COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-1431-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Chad Williams appeals from judgments entered after a jury found him guilty of possession of cocaine with intent to deliver, *see* WIS. STAT. § 961.41 (1m)(cm)(3), and possession of marijuana, *see* WIS. STAT. § 961.41(3g)(e). He also appeals from an order denying his motion for

postconviction relief. He argues that the trial court erred in denying his motion to suppress, and that he received ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 On January 29, 1997, four Milwaukee police officers knocked on the door of an apartment where Williams's brother lived. Williams answered the door and invited the officers into the apartment. Williams led the officers through the apartment into the living room. When he reached the living room, he turned to face the officers. As Williams turned, he tossed a folded blue piece of paper onto the floor. One of the officers recognized the folded blue paper as a common container for cocaine. The officer picked up the folded blue paper, unfolded it, and found what appeared to be cocaine. The officer arrested Williams and searched him incident to the arrest, finding a large amount of cash and some food stamps.

¶3 The officers then looked through the rest of the apartment. One bedroom of the apartment was locked, and the officers obtained the key to the bedroom from Williams. The officers found a bag of cocaine and a bag of marijuana in the bedroom.

¶4 Williams filed a motion to suppress the evidence the officers found in the apartment, and the evidence they found when they searched Williams incident to his arrest. After a hearing, the trial court denied the motion to suppress.

¶5 Thereafter, Williams was tried and convicted by a jury. The trial court entered judgments accordingly.

DISCUSSION

¶6 Williams argues that the trial court erred in denying his motion to suppress the evidence that the police found in his possession at the time of his arrest and the evidence that the police found in his brother's bedroom. He asserts that the police improperly seized the cocaine that he dropped on the floor, and that his subsequent arrest and the search incident to his arrest were invalid. Williams further asserts that the trial court erred in concluding that he did not have a reasonable expectation of privacy in his brother's apartment, and that he thus could not challenge the search of the apartment.

¶7 "Whether police conduct constitutes an unreasonable search and seizure in violation of the state and federal constitutions depends, in the first place, on whether the defendant had a legitimate, justifiable or reasonable expectation of privacy that was invaded by the government action." ***State v. Rewolinski***, 159 Wis. 2d 1, 12, 464 N.W.2d 401, 405 (1990) (footnotes omitted). Whether a defendant had a reasonable expectation of privacy depends on two separate questions. *See* ***id.***, 159 Wis. 2d at 13, 464 N.W.2d at 405. "The first question is whether the individual by his conduct exhibited an actual, subjective expectation of privacy. The second question is whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable." ***Id.*** A defendant bears the burden of proving by a preponderance of the evidence both that he or she had an actual, subjective expectation of privacy, and that the expectation was legitimate or justifiable. *See* ***id.***, 159 Wis. 2d at 13–16, 464 N.W.2d at 405–407.

¶8 The following factors are relevant in determining whether a defendant has an expectation of privacy that society is willing to recognize as

reasonable: (1) whether the defendant had a property interest in the premises; (2) whether the defendant was lawfully on the premises; (3) whether the defendant had complete dominion and control and the right to exclude others; (4) whether the defendant took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy. *See* ***State v. Dixon***, 177 Wis. 2d 461, 469, 501 N.W.2d 442, 446 (1993). These factors are neither controlling nor exclusive, and we must determine under the totality of the circumstances whether the defendant has an expectation of privacy that society is willing to recognize as reasonable. *See* ***id.***

¶9 At the hearing on the motion to suppress, Williams testified that he lived with his mother. He testified that the apartment where the officers arrested him was his brother's apartment, and that he had been invited there to pick up some food stamps for his mother. He testified that another brother was also at the apartment, and that he and his two brothers were watching a basketball game when the police knocked on the door. Williams said that he did not keep any clothes or toiletries at his brother's apartment, but that he had recently been given the keys to his brother's apartment so that he could take girls there. He testified that he would normally call his brother to get permission before bringing a girl to the apartment.

