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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP637-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JORDAN BENNETT MICKLEVITZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT BY THE HONORABLE CAROLINA STARK, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED BY THE HONORABLE FREDERICK C. ROSA, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

1. Did the circuit court err when it determined that the officers' warrantless entry into Micklevitz's apartment was justified by the protective sweep exception to the warrant requirement?

The circuit court denied Micklevitz's motion to suppress the evidence located during the sweep.

This Court should affirm the circuit court.

2. Did the circuit court erroneously exercise its discretion when it denied Micklevitz's ineffective assistance of counsel claims without holding a *Machner* hearing?

The circuit court determined that counsel could not be deficient for failing to raise the arguments Micklevitz wished to raise in his second suppression motion and that Micklevitz was not prejudiced because there was not a reasonable probability that any of them would have succeeded.

This Court should affirm the circuit court.

3. Did the circuit court erroneously exercise its discretion when it refused to hold another suppression hearing for Micklevitz's new attorney to reargue the suppression issue and present additional evidence after his first attorney withdrew?

The circuit court refused to reopen the hearing.

This Court should affirm the circuit court.

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[1] Because all three of Micklevitz's ineffective assistance claims involve counsel's investigation and presentation of the motion to suppress, the State has combined Micklevitz's issues III, IV, and V into a single section.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This cases involves only the application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

Milwaukee Police were dispatched to Micklevitz's apartment for a misdemeanor domestic violence battery "want." When they got there, they smelled fresh marijuana through the door. Once Micklevitz opened the door the odor became very strong. When he saw police there, he tried to close the door, and a struggle ensued that led to Micklevitz being pepper-sprayed. Police saw several magazines of ammunition and spent bullet casings in the apartment while arresting Micklevitz. Police also found a loaded gun on Mickelvitz with a round in the chamber. They conducted a protective sweep of the apartment and found evidence in plain view consistent with selling marijuana, and also found a large cache of weapons.

The circuit court held a suppression hearing and determined that the police had sufficient justification for a protective sweep. Micklevitz hired a new attorney, who attempted to file a new suppression motion alleging myriad Fourth Amendment violations other than the protective sweep. The circuit court refused to reopen the motion hearing. Micklevitz subsequently pled guilty to keeping a drug house and possession of marijuana with intent to deliver.

Micklevitz now alleges that the circuit court and his first trial attorney committed multiple errors regarding suppression of the drug trafficking evidence, amounting to ineffective assistance of counsel and an erroneous exercise of discretion by the trial court. He also claims that the

postconviction court erroneously denied his motion alleging ineffective assistance of counsel on this ground without a hearing.

Nothing Micklevitz has alleged in the circuit court, the postconviction court, or on appeal warrants relief.

The circuit court properly found that the officers were justified in conducting a protective sweep after Micklevitz became combative when they made contact with him, they smelled marijuana, found ammunition in the apartment, and found a loaded gun on Micklevitz. It also properly refused to reopen the suppression hearing based on Micklevitz's second suppression motion because the grounds advanced were all legally baseless.

The circuit court also properly denied Micklevitz's postconviction motion. His motion was based on the same baseless Fourth Amendment challenges and alleged that his attorney was ineffective for failing to advance them. But his motion contains nothing but conclusory allegations, and because the underlying arguments were meritless, they all would have failed. The record conclusively demonstrates that Micklevitz could not show deficient performance or prejudice even had he sufficiently pled his motion. He is due no relief on any of his claims.

STATEMENT OF THE CASE

On August 20, 2015, Milwaukee Police Officers Matthew Zaworksi and Tehrangi Chapman were looking for Jordan Micklevitz in connection with a misdemeanor domestic violence want. (R. 1:3.) They went to his apartment, covered the peephole, and knocked on the door. (R. 1:3.) The officers smelled fresh marijuana and could hear a television playing behind the door, but no one answered. (R. 1:3.) As the officers were about to leave, Officer Zaworski announced

"[m]aintenance," and seconds later someone opened the door about six inches. (R. 1:3.)

The person who opened the door matched Micklevitz's description. (R. 1:3.) Zaworski asked if the person was "Jordan," and Micklevitz said, "Yeah, hold on." (R. 1:3.) He then attempted to close the door. (R. 1:3.) Both officers shouted "police!" and told Micklevitz to stop pushing the door. (R. 1:3.) Both officers put their feet in the doorway to stop it from closing, and a strong odor of marijuana wafted into the hallway. (R. 1:3.) Micklevitz continued to push on the door, and the officers warned him that if he did not stop they would spray him with oleoresin capsicum (OC) spray.[2] (R. 1:3.) Zaworski sprayed Micklevitz, but Micklevitz continued pushing the door. (R. 1:3.) They sprayed him a second time and took him into custody where the hallway adjoins the living room. (R. 1:3.)

The officers searched Mickevitz and found a loaded semiautomatic handgun in his right rear pocket with a round chambered. (R. 1:3.) They also found three Suboxone strips. (R. 1:3.) Chapman took Micklevitz into the hallway and held him there while Zaworski did a protective sweep of the apartment. (R. 1:3.) In the living room, Zaworski saw several ammunition magazines and a digital scale with marijuana residue on a table. (R. 1:4.) On a chair were several corner cut baggies with what appeared to be marijuana, several pill bottles, and gem pack style zip lock bags. (R. 1:4.) In the bedroom, Zaworski saw an open gun safe with multiple rifles, handguns, and ammunition. (R. 1:4–5.) No other occupants were found. (R. 1:4.)

The officers sought and received a search warrant for the apartment. (R. 1:4.) Inside, the police recovered multiple firearm magazines, over 19,000 unspent rounds of

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[2] Colloquially known as pepper spray.

ammunition, 21 different firearms, a digital scale, several cell phones, two black notebooks containing drug transaction information, over 500 clear zip lock gem bags, 41.3 grams of marijuana, and over 200 prescription pills. (R. 1:4–9.)

The State charged Micklevitz with the following: count one, keeping a drug house; count two, possession with intent to deliver THC, 200 grams or less; count three, possession with intent to deliver a schedule IV controlled substance; and count four, possession with intent to deliver a schedule I or II narcotic. (R. 1:1–2.) All four counts included the use of a dangerous weapon enhancer. (R. 1:1–2.) Micklevitz, represented by Attorney Steven Kohn, filed a motion to suppress everything found in the apartment. (R. 7:1–2.) He claimed that the officers had no justification to perform a protective sweep and, without the sweep, they did not have enough evidence for the warrant. (R. 7.)

