COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2706-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER W. HUBBARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

PER CURIAM. Roger W. Hubbard has appealed from a judgment convicting him as a party to the crime of possession of marijuana with intent to deliver within 1000 feet of a school in violation of §§ 939.05, 961.41(1m)(h) and 961.49(1) and (2)(a), STATS. Judgment was entered pursuant to Hubbard's plea of

no contest. He has also appealed from an order denying his motion for postconviction relief. We affirm both the judgment and the order.

The sole issue presented on appeal is whether Hubbard was denied effective assistance of counsel when his trial attorney failed to move to suppress evidence seized from Hubbard's home during the execution of a search warrant. Hubbard contends that his trial counsel should have moved for suppression on the ground that the police officers executing the search failed to comply with the "knock-and-announce" rule.

A defendant is entitled to withdraw a plea of guilty or no contest after sentencing only by showing, by clear and convincing evidence, that a manifest injustice has occurred. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test is met if the defendant was denied effective assistance of counsel. *See* ***id.*** The two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to no contest pleas alleging ineffective assistance of counsel. *See* ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See* ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). The trial court is the ultimate arbiter of witness credibility. *See* ***State v. Marty***, 137 Wis.2d 352, 359, 404 N.W.2d 120, 123 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69 (1996). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and

counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.***

We need not analyze counsel's performance absent a showing that any alleged deficiencies prejudiced the defendant's case. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349 (Ct. App. 1994). It is not prejudicial or ineffective assistance for counsel to fail to bring a motion to suppress which would have failed. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

At the postconviction hearing held in this case, Hubbard, his wife and two police officers testified concerning the circumstances of the officers' execution of the warrant. At the conclusion of the hearing, the trial court made findings of fact and determined that trial counsel was deficient for not considering the filing of a motion to suppress based on the knock-and-announce rule. However, the trial court also concluded that counsel's performance was not prejudicial because the motion to suppress would have been denied.

Hubbard does not contest the findings of fact made by the trial court. However, he contends that suppression was mandated based on the findings because, as found by the trial court, the police officers entered his home without first identifying themselves as police officers and announcing that they were there to execute a search warrant.

In its findings of fact, the trial court found that the officers entered a gate on the deck of Hubbard's house to reach the back entrance to the home, which consisted of a storm door and wooden inner door. The trial court found that

the officers knocked on the storm door, waited approximately twenty seconds and then opened the storm door. The trial court further found that from their vantage point by the storm door, the officers could see through a window into the kitchen, dining room and living room, but observed no people inside. The trial court found that after opening the storm door, Detective Robert Konstanz, the detective leading the execution of the warrant, knocked on the inside wooden door, which opened from the force of his knocking. When no one responded to the knocking, the officers entered a small entry or back hallway area which separated the door they entered from an inner door into the kitchen. The latter door led to the interior of the house and was open. Konstanz knocked on this door and inquired whether anyone was home. Hubbard or his wife then called from the living room, "We're in here. Come on in." The trial court found that Konstanz then announced "police" and entered, although there was no announcement that the officers had a search warrant.

Based upon its findings and the testimony of Konstanz, the trial court properly determined that a motion to suppress would have been unsuccessful. The knock-and-announce rule provides that, with some exceptions, police officers seeking to enter a dwelling to execute a search warrant must announce their identity and purpose and allow time for the door to be opened. *See* ***State v. Meyer***, 216 Wis.2d 729, 734 n.4, 576 N.W.2d 260, 263 (1998). However, rigid compliance with this rule is not required for a search to be reasonable, and each case must be decided on its own particular circumstances. *See* ***State v. Suits***, 73 Wis.2d 352, 356, 243 N.W.2d 206, 209 (1976). Whether the manner of execution of a search warrant was constitutionally reasonable is a question of law which we review independently. *See* ***State v. Berry***, 174 Wis.2d 28, 33, 496 N.W.2d 746, 748 (Ct. App. 1993).

