COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1939-CR **Cir. Ct. No. 2003CF6562**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY B. BRAZIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., and TIMOTHY G. DUGAN, Judges. *Affirmed*.

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

¶1 WEDEMEYER, P.J. Larry B. Brazil appeals from a judgment entered after he pled guilty to one count of possession of a controlled substance

(cocaine) with intent to deliver and being a felon in possession of a firearm, contrary to WIS. STAT. §§ 961.41(1m)(cm)3 and 941.29(2)(a) (2003-04).[1] He also appeals from an order denying his postconviction motion. Brazil raises two issues in this appeal: (1) whether the trial court erred in finding that Brazil voluntarily consented to the police officer's entry into and search of his home; and (2) whether the trial court erred in summarily denying his claim that trial counsel provided ineffective assistance. Because the trial court's consent finding is not clearly erroneous and because Brazil failed to establish facts necessitating an evidentiary hearing on his ineffective assistance of counsel claim, we affirm.

BACKGROUND

¶2 On November 13, 2003, City of Milwaukee Police Detectives Carlo Davila and Herb Glidewell and Milwaukee Police Officer Dwain Monteilh went to Brazil's address at 2221 North 44th Street based on a complaint of drug dealing and with a warrant for his arrest. When they arrived, Monteilh went to the side door of the residence and asked a man (later identified as Terry Hale) who was exiting, if Brazil was home. Hale directed Monteilh to Brazil who was in the hallway of the home. Monteilh identified himself to Brazil as a police officer and indicated the need to speak with him. Brazil retreated into the residence, leaving a child in the hallway and slammed the door. Monteilh then called for the detectives to come to the house and explained what had happened.

¶3 Monteilh and Davila then knocked on the door for a couple of minutes, calling out to Brazil, saying it was the police and they needed to talk to

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

him. When Brazil opened the door, the police indicated they were there to investigate a complaint of drug dealing by Brazil. Davila asked if they could come inside and talk further. Brazil denied that any drug dealing was occurring, but stepped back and opened the door wider, allowing the police to enter the kitchen. Glidewell came in shortly thereafter. This occurred at approximately 1:30 p.m.

¶4 The police saw scales and a large stack of money on the table in the kitchen, which Glidewell believed to be related to drug dealing. Glidewell asked Brazil if there were any drugs, guns or more money in the house and Brazil said "no." Glidewell then asked Brazil if they could search the house and Brazil responded "yes, go ahead and search, there is nothing here." Davila also stated that he asked Brazil if the police could search the house for drugs and Brazil consented to such a search. Glidewell and Davila then began to search the home while Monteilh remained in the living room with Brazil and Hale, who had re-entered the home.

¶5 Glidewell found a handgun hidden in the living room fireplace. Either just before or just after this discovery, Brazil asked to speak with Davila privately. The two went into the bedroom and Brazil told Davila there was some cocaine hidden in a vent. Three or four bags of cocaine were discovered hidden in the vent.

¶6 As a result of this discovery, Brazil was read his rights and arrested. He was subsequently charged with possession with intent to deliver and as a felon in possession of a firearm. He pled not guilty and filed a motion seeking to suppress the evidence on the basis that he did not consent to the search. The trial court conducted a hearing at which the three police officers, Brazil, Hale, and a

few other defense witnesses all testified. It was the defense's position that consent was never given, but rather that the police kicked down the door and forced entry. The trial court found the police testimony to be credible and the defense witnesses to be incredible. As a result, the trial court found that Brazil voluntarily consented to the police entry. It denied the motion to suppress.

¶7 At a later date, Brazil changed his plea to guilty and judgment was entered. He was sentenced to ten years, consisting of sixteen months initial confinement, followed by eight years and eight months of extended supervision on the drug count, and four years (concurrent to the drug count) consisting of one year initial confinement, followed by three years' extended supervision on the firearm count. Brazil then filed a postconviction motion alleging ineffective assistance of counsel. He contended that his trial counsel should have also filed a suppression motion on the basis that the conversations with Brazil in his home were non-***Mirandized*** custodial interrogations and therefore the evidence obtained as a result of the conversation should be suppressed. The trial court summarily denied the motion. Brazil now appeals.

DISCUSSION

A. Consent.

¶8 Brazil first argues that the trial court erred in finding that he voluntarily consented to the entry and search by the police. We are not convinced.

¶9 Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact. We accept the trial court's underlying findings of fact unless they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App.