The circuit court held a suppression hearing. (R. 93.) Officer Zaworski was the only witness. (R. 93:3.) He testified that as he approached the apartment, he could clearly hear a television coming from inside and "could smell a very faint odor of marijuana from that door." (R. 93:10–11.) He described Micklevitz finally opening the door after he said "maintenance." (R. 93:11.) He described their struggle at the door and said that as it was going on "I can smell that there is this odor of fresh marijuana and kind of getting wafted into the hallway towards us." (R. 93:12–13.) He said the odor became stronger as they struggled with Micklevitz over the door. (R. 93:16.) Zaworski said that after some verbal warnings, he pepper-sprayed Micklevitz. (R. 93:14.)

Zaworski said they finally took Micklevitz into custody about 10–15 feet into the apartment. (R. 93:18.) He described the apartment layout and explained that there were several "tactical disadvantages" to how the entryway was designed that made it difficult to find safe places to stand. (R. 93:18–20.) Zaworski testified that due to the layout of the

apartment, he was unable to determine if there was anyone else there while they were struggling with Micklevitz. (R. 93:24–25.) He said they took him into the hallway because of the "overwhelming OC spray," and that "it was hard to breathe." (R. 93:23.) Zaworski said that the odor of marijuana was so strong, though, that he could smell it despite the spray. (R. 93:23.)

Zaworski testified that he went back into the apartment "due to the fact that he was armed and the resistive behavior, I didn't know if there was anybody else in there. So I went back in the apartment just to make sure there was nobody else in there." (R. 93:28.) He said he also had noticed some spent shell casings and magazines while arresting Micklevitz and was worried that "there is [sic] maybe more firearms inside or, you know, just as far as a threat to us, if anybody comes out with a firearm you just don't want that." (R. 93:28–29.) He said that between the smell of marijuana, the spent shell casings, the firearm magazines, and Micklevitz having a loaded gun with a round chambered, he was concerned about being ambushed or having some unknown person in the apartment destroy the evidence. (R. 93:31–34.)

When asked about "the concurrence of both drugs and weapons," Zaworski said "[t]hrough my training and experience, they go hand in hand." (R. 93:42–43.) He said the presence of guns and drugs also heightened his concerns that someone else might have been in the apartment, because people "often don't do this type of activity alone and they're often not the only one that's armed." (R. 93:43.)

The State noted that the defense "ha[s] boiled down what the real essential question is in this particular case, and that is whether or not Officer Zaworski was reasonable and permitted under the law to have re-entered that apartment that second time [when he performed the protective sweep] for any reason that might have been permissible as a warrant exception." (R. 93:60.) The State argued that the officers

reasonably feared for their safety or that someone could be in the apartment and could destroy the marijuana after finding a strong odor of marijuana, some visible drug dealing paraphernalia, a loaded weapon on the defendant, evidence of other firearms, and with both officers weakened by the effects of the OC spray. (R. 93:63–64.)

Before Kohn began the defense argument, the court asked, "[I]s the State correct now that we have heard the presentation of the evidence at the motion hearing, is the State correct that at this point the defense challenge . . . focuses on that second entry, is that correct, or does your challenge include more than that?" (R. 93:67.) Kohn replied, "It focuses on the second entry because anything, any entries after that are also illegal because of what is observed in the second entry." (R. 93:68.)

Kohn argued that once the officers had Micklevitz in custody, they accomplished their mission of arresting him for the domestic violence want, and there was no reason to think that a second person was in the apartment. He said that under the totality of the circumstances there was no indication that they needed to sweep the apartment "and therefore the fruits of everything else falls from that." (R. 93:71.)

The State noted that the cases regarding creating an exigency held that it is a defendant's behavior after the police knock on a door that creates an exigency, not the police simply showing up and removing someone from an area. (R. 93:72.)

The court denied Micklevitz's motion in an oral ruling. (R. 94.) The court found that under the totality of the circumstances,

> Officer Zaworski's warrantless second entry into apartment 206 was legally permissible as a justified protective sweep for the following reasons.

First, the second entry into apartment 206 was for the purpose of protecting himself and Officer Chapman, that was his primary purpose; it had a secondary purpose of looking for people to make sure that any evidence wasn't destroyed, but the primary purpose was to see if there was anyone else in the apartment who might come out either armed or unarmed to harm the officers as they were in the hallway waiting for backup with Mr. Micklevitz.

Another reason or additional factor was that Officer Zaworski had reasonable suspicion to believe that the area he went in to search may harbor an individual posing a danger to the officers. Now, I note that the officer had to have a reasonable suspicion, not probable cause, a reasonable suspicion to have that fear of safety. And the officer had that and he gave very articulate reasons for it during his testimony.

The odor of marijuana in the apartment, the defendant's own resistant behavior, that Officer Zaworski during the first entry to the apartment while arresting the defendant viewed a spent bullet casing and other ammunition in the apartment; and that he recovered a loaded handgun with a bullet in the chamber from the defendant and did not have an opportunity to see all of the rooms in the apartment when they were there the first time.

Also, the second entry happened very quickly after arresting and removing the defendant from the hallway [sic]. The officers and the defendant were still very close to the apartment and so the officer was reasonable in thinking that someone else could be in the apartment; and that if someone else was in the apartment, under all of these circumstances, they may be armed and posing a danger to him and his partner.

Also, the second entry was a very quick search of the apartment, it was limited to areas where a person could be hiding; it did not last longer than necessary to dispel the reasonable suspicion of danger that the officer had and it didn't extend to areas other than those where a person could be hiding.

(R. 94:9–10.) The court also noted, though, that even without the second entry, "law enforcement officers would have had enough to get a search warrant for that apartment." (R. 94:11.) The odor of marijuana, the loaded gun recovered from Micklevitz, and the spent casings and other ammunition they saw while arresting Micklevitz would have been enough for a warrant to search the apartment. (R. 94:11.) "[S]o even if that second entry was not justified, and the viewing of the suspected marijuana not included in a search warrant application, there still would have been enough for a court official to authorize the search warrant." (R. 94:12.)

A short time later Kohn moved to withdraw. (R. 15.) The court allowed the withdrawal and Micklevitz ultimately retained Attorney Jim Goldmann to represent him. (R. 31:1.)

Goldmann filed another suppression motion. (R. 32.) He alleged that all parts of the officer's encounter with Micklevitz violated various Fourth Amendment principles. (R. 32:3.) As relevant here,[3] he claimed that: (1) the officers' entry into the apartment building itself was an illegal warrantless entry; (2) that there was an illegal warrantless entry "by use of force" by the officers attempting to open the door; (3) the protective sweep was unjustified; and (4) the officers' acts "are not sufficiently attenuated from the illegal acts as to obfuscate the taint from the illegal entry, seizure, and search of the residence." (R. 32:3.)

