

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 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. 00-0475-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH KEEPERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Joseph Keepers appeals from both the judgment of conviction entered after he pled guilty to one count of carrying a concealed weapon, contrary to WIS. STAT. § 941.23, and the trial court's order denying his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

postconviction motion. On appeal, Keepers argues that at the hearing on his motion to suppress the evidence, trial counsel was ineffective for failing to (1) present available evidence, and (2) adequately cross-examine police witnesses. This court affirms.

I. BACKGROUND.

¶2 On June 16, 1998, two Milwaukee police officers were dispatched to an apartment building to do a follow-up investigation concerning a shooting that occurred there two days earlier. The officers were instructed to conduct “field interviews” of any individuals they found loitering inside the apartment building. While inside the building, the officers stopped Keepers and asked him for his name and date of birth. Keepers complied, and after the officers ran a warrant check, they discovered that Keepers had an outstanding warrant. He was placed under arrest. During a custodial search of Keepers, the officers discovered a handgun in a pack Keepers was wearing around his waist. Keepers was subsequently charged with carrying a concealed weapon.

¶3 Keepers filed a motion to suppress the handgun. In his motion, Keepers challenged the validity of the initial stop, alleging that the officers did not have a reasonable suspicion that he was committing or had committed a crime. The State argued that even if the initial stop was not justified, the taint was removed by the outstanding warrant.

¶4 An evidentiary hearing was held. Both of the arresting officers testified. Officer Juan Duran testified that he and his partner, Officer Katherin Skoczek, observed Keepers standing in front of one of the apartments in the hallway of the apartment building. Officer Duran stated that in the past he had made several arrests at that particular apartment for drug dealing, so he asked

Keepers what he was doing there. Keepers told him that he was visiting a friend, but according to Duran, Keepers was unable to provide the person's name. Officer Skoczek testified that she asked Keepers whether the apartment was even occupied, and he said he did not know. When Keepers was unable to provide the name of the person he was allegedly visiting, the officers suspected that he might be visiting the apartment to purchase narcotics. It was then that the officers asked Keepers for his name and date of birth, ran the warrant check, discovered that he had an outstanding warrant and arrested him. Following the officers' testimony, Keepers did not present any evidence.

¶5 The trial court denied Keepers' motion to suppress the handgun. The court found that the officers "had reason to suspect that [Keepers] might be [at the apartment] waiting for someone in the apartment to sell [him] drugs." Based on its finding that the initial stop was supported by reasonable suspicion, the trial court concluded that the subsequent search was valid and the handgun was admissible. Following the trial court's ruling, Keepers pled guilty.

¶6 Keepers then filed a postconviction motion, alleging that trial counsel was ineffective during the suppression hearing. Keepers asserted that his trial counsel failed to present available evidence to contradict the police officers' testimony. Specifically, in an affidavit attached to his motion, Keepers asserted that on the day he was arrested he had been visiting a friend, Shonda Washington (a.k.a. "Poochie"), at her apartment. He alleged that, as he was leaving her apartment, he said "see you later Poochie," opened the door and saw two police officers standing in the hallway. Keepers insisted that the officers saw him leaving Washington's apartment and heard him say goodbye to her. Keepers did not remember the officers asking him who he was there to visit, but he thought they had asked him whether he lived in the building. He further submitted that he

never told them he did not know the name of the person who lived in the apartment. He maintained that while he was waiting with the officers for the results of the warrant check, “Poochie” came to the door of her apartment and asked if everything was all right. Keepers averred that he had informed his trial counsel of the circumstances surrounding the stop and subsequent arrest, and that he had given counsel “Poochie’s” full name.

¶7 The trial court held a *Machner*² hearing, at which both Keepers and his trial counsel testified. Keepers testified that he informed his trial counsel of the circumstances surrounding the stop and arrest, as set forth in his affidavit, prior to the suppression hearing. He also asserted that he informed counsel that “Poochie” witnessed the encounter outside her apartment. Keepers’ trial counsel’s testimony was inconsistent and unclear. Trial counsel first testified that contrary to Keepers’ testimony, while Keepers told him he had been visiting someone he knew in the building, he did not think Keepers had provided the individual’s name. Later, counsel stated, “[t]o the best of my recollection the first ... time that I recall hearing about another person was at the [suppression] hearing.” Counsel also admitted that it was possible that Keepers had given him “Poochie’s” name prior to the suppression hearing.

¶8 Following the hearing, the trial court denied Keeper’s postconviction motion, finding that Keepers’ testimony was not credible. The trial court asserted that it did not believe that Keepers told his trial counsel about “Poochie” prior to the hearing, and it was convinced Keepers did not provide this information to his counsel until the middle of the hearing. The trial court concluded that Keepers

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

made these assertions “simply to deny what the police officers were saying, but had no other information to back that up.” The trial court further concluded that trial counsel’s strategic decision to challenge the validity of the initial stop based on a lack of reasonable suspicion was reasonable. Therefore, the trial court found that Keepers was not deprived of the effective assistance of counsel at the suppression hearing.

