COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2831-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLY J. LOVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Willy J. Love appeals from a judgment, entered after a jury trial, convicting him of possession of cocaine with intent to deliver, second or subsequent offense, as a party to a crime, and possession of cocaine without the tax stamp, in violation of WIS. STAT. §§ 961.41(1m)(cm)4, 961.48,

939.05 and 139.89.[1] He also appeals from an order denying him postconviction relief. Love asserts the following claims of error: (1) he was denied effective assistance of counsel because his trial lawyer did not attempt to impeach a police officer at the suppression hearing; (2) the trial court erred by excluding the testimony of Love's accomplice, whom, he claims, would have testified that the cocaine belonged to him; and (3) his convictions for both possession of cocaine with intent to deliver and possession of cocaine without the tax stamp violate double jeopardy. We affirm.

I. BACKGROUND

¶2 Love was a passenger in a car driven by his half-brother, Robert Davis, when two police officers stopped the car for having an obstructed view. In the police report, Officer August Halama stated that the view was obstructed by a "pine cone" on the rear view mirror. Police approached the car and saw several cell phones and a bag of sandwich baggies on the floor behind the driver and the passenger. After the driver consented to a search of the vehicle, police found a digital scale with white residue. Love consented to a search of his person and police found a plastic baggie containing cocaine in his pants. According to Love,

[1] WISCONSIN STAT. § 139.89 (1991-92), the tax stamp law, was found to unconstitutionally compel self-incrimination in ***State v. Hall***, 207 Wis. 2d 54, 557 N.W.2d 778 (1997). Effective October 14, 1997, however, the tax stamp law was amended to accommodate ***Hall***'s criticisms. *See* 1997 WIS. ACT 27 § 2979m. The crimes alleged in this case were committed in September 1998, after the amendment's effective date. Love does not raise a constitutional challenge to WIS. STAT. § 139.89, other than his contention that conviction for both possession and possession without affixation of a tax stamp violates his right to be free from double jeopardy.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the cocaine belonged to Davis, who had thrown the cocaine to him when the police stopped the car.

¶3 Love moved to suppress the cocaine as the fruit of an illegal stop. At the suppression hearing, Officer Halama was not called to testify. Instead, his partner, Officer Jeffrey Timmerman, testified and, as characterized by the trial court, "gave a precise, detailed description of a hundred dollar bill air freshener in a fan shape, 5 inches by 4 to 6 inches below the mirror, plus two Styrofoam eight balls hanging from the rear-view mirror approximately 3 to 4 inches below the mirror of golf ball size." Love also testified at the suppression hearing. He admitted that a pine cone air freshener was hanging about four inches below the rear view mirror. Defense counsel did not impeach Officer Timmerman with Officer Halama's police report, however. The trial court found the stop to be valid and denied Love's motion to suppress, stating: "I believe Officer Timmerman that there was an obstructed view at least in the officer's judgment." The trial court also found: "The defendant says it was just a pine cone air freshener … but I did not believe his version of what was hanging from the rear-view mirror."

¶4 Prior to trial, defense counsel proffered the testimony of Robert Davis, who would have testified that the cocaine found on Love belonged to him, that he threw it to Love when the car was stopped, and that Love did not know about the presence of the cocaine before it was thrown to him. The trial court excluded this evidence as not relevant to the elements of possession with intent to deliver cocaine, reasoning that it did not matter if the cocaine belonged to someone else since Love possessed it in his pants. In addition, the trial court noted that at the suppression hearing Love had testified that he intended to throw the cocaine back to Davis after the police left, which the court considered to be a "delivery." At trial, Love testified that the cocaine did not belong to him but that

he would have left the cocaine on the ground rather than giving it back to Davis. As noted, the jury found Love guilty of both charges.

¶5 At the postconviction hearing, held pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (evidentiary hearing generally required for ineffective-assistance-of-counsel claims), the court determined that Love's trial lawyer "ably litigated the suppression motion." The trial court found: "Timmerman's testimony was remarkable … and I say that even today after I've seen the back of the citation, the police report and heard the testimony," and determined that its conclusion would have been the same. The court again found Robert Davis's proffered testimony to be irrelevant and rejected Love's double jeopardy argument.

