

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 11, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

No. **98-3357-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ERIC HUNE,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK and STEVEN D. EBERT, Judges. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Eric Hune appeals from a judgment convicting him of two counts of possessing drugs with intent to deliver. He raises various arguments, none of which entitle him to reversal. We therefore affirm.

¶2 The State charged Hune with possessing cocaine with intent to deliver within 1,000 feet of a school, and with possessing marijuana with intent to deliver, also within 1,000 feet of a school. The State added two counts of violating the State's Drug Stamp Act.

¶3 All four charges went to trial. The State presented evidence that Hune did not purchase tax stamps for the drugs in his possession, and that he possessed them within 1,000 feet of a Head Start Early Childhood Development Center. The jury, with no African-American jurors, found Hune, an African-American, guilty on all four counts.

¶4 In postconviction proceedings, the trial court dismissed the drug stamp convictions after the supreme court declared the Drug Stamp Act unconstitutional. *See State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997). The court also dismissed the penalty enhancers based on possessing within 1,000 feet of a school, after concluding that the Head Start premises was not a "school" under the enhancer provision. However, the court denied Hune's challenge to the jury makeup and his allegation that trial counsel ineffectively represented him. On appeal, Hune contends that: (1) his convictions were contaminated and rendered unconstitutional by the evidence presented on the tax stamp charges and the proximity to a school enhancer; (2) the jury panel unconstitutionally excluded African-Americans; (3) the trial court erroneously limited cross-examination of a prosecution witness; and (4) he received ineffective assistance from trial counsel.

¶5 Evidence on the dismissed charges and enhancers did not contaminate Hune's conviction. Prejudicial spillover from evidence used to obtain a conviction that is later reversed may justify reversal on other joined counts under the doctrine of retroactive misjoinder. *See State v. McGuire*, 204 Wis.2d 372,

379-81, 556 N.W.2d 111, 114-15 (Ct. App. 1996). In deciding the issue, we consider: (1) whether the evidence on the dismissed counts was so inflammatory as to incite the jury to convict on the remaining counts; (2) the degree of overlap and similarity between the evidence on the dismissed counts and the remaining counts; and (3) the strength of the case on the remaining counts. *See id.* at 379-80, 556 N.W.2d at 114. Here, Hune cannot reasonably describe as inflammatory the evidence that he did not possess tax stamps, and that he possessed drugs in close proximity to a Head Start center. The testimony presented on these issues was brief and to the point. It did not introduce any unfair prejudice as to the possession counts. Additionally, it did not overlap nor resemble the evidence on the possession count, which was not only unrelated but compelling.

¶6 Hune did not establish that the jury panel unconstitutionally excluded African-Americans. In the post-conviction proceeding Hune bore the initial burden to show: (1) that the allegedly excluded group is distinctive in the community; (2) that the group is not fairly and reasonably represented in jury panels; and (3) that the group's under-representation is attributable to systematic exclusion in the jury selection process. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979). Hune introduced no evidence on the second and third factor listed above.

¶7 The trial court did not erroneously limit cross-examination of prosecution witness Albert Cole. The State introduced evidence that Hune handed a bag containing drugs to Cole, who then quickly passed it to another person. Hune's defense theory was that Cole placed the drugs in the bag after Hune passed it to him. He contends that he was not allowed to meaningfully present that defense because he was not allowed to cross-examine Cole about prior acts of drug dealing. However, we conclude that even if that line of cross-examination was admissible, its exclusion was harmless. The jury heard evidence that Cole

carried marijuana in a bag in his pants, another witness testified to seeing Cole take something from inside his pants and place it in Hune's bag, and Cole did, in fact, admit to a prior drug conviction. Additional cross-examination on Cole's past acts would have been cumulative, at best.

¶8 Hune did not receive ineffective assistance from trial counsel. He contends that counsel unreasonably failed to attempt to suppress evidence resulting from Hune's contact with his probation agent. Although that agent encountered and questioned Hune shortly before his arrest, Hune presented no evidence that the agent restrained or seized him for Fourth Amendment purposes. Trial counsel reasonably concluded that their encounter was consensual and Hune could not have succeeded on a suppression motion.

¶9 Hune next contends that trial counsel unreasonably failed to obtain and disclose the criminal record of another witness, Christopher Kilgour. However, counsel reasonably concluded that it was not necessary to impeach Kilgour. In his testimony, Kilgour stated that he saw Hune pass the bag to Cole, but also testified that he lost sight of Cole for several seconds after the transfer. Consequently, Kilgour's testimony was not inconsistent with Hune's defense.

¶10 Finally, Hune contends that counsel ineffectively failed to obtain and use maps of the crime scene to strengthen his defense. On an ineffective assistance of counsel claim, the defendant bears the burden of proving both deficient performance and prejudice. *See State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). At Hune's postconviction hearing, he failed to present evidence that the use of maps would have benefited his defense.

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

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

