

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP992-CR

Cir. Ct. No. 2004CF135

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD B. ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Bernard Adams appeals a judgment convicting him of four felonies, including attempted first-degree intentional homicide, and first-degree sexual assault. He contends that the State introduced inadmissible evidence at his trial, and that trial counsel was ineffective in his pretrial efforts to

suppress that evidence. He also contends that the trial court erred by denying his motion for appointment of postconviction counsel. We affirm.

¶2 Adams was arrested at his home after police identified him as the perpetrator of a sexual assault. He was transported to jail and made an inculpatory statement during an interrogation that commenced about five hours after his arrest. The circuit court appointed counsel to represent Adams in this proceeding after the State Public Defender's office determined that he was ineligible for representation under its standards.

¶3 Counsel filed a pretrial motion to suppress Adams' post-arrest statement to police on the grounds that it was the product of an illegal arrest. Accompanying the motion was Adams' affidavit in which he averred that police officers forcibly removed him from his home in order to arrest him.

¶4 Adams lived in a trailer to the front of which he had added a small enclosed porch, or entryway, with walls and a door made from particle board. At the hearing on his suppression motion an officer testified that the entry to the porch was open, and that another officer, Rodney Hicks, entered it and knocked on Adams' front door. Adams then came outside and was arrested in his yard. A second officer at the scene testified that Adams was arrested in his yard after Hicks knocked and asked him to come outside. Adams' wife testified that the porch door was closed and the officer knocked on that door. She testified that, when Adams opened the porch door, he was physically dragged outside and arrested. Adams did not testify, and based on his wife's testimony counsel argued that the arrest was illegal because it was originated by force while Adams was still inside his home, within the particle board enclosure. The circuit court found that the arrest occurred after Adams voluntarily came out of his residence, was

therefore a lawful arrest, and provided no grounds to suppress his subsequent statement.

¶5 After a *Miranda-Goodchild*¹ hearing the court found that Adams made his statement freely, voluntarily, and intelligently after receiving and knowingly waiving his *Miranda* rights.

¶6 After Adams was convicted, he was denied postconviction representation by the Public Defender's office. Consequently, he moved the circuit court for representation. His financial circumstances remained the same, except for the added debt incurred in this proceeding from restitution and attorney fee reimbursement. The court denied representation, because his wife's net income of \$1440 exceeded the then applicable federal poverty guideline of \$1070 for a two person household, and because the court considered his need for an attorney greater when he faced trial.

¶7 Adams, representing himself, subsequently filed a postconviction motion alleging that trial counsel ineffectively represented him during the suppression proceedings. After evidentiary hearings on the motion the trial court denied it, resulting in this appeal.

¶8 In order to succeed on his claim of ineffective assistance, Adams must show that counsel's representation was deficient and that the deficiency prejudiced him. See *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Proof of either the deficiency or the prejudice prong presents a question of

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

law this court reviews without deference. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). If we conclude Adams has not proved one prong, we need not address the other. See *Strickland v. Washington*, 466 U.S. 668, 697 (1984). To prove deficient performance, Adams must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." *Id.* at 690. In other words, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. *Id.* at 687. To show prejudice, Adams must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. *Id.* at 694.

¶19 Adams contends on appeal that his arrest was illegal because Hicks unlawfully entered his porch area when the officers came to arrest him. Counsel's ineffectiveness, in Adams' view, consisted of counsel's failure to argue that Hicks' entry into the enclosed porch area rendered the subsequent arrest unconstitutional, even if it occurred outside the residence, without force. However, Adams does not contest that Hicks entered the porch only to contact Adams by knocking on the door to his trailer.² The subsequent arrest occurred because Adams voluntarily came outside, and had nothing to do with which door Hicks chose to knock on. Additionally, Adams presents no authority, and we are aware of none, holding that Hicks made an unconstitutional intrusion by entering the makeshift enclosure through its open door, solely in order to make contact by knocking on the trailer's front door. Consequently, counsel had no reasonable

² For purposes of his appeal and postconviction motion, Adams has apparently chosen to accept the police version of events, in which Officer Hicks entered the porch area to knock on the main door, and has abandoned the version of events he presented at the suppression hearing, in which Hicks did not enter the porch area and instead knocked on the outer door, and then forcibly removed Adams from the porch when he answered.

basis in fact or law to challenge the arrest on the grounds Adams now argues. We also conclude that a reasonable attorney could have reasonably decided not to argue a theory of illegal arrest requiring him/her to impeach the defendant's only witness to the arrest, and to essentially abandon the claim of forcible removal from the porch presented in her testimony.

¶10 Additionally, even if Adams' arrest had been illegal, Adams could not demonstrate prejudice from counsel's failure to establish its illegality. If, as is the case here, an arrest is made with probable cause, statements made later in custody are admissible even if the means of arrest were unconstitutional. *See New York v. Harris*, 495 U.S. 14, 17-19 (1990) (“[B]ecause the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings and allowed to talk,” despite the fact that the arresting officers violated Harris' Fourth Amendment rights.).³

¶11 The circuit court properly denied Adams' request for appointed postconviction counsel. This court has endorsed using the federal poverty guidelines to determine if a defendant may be considered indigent for purposes of appointing counsel. *State v. Nieves-Gonzalez*, 2001 WI App 90, ¶8, 242 Wis. 2d 782, 625 N.W.2d 913. Here, it is undisputed the income earned by Adams' wife placed the family at least \$340 per month in net income above the applicable

³ We note that the State failed to address this basic point of Fourth Amendment law in its brief. The State also inexplicably responds to an argument Adams does not present concerning counsel's decision not to call him as a witness at the suppression or *Miranda-Goodchild* hearings.

poverty guideline at the time for a two-person family.⁴ Under these circumstances, the circuit court reasonably exercised its discretion in denying counsel to assist in pursuing postconviction relief, even if the trial court believed it appropriate to appoint trial counsel based on the same economic data. *See State v. Dean*, 163 Wis. 2d 503, 514, 471 N.W.2d 310 (Ct. App. 1991) (whether to appoint counsel is a matter within the circuit court's decision).

By the Court.—Judgment and order affirmed.

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

⁴ Adams contended that the poverty guideline monthly gross income figure for two persons was \$1100, while the circuit court found it to be \$1070.

