COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2392-CR **Cir. Ct. No. 2002CF5627**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER D. WICKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

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

¶1 FINE, J. Peter D. Wicker appeals a judgment entered after the trial court in a bench trial found him guilty of possessing more than ten but fewer than fifty grams of heroin, with the intent to deliver, *see* WIS. STAT. § 961.41(1m)(d)3,

and from the order denying his motion for postconviction relief. Wicker claims that his trial lawyer gave him ineffective representation. We affirm.

I.

¶2 This case began when a police officer saw Wicker standing in front of what the officer believed was a drug house and summoned other officers. When they arrived, one of the officers followed Wicker into the house through the front door and, as he told the trial court, saw Wicker throw a black object and a brown paper bag onto a bed in a bedroom that he saw "straight through the front door." The black object was a scanner set to one of the Milwaukee-Police channels. There were seventy-five aluminum-foil packets of heroin in the paper bag.

¶3 Wicker did not live in the house, and testified that he was a friend of a woman who lived there. He further told the trial court that he had stayed there once overnight, but that he did not have anything "to do with that residence."

¶4 Wicker sought to suppress the scanner and heroin because, he argued, the police went into the house without a warrant unlawfully, and, also, because of what he claimed was a violation of ***Terry v. Ohio***, 392 U.S. 1 (1968).

II.

¶5 On appeal, Wicker claims that his trial lawyer was ineffective because the lawyer did not: (1) argue that his stop and arrest were illegal, and (2) cross-examine and impeach a State witness. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant claiming ineffective-assistance of his or her trial lawyer must establish both that the lawyer gave deficient performance and

also that the defendant suffered prejudice as a result). We address these contentions in turn.

A. *Stop and Arrest.*

¶6 Although Wicker's lawyer filed a motion to suppress arguing that the police did not have reasonable suspicion to stop and detain him under ***Terry***, Wicker contends that his lawyer was ineffective because the trial court did not address and his lawyer did not argue his ***Terry*** claim at the hearing on his motion to suppress. We disagree.

¶7 "***Terry*** applies to confrontations between the police and citizens in public places only. For private residences and hotels, in the absence of a warrant, the police must have probable cause and exigent circumstances or consent to justify an entry." ***State v. Stout***, 2002 WI App 41, ¶15, 250 Wis. 2d 768, 780–781, 641 N.W.2d 474, 479; *see also* ***State v. Munroe***, 2001 WI App 104, ¶13 n.4, 244 Wis. 2d 1, 14 n.4, 630 N.W.2d 223, 229 n.4 ("[B]oth ***Terry*** and [WIS. STAT.] § 968.24 authorize such stops in public places, not in homes or hotel rooms.").[1] Accordingly, ***Terry*** does not apply here and, therefore, Wicker's lawyer was not

[1] WISCONSIN STAT. § 968.24, Wisconsin's codification of ***Terry***, provides:

> **Temporary questioning without arrest.** After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a *public place* for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

(Emphasis added.)

ineffective because he did not argue ***Terry*** to the trial court. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994) ("trial counsel was not ineffective for failing or refusing to pursue feckless arguments").

¶8 Wicker also argues that the evidence should have been suppressed because police entry into the house was unlawful, and, therefore, probable cause to arrest him cannot rest on what the officers saw him do in the house. Wicker does not, however, contend on appeal that the trial court erroneously concluded that he lacked standing to assert that police entry into the house was unlawful. *See* ***State v. Trecroci***, 2001 WI App 126, ¶¶56–61, 246 Wis. 2d 261, 289–291, 630 N.W.2d 555, 569–570. Thus, once they were inside the house, what they saw gave them probable cause to arrest Wicker, and he does not argue that it did not.

B. *Cross-Examination of Witness.*

¶9 Wicker contends that his trial lawyer was ineffective because the lawyer did not cross-examine and impeach the officer who triggered the events by calling for other officers. The officer, Christopher Ederesinghe, testified at the preliminary examination that he saw Wicker run into the house holding a brown paper bag and a "radio-like object." Ederesinghe also claimed that he then saw through the house's front door Wicker run past a bed and "toss[]" the paper bag and "radio-like object" onto the bed. At the trial, however, Ederesinghe testified that he lost sight of Wicker as he, Ederesinghe, ran to the back of the house to secure that area. Ederesinghe further admitted at the trial that he did not see Wicker throw the paper bag and scanner onto a bed and, on cross-examination, conceded that while he saw Wicker holding a "walkie-talkie" he did not see a paper bag. Wicker argues that his trial lawyer was ineffective because the lawyer did not impeach Ederesinghe at the trial with these inconsistencies. We disagree.

¶10 The trial court concluded Wicker was not prejudiced because "the evidence against the defendant proved ample to meet the burden of proof." One of the other officers going into the house testified at the trial that he saw Wicker run into the house with a brown paper bag and a "medium-sized object," and a second officer testified that he saw Wicker throw a black object and a brown paper bag onto a bed. When examined, the bag had heroin in it. We agree with the trial court's assessment that the *de minimis* conflict in testimony did not rise to the level so that the lawyer's failure to pursue it "undermine[d] confidence in the outcome." ***Strickland***, 466 U.S. at 694. Accordingly, contrary to Wicker's additional, albeit related, contention, the trial court did not err in not holding an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996) ("if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.").

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.