The circuit court refused to reopen the suppression hearing. (R. 102:2–3.) It determined that the motion "really focuses on things that the defendant, I think, waived at the first motion hearing; because that was the opportunity to identify those motion issues to have the hearing, to present the evidence on it. And the defense was clear to the Court that

[3] Goldmann's motion included several other claims that Micklevitz did not pursue in his postconviction motion or advance on appeal.

they were not challenging the first entry into the residence . . . they were challenging the second entry." (R. 102:4.) The court also noted that Goldmann was raising credibility issues about the officers' claims that they smelled marijuana and other observations, as well as the sufficiency of the warrant, "that [were] already addressed at the motion hearing." (R. 102:5, 8–9.) The court said it did not have any reason to think that Micklevitz's counsel[4] was ineffective at the motion hearing, and it would not reopen that hearing "either to add additional issues or to add additional evidence." (R. 102:12–13.)

Micklevitz reached a plea agreement with the State. (R. 40; 41.) Micklevitz agreed to plead guilty to two counts of his choosing in Milwaukee County case number 2015-CF-2777, and the State would dismiss and read in the other two counts, as well as two charges in another case. (R. 112:2.) The State also agreed to leave the sentence up to the court. (R. 112:2.) The court accepted the plea agreement and found Micklevitz guilty of counts one and two in 2015-CF-2777. (R. 112:20–21.) The court subsequently sentenced him to three years of initial confinement and two years of extended supervision. (R. 113:1.)

Micklevitz filed a postconviction motion "for an order vacating the judgment of conviction . . . and suppressing the evidence located with Jordan Micklevitz [sic] apartment." (R. 73:1.) Micklevitz alleged that the circuit court erroneously exercised its discretion when it refused to reopen the motion hearing and take more testimony on the myriad claims Goldmann had raised in Micklevitz's second suppression motion, and that Kohn was ineffective for failing to raise them in the first motion. (R. 73:6–7.) He also claimed that the

[4] The court erroneously referred to the wrong counsel. Attorney Kohn represented Micklevitz at the suppression motion hearing.

circuit court erred when it found that the second entry was justified by the protective sweep doctrine. (R. 73:11–14.)

The postconviction court denied Micklevitz's motion without a hearing. (R. 86:6.) It found that there was not a reasonable probability of a different result had Kohn raised the issues that Goldmann raised in his second suppression motion because the court would not have suppressed the evidence under any of those theories. (R. 86:4–6.) It also found that counsel could not be deficient for failing to raise meritless claims, and that the circuit court's refusal to reopen the suppression hearing did not affect Micklevitz's substantive rights. (R. 86:6.) Micklevitz appeals.

ARGUMENT

I. The circuit court properly found that the officers engaged in a lawful protective sweep.

A. Standard of review

Review of an order denying a suppression motion presents a question of constitutional fact. *State v. Hughes,* 2000 WI 24, ¶ 15, 233 Wis. 2d 280, 607 N.W.2d 621. This Court will uphold the circuit court findings of fact unless clearly erroneous. *Id.* Application of the facts to the law presents an issue of law, reviewed de novo. *Id.*

B. Relevant law

The Fourth Amendment to the United States Constitution, and article I, section 11, of the Wisconsin Constitution both presumptively prohibit warrantless entries by police into private residences. *Hughes*, 233 Wis. 2d 280, ¶ 17. Wisconsin courts traditionally consider state constitutional protections coextensive with the Fourth Amendment. *State v. Houghton*, 2015 WI 79, ¶ 49, 364 Wis. 2d 234, 868 N.W.2d 143.

No absolute bar exists to warrantless, nonconsensual entries. *State v. Lee*, 2009 WI App 96, ¶ 7, 320 Wis. 2d 536, 771 N.W.2d 373. "[T]he Fourth Amendment bars only unreasonable searches and seizures." *Maryland v. Buie*, 494 U.S. 325, 331 (1990). There are some "contexts, however, where the public interest is such that neither a warrant nor probable cause is required." *Id.*

One of those contexts, at issue here, involves a protective sweep of any areas where persons posing a danger to police and people on scene might hide. To justify a sweep into these areas, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing the area to be swept harbors an individual posing danger to those on the arrest scene." *Id.* at 334–36; s*ee also State v. Londo*, 2002 WI App 90, ¶ 11, 252 Wis. 2d 731, 643 N.W.2d 869.

"[E]vidence or contraband seen in plain view during a lawful sweep can be seized and used in evidence at trial." *United States v. Garcia-Lopez*, 809 F.3d 834, 839 (5th Cir. 2016). Police may lawfully seize evidence in plain view when they legally occupy their vantage point, and when they have probable cause to connect the evidence to criminal activity. *State v. Guy*, 172 Wis. 2d 86, 101–02, 492 N.W.2d 311 (1992); *see also Horton v. California*, 496 U.S. 128, 135–37 (1990).

C. The officers had sufficient justification for a protective sweep of Micklevitz's apartment.

The circuit court properly found that, under *Buie*, the officers were justified in conducting a protective sweep in these circumstances.

Based on the facts the police knew at the time, the police could reasonably believe that a drug operation was taking place and that they could be in danger from another armed person in the apartment. The officers were dispatched to the apartment to investigate a battery, in other words, a

violent offense. (R. 93:7–8.) Once they arrived, they smelled fresh marijuana and could hear the television in the apartment but received no answer when they knocked on the door. (R. 93:10–11.) An overpowering smell of fresh marijuana wafted out once Micklevitz opened the door. (R. 93:13, 16.) When Micklevitz learned that the police were outside his apartment, he tried to prevent any contact and resisted forcefully to keep them out. (R. 93:11–14.) Indeed, Zaworski had to pepper spray Micklevitz twice before he stopped fighting against the officers to close the door. (R. 93:14.) The officers arrested Micklevitz in the entrance to his living room. (R. 93:24–25.) They saw several firearm magazines, spent casings, and other ammunition in the apartment. (R. 93:28–29.)

In addition, Zaworski did not have an opportunity to see into the other rooms in the apartment when police arrested Micklevitz, and testified that the layout of the apartment put the officers at a "tactical disadvantage." (R. 93:19, 24.) He also testified that they had Micklevitz in handcuffs within ten seconds of getting the door open, and they immediately removed him to the hallway about 10–15 feet away simply to get out of the pepper spray. (R. 93:25–26, 29.) They searched his person incident to arrest and found the loaded gun. (R. 93:26.) Both officers were also feeling the effects of the pepper spray during the arrest. (R. 93:30.) Zaworski also testified that, in his experience, drugs and weapons "often go hand-in-hand" and that drug dealers "often don't do this type of activity alone and they're often not the only one that's armed." (R. 93:43.)

The nature of the criminal operation at issue and whether the suspect is unlikely to be a solo participant are relevant to the reasonableness of a protective sweep. 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 6.4(c) (5th ed. 2012). Drug delivery is rarely a solitary endeavor, and "[t]he violence associated with drug

trafficking today places law enforcement officers in extreme danger." *State v. Williams*, 168 Wis. 2d 970, 984, 485 N.W.2d 42 (1992). "[T]he particular configuration of the dwelling" is also appropriately considered. LaFave, *supra,* § 6.4(c) at 500 (citation omitted).