In this case, the police were clearly entitled to walk through the gate on the deck and cross the deck to reach the back door. *See* ***State v. Edgeberg***, 188 Wis.2d 339, 346-47, 524 N.W.2d 911, 914-15 (Ct. App. 1994). The evidence indicated that the police then knocked on the storm door and waited twenty seconds.[1] When they got no response and observed no one through the adjacent window which offered a view into the kitchen, dining room and living room, Konstanz opened the storm door to knock directly on the inner wooden door, which opened in response to his vigorous knocking. At this point, Konstanz called "hello" and asked whether anyone was there. He testified that he waited another fifteen to twenty seconds and then went into the entryway. He stated that from the entryway he observed another inner door leading into the kitchen, which was open. He testified that he again saw no one, knocked, yelled "hello" and asked whether anyone was home. He testified that in response to the Hubbards' invitation to come in, he announced that it was the police and stepped from the entryway into the kitchen.[2]

Because no one responded to the knocks on either the storm door or the inside wooden door, and because the officers observed no one when looking through the window into the kitchen, dining room and living room, Konstanz could reasonably conclude that no one would hear him if he announced their identity and purpose and that doing so would be a useless gesture. The officers

[1] Hubbard contends that it was unreasonable for the officers to fail to use the doorbell at the back entrance. They were not required to do so. *See* ***State v. Greene***, 172 Wis.2d 43, 49, 492 N.W.2d 181, 184 (Ct. App. 1992).

[2] Konstanz testified that after the Hubbards said to come in and while he was still in the entryway, he announced, "It's the police. Search warrant." As previously noted, the trial court found that there was no announcement that the officers had a warrant. However, the trial court's finding does not affect our decision because it is undisputed that the Hubbards told the officers to come in when Konstanz knocked on the door to the kitchen.

therefore were not required to make an announcement and acted reasonably in going through the doorway and into the entryway. *See* ***Suits***, 73 Wis.2d at 355-57, 243 N.W.2d at 208-09 (police pushed open the front door of a residence and entered the living room without first knocking or announcing their identity, reasonably believing that their knock would not be heard).[3] Once in the entryway, they acted reasonably in knocking on the door to the kitchen and inquiring whether anyone was there. Because the Hubbards then instructed them to come in, and because no legal authority requires the police to announce their identity and purpose when entering a residence in response to an invitation, they properly entered the kitchen and executed their warrant.[4]

The trial court therefore properly determined that even if trial counsel had filed a motion to suppress the evidence seized in the search, the motion would have been denied. Hubbard's ineffective assistance of counsel claim therefore must fail.

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[3] Hubbard attempts to distinguish ***State v. Suits***, 73 Wis.2d 352, 243 N.W.2d 206 (1976), on the ground that occupants of the home had prior knowledge that the police were at the door, contending that such knowledge was fundamental to the determination that compliance with the knock-and-announce rule would be a useless gesture. We disagree. First, while partygoers at the house being searched in ***Suits*** observed the officers approaching, the residents of the house had observed only car lights. *See* ***id.*** at 355, 243 N.W.2d at 208. Second, although the court pointed out that the approach of the officers was observed, in discussing whether the officers' knock and announcement would have been a useless gesture, the court stated that "the indications to Detective Kretschman were that his knock would not have been heard." *See* ***id.*** at 356, 243 N.W.2d at 209. Nothing in the decision indicates that awareness of the officers' approach was a prerequisite to concluding that knocking and announcing would be a useless gesture.

[4] In an undeveloped, one-sentence argument, Hubbard contends that his consent was involuntary and the trial court's decision cannot be sustained based upon his invitation. This court will decline to review issues which are inadequately briefed. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). In any event, because we conclude that the officers had a right to be in the entryway and because it is undisputed that the Hubbards told them to come in upon hearing the knock, no basis exists to conclude that their invitation was involuntary.

By the Court.—Judgment and order affirmed.

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