**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

July 11, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**No. 99-0562-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DAVID ERIC WILLIAMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and DENNIS P. MORONEY, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

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[1] The Hon. Mel Flanagan presided over the trial and entered the judgment of conviction. The Hon. Dennis P. Moroney issued the order denying Williams's motion for postconviction relief.

¶1 PER CURIAM. David E. Williams appeals, *pro se*, from the judgment of conviction entered following a jury trial, for one count of possession of a controlled substance (heroin) with intent to deliver, within 1000 feet of a school, as a party to a crime, second or subsequent offense, contrary to WIS. STAT. §§ 961.14(3)(k), 961.41(1m)(d)1, 939.05, 961.48, and 961.49(1)(2)a, and one count of delivery of a controlled substance (heroin) within 1000 feet of a school, second or subsequent offense, contrary to WIS. STAT. §§ 961.41(3)(k) & (1)(d)1, 961.48, and 961.49(1)(2)a. Williams also appeals from the order denying his postconviction motion. On appeal, Williams argues that: (1) the trial court lacked jurisdiction over one of the two offenses charged in the complaint because at the preliminary hearing the circuit court only found probable cause that *a* felony had been committed; (2) his due process rights were violated when the prosecutor did not file an amended information adding a second or subsequent offense penalty enhancer until after his arraignment; (3) the photo array used to identify him was improperly suggestive; (4) the trial court erred in denying his motion to suppress the evidence seized from his sister-in-law's apartment and the statements he made following the search; and (5) his trial counsel was ineffective. We are not persuaded by Williams's arguments and, therefore, we affirm.

## I. BACKGROUND.

¶2 On September 28, 1997, Williams was arrested at his sister-in-law's apartment for possession of heroin. According to Williams, he received a phone call that morning from his sixteen-year-old nephew asking for help because Williams's sister-in-law had been seriously injured by Williams's brother. Williams claims that he immediately went to his sister-in-law's apartment and called 911. An ambulance responded to the apartment and transported Williams's sister-in-law to the hospital for medical treatment. Williams also called the police.

The police arrived to investigate the disturbance, but left upon discovering that Williams's brother was no longer at the apartment. Williams remained at the apartment with his twelve-year-old niece and a nine-year-old nephew, as well as the sixteen-year-old nephew who had called him for help.

¶3 A short time later, Williams was lying on a couch in the apartment when several Milwaukee police officers knocked on the door. Williams's niece let them in, and the officers informed Williams that they were looking for his brother because he was a suspect in an armed robbery and they had a warrant for his arrest. Williams asserts that he informed the officers that he did not live in the apartment, and that his brother was not there.

¶4 Both Williams and the police agree that the police asked if they could search the apartment. Whether Williams consented to the search is in dispute. Williams insists that he informed the officers that he could not give them permission to search the apartment because he did not live there and he was merely babysitting his niece and nephews. However, the police testified that Williams consented to the search and, during the search, the police discovered a pill bottle containing heroin under the couch where Williams had been lying. Over one hundred dollars in cash was also found near Williams on the couch. Williams was arrested.

¶5 Later, another Milwaukee police officer, Officer Graham, after learning that someone had been arrested at Williams's sister-in-law's apartment, informed the arresting officers that the day before he had responded to complaints of drug dealing at that apartment and, acting undercover, he had gone to the apartment in an attempt to buy heroin. Officer Graham reported that he bought two packets of heroin from an individual at the apartment. Officer Graham

identified a picture of Williams as the individual who sold the heroin to him. Officer Graham then went to the interview room where Williams was being held and again identified Williams as the individual who sold him the heroin.

¶6 Williams was charged with one count of delivery of a controlled substance and one count of possession with intent to deliver a controlled substance, as a party to a crime. The criminal complaint also alleged that Williams's sister-in-law's apartment is within 1000 feet of a school and, therefore, the charged drug offenses also violated WIS. STAT. § 961.49. Later, the prosecutor filed an amended information adding the second or subsequent offense penalty enhancer. Williams pled not guilty and the case was set for a jury trial. Prior to trial, Williams filed three separate motions to suppress the evidence and his statements. Williams's trial counsel filed one of the suppression motions, and Williams filed the other two *pro se*. The trial court denied all three motions.

