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

June 27, 2000

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



**No. 98-1909-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MACK MCCLINTON,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Mack McClinton, *pro se*, appeals from the judgment of conviction for possession with intent to deliver controlled substance – heroin – second or subsequent offense, party to a crime, following a bench trial, and from the order denying his motion for postconviction relief. He argues: (1)

the trial court erred in failing to grant an evidentiary hearing on his challenge to the amended information; (2) the trial court erred in denying his motion to suppress evidence; (3) trial counsel was ineffective; and (4) the evidence was insufficient to support the verdict. We affirm.

¶2 McClinton was initially charged with possession with intent to deliver a controlled substance – cocaine, party to a crime, after police discovered controlled substances inside and outside of a locked safe in McClinton's apartment. After McClinton waived his preliminary hearing, the State filed an information with that same charge. At a subsequent appearance, however, the State asked the trial court's permission to file an amended information charging McClinton with two counts: possession with intent to deliver cocaine, and possession with intent to deliver heroin, both as party to a crime. The added charge was based on state crime laboratory analysis, completed between the time of the arrest and preliminary hearing, indicating that the substance seized from McClinton's safe was heroin and the substance found outside the safe was cocaine.[1] Defense counsel and McClinton stated that they did not object to the amended information, and the court allowed it to be filed.[2] Following a court trial, McClinton was convicted of the heroin offense, acquitted of the cocaine offense, and sentenced to twelve years in prison.

¶3 McClinton first argues that the trial court erred in failing to grant an evidentiary hearing on his motion to dismiss the amended information. He

[1] All drugs were originally identified as cocaine, but later tests indicated that the drugs seized form the safe were heroin; the drugs found outside the safe were consistently identified as cocaine.

[2] Subsequently, the State filed an information increasing each charge to a "second or subsequent offense." That modification, however, is unrelated to any issue on appeal.

contends that, because of what he terms "the conflicting opinions of the state's two expert witnesses" who had concluded that the substances were cocaine and heroin, a hearing was required "to determine the actual substance." As the State points out, however, McClinton expressly declined to object to the amended information when it was filed and, subsequently, he never challenged the amended information or filed a motion for the evidentiary hearing he now claims was denied. Thus, McClinton waived this issue. *See* ***State v. Perry***, 215 Wis. 2d 696, 704, 573 N.W.2d 876, 879 (Ct. App. 1997) (failure to object to the amendment of an information waives an appellate challenge to the propriety of additional charges in the amended information). [3] Moreover, the purpose of a trial is to resolve the factual issues; by having a trial, McClinton had his "evidentiary hearing" on the nature of the controlled substance.

¶4 McClinton next argues that the trial court erred in denying his motion to suppress evidence. Although his argument is not entirely clear, and although, at one point in his brief, McClinton takes exception to the court's failure to "render an affirmative decision as to when should police proceed to search the premises," he never directly challenges the trial court's conclusion that exigent circumstances allowed the police to enter his apartment. As the State points out, McClinton seems to limit his challenge to the subsequent search of the safe in which the police found the heroin.

¶5 McClinton contends that a search warrant should have been required. He bases his contention on his testimony at the suppression hearing

[3] In reply, McClinton maintains that he did file a motion to dismiss the amended information, and he includes a copy of a motion as an appendix to his reply brief. That motion, however, was one to dismiss the *complaint*, and was filed months before the amended information was filed.

where, he emphasizes, he "unequivocally stated without mental reservation or self-evasion that he never gave consent to the police" to search. He also maintains that "[t]here was not one officer who said defendant gave him or her consent to do anything." Further, he argues, even if he consented, his consent was not voluntary because it came only after police allegedly forced him to lie on the ground, face down, outside his residence for twenty-five minutes in subzero temperatures, wearing only a T-shirt, and then "escorted him upstair [sic] with a shot gun in his anus."

¶6 The suppression hearing testimony of several officers countered McClinton's claim of nonconsent. Officer Terrence Gordon testified that McClinton "said we could open the safe." Officer David Chavez testified that when "we asked can we open the safe," McClinton said, "Go ahead." Officer Jose Lazo testified that when another officer asked McClinton who owned the safe, McClinton said it was not his and the police could open it. Additionally, Officer Noel Guardiola, who escorted McClinton upstairs, testified that although other officers with shotguns had secured the perimeter of the building, neither he nor any other officer pointed at or held a shotgun to McClinton as they went upstairs. The trial court, evaluating the testimony of McClinton and the officers, found the police version credible and concluded that McClinton gave consent to the search, and that the consent was voluntary.

¶7 Whether a defendant has voluntarily consented to a warrantless search presents mixed questions of constitutional fact and law. *See* ***State v. Phillips***, 218 Wis. 2d 180, 194-95, 577 N.W.2d 794, 801 (1998). We will not upset the trial court's factual findings unless they are clearly erroneous. *See* ***id.*** Further, "[b]ecause the trial court is the sole judge of credibility, this court will not reverse a credibility determination unless we could conclude, as a matter of law,

that no finder of fact could believe the testimony." ***State v. Garcia***, 195 Wis. 2d 68, 75, 535 N.W.2d 124, 127 (Ct. App. 1995). We independently assess whether the facts support the trial court's determination of constitutional questions. *See* ***Phillips***, 218 Wis. 2d at 195, 577 N.W.2d at 801.