1996). However, we independently determine whether a search or seizure passes constitutional muster. ***Id.***

¶10 A warrantless entry into a home to conduct a search, absent a showing of a recognized exception to the warrant requirement, is presumptively unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984); ***State v. Gonzalez***, 147 Wis. 2d 165, 167-68, 432 N.W.2d 651 (Ct. App. 1988). The State bears the burden of proving that the search and seizure falls within one of the recognized exceptions. ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994). The State contends here, and the trial court found, that Brazil consented to the entry and the search. Consent is one of the recognized exceptions to the warrantless entry. ***State v. Smith***, 131 Wis. 2d 220, 226-27, 388 N.W.2d 601 (1986).

¶11 Based on our review of the record, we cannot rule that the trial court's finding was clearly erroneous. There were clearly two different versions of what happened presented at the suppression hearing. The police all testified that Brazil consented to the entry of the premises, when he stepped back and opened the door wider and allowed the officers to enter the home. Brazil and the defense witnesses testified to support the defense theory that the officers forced their way into the home by kicking in the door. Brazil even brought the door with a footprint on it to the suppression hearing to support his version of events.

¶12 The trial court, however, at the conclusion of the hearing found the police version of what happened to be credible and the defense version of what happened to be incredible. The credibility determination is upheld "unless we …

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 (Ct. App. 1995).

¶13 Here, all three officers present at the scene testified and the trial court found their testimony to be credible. In reviewing the testimony of the officers, we cannot reverse the credibility finding. The officers' version of events is such that a factfinder could reasonably believe the testimony. The trial court also provided analysis as to why the officers' testimony was more believable than the defense testimony. Both Hale and Brazil testified that the police threatened to have social services come and take the child (who was Brazil's grandchild) away unless the location of the drugs was revealed. There was defense testimony that the police actually dialed social services, said they called social services or that social services was on the way. However, as the trial court pointed out, no one from social services ever arrived at the home, and, in fact, the police allowed the child's mother to come and take the child.

¶14 In addition, Hale testified that he stood by and watched the man kick the door until it opened. Hale, who said that at the time it was happening, he did not know the man was a police officer, stated that he just stood and watched. He did not run away, did not yell at the man to stop, and did not call police. Thus, his testimony was inconsistent with what a reasonable person would do if a stranger was kicking in the door of a friend's home. The trial court also pointed out that Hale's testimony was elicited using "extremely leading questions," which also suggests that it may not be credible.

¶15 The trial court reasoned that Brazil's testimony was also not credible, starting with his first statement that he slammed the door initially on the officer because he did not know it was a police officer and thought he was being

robbed. As the trial court pointed out, it is undisputed that Brazil left his grandson in the hallway with the alleged robber. Brazil would not have done so if he truly believed the person was a robber, rather than police, because it would have put his grandson in grave danger.

¶16 Further, the trial court found that if the police actually kicked in the door, it would have happened a lot sooner and Brazil would not have had time to hide the drugs in the vent. In other words, the police officers' testimony that they knocked for a couple minutes before Brazil finally opened the door is consistent with the physical fact that the cocaine was not out on the table with the scale and money, but had been hidden in the vent. The trial court also found that the pictures of the door frame hinges were not consistent with what you would expect to see had the door actually been kicked in. The trial court noted that:

> the screws are out and a little bit angled and they're long screws….The door frame itself looking at the pictures … is not broken. It is just that part that is screwed in that has come out at an angle, and I don't find that's consistent with the door being kicked in under those circumstances. It would have broken.

¶17 The trial court also pointed out that "if the door were in this condition, it wouldn't shut." There were several witnesses who came back to the home while the police were inside and had to knock on the door for several minutes before the police unlocked and opened it. The trial court indicated that had the door been kicked open, it would not have been functional.

¶18 We conclude that the trial court's credibility findings were reasonable and that based on the testimony of the police officers, the trial court's finding that Brazil voluntarily consented to the entry and search was not clearly erroneous. Both Davila and Monteilh testified that they knocked on the door until

Brazil opened it. When they identified themselves as police and asked to come in to discuss the drug complaint further, Brazil backed up and opened the door wider, allowing them to enter. This is sufficient to support the trial court's finding that Brazil consented to the entry. *See* ***State v. Tomlinson***, 2002 WI 91, ¶37, 254 Wis. 2d 502, 648 N.W.2d 367 ("Consent to search does not have to be given verbally. Consent may be given in non-verbal form through gestures or conduct."). We agree with the trial court that Brazil's non-verbal gestures and conduct constituted a consent to enter. As the trial court pointed out, it would not be unusual for Brazil to consent to a search if he felt he had hidden the drugs so well that the police would never find them. Thus, by consenting, he would appear cooperative without risking the discovery.

