STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1722-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT BRIAN SPENCER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH DONALD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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ISSUES PRESENTED

1. Was the evidence sufficient for a rational jury to find Defendant-Appellant Robert Brian Spencer guilty beyond a reasonable doubt of possession of heroin with the intent to deliver?

A jury found Spencer guilty of possession of more than ten grams but less than fifty grams of heroin with the intent to deliver.

This Court should hold that the evidence was sufficient for a rational jury to find Spencer guilty.

2. Did Spencer meet his burden of proving that trial counsel's performance was both deficient and prejudicial in several respects?

The trial court held after postconviction evidentiary hearings that Spencer failed to prove deficient performance and prejudice in any respect.

This Court should affirm.

3. Did Spencer prove that the State failed to disclose exculpatory evidence?

The State did not disclose before or at trial that one of the police officers had been disciplined five years before trial for dishonesty in a matter unrelated to this case. The trial court held on postconviction review that the evidence was not material because there was no reasonable probability of a different outcome had the evidence been disclosed to the defense before trial.

This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This appeal involves the application of established principles of law to the unique facts presented.

STATEMENT OF THE CASE

The trial testimony

On July 18, 2014, police executed a "no knock" search warrant for suspected illegal possession of firearms at 3624 North 13th Street in Milwaukee, the home where Spencer lived with Tameka Rash and their children. (R. 83:83.) Spencer was the "target" of the firearms search. (R. 83:84.)

Police executed the no-knock entry by tossing a flash-bomb or flash-grenade towards the house before entering. (R. 83:83, 114; 84:7, 35; 86:61–62, 87.) Within thirty seconds of the blast, two police officers working containment outside the house (namely, Milwaukee Police Officers Jason DeWitt and Ryan McElroy) saw the hand of what appeared to be an African-American person throw what turned out to be a purple Crown Royal Canadian Whisky bag over a six-foot-tall fence along the north end of the yard into the neighbor's yard. (R. 84:7–8, 34–36, 39; 85:21–23, 31–33.) The bag contained fifty corner-cut baggies filled with heroin and a digital scale. (R. 84:22; 85:7–8, 24–26; 86:33.) Officer McElroy retrieved the purple Crown Royal bag from underneath a patio table in the neighbor's yard seconds after he saw it being thrown over the fence. (R. 85:32–33.)

Police found two more digital scales in the southeast corner of Spencer's yard near a deck (R. 85:16, 40), and found in the basement of the house more Crown Royal bags and two open boxes of sandwich bags (R. 85:38).

The Crown Royal bag was tossed from an area near two dog kennels along the fence on the north side of the

yard, and near a storage shed in the northwest corner of the yard. (R. 83:87, 89, 106.) When the rear containment officers arrived, they saw Spencer standing in the north end of the yard between the two dog kennels. He was the only adult male in the yard. (R. 83:89, 114–15, 121–22, 129.) Police found inside the storage shed two more purple Crown Royal bags, a box of sandwich bags, four balloons, aluminum foil, and ammunition for a .380 caliber handgun. (R. 84:13–15, 19–20.) Spencer admitted to police that the items found inside the storage shed were his. (R. 84:29.) Spencer said the ammunition was for a gun that he admitted was his and that police found underneath his bed. (R. 86:91–92, 99.) The door to the shed was unlocked that day. (R. 86:67, 85.)

The heroin inside the tossed bag weighed 39.4292 grams. (R. 86:51.) It had a street value of $4,000 in bulk or, if sold in individual corner-cut baggies, of approximately $8,000. (R. 86:39–40.) The State's expert witness on heroin use and dealing rendered the opinion that the heroin found inside the Crown Royal bag was intended for delivery. (R. 86:42.)

Spencer and Tameka Rash had been in a nine-year relationship and were living together in the 13th Street house at the time of the search on July 18, 2014. Rash testified that she was in the backyard but ran inside the house when she heard the blast. (R. 86:61–62.) Also in the yard, according to Rash, were Spencer's daughter, Beatrice Young, Kenneth Wooten, Jerry Little, and "Al." (R. 86:62–63.) Rash testified that Spencer was in the bathroom and ran outside when he heard the blast. (R. 86:64, 65–66.) Rash said she passed Spencer coming out through the rear door as she ran inside the house. (R. 86:74.)

Milwaukee Police Officer Joel Susler testified that Tameka Rash told him the gun found in the bedroom belonged to Spencer, she first saw it a few days earlier, and she told Spencer to get rid of it. (R. 86:105–06.) When Susler

confronted Rash with the discovery of heroin, Rash began sobbing and said she had told Spencer they did not need the money and to "leave that alone." (R. 86:107.)

Spencer testified and denied possessing heroin or throwing the heroin over the fence. He claimed that the heroin belonged to one of the men in the yard, and he did not know who threw it because he was inside the house at the time. (R. 86:92.) Spencer testified that he was in the bathroom when he heard the blast and ran outside to protect his daughter and her child. (R. 86:87.) He passed Tameka Rash on the way out as she was coming inside. (R. 86:93.) Spencer explained that he was out in the yard earlier with his daughter and Albert but went inside to use the bathroom. (R. 86:89.) Spencer denied being anywhere near the fence or the dog kennels. (R. 86:99.) Spencer claimed he knew who threw the bag over the fence, it was one of the other men in the yard, but it was not him. (R. 86:92, 95.) Spencer did not identify who threw the heroin over the fence or who owned it.