¶7 During the trial, Williams repeatedly spoke out of turn and disobeyed the trial court's orders. Due to Williams's behavior in front of the jury, the trial court decided that the only way to ensure that Williams would comply with the court's directions was to videotape his testimony which was later shown to the jury. Williams was convicted of both counts. He was sentenced to twenty years' imprisonment on the first count, and fifteen years on the other count, consecutive to the first sentence. The trial court, however, stayed the sentence on the latter count and imposed a ten-year period of probation. Williams filed a postconviction motion seeking a new trial; the trial court denied it without a hearing.

## II. ANALYSIS.

¶8 First, Williams asserts that the trial court did not have jurisdiction over one of the two counts. He bases his argument on the fact that at the preliminary hearing the magistrate stated only that "there is probable cause to believe at least one felony has occurred." Williams submits that because probable cause was not found for the second count, that the trial court was deprived of jurisdiction over one of the offenses. Williams relies on both WIS. STAT. §§ 970.03(9) and (10) to support his argument. Section 970.03(9) states that: "If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith." Section 970.03(10), in pertinent part, states: "In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause." Williams concludes that because the court commissioner only found probable cause to believe that at least one felony had occurred and the criminal complaint charged him with two offenses, the trial court was deprived of jurisdiction over one of the offenses. Williams is mistaken.

¶9 WISCONSIN STAT. § 970.03(1) does not require, at a preliminary hearing, a finding of probable cause for each felony alleged in a complaint. Section 970.03(1) only requires the circuit court to consider the facts presented at the preliminary hearing to determine whether "there is probable cause to believe a felony has been committed by the defendant." WIS. STAT. § 970.03(1); *see also* ***State v. Burke***, 153 Wis. 2d 445, 456, 451 N.W.2d 739 (1990); ***State v. Williams***, 198 Wis. 2d 516, 534, 544 N.W.2d 406 (1996) (section 970.03(10) should be interpreted to read, "In multiple count complaints, the court shall order dismissed any count for which it finds there is not probable cause *to believe a felony has been committed by the defendant*."). In ***Burke***, the supreme court asserted that:

> there is no requirement in [WIS. STAT. § 971.01(1)] that there must be direct evidence, much less sufficient evidence to support a probable cause finding, presented at the preliminary examination for each charge in the information. If the legislature had intended a probable cause finding for each count in an information, [§ 971.01(1)] would expressly make that requirement, or [WIS. STAT. § 970.03(7)] would require the circuit court to state the specific felony it believed the defendant probably committed and provide only that felony could be charged in the information.

***Id.*** at 456 (construing ***Bailey v. State***, 65 Wis. 2d 331, 222 N.W.2d 871 (1974)). The court went on to assert that § 970.03(1) "does not require the circuit court to state the specific felony it believes the defendant committed, nor does it limit the circuit court to considering only whether the defendant probably committed the specific felony charged in the complaint." ***Id.*** Finally, we note that when determining whether there is probable cause to believe a felony has occurred, courts must treat multiple count complaints the same as single count complaints. *See* ***State v. Williams***, 198 Wis. 2d 479, 491, 544 N.W.2d 400 (1996).

¶10 At Williams's preliminary hearing, the State presented evidence to support both offenses charged in the complaint. Two Milwaukee police officers testified for the State. First, Officer Boehlke, one of the arresting officers, testified that with respect to the possession with intent to deliver heroin count, Williams gave a statement admitting that while he was at his sister-in-law's apartment he possessed a pill bottle that contained heroin. Officer Graham testified concerning the facts surrounding the delivery of heroin count. He claimed that he purchased heroin from Williams at his sister-in-law's residence the day before Williams's arrest. Based on the officers' testimony, we are satisfied that the circuit court properly concluded that there was probable cause to believe that Williams had committed a felony.