Accordingly, the police were justified in sweeping the apartment for others to ensure their own safety. The police could reasonably believe, once they smelled fresh marijuana and heard the TV, that the apartment was occupied and some type of drug activity was taking place in it. They further knew that Micklevitz, at least, might be violent—they were there for a battery and domestic violence situation. The fact that the odor became overpowering once Micklevitz opened the door gives rise to a reasonable belief that there was a large quantity of marijuana present and that Micklevitz was not smoking it. The police could reasonably believe that Micklevitz was engaged in more serious criminal activity than simply marijuana possession or misdemeanor battery, and his resistive behavior showed that he was willing to risk his own safety and anyone else's to prevent police interrupting it. Because they could not see into the other rooms of the apartment, they could not know if he was alone. But the officers knew from experience that drug dealing is usually not accomplished alone, and that there are often multiple people involved in those situations. Further, the pepper spray had affected the officers, and Zaworski testified they therefore were "not on our guard a hundred percent." (R. 93:30.) The police not wanting to be ambushed in this situation was a reasonable concern, and a protective sweep was justified. *Buie*, 494 U.S. at 333.

Micklevitz discusses each factor the court considered in isolation and claims that individually, none of them gave rise to a reasonable belief that the apartment contained a person who could pose a danger to the officers. (Micklevitz's Br. 10–11.) That is not how courts assess Fourth Amendment claims.

In determining whether a police action was reasonable, including whether a warrantless protective sweep was reasonable, a court considers the totality of the circumstances. *State v. Garrett*, 2001 WI App 240, ¶ 22, 248 Wis. 2d 61, 635 N.W.2d 615 ("In determining whether a police officer's conduct is reasonable, we must examine all the facts and circumstances confronted by the police at the time the sweep was conducted.").

Furthermore, Micklevitz's arguments are unpersuasive. He first claims, with no citation to any authority, that "the odor of fresh marijuana has no relation to a protective sweep." (Micklevitz's Br. 10.) It is well-settled that drug activity is dangerous and can be properly considered when assessing the totality of the circumstances for a protective sweep. *Garrett*, 248 Wis. 2d 61, ¶ 27. Second, he claims that nothing about his resistive behavior made it more likely that other individuals posing a danger were present. (Micklevitz's Br. 12.) But again, that takes the behavior out of context and does not consider the totality of the circumstances. Third, he argues that because he is an "avid supporter of the Second Amendment it was logical that Micklevitz would answer the door armed." (Micklevitz's Br. 12.) Micklevitz fails to explain, though, why his enthusiasm for the Second Amendment makes the presence of loaded guns with chambered bullets less dangerous for police.

The cases Micklevitz cites are equally unpersuasive. In *State v. Phillips*, 2015AP927-CR, 2016 WL 3247504 (Wis. Ct. App. June 14, 2016) (unpublished), this Court was assessing whether the police established probable cause and exigent circumstances to justify a warrantless entry into a residence. *Id.* ¶ 15 ("The disputed issue is whether the State met its burden to demonstrate that exigent circumstances justified the warrantless entry."). That is an entirely different analysis than whether the police had reasonable suspicion for a protective sweep after they are already in a residence. *See*

State v. Sanders, 2008 WI 85, ¶ 25, 311 Wis. 2d 257, 752 N.W.2d 713. Consequently, *Phillips* is of no assistance to Micklevitz.

The two protective sweep cases Micklevitz cites are distinguishable because they involve substantially different facts than this case. (Micklevitz's Br. 13.) In *State v. Schwartz*, 2013AP1868-CR, 2014 WL 3731994 (Wis. Ct. App. July 30, 2014) (unpublished), police were investigating a hit-and-run accident involving a parked car. *Id.* ¶ 2. They looked through the window and saw a man who matched Schwartz's description lying on the couch. *Id.* They also saw two empty gun magazines and a rifle round on the table. *Id.* Police knocked on the front door but received no response, and a neighbor told them that Schwartz lived alone. *Id.* Nevertheless, police forced their way in with a battering ram, and Schwartz "immediately jumped up" off the couch. *Id.* ¶ 3. Police placed Schwartz in handcuffs, and several officers searched the second floor, main floor, and basement of the residence. *Id.* In the basement, they found marijuana plants. *Id.* This Court held that on those facts, the police had no reason to suspect that there was a dangerous person in the residence and suppressed the marijuana. *Id.* ¶ 9

That is very different from what happened here. Here, Chapman and Zaworski were investigating a violent crime, unlike the hit-and-run of a parked car in *Schwartz*. Chapman and Zaworski did not know if Micklevitz lived alone and could not see whether there may or may not be anyone else inside the residence. The officers here had reason to believe that drug activity was taking place even before they knocked on the door, which got stronger when Micklevitz opened it; there was no such evidence in *Schwartz*. And Schwartz did not fight with officers at the door—indeed, it appeared that Schwartz was not even aware the officers were at the door—and no weapons were found on him. The facts in *Schwartz* are simply too far afield to be persuasive here.

Similarly, in *State v. Kruse*, 175 Wis. 2d 89, 499 N.W.2d 185 (Ct. App. 1993), police encountered a very different scene than the one here when they went to Kruse's apartment. Police were investigating a complaint that Kruse had threatened the complainant's life and that of a bartender and may have a gun. *Id.* at 92. They learned that Kruse lived with a woman, and that he had a felony warrant for burglary. *Id.* When they arrived at his apartment, they knocked on the door and rang the bell. *Id.* After about five minutes, Kruse opened the door and appeared as though he had been sleeping. *Id.* He invited police into the living room, identified himself, and was placed in custody. *Id.* Police placed him on the couch in handcuffs and proceeded to search the apartment. *Id.* at 92–93. In a closed closet in the bedroom they found a large bag of marijuana. They removed Kruse and continued to search the apartment. *Id.*

This Court held that the search was unjustified because police had no reason to believe that their safety was endangered, and they did not act as though they feared for their safety. *Id.* at 97–98. Unlike Micklevitz, Kruse was cooperative from the moment police arrived. *Id.* Also unlike here, police had no reason to believe drug activity was taking place until they found the hidden marijuana, and Kruse's felony warrant was for a nonviolent crime. *Id.* Though the complaint said that Kruse "may be" carrying a gun, unlike here, police found no evidence of any firearms in the apartment. *Id.* at 92–93. Further, the officers in *Kruse* "browsed through the apartment" without their weapons drawn and without searching the area within Kruse's immediate reach. *Id.* at 98. They also testified that they "routinely" engage in that type of search incident to any felony arrest. *Id.* Here, Zaworski moved Micklevitz to get him out of the pepper spray, searched him briefly, found the gun, and then immediately engaged in a brief search only of the areas of the apartment where a person might hide. The

circumstances in *Kruse* were not akin to the scene that confronted Zaworski and Chapman in this case.

