COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2794-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD E. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

EICH, J.[1] Richard E. Davis appeals from a judgment, entered after a jury trial, finding him guilty of possession of marijuana and resisting an officer, and from an order denying his motion for postconviction relief. He argues that his trial counsel was ineffective for: (1) failing to move to suppress evidence on grounds that the stop, detention and arrest were illegal; (2) failing to request a

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

"theory of defense" jury instruction; and (3) failing to adequately represent him at sentencing. We reject his arguments and affirm the judgment and order.

One of the arresting officers, City of Fitchburg Police Officer Roderick Nitzsche testified at Davis's trial. Nitzsche testified that he and his partner were dispatched to a disturbance in the basement-level of an apartment complex at 12:20 a.m. Upon entering the front lobby, he observed two men—one later identified as Davis—sitting on a staircase leading to the basement foyer area. Nitzsche also smelled a "distinct" odor of marijuana. His partner responded to the basement while Nitzsche questioned Davis regarding the disturbance. When Nitzsche requested identification, Davis indicated that it was in his car, and attempted to walk around Nitzsche towards the front entrance. Nitzsche positioned himself such that Davis could not leave, and advised Davis that a verbal identification would be sufficient. Davis said his name was Antoine Jackson. When Nitzsche asked how to spell Antoine, Davis responded by spelling A-n-t-e-r.

Nitzsche testified that as he continued to question Davis regarding the disturbance, Davis was "extremely nervous, fidgety and anxious for [Nitzsche] to leave the scene and respond downstairs." Davis again attempted to leave, and Nitzsche advised him that he needed to stay so Nitzsche could investigate what was going on.

A short time later, two back-up officers arrived in a marked squad car which was visible through the lobby window. Davis immediately indicated that he would show Nitzsche what was going on downstairs and ran "in a very fast manner" down the stairs to the basement area. He buzzed apartment number seven on the security-locked buzzer—the location of the disturbance to which the

officers were responding—in a hurried and continual fashion. According to Nitzsche, Davis was agitated, nervous and jumpy, and continuously looking up the staircase. The back-up officers arrived in the basement area, and after numerous glances at the staircase, Davis suddenly broke from the location and ran toward the stairs. Nitzsche went after Davis, eventually taking him down from behind, forcing him to the stairs. Davis struggled, resisting the officers' efforts to handcuff him by flailing his arms and legs. He continued to resist and struggle, until eventually one of the officers used his OC spray to gain control of him. The officers searched Davis incident to his arrest for resisting an officer, and discovered a bag of marijuana on his person.

As indicated, Davis was convicted of resisting an officer and possession of marijuana, both as a repeat offender, and was sentenced to three years in prison.[2]

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). And because representation is not constitutionally ineffective unless both elements of the test are satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), we may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

[2] Davis was also charged with—and acquitted of—obstructing an officer.

On appeal, the issues are both of fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings as to what the attorney did, what happened at trial, and the basis for the challenged conduct, are factual and will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether counsel's actions were deficient and, if so, whether they prejudiced the defense, are questions of law which we review independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992)

An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38. We thus assess whether such performance was reasonable under the circumstances of the particular case, ***Hubanks***, 173 Wis.2d at 25, 496 N.W.2d at 105; and to prevail in the argument the defendant must show that counsel "made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment."

Even if deficient performance is found, we will not reverse unless the defendant proves that the deficiency actually prejudiced his defense: that counsel's errors were so serious as to deprive the defendant of a fair trial—a trial whose result is reliable. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847. In other words, errors of counsel actually had an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. "[T]here [must] be 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 129, 449 N.W.2d at 848.

Davis argues first that his counsel was ineffective for failing to move to suppress all evidence arising out of what he claims to have been an illegal stop, detention and arrest. We reject the argument. We are satisfied the evidence was admissible.