Defense counsel conceded to the jury in closing argument that Spencer was a convicted felon and that he illegally possessed the .380 handgun found under his bed. (R. 86:137–38.) "This case is about the heroin," counsel argued. (R. 86:138.) After acknowledging that both Officers McElroy and DeWitt saw a hand throwing the purple bag of heroin over the fence and that McElroy immediately recovered it in the neighbor's yard on the other side of the fence, defense counsel did not dispute that someone threw the bag over the fence shortly after police arrived. (R. 86:140.) He argued instead that there was plenty of time for one of the other men in the yard to retrieve the heroin (presumably from the shed) and throw it over the fence. (R. 86:143.) Acknowledging that none of the three men testified, counsel explained they would not have admitted if called to the stand that the heroin was theirs or that any of

them threw it. They would have denied any connection with the heroin. This, counsel argued, was a matter of "common sense." (*Id*.)

The jury found Spencer guilty as charged of being a felon in possession of a firearm and possession of a controlled substance in an amount greater than ten grams but less than fifty grams with intent to deliver. (R. 15; 86:153.) The trial court sentenced Spencer to concurrent terms of (on the drug count) ten years of initial confinement followed by five years of extended supervision and (on the firearm count) two years of initial confinement followed by three years of extended supervision. (R. 87:38.) The judgment of conviction was entered on December 6, 2014. (R. 23.)

The postconviction proceedings

On July 20, 2016, Spencer filed a postconviction motion alleging that the State failed to disclose exculpatory evidence of disciplinary action taken against Officer DeWitt, that trial counsel was ineffective in several respects, and that the evidence was insufficient to convict Spencer of possession of heroin with the intent to deliver. (R. 45.) The State filed a brief in opposition (R. 51), and Spencer filed a reply brief (R. 58).

Spencer's motion challenged the effectiveness of trial counsel for not calling as a defense witness Spencer's daughter, Beatrice Young, who was with him in the yard holding her baby (R. 83:104, 127; 84:28); and for not calling the three men who were working on cars on a parking slab just outside the yard: Kenneth Wooten, Jerry Little and Albert Medley, any of whom may have been connected with the heroin and thrown it over the fence. (R. 45:24–25; 83:103; 86:62–63; 88:13–18; 89:9.) The motion also challenged trial counsel's effectiveness for not sufficiently

challenging Officer DeWitt's ability to see the hand throwing the bag of heroin over the fence. (R. 45:23–24.)

In a written decision issued on December 6, 2016, the trial court denied the motion in part and ordered an evidentiary hearing into the above ineffective assistance challenges. (R. 62, A-App. 102–09.)

The motion also challenged trial counsel's effectiveness for not filing a pretrial suppression motion challenging the search on the ground that there were insufficient facts to support issuance of a "no knock" search warrant. (R. 45:9–14.) The trial court denied this aspect of the ineffective assistance challenge without an evidentiary hearing because police reasonably relied in good faith on a judge's decision to issue a "no knock" warrant based on the judge's finding that there was probable cause to believe Spencer, a convicted felon, was selling firearms. So, had counsel filed a suppression motion, it would have failed. (R. 62:3–5, A-App. 104–06.)

The court next rejected without an evidentiary hearing Spencer's challenge based on *Brady v. Maryland*, 373 U.S. 83 (1963), that the State failed to disclose disciplinary action taken in 2009, five years before trial, against Officer Jason DeWitt, one of the two officers who claimed to have seen a hand throwing the purple bag over the fence. (R. 45:17–20.) The court held that DeWitt's suspension for "failure to be attentive and zealous in the discharge of his duties" on an unrelated matter (R. 51:5), had little probative value and there was not a reasonable probability of a different result given that another officer also witnessed the bag being thrown over the fence. (R. 62:5–6, A-App. 106–07.)

Finally, the trial court rejected Spencer's challenge to the sufficiency of the evidence to convict him of possession of a controlled substance with the intent to deliver. (R. 45:15–16.) It held that the evidence was sufficient for a rational

jury to find him guilty beyond a reasonable doubt. (R. 62:7–8, A-App. 108–09.) "While evidence is circumstantial, it was more than sufficient evidence for the jury to find beyond a reasonable doubt that the heroin belonged to the defendant." (R. 62:8, A-App. 109.)

The ineffective assistance evidentiary hearing

The court held four *Machner* evidentiary hearings into the ineffective assistance challenges (other than that regarding counsel's failure to file a suppression motion) on February 24, March 8, June 9, and July 14, 2017.

