COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1179-CR **Cir. Ct. No. 2012CF49**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER ALLEN SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: J. DAVID RICE, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham, and Kloppenburg, JJ.

¶1 PER CURIAM. Christopher Schmidt appeals a judgment of conviction and an order that denied Schmidt's postconviction motion. Schmidt argues that his counsel was ineffective at his suppression hearing by failing to attempt to impeach the testifying officer with statements in the officer's police

report. Schmidt argues that statements in the report contradicted the officer's testimony and established that the officer conducted an unreasonable search, requiring suppression. For the reasons set forth below, we conclude that counsel was not ineffective at the suppression hearing. We affirm.

¶2 Schmidt was charged with manufacturing a controlled substance, possession of a controlled substance, possession of drug paraphernalia, and disorderly conduct, with a domestic abuse enhancer. The charges arose from a police investigation of a report of a disturbance in Schmidt's apartment. Schmidt moved to suppress the evidence obtained during the investigation, arguing that the evidence was obtained as the result of an illegal search.

¶3 At the suppression hearing, the State presented testimony by the investigating officer, Josh Kenworthy, which included the following. Kenworthy responded to the report of a disturbance at Schmidt's apartment and made contact with another occupant of the apartment, J.P. Kenworthy asked J.P. to move from the living room to the kitchen to sign paperwork related to the incident. While Kenworthy and J.P. were walking from the living room to the kitchen, Kenworthy observed a box covered with bandanas wedged between a gas fireplace and the wall. Kenworthy believed that the box was a fire hazard in that location. Kenworthy asked J.P. what the box was, and J.P. responded that it was a fish tank. Kenworthy then said to J.P., "Could you take it out of there, please?" J.P. took the box from behind the fireplace, removed the bandanas, and brought the box to the kitchen. In the kitchen, Kenworthy was able to see that the box was a fish tank, and that psilocybin mushrooms were growing inside the tank.

¶4 Schmidt argued that an unconstitutional search occurred when Kenworthy directed J.P. to move the tank, citing ***State v. Hicks***, 480 U.S. 321

(1987). He argued that the police action of directing J.P. to move the box was equivalent to the police moving the box, and that moving an item to inspect it absent probable cause violates the Fourth Amendment under ***Hicks***.

¶5 The circuit court made findings of fact that were generally consistent with Kenworthy's testimony. The court found that Kenworthy observed in plain view the box covered with bandanas behind the gas fireplace, and that Kenworthy directed J.P. to remove the box to prevent a fire hazard. The court noted that there was no evidence that J.P. was directed to do anything other than remove the box and bring it to the kitchen. The court stated that, had the officer removed the bandanas or directed J.P. to remove the bandanas covering the box, the case would arguably fall under ***Hicks***. However, the court found that there was no evidence that the officer had either removed the bandanas or directed J.P. to remove the bandanas and that, once J.P. removed the bandanas, the illegal mushrooms were in plain view. Thus, the court reasoned, the police acted legally in seizing the evidence. Schmidt then reached a plea agreement with the State and pled no contest to manufacturing a controlled substance and possessing a controlled substance, and the remaining charges were dismissed and read in for sentencing purposes.

¶6 Schmidt filed a postconviction motion for plea withdrawal, arguing that he was denied the effective assistance of counsel in pursing his suppression motion. Schmidt argued that his counsel performed deficiently at the suppression hearing when counsel failed to attempt to impeach Kenworthy with his report. Schmidt cited the following language in Kenworthy's report as contradicting Kenworthy's suppression hearing testimony:

> [J.P.] said it was a fish tank. I asked if she could take it from behind the fireplace *so I could look at it*. [J.P.] did

> take that item from behind the fireplace. I asked if she could bring it to the kitchen with us *so I could see it in the light*."

Schmidt argued that Kenworthy's testimony that J.P. removed the bandanas without being directed to do so was inconsistent with Kenworthy's account in the report indicating that Kenworthy instructed J.P. to remove the box so that Kenworthy could look at it. Schmidt argued that he was prejudiced by counsel's deficient performance because use of the report as impeachment material would have established that Kenworthy directed J.P. to remove the box from behind the fireplace so that Kenworthy could look at the contents,[1] constituting an unreasonable search under ***Hicks***.