A police officer may temporarily stop and detain an individual to investigate possible criminal behavior even if there is no probable cause for an arrest. ***Terry v. Ohio***, 392 U.S. 1, 22, (1968); § 968.24, STATS. To be valid, however, the stop must be based on the officer's reasonable suspicion that criminal activity may be afoot. ***State v. Jackson***, 147 Wis.2d 824, 833-34, 434 N.W.2d 386, 390 (1989). "Reasonableness" is the key word. It is a common sense test: whether, under the totality of the facts and circumstances, it was reasonable for the officer, in light of his or her training and experience, to believe that the defendant had committed, was committing, or was about to commit an offense. ***Id.*** at 833-34, 424 N.W.2d at 390. To be reasonable, the suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990), *citing* ***Terry***, 392 U.S. at 21.

We conclude that Nitzsche had reasonable suspicion to stop Davis upon entering the lobby.[3] The specific and articulable facts apparent to Nitzsche

[3] It is noteworthy that the officers did not need to have any suspicion, reasonable or otherwise, to initially question Davis about the disturbance. *See* ***Florida v. Royer***, 460 U.S. 491, 497 (1983) (law enforcement officers do not violate the fourth amendment by merely approaching an individual on the street or in another public place and questioning him or her).

at the time were that: (1) he was dispatched to a disturbance in the basement of an apartment complex at 12:20 a.m.; (2) immediately upon entering the front lobby, he smelled the "distinct" odor of marijuana; (3) the only people present in the area were Davis and another man sitting on the stairs leading to the basement; (4) the two men immediately stood up upon seeing the uniformed officers; (5) they acted nervous and jumpy; and (6) there was hollering coming from the basement level. Based on his training and experience, all this led Nitzsche to believe that Davis might have been engaged in criminal activity[4]—either involving the disturbance or a controlled substance violation. Although there may well have been an innocent explanation, Nitzsche was not required to rule out the possibility of innocent behavior on Davis's behalf before initiating a brief stop. ***State v. Waldner***, 206 Wis.2d 51, 59, 556 N.W.2d 681, 685 (1996).[5] And while each of Nitzsche's personal observations alone may not have justified a stop, we believe that the totality of the facts and circumstances known to him at the time were adequate to establish a reasonable suspicion. ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65 (Ct. App. 1991) (citation omitted).

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[4] We note that an officer's suspicions needn't relate to a particular criminal activity. ***State v. Anderson***, 155 Wis.2d 77, 86, 454 N.W.2d 763, 767 (1990).

[5] In ***State v. Waldner***, 206 Wis.2d 51, 556 N.W.2d 681 (1996), the supreme court stated:

> Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Thus, when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

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We also conclude that Nitzsche possessed reasonable suspicion to detain Davis until the time of his arrest. Where, as here, the circumstances show that the investigation has not yet been completed, a suspect does not have the right to terminate it. ***State v. Goyer***, 157 Wis.2d 532, 537, 460 N.W.2d 424, 426 (Ct. App. 1990). Nitzsche was thus reasonably justified when he positioned himself to prevent Davis from fleeing the scene, because he wasn't finished questioning him; at that point, he had not even been able to have Davis identify himself. As we said in ***Goyer***, "[t]he right to make a ***Terry*** stop would mean little if the officer could not restrain a suspect who attempts walk away from the investigation." ***Id.*** at 538, 460 N.W.2d at 426. Nitzsche's suspicions were further heightened by: (1) Davis's inability to spell his purported name; (2) his numerous remarks that Nitzsche should go downstairs and assist the other officer; (3) his second attempt to exit out the front entrance; (4) the fact that he became extremely nervous, fidgety, and anxious; (5) his intent to enter the security-locked portion of the basement; (6) the fact that he buzzed the same apartment to which the officers were dispatched; (7) his frequent glances up the front stairs; and (8) his final attempt to flee from the officers. And because flight is a valid reason justifying a ***Terry***-stop, ***State v. Anderson***, 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990), resisting that stop—as Davis unquestionably did—would provide grounds to arrest him for resisting an officer. And any evidence seized during the search incident to Davis's arrest would then be lawfully obtained.[6]

Id. at 60, 556 N.W.2d at 686 (citations omitted).

