

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2987

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT D. NASH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Scott Nash appeals an order denying his motion for postconviction relief. Nash moved to vacate a judgment convicting him on two counts of possessing drugs with intent to deliver them, and one count of felon possessing a firearm. Nash entered a plea to the charges after the trial court denied, as untimely, his motion to suppress evidence of the firearm charge. In his

postconviction motion Nash alleged that counsel ineffectively failed to bring the suppression issue before the court. The dispositive issue on appeal is whether Nash was prejudiced by counsel's negligence. We conclude that he was not, and therefore affirm.

Nash violated the terms of his probation on prior charges, and the Department of Corrections (DOC) issued an apprehension request. A few months later, police informed the DOC of Nash's whereabouts, and of his participation in three recent drug transactions.

DOC agents, accompanied by police, went to Nash's residence after calling and learning from another person that he was home. The agents and officers knocked and announced their presence and purpose. They could hear sounds within the apartment, but no one answered the door. After failing to obtain entry using the landlord's keys, they forcibly entered the apartment and arrested Nash. A search of the premises revealed a handgun in a pocket of Nash's jacket found hanging in a closet.

Nash's counsel filed a motion challenging the search of his apartment, but the trial court denied it as untimely. After conviction was entered on Nash's plea, he did not timely seek relief under RULE 809.30, STATS. He takes this appeal from the trial court's denial of his motion seeking relief under § 974.06, STATS.

To obtain relief based on a claim of ineffective assistance of counsel, a defendant must not only show deficient performance, but prejudice from that performance as well. *See State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Prejudice results when counsel's errors deprive the defendant of a fair trial with a reliable result. *See id.* at 640-41, 369 N.W.2d at 718. Whether

counsel's negligent performance resulted in prejudice is a question of law. *See id.* at 634, 369 N.W.2d at 715.

Nash cannot reasonably claim prejudice from counsel's failure to file a timely suppression motion because he could not have succeeded on that motion. A DOC apprehension request is comparable to an arrest warrant in the authority it grants probation officers to execute it. *See State v. Pittman*, 159 Wis.2d 764, 771-72, 465 N.W.2d 245, 247-48 (Ct. App. 1990). Officers may execute an arrest warrant by forced entry after knocking and announcing their presence without response. *See United States v. Markling*, 7 F.3d, 1309, 1318 (7th Cir. 1993). Here, the DOC agents reasonably believed that Nash was home and justifiably effected a forced entry after waiting, without success, for someone to open the door. Contrary to Nash's contentions, in so doing, the agents not only complied with constitutional law but applicable DOC rules and policies as well.

Nash cannot reasonably contend that the agents lacked authority to search his apartment, once they entered and arrested him. “[A] probation agent who reasonably believes that a probationer is violating the terms of probation may conduct a warrantless search of a probationer’s residence.” *State v. Angiolo*, 207 Wis.2d 561, 565, 558 N.W.2d 701, 702 (Ct. App. 1996) (citation omitted). Additionally, one detained on a probation hold has no greater reasonable expectation of privacy than one who has been arrested. *See State v. Betterley*, 191 Wis.2d 407, 420, 529 N.W.2d 216, 221 (1995). An arresting officer, or in this case the detaining agent, may then search the detained person and his or her immediate surrounding area. *See State v. Angiolo*, 186 Wis.2d 488, 498, 520 N.W.2d 923, 928 (Ct. App. 1994). Nash’s weapon was found in a closet near where he was seized. It therefore fell within his immediate surrounding area.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

