

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 2005AP58-CR

Cir. Ct. No. 2003CF4136

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

XAVIER B. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Xavier B. Smith appeals from a judgment after a jury convicted him of one count of possession of a controlled substance (cocaine), with intent to deliver more than one gram and less than five grams, as a second or subsequent offender, contrary to WIS. STAT. §§ 961.41(1m)(cm)1r and 961.48

(2003-04).¹ He also appeals from an order denying his postconviction motion, in which he claimed he was denied effective assistance of trial counsel. Because trial counsel's cross-examination did not prejudice the defense, we affirm.

BACKGROUND

¶2 On July 21, 2003, at approximately 5:00 p.m., Police Officer Charles Libal and two other officers were patrolling in an unmarked vehicle, investigating narcotics activities in the general area of West Sarnow Avenue and North 35th Street in the City of Milwaukee. As their vehicle approached the intersection of Sarnow Avenue and 35th Street, the three officers observed Smith standing outside of the residence numbered 3504 West Sarnow Avenue on the northwest corner of the intersection. Libal was familiar with the residence because on July 9, 2003, he participated in a search warrant for drugs at the same location. As the vehicle turned left to go west on Sarnow Avenue, Smith was observed walking quickly north on 35th Street. The officers circled through an alley and came back out on North 35th Street. They again observed Smith. When Smith noticed the police vehicle, he ran up the porch stairs of the home at 1735 North 35th Street.

¶3 Libal exited the vehicle and called to Smith to come down from the porch because he wanted to talk to him. Smith responded by jumping off the porch and running through the gangway heading west toward the alley in the direction of North 36th Street. His path took him through a vacant lot immediately west of the alley. Libal chased after him. When Libal initially began to pursue Smith, he was about ten feet behind him, but gradually he drew within

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

approximately five to seven feet. One of Libal's partners, Detective Eugene Nagler, was also in pursuit, running behind Libal.

¶4 As Smith ran west through the vacant lot, Libal noticed Smith's right hand reach into his right front pocket and pull out what appeared to be a plastic baggie. When Smith approached the porch area of the residence numbered 1802 North 36th Street, Libal noticed Smith drop the plastic baggie from his right hand. Smith then jumped over the porch rail and entered the 1802 North 36th Street residence. Libal recovered the baggie and, in so doing, observed that the baggie contained what he judged to be approximately thirty corner cuts of crack cocaine; testing later verified this assessment. Libal and his fellow officers then entered the house and arrested Smith when they found him hiding in the basement. Libal testified that he never lost sight of Smith during the chase. Nagler, who was following Libal, also observed Smith as he was running through the vacant lot, saw Smith place his right hand in his right front pocket and then observed Smith holding what appeared to be a clear plastic bag. Nagler did not pursue Smith to the front of the house, but veered off to cover the back of the house to prevent an escape.

¶5 At trial, Smith testified on his own behalf. He claimed he ran from police because he had outstanding traffic fines. He denied removing anything from his pockets during the chase. Smith denied any knowledge of crack cocaine, but he did admit he was a former crack cocaine user. The jury convicted Smith of the alleged charge. The trial court sentenced him to ten years, bifurcated into five years of initial confinement and five years of extended supervision. Smith moved for postconviction relief on the grounds of ineffective assistance of trial counsel.

The trial court denied his motion without a *Machner* hearing.² Smith now appeals.

ANALYSIS

¶6 Smith claims his trial counsel provided ineffective assistance in the manner in which he cross-examined Officer Libal. Smith argues that at the preliminary examination, Libal testified that he was about ten to fifteen feet away from Smith when he observed Smith reach into his right hand front pocket and pull out a baggie containing what appeared to be corner cuts of crack cocaine. In contrast, at trial, Libal testified he was approximately five to seven feet away from Smith at the time he observed Smith's actions. Smith claims that: "by failing to establish that [Officer Libal] had, in fact, testified otherwise at the preliminary hearing, counsel deprived the jury of information that was both vital to his theory of the defense and which would have assisted them in weighing the testimony of the officer." We reject Smith's contention for reasons to be stated.

¶7 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Strickland*, 466 U.S. at 697.

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

¶8 An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. In other words, there must be a showing 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." *Id.* at 694.

¶9 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *Id.* at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶10 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. The defendant cannot meet this burden by showing merely the possibility that the error had some effect on the outcome.

¶11 The main thrust of Smith's challenge to the effectiveness of his trial counsel consists of his argument that the inconsistency between the measurement of ten to fifteen feet and five to seven feet as testified to at the preliminary

examination versus the trial testimony was not exploited to the extent that was reasonably satisfactory for his defense. Doubtless, trial counsel could have impeached Officer Libal with an official transcript of his prior preliminary testimony. The significance of the inconsistency that Smith urges upon us, however, does not make that much of a difference. To demonstrate the minimal value of this inconsistency, one need only examine the actual testimony that was given concerning the distinction that Smith seeks to make.