D. Even if the sweep was unjustified, the evidence was admissible under the independent source doctrine.

Even if the above reasons were insufficient to support a protective sweep, the circuit court still properly denied Micklevitz's suppression motion. As the circuit court noted, "even without [the protective sweep], law enforcement officers would have had enough to get a search warrant for that apartment. Specifically, given the odor of marijuana that the officer had smelled during the first entry for the arrest, given the resistive behavior of the defendant, the loaded gun recovered from the defendant, and that during the first entry for arrest [they] saw spent casings and other ammunition." (R. 94:11.)

In other words, even assuming the protective sweep was unjustified, the independent source exception to the exclusionary rule applies here. The exclusionary rule requiring suppression of evidence may apply if the officers found the evidence through an unlawful search. *State v. Dearborn*, 2010 WI 84, ¶ 15, 327 Wis. 2d 252, 786 N.W.2d 97. But the purpose of the exclusionary rule is to "prevent the prosecution from being 'put in a better position than it would have been in if no illegality had transpired.'" *State v. Jackson*, 2016 WI 56, ¶ 51, 369 Wis. 2d 673, 882 N.W.2d 442 (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). "However, it does not follow that the exclusionary rule should put the prosecution 'in a *worse* position simply because of some earlier police error or misconduct.'" *Id.* The exclusionary rule is therefore subject to exceptions.

The independent source doctrine is one such exception. "As applied to circumstances where an application for a warrant contains both tainted and untainted evidence, the

issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant" and constitutes an independent source. *State v. Carroll*, 2010 WI 8, ¶ 44, 322 Wis. 2d 299, 778 N.W.2d 1. Probable cause for a warrant to issue requires that it state sufficient facts to raise "an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978). If police would have sought a search warrant absent the "tainted" evidence, and the magistrate would have granted it, there is an independent source for the evidence and it should not be excluded. *Carroll*, 322 Wis. 2d 299, ¶ 45.

Here, the warrant application still states probable cause even if the evidence found during the protective sweep from the warrant is stricken. (R. 75.) Only paragraphs seven and eight would be omitted. (R. 75:5–9.) As the circuit court noted, the warrant still would have listed the strong odor of marijuana coming from the apartment, Micklevitz's attempts to close the door after he realized police were there, the fact that the police believed he was resisting in order to destroy the marijuana, and that they found a handgun in Micklevitz's back pocket after they subdued him. (R. 75:5–6.) Those are sufficient facts to raise an honest belief that evidence of illegal drug possession and possibly trafficking will be found in the apartment. *Starke*, 81 Wis. 2d at 408.

Micklevitz has not contested—or even mentioned—the court's determination that the officers had probable cause for a warrant and would have sought one even without the sweep. He has therefore conceded that the circuit court was correct on this point. *Wis. Dep't of Nat'l Res. v. Building and All Related or Attached Structures Encroaching on Lake Noquebay Wildlife Area*, 2011 WI App 119, ¶ 11, 336 Wis. 2d 642, 803 N.W.2d 86 (Appellants who do not challenge a circuit court's ruling on a particular point on appeal are deemed to

have conceded its validity.). The officers would have sought and obtained a search warrant for the apartment and found all of the evidence Micklevitz sought to suppress even had the protective sweep never occurred. (R. 94:12.) Because the officers would have legally discovered the evidence that way, the circuit court properly refused to suppress the evidence even if the protective sweep was unjustified.

II. Micklevitz's postconviction motion was insufficiently pled to entitle him to an evidentiary hearing.

A. Standard of review

Whether Micklevitz sufficiently pled his claim of ineffective assistance of counsel to trigger a hearing presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court must first determine if Micklevitz alleged sufficient facts that, if true, would entitle him to relief. This is a question of law and is reviewed de novo. *Id*. "If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing." *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157 (citation omitted). "This discretionary decision will only be reversed if the trial court erroneously exercised that discretion." *Id*.

B. Relevant law

It is well-settled that the right to counsel contained in the United States Constitution[5] and the Wisconsin Constitution[6] includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686. A defendant who asserts ineffective assistance must

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[5] U.S. Const. amends. VI, XIV.

[6] Wis. Const. art. I, § 7.

demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

Merely asserting ineffective assistance of counsel is not sufficient to warrant a hearing on the claim. *Phillips*, 322 Wis. 2d 576, ¶ 17. To receive a hearing, Micklevitz had to allege sufficient material facts that, if true, would entitle him to relief. *State v. Balliette,* 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. If Micklevitz didn't allege sufficient material facts, or presented conclusory allegations, or if the record conclusively demonstrated he wasn't entitled to relief, the circuit court could exercise its discretion and deny his motion without a hearing. *State v. Bentley,* 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996).

A motion satisfies the "sufficient material facts" standard when it "allege[s] the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen,* 274 Wis. 2d 568, ¶ 23. It must include enough facts to allow the circuit court to meaningfully assess the defendant's claim. *Id.* ¶ 21. Meaning, Dunn's motion had to contain sufficient facts to establish deficient performance and prejudice under *Strickland*.

The motion had to contain facts that established that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

The motion also had to contain sufficient facts to establish 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. "It is not sufficient for the defendant to show that his counsel's

errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted).

Given the standard of review for denying a *Machner* hearing, this Court typically reviews only the allegations contained in the postconviction motion, not any additional allegations contained in the defendant-appellant's brief. *Allen,* 274 Wis. 2d 568, ¶ 27.

C. Micklevitz's motion consisted only of conclusory allegations, and the facts he alleged would not warrant relief even if true.

The postconviction court properly denied Micklevitz's motion without a *Machner* hearing. His motion contained only conclusory allegations of deficient performance that were based on misstatements of the law. And even if Micklevitz had properly pled his motion, an attorney is not deficient for making a reasonable strategic decision to focus on one claim over others or for failing to make meritless arguments. Micklevitz also failed to show prejudice, and the record shows that there is not a reasonable probability that his suppression motion would have been successful had Kohn advanced the claims Micklevitz now makes. The circuit court properly exercised its discretion when it summarily denied his motion.

1. Kohn's failure to challenge the officers' entry into the apartment building was not deficient or prejudicial because the curtilage of Micklevitz's apartment does not extend to the entire building or the locked front door.

Kohn was not deficient for failing to argue that the officers "entered the curtilage of Micklevitz's apartment when the officers bypassed the locked outer door." (Micklevitz's Br.

