COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0076-CR **Cir. Ct. No. 00CF005477**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT W. HUBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: KITTY BRENNAN and JEFFREY CONEN, Judges. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Robert W. Huber appeals from a judgment entered after he pled guilty to nine counts of sexual assault of a child age sixteen or older, contrary to WIS. STAT. § 948.09 (1999-2000). He also appeals from orders denying his postconviction motion. Huber claims the trial court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

summarily denying his claim of ineffective assistance and that the trial court erred in ruling that he did not have a reasonable expectation of privacy to articles he left behind in a rooming house. Because the trial court did not err in either respect, this court affirms.

I. BACKGROUND

¶2 On October 31, 2000, Huber was charged with three counts of second-degree sexual assault of a child and one count of sexual intercourse with a child under sixteen years of age. On February 27, 2001, the State filed an amended information charging Huber with three counts of second-degree sexual assault of a child, one count of first-degree sexual assault while armed, one count of second-degree sexual assault by the use or threat of force or violence and one count of sexual intercourse with a child age sixteen or older.

¶3 The charges were based on incidents which occurred over a period of time between early 1998 and the summer of 2000. There were two victims—Janelle S. and Erica S.

¶4 In March 2001, the trial court heard testimony regarding Huber's motion to suppress evidence. On May 16, 2000, Huber entered into a rental agreement to rent a room in a rooming house. The agreement stated that Huber would pay the rent on a weekly basis—specifically, every Friday between five and seven in the evening. On October 11, 2000, Huber was five days late with the weekly rent. Landlord Larry Schubel advised Huber that he could no longer stay there. He told Huber to take whatever belongings he wanted and turn over the keys. The remainder of the property would belong to Schubel unless Huber returned with the rent. Huber took his coat and briefcase, turned the keys over to Schubel and left the room. Schubel entered the room to make sure the windows

were closed and to secure it. As he was doing that, he bumped into a chair and pictures of underage girls spilled out into plain view. The pictures depicted the girls in various states of undress. Schubel then played a video, which depicted Huber engaged in sexual intercourse with an underage girl. At this point, Schubel locked the door and called the police. Huber never returned with the rent nor attempted to regain entry into the apartment.

¶5 Despite these facts, Huber argued that he had a reasonable expectation of privacy to the articles he left behind in the room. He based his argument on the fact that he was repeatedly late with the rent and allowed to return to the room upon paying the late rent. The trial court disagreed, ruling that Huber had no legal right to be in the room or a right to the articles he left behind. Because he had no reasonable expectation of privacy, there was no basis to file a motion to suppress and therefore, the property could be used as evidence against Huber during the trial.

¶6 Huber indicated that his defense would be that he had consensual sex with people over the age of sixteen with no use of a knife or violence. Huber entered into a plea agreement, wherein the State would file an amended information consisting of nine counts of sexual assault of a child age sixteen or older. All nine counts would be misdemeanors. The State was willing to enter into the agreement to spare the victims from having to testify during a trial. The trial court accepted Huber's guilty plea to all nine counts. He was sentenced to the maximum sentence on each count—nine months, consecutive to each count and consecutive to any other sentence.

¶7 Huber then filed a postconviction motion alleging ineffective assistance of counsel. The trial court denied the motion. Huber subsequently filed a motion for reconsideration, which was also denied. Huber now appeals.

II. DISCUSSION

A. Ineffective Assistance.

¶8 Huber first claims the trial court erred in summarily denying his motion alleging that he received ineffective assistance of trial counsel. Specifically, he contends his trial counsel was ineffective in three ways: (1) counsel informed Huber that he did not think he could adequately represent Huber because of his ties to the victims' communities; (2) counsel failed to call an exculpatory witness to testify at the suppression hearing; and (3) counsel failed to advise him that Janelle was not recanting her allegations; if counsel had so advised him, he would not have pled guilty. The trial court denied Huber's ineffective assistance claim on the basis that Huber's claims were conclusory in nature and non-meritorious. This court agrees with the trial court's assessment.

¶9 In order to establish that he or she did not receive effective assistance of counsel, a defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶10 In assessing the defendant's claim, this court need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶11 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 310-11.

¶12 This court has reviewed both Huber's initial submission on his postconviction motion and the material submitted for the motion for

reconsideration. Both submissions fall short of satisfying the standard required to necessitate an evidentiary hearing with respect to his three claims of ineffective assistance of counsel.

¶13 First, Huber contends counsel told him that he could not adequately represent Huber because of ties to the victims' communities. This contention is presented solely with allegations directly from Huber as to what his counsel told him. Although Huber supplies a variety of factual scenarios related to this, there are no objective factual assertions to support his self-serving, conclusory statements.

¶14 Second, he argues that counsel failed to call an exculpatory witness to testify at the suppression hearing. The record reflects that Huber raised this allegation during his plea colloquy and counsel responded that the decision to forego calling this witness was a strategic one. Counsel indicated that calling this witness would not have changed the trial court's ruling. During this exchange, the trial court offered Huber the opportunity to withdraw his guilty plea. Huber did not accept the offer.