II. DISCUSSION

A. Ineffective-Assistance-of-Counsel Claim

¶6 Love first claims that he was denied effective assistance of counsel because his trial lawyer did not attempt to impeach Officer Timmerman with the police report and testimony of Officer Halama at the suppression hearing. The familiar two-pronged test for ineffective-assistance-of-counsel claims requires defendants to prove: (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. *See* ***id.***, 466 U.S. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim

fails. *See* ***id.***, 466 U.S. at 697. We will "strongly presume" counsel to have rendered adequate assistance. ***Id.***, 466 U.S. at 690. Whether counsel's representation constituted ineffective-assistance-of-counsel is a mixed question of law and fact. *See* ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether a lawyer's performance is deficient or, if so, there is prejudice, is a question of law that this court reviews *de novo*. *See* ***id.***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

¶7 We conclude that Love has failed to show he was prejudiced. Accordingly, we need not determine whether counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697. The main issue of the suppression hearing in this case was whether the police officers had probable cause to believe that the driver's view was obstructed.[2] Here, the trial court clearly believed Officer Timmerman's testimony that the driver's view was obstructed by "a hundred dollar bill air freshener in a fan shape … plus two Styrofoam eight balls hanging from the rear-view mirror," and did not believe Love's testimony that it was only a pine cone air freshener. The postconviction court concluded that even if Love's trial lawyer *had* impeached Officer Timmerman with Officer Halama's testimony and police report, its decision to deny the motion would not have changed. Love argues that the trial court's holding relies on clearly erroneous facts. We disagree. The trial judge was the finder-of-fact at the suppression hearing and also presided over the

[2] WISCONSIN STAT. § 346.88(3)(b) provides:

> **Obstruction of operator's view or driving mechanism.** No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front windshield.

postconviction hearing. "We must give due regard to the trial court's opportunity to judge the credibility of … witnesses." ***State v. Yang***, 201 Wis. 2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996). Moreover, while the evidence differs on what exactly hung from the rear view mirror, there is no conflict that something did: Love himself testified that a pine cone air freshener was hanging about four inches below the rear view mirror. This alone may have given the officers probable cause to believe a traffic violation had occurred. *See* ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696, 698 (Ct. App. 1996) (traffic stop reasonable if officers have probable cause to believe a traffic violation has occurred); WIS. STAT. § 346.88(3)(b) ("No person shall drive any motor vehicle … with any object so placed or suspended … so as to obstruct the driver's clear view through the front windshield."). Thus, we conclude that Love was not denied effective assistance of counsel because counsel's attempts to impeach Officer Timmerman would not have changed the result of the suppression motion.

B. Exclusion of Proffered Testimony

¶8 Love next argues that the trial court improperly excluded the relevant, proffered testimony of Robert Davis that the cocaine belonged to him and not to the defendant. Specifically, Love argues that this testimony was relevant because it went to whether he intended to deliver cocaine. The State counters that Davis's testimony was not relevant because Love was charged as a party to the crime. A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted).

¶9 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. The phrase "any tendency" reflects the "low threshold for the introduction of evidence that the relevancy statute creates." ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899, 904 (1997). The proffered testimony of Davis met this low threshold of relevance and the trial court erred by excluding it.

¶10 An evidentiary error, however, is subject to a harmless-error inquiry. *See* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528, 534 (Ct. App. 1996); *see also* WIS. STAT. § 805.18(2).[3] In this inquiry, the State has the burden of establishing, beyond a reasonable doubt, that there is no "reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543, 544 n.11, 370 N.W.2d 222, 232 n.11 (1985). This is a question of law that we review *de novo*. *See* ***State v. Harris***, 199 Wis. 2d 227, 256–263, 544 N.W.2d 545, 557–559 (1996). In determining whether an error is harmless, we weigh the effect of the trial court's error against the totality of the credible evidence supporting the verdict. *See* ***id.***, 199 Wis. 2d at 255, 544 N.W.2d at 557. We conclude that the State has met its burden.