II. ANALYSIS.

¶9 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the *Strickland* analysis applies equally to ineffectiveness claims under the state constitution). 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. 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. If this court concludes that the defendant has not proven one prong, we need not address the other prong. *See id.* at 697. On appeal, the trial court’s findings of fact will be upheld unless they are clearly erroneous. *See State v. Pitsch*, 124 Wis. 2d 638, 634, 369 N.W.2d 711 (1985). However, proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. *See id.* at 634.

¶10 Keepers argues that his trial counsel provided ineffective assistance during the suppression hearing. It is undisputed that Keepers' trial counsel litigated the suppression motion on the theory that the officers lacked the reasonable suspicion necessary to justify a *Terry*³ stop. Keepers posits that the trial court "correctly ruled ... if the defendant was unable to name the person he was visiting, at an apartment where the police had previously made drug-related arrests, this surely gave rise to a reasonable suspicion to justify a *Terry* stop." However, "if the police saw Mr. Keepers exiting the apartment, and heard him say goodbye to one of the occupants, they had no basis for even a *Terry* stop." Therefore, Keepers concludes that trial counsel was ineffective for: (1) failing to present any evidence that he, in fact, knew the name of the person whose apartment he had allegedly been visiting, and (2) failing to cross-examine Officer Skoczek regarding a notation in her report which stated, "[Keepers] was exiting the apartment of a subject who was recently involved in an altercation involving a gun."

¶11 First, this court concludes that trial counsel's decisions during the suppression hearing constitute reasonable strategic decisions. If strategic or tactical decisions are "based upon rationality founded on the facts and the law ... this court will not find that those decisions constitute ineffective assistance of counsel, even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." *State v. Felton*, 110 Wis. 2d 485, 501-02, 329 N.W.2d 161 (1983). This court considers trial counsel's conduct in light of the law and the facts that existed when that conduct occurred. *See id.*

³ *Terry v. Ohio*, 392 U.S. 1 (1968).

¶12 Keepers' conclusion that trial counsel was ineffective is premised entirely on his allegation that, prior to the suppression hearing, trial counsel knew that Keepers had been visiting a specific person, and that the police watched him leave that person's apartment. Keepers argues that trial counsel knew of the existence of these facts and trial counsel should have concluded that the police did not have a reasonable suspicion justifying the stop. Clearly, at any motion challenging the stop, trial counsel should have solicited this information at the hearing. However, it is unclear from the record whether Keepers provided this information to trial counsel prior to the suppression hearing, during the suppression hearing, or whether he provided this information at all. Nevertheless, even if we accept Keepers' allegations that trial counsel was aware that he had been visiting someone he knew, Keeper's version of the story directly contradicted the police officer's version, leaving counsel with a difficult decision. Should trial counsel challenge the credibility of the arresting officers or argue that the stop was not reasonable based upon the undisputed fact, Keepers' trial counsel stated that "if there was going to be a credibility issue between the cops and the client, they were [sic] probably going to be resolved against my client." Knowing that Keepers had two prior convictions before the same court for carrying a concealed weapon, as well as having had a bench warrant issued for Keepers' arrest, trial counsel was justifiably concerned about Keepers' credibility when compared with that of the officers'. Therefore, trial counsel's asserted:

Well I thought at the time that I would simply—My best course was to argue that simply being unable to state your business is not a reasonable suspicion that could justify a police officer making a stop and pat down and everything else that flows from a pat down.

Thus, trial counsel made a strategic decision regarding what legal theory to proceed on. In light of the facts as they existed at the suppression hearing, counsel's strategic decision was reasonable.

¶13 Moreover, the trial court's findings support this court's conclusion. In its decision following the *Machner* hearing, the trial court asserted that:

I don't believe Mr. Keepers' testimony that he told [trial counsel] before the hearing that [the known individual] was in that apartment or that that apartment door opened during the detention by the police. I don't believe he told [trial counsel] that [the individual] was even in the apartment during this motion hearing, during the suppression hearing.

Therefore, given the trial court's credibility determination, this court concludes that trial counsel's strategic decision was not only reasonable, but also prudent.

¶14 This court is satisfied that, in light of the facts available at the time of the suppression hearing, counsel's strategic decisions were "based upon rationality founded on the facts and the law" and, therefore, Keepers' trial counsel was not ineffective. *Felton*, 110 Wis. 2d at 501-02. Consequently, this court will not address the remaining arguments. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground"); *see also Gross v. Hoffman*, 227 Wis. 2d 296, 300, 277 N.W.2d 663 (1938) (if this court's decision on one point disposes of an appeal, the remaining issues need not be decided).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