Trial counsel, Benjamin Peirce, testified that Tameka Rash told him Kenneth Wooten and Al Medley were heroin dealers who stored their heroin inside Spencer's storage shed in the yard. Rash told Peirce how to contact them. (R. 88:44–45; 89:6–8.) Peirce testified that Spencer also told him the heroin in the bag belonged to one of the two men. (R. 88:17; 89:9–10.) Attorney Peirce tried to contact all three men–Wooten, Medley and Little–by knocking on doors, leaving business cards at their addresses, and making telephone calls or sending text messages, all to no avail. (R. 88:13–14, 46; 89:6–8, 23.) As Peirce earlier explained at sentencing, he tried to get the three men to testify, but they "made themselves scarce and unavailable" to testify. (R. 87:19.) They likely would not have admitted any connection to the heroin even if they had testified, he added. (*Id*.)

Of the three men, only Albert Medley testified at the June 9, 2017, postconviction hearing. Medley testified that he was Spencer's neighbor from two doors down and was in Spencer's backyard when he heard the boom from the flash-bomb. (R. 91:9.) Medley could not recall whether Spencer was in the yard or inside the house when the blast occurred. (R. 91:9–10.) He did not know where Spencer was when the blast occurred. (R. 91:14, 18.) An investigator for the Public

Defender testified that Medley gave an unsworn statement in December 2015 to the effect that Spencer was inside the house at the time of the blast. (R. 91:27.) Medley also told the investigator that his roommate, "Jerry," was working on a car in the alley and that Spencer's daughter was in the yard with him, but then Medley thought that she might have been inside the house. (R. 91:27.)

As did trial counsel, Spencer's postconviction counsel tried to contact Albert Medley (and presumably the other two men) through an investigator by telephone and by leaving a business card at his last known address. (R. 91:25, 31–32, 33–34.) He was able to produce only Medley to testify. (R. 91:8.) Kenneth Wooten avoided service and did not testify. (R. 91:34.) Jerry Little also did not testify at the postconviction hearing for reasons unexplained by Spencer. Although Spencer told Attorney Peirce that these three men would corroborate his account (R. 88:45), Peirce did not believe that these men would be good defense witnesses because they would deny any involvement with the heroin. (R. 88:15, 23, 25–26.) Peirce said he achieved his main objective of establishing through other witnesses at trial the critical undisputed fact that these three men were in or near the yard when the search occurred and could have thrown the heroin over the fence before Spencer came back outside. (R. 88:23.)

Attorney Peirce testified that he spoke to Spencer's daughter, Beatrice Young, but did not call her to testify at trial because he did not believe she would be a good witness for the defense; she, too, faced charges (later dropped) as the result of the search. (R. 88:12, 28, 30–32; 89:14–15.) Young told police that Spencer was in the yard alone with her and her child at some point, but also that he came out of the house after the blast, and she did not see what Spencer did thereafter because her back was turned to him. (R. 88:30; 89:24–25.) Peirce believed that Young's testimony would not

have changed the fact that, seconds after the blast, police saw Young and Spencer in the yard and that Spencer was the only adult male near to the fence over which someone threw the bag containing the heroin. (R. 88:34.) Young's testimony would not have helped, in Peirce's view, because it would have placed Spencer near the fence around the time that someone threw the heroin over it. (R. 89:14–15.) Peirce testified that he tried to establish through Tameka Rash's and Spencer's testimony that Spencer did not come back outside until after the heroin was thrown over the fence. (R. 88:35–36.)

Spencer also challenged trial counsel's effectiveness for not showing the jury during trial, or having sent into the jury room during deliberations, a photograph of a mature tree near the area of the fence where the bag was thrown. The defense investigator took photographs some time in 2015 showing a mature tree near the fence that, Spencer claims, would have obstructed the view of Officer DeWitt, preventing him from seeing a hand throw the bag over the fence. (R. 45:37–39; 89:29–31.) In its December 6, 2016, written decision, the trial court found as fact that it was "not persuaded that these photographs demonstrate that officers could not have seen a hand throwing a bright purple bag over the six foot fence." (R. 62:8, A-App. 109.) The court, however, allowed Spencer to develop this issue further at the evidentiary hearing. (*Id.*)

Attorney Peirce explained that he went out to the scene and took his own cell phone photographs. Police also turned over to the defense many photographs of the scene in discovery. (R. 88::12.) Peirce cross-examined Officer DeWitt and showed him a photograph with the tree in it. DeWitt claimed he was still able to see the hand despite the tree but could not tell if it was a male or female hand. (R. 89:17–18.) Peirce did not pursue the matter any further because the ability of Officers DeWitt and McElroy to observe was, by

their own accounts, limited. (R. 88:38–39.) Rather than contest whether police saw anyone throw the bag over the fence, Peirce took the strategic approach of pointing out that the officers did not see *Spencer* throw the bag, they could not identify who threw it, and anyone else in the yard could have thrown it before Spencer came back outside. (R. 88:39; 89:13.) For that reason, Peirce did not believe it was necessary to challenge any more than he did DeWitt's ability to observe the hand on cross-examination. (R. 88:40.)