[3] WISCONSIN STAT. § 805.18(2) provides, as material here:

> **Mistakes and omissions; harmless error.** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of … the improper admission of evidence … unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

¶11 Intent to deliver may be demonstrated by evidence of the quantity and monetary value of the controlled substance, the possession of the manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance. *See* WIS. STAT. § 961.41(1m). Here, the evidence that either Love or Davis intended to deliver cocaine was overwhelming, due to the amount of cocaine found on Love and the other items found in the car. In addition to the forty-gram single chunk of cocaine found on Love, police found sandwich bags on the rear floor of the car, two or three cell phones between the car seats, $65 worth of $5 bills on Love, and a digital scale with white residue on it. Moreover, "[i]n Wisconsin there is no requirement that an aider and abettor share the specific intent required for commission of the substantive offense he aids and abets." ***State v. Zelenka***, 130 Wis. 2d 34, 47, 387 N.W.2d 55, 60 (1986). We conclude that there was no reasonable possibility that the exclusion of the evidence contributed to the convictions.

¶12 Love alternatively argues that his trial counsel was ineffective for failing to explain the relevance of Robert Davis's testimony to the trial court. We disagree. Trial counsel was not ineffective in this regard because Love suffered no prejudice. We reach this conclusion based on the same rationale contained in the harmless-error analysis of this opinion. *See* ***State v. Myren***, 133 Wis. 2d 430, 441, 395 N.W.2d 818, 824 (Ct. App. 1986) (The "'reasonable possibility' test" under the harmless-error analysis established by ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231–232 (1985), "is substantively the same as the 'reasonable probability' test declared by the Supreme Court" in ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

C. Double Jeopardy

¶13 Finally, Love claims that his convictions for possession of cocaine with intent to deliver and possession of cocaine without the tax stamp violate his protections against double jeopardy. The Double Jeopardy Clause, embodied in both the Fifth Amendment of the United States Constitution and article 1, section 8 of the Wisconsin Constitution, provides, among other things, for protection against multiple punishments for the same offense.[4] *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 515, 509 N.W.2d 712, 717 (1994) (citation omitted). Where a defendant alleges that a charging document is multiplicitous, a two-pronged test is utilized. First, the court inquires whether the charges are identical in law and fact. "The determination of whether offenses are different in law or whether one offense is a lesser-included offense of another is controlled by the 'elements only' test set out in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932)." ***State v. Lechner***, 217 Wis. 2d 392, 405, 576 N.W.2d 912, 919 (1998). Second, the court must then consider whether the legislature intended that multiple punishments could be imposed. *See* ***Lechner***, 217 Wis. 2d at 402–403, 576 N.W.2d at 918. Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews *de novo*. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 332 (1998).

¶14 This exact question presented in this case was resolved by ***State v. Dowe***, 197 Wis. 2d 848, 852, 541 N.W.2d 218, 220 (Ct. App. 1995), *rev'd on other grounds*, ***State v. Hall***, 207 Wis. 2d 54, 557 N.W.2d 778 (1997), which

[4] The Double Jeopardy Clause of the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. Const. amend. V. Similarly, article I, § 8 of the Wisconsin Constitution provides: "[N]o person for the same offense may be put twice in jeopardy of punishment."

specifically held that "possession of a controlled substance with intent to deliver is not a lesser-included offense of a tax stamp violation."[5] Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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

[5] Although ***State v. Dowe***, 197 Wis. 2d 848, 541 N.W.2d 218 (Ct. App. 1995) was subsequently reversed on other grounds, the supreme court did not reverse the double jeopardy holding. Thus, it retains its precedential value and this court is bound by it. *See* ***State v. Byrge***, 225 Wis. 2d 702, 717 n.7, 594 N.W.2d 388, 394 n.7 (Ct. App. 1999); ***Cook v. Cook***, 208 Wis. 2d 166, 186, 560 N.W.2d 446, 254 (1997).