[6] Davis's argument that he was "under arrest" from the inception of the incident lacks merit. When considering whether there was an arrest—as compared to an investigatory stop—we look to the defendant's freedom to leave the scene and the purpose, place and length of the interrogation. *See* ***State v. Leprich***, 160 Wis.2d 472, 477, 465 N.W.2d 844, 846 (Ct. App. 1991). Here, Nitzsche did not attempt to take Davis into custody, or anywhere else. He questioned Davis in the front lobby, where the initial contact was made, for the sole purpose of investigating the disturbance and the marijuana odor. Any movements of position were initiated by Davis when he attempted to leave out the front door and when he went down the stairs to the basement. No officer threatened Davis, displayed any weapons, physically touched him or significantly

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Davis next argues that his counsel was ineffective for failing to request two "theory of defense" jury instructions. While a trial court has wide discretion in issuing jury instructions, ***State v. Roubik***, 137 Wis.2d 301, 308, 404 N.W.2d 105, 108 (Ct. App. 1987), a defendant is entitled to a "theory of defense" instruction only if it supported by credible evidence. ***State v. Bernal***, 111 Wis.2d 280, 282, 330 N.W.2d 219, 220 (Ct. App. 1983); *see also* ***State v. Davidson***, 44 Wis.2d 177, 192, 170 N.W.2d 755, 763 (1969) (the defense also must relate to a "legal" theory of defense and not be adequately covered by other instructions).

We see no factual basis in the record that would support either instruction. Whether Davis had a right not to answer the officers' questions is irrelevant because Davis voluntarily answered them; he never refused to answer any of the questions. At the ***Machner*** hearing, trial counsel testified that he did not request such an instruction because the "jury instruction [was] not supported by evidence presented at trial." We agree. With respect to the right-to-resist-an-arrest instruction, our conclusion that Davis was not under arrest until after he fled and resisted, renders this instruction irrelevant as well. Even so, the use of force in resisting an arrest—even if it is an illegal arrest—is only valid when the arresting officer uses excessive force. ***State v. Reinwand***, 147 Wis.2d, 192, 202, 433 N.W.2d 27, 31 (Ct. App. 1988). And the record shows that at no time did the

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deprived his freedom of action in any way—until, of course, Davis later attempted to flee up the stairs. While it was true that Davis was not free to leave until the ***Terry***-stop was completed, the circumstances do not indicate that a reasonable person in Davis's position would have believed that he was in custody and under arrest from the outset.

Davis's argument that he was justified in using force to resist his "illegal arrest" must likewise be rejected. First, again, Davis was not under arrest at the time he attempted to flee the officers' temporary detention and investigative questioning. While it is true that an individual has the right to use reasonable force in resisting the use of excessive force by an arresting officer, ***State v. Reinwand***, 147 Wis.2d 192, 201, 433 N.W.2d 27, 31 (Ct. App. 1988), the officers here did not use excessive force. The record indicates that prior to Davis's flight and resistance, the officers did not use any force—and that once he fled, they only used reasonable force.

officers use excessive force, but only that degree of force which was reasonable under the circumstances.

Davis also argues that his counsel was ineffective at sentencing because he was "unprepared" to respond to allegations about Davis's "gang connections" and "jail misbehavior." However, since the trial court indicated that it didn't consider Davis's gang connections or give them any weight in imposing the sentence, any lack of preparation on counsel's part could not have prejudiced him. Similarly, we believe that counsel's failure to obtain information concerning Davis's jail misbehavior—which Davis claims was readily available to counsel under the open records law—was *de minimis*, and also non-prejudicial. Apparently, Davis's jail misbehavior did not weigh heavily among the other legal factors the court considered at sentencing—including the nature of the offenses that occurred, Davis's character, his "checkered" history of law violations, the public's need for protection and his ability to rehabilitate in a less incarcerated structure.

Finally, Davis's argument that his counsel was ineffective by telling the trial court that Davis "had agreed to a sentencing agreement and structure that Davis had not agreed to"—presumably a consecutive sentence—must also be rejected. The sentencing transcript shows that when Davis's counsel recommended a consecutive sentence structure, Davis informed the court that no such agreement existed and that he had not authorized his counsel to make the joint-recommendation. It further shows that the court then allowed Davis to make a lengthy argument supporting his position on sentencing. Davis has not shown that he was prejudiced.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.