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DISTRICT IV

June 11, 2013

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

2010AP1535-CR State of Wisconsin v. Paul J. Esau (L.C. # 2005CF340)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Paul Esau appeals a judgment of conviction and an order denying his motion for postconviction relief. 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 (2011-12).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

A jury found Esau guilty of possession of THC and possession of drug paraphernalia. Esau's postconviction motion sought to vacate his convictions on the ground that his trial counsel was ineffective by not filing a motion to suppress the marijuana and pipe the officer found in a cigarette package in Esau's pocket. After an evidentiary hearing, the circuit court denied the postconviction motion based on a determination that a motion to suppress would not have succeeded.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the circuit court's findings of fact unless those findings are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

There is no dispute that Esau consented to a search by the police officer. Esau's ineffective assistance claim focuses on the scope of Esau's consent. And, the scope of consent issue is whether a reasonable person in Esau's position would have believed he was giving consent to the officer patting him down, feeling an object about the size of a cigarette package, retrieving the object—which turned out to be a cigarette package—and opening the package to determine its contents.[2] Because we conclude that the facts available to defense counsel showed that a reasonable person

[2] The officer actually felt, retrieved, and inspected two cigarette packages, but the number of packages does not affect our analysis.

would have believed that the consent given covered the seizure and search of the cigarette package, the ineffective assistance claim fails.

The officer's incident report stated that the officer stopped Esau while Esau was bicycling on a highway, but did not arrest him. According to the report, as the officer was preparing to transport Esau to a safer location, but before allowing Esau to ride in the patrol car, the officer asked Esau about patting "him down for any type of illegal items on his person."

At the postconviction hearing, counsel explained his reason for not filing a suppression motion. Counsel testified that, based on Esau's description of the events and the officer's report, counsel believed that Esau consented to the officer's request for a pat-down for "illegal items," rather than for weapons only, as Esau asserted. In trial counsel's view, consent to a pat-down for illegal items includes permission to search into pockets and items such as a cigarette package. Therefore, counsel said, he did not file a suppression motion because he believed, based on the officer's report, that the testimony would show, and the court would find, that Esau consented to a search into his pockets and the cigarette packages.[3] For the most part, we agree with counsel's assessment.

The term "pat-down" normally refers to a pat-down of the outer clothing of a person. *See, e.g.*, ***State v. Richardson***, 156 Wis. 2d 128, 146-47, 456 N.W.2d 830 (1990). However, trial counsel reasonably believed that the circuit court would find that Esau agreed to more than just a pat-down for weapons. Rather, Esau agreed to a pat-down for, in the officer's words, "any type of

[3] To the extent Esau's account of the exchange with the officer differs from the officer's account, it was objectively reasonable for trial counsel to believe that the circuit court would find the officer's version more credible.

illegal items on [Esau's] person." A reasonable person would understand that a container the size of a cigarette package could house illegal substances such as illegal drugs. And, such a person would know that a container that size would be discernible during a pat-down. It follows that a reasonable person would have believed he was agreeing that the officer could, during the pat-down, detect and inspect a cigarette package.

Accordingly, we reject Esau's assertion that his trial counsel performed deficiently when counsel failed to file a suppression motion.

We reach a similar conclusion as to prejudice. To demonstrate prejudice, the 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. Esau is prejudiced by counsel's performance only if the suppression motion, correctly analyzed, would have resulted in the suppression of evidence. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). As we have seen, a suppression motion would not have resulted in suppression.

In its postconviction decision, the circuit court concluded that Esau's suppression motion would have failed because he consented to a full search. Trial counsel similarly indicated that he believed consent extended to a search of Esau's pockets. We do not go this far. The officer's reference to a *pat-down* limited the scope of consent. A reasonable person might not think a pat-down meant reaching into a pocket without detecting something in that pocket during the pat-down. And, plainly, a request for a pat-down falls short of a request for a full search. Still, the result here is the same. There was no deficient performance and Esau was not prejudiced because the most reasonable view of the situation is that Esau gave permission for the action the officer took to discover the drug evidence.

It might be argued that a reasonable person in Esau's position would have thought he was giving limited permission for a pat-down that would permit the officer to remove and inspect an item only if its illegal nature was discernible by means of the pat-down. We think this level of fine tuning defies common sense. Many illegal items, especially illegal drugs in various containers, are not obviously illegal when felt through clothing and protected by a container. For Esau to have *reasonably* thought the officer would only retrieve and inspect items that "felt" illegal, the officer would have needed to make a more detailed and qualified pat-down request.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals