**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 9, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-2686-CR** **Cir. Ct. No. 01-CF-157**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GARY L. EVERTS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from judgments and an order of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Gary L. Everts appeals from judgments of conviction for thirteen misdemeanors, including two counts of theft of moveable property,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

one count of receiving stolen property, six counts of criminal damage to property and four counts of entry into a locked vehicle, all as a party to a crime and a repeat offender. Everts argues that his trial defense counsel was ineffective for failing to secure the testimony of seventeen witnesses he claims were necessary to his defense. Everts further claims that he did not knowingly and voluntarily waive his right to testify at trial because trial defense counsel misinformed him of the consequences of testifying. Finally, Everts argues that the trial court erred when it denied his motion to dismiss the repeater allegations.

## FACTS[2]

¶2 On February 26, 2001, Everts was charged with one count of felony theft and twenty-three misdemeanors, including criminal damage to property and entry into a locked vehicle. The criminal complaint alleged that Everts and his brother, Chad Everts, damaged and stole from cars in an apartment complex parking lot. A twenty-two count information, filed on March 19, 2001 at Everts' arraignment, charged one felony, receiving or concealing stolen property, and twenty-one misdemeanors, including eleven counts of criminal damage to property, six counts of entry into a locked vehicle and four counts of theft. All twenty-two criminal charges were charged as a party to a crime and a repeat offender.

[2] Everts has not provided consistent or consistently accurate citations to the record to corroborate the facts set out in his briefs. Such failure is a violation of WIS. STAT. RULE 809.19(1)(d) and (3) of the rules of appellate procedure, which requires parties to set out facts "relevant to the issues presented for review, with appropriate references to the record." An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record. ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957).

¶3 On October 26, 2001, Everts filed a notice of alibi, listing Chad Everts, Christine Arizola (Everts' sister), and Sara Wilson (Everts' fiancée) as alibi witnesses.[3] On November 8, 2001, trial defense counsel filed a motion asking the trial court to allow Arizola, who now lived in San Antonio, Texas, to testify by telephone. This motion detailed the factual circumstances regarding Arizola's difficulty in testifying in person at trial and asked the trial court to allow her to testify via telephone. The motion also detailed what Arizola was prepared to say. Arizola was prepared to testify that on the night in question, Everts showed up at her house around 4:00 a.m., upset and worried about Chad. Arizola would testify that she drove Everts various places looking for Chad and dropped Everts off around 4:20 a.m. in the parking lot where the crimes occurred. The trial court denied this motion on the day of trial.

¶4 A jury trial was held on November 14 and 15, 2001. Everts' theory of defense admitted he was at the scene of the crime when arrested but asserted he was attempting to stop Chad from committing the crimes charged. In essence, Everts claimed that Chad had committed all the crimes on his own.

¶5 Both Chad and Wilson testified at Everts' trial consistent with this theory of defense. However, a witness identified Everts as one of two persons she saw proceeding through the parking lot, breaking into cars. A police officer testified that after Chad had been arrested, she discovered Everts in the apartment complex parking lot hiding under the front of a car; Everts was found to have in his pockets a small video cassette tape with some handwriting on it, a small plastic

[3] While the State asserts that a notice of alibi was filed and provides a copy of said notice, this notice is not contained anywhere in the record and there is no indication this was ever filed with the trial court.

container with car fuses and a black plastic CD face from a car stereo unit. In addition, the officer testified that at the time of Everts' arrest, Everts admitted that he and Chad were both involved and he had been inside the trunk of a car parked at the scene.

¶6 The jury found Everts guilty of thirteen criminal counts and not guilty of nine criminal counts. The felony receiving stolen property count was reduced to a misdemeanor by the jury verdict. Prior to sentencing, Everts filed a motion to dismiss the penalty enhancer on all counts. The trial court denied this motion. Everts was sentenced to a total of nine years' incarceration and four years' probation, consecutive to the prison time.

¶7 On July 24, 2002, Everts filed a postconviction motion for a new trial based upon ineffective assistance of counsel. At the September 20, 2002 hearing, Everts testified that during pretrial conversations with his trial defense counsel he asked that trial defense counsel interview and call approximately seventeen witnesses to support his alibi defense. Everts charged that trial defense counsel contacted only three of those witnesses, Chad, Arizola and Wilson, but did not contact the remaining witnesses and did nothing to secure their testimony and Arizola's testimony for trial.

¶8 Arizola also testified at the postconviction hearing; she indicated that she was only provided a couple weeks' notice of the trial and was never subpoenaed. She further testified that trial defense counsel informed her she could testify via telephone but that trial defense counsel never contacted her again. Arizola also testified that despite the short notice, she could have returned to Wisconsin to testify.

