Collateral attack between blue sheets (CM p 34 of 82) Brief's appendix of Defendant-Appellant)

II. Trial counsel rendered ineffective assistance by failing to adequately challenge the Court's jurisdiction of Rogers's trial on felony charge dismissed and without probable cause

Count 6 of the original Criminal Complaint charged that Rogers, on or about Friday, July 28, 2006, in the City and County of Racine, as a party to a crime, with intent to steal, did take property from the person or presence of the owner, Richard R. Therkelsen, by use or threatening use of a dangerous weapon, contrary to Wis. Stat. §§ 943.32 (2), 939.50 (3) (c), 939.05 -- a Class C Felony (R. 1:2). A preliminary hearing was held on May 6, 2009, where the State advised the Court that:

> If it will save time, I don't think I could prove-up Count 6. I would be willing to dismiss that to shorten the hearing up-

(R. 72:18). However, the Circuit Court dismissed the Count (id). Four months later, the State filed an Amended Crimianl Complaint (labeled: 2nd Amended Criminal Complaint), recharging Rogers with the dismissed Count (R. 4) (enumerated as Count 4). That same day, the State filed a 2nd Amended Information which also included the dismissed Count, as Count 4 (R. 5).

Subsequently, Rogers was appointed ne counsel (R. 22; 80; 81:2), and on October 18, 2010, new attorney, Douglas I Henderson, requested permission to challenge the State's 2nd Amended Information (R. 86:2). One

month later, counsel filed Rogers's objection to the State's request to amend and motion to admit other acts evidence (R. 32). The objection regarded a 2nd Amended Information that included, as Count 4, a previously dismissed charge, in violation of Wis. Stat. § 971.29 and Whitaker v. State, 83 Wis. 2d 368 (1978) (R. 32:1). It was asserted that:

> The doctrine of judicial estoppel should act as a bar to prevent the State from asserting inconsistent positions.

(R. 32:2) (citing State v. Petty, 201 Wis. 2d 337 (1995).

This assertion is based on the misconception that the State made the "decision to dismiss" -- what was previously Count 6 in the original Criminal Complaint -- "at the preliminary hearing" (R. 32:2). But as noted above, the Court had dismissed that Count. See Ante at 26.

In a multiple-count complaint, the District Attorney is required to establish probable cause as to each transactionally distinct count, State v. Akins, 198 Wis. 2d 495, 506 (1996), because it is necessary for the Circuit Court to find probable cause as to each. State v. Williams, 198 Wis. 2d 479, 484 n. 3 (1996). And when counts are ordered dismissed, facts arising therefrom may not be the basis for any count in a subsequent Information pursuant to Wis. Stat. Chap. 971, see Wis.

Stat. § 970.03 (10), except that "the district attorney may file another complaint if the district attorney has or discovers additional evidence." Wis. Stat. 970.04.

But when a District Attorney issues another Complaint for a charge that was dismissed at a previous preliminary examination for a lack of probable cause, when challenged, the District Attorney "should summarize for the court how, in his or her judgment, the new or unused evidence will support a finding of probable cause. Such a procedure gives the judge an opportunity to assess the reasonableness of the State's effort to pursue a second preliminary examination." State v. Brown, 96 Wis. 2d 258, 267 (1980).

In the instant case, Rogers's attorney objected to the State's request to file a 2nd Amended Information; not the issuance of "another Complaint." Thus, trial counsel was deficient in failing to "challenge" the real issue of controversy. At any rate, Wis. Stat. § 971.01 (1) "requires the prosecutor to file an information containing only charges based on evidence presented at the preliminary hearing. State. v. Burke, 148 Wis. 2d 125, 128-29 (Ct. App. 1988) (citing Whitaker, 83 Wis. 2d at 373; Lofton v. State, 83 Wis. 2d 472, 482, (1978); and State v. Hooper, 101 Wis. 2d 517, 534 (1981)). Here, the State filed another Complaint and Amended Information

incorporating a Count that was previously dismissed by the Circuit Court for a lack of probable cause, without presenting any additional evidence or pursuing a "second preliminary examination." Had trial counsel made this challenge there is a reasonable likelihood that based on these facts and law, Rogers would not have proceeded to trial on the dismissed Count. See Asmus, 324 Wis. 2d 427 (Ct. App. 2010); Armstrong, 55 Wis. 2d 282 (1972) (When a second preliminary examination had not been had the Trial Court lost personal jurisdiction on the recharged Count).

Trial counsel's deficient performance was prejudicial because: (1) the failure to object that probable cause was not found before trial commenced waived the issue. See Wis. Stat. § 971.31; Bailey v. State, 65 Wis. 2d 331, 345 (1974); and (2) Rogers was convicted of an alleged crime for which no probable cause had been found (R. 91:86) (the dismissed Count 4 of the 2nd Amended Complaint was renumbered as Count 1 in a 4th Amended Information). See State v. Street, 202 Wis. 2d 533, 546 (Ct. App. 1996) (holding that the "attorney's failure to object when the trial court did not satisfy this requirement was prejudicial . . . , [because] there was not probable cause to believe that" a felony was committed).