**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 16, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-1126-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMES WARD,**

**DEFENDANT-APPELLANT,**

**ELIZABETH GREENE,**

**DEFENDANT.**

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

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

PER CURIAM. James Ward appeals from a judgment of conviction entered after he pleaded guilty to possession of cocaine with intent to

deliver, as a second offense, contrary to §§ 161.16(2)(b)1, 161.41(1m)(cm)3, and 161.48, STATS., 1993-94.[1] Ward also appeals from an order denying his postconviction motion to withdraw his guilty plea. Ward argues that: (1) his trial counsel was ineffective in advising him that he did not have standing to challenge the search that yielded the cocaine, and thus the trial court erred in denying his postconviction motion to withdraw his guilty plea; and (2) the trial court erred in admitting Ward's trial counsel's testimony regarding Ward's reasons for entering his guilty plea. We reject Ward's arguments and affirm.

## I. BACKGROUND

The facts of the underlying crime, as related in the criminal complaint, are as follows. On July 13, 1995, Ward sold cocaine to an undercover police officer at an apartment building located at 1819 North Cambridge Avenue, in Milwaukee. Ward told the officer to wait in the stairway of the apartment building while he went to the second floor and got the cocaine. After a few minutes, Ward returned with two rocks of cocaine base, which he sold to the officer for twenty dollars. Ward also gave the officer a piece of paper, which read, in part, as follows: James, 1819 North Cambr., #208. About an hour later, the undercover officer and some other officers went to apartment #208 at 1819 North Cambridge and knocked on the door. Ward answered the door and was then arrested. Ward's girlfriend, who lived at the apartment, gave the officers consent to search the apartment. The officers found over eleven thousand dollars in cash and more than eighteen grams of cocaine in the apartment. Ward admitted that he

[1] Effective July 9, 1996, §§ 161.16(2)(b)1, 161.41(1m)(cm)3, and 161.48, STATS., 1993-94 were recodified in chapter 961, STATS., 1995-96. *See* 1995 Wis. Act 448, §§ 173, 245, 288, 515.

owned the drugs. The complaint further alleged that Ward had a previous conviction for possession of a controlled substance with intent to deliver.

Based on the foregoing facts, the State charged Ward with possession of cocaine with intent to deliver, as a second offense. Ward pleaded guilty to the charged offense and was sentenced, but subsequently filed a postconviction motion to withdraw that plea. The postconviction motion alleged that Ward's trial counsel was ineffective in advising Ward that he did not have standing to challenge the search of the apartment, and thereby causing Ward to plead guilty. The trial court held a ***Machner*** hearing at which Ward's trial counsel testified.[2] The trial court concluded that Ward's trial counsel's performance was not deficient. The trial court therefore denied Ward's request to withdraw his guilty plea.

## II. DISCUSSION

Ward argues that his trial counsel was ineffective in advising him that he did not have standing to challenge the search of the apartment. He argues that he informed his trial counsel of facts that indicated that he had a reasonable expectation of privacy in the apartment, but that his trial counsel incorrectly concluded that he did not have standing because counsel did not know the law. Ward further asserts that if his trial counsel had advised him that he could challenge the search of the apartment, then he would not have pleaded guilty.

After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis.2d 232, 235,

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

418 N.W.2d 20, 21 (Ct. App. 1987). A defendant has the burden of proving by clear and convincing evidence that a manifest injustice has occurred. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. *See* ***id.***

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant has not been denied effective assistance of counsel merely because he or she did not receive "the best counsel that might have tried the case, nor the best defense that might have been presented. 'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***State v. Williquette***, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993) (quoted source omitted), *aff'd*, 190 Wis.2d 677, 526 N.W.2d 144 (1995). Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***Strickland***, 466 U.S. at 690. Counsel is strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.*** To show prejudice, Ward must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

Ward argues that he told his trial counsel facts sufficient to establish that Ward had a reasonable expectation of privacy in the apartment, and that his trial counsel was therefore deficient in advising him that he lacked standing to challenge the search of the apartment. At the ***Machner*** hearing, Ward's trial counsel testified that he concluded that Ward did not have standing to challenge the search based on information that he received from Ward and Ward's previous counsel, who had withdrawn from the case. He testified that Ward's previous counsel had informed him that Ward had said that he never stayed overnight at the apartment, and that Ward had told him that he did not live at the apartment, and that he kept his belongings at his sister's home and his mother's home. Counsel also testified that Ward never told him that Ward's girlfriend did not consent to the search. The trial court accepted counsel's testimony and concluded that, based on the information that Ward provided, counsel was not deficient in advising Ward that he did not have standing to challenge the search.