¶9 Trial defense counsel testified that he had contacted three core alibi witnesses but did not contact the additional fourteen witnesses provided by Everts because they did not provide valuable or helpful information to the alibi defense. Trial defense counsel testified that "[i]n talking ... with Mr. Everts, I found the rendition of what occurred ... to be so fraught with twists and turns that I wasn't able to follow or make out" their accounts. Trial defense counsel testified that he received the information about what these witnesses would testify to from Everts and, based upon his discussion with Everts, concluded that these witnesses did not have a particular value to the case, were not relevant to the alibi and would not assist in the defense. Trial defense counsel also testified that he had spoken to Arizola about testifying but because of her difficulty in traveling from Texas and the case's priority on the court calendar, he tried to procure her testimony by telephone. Trial defense counsel denied making any promises to Arizola that she could testify by phone in the case; he testified he informed her it would be preferable for her to testify in person but she informed him she needed enough travel time and notice.

¶10 Everts alleged further ineffective assistance of counsel in his postconviction motion, claiming his decision to not testify was not fully informed. Everts claimed that he was not aware of the limitations to revealing his criminal record if he chose to testify but was "informed that his entire criminal record would be revealed if he chose to testify." Everts testified that he was told his "record wouldn't be brought up if [he] didn't testify. But there was a police report that was brought up during the trial which would have shown that [he] was arrested and in jail."

¶11 Trial defense counsel testified that he had made a strategic decision for Everts not to testify; he testified that he asked Everts not to testify because his

story could be told by other witnesses. Trial defense counsel further indicated he was concerned that Everts' prior convictions, including other thefts, could be raised and affect his credibility. Trial defense counsel testified that he concluded that Everts' testimony would do more harm than good; he testified that he discussed with Everts in detail the advantages, disadvantages and legal ramifications of both testifying and not testifying.

¶12 The trial court rendered an oral decision on September 20, 2002, denying the postconviction motion. A written order followed on October 9, 2002. Everts appeals.

## DISCUSSION

¶13 Everts argues that his trial defense counsel was ineffective for failing to secure the testimony of seventeen witnesses necessary to defend against the charges and for misinforming him of the consequences of testifying at trial. He further argues that the trial court erred when it denied his motion to dismiss the habitual offender repeater allegation in the information. We address and reject each of Everts' arguments.

### *Ineffective Assistance of Counsel*

¶14 Everts has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Eckert***, 203 Wis. 2d 497, 506, 553 N.W.2d 539 (Ct. App. 1996). In order to prove that he has not received effective assistance of counsel, Everts must show two things: (1) that his lawyer's performance was deficient and (2) that this deficient performance prejudiced his defense. ***Eckert***, 203 Wis. 2d at 506. The issues of performance and prejudice present mixed questions of law and fact. ***Id***. at 507.

Findings of historical fact by the trial court will not be upset unless clearly erroneous. ***Id***. The questions of whether counsel's behavior was deficient and whether it was prejudicial to Everts are questions of law in which we need not defer to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Everts has the burden to establish both components. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

¶15 To establish deficient performance, Everts must prove that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and overcome a strong presumption that his counsel acted reasonably within professional norms. ***Id.*** (citation omitted). The ***Strickland*** Court set forth certain elemental duties that an attorney owes the criminal defense client, among which is the duty to "bring to bear such skill and knowledge as will render the trial ... a reliable adversarial testing process." ***Smith***, 207 Wis. 2d at 273-74 (citation omitted).

¶16 Judicial scrutiny of an attorney's performance is normally highly deferential. ***Id.*** at 274. We must determine whether, under all the circumstances, counsel's conduct was outside the wide range of professionally competent assistance. ***Id***. In ***Strickland***, the Court noted that counsel's actions are often based on "informed strategic choices made by the defendant." ***Smith***, 207 Wis. 2d at 274 (citation omitted).

¶17 We must measure whether defense counsel's performance was reasonable under the circumstances of the particular case. ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207. Defense counsel's subjective testimony as to strategy is evidence to be considered along with other evidence in the record that a court must examine in assessing counsel's overall performance.

***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 783 (Wis. Sept. 19, 2001) (No. 00-2133-CR).

¶18 In addition to proving deficient performance, Everts must also show that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 687. Proof of prejudice requires a showing that Everts was deprived of a fair proceeding whose result is reliable. ***Smith***, 207 Wis. 2d at 275.

¶19 The ***Strickland*** test is not an outcome-determinative test. ***Smith***, 207 Wis. 2d at 276. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Smith***, 207 Wis. 2d at 276 (citation omitted). The Supreme Court has said that the "benchmark" of the right to counsel is the "fairness of the adversary proceeding." ***Id.*** (citation omitted).