¶10 The trial court properly concluded that Williams did not have a reasonable expectation of privacy in his brother's apartment at the time the officers searched the apartment. Under the totality of the circumstances, Williams did not have an expectation of privacy that society is willing to recognize as reasonable. As noted, Williams did not live in the apartment and thus did not have a property interest in the apartment. He did not have complete dominion and control over the apartment or the right to exclude others; rather, access to the

apartment was controlled by his brother. There is no evidence that Williams took any precautions to protect a privacy interest in his brother's apartment. Williams also did not put the apartment to a private use, but was at his brother's apartment merely to pick up some food stamps and watch television with his brothers. Finally, Williams's claim of privacy is not consistent with historical notions of privacy. Indeed, Williams fails to cite any authority that supports his argument that a short-term social guest has a reasonable expectation of privacy in his host's home.

¶11 Williams argues that ***Minnesota v. Olson***, 495 U.S. 91 (1990), supports his assertion that a social guest has a reasonable expectation of privacy in the host's home. In ***Olson***, the Supreme Court held that an overnight houseguest has a reasonable expectation of privacy while staying at the host's home. *See* ***id.***, 495 U.S. at 98. In arriving at this conclusion, the Court explained:

> From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.

Id., 495 U.S. at 99. Unlike an overnight guest, Williams did not seek shelter and privacy in his brother's apartment so that he and his possessions would not be disturbed; he also was not seeking safety and security for himself and his belongings while he slept. Rather, the record reveals that Williams brought no clothing or toiletries to his brother's apartment, and that he was present only to pick up some food stamps and watch television. He did not have an expectation of

privacy similar to that of an overnight guest. The trial court properly denied Williams's motion to suppress.[1]

¶12 Williams next argues that his trial counsel was ineffective because he failed to ensure that Williams received the full number of peremptory challenges to which he was statutorily entitled. Pursuant to WIS. STAT. § 972.03, each side is entitled to one additional peremptory challenge when an alternate juror is selected.[2] The record reveals that although an alternate juror was selected, neither party received an additional peremptory challenge. Williams argues that

[1] Williams does not argue that the police did not have probable cause to arrest him once they found the cocaine on the floor of his brother's apartment, nor does he argue that the police could not properly search him incident to his arrest. He argues only that the police did not properly seize the cocaine from the floor. As noted, Williams did not have a reasonable expectation of privacy in his brother's apartment; thus, he cannot challenge the seizure of the cocaine from the floor. Accordingly, we do not discuss whether Williams abandoned the cocaine he tossed upon the floor, or whether the cocaine was in "plain sight." *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (appellate court need only decide dispositive issue).

[2] WISCONSIN STAT. § 972.03 provides:

> Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section. When the crime charged is punishable by life imprisonment, the state is entitled to 6 peremptory challenges and the defendant is entitled to 6 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment, the total peremptory challenges allowed the defense shall not exceed 12 if there are only 2 defendants and 18 if there are more than 2 defendants; in other felony cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2. In misdemeanor cases, the state is entitled to 3 peremptory challenges and the defendant is entitled to 3 peremptory challenges, except that if there are 2 defendants, the court shall allow the defense 4 peremptory challenges, and if there are more than 2 defendants, the court shall allow the defense 6 peremptory challenges. Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under s. 972.04 (1).

his counsel was deficient in failing to request the additional peremptory challenge, and that prejudice should be presumed.

¶13 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).

¶14 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. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.***, 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.***

¶15 To show prejudice, the defendant must demonstrate "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." *See* ***id.***, 466 U.S. at 694.

¶16 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.

¶17 Williams does not assert that he did not receive a fair trial by an impartial jury; rather he asserts that we should presume that he was prejudiced because he did not receive the full number of peremptory challenges to which he was statutorily entitled. We decline to presume prejudice, however, because both Williams and the State received the same number of peremptory challenges, and the Wisconsin Supreme Court concluded in ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), that prejudice should not be presumed in these circumstances. *See* ***id.***, 227 Wis. 2d at 772, 596 N.W.2d at 757 ("[W]e decline Erickson's invitation to presume prejudice every time the defendant does not get the number of peremptory strikes allowed by statute but the State and the defendant get an equal number of peremptory strikes."). The trial court properly rejected Williams's claim that he received ineffective assistance of counsel.

By the Court.—Judgments and order affirmed.

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