The trial court's decision

The trial court denied the motion in an oral decision from the bench. It determined that Spencer failed to prove both deficient performance and prejudice in any respect. (R. 92:33–35, A-App. 110–12.) He failed to prove prejudice because, even if the three men and Beatrice Young had testified, their confusing and inconsistent accounts of whether or when Spencer was in the yard would not have aided the defense much. (R. 92:35, A-App. 112.) The trial court next rejected Spencer's claim that trial counsel should have more aggressively challenged DeWitt's ability to observe based on the photographs taken some time in 2015 by the defense investigator. The court was unconvinced that the photographs taken by the defense investigator some time during 2015 accurately reflected how the area of the yard near the fence looked on July 18, 2014. (*Id.*)

On July 27, 2017, the trial court issued a written order denying the motion for the reasons stated at the close of the fourth evidentiary hearing and in its written decision issued on December 6, 2017. (R. 72, A-App. 101.)

Spencer now appeals from the judgment of conviction and the order denying postconviction relief. (R. 76.)

SUMMARY OF THE ARGUMENT

The circumstantial evidence, when it is viewed most favorably to the State and the conviction, strongly supported the jury's verdict finding Spencer guilty of possessing heroin with the intent to deliver. A reasonable jury could have found beyond a reasonable doubt that, in the chaos after police exploded a flash-bomb to initiate the "no knock" search of his house, Spencer ran to his unlocked shed, retrieved the Crown Royal bag containing the heroin individually packaged for delivery, and threw it over the six-foot fence into his neighbor's yard. It was Spencer's hand that Officers McElroy and DeWitt saw throw the bag containing the heroin over the fence.

Spencer failed to meet his burden of proving deficient performance and prejudice to substantiate any of his challenges to trial counsel's effectiveness. Had counsel succeeded in producing the three men who were situated on a parking slab just outside the yard, they would not have helped the defense cause. None of them was likely to admit to throwing the heroin over the fence or to having any connection whatsoever with the heroin. The only man who did testify at the postconviction hearing, Albert Medley, could not recall whether Spencer was in the yard when the flash-bomb went off.

Spencer's daughter, Rebecca Young, also would not have provided helpful testimony. Young placed Spencer in the yard with her and her child both shortly before and shortly after the blast. She would have corroborated the police testimony that she was with Spencer, the only adult male in the yard, as containment officers approached the house.

Counsel sufficiently challenged Officer DeWitt's ability to observe a hand throwing the bag over the fence despite the presence of a mature tree near the fence. Even if

DeWitt's ability to observe may have been obstructed by the tree, Officer McElroy saw the same thing from the other end of the fence.

The trial court properly denied without an evidentiary hearing Spencer's challenge to the effectiveness of trial counsel for not filing a suppression motion to challenge the validity of the "no knock" search warrant. The motion would have failed because: (a) the warrant application alleged sufficient facts for the issuing judge to authorize a "no knock" entry; and (b) police acted in good faith reliance on the judge's decision to authorize a "no knock" entry even if in hindsight there was an insufficient basis for it.

Finally, the State did not fail to disclose material exculpatory evidence. The 2009 disciplinary action against Officer DeWitt for "failure to be attentive and zealous in the discharge of his duties" in an unrelated matter, had little probative value with regard to DeWitt's general credibility here. Any adverse impact it might have had on DeWitt's credibility would have been greatly diminished by Officer McElroy's corroborative testimony to the effect that, like DeWitt, McElroy saw a hand throw the bag over the fence. Officer McElroy then immediately retrieved the bag containing the heroin packaged for sale from the neighbor's yard. There is no reasonable probability of a different verdict if DeWitt admitted at trial that he was disciplined five years earlier for "failure to be attentive and zealous in the discharge of his duties."

STANDARD OF REVIEW

1. On review of a challenge to the sufficiency of the evidence to convict, this Court must uphold the verdict unless, after viewing the evidence in the light most favorable to the State and the conviction, it finds that no rational jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

2. On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of fact and law. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2). The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was deficient and prejudicial—are questions of law subject to independent review in this Court. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis. 2d 121, 127–28, 449 N.W.2d 845 (1990).

3. This Court independently reviews the constitutional issue whether the State denied Spencer due process by failing to disclose exculpatory evidence, but in light of the not-clearly-erroneous historical facts as found by the trial court. *State v. Sturgeon*, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). *See also State v. Rockette*, 2006 WI App 103, ¶ 39, 294 Wis. 2d 611, 718 N.W.2d 269 (the reviewing court independently applies the *Brady* constitutional standard to the undisputed facts).

ARGUMENT

I. When it is viewed most favorably to the State and the conviction, the evidence was sufficient to find Spencer guilty of possession of heroin with the intent to deliver.

A. This Court must review the jury's verdict with great deference.

This Court, "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt."

Poellinger, 153 Wis. 2d at 507. If the jury could possibly "have drawn the appropriate inferences from the evidence" to find the defendant guilty, this Court must uphold the verdict "even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.*

When more than one inference can reasonably be drawn from the evidence, the inference that supports the fact-finder's verdict must be the one followed by this Court on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). This Court may overturn the verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

The trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *Poellinger*, 153 Wis. 2d at 506. It is exclusively within the fact-finder's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985). The standard for review is the same whether the verdict is based on direct or, as here, circumstantial evidence. *Poellinger*, 153 Wis. 2d at 503.

