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DISTRICT II

March 8, 2023

To:

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Circuit Court Judge
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

John W. Kellis
Electronic Notice

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

2022AP1053-CR State of Wisconsin v. Darryl Alexander Shumate
(L.C. #2020CF829)

Before Gundrum, P.J., Grogan and Lazar, 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).

Darryl Alexander Shumate appeals from a judgment entered after he entered no contest pleas to two counts of possession of child pornography contrary to WIS. STAT. § 948.12(1m) (2021-22).¹ He also appeals from an order denying his postconviction motion seeking plea withdrawal based on his claim that his trial counsel provided ineffective assistance. Specifically, Shumate argues that if his trial counsel had obtained and presented certain tax records and a property listing describing Shumate's home as a duplex rather than a single family home at the suppression hearing, the circuit court would have found the search warrant overbroad and

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

suppressed the child pornography discovered during the search. 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. We affirm.

After receiving a cyber tip² about child pornography images being exchanged by two people on Facebook, City of Sheboygan police identified the cell phone associated with the sender of the images as Shumate's. Police obtained a search warrant to search Shumate's residence, 2011 North 11th Street in the City of Sheboygan, and the search warrant described the residence as:

A two story residence, blue in color with white trim. The front door is on the west side of the residence and is white in color. The residence is located on the east side of North 11th Street, with the numbers "2011" posted on the west side of the residence to the south of the front door in black letters on white background. The residence has a detached garage.

Police executed the search in November 2020, found Shumate at home, and discovered his cell phone and computers on the second floor of the residence. Police also located a laptop belonging to Shumate on the main floor. After waiving his *Miranda*³ rights, Shumate confessed to liking child pornography and explained that he regularly deletes images off of his devices. Police located nine images depicting child pornography on Shumate's phone, and the State subsequently charged him with nine counts of possession of child pornography.

² The Wisconsin Internet Crimes Against Children (ICAC) Task Force provided the cyber tip to Sheboygan police.

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Shumate filed a suppression motion alleging that he lived on the second floor of the residence—which he claimed was “a separate upstairs unit” that had a separate address of 2011A North 11th Street—that the search warrant did not cover. At the hearing, the State presented evidence consisting of: (1) Shumate’s driver’s license listing 2011 North 11th Street as his address; (2) photos of the home showing a single front door and a single address of “2011” on the home; (3) Shumate having repeatedly told police in the past that he was the “property owner and person responsible” for the 2011 North 11th Street home; (4) Shumate listing 2011 North 11th Street as his address when applying for a driver’s license in 2017; (5) the home having a single mailbox; and (6) police having seen no indicators that 2011 North 11th Street was anything but a single family residence. The State also offered testimony from the officers who executed the search warrant that on the inside, there was no indication the second floor was a separate residence. Moreover, although police found Shumate on the second floor, Shumate directed them to his laptop located on the first floor.

Although the home did not have a separate entrance to the second floor, Shumate testified that there was a back-door entrance and that he used the back door, which he claimed had the address of “2011A” written in black marker on the doorframe. He said the home used to have two mailboxes, but an unidentified person ripped one off, and he had not replaced it. Shumate also indicated the home used to have two gas and electric meters—one for each floor—but one was disconnected due to an issue with the furnace. Shumate conceded that the second floor had no kitchen or bathroom and that he used the first floor for both needs. He also admitted the second floor had no electricity or gas, so he had to run extension cords from the basement.

The circuit court denied the suppression motion, ruling that Shumate’s testimony was not credible and that the evidence supported the officers’ belief that this was a single family residence. Accordingly, the court held that the warrant was properly executed.

Shumate then entered no contest pleas to two counts of possession of child pornography and was sentenced to a total of six years’ initial confinement and fourteen years’ extended supervision. After judgment was entered, Shumate filed a motion seeking to withdraw his pleas, alleging his trial counsel should have obtained and introduced additional evidence from tax records listing the home as a duplex with two units—2011 and 2011A—at the suppression hearing. The circuit court denied Shumate’s motion after holding a *Machner*⁴ hearing. It ruled that Shumate failed to establish *Strickland*⁵ prejudice because this additional information would not have changed the court’s suppression decision. It also specifically held that trial counsel did not act deficiently.

On appeal, Shumate labels the circuit court’s *Strickland* determinations on deficiency and prejudice as erroneous findings of fact. In its Response brief, the State points out that these are not findings of fact but rather legal determinations and that Shumate’s argument is undeveloped. The Response brief also sets forth why the circuit court’s legal determinations on deficiency and prejudice were correct and why the search warrant was not overbroad based upon the evidence in the Record.

⁴ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

Shumate did not file a Reply brief. His failure to file a Reply brief means he concedes the arguments made in the State's Response brief. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (When an appellant does not reply to a proposition asserted in the response brief, we may take it as a concession.). Accordingly, Shumate concedes that the circuit court's legal determinations that his trial counsel did not act deficiently and that counsel's actions did not cause him prejudice were correct. Because Shumate failed to demonstrate he received ineffective assistance, we conclude the circuit court did not err in denying his postconviction motion seeking to withdraw his pleas.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals