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DISTRICT I

July 27, 2017

To:

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1513-CR State of Wisconsin v. Derrick Smith
(L.C. #2013CF4407)

Before Brennan, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Derrick L. Smith appeals a judgment convicting him of one count of felon in possession of body armor, three counts of felon in possession of a firearm, and two counts of felon in possession of an oleoresin device (pepper spray). He also appeals the circuit court's order denying his motion for postconviction relief without a hearing. He argues that he received ineffective assistance of counsel because his lawyer did not challenge the second search warrant

issued in this case under ***Franks v. Delaware***, 438 U.S. 154 (1978). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm.

At the outset, we note that the appellant's brief relies on the postconviction motion for its substantive ***Franks*** argument. The Rules of Appellate Procedure require that the appellant's brief present the argument on each issue, with the reasons for the argument, and citations to authorities, statutes, and the parts of the record on which the argument relies. *See* WIS. STAT. RULE 809.19(1)(e). Counsel must comply with this rule in future court filings.

Turning to the merits, a defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). To demonstrate prejudice, 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." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Nielsen***, 247 Wis. 2d 466, ¶13. If a court concludes that the defendant has not proven one prong of the ***Strickland*** test, it need not address the other prong. *See* ***Strickland***, 466 U.S. at 697.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

A defendant seeking to suppress evidence obtained through a search warrant on the grounds that the affiant made false statements in support of the warrant must show that the false statements were made "knowingly and intentionally, or with reckless disregard for the truth." ***Franks***, 438 U.S. at 155-156. If the defendant makes this showing, the circuit court must then set the affidavit's false material aside to determine whether "the affidavit's remaining content is insufficient to establish probable cause." ***Id.*** at 156. If the affidavit is not sufficient to establish probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." ***Id.***

Smith contends that his lawyer should have challenged the second search warrant issued in this case because the police officer affiants provided false information to support the warrant. He contends they falsely averred that, as they were executing the first search warrant of a business located at 2821 North 4th Street, Suite #317, doors to adjoining Suites #319 and #320 were open, which allowed them to see inside those suites. They averred that based on items they saw inside those suites, those suites were part of the same business they obtained permission to search in the first warrant.

Assuming for the sake of argument that Smith's trial counsel had successfully brought a ***Franks*** motion regarding the affiants' statements with regard to Suites #319 and #320, the remedy under ***Franks*** would have been for the circuit court to excise the information. If the circuit court had excised the false statements and suppressed the evidence found in Suites #319 and #320, the second warrant would nevertheless have been valid as to the search of Smith's home because probable cause to search Smith's home had nothing to do with the allegedly false information; the affiants stated that they learned that they had the wrong address for Smith's home as set forth in the first search warrant but obtained the correct address from Smith after he

was arrested, which they were then able to corroborate. Because the search warrant for Smith's home was supported by probable cause, and the evidence adduced from the home included multiple guns, oleoresin devices, and Taser cartridges, there is no reasonable probability that the verdict would have been different.[2] Therefore, Smith suffered no prejudice from counsel's failure to raise a ***Franks*** challenge to the portion of the second warrant pertaining to the place Smith worked. *See* ***State v Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994) (counsel's failure to bring a motion that would have been denied does not prejudice a defendant).

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED this this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

[2] In contrast, the police recovered only ammunition from the search of suite #319 and suite #320.