We must accept the trial court's findings of fact with respect to the information that Ward provided to his counsel. *See* ***Harvey***, 139 Wis.2d at 376, 407 N.W.2d at 245. Ward's statements that he did not live at the apartment, that he did not keep his belongings at the apartment and that he never stayed overnight at the apartment indicated Ward was merely a casual guest in the apartment at the

time of the search. Ward concedes in his reply brief that a casual guest does not have a reasonable expectation of privacy. In order to assert a constitutional challenge of an illegal search, a defendant must have a reasonable expectation of privacy that was violated by the search. *See* ***State v. Rewolinski***, 159 Wis.2d 1, 12, 464 N.W.2d 401, 405 (1990). Thus, we conclude that Ward's counsel was not deficient in advising Ward that he did not have standing to challenge the search.

Ward also argues, however, that trial counsel was deficient in failing to further investigate his relationship to the apartment to find facts indicating that Ward had a reasonable expectation of privacy. We agree with the trial court's analysis that trial counsel was not deficient in failing to look for facts to contradict the information that Ward had supplied, which indicated that Ward was a casual guest in the apartment at the time of the search. Counsel's advice may properly be based "on information supplied by the defendant." ***Strickland***, 466 U.S. at 691. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless …, counsel's failure to pursue those investigations may not later be challenged as unreasonable." ***Id.*** Moreover, Ward's counsel testified that he advised Ward to plead guilty regardless of any potential suppression motion because the State intended to charge Ward with a delivery charge, which had stricter parole-eligibility requirements, if Ward did not plead to the possession charge, and Ward had no defense to the delivery charge. This was a reasonable strategic decision that obviated the need to investigate the standing issue. Because Ward's counsel was not deficient, the trial court properly denied Ward's motion to withdraw his guilty plea.

Ward next argues that the trial court erred in permitting Ward's trial counsel to testify concerning Ward's reasons for entering his guilty plea. A trial court has broad discretion in determining the relevance and admissibility of

proffered evidence. *See* ***State v. Oberlander***, 149 Wis.2d 132, 140, 438 N.W.2d 580, 583 (1989). Our review is limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Larsen,*** 165 Wis.2d 316, 320 n.1, 477 N.W.2d 87, 89 n.1 (Ct. App. 1991). We will not reverse the trial court's decision to admit evidence unless there is no reasonable basis for that decision. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

Ward asserts that his trial counsel's testimony violated the lawyer–client privilege because the testimony was not relevant to his ineffective-assistance claim, and that the testimony was therefore inadmissible. Specifically, Ward challenges counsel's testimony that he advised Ward to plead guilty to the charged offense "regardless of any motions that could have been brought on the search, [because] there was a hand-to-hand buy with an officer [that Ward] did not dispute," and the State had informed counsel that if Ward did not plead to the charged offense, then the State would charge Ward with a delivery charge, which had stricter parole eligibility requirements than the possession charge.

"[W]hen a defendant charges that his or her attorney has been ineffective, the defendant's lawyer–client privilege is waived to the extent that counsel must answer questions relevant to the charge of ineffective assistance." ***State v. Flores***, 170 Wis.2d 272, 277–278, 488 N.W.2d 116, 118 (Ct. App. 1992). *See also* § 905.03(4)(c), STATS. (there is no lawyer–client privilege as to "a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client"). As noted, in order to establish ineffective assistance of trial counsel, Ward had to show that he would not have pleaded guilty and would have insisted on going to trial but for counsel's errors. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54. Such a showing requires a specific explanation of why he would have gone to trial rather than enter a plea. *See* ***id.***, 201 Wis.2d at 314, 548 N.W.2d

at 55. Therefore, Ward's motivations for entering his plea, including the advice of his counsel regarding the benefits of the plea, are relevant to Ward's claim of ineffective assistance, and his counsel's testimony did not violate the lawyer–client privilege. The trial court properly exercised its discretion in admitting the testimony.

*By the Court*.—Judgment and order affirmed.

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