COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2068-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS GIEGLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas Giegler appeals from a judgment of conviction on one count of burglary as a party to the crime and as a habitual criminal, and from an order denying his postconviction motion. The issues are whether his counsel was ineffective by not challenging the search warrant, and

whether the trial court erred in its pretrial conclusion that there was probable cause for Giegler's arrest. We affirm.

¶2 Police executed a search warrant at Giegler's residence. The warrant authorized the seizure of microwave ovens. It described the two ovens the police were looking for by brand name and control features. An oven matching a description in the warrant was seized from Giegler's residence, though the victim later determined it was not one of the ovens stolen. Giegler's argument is that his trial counsel was ineffective by not challenging the validity of the search warrant, and that, if the warrant was not valid, the police would not have been in his home, where they also arrested him without an arrest warrant.

¶3 The standards for determining ineffective assistance of counsel were established in ***Strickland v. Washington***, 466 U.S. 668 (1984), are not in dispute, and need not be repeated here. The trial court concluded that Giegler's motion did not sufficiently allege prejudice because any motion challenging the search warrant would have been denied. According to Giegler, the flaw in the warrant is that the ovens were not identified with sufficient specificity because the warrant descriptions lacked a serial number or "other unique identifying characteristics."

¶4 On appeal, the parties generally agree on the applicable law, namely, that a search warrant must state with particularity the items to be seized, and should do so to the degree of specificity that is available under the circumstances. In Giegler's view, this apparently means that the named item must be identified to the highest degree of specificity that is ever possible for a member of that class of items. Therefore, because microwave ovens have serial numbers, he believes a serial number is required for a valid warrant.

¶5 We do not believe it is necessary for items to be described with this degree of particularity. Furthermore, Giegler does not cite to anything in the record suggesting that his trial counsel had any reason to believe the police knew the serial numbers or other unique characteristics of these ovens and therefore could have put them in the warrant. Under these circumstances, Giegler has not shown that counsel's performance was deficient or that he was prejudiced.

¶6 Giegler also argues that his counsel should have challenged the execution of the warrant. Specifically, he argues that once the police determined that the oven in his apartment did not fit the warrant description, there was no probable cause to enter the bedroom and arrest him. Giegler does not provide a citation to the record in support of his argument that the oven at his apartment did not fit the warrant's description. One police officer testified that the oven was consistent with the description, although the officer also appeared to believe, incorrectly, that the search warrant did not contain specific brand names. The State asserts in its brief that it was unable to find any indication in the record of the brand name of the oven found in Giegler's residence, only that the victim determined it was not one of the stolen ovens. In other words, the record does not support the argument that the oven found in Giegler's residence was *not* consistent with the warrant. Giegler has not filed a reply brief, and we take that as a concession that there is no factual support in the record for this argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

¶7 Giegler's next argument is that his trial counsel was ineffective because she did not use the search warrant issues discussed above as a basis to suppress a statement Giegler made. Because we have concluded that counsel was

not ineffective by not pursuing the warrant issues, it follows that counsel was also not ineffective by not using those same arguments to seek suppression.

¶8 Giegler's final argument is that the trial court erred by denying his suppression motion which alleged that he was arrested without probable cause. The court held an evidentiary hearing on this motion, at which it heard testimony from police and Giegler and made factual findings. Giegler argues that the trial court erred by finding that the microwave oven found in his residence was consistent with the warrant description. The State, presumably seeking to avoid reliance on the somewhat unclear record we described above, argues that the oven is not necessary to establish probable cause.

¶9 We agree that probable cause was established without reference to the oven. Police had information from two informants who had incriminated themselves and Giegler in various burglaries. One of them said that Giegler had told him that, while performing a certain burglary alone, Giegler cut himself on the arm and bled quite a bit at the scene. Police had indeed recovered blood from the area of entry, and, at the time of Giegler's arrest, there was a scab scarring over an area on his arm. Giegler disputes the trial court's finding that Giegler's arm cut was seen by an officer before his arrest. Although some of the testimony on that point was vague, other testimony clearly provided sufficient support for the court's finding. We conclude that this information was sufficient to provide probable cause to arrest.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).