COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1150-CR **Cir. Ct. No. 02CF000158**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Keith Griffin appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that his trial counsel was ineffective for failing to challenge the legality of the police entry and search of the apartment in which he was arrested, and that the trial court erred when it denied his motion for

postconviction relief by finding that the arrests were supported by probable cause. Because we conclude that Griffin has not established that he received ineffective assistance of counsel and that the trial court did not err, we affirm.

¶2 Griffin was found guilty after a jury trial of one count of possession of more than 100 grams of cocaine with intent to deliver as a party to a crime. The court sentenced him to five years of initial confinement and five years of extended supervision. Griffin subsequently brought a motion for postconviction relief alleging that his trial counsel was ineffective for failing to bring a motion to suppress evidence. The court held a hearing on the motion and, with the agreement of the parties, decided first whether a motion to suppress would have been granted. The court concluded that such a motion would not have been granted, and consequently denied the postconviction motion alleging ineffective assistance of counsel.

¶3 The relevant facts are uncontested. While investigating a stolen automobile complaint, the police contacted William Johnson. When they patted Johnson down, the police discovered cocaine. Johnson told the police that he was selling drugs for Griffin and others. Johnson also stated he had been at an apartment where he saw Griffin selling crack cocaine. An undercover officer then went to the apartment and knocked on the door.[1] The officer said he was looking for "Dee." A woman opened the door, the officer showed her money, and said he needed to buy some. The woman motioned for the officer to follow her and she took him inside the apartment. Griffin and another man were in the apartment.

[1] Although neither party explains this in their briefs, it appears from the record that the officer initially went to Apartment 30 in the building. When there, he learned that the people he was looking for were in Apartment 28 in the same building.

¶4 The officer then said he wanted to buy some rock and that he had "a hundred." One of the men asked the other if he knew the officer, and the other said no. The woman who let him in also denied knowing him. One of the men then told the officer that he did not know what the officer was talking about. The woman then led the officer out and told him that they were all out and did not have any more. As he was leaving, the officer identified himself as police, opened the door for other officers, and came in and detained the people in the apartment. The police searched the apartment and found 120 grams of crack cocaine hidden from view.

¶5 Griffin argues that he was denied effective assistance of counsel because his counsel did not challenge the legality of the police's initial entry into the apartment. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington*****,** 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687.

¶6 Based on the criminal complaint and the testimony at the preliminary hearing, the circuit court determined that the entry was with consent, that the police had probable cause to arrest before entry, and that the ensuing search was valid as a search incident to the arrest. When a person invites an undercover officer into his or her home, the entry is with consent and therefore lawful, and the police may execute a warrantless arrest. ***State v. Johnston***, 184 Wis. 2d 794, 807-08, 518 N.W.2d 759 (1994). It does not matter that the police

obtained the consent "through deceit and by concealing their identities." ***Id.*** at 807. The subsequent entry of the other police officers is also valid if they were there to provide backup to the initial officer. *See* ***id.*** at 811-12. The circuit court, therefore, properly determined that the officers' entry into the apartment was lawful.

¶7 Griffin also argues that the circuit court erred when it ruled that the officers had probable cause to arrest based on what they discovered after they entered the apartment, and that the search of the apartment was conducted incident to a lawful arrest. We conclude that the court did not err. As the State argues, the circuit court based its ruling on the statements in the criminal complaint and the testimony at the preliminary hearing, not just on the police officers' observations.

¶8 An officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant committed an offense. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). The officer's observations supporting an arrest need not be sufficient to prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). It is only necessary that the evidence would lead a reasonable officer to believe that guilt is more than a mere possibility. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Id.*** (citations omitted).

¶9 Based on the facts stated in the complaint and the testimony given at the preliminary hearing, as well as the observations the officer made when he entered the apartment, we conclude that there was probable cause to arrest Griffin. The subsequent search of the premises was, therefore, conducted incident to a lawful arrest. Since we agree with the circuit court that a motion to suppress would not have been properly granted, then Griffin is not able to establish that he was prejudiced by his counsel's failure to make such a motion. Since he is unable to establish prejudice, he cannot succeed on his claim of ineffective assistance of counsel. The judgment and order of the circuit court are affirmed.

By the Court.—Judgment and order affirmed.

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