COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-3010-CR
03-0066-CR

Cir. Ct. No. 00CF000043

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK DAVID HAYTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: ROBERT P. VANDEHEY, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Mark Hayter appeals a judgment convicting him of manufacturing THC. He also appeals an order denying his postconviction motion for a new trial. Hayter claims that his arrest was invalid and all evidence seized thereafter should have been suppressed; that he was denied effective assistance of

counsel; and that the State improperly withheld discovery evidence. We reject each contention and affirm for the reasons discussed below.

BACKGROUND

¶2 Based on information given by a confidential informant, the Prairie du Chien police department initiated an investigation into whether Hayter was selling drugs. On two separate occasions, the police conducted controlled drug buys in which the confidential informant, while under surveillance, bought marijuana from Hayter. On a third occasion, Hayter gave the confidential informant a sample of marijuana, but told the informant he would need to come back that evening to get the rest.

¶3 When Hayter left his residence shortly after the confidential informant left, the police decided to follow Hayter to see if he would lead them to his source. After the police observed Hayter visit another residence, they pulled his car over, arrested him, and searched him and his vehicle and found nothing.

¶4 The police subsequently obtained a warrant to search Hayter's mobile home, where, in a back room, they found a grow light, fifteen to twenty-five five-gallon buckets, watering cans, stalks, loose marijuana leaves, and potting soil. During police questioning the next day, Hayter admitted that he had been growing marijuana from seeds for some time. Hayter subsequently told officers where they could find additional individually wrapped bags of marijuana buried near his mobile home.

¶5 During the trial, defense counsel learned for the first time that some of the controlled buys had been tape-recorded. Hayter moved for a mistrial. The trial court ruled that the State had improperly failed to turn over tapes in its

possession, but concluded there was no showing of prejudice sufficient to warrant a mistrial. Instead, the trial court instructed the jury to disregard any testimony about prior marijuana sales in which Hayter may have been involved.

¶6 The jury returned a guilty verdict. The trial court imposed and stayed a term of eighteen months of initial confinement to be followed by three years of extended supervision, subject to three years of probation.

DISCUSSION

Suppression

¶7 Hayter first argues that all of the evidence against him should have been suppressed on the grounds that the police had no basis to stop his car because he had not committed any traffic offense. This was not, however, an investigative stop designed to determine whether Hayter had committed a traffic offense, but rather an arrest based on probable cause that Hayter had been selling marijuana.

¶8 "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). Here, the information the police had collected from a series of controlled drug buys provided more than sufficient probable cause to arrest Hayter. The arrest, the search of Hayter's car incident to that arrest, and evidence gathered as a result of Hayter's subsequent police interrogation were therefore all proper.

Assistance of Counsel

¶9 Hayter next contends that counsel provided ineffective assistance by failing to adequately investigate his case or prepare for trial.

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12, *review denied*, 2003 WI 126, ___ Wis. 2d ___, 668 N.W.2d 557 (citations omitted).

¶10 Here, we need not address whether counsel's performance was deficient in any respect because Hayter has not shown what, if anything, counsel could have discovered or done differently that would have had any effect on the outcome of his case. Hayter has failed to show prejudice.

Discovery Violations

¶11 Finally, Hayter contends that the State violated discovery rules by failing to provide a witness list and to turn over tape-recordings of the controlled drug buys prior to trial. The record, however, supports the trial court's determinations that neither of these violations prejudiced Hayter.

¶12 With regard to the witness list, the State represented that it would not be calling any witnesses who were not mentioned in the police reports (which had been turned over to the defense), and defense counsel did not dispute at a pretrial hearing that she knew who the witnesses would be. Nor does Hayter now name any specific witness whose appearance at trial was a surprise to him. *See* ***Irby v. State***, 60 Wis. 2d 311, 320-22, 210 N.W.2d 755 (1973) (undisclosed witness need not be excluded unless defendant demonstrates prejudice).

¶13 Similarly, with regard to the tape-recordings, Hayter does not point to any exculpatory evidence contained in the tapes that would have affected the outcome of the trial. Therefore, he has no basis to claim a violation of the State's duty to disclose exculpatory evidence. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Moreover, the tapes were never offered, much less admitted, at trial. We are therefore satisfied that the trial court's decision to strike testimony relating to the controlled drug buys was an entirely adequate remedy for the discovery violation. *See* ***State v. DeLao***, 2002 WI 49, ¶¶51, 60, 252 Wis. 2d 289, 643 N.W.2d 480.

By the Court.—Judgment and order affirmed.

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