¶15 Third, Huber contends his counsel misinformed him as to the victim's allegations. Huber alleges that he would not have pled guilty if he knew the victim was not recanting her allegations. Again, there is no objective factual evidence to support Huber's contention. Moreover, the record reflects that the plea agreement was offered solely to spare the victims from having to testify and there is no indication it had anything to do with victim recantation. Accordingly, this court concludes that Huber failed to satisfy the requisite burden in order to obtain an evidentiary hearing on his ineffective assistance claim. As a result, the trial court's ruling was not erroneous. This court affirms.

B. Reasonable Expectation of Privacy.

¶16 Huber also claims the trial court erred in finding that he did not have a reasonable expectation of privacy in the room he had rented at the rooming house. He argues that the trial court's findings are clearly erroneous because they are "contrary to the evidence presented." This court cannot agree with Huber's argument.

¶17 This claim arose in the context of a motion to suppress evidence. To challenge a warrantless search or seizure, one must show a legitimate expectation of privacy in the thing or place searched or seized. ***State v. Fillyaw***, 104 Wis. 2d 700, 710, 312 N.W.2d 795 (1981). This showing entails both a manifestation of a subjective expectation of privacy as well as an indication that the privacy interest is one that society is willing to recognize as reasonable. ***State v. Rewolinski***, 159 Wis. 2d 1, 13, 464 N.W.2d 401, 405 (1990). Whether a party has standing to challenge the constitutionality of a search is a question of law this court reviews independently. ***Fillyaw***, 104 Wis. 2d at 711.

¶18 A person may assert a claim under the Fourth Amendment only if he or she has a legitimate expectation of privacy in the invaded place. ***Katz v. United States***, 389 U.S. 347, 353 (1967); ***State v. Dixon***, 177 Wis. 2d 461, 467, 501 N.W.2d 442 (1993). A person's expectation of privacy is legitimate only if it is one that society is willing to recognize as reasonable. ***Minnesota v. Olson***, 495 U.S. 91, 95-96 (1990). The proponent of a motion to suppress bears the burden of establishing the reasonableness of the alleged privacy expectation by a preponderance of the credible evidence. ***State v. McCray***, 220 Wis. 2d 705, 710, 583 N.W.2d 668 (Ct. App. 1998).

¶19 In determining whether an accused has an expectation of privacy that society is willing to recognize as reasonable, courts look at the "totality of the circumstances." ***State v. Whitrock***, 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991). Under the totality of the circumstances approach, the following factors are relevant, though not controlling: (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy. ***Dixon***, 177 Wis. 2d at 469.

¶20 Here, Huber failed to satisfy his burden. As noted by the trial court, the undisputed facts are that Huber was five days' late in paying rent. The landlord had asked Huber for the rent several times before October 11, 2000. Five days' late is significant when a renter is paying on a weekly basis because in two more days, the renter is expected to pay another week's rent. On the fifth tardy day, the landlord informed Huber that he could no longer stay in the rooming house. He told Huber to take whatever belongings he wanted and turn over the keys. He told Huber that anything Huber left behind would belong to the landlord. Huber took two items, turned over the keys, and left.

¶21 It was then that the police obtained articles from the rooming house. This court must ask whether Huber had a subjective expectation of privacy at this point in time. This court agrees with the trial court's assessment that Huber abandoned any reasonable expectation of privacy. Huber did not dispute that he was five days' late with the rent. He willingly turned the keys over to the

landlord, indicating that he knew he no longer had any legal right to be in the rooming house.

¶22 While it is true that a person who rents a room has a legitimate expectation of privacy during the period the room is rented, *see* ***United State v. Connor***, 127 F.3d 663, 666 (8th Cir. 1997), that privacy expectation no longer exists when the rental period expires, *see* ***United States v. Rahme***, 813 F.2d 31, 34 (2d Cir. 1987); *see also* ***State v. Rhodes***, 149 Wis. 2d 722, 726, 439 N.W.2d 630 (Ct. App. 1989) (holding that defendant sleeping in hotel room, which was not registered to the defendant, three hours past checkout time did not have a reasonable expectation of privacy).

¶23 Here, Huber's rental period expired when he defaulted on the rent. Huber was afforded an opportunity by the landlord to take property with him. Huber could have taken the photographs and videotape at that time; he did not. He turned the keys over to the landlord, relinquishing physical control to the room and left. Thus, the trial court was correct in ruling that Huber lost any legitimate expectation of privacy in the items left in the room after he vacated the premises. Society would not recognize a reasonable right to privacy under these circumstances. Accordingly, Huber failed to establish a reasonable expectation to privacy; as a result, there was no basis to support a motion to suppress and no violation of the Fourth Amendment.

By the Court.—Judgment and orders affirmed.

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