An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial. *Poellinger*, 153 Wis. 2d at 505–06. "It is not the role of an appellate court to do that." *Id.* at 506. *See State v. Steffes*, 2013 WI 53, ¶ 23, 347 Wis. 2d 683, 832 N.W.2d 101 (citing *Poellinger*, 153 Wis. 2d at 505–06, for the proposition that an appellate court will uphold the verdict "if any reasonable inferences support it").

"This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence

that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

B. A rational jury found Spencer guilty of possession of the heroin thrown into his neighbor's yard with the intent to deliver.

Someone threw the purple Crown Royal bag containing 39.4 grams of heroin in small, individually packaged, corner-cut baggies and a digital scale from Spencer's yard over the six-foot fence into the neighbor's yard shortly after police began executing the search warrant at Spencer's house. (R. 84:22; 85:7–8, 24–26; 86:33.) A jury could reasonably infer that Spencer possessed the heroin with the intent to deliver, and he threw it over the fence to avoid detection.

The evidence, when viewed most favorably to the State and the conviction, showed the following:

Whoever owned the heroin possessed it with the intent to deliver it. (R. 86:42.) It had a street value when sold in individual corner-cut packets of approximately $8,000. (R. 86:39–40.) The heroin was thrown from Spencer's property, likely packaged there and kept inside his unlocked storage shed along the north fence near to where police saw the bag of heroin being thrown. Spencer admitted that everything inside the shed belonged to him. (R. 84:29.) These items included: two more Crown Royal bags, sandwich bags similar to those used to package the heroin, aluminum foil, four balloons, and ammunition for the .380 caliber handgun police found inside the house that Spencer also admitted was his. (R. 84:13–15, 19–20, 28; 85:5; 86:91–92, 99.) Police found two more digital scales in the southeast corner of Spencer's backyard near a deck. (R. 85:16, 40–41, 43–44.) Police found

in the basement of Spencer's house more Crown Royal bags and two open boxes of sandwich bags. (R. 85:38.)

As they arrived to execute the search warrant, police saw only Spencer and his daughter (with her child) in the yard. Spencer was positioned near the dog kennels along the north fence. (R. 83:89, 104–07, 114–15, 120, 121–22, 127, 129.) Three other men were working on cars parked on a slab outside the yard. They were not close to where police saw the bag being tossed over the fence. (R. 83:103, 120.) Tameka Rash told police that she had implored Spencer not to mess with heroin because they no longer needed the money. (R. 86:107.)

A rational jury could draw reasonable inferences from this circumstantial evidence to find beyond a reasonable doubt that this was Spencer's heroin, he kept it on his property with the intent to sell it, he ran to the unlocked storage shed as soon as he heard the blast commencing the police search of his house, he grabbed the Crown Royal bag that he knew contained the packets of heroin, and he threw it into his neighbor's yard. It was Spencer's hand, not someone else's, that police saw throwing the bag over the fence. This rational jury's verdict must stand because it is supported by circumstantial proof beyond a reasonable doubt of Spencer's guilt.

II. Spencer failed to prove that trial counsel's performance was deficient and prejudicial in any respect.

A. The law applicable to an ineffective assistance challenge

Spencer bore the burden of proving that the performance of his trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Johnson*, 153 Wis. 2d at 127.

To prove deficient performance, Spencer had to overcome a strong presumption that counsel acted reasonably within professional norms. *Strickland*, 466 U.S. at 690; *Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 127. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583. *See Eckstein v. Kingston*, 460 F.3d 844, 848–49 (7th Cir. 2006) (same). Decisions that fall squarely within the realm of strategic choice are not reviewable under *Strickland*. *United States v. Cieslowski*, 410 F.3d 353, 361 (7th Cir. 2005). *See Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009). "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690).

The reviewing court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee*, 589 F.3d at 356. Spencer was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *Id.* at 355–56. *See State v. Wright*, 2003 WI 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386 (same). Ordinarily, a defendant does not prevail unless he proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

Regarding prejudice, Spencer bore the burden of proving that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. He had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *McAfee*, 589 F.3d at 357. *See Trawitzki*, 244 Wis. 2d 523,

¶ 40; *Johnson*, 153 Wis. 2d at 129. Spencer could not speculate. He had to affirmatively prove prejudice. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

Trial counsel is not ineffective for failing to interpose meritless objections at trial. *E.g.*, *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12.

The reviewing court need not address both the deficient performance and prejudice components if Spencer failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Spencer failed to prove deficient performance and prejudice caused by trial counsel's inability to locate the three men on the parking slab or by counsel's decision not to call Beatrice Young as a witness.