20.) Micklevitz appears to argue that the front door to the building was curtilage to Micklevitz's apartment simply by virtue of his apartment being inside a building with a locking front door. This claim is squarely foreclosed by *State v. Dumstrey*, 2016 WI 3, ¶ 4, 366 Wis. 2d 64, 873 N.W.2d 502, and *United States v. Dunn*, 480 U.S. 294 (1987). An attorney's decision not to advance a legal theory rejected by the Wisconsin Supreme Court cannot be unreasonable, and there is no probability that a motion advancing this theory would have succeeded. *See State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583.

"The protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence." *Dumstrey*, 366 Wis. 2d 64, ¶ 23 (citation omitted). "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life and therefore has been considered part of the home itself for Fourth Amendment purposes." *Id.* (citation omitted). To determine whether an area constitutes curtilage, the Wisconsin Supreme Court has "adopted four factors set forth by the Supreme Court" in *Dunn*. *Id.* ¶ 32. One, "the proximity of the area claimed to be curtilage to the home." *Id.* (citation omitted). Two, "whether the area is included within an enclosure surrounding the home." *Id.* (citation omitted). Three, "the nature of the uses to which the area is put." *Id.* (citation omitted). And four, "the steps taken by the resident to protect the area from observation by people passing by." *Id.* (citation omitted).

The home and its curtilage are not the only places protected by the Fourth Amendment, though. A Fourth Amendment violation occurs from warrantless police intrusion into a particular place if the person "manifested a subjective expectation of privacy" in the area that "society

accepts as objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 39 (1988).

Micklevitz's claim that the front door was curtilage to his apartment simply by virtue of the apartment being in a building is foreclosed by *Dumstrey*. Indeed, the Wisconsin Supreme Court in *Dumstrey* noted that "it is important to distinguish between the apartment building and Dumstrey's actual home." *Dumstrey*, 366 Wis. 2d 64, ¶ 35. The court stated, "His home cannot reasonably be said to constitute the entire apartment building . . . . Surely, his 29 fellow tenants would not consider their individual apartments to be a part of Dumstrey's home, and Dumstrey could not reasonably contend otherwise." *Id.* ¶¶ 35–37. Because Micklevitz's curtilage analysis rests on an assumption that the entire building constitutes curtilage to his apartment, it must fail.

Micklevitz's assertion also fails all four of the *Dunn* factors. First, the locked outer apartment door is not in proximity to Micklevitz's apartment. The apartment is on the second story, (R. 93:10), a completely different floor than the front door. *See Dumstrey*, 366 Wis. 2d 64. ¶ 37 (garage below the apartment building was not proximate to the apartment for Fourth Amendment purposes). Second, the locked front door and the entire interior of the building is not "included within an enclosure" surrounding Micklevitz's home simply because his apartment was in the same building. *Id.* ¶ 39 (parking garage is not included within an enclosure surrounding the apartment simply by virtue of being part of the apartment building). Third, the interior of the building, including the front door, is used by others and their guests to access their own apartments, as well as anyone else entering the building such as delivery persons, maintenance workers, and prospective tenants. Micklevitz cannot reasonably contend that accessing his apartment through an area that every other tenant has access to and also uses for ingress and egress constitutes conducting intimate or private activities of

the home. *See id.* ¶ 41. Finally, Micklevitz took no steps to shield the interior of the building behind the door from the other tenants or from anyone else. There is no reasonable argument that the locked front door and the building at large constituted curtilage for Fourth Amendment purposes.

The only other question, then, is whether Micklevitz had a reasonable expectation of privacy in the entire interior of the locked building. This inquiry depends on the totality of the circumstances. *Dumstrey*, 366 Wis. 2d 64, ¶ 47. The Wisconsin Supreme Court has identified six relevant factors for this analysis. *Id.* They are whether the defendant: (1) had a property interest in the premises; (2) was lawfully on the premises; (3) "had complete dominion and control and the right to exclude others"; (4) took precautions customarily taken by those seeking privacy; (5) put the property to some private use; and (6) "whether the claim of privacy is consistent with historical notions of privacy." *Id.* (citation omitted).

The totality of the circumstances shows that Micklevitz had no reasonable expectation of privacy in the building or the front door. There is no real dispute that Micklevitz had a property interest in the property and was lawfully on the premises. But none of the other factors support Micklevitz's position. Micklevitz had no "dominion and control" over the front door or the rest of the building. *Id.* ¶ 49. He had no authority whatsoever to exclude other tenants or their guests from entering the building. *Id.* Indeed, it is possible that another tenant opened the locked door for the police, which Micklevitz had no authority to prevent. Micklevitz took no precautions to seek privacy within the hallway or the front door "from the countless strangers that could be present daily." *Id.* And he has made no argument that he puts the building at large to some private use other than walking to his apartment door. *Id.* Finally, "historical notions of privacy are simply not consistent with such a large number of people having the same right of access" as Micklevitz himself. *Id.*

Micklevitz had no reasonable expectation of privacy in the front door or the hallways of the building. *Cf. United States v. Barrios-Moriera*, 872 F.2d 12, 14–15 (2d Cir. 1989) ("Here the police entry was into a common hallway, an area where there is no legitimate expectation of privacy . . . even though the area was guarded by a locked door") *abrogated on other grounds by Horton*, 496 U.S. at 130.

Micklevitz has made no argument to the contrary. In both his postconviction motion and his brief, Micklevitz does not actually apply any of the *Dunn* factors; he merely states that they exist. (R. 73:9; Micklevitz's Br. 23–24.) Likewise, he discusses the general Fourth Amendment concepts the court mentioned in *Dumstrey*, but does not apply them. (R. 73:8–9; Micklevitz's Br. 21–24.) Further, the State fails to understand how Micklevitz reached the conclusion that "The Wisconsin Supreme Court [in *Dumstrey*] stated that the common storage area in an apartment building's basement was 'clearly within the curtilage' of the home." (R. 73:8; Micklevitz's Br. 22.) In the passage Micklevitz quotes, the Wisconsin Supreme Court was quoting Dumstrey's brief while explaining the parties' arguments, which quoted a passage from *Conrad v. State*, 63 Wis. 2d 616, 633, 218 N.W.2d 252 (1974). *Dumstrey*, 366 Wis. 2d 64, ¶ 24. The supreme court noted that more recent United States Supreme Court and Wisconsin cases were inconsistent with *Conrad* and that it was likely no longer good law. *Id.* ¶¶ 24–33.

Micklevitz's only attempt to show that *Dumstrey* supports his claim that the entire building constitutes curtilage is a general reference to "concept[s]" raised in the concurrence, and one conclusory statement relying on the dissent. (R. 73:9; Micklevitz's Br. 23 ("reviewing the dissenting opinion, the hallway outside of Micklevitz's apartment is within the curtilage of his home.").) The dissent is not the law. Moreover, Micklevitz makes no argument that he had a reasonable expectation of privacy in the doorway, the

building in general, or the hallway. (*Id.)* The postconviction court properly denied his motion without a hearing on this ground because his motion was inadequately pled, and his claims are inadequately briefed to warrant relief from this Court.

