COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1683-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD A. LAGERSTROM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: GEORGE S. CURRY and WILLIAM DYKE, Judges. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Todd Lagerstrom appeals from a judgment convicting him on five felony charges. He also appeals an order denying him postconviction relief. The issue is whether he received effective assistance of trial counsel. We conclude that he did, and therefore affirm.

Lagerstrom and John Cantwell were escapees from a Wisconsin correctional institution when, in May 1995, two men committed a home invasion in Boscobel, Wisconsin. Evidence left at the scene and further investigation caused investigators to identify Lagerstrom and Cantwell as suspects and to discover that they were staying at a Milwaukee motel. The Milwaukee police were alerted and subsequently arrested them at the motel. A warrantless search of their motel room, conducted after the arrest, revealed inculpatory evidence.

Before Lagerstrom's jury trial, his attorney moved to exclude any mention of his escapee status. Counsel then withdrew the motion, however, at Lagerstrom's insistence. Lagerstrom wanted the jury to know that he was an escapee because there was a large, highly visible law enforcement presence in Boscobel the day of the crime in connection with the filming of a TV commercial. The jury subsequently learned of Lagerstrom's status, and counsel asked the jury to logically infer that as an escapee Lagerstrom would have avoided Boscobel on the day of the crime. Counsel did not attempt to suppress the evidence seized at the motel, and the State used that evidence at trial.

Lagerstrom did not testify during the trial. The jury found him guilty on all five charges against him. Lagerstrom then brought a postconviction motion alleging, among other things, that trial counsel negligently gave into Lagerstrom's demand to use his escapee status, refused to allow him to testify despite his insistence on doing so, and negligently failed to pursue suppression of the motel evidence. The trial court denied relief on these and all other issues, resulting in this appeal.

To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's errors or omissions

prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by an objective standard of reasonably competent professional judgment. ***Id***. at 636-37, 369 N.W.2d at 716. Whether counsel's performance was deficient and whether it was prejudicial to the defendant are questions of law. ***Id***. at 634, 369 N.W.2d at 715. An attorney's mistaken view of the facts or ignorance of the relevant law may constitute ineffective representation if it leads to an unreasonable or uninformed tactical decision. ***State v. Felton***, 110 Wis.2d 485, 504-07, 329 N.W.2d 161, 170-71 (1983).

Counsel reasonably agreed to use Lagerstrom's preferred trial tactic. Counsel must take responsibility for tactical decisions. SCR 20:1.2; ***Weatherall v. State***, 73 Wis.2d 22, 26, 242 N.W.2d 220, 222 (1976). Here, Lagerstrom contends that counsel abdicated that responsibility by agreeing to what Lagerstrom now describes as an irrational demand with disastrous consequences. We conclude, however, that using Lagerstrom's escapee status as evidence was not unreasonable. It is, in fact, highly reasonable to infer that an escapee might want to avoid a town full of police officers, and Lagerstrom had little, or any exculpatory evidence to offer otherwise. Given the State's very strong case, including physical evidence, the victim's identification and testimony from other witnesses placing him in Boscobel that day, the downside to Lagerstrom's tactic was not that great. Additionally, given the State's strong, if not overwhelming, case, Lagerstrom has not satisfied the prejudice component of the test on ineffective counsel, either.

Even if counsel improperly prevented Lagerstrom from testifying, he failed to prove that not testifying prejudiced him. When counsel denies the

defendant his or her constitutional right to testify, the defendant must still demonstrate prejudice to establish an ineffective assistance of counsel claim. ***State v. Flynn***, 190 Wis.2d 31, 50-51, 527 N.W.2d 343, 350-51 (Ct. App. 1994). Here, the evidence against Lagerstrom included physical evidence left at the scene traced to one of Lagerstrom's traveling companions during his escape, witnesses placing him in Boscobel the night before and morning of the robbery, clothing seized by police in his Milwaukee motel room that closely matched the perpetrators' and an unequivocal identification of Lagerstrom by the two victims of his crimes. As noted, this evidence was very strong if not overwhelming. At his postconviction hearing, Lagerstrom did not explain what testimony he would have offered to counter it, and we are not persuaded that anything he could have said would have changed the verdict.

Counsel did not have meritorious grounds to bring a motion to suppress the evidence seized by the Milwaukee police. In ***State v. Amos***, 153 Wis.2d 257, 269-71, 450 N.W.2d 503, 507 (Ct. App. 1989), we held that an escapee has no Fourth Amendment privacy right in his or her place of refuge from authority. In ***Amos***, the place of hiding was a private residence. The same rule logically applies when the place of hiding is a motel room. *See* ***United States v. Roy***, 734 F.2d 108, 111 (2nd Cir. 1984) (prison escapee is no more than a trespasser in society, and gains no greater privacy expectation by the escape than he or she had while incarcerated).

By the Court.—Judgment and order affirmed.

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