¶8 Here, the court heard the testimony of several witnesses and, explicitly and implicitly, resolved any discrepencies by finding the officers credible and accepting their account. Other than strenuously disagreeing with the court's findings and conclusion, McClinton offers no basis on which we could reject the trial court's assessment. In fact, in reply, McClinton contends only that because the officers "could not recall specifically who did what during the incident," and because the three officers who testified about the search of the safe used the word "we" rather than "I" when describing the conversations in which he gave consent to search, and because "all three officers could not have asked the defendant for consent at the same time," this court should conclude that he never gave consent. Thus, in essense, McClinton has done little more than refer to the officers' uncertainty about unspecified aspects of their conduct and seize upon their common, colloquial speech in an effort to undermine perfectly plausible testimony. His argument has no legal merit.[4] The trial court's findings are supported by the evidence, and those findings support the trial court's legal conclusion.

[4] In reply, McClinton also argues that even if we conclude that he voluntarily consented to the search of the safe, "this court must still reverse … on the ground of technical violation of his Miranda rights." Because McClinton has presented this argument for the first time in his reply brief, we decline to address it. *See* ***State v. Grade***, 165 Wis. 2d 143, 151 n.2, 477 N.W.2d 315, 318 n.2 (Ct. App. 1991) ("We will not, as a general rule, consider arguments raised for the first time in a reply brief ….").

¶9 McClinton next argues that counsel was ineffective for: (1) failing to argue "that there were no substance [sic] to mix heroin in which to prepare for delivering," because expert testimony had established that certain substances were required to mix with heroin in order to prepare it for delivery, but no such substances had been found in his residence; (2) failing "to argue as to how one state expert witness could undo the other" given the conflicting test results establishing that the seized substances were cocaine and heroin; and (3) failing to argue the weight of the evidence. He has not, however, offered any argument in support of his assertions. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments). Further, he has not provided this court with a transcript of the ***Machner*** hearing the trial court held on his ineffective assistance motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1992) (preservation of testimony of trial counsel "is a prerequisite to a claim of ineffective representation on appeal"); *see also* ***State v. Dietzen***, 164 Wis. 2d 205, 212, 474 N.W.2d 753, 755-56 (Ct. App. 1991) (appellant responsible for assembling and submitting record); WIS. STAT. RULE 809.19(1)(e) & (3)(a), (appellate arguments must be supported by authority and record references). McClinton has not replied to the State's arguments–both procedural and substantive–responding to his appellate claims of ineffective assistance. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted). Thus, while we often provide considerable latitude for *pro se* litigants, we decline to address McClinton's ineffective assistance claims for lack of adequate argument and a complete record for review. *See* ***State v. Heft***, 178 Wis. 2d 823, 825, 505 N.W.2d 437, 438 (Ct. App. 1993) ("[I]in the absence of a complete record, this

court "will, when necessary, assume that 'every fact essential to sustain the trial court's decision is supported by the record.'").[5]

¶10 Finally, McClinton maintains that the evidence was insufficient to support his conviction. In a relatively undeveloped argument, he primarily asserts that "[w]hile the substance may have been found in an area where [he] had property, that does not constitute that the substance in question actually belong [sic] to [him]." He elaborates that "[t]here were no scientific facts in evidence, no eye witness, no finger prints, no DNA test that links [him] to this substance." We reject McClinton's claim.

¶11 This case was tried to the court. Rendering its verdicts, the trial court summarized the evidence on which it based the factual findings and conclusion. The court stated, in part:

> With respect to the heroin, I don't think there's any question on this record but that the State has proven this case beyond a reasonable doubt. You've got Mr. McClinton's bedroom that he has acknowledged is his room, his papers, some papers, identifying papers, are in there indicating he pays the electricity for this apartment.
>
> He's–he testified that he was there, that this is his mailing address ….
>
> And in the safe in his bedroom, which he has the key for … and which he acknowledges is his safe …. The officer had to pry it open, but [McClinton] did have a key for it that worked the lock, … when the officers pried the safe open, they found two things of great significance as far as this Court's concerned.
>
> One is Mr. McClinton's wallet with identification papers in it. Two, 1.885 grams, as weighed yesterday, of

[5] As the State also points out, this court, in its February 16, 1999 order denying the State's motion to *require* McClinton to file the transcript of the ***Machner*** hearing, warned McClinton that his "failure to include the transcript in the record could prove fatal to his arguments on appeal if that transcript is necessary to resolution of those arguments."

> pure heroin, which according to at least one interpretation of the numbers[,] if diluted to the level that it's used on the street … [is] somewhere around $25,000 worth of heroin … in the safe with his wallet.
>
> Now, if that isn't control of an item, I don't know what is, and I'm satisfied that the State has proven the Posession of Heroin with Intent to Deliver because pretty clearly that amount of heroin is not for personal use, and therefore, there's no question in this Court's mind but that the State has proven that charge beyond a reasonable doubt.

¶12 As the supreme court has explained, when determining whether evidence is sufficient to support a conviction, this court:

> may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). This standard applies to convictions based on circumstantial evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. Moreover, "the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused." ***Id.*** at 506, 451 N.W.2d at 757. Thus, we "must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter law." ***Id.*** at 507, 451 N.W.2d at 757.

¶13 McClinton does not contend that, if he possessed the heroin, the evidence was insufficient to prove that he did so with intent to deliver. Thus, he does not challenge the trial court's inference that the amount of heroin, in combination with the other evidence, established his intent to deliver. Instead,

McClinton simply maintains that the evidence was insufficient to establish his possession. We disagree. As the trial court correctly observed, McClinton's residence in the room and ownership and control of the safe, in combination with the recovery of the heroin from the safe, led to the reasonable inference that McClinton possessed the heroin. The evidence was sufficient.

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

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