COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0276-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD PAYETTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard Payette appeals his conviction for possessing THC with intent to deliver, having pleaded guilty to the charge. Officer Corey Eick stopped Payette on the street in the Village of Coleman and took a bag of marijuana from his coat pocket, without a search warrant. Payette

contends that Eick lacked sufficient objective grounds to stop and frisk him on a village street and therefore conducted an illegal search and seizure under the Fourth Amendment. Payette's trial counsel never raised this issue in the trial court, instead advising Payette to plead guilty. Payette argues that his trial counsel was ineffective for failing to pursue the issue and for advising Payette to plead guilty. In postconviction proceedings, the trial court ruled that the stop and search were legal and that Payette's trial counsel had not furnished Payette deficient legal representation. We agree with the trial court's ruling and therefore affirm Payette's conviction.

¶2 To establish ineffective assistance of trial counsel, defendants need to show that trial counsel's performance was deficient and the performance prejudiced the proceeding's outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Under the prejudice prong, defendants need to show a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. *See* ***id.*** The errors must have been sufficiently serious to render the conviction unreliable. *See* ***id***. at 687. The ultimate focus is on the fundamental fairness of the proceedings. *See* ***State v. Haskins***, 139 Wis. 2d 257, 263-64, 407 N.W.2d 309 (Ct. App. 1987). If courts can resolve the case on the basis of the prejudice prong, they need not address the performance prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The prejudice prong requires those like Payette who plead guilty to show that they would have gone to trial but for trial counsel's errors. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶3 Eick had a sufficient basis to stop Payette. Officers may stop and detain individuals if they have reasonable suspicion that the individual committed a crime. *See* ***Terry v. Ohio***, 392 U.S. 1, 30 (1968); ***State v. Guzy***, 139 Wis. 2d

663, 675, 407 N.W.2d 548 (1987). From his squad car, Eick saw Payette and Jeffrey Young walking down the street two blocks from the Coleman Hotel. At the same time, Eick received a report from a reliable source that young men had been smoking marijuana at the hotel. Payette and Young were young men, in keeping with the description from Eick's source. Eick knew the residents of the village--it had only 834 residents--and Payette and Young were strangers to him. Payette was wearing a long heavy trench coat, even though it was not cold; the coat furnished Payette an easy means to conceal contraband or weapons. This was enough to give Eick reasonable suspicion that Payette and Young had been using marijuana at the hotel. These facts justified the investigative stop. This was not a stop done simply to make generalized criminal inquiries of the detainee. *See* ***United States v. Ward***, 488 F.2d 162 (9th Cir. 1973) (***Terry*** does not allow stops for generalized criminal inquiries).

¶4 Eick also had a sufficient basis to frisk Payette. Officers may frisk individuals if they have reasonable grounds to believe they pose a danger. *See* ***Michigan v. Long***, 463 U.S. 1032, 1049 (1983). When stopped, Payette and Young told Eick that they were coming from the hotel. Both looked nervous and fidgety. They kept their hands in their pockets. Eick asked them to remove their hands. When Payette and Young complied, Eick observed a large bulge remaining in Payette's coat pocket. Eick asked Payette what he had there, and Payette answered "dope." This answer, together with the totality of the circumstances, gave Eick reasonable grounds to reach into Payette's pocket as a protective search. Payette and Young had previously kept their hands in their pockets, and weapons are often used by drug dealers. *See* ***State v. Guy***, 172 Wis. 2d 86, 95-99, 492 N.W.2d 311 (1992). Eich testified that he was concerned because the long dark coat furnished Payette an easy means to conceal weapons. Finally, Eick had

probable cause to arrest Payette once he answered "dope." Eick could have searched Payette on the basis of that probable cause before making the formal arrest. *See* ***State v. Swanson***, 164 Wis. 2d 437, 450-51, 475 N.W.2d 148 (1991). In short, trial counsel provided Payette competent representation on the Fourth Amendment issue.

By the Court.—Judgment and order affirmed.

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