2. Kohn's failure to challenge the officers' entry into Micklevitz's apartment was neither deficient nor prejudicial because police had probable cause and exigent circumstances allowing them to enter.

The warrant requirement gives way "where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." *Hughes*, 233 Wis. 2d 280, ¶ 17. Where probable cause for an entry, rather than an arrest, is at issue, probable cause requires a "fair probability" that entry—which is considered a search—will yield evidence of crime. *Id.* ¶ 21 (citation omitted). This Court considers the reasonableness of law enforcement's conduct, not its ultimate correctness. *State v. Robinson*, 2010 WI 80, ¶ 26, 327 Wis. 2d 302, 786 N.W.2d 463.

The exigent circumstances exception plays an important role in real-world law enforcement. Police officers routinely make split-second judgments under tense, uncertain, and rapidly evolving circumstances. *Kentucky v. King,* 563 U.S. 452, 466 (2011). "The objective test for determining whether exigent circumstances exist is whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape." *Hughes*, 233 Wis. 2d 280, ¶ 24. The actual existence of an exigency is not the issue, but whether police have sufficient suspicion to believe an exigency exists:

"[H]indsight, understandably, does not enter into the equation when judging the lawfulness of a warrantless police entry." LaFave, *supra,* § 6.5(b) at 533 and n.80.

In *Hughes*, the Wisconsin Supreme Court held that a strong odor of marijuana coming from an apartment, coupled with knowledge on the part of the occupants that the police are standing outside, constitutes probable cause and exigent circumstances justifying a warrantless entry. *Hughes*, 233 Wis. 2d 280, ¶ 1. There, officers responded to an apartment complex to investigate a trespassing complaint called in by a security guard. *Id.* ¶ 3. The guard told the officers that he saw two people who were banned from the premises enter apartment 306, Vanessa Hughes' apartment. *Id.* The officers went to the apartment to investigate and knocked on the door. *Id.* ¶ 4. They could hear loud music and voices inside the apartment, but received no response. *Id.* They called for backup and stood in the hallway to wait for it to arrive. *Id.*

As they were waiting, the door suddenly opened and the officers "were immediately confronted with (a) a very strong odor of marijuana coming from the apartment, and (b) a very surprised" person who was leaving the apartment and did not expect to see the police standing in the hallway. *Id.* ¶ 5. She tried to slam the door. *Id.* The officers, concerned that the people inside would destroy any drug evidence, prevented the person from closing the door and went in. *Id.* They ultimately found 5.39 grams of crack cocaine on Hughes. *Id.* ¶ 11.

Hughes moved to suppress the evidence, alleging that the officers' warrantless search was not supported by probable cause or justified by exigent circumstances. *Id.* ¶ 12. The Wisconsin Supreme Court disagreed. *Id.* ¶ 17. It observed that "[t]he quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence will be found in a particular place." *Id.* ¶ 21 (citation omitted). It held that "[t]he unmistakable odor of marijuana coming from Hughes' apartment provided this fair

probability." *Id.* ¶ 22–23 ("When the strong smell of marijuana is in the air, there is a 'fair probability' that marijuana is present."). It then held that the police also had exigent circumstances because a police officer would reasonably believe that delay in procuring a search warrant would risk destruction of evidence. *Id.* ¶ 26. The Court noted that "[m]arijuana and other drugs are highly destructible. . . . It is not unreasonable to assume that a drug possessor who knows the police are outside waiting for a warrant would use the delay to get rid of the evidence." *Id.*

This case is indistinguishable from *Hughes*. The police went to Micklevitz's apartment to arrest him on the misdemeanor domestic violence want. (R. 93:8.) The officers were lawfully present in the hallway[7] and approached the door. (R. 93:10.) When they approached the apartment, they could hear loud noises coming from inside and could also smell marijuana. (R. 93:10–11.) They received no answer when they knocked on the door. (R. 93:10–11.) When Micklevitz finally opened the door after Zaworski said "maintenance," Micklevitz saw two Milwaukee Police officers in full uniform standing outside in the hallway. (R. 93:11–12.) Zaworski testified that when Micklevitz opened the door, the smell of fresh marijuana got stronger and "kind of hits you in the face," akin to when "you walk past a garbage can that smells very badly." (R. 93:16.) Like *Hughes*, Micklevitz then attempted to close the door on the police, and Chapman prevented him from doing so by putting his foot in the doorway. (R. 93:17.) Zaworski testified that he "felt that [Micklevitz] was trying to close the door on us to possibly escape for the battery or to destroy evidence that may be inside," and that was why "we didn't want to allow that door to close on us." (R. 93:18.)

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[7] As the State explained, Micklevitz had no reasonable expectation of privacy in the building in general or in the common hallway.

On these facts, the officers had both probable cause and exigent circumstances that allowed them to enter Micklevitz's apartment. *Hughes*, 233 Wis. 2d 280, ¶ 1. They were in a place they were lawfully allowed to be to investigate a different incident. They could hear sounds coming from inside Micklevitz's apartment but received no answer when they knocked. Micklevitz clearly did not expect to see the police standing outside when he opened the door for "maintenance," and when he did, the odor of marijuana became very strong. And while an odor of marijuana alone is not enough to provide exigent circumstances, Micklevitz's awareness that police were now waiting outside his door created a significant risk that Micklevitz would destroy the marijuana while officers waited for a warrant. *See State v. Torres*, 2017 WI App 60, ¶ 18, 378 Wis. 2d 201, 902 N.W.2d 543. In sum, "[t]he unmistakable odor of marijuana coming from [Micklevitz's] apartment" constituted probable cause, and the significant risk that Micklevitz, now knowing that the police are waiting outside the apartment, would use the delay for a warrant to get rid of the evidence constituted exigent circumstances. *Hughes*, 233 Wis. 2d 280, ¶¶ 22, 26.

Consequently, Kohn was not deficient for failing to challenge Officer Chapman's placing his foot in the door when Micklevitz tried to close it. (Micklevitz's Br. 24–25.) An attorney, looking at these facts, would reasonably conclude that a challenge to the entry would have been fruitless, and any attempt to challenge the entry on this ground would have failed.

Neither Micklevitz's postconviction motion nor his appellate brief discuss any of the circumstances surrounding the officers' entry into the apartment. (R. 73:10; Micklevitz's Br. 24–25.) He simply observes that the officers did not have a warrant and concludes that, therefore, Chapman placing his foot in the doorway violated the Fourth Amendment. (R. 73:10; Micklevitz's Br. 24–25.) He provided nothing

supporting that argument to the circuit court, and nothing in his appellate brief that would "allow the reviewing court to meaningfully assess [his] claim." *Allen*, 274 Wis. 2d 568, ¶ 21. Micklevitz did not sufficiently allege deficient performance or prejudice on this ground, and the circuit court properly denied this claim without a hearing.

