessary evidentiary hearings when there may be no disputed facts requiring resolution, or when the facts would not warrant the relief sought even if proved." ***State v. Velez***, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999). This ensures that "the evidentiary hearing will serve as more than a discovery device." ***Id.*** Thus, a defendant is not entitled to an evidentiary hearing every time he or she makes a pretrial motion. ***Id.*** "An evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." ***Id.*** (quoting ***United States v. Sophie***, 900 F.2d 1064, 1070 (7th Cir. 1990)).

Radder, 382 Wis. 2d 749, ¶8. Batista-Cabrera failed to raise a significant, disputed factual issue as to the evidence obtained during the search of Irizarry's residence. *See* ***id.*** Consequently, the circuit court properly denied Batista-Cabrera's pretrial suppression motion without a hearing.

Batista-Cabrera goes on to argue that despite the State's pretrial assurances that it would only introduce identifying documents, the State introduced evidence of the search during trial. This argument fails for a couple of reasons. First, Batista-Cabrera does not specify what evidence was wrongly introduced. Second, it does not appear that Batista-Cabrera objected to testimony or exhibits related to the officers' search of the residence, nor does he identify any place else in the trial record where he moved to strike testimony or exhibits related to the seizure of evidence from within the residence. This court is not obligated to search the record to supply facts in support of his argument. *See* ***State v. West***, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993). We conclude Batista-Cabrera forfeited his challenge to the admission of evidence of the search that he now claims was improperly admitted at trial. *See* ***State v. Mercado***, 2021 WI 2, ¶35, 395 Wis. 2d 296, 953 N.W.2d 337.

B. Search of the Garbage Bins Outside the Residence

In his postconviction motion and on appeal, Batista-Cabrera argues a second ground for suppression: that the officers' search of the garbage bins exceeded the scope of the warrant. However, Batista-Cabrera did not make this specific argument at the pretrial hearing.[4]

During the pretrial hearing, the following exchange took place after trial counsel informed the circuit court that what the parties were "really talking about [was] the sweatpants and the cartridges" found in the garbage bins outside the residence:

> THE COURT: Okay. So where is my case on garbage searches, my legal authority?
>
> [PROSECUTOR]: …. I would just simply indicate the defense in this case is the garbage search did not occur until after the warrant occurred. It was done pursuant to the warrant. The warrant allowed them to search all areas connected to the residence.

The circuit court then inquired further with trial counsel, explaining it was "a little at a loss about the substance of your motion[, which] discusses primarily intrusion into the home, and it discusses entry into the home…. Here we're talking about evidence found outside the house[.]" In responding, trial counsel continued to remark on what happened inside the residence and did not explain his argument related to the search of the garbage bins. When it denied the motion, the circuit court explained that Batista-Cabrera did not offer any affidavits to

[4] In his reply brief, Batista-Cabrera acknowledges the shortcoming. He writes: "While the motion and [trial counsel] did not articulate a theory that seizure of the clothing and bullets outside the residence exceeded the scope of the warrant, the [circuit] court cut off the motion hearing before [trial counsel] had a full opportunity to do so." The record does not support Batista-Cabrera's assertion that the circuit court precluded trial counsel from making an argument in this regard.

support the suppression motion, only an argument that "center[ed] around items that were seized inappropriately from inside the house according to the defense."

This court is not convinced by Batista-Cabrera's assertion: "Any reasonable interpretation of [trial counsel's] remarks [at the pretrial hearing] would indicate[] that he objected to that search as outside the scope of the warrant and [because the items were] not abandoned property." When a party fails to raise an issue before the circuit court with enough specificity to allow the circuit court to correct any potential error, the party forfeits that issue on appeal. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177; ***State v. Torkelson***, 2007 WI App 272, ¶25, 306 Wis. 2d 673, 743 N.W.2d 511. Such is the case here. Batista-Cabrera forfeited his challenge that the garbage search exceeded the warrant's scope by waiting until his postconviction motion to articulate this theory.

This record conclusively demonstrates that Batista-Cabrera is not entitled to relief. Consequently, the circuit court properly denied his postconviction motion without holding a hearing.[5] *See* ***State v. Ruffin***, 2022 WI 34, ¶28, 401 Wis. 2d 619, 974 N.W.2d 432 (stating that the circuit court has discretion to deny an evidentiary hearing on a postconviction motion "[i]f the motion does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[.]").

[5] In his reply brief, Batista-Cabrera for the first time makes a "plain error" argument. *See* WIS. STAT. § 901.03(4) (allowing appellate courts to "tak[e] notice of plain errors affecting substantial rights although they were not brought to the attention of the judge"). He also argues, for the first time, that this court should exercise its discretionary power of reversal. We need not address arguments raised for the first time in a reply brief. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

Therefore,

IT IS ORDERED that the judgments and 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