¶11 Next, Williams argues that the prosecutor violated his due process rights when, following the arraignment, she filed an amended information charging a second or subsequent offense penalty enhancer. To support his argument, Williams relies on WIS. STAT. § 973.12(1), which states in pertinent part: "[W]henever a person charged with a crime will be a repeater ... if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea." Williams concludes that since the State did not amend the information to add the second or subsequent offense enhancement until after the arraignment, it was "grossly late in charging [him] as a repeat offender."

¶12 Attached to Williams's criminal complaint was a certified copy of the judgment of conviction and supporting documents establishing that Williams had previously been convicted for delivery of a controlled substance (cocaine), second or subsequent offense, as a party to a crime, on March 6, 1996. The first information however, did not contain the appropriate second or subsequent offense penalty enhancer. Prior to trial, the prosecutor rectified this error by filing an amended information that included the second or subsequent offense penalty enhancer pursuant to WIS. STAT. § 961.48.

¶13 Williams's argument is refuted by the plain language of WIS. STAT. § 961.48(2m)(b)1, which provides:

> Notwithstanding [WIS. STAT. § 971.29(1)], at any time before entry of a guilty or no contest plea or the commencement of a trial, a district attorney may file without leave of the court an amended complaint, information or indictment that does any of the following:
>
> (1) charges an offense as a 2nd or subsequent offense under this chapter by alleging any applicable prior convictions.

Thus, the statute allows the prosecutor to file an amended information charging an offense as a second or subsequent offense, without leave of the court, at any time prior to trial. Therefore, the prosecutor's actions complied with the statutory requirement and did not violate Williams's due process rights.

¶14 Next, Williams argues that Officer Graham's identification was improper because the officer was only shown one photograph instead of an array of similar photographs. After the police arrested Williams at his sister-in-law's residence for possession of heroin, the officers showed a single photograph of Williams to Officer Graham who made the controlled buy of heroin from Williams the day before. Officer Graham identified Williams from that photograph as the individual who had sold the heroin to him. Williams contends that such an identification procedure was improperly suggestive because with the showing of only one photo it was inevitable that Officer Graham would identify Williams as the suspect. Thus, Williams concludes that the identification procedure was prejudicial and the identification should have been suppressed. We reject Williams's argument.

¶15 In deciding whether an out-of-court photo identification was properly admitted, we must examine each case in light of the particular facts and apply a two-part test. *See* ***State v. Hall***, 196 Wis. 2d 850, 878, 540 N.W.2d 219 (Ct. App. 1995), *rev'd on other grounds*, ***State v. Hall***, 207 Wis. 2d 54, 557 N.W.2d 778 (1997). We must first determine whether the identification procedure was improperly suggestive. *See* ***id.*** Then we must decide whether, despite the suggestiveness of the procedure, under the totality of the circumstances, the identification was reliable. *See* ***id.***

¶16 We note that "[a] single photo array is not *per se* impermissibly suggestive." ***Id.*** at 879. However, we are satisfied that, here, even if the single photograph procedure was improperly suggestive, under the totality of the circumstances, Officer Graham's identification of Williams was reliable.

¶17 In determining whether an identification was reliable, under the totality of the circumstances, the following five factors are relevant:

> (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.

***State v. Wolverton***, 193 Wis. 2d 234, 264-65, 533 N.W.2d 167 (1995). Officer Graham's identification of Williams satisfies these five factors.