¶19 Based on the officers' testimony and the trial court's credibility determination, we cannot overturn the trial court's finding that Brazil voluntarily consented to the entry and search of his home. Thus, the trial court did not err in denying the motion to suppress.

B. Ineffective Assistance of Counsel.

¶20 Brazil's next contention is that the postconviction court erred in denying his motion alleging ineffective assistance of counsel. Specifically, Brazil argues that trial counsel should have also made a suppression motion based on the ground that the police engaged in non-***Mirandized*** custodial conversation with Brazil, which led to the discovery of the cocaine. The trial court summarily denied this claim, ruling:

> The court rendered a decision setting forth its factual findings and conclusions of law on July 16, 2004. It found Terry Hale's testimony unbelievable, and it did not believe that the police had handcuffed the defendant upon entry. The court found the defendant's testimony incredible as

> well, fully setting forth its reasons on the record, i.e. defendant's previous lies to police, inconsistencies in his testimony, and credibility of police detectives and officers. This court heard the witnesses, observed their demeanor, and had an opportunity to assess their credibility. The court finds that even if trial counsel had pursued a motion to suppress on grounds that an improper custodial interrogation had occurred, it would have found that the defendant was not in custody during the police knock and talk and that Miranda warnings were not necessary. Accordingly, the court concludes that the defendant was not prejudiced by trial counsel's failure to pursue a motion to suppress on this basis.

¶21 We affirm the trial court. In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer'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." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] defendant must show 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶22 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a

sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶23 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***Id.*** To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination "is limited to whether the court erroneously exercised its discretion in making this determination." ***Id.*** at 318.

¶24 The question then for this court is did Brazil present sufficient facts on both trial counsel's performance and resulting prejudice to demonstrate that counsel should have presented the issue of improper custodial interrogation at the suppression hearing. We conclude that Brazil has failed to satisfy his burden of proof.

¶25 Brazil asserts that there was sufficient evidence to demonstrate that the questioning of him within his home was a custodial interrogation. In support of that, he states that the police were in the home for over an hour before recovering evidence, that Brazil testified about the threats the police made in order to get him to reveal where the drugs were hidden, and he cites the other defense witnesses' testimony that Hale and Brazil were handcuffed. Our review of the record, however, does not reveal any veracity to these contentions.

¶26 First, as noted, the trial court found Brazil's testimony to be incredible and we are not in a position to overturn that finding. Thus, any claimed threats made to Brazil by the police cannot be considered. The police testimony, however, was found to be credible. The police testified that no threats were made. Second, the police testimony does not support the hour-long time period alleged by Brazil. The police indicated that they were outside the house observing for approximately thirty minutes before approaching the home. Glidewell testified that Brazil consented to the search of the home within minutes of entry and that the gun was discovered about fifteen minutes after entry. It was at about this time that Brazil revealed the location of the hidden drugs. Based on this timeline, we cannot conclude that the police were rummaging through the home for one hour before any evidence was recovered. Third, there is no testimony by the police that either Brazil or Hale were handcuffed or restrained. The only testimony from the police was that while two of the officers searched the home, one officer remained in the living room with Brazil and Hale.

¶27 In order to demonstrate that the conversations in the house were actually custodial interrogations, Brazil would need to demonstrate that his freedom of action was curtailed to an extent associated with a formal arrest. *See* ***Arizona v. Mauro***, 481 U.S. 520, 527 (1987). "'[I]nterrogation' occurs when a

person is 'subjected to either express questioning or its functional equivalent.'" ***State v. Armstrong***, 223 Wis. 2d 331, 356, 588 N.W.2d 606 (1999) (citing ***Rhode Island v. Innis***, 446 U.S. 291 (1980)). The "'functional equivalent"' of interrogation has been defined as "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" ***Mauro***, 481 U.S. at 526-27 (citation omitted). We apply this test from the "perception of the accused, not the intent of the police officer." ***State v. Badker***, 2001 WI App 27, ¶13, 240 Wis. 2d 460, 623 N.W.2d 142. We look to whether a reasonable person in Brazil's situation would "'have felt he or she was not at liberty to terminate the interrogation and leave.'" ***Yarborough v. Alvarado***, 541 U.S. 652, 663 (2004) (citing ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995)). We also "consider the totality of the circumstances, including such factors as: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