¶12 At the preliminary hearing, Officer Libal did testify as to how far he was from Smith during the foot chase, when he observed him reach into his pocket: "Approximately ten to fifteen feet." The district attorney then attempted to ask whether this observation occurred while the foot chase was in the vacant lot, but the examining magistrate sustained an objection to the question. At trial, this area of inquiry was further examined. The record reveals the following:

Q Where were you in relation to him when this sprint began?

A ... When I initially made contact with him, ten to fifteen feet away. Once he started running, initially I was probably about ten feet away from him. Once we got towards the alley, I probably wasn't any more than five to seven feet away behind him.

....

A ... As he's running through the vacant lot, he begins to reach into his right front pants pocket and starts to pull out what appears to be a clear plastic baggie.

Q And at this point you say you're about five to seven feet away from him, or is this the point when you're ten feet away from him?

A No, initially I was -- at the start of the foot pursuit, I was probably about ten feet away. At this point I'm probably five to seven.

Q And are you the only one chasing him?

A No, I'm not.

Q Who else is chasing him at this point as he's crossing the alley?

A I'm at least aware of Detective Nagler.

Q Okay. And are you in front of the pack?

A Yes.

Q Okay. So you're the closest to the defendant at this point; is that right?

A Yes.

....

Q During that chase ... did you ever lose sight of the defendant?

A No, I did not.

Q And did anyone else come into the chase at all? Was there anyone else in the picture when you were chasing the defendant?

A No.

Q Could anyone else drop this baggie?

A No.

Q And was your view obstructed in any way when you say you saw the defendant drop the baggie?

A No. This is a wide open, vacant lot.

¶13 Now, we examine Detective Nagler's testimony on both direct and cross-examination bearing on the challenged point. First on direct examination:

Q Okay. At the point where you took the two different paths, was this before or after the defendant reached in his right front pants pocket?

A He -- he was reaching in his pants pocket while we were all running in the southwesterly direction.

Q Okay. Did you personally observe the defendant reach into his pants pocket?

A Yes.

Q Did you observe the defendant take anything out of his pants pocket?

A I could see he had something in his hand. I knew it was not a gun. I couldn't tell you exactly what it was. I could see, it -- it appeared to look like plastic to me.

Q Was it consistent or not consistent with a plastic baggie?

A Consistent.

¶14 On cross-examination, we first find the following relevant testimony:

Q And as you were running through the gangway and along the fence there, did you at any time ... lose sight of my client when he was running?

A Yes.

Q And when you came to the end of the fence and you -- at the alley, at the beginning of the alley, are you with me?

A Yes.

Q And you looked across, did you see my client somewhere?

A Yes, when I came around the fence.

Q Okay.... where was he ...?

....

A Mr. Smith would have been in front of Officer Libal, and they would have been across the alley into -- into the field.

Q And how far apart do you believe my client and Officer Libal were?

A They were pretty close.... I couldn't tell exactly how close they were.

¶15 Further into the cross-examination we read:

Q ... Now you say ... that you saw my client put his hand inside of his pocket.... [w]hile he was running.

A Yes, I could see his right hand coming down and it appeared to be into his pocket.

Q You saw it go into the pocket.

....

A It appeared to be into the pocket, yes.

Q Could he just have been holding up his pants with his right hand?

....

A It didn't look that way to me.

Q Okay, and you said you saw something in it that looked like it could have been plastic is what you described it as. Right?

A Yes.

Q Clear plastic, colored plastic, what?

A It -- it looked [like] clear plastic.

Q Okay. You have no idea in terms of what it -- the description of it was? I mean was it a, anything that looked like a clear plastic squirt gun, or did it look like cellophane crumpled up, I mean what exactly is it that you're looking at?

A It looked like plastic, plastic wrap, plastic bag, but again, from that distance, I couldn't tell you it was definitely a plastic bag.

Q And it was in his hand and his hand was closed?

A I could see plastic on his hand when it came out of the pants pocket, the front of his pants. I couldn't, again, I couldn't tell you exactly what it was.

¶16 From this review, several facts are uncontested. There was a discrepancy in the reported distance between Officer Libal and Smith at the time Smith put his right hand in his right pants pocket and then dropped the baggie. Under the circumstances, however, the discrepancy was not a great distance. The site of the reported activity was an open, vacant lot. Officer Libal's view of Smith's actions was unobstructed. Detective Nagler's view of the incident, although obstructed initially during the pursuit along the fence south and next to the gangway, became unobstructed after he reached the alley and provided unchallenged corroboration for Officer Libal's account of Smith's actions.

¶17 Smith's attempt to magnify the significance of the reported distance discrepancy misses the mark of probity because it in no way impugns the unobstructed observations either Officer Libal or Detective Nagler had of Smith's actions as he ran across the vacant lot to the 36th Street residence.

¶18 For this reason, there is not a reasonable probability that there would have been a different outcome had the jurors heard the exact testimony Officer Libal gave at the preliminary hearing. Thus, the failure to impeach Officer Libal with his prior inconsistent statement did not undermine the confidence in the outcome reached by the jury. Therefore, Smith was not prejudiced, and accordingly, trial counsel's performance was not ineffective.

By the Court.—Judgment and order affirmed.

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