¶18 Officer Williams testified that he purchased the heroin from Williams at approximately 7:10 p.m. while the light outside was still fairly bright. During the time that Officer Graham spoke with Williams, they were standing a mere two to three feet apart. Officer Graham testified that he has 20/30 vision and, although he was not wearing his glasses when he purchased the heroin, he could clearly see Williams's face from such a short distance. Officer Graham also asserted that he was able to get a good look at Williams and he provided a detailed description of Williams in his police report. On the day after he purchased the heroin from Williams, Officer Graham heard that there had been an arrest at the same address. Officer Graham stated that he was shown a photograph of Williams and that he immediately identified the person in the photograph as the person who had sold him the heroin the day before. Officer Graham testified that he had no doubt that Williams was the person who had sold him the heroin. For these

reasons, we are satisfied that Officer Graham's identification of Williams meets the factors set forth in ***Wolverton***. Under the totality of the circumstances, the identification of Williams was reliable and, therefore, we conclude that it was properly admitted by the circuit court.

¶19 Next, Williams argues that the trial court erred in denying his motions to suppress the evidence seized from his sister-in-law's apartment and the statements he made following the search. The trial court determined that Williams could not lawfully challenge the search because he did not have a reasonable expectation of privacy while in his sister-in-law's apartment. Following the trial, Williams, acting *pro se*, filed a motion for a new trial based, in part, on the trial court's denial of his suppression motions. The trial court again found that Williams lacked a reasonable expectation of privacy. On appeal, Williams now argues that the trial court erred in denying his suppression motions because, as a guest, he had an expectation of privacy while in the apartment, the arresting officers did not have a search warrant, and he did not consent to the search.

¶20 When reviewing the denial of a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. McCray***, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). However, whether the facts underlying the search and seizure satisfy constitutional requirements presents this court with a question of law, which we review *de novo*. *See* ***id.***

¶21 The Fourth Amendment prohibition against unreasonable searches and seizures protects individuals, not places and, therefore, an individual may have a Fourth Amendment right to privacy outside of his or her home. *See* ***id.*** at 709-10.

> The test for determining whether an individual has standing to raise a Fourth Amendment issue examines "whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." A legitimate expectation of privacy is one which "society is prepared to recognize as reasonable."

***Id.*** at 710 (citations omitted). In making this determination, Wisconsin courts have consistently applied a totality of the circumstances approach. *See* ***State v. Whitrock***, 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991). In analyzing the totality of the circumstances to determine whether the individual has a legitimate expectation of privacy, the supreme court has identified six relevant factors:

> (1) whether the defendant had a property interest in the premises, (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with the historical notion of privacy.

***Id.***

¶22 We are satisfied that, under the totality of the circumstances, Williams did not have a legitimate expectation of privacy in his sister-in-law's apartment while watching his niece and nephews. The totality of the circumstances indicates that Williams's connection to the residence was too remote to establish a reasonable expectation of privacy.

¶23 The trial court found that Williams did not exercise sufficient control or authority over the premises to object to the search because his sister-in-law did not grant him the authority to exclude others, nor did he reside at the apartment, keep property there, have his own key, or possess any other evidence of authority or control. The trial court's findings are not against the great weight and clear

preponderance of the evidence and, therefore, we will not disturb them on appeal. *See* ***McCray***, 220 Wis. 2d at 709.

¶24 Further, our independent review of the totality of the circumstances confirms that Williams failed to satisfy the ***Whitrock*** factors. Williams did not have a property interest in the apartment, he lacked complete dominion and control and the right to exclude others, he failed to take precautions typically taken by individuals seeking privacy, he did not put the property to a private use, he did not have a key to the apartment, and he did not spend the night. Further negating Williams's claim is the fact that he testified that his sister-in-law did not explicitly ask him to remain at the apartment, but he took it upon himself to watch his niece and nephews while she was at the hospital. Also, when Williams's sister-in-law was taken to the hospital, Williams's sixteen-year-old nephew was still at the apartment and was available to watch after the children. Under these circumstances, we conclude that Williams did not have a reasonable expectation of privacy in his sister-in-law's apartment and, therefore, he could not legally challenge the search and seizure.[2]

¶25 Finally, Williams argues that the trial court erred when it denied his ineffective assistance of counsel postconviction motion, without a hearing. Williams contends that his trial counsel was ineffective for failing to: (1) conduct