1. Counsel's failure to call the three men working on the parking slab outside the yard

Counsel tried everything he could to locate, interview, and perhaps call as defense witnesses the three men who were working on cars on the parking slab adjacent to Spencer's yard when police executed the search warrant on July 18, 2014. He went to the addresses provided by Spencer and Tameka Rash, he knocked on doors and left business cards, he then tried to telephone or text message them, all to no avail. They were not interested in cooperating. (R. 87:19; 88:13–14, 46; 89:6–8, 23.)

Spencer argues that counsel should have done more, but does not explain what that should have been. Postconviction counsel did precisely what trial counsel did; he went to their last known addresses and left business cards. He was only able to produce one of the three men, Albert Medley. (R. 91:8, 25, 31–32, 33–34.) Kenneth Wooten avoided service and did not testify. (R. 91:34.) Jerry Little did not testify for reasons unexplained by Spencer. Spencer failed to prove deficient performance.

Spencer failed to prove prejudice. Neither trial nor postconviction counsel could produce Kenneth Wooten or Jerry Little. They were bent on avoiding service of process to testify at trial and at the postconviction hearing. They would likely do the same at any retrial. Postconviction counsel could only produce Albert Medley. His testimony would be useless at any retrial. Medley testified under oath at the postconviction hearing that he had no idea where Spencer was when the search commenced. (R. 91:9–10, 14, 18.) His contradictory, unsworn statement to a defense investigator in December 2015 that Spencer was inside the house when the blast occurred has little probative value. (R. 91:25–26.)

Finally, as trial counsel sensibly explained to the jury, had they testified at trial, these three men were not about to get on the witness stand and admit under oath to either owning the heroin or throwing it over the fence. (R. 86:143.) Spencer failed to prove a reasonable probability of a different verdict had Medley, Wooten or Little testified at trial.

2. Counsel's decision not to call Beatrice Young

Spencer failed to prove deficient performance in counsel's decision not to call Beatrice Young as a defense witness. Young would have confirmed the police testimony that she was in the yard with her baby along with Spencer around the time of the flash-bomb blast, and that Spencer

was again with her in the yard shortly after the blast (R. 45:40–41; 51:18–19; 92:7–8, 11–12.) Young said in her statement to police that she and Spencer were the only adults in the yard at the time of the blast. (R. 45:40; 51:18–19.) This would not have helped the defense.

Even if the jury were to believe Young that Spencer went inside the house shortly before the blast and came back out seconds after the blast, it could also have reasonably found that Spencer had sufficient time after running back outside to go to his unlocked shed, grab the bag of heroin, and throw it over the fence while containment officers were still getting situated in this rapidly-developing scenario. Spencer acted quickly enough so that, though police officers were surrounding the house, they were only in position to see an unidentified person's hand throwing the bag over the fence. Spencer failed to prove a reasonable probability of a different verdict had counsel called Spencer's obviously biased daughter to present such shaky testimony.

C. Spencer failed to prove deficient performance and prejudice arising out of counsel's alleged failure to adequately challenge Officer DeWitt's ability to observe.

Office Jason DeWitt was shown photographs of the yard on direct and testified that they accurately depicted how the yard appeared on July 18, 2014, when he saw a hand throwing the Crown Royal bag over the fence. (R. 84:8–9.) Counsel for Spencer cross-examined DeWitt about his ability to observe the hand throwing the bag over the six-foot fence given the presence of a tree. (R. 84:32–40; 85:4–7.) His attack was based on photographs of the scene counsel showed to DeWitt depicting a mature tree near the north fence. (R. 84:36–39.) Spencer complains that counsel should have done more to show that the tree would have obstructed DeWitt's view. DeWitt, however, insisted that he was able to

see the hand despite the tree and any other obstructions. (R. 84:39.)

Attorney Peirce had no reason to doubt DeWitt's ability to observe the hand given that another police officer positioned on the other end of the fence, McElroy, saw the same hand throw the same bag over the same fence. Unlike DeWitt, McElroy immediately ran into the neighbor's yard and retrieved the bag of heroin he had just seconds earlier seen being thrown over the fence. (R. 85:21–24.) Spencer does not challenge counsel's performance with regard to McElroy's ability to observe.

Given the strength of McElroy's corroborating testimony and the undeniable fact that the heroin somehow ended up in the neighbor's yard (presumably the bag did not sprout wings and fly over the fence on its own), Spencer failed to prove deficient performance and prejudice in how counsel chose to cross-examine Officer DeWitt about his ability to observe the bag being tossed over the fence.

Spencer also argues that trial counsel should have shown the photographs to the jury that he showed to DeWitt when he cross-examined DeWitt about his ability to observe the hand. (Spencer's Br. 23–24.) Spencer bases that argument on the photographs taken by his investigator some time in 2015. He goes so far as to falsely argue the trial court made the factual finding that the photographs, "demonstrate that the officers could not have seen the bag being thrown over the fence." (Spencer's Br. 24.) The trial court found the exact opposite: "Further, the court has reviewed Exhibits 23 and 24 in conjunction with the pictures attached to the defendant's motion, and it is not persuaded that these photographs demonstrate that officers could not have seen a hand throwing a bright purple bag over the six foot fence." (R. 62:8, A-App. 109.) The photographs taken contemporaneously by police, introduced into evidence at trial, and shown to DeWitt were not of the same dismal

quality as those provided by the defense investigator. (*Compare* R. 12:1; 13:11; 13:12, and 13:16 *with* 45:37–39.)