¶7 The circuit court held a ***Machner***[2] hearing on Schmidt's claim of ineffective assistance of counsel. Schmidt's trial counsel testified that she did not attempt to impeach Kenworthy with the statements in his report because, at the time, she did not believe that the report contradicted Kenworthy's testimony. Counsel explained that, at the time of the suppression hearing, she believed that Kenworthy's testimony was consistent with his report because, according to both the testimony and the report, Kenworthy directed J.P. to move the box because Kenworthy believed it was a fire hazard. Thus, counsel explained, she did not utilize the report because, at the time, she did not recognize the report to be inconsistent with Kenworthy's testimony.

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[1] While the parties are not always precise in discussing the box as opposed to the contents of the box, it is clear from the context of this case that the dispute is whether the police report would have provided evidence that Kenworthy directed J.P. to reveal the contents of the box.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 The circuit court found that the account in the report that Kenworthy directed J.P. to remove the box and bring it to the kitchen so that Kenworthy could see it in the light could not reasonably be interpreted to mean that Kenworthy directed J.P. to remove the bandanas from the box to expose its contents. Thus, the circuit court found, the account in the report was consistent with Kenworthy's testimony that he directed J.P. to remove the box because it was a fire hazard and that J.P. decided on her own to remove the bandanas. The circuit court found that, because Kenworthy's report was not inconsistent with his testimony at the suppression hearing, trial counsel's performance was not deficient when counsel failed to attempt to impeach Kenworthy with the report at the suppression hearing. The court also found that, had counsel used the report, the outcome of the suppression hearing would have been the same. For those reasons, the circuit court denied the postconviction motion. Schmidt appeals.

¶9 A defendant seeking to withdraw a guilty plea after sentencing must prove "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Milanes***, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94. A manifest injustice occurs when the defendant's plea was the result of the ineffective assistance of counsel. ***State v. Washington***, 176 Wis. 2d 205, 213–14, 500 N.W.2d 331 (Ct. App. 1993). To prevail on an ineffective assistance of counsel claim, the defendant must prove that counsel's representation was deficient and that the deficient performance resulted in actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, the defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a reliable outcome; that is, "[t]he

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 687, 694.

¶10 Whether counsel's performance was deficient and whether the defendant was prejudiced both present a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633–34, 369 N.W.2d 711 (1985). We uphold the circuit court's factual findings unless those findings are clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are questions of law that we review de novo. ***Id.*** at 128.

¶11 Schmidt contends that his trial counsel performed deficiently at the suppression hearing by failing to attempt to establish, through impeachment using the report, that Kenworthy directed J.P to reveal the contents of the fish tank. Schmidt argues that, had counsel made this use of the report, the evidence would have been suppressed and Schmidt would not have pled no contest to the two controlled substances charges.

¶12 We will assume without deciding that counsel performed deficiently by failing to attempt to impeach Kenworthy with the report because the report appears to have, on its face, at least some impeachment value on a material topic. We conclude, however, that Schmidt did not meet his burden of establishing prejudice through the evidence adduced at the ***Machner*** hearing.

¶13 Both the United States and Wisconsin constitutions protect persons against unreasonable searches by police. ***State v. Guy***, 172 Wis. 2d 86, 93, 492 N.W.2d 311 (1992). Under the plain view doctrine, however, no search occurs

when police who are lawfully in their vantage point observe contraband in plain view. ***Id.*** at 101. Thus, police may lawfully seize evidence that is in plain view when they are legally in a position to view the evidence and have probable cause to believe the evidence is connected to criminal activity. ***Id.*** at 101-02.

¶14 In ***Hicks***, 480 U.S. at 323-28, the Supreme Court held that when a police officer moved an object in plain view to further inspect the object, the officer conducted a "search" requiring probable cause. ***Id.*** at 324-25. In that case, the officer was lawfully in an apartment to investigate a recent shooting and observed stereo equipment that the officer believed was out of place in the apartment; the officer moved the equipment to locate serial numbers. ***Id.*** at 323. The officer relayed the serial numbers to dispatch, and learned that the serial numbers were connected to stolen equipment. ***Id.*** The court explained that when the officer took "action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, [he] did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry." ***Id.*** at 325. On this basis, the court determined that the search and seizure of the equipment was constitutionally unreasonable, because police lacked probable cause to believe the equipment was stolen based on observations of the parts of the equipment that were in plain view. ***Id.*** at 325-28.