¶28 In the circumstances of this case, Brazil has failed to proffer sufficient facts to demonstrate that he was in custody when speaking with the officers in his home, as he relies solely on the testimony of witnesses, which the trial court found to be incredible. We are cognizant of the fact that Brazil and his witnesses testified at the suppression hearing to facts to suggest that the police restrained him of his liberty, threatened him, forced entry and drew weapons. However, it is not the role of this court to assess the credibility of the witnesses. That assessment was done by the trial court, which had the benefit of hearing the testimony of the witnesses firsthand, rather than reading the testimony in the transcript. The trial court was able to assess the demeanor and non-verbal

reactions of each witness in order to analyze the credibility of those involved in this case.

¶29 Because we have concluded that the trial court's credibility assessments were not clearly erroneous, we cannot go back now and rely on incredible testimony to find support for Brazil's contentions. Accordingly, we must base our analysis on the testimony, which was found to be credible—that of the police officers. Based on the police officers' testimony, Brazil was not formally restrained or threatened. The police asked permission to enter the home and asked whether they could search the home. They disclosed to Brazil that the reason for the request was a drug-dealing complaint. The testimony of the police conclusively demonstrates that Brazil disclosed the location of the cocaine voluntarily on his own and not following a question from the officers. Brazil asked to speak to Davila alone and decided to reveal the location of the cocaine in an attempt to "come clean" and cooperate.

¶30 Further, based on the police testimony, Brazil had consented to the search of his home and, thus, was free to terminate the consent and ask the police to leave his home at any time.[2] Based on the foregoing, there are no credible

[2] Brazil argues that this case is similar to ***State v. Wilson***, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999), where the defendant was "effectively arrested when [the police officer] twice refused to allow him to leave to use the bathroom." ***Id.*** at 267. We disagree. In ***Wilson***, it was undisputed that the officer approached Wilson's home after detecting the smell of marijuana. ***Id.*** at 260-67. The officer asked a child, who was playing in the backyard, if her parents were home. ***Id.*** at 260. The child went to the back door, opened it "and called out, '[t]he cops are here.'" ***Id.*** The officer followed the child to the back door and followed the child through the door, remaining on a landing just inside the back door. ***Id.*** at 261. Wilson immediately approached the officer from the basement steps. ***Id.*** When asked about the marijuana odor, Wilson said he needed to use the bathroom, but the officer said he could not go until the officer searched his person. ***Id.*** Wilson repeated that he needed to use the bathroom and the officer told him he could not leave without first being searched. ***Id.*** Wilson submitted to the search and the officer found a bag of marijuana. ***Id.*** In ***Wilson***, the court found that when the officer refused to allow Wilson to use the bathroom, it resulted in an "effective[] arrest[]" and an "in custody" situation. ***Id.*** at 267.

(continued)

factual allegations upon which trial counsel could have proffered a successful suppression motion on the alternate basis of improper custodial interrogation. Thus, Brazil has failed to demonstrate that he was prejudiced by trial counsel's failure to make said motion, and as a result, the trial court did not err in summarily denying his motion alleging ineffective assistance of counsel.

¶31 Brazil also contends that an evidentiary hearing should have been held before denying the motion because the record does not reflect what questions he may have been asked before he revealed the location of the cocaine. Specifically, he argues that evidence should have been elicited as to the degree of restraint used, whether the police advised him of the arrest warrant, and what persuasive techniques were used. Such contentions do not warrant an evidentiary hearing in this instance.

¶32 All of the questions Brazil proffers involve what the police asked him, told him, and how they treated him. This is all factual information which Brazil would have known and if any of this information contained facts, which if true, would entitle him to relief, it should have been set forth in his postconviction motion. The postconviction motion, however, contained conclusory, self-serving statements asserting that Brazil was in custody when the officers were in his home. Thus, the motion did not contain sufficient factual information to warrant an evidentiary hearing on this claim. Accordingly, we conclude that the trial court

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The factual circumstances in the case before us are much different. In ***Wilson***, the officer entered without consent whereas Brazil consented to the entry and search. In ***Wilson***, it was undisputed that the officer refused to allow Wilson to use the bathroom even though he asked to do so two times. There is no evidence that the officers refused to let Brazil use the bathroom. Accordingly, ***Wilson*** offers no support for Brazil's contentions in this appeal.

did not err when it denied Brazil's motion without conducting an evidentiary hearing.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.