COURT OF APPEALS
DECISION
DATED AND RELEASED

November 9, 1995

No. 93-0166-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONT CALDWELL,

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Lamont Caldwell appeals from a postconviction order denying his motion for a new trial. The issues are whether the trial court erroneously exercised its discretion in admitting a photograph of Caldwell in which his tattoo is visible, and whether trial counsel was ineffective for failing to move to suppress evidence seized following an allegedly illegal entry and search. We conclude that trial counsel waived his objection to admission of the

photograph, and because the entry and search were legal, trial counsel's performance was not deficient. Therefore, we affirm.

A jury found Caldwell guilty of possessing cocaine base with intent to deliver, contrary to §§ 161.14(7)(a) and 161.41(1m)(cm)1, STATS., 1991-92. The trial court denied Caldwell's postconviction motion for a new trial based on the improper admission of the photograph and for ineffective assistance of trial counsel.

Caldwell moved in limine to preclude admission of any photographs depicting gang symbols. The prosecutor sought to introduce the police photograph of Caldwell which shows his tattoo displaying gang membership. The trial court granted the motion in limine; however, it allowed introduction of the police photograph, but precluded any reference to the tattoo as depicting gang membership.

Caldwell asserts that his concession during opening statement, that he possessed crack cocaine, obviated introduction of the photograph. However, the prosecutor was required to prove Caldwell's identity and was not advised of this concession until opening statement. At trial, the prosecutor proffered the police photograph to accurately represent how Caldwell looked when arrested. The trial court elicited an objection, but trial counsel responded, "[n]o [objection], your Honor."[1]

Caldwell contends that the State introduced the photograph to suggest gang involvement, precluded by § 904.04(2), STATS. However, § 901.03(1)(a), STATS., requires a timely objection raising specific grounds. Caldwell's failure to object waives his right to challenge the ruling on appeal. *See* ***id***.

[1] When the prosecutor sought to show the jury the photograph, trial counsel stated, "I think it would be more appropriate to wait until after this matter has been heard." However, this does not preserve the objection under § 901.03(1)(a), STATS.

Caldwell contends that he received ineffective assistance of trial counsel who failed to move to suppress the cocaine. To prevail, Caldwell must demonstrate that trial counsel's performance was deficient and that deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

The warrant authorized the search of "the above named or described person(s) or place(s) for the above named or described person(s) or property" for evidence of cocaine-related crimes. Caldwell was not named in the warrant. Police handcuffed Caldwell until he could be searched. While frisking Caldwell, the officer felt hard objects in Caldwell's shirt pocket. The officer then reached inside and retrieved crack cocaine.

At the postconviction hearing, trial counsel explained that he did not move to suppress the cocaine because he believed that Caldwell lacked standing to challenge the police's entry since he had no legitimate expectation of privacy in the premises. *See* ***State v. Fillyaw***, 104 Wis.2d 700, 713-16, 312 N.W.2d 795, 801-03 (1981), *cert. denied*, 455 U.S. 1026 (1982). Nothing in the record indicates that Caldwell had a proprietary interest in these premises.

Caldwell asserts that the entry was illegal because the warrant did not authorize a "no knock" entry. However, exigent circumstances may justify a "no knock" entry. ***State v. Williams***, 168 Wis.2d 970, 982, 485 N.W.2d 42, 46 (1992), *rev'd in part on other grounds*, ***State v. Stevens***, 181 Wis.2d 410, 511 N.W.2d 591 (1994); *see also* ***id***. at 985-86, 485 N.W.2d at 48 (presence of firearms and large quantities of illegal drugs may constitute exigent circumstances justifying an unannounced entry). Here, the warrant affidavit was based on cocaine being sold and guns being stored on the premises.

Caldwell contends that the search was illegal because he was not named in the warrant. The warrant authorized the search of all persons present at 1007 Harvey Street, including the front porch, curtilage and vehicles. Although Caldwell was not identified specifically, he was present on the premises and searching him was authorized under ***State v. Jeter***, 160 Wis.2d 333, 339-41, 466 N.W.2d 211, 214-15 (Ct. App.), *cert. denied*, 502 U.S. 873 (1991). ***Jeter*** held that the search of a visitor on private premises identified in an "all persons present" warrant is lawful. ***Id***.

Caldwell questions whether a pat-down search was reasonable to maintain the officer's safety because Caldwell was handcuffed. We conclude that the search was reasonable because the officer was in an alleged drug house, occupied by a reputed gang member, who was thought to be armed. Caldwell also asserts that only a pat-down search for weapons was permissible under ***Terry v. Ohio***, 392 U.S. 1 (1968), and that the officer's discovery of hard objects in Caldwell's pocket could not have reasonably led to a further search for weapons. We disagree.

The "all persons present" search warrant and supporting affidavit premised on cocaine possession, provided probable cause to search Caldwell for contraband. *See* ***State v. Guy***, 172 Wis.2d 86, 100, 492 N.W.2d 311, 317 (1992), *cert. denied*, 113 S. Ct. 3020 (1993). As Detective John A. Markley, a member of the Street Crimes and Drug Unit, patted Caldwell down, he felt hard objects in Caldwell's shirt pocket, which his experience led him to believe was cocaine. That realization, under the foregoing circumstances, provided probable cause to believe that the hard objects were contraband and permitted him to reach into Caldwell's pocket and retrieve crack cocaine, under the plain-touch doctrine. ***State v. Buchanan***, 178 Wis.2d 441, 449-50, 504 N.W.2d 400, 404 (Ct. App. 1993) (citing ***Minnesota v. Dickerson***, 113 S. Ct. 2130 (1993)). We conclude that Caldwell did not receive ineffective assistance of trial counsel for failing to file a suppression motion.

By the Court.—Order affirmed.

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