COURT OF APPEALS
DECISION
DATED AND RELEASED

January 21, 1997

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.

NOTICE

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

No. 96-0198

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM HARDY THORNTON, JR.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. William Hardy Thornton, Jr., appeals from an order denying his motion for postconviction relief pursuant to § 974.06, STATS. He raises two issues for review: whether the trial court erred in denying his postconviction motion without a hearing; and whether the trial court erred in

denying his ineffective assistance of counsel motion.[1] We reject his arguments and affirm.

I. BACKGROUND.

In 1992, Thornton was convicted after a jury trial of two counts of attempted first-degree intentional homicide while armed; one count of possession of a controlled substance with intent to deliver while armed and within 1,000 feet of a school; one count of bail jumping; and one count of failure to pay a controlled substance tax.

Prior to his original trial, Thornton had challenged the search and seizure of physical evidence obtained in an execution of a search warrant. Thornton's original trial counsel did not present any evidence to support the challenge, nor did Thornton testify. The original trial court denied the suppression motion, concluding that Thornton had not established standing to challenge the search and seizure because he had not established that he had a legitimate expectation of privacy in the premises where he was searched.

In his direct appeal, Thornton never raised the issue of the effectiveness of his trial counsel. In his § 974.06 motion, Thornton raises this issue for the first time. Included in support of his postconviction motion were affidavits regarding Thornton's original trial counsel's representation. Also included was an affidavit of proposed testimony outlining evidence Thornton would have adduced had his counsel called him at the suppression hearing.

Without holding an evidentiary hearing, the trial court denied Thornton's § 974.06 motion, concluding that the information contained in the affidavits was insufficient to establish Thornton's standing to challenge the search and, further, that even if standing would have been granted, the suppression motion would have failed. This appeal follows.

[1] Thornton raised the issue of whether he received effective assistance of his appellate counsel in the § 974.06 motion. He has not pursued this issue on appeal; therefore, it is waived.

II. ANALYSIS.

Thornton first argues that the trial court erred when it denied his ineffective assistance of counsel motion without a hearing. We disagree.

Our standards of review on this issue were recently stated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11, 548 N.W.2d at 53. Further, if "`the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id***. at 309-10, 548 N.W.2d at 53 (citation omitted).

To succeed in an ineffective assistance of counsel claim the defendant must satisfy the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). Thus, "a defendant must show that counsel's performance was both deficient and prejudicial." ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Essentially, the trial court concluded that the alleged evidence presented in Thornton's motion did not satisfy the prejudice prong of the ***Strickland*** test. That is, Thornton failed to raise a factual question of whether he

was prejudiced by the performance of his trial counsel because he failed to show a reasonable probability that, but for counsel's alleged deficiency, the suppression motion would have been granted. *See* ***Strickland***, 466 U.S. at 694.

Thornton's challenge to the search and seizure is premised on a contention that the search warrant was invalid because the probable cause supporting the issuance of the warrant had dissipated by the time the warrant was executed. The warrant was issued on February 6, 1992, but was not executed until February 10, 1996. Thornton argues that since probable cause for the warrant was based on an alleged drug deal that might have been made as many as three days before the warrant's issuance, the four days that lapsed before the search was executed dissipated that probable cause.

While a delay in the execution of a search warrant may invalidate a search or seizure premised on that warrant, the mere passage of time is not the sole determiner of whether the warrant's execution was constitutionally timely. ***State v. Edwards***, 98 Wis.2d 367, 372, 297 N.W.2d 12, 15 (1980). Thus, "any consideration of the timeliness of the execution of a search warrant necessarily requires an inquiry into the continued existence of probable cause at the time of the execution." ***Id***. at 372, 297 N.W.2d at 15.

> The proper test for determining the timely execution of a search warrant is (1) whether the warrant was executed in compliance with sec. 968.15, Stats., and (2) if such compliance is found, whether the probable cause which existed at the time of the issuance of the warrant still continued at the time of its execution.

Id. at 375-76, 297 N.W.2d at 16. Further, it is the defendant's burden to prove that probable cause had dissipated by the time the warrant was executed. ***Id***. at 376-77, 297 N.W.2d at 17.

The record reflects that in this case the search warrant was based, at least in part, on an affidavit detailing a "controlled purchase" of cocaine at the residence at which the warrant was executed. That affidavit also contained information that the individuals selling the contraband were carrying firearms

for their protection. The court commissioner then issued the warrant for drug-related crimes.

Thornton attached a police report in his postconviction submissions. The report shows that the police had information that the person operating the "dope house" at which the search warrant was executed drove a gold-colored BMW automobile. This car had been spotted at the residence on several days before the issuance of the search warrant. On the day after the warrant was issued, however, the BMW was not at the residence; a Chevy Impala was parked there instead. Three days later, the police received information that the alleged drug dealer was no longer driving the BMW, but was driving a blue Chevy that had been seen parked in front of the residence. The police then attempted to purchase cocaine at the residence, but were unsuccessful. They did see the person refusing to sell the drugs to the undercover officers enter the blue Chevy. At that time, the police executed the search warrant on the residence.

Given the above information presented in the original warrant affidavit and the subsequent affidavits presented with Thornton's § 974.06 motion, we conclude that the trial court could properly deny the motion without a hearing. Thornton failed to allege facts that would meet his burden establishing that probable cause had dissipated by the time the warrant was executed. The undisputed evidence does not raise any questions of fact over the validity of the execution of the search warrant. The evidence shows that the police awaited the appearance of the person allegedly selling drugs before they executed the warrant. This evidence shows the probable cause had not dissipated between the time of the issuance and the execution. Further, the warrant was executed within four days of its issuance, thereby complying with § 968.15, STATS. Thus, Thornton failed to present sufficient facts that raised a question of fact that his trial counsel's performance was prejudicial under ***Strickland***—that is, that the suppression motion would have been granted had Thornton's trial counsel presented the evidence. Based on its proper conclusion that the record demonstrated that Thornton was not entitled to relief, the trial court validly exercised its discretion in denying the motion without a hearing. ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 57.

By the Court.—Order affirmed.

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