Any photographs would have been of little assistance to the jury in assessing DeWitt's credibility, especially those taken by the defense investigator. Spencer does not explain why, even with a mature tree near the fence as depicted in the photographs introduced by the State, Officers DeWitt and McElroy could not possibly have seen a hand throwing the purple bag over the fence.

D. Trial counsel was not ineffective for deciding against filing a meritless suppression motion.

As the trial court ruled on postconviction review, a suppression motion challenging the basis for issuing a "no knock" warrant would have been denied. This is because (a) the warrant was likely valid or, if not, (b) the good faith exception to the exclusionary rule would have applied. (R. 62:3–5, A-App. 104–06.)

The issuing judge may draw reasonable inferences from the facts asserted in the affidavit. The inferences drawn need not be the only reasonable ones. The issue is whether the inferences drawn by the issuing judge were reasonable. *E.g.*, *State v. Ward*, 2000 WI 3, ¶ 30, 231 Wis. 2d 723, 604 N.W.2d 517; *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305.

Reviewing courts are to give "great deference" to the issuing judge's probable cause determination; it must stand unless the defendant proves that the facts were "clearly insufficient" to support the probable cause finding. *State v. Marquardt*, 2005 WI 157, ¶ 23, 286 Wis. 2d 204, 705 N.W.2d 878 (citing *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)). The issuing judge's decision must stand if there is a substantial basis for it. This deferential standard of review is in line with the "Fourth Amendment's strong

preference for searches conducted pursuant to a warrant." *State v. Schaefer*, 2003 WI App 164, ¶ 4, 266 Wis. 2d 719, 668 N.W.2d 760. *See Ward*, 231 Wis. 2d 723, ¶¶ 21–24; *State v. Lindgren*, 2004 WI App 159, ¶¶ 15–16, 19–20, 275 Wis. 2d 851, 687 N.W.2d 60.

When giving deferential review in the close case, the reviewing court should resolve all doubts in favor of the issuing judge's probable cause determination. *Lindgren*, 275 Wis. 2d 851, ¶ 20. Also, because warrant applications "[A]re normally drafted by non-lawyers in the midst and haste of a criminal investigation. . . . [t]echnical requirements of elaborate specificity . . . have no proper place in this area." *Higginbotham*, 162 Wis. 2d at 991–92 (citation omitted). *See Ward,* 231 Wis. 2d 723, ¶ 32. There must be a sufficient factual basis under the particular circumstances for the judge to authorize entry without knocking and announcing. *See State v. Eason*, 2001 WI 98, ¶ 18, 245 Wis. 2d 206, 629 N.W.2d 625 (citing *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)). This warrant application satisfied those minimal standards.

The warrant application alleged sufficient facts to show there was probable cause to believe that Spencer, a convicted felon, had recently sold a firearm to a confidential informant. Police asked for "no knock" authorization given that firearms were involved. These factual allegations were sufficient to cause the reviewing judge to issue both the warrant and authorization for police to enter the house without knocking and announcing because there were sufficient facts alleged to cause him to believe that firearms were present and might be used against them if police knocked and announced their presence. (R. 45:30–33, A-App. 115–20.)

If, in hindsight the warrant was overly broad, suppression was not justified because the officers executing the warrant reasonably relied in objective good faith on the

neutral and detached judge's decision to issue the warrant and authorize a "no knock" entry. *United States v. Leon*, 468 U.S. 897, 913 (1984); *Marquardt,* 286 Wis. 2d 204, ¶¶ 24–26; *Eason*, 245 Wis. 2d 206, ¶ 63.

The officers who executed the search, "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Leon,* 468 U.S. at 921. The warrant application was presented to the judge only after it set forth probable cause for the search based on a significant police investigation, and after it was independently reviewed and approved by a Milwaukee County Assistant District Attorney. *Marquardt*, 286 Wis. 2d 204, ¶¶ 44–47; *Eason*, 245 Wis. 2d 206, ¶ 63. (R. 45:33, A-App. 120.) Because police reasonably relied on the judicially-issued "no knock" warrant in objective good faith, the exclusionary rule does not come into play and the evidence seized was properly held admissible.

In sum, Spencer failed to prove deficient performance and prejudice because counsel was not ineffective for deciding against bringing a meritless suppression motion. *Berggren*, 320 Wis. 2d 209, ¶ 21.

E. The trial court properly exercised its discretion when it denied Spencer's request for a postconviction suppression hearing.

Spencer complains that the trial court should have ordered a suppression hearing on postconviction review even though Spencer did not move for one pretrial. This argument is meritless for the following reasons: Spencer's postconviction counsel had every opportunity to ask trial counsel at the *Machner* hearing why he did not file a suppression motion, but failed to do so. The law presumes, therefore, that trial counsel decided against a suppression

motion for sound strategic reasons. *Strickland*, 466 U.S. at 690; *Maloney*, 281 Wis. 2d 595, ¶ 43. It is likely that trial counsel recognized the motion would have failed because he anticipated that the trial court would either uphold the warrant as valid, or rule that, even if invalid, the good faith exception applies and the evidence would remain admissible.