[2] The State argues that even if Williams had standing to challenge the search and seizure the trial court properly denied his motion to suppress because he consented to the warrantless search. Williams argues that the State did not satisfy its burden of proving that he had joint access or control over the residence sufficient to consent to a search. However, because we conclude that the trial court correctly determined that Williams lacked a reasonable expectation of privacy in his sister-in-law's apartment, we will not address the State's alternative argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (appellate court need only address dispositive issues).

a proper voir dire of the prospective jurors; (2) advise him of the prejudicial effect of appearing before the jurors by video instead of in person; (3) challenge the denial of his suppression motion; (4) challenge the improperly suggestive photo array; (5) object to the State's oral amendment of the information to add a "repeater enhancer" following the arraignment; and (6) subpoena a fingerprint technician to prove that the fingerprints on the pill bottle that contained the heroin were not his. We reject all of Williams's arguments.

¶26 The familiar two-pronged test for ineffective assistance of counsel claims requires a defendant to prove (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). 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 (counsel's performance was not deficient if his conduct was reasonable given the facts of the case viewed at the time of the conduct). To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We will uphold the trial court's findings of fact unless they are clearly erroneous, but proof of either the deficiency or the prejudice prong presents this court with a question of law which we review *de novo*. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶27 Had Williams's postconviction motion alleged facts which, if true, would have entitled him to relief, the trial court would have had no discretion and would have had to have held an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 310. However, the trial court had the discretion to deny the motion without a

hearing if the motion failed to allege sufficient facts, presented only conclusory allegations, or if the record conclusively demonstrated that Williams was not entitled to relief. *See* ***id.*** at 309-10 (quoting ***State v. Nelson***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). We will only reverse this decision upon an erroneous exercise of discretion. *See* ***id.*** at 311. We are satisfied that the trial court properly exercised its discretion in denying Williams's postconviction motion claiming ineffective assistance of counsel without a hearing.

¶28 Williams's claims of ineffective assistance of trial counsel are wholly conclusory and generally without foundation in fact or law. We agree with the trial court that Williams's claims that his trial counsel was ineffective for failing to conduct a proper voir dire, failing to advise him on the possible prejudicial nature of video testimony, and failing to challenge the denial of his suppression motion, were merely conclusory.

¶29 Further, we adopt the trial court's finding that Williams's claims that his trial counsel was ineffective for failing to challenge the photo identification lacked proper support in fact or law. Williams's trial counsel extensively cross-examined the officer who had purchased heroin from Williams and then identified him as the individual in the photo, in an effort to discredit his out-of-court identification of Williams. In his closing argument, counsel also argued that the photo identification procedure was improper because the police had only used one photo.

¶30 We also agree with the trial court that Williams's counsel was not ineffective for failing to challenge the amendment of the information following his arraignment to add a penalty enhancer because amending the information was

legally permissible. Moreover, the prosecutor did not orally amend the information, as a written amended information was filed with in the trial court.

¶31 The trial court found that Williams's claim that his attorney was ineffective for failing to subpoena a fingerprint technician to analyze the pill bottle was also without merit because Williams had already informed police that he had handled the pill bottle. Thus, given Williams's admission, even if an analysis of the pill bottle were to somehow reveal that Williams's fingerprints were not on the bottle, the trial court concluded that such tests would not be decisive. We agree with the trial court's analysis. Thus, all of the claims of ineffective assistance which Williams raises on appeal have either failed to sufficiently allege prejudice, or are defeated by the record that conclusively demonstrates that Williams was not prejudiced by the alleged errors. *See* ***Strickland***, 466 U.S. at 697 (if the defendant fails to establish one prong this court need not consider the other prong). Therefore, we are satisfied that the trial court properly exercised its discretion in denying Williams's postconviction motion for ineffective assistance of trial counsel, without a hearing.

*By the Court*.—Judgment and order affirmed.

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