COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

NOTICE

No. 95-2805-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SERSHAWN C. NICHOLSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Sershawn C. Nicholson pled guilty to possession of a controlled substance (cocaine base) with intent to deliver. Prior to Nicholson's plea, the trial court denied his motion to suppress because Nicholson did not have a reasonable expectation of privacy in the premises from which the evidence was seized.

On appeal, Nicholson argues that he received ineffective assistance of counsel at the suppression hearing. At a ***Machner***[1] hearing, Nicholson presented the evidence that he felt should have been introduced at the suppression hearing. Because that evidence does not support a finding that Nicholson had a reasonable expectation of privacy in the premises, he has not established prejudice. Therefore, we affirm the judgment of conviction and postconviction order.

FACTS

On September 9, 1994, police conducted a "knock and talk" raid at a Madison apartment that they suspected was being used for drug trafficking. Nicholson was in the apartment and had several baggies of cocaine base on or near his person. Nicholson told a detective that he had entered the apartment shortly before police arrived to use the telephone. Nicholson told police that he had been in the apartment on other occasions to use the telephone or bathroom.

The apartment was leased to Sherry Kraus and Marvin Hill. At the suppression hearing, a detective testified that Kraus had told her that uninvited persons had been using the apartment to sell drugs. At the postconviction hearing, however, both Kraus and Hill testified that Nicholson had asked and was given permission to use the telephone that evening. Hill also testified that on other occasions, Nicholson "would always ask to come in. He's never just barged in or anything like that or opened the door and walked in or anything like that. He's always knocked and asked permission to come in."

INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant claiming denial of the effective assistance of counsel must establish both that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. ***State v. Teynor***, 141 Wis.2d 187, 209, 414 N.W.2d 76, 84 (Ct. App. 1987). Whether a deficient

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

performance was prejudicial to the defendant is question of law. ***Id.*** at 210, 414 N.W.2d at 84. Prejudice is shown when 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." ***State v. Harvey***, 139 Wis.2d 353, 375, 407 N.W.2d 235, 245 (1987) (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

Nicholson contends that his trial counsel was ineffective for not calling Kraus and Hill to testify at the suppression hearing. Underlying the contention is Nicholson's belief that their testimony that he was in the apartment with their permission would have led the court to conclude that he had a reasonable expectation of privacy in the premises, and thus could challenge the subsequent search and seizure.

A person has a reasonable or legitimate expectation of privacy when (1) the individual has "exhibited an actual (subjective) expectation of privacy" and (2) the "expectation of privacy is legitimate or justifiable in that it is one that society is willing to recognize as reasonable." ***State v. West***, 185 Wis.2d 68, 89, 517 N.W.2d 482, 489, *cert. denied*, 115 S. Ct. 375 (1994). Factors relevant to the determination of whether society is willing to recognize an expectation of privacy as reasonable include:

> [w]hether one has a property interest in the premises, whether one was legitimately on the premises, whether one has complete dominion and control and the right to exclude others, whether one took precautions those seeking privacy take, whether one put the property to some private use, and whether the privacy claim is consistent with historical notions of privacy.

Id. at 90, 517 N.W.2d at 490.

Nicholson satisfies none of those factors. Although Nicholson arguably was in the apartment with permission, he had no property interest in the apartment or dominion and control over the apartment. Nicholson's presence in the apartment was temporary and transient—he was there merely

to use the telephone. Nicholson's claimed expectation of privacy under these circumstances borders on the absurd.

Nicholson relies on ***Minnesota v. Olson***, 495 U.S. 91 (1990), in which the Supreme Court held that an overnight guest had a reasonable expectation of privacy in the premises. ***Id.*** at 99-100. However, nothing in ***Olson*** suggests that an acquaintance who makes an occasional telephone call in the premises would have a similar reasonable expectation of privacy. Nicholson's reliance on ***Olson*** is misplaced.

We conclude that Nicholson was not prejudiced by his counsel's performance at the suppression hearing. Even if counsel had introduced evidence that Nicholson was in the apartment with the lessees' permission, the result of the hearing would not have been different. Therefore, Nicholson's claim of ineffective assistance of counsel fails. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994) (counsel is not ineffective for not pursuing a suppression motion that would have been denied).

By the Court.—Judgment and order affirmed.

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