3. Police had lawful authority to reenter the apartment to secure the evidence that was discovered in plain view during the protective sweep, including photographing it and the scene, and did not need a warrant to do so.

Micklevitz appears to argue that the officers required a warrant to reenter the apartment at any point after they removed Micklevitz. Based on the police photographs of the apartment taken after Micklevitz was removed, he claims that they were engaged in a "four hour protective sweep" that they lied about in the suppression hearing. (Micklevitz's Br. 16–17.) He also alleges that Kohn was deficient for failing to review and present this "crucial information" and that the "who, what, when, where, why, and how" was sufficiently addressed in his postconviction motion. (Micklevitz's Br. 18–19.) He is wrong.

Assuming that the timestamps on the police photographs are correct, Micklevitz is due no relief. The photographs show that the police were doing no more than photographing the evidence that Officer Zaworski already found in plain view during his protective sweep. The officers did not need a warrant to take this step after making a lawful warrantless entry. *La Fournier v. State*, 91 Wis. 2d 61, 68–69, 280 N.W.2d 746 (1979) (Where officers continue a lawful initial entry by securing the scene and documenting evidence in plain view, the subsequent entry does not require a warrant). Simply reentering the apartment to document the

evidence and secure the scene did not transform the officers' actions into a Fourth Amendment violation. *Id.*

Micklevitz's claim that the officers "lied about their number of entrances and length of entrances into Micklevitz's apartment" is therefore specious. (Micklevitz's Br. 14.) The protective sweep included only Zaworski's visual inspection of areas large enough for a person to hide. *Sanders*, 311 Wis. 2d 257, ¶ 33. The court found that "the second entry was a very quick search of the apartment, it was limited to areas where a person could be hiding; it did not last longer than necessary." (R. 94:10.) Nothing Micklevitz alleges shows otherwise. (Micklevitz's Br. 3–5, 14–18.) The officers had lawful authority to seize all of the evidence that was in plain view during the protective sweep. *Guy*, 172 Wis. 2d at 101–02. But Zaworski was not required to physically seize this evidence *during* his sweep of the apartment while trying to ensure everyone's safety, and requiring the police to do so would be unreasonable.

The warrantless entry was legal, and the warrantless sweep was legal. Accordingly, because this evidence was in plain view during the officers' lawful entry and search, the police did not need a warrant to go back in to seize it, to secure the scene, to take photographs of the evidence, or to test the marijuana found while waiting for a warrant. *La Fournier,* 91 Wis. 2d at 68–69; *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is [contraband] does not compromise any legitimate interest in privacy.") The officers needed a warrant to conduct a more thorough search of the apartment and to look for items that were not in plain view during the initial protective sweep. The photographs show that the officers did not move or more thoroughly search anything between 7:02 p.m. and when the warrant was issued at 11:44 p.m. As Micklevitz observes, the pictures "paint a clearer picture than any brief." (Micklevitz's Br. 17.) And the picture

painted is one of the officers lawfully securing the scene and photographing the evidence in plain view while they wait for a warrant. There was nothing unlawful about the police remaining on the scene and making subsequent entries to into the apartment to secure it. *La Fourier*, 91 Wis. 2d at 69.

But even if the officers reentering the apartment while they waited for the warrant had been unlawful, Micklevitz fails to explain why this reentry would require suppression of the evidence. As stated earlier, it is black letter law that the exclusionary rule should not "put the prosecution 'in a worse position'" than it would have been if no misconduct had occurred. *Jackson*, 369 Wis. 2d 673, ¶ 51 (citation omitted). The officers already located everything in the pictures during the lawful protective sweep. They did not actually collect any evidence or do a more thorough search until they had the warrant. A subsequent illegal entry would not require suppression of evidence that the officers already lawfully discovered, and would only serve to put the government in a worse position than it would have been in absent the allegedly unlawful conduct.

And again, the officers had probable cause for a search warrant before the protective sweep even took place, and therefore had an independent source to discover all of this evidence even without the sweep. *Carroll*, 322 Wis. 2d 299, ¶ 44.

Consequently, Kohn cannot have been deficient for failing to investigate or advance this claim. An attorney is not deficient for failing to advance meritless arguments or make motions that would not have succeeded. *Maloney*, 281 Wis. 2d 595, ¶ 37. And even if this claim could have succeeded, a reasonable attorney could have looked at the pictures and the procedure the police used here and determined that this issue was not strong enough to pursue. Nor was Micklevitz prejudiced by his attorney's failure to make a motion that would have failed.

Furthermore, Micklevitz's postconviction motion and brief are insufficiently pled to warrant a hearing. His argument that Kohn was deficient consists of two sentences simply stating that "Kohn's failure to review discovery . . . is clearly below objective standards," and that "Kohn only challenging one search . . . falls below objective standards." (R. 73:7.) That "is the defendant's opinion only, and it does not allege a factual basis for the opinion." *Allen*, 274 Wis. 2d 568, ¶ 21. Nowhere does Micklevitz's motion explain *why* failure to raise all of these issues fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

His prejudice argument is likewise insufficient. He claims only that "Atty. Kohn's deficient performance prejudiced Micklevitz by attacking only one part of a significantly flawed search." (R. 73:7.) Not only is that the precise type of prejudice argument that the supreme court found insufficient in *Allen*, but Micklevitz also fails to discuss the circuit court's finding that the police had probable cause for a warrant without the protective sweep. As explained, all of this evidence would have been admissible pursuant to the independent source doctrine even if everything Micklevitz alleges about the protective sweep is true. Micklevitz's motion therefore failed to sufficiently allege either prong of ineffective assistance and the record conclusively demonstrates he is due no relief. The circuit court properly denied his claim without a hearing.

III. The circuit court properly exercised its discretion when it refused to reopen the suppression hearing.

"A circuit court properly exercises discretion when it applies a correct legal standard to the facts of record." *Nationstar Mortgage LLC v. Stafsholt*, 2018 WI 21, ¶ 35, 380 Wis. 2d 284, 908 N.W.2d 784.

As Micklevitz notes, the circuit court "may on its own motion reopen for further testimony in order to make a more complete record in the interests of equity and justice." *State v. Hanson*, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978). But that decision is left to the discretion of the circuit court. There is nothing inequitable or unjust about refusing to reopen a hearing for testimony about facts regarding nonmeritorious issues—those facts would be irrelevant and superfluous. Because none of Micklevitz's arguments had any legal merit, the circuit court properly exercised its discretion in refusing to reopen the suppression hearing.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 29th day of August, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,397 words.

Dated this 29th day of August, 2018.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of August, 2018.

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