The trial court, in its discretion, may summarily deny a postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the movant is not entitled to relief. *State v. Balliette*, 2011 WI 79, ¶¶ 50, 56–59, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Bentley*, 201 Wis. 2d 303, 309–11, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972).

The trial court properly exercised its discretion in denying Spencer's request for the suppression hearing on postconviction review that Spencer did not request pretrial. He failed to prove the suppression motion had merit, especially given the "good faith" exception. (R. 62:3–5, A-App. 104–06.) For the reasons set forth immediately above, the record conclusively shows that Spencer is not entitled to relief because the suppression motion would have rightly failed. There was no need for a postconviction suppression hearing.

III. Spencer failed to prove that the prosecution breached its duty to disclose material exculpatory evidence regarding Officer DeWitt.

A. The law applicable to a prosecutor's duty to disclose exculpatory evidence

Under the Fourteenth Amendment, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. *See State v. Nerison*, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). The *Brady* rule is codified in the Wisconsin discovery statute, Wis. Stat. § 971.23(1)(h).

To establish a *Brady* violation, the defendant must make three showings: (1) the State "suppressed" the evidence in question from the trial; (2) the evidence in question was "favorable" to the defendant; and (3) the evidence was "material" to the determination of the defendant's guilt or punishment. *Brady*, 373 U.S. at 87; *Socha v. Richardson*, 874 F.3d 983, 987 (7th Cir. 2017).

With respect to the "suppression" element, due process "requires production of [exculpatory] information which is within the exclusive possession of state authorities." *State v. Sarinske*, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979). With respect to whether the evidence in question is "favorable" to the defense, the *Brady* rule extends to evidence that may be used to impeach the credibility of a prosecution witness. *Nerison*, 136 Wis. 2d at 54–56; *Socha,* 874 F.3d at 988. Finally, evidence is "material" and, therefore, must be disclosed, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). *See Banks v. Dretke*, 540 U.S. 668, 698, 702–03 (2004); *Socha*, 874 F.3d at 989 (same). The mere possibility that the evidence might have helped the defense does not meet the materiality standard. *State v. Harris*, 2004 WI 64, ¶ 16, 272 Wis. 2d 80, 680 N.W.2d 737.

The harmless error rule also applies to proven *Brady* violations. *See United States v. Agurs*, 427 U.S. 97, 103

(1976) (the harmless error rule applies even in situations where the undisclosed evidence showed that the prosecutor knew or should have known that his case included perjured testimony).

B. Spencer failed to prove that the disciplinary action involving Office DeWitt in an unrelated matter that occurred five years before trial was material.

Officer Jason DeWitt was disciplined in 2009 for "failure to be attentive and zealous in the discharge of his duties" in an unrelated matter. (R. 45:36.) The trial court correctly held that there is no reasonable probability of a different verdict had defense counsel impeached DeWitt with this information. (R. 62:6, A-App. 107.)

The 2009 disciplinary action against DeWitt in an unrelated 2008 incident does nothing to discredit the more important corroborative testimony of Officer McElroy, who not only also saw a hand throwing a purple bag over the fence, but he then immediately retrieved the bag from underneath a patio table in the neighbor's yard where it was thrown. Spencer seems to imply that DeWitt made up his testimony because he was dishonest five years earlier, but he does not argue that McElroy also made up his completely corroborative testimony. Officers Mengel and McBride also testified that Spencer was the only adult male they saw in the yard as they approached. (R. 83:104–07, 114–15, 121–22, 127, 129.)

Someone threw the bag over the fence. DeWitt could not identify who that was. Neither could McElroy. Their testimony did not undermine the defense theory that one of the other three men in or near the yard threw the bag over the fence, and Spencer ran out of the house in response to the blast only after the bag had been thrown. Spencer failed to prove a reasonable probability of a different result had

DeWitt admitted on cross-examination that he was disciplined for not being "attentive and zealous in the discharge of his duties" on an unrelated matter five years earlier.

It follows that any error was harmless even if the disciplinary action against DeWitt was exculpatory and should have been turned over to the defense before trial. Spencer did not dispute at trial that someone in the yard threw the bag over the fence or that the heroin inside of it was possessed by someone with the intent to deliver. The only issue was whether Spencer threw the bag.

DeWitt did not testify that Spencer threw it. He was unable to identify who threw the bag. Impeaching DeWitt's credibility with proof that he was found to have been dishonest in an unrelated matter five years before trial would have had no conceivable impact on the jury's assessment of the credibility of his testimony, fully corroborated by McElroy, on the undisputed point that some unidentified person threw the bag over the fence. Beyond a reasonable doubt, any potential *Brady* violation was harmless. *State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). *See generally State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 22nd day of August, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,257 words.

Dated this 22nd day of August, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of August, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General