¶15 Here, Schmidt acknowledges that the box was in plain view when Kenworthy noticed it behind the gas fireplace, but focuses his argument on the uncontested fact that the contents of the box were not then in plain view. He argues that the statement in the police report that Kenworthy directed J.P. to remove the box so that Kenworthy could look at it establishes that Kenworthy's actions constituted a search under ***Hicks***. Schmidt points out that, if the reason for

removing the box from behind the fireplace was only to eliminate a fire hazard, there would have been no reason to further inspect the box; removing the box from its location would have been sufficient. Thus, Schmidt contends, the account in the report establishes that Kenworthy directed J.P. to remove the box so that Kenworthy could inspect it, rather than to prevent a fire hazard. Schmidt argues that, if Kenworthy directed J.P. to remove the box for the purpose of Kenworthy inspecting it, J.P. did not remove the bandanas of her own volition, but rather in compliance with the requested inspection. He contends that his trial counsel was deficient by failing to attempt to use the report to impeach Kenworthy's testimony that J.P. removed the bandanas of her own volition.

¶16 The State does not argue that Kenworthy had probable cause to seize the box as an item containing contraband when he first saw it. However, the State argues that it was J.P. who on her own decided to reveal its contents. More specifically, regarding the ineffective assistance argument Schmidt makes, the State contends that Schmidt's trial counsel did not perform deficiently by failing to attempt to impeach Kenworthy with the report at the suppression hearing because the report was not inconsistent with Kenworthy's testimony. The State points out that Kenworthy's report and testimony provided the same information, except that the report also included the language "so I could look at it." The State argues that the "so I could look at it" language is most reasonably interpreted as Kenworthy's summary of his encounter with J.P., rather than a verbatim account of their conversation. Thus, the State asserts, the police report does not purport to recount what Kenworthy told J.P., and thus does not contradict Kenworthy's testimony. The State also argues that Schmidt has not shown prejudice because the report does not establish that Kenworthy communicated to J.P. that he wanted to see the

contents of the box, and thus there is no reasonable probability of a different outcome had the report been used at the suppression hearing.

¶17 First, we reject the State's contention that the language in the report is entirely consistent with Kenworthy's testimony and therefore had no impeachment value. Clearly, Kenworthy's report was at least potentially inconsistent with his testimony by appearing to indicate that Kenworthy directed J.P. to remove the box for the purpose of Kenworthy observing its contents "in the light," rather than merely to prevent a fire hazard.

¶18 Second, however, we also reject Schmidt's contention that the report was so plainly inconsistent with Kenworthy's testimony that the existence of the report, without more, sufficiently demonstrates that suppression would have followed had counsel used the police report as impeachment material at the suppression hearing. The language in the report is ambiguous as to whether there was any communication between Kenworthy and J.P. that amounted to a direction to J.P. to reveal the contents of the box. The statements in the report that Kenworthy directed J.P. to remove the box *so he could look at it* and to bring it to the kitchen so that he could *see it in the light* may indicate that Kenworthy told J.P. he wished to see the contents of the box; but in the alternative, they may indicate merely that Kenworthy subjectively held that intent. Thus, while one reading of the report could be inconsistent with Kenworthy's testimony, the existence of a second reading that would not be inconsistent with Kenworthy's testimony indicates that, without more, Schmidt failed to establish a reasonable probability that the evidence would have been suppressed had counsel used the report to attempt to impeach Kenworthy at the suppression hearing.

¶19 It was Schmidt's burden to establish at the ***Machner*** hearing that he was prejudiced by his counsel's failure to attempt to impeach Kenworthy with the report. *See* ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515. Schmidt did not offer any evidence at the ***Machner*** hearing, such as further testimony by Kenworthy, to prove that Schmidt was actually prejudiced by counsel's failure to attempt to impeach Kenworthy with the report at the suppression hearing. Particularly in light of the fact that Kenworthy's testimony at the suppression hearing was unambiguous and undisputed, and thus there was nothing in the record to corroborate the reading that Schmidt now gives to the report, it was incumbent upon Schmidt to put forth evidence at the ***Machner*** hearing to prove the impeachment value of the report. Because Schmidt has not shown a reasonable probability of a different outcome had counsel attempted to impeach Kenworthy with the report, Schmidt's claim of ineffective assistance of counsel fails on the prejudice prong.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).