*Witnesses*

¶20 Everts' trial defense counsel was not ineffective in failing to secure the testimony of all seventeen witnesses named by Everts. Trial defense counsel testified that he had contacted three core alibi witnesses but did not contact the additional fourteen witnesses provided by Everts because they did not provide valuable or helpful information to the alibi defense. Trial defense counsel testified that "[i]n talking ... with Mr. Everts, I found the rendition of what occurred ... to be so fraught with twists and turns that I wasn't able to follow or make out" their accounts. Trial defense counsel testified that he received the information about what these witnesses would testify to from Everts and, based upon his discussion with Everts, concluded that these witnesses did not have a particular value to the

case, were not relevant to the alibi and would not assist in the defense. Trial defense counsel also testified that he had spoken to Arizola about her coming to testify but that because he knew of her difficulty in traveling from Texas for the trial and of the case's priority on the court calendar, he would try to procure her testimony by telephone. Trial defense counsel denied making any promises to Arizola that she could testify by phone in the case; he testified he informed her it would be preferable for her to testify in person but that she informed him she needed enough travel time and notice.

¶21 We conclude that trial defense counsel's conduct does not constitute ineffective assistance of counsel. Everts asked trial defense counsel to contact seventeen different witnesses; of those seventeen, trial defense counsel contacted three core witnesses and concluded that the remaining fourteen would not provide valuable or helpful information because Everts' account of their purported testimony was confusing and "fraught with twists and turns." Counsel's actions are typically based on information supplied by the defendant and the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own actions. ***State v. Leighton***, 2000 WI App 156, ¶40, 237 Wis. 2d 709, 616 N.W.2d 126.

¶22 Of the remaining three witnesses, Chad Everts and Sara Wilson testified on Everts' behalf. Trial defense counsel did attempt, unsuccessfully, to obtain Arizola's testimony by telephone. In addition, Arizola's testimony did not entirely support Everts' alibi defense. Arizola was prepared to testify that on the night in question, Everts showed up at her house around 4:00 a.m., upset and worried about Chad and she drove Everts various places looking for Chad, dropping Everts off around 4:20 a.m. in the parking lot where the crimes occurred. However, her testimony would not have addressed the criminal acts Everts was

alleged to have committed while in the parking lot. Her testimony would also have been cumulative, as would fourteen more alleged alibi witnesses. It was reasonable for trial defense counsel to conclude that pursuing further alibi witnesses would be fruitless.

*Consequences of Testifying*

¶23 Everts further alleges ineffective assistance of counsel because he claims to have been misinformed of the consequences of testifying at trial. Everts claimed that he was not aware of the limitations to revealing his criminal record if he chose to testify but was "informed that his entire criminal record would be revealed if he chose to testify."

¶24 Trial defense counsel testified that he had made a strategic decision for Everts not to testify because Everts' story could be told by other witnesses. Trial defense counsel further indicated he was concerned that Everts' prior convictions, including other thefts, could be raised and affect his credibility. Trial defense counsel testified that he concluded that Everts' testimony would do more harm than good; he testified that he discussed with Everts in detail the advantages, disadvantages and legal ramifications of both testifying and not testifying.

¶25 We will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic decision rationally based on the facts and the law does not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65. Trial defense counsel's decision that Everts not testify was a strategic decision borne out by the facts, namely, Everts' extensive criminal record.

¶26 Everts provides no evidence that the alleged misinformation he was provided had any effect on his decision to testify. In fact, at the postconviction hearing, Everts acknowledged that in five separate criminal proceedings against him, resulting in nine criminal convictions, he had spoken with other attorneys about the consequences of testifying versus not testifying; he admitted understanding the ramifications of testifying versus not testifying and conceded that his attorney "made no error in terms of describing it to [him and he] already knew the fact about how that worked, about what happens" if he were to testify. There was no ineffective assistance on this issue.

***Repeater Allegations***

¶27 Finally, Everts argues that the trial court erred when it denied his motion to dismiss the habitual offender repeater allegation in the information. The basis for the repeater allegation was set forth in the information as follows:

> The defendant is a repeater within the meaning of Section 939.62(2) Wis. Stats., having been convicted of a **felony** within the previous five-year period, excluding period of confinement wherein the defendant was serving a sentence. The defendant was convicted of: **Threats to Injure** and **Battery** on December 15, 1994 in Kenosha Circuit Court File 94-CF-502 at which time Judge Schroeder sentenced the defendant to nine month [sic] jail on the Battery and withheld sentence on the Threats to Injure. The defendant's probation was ultimately revoked and the defendant served a prison sentence on the felony in File 94-CF-502. The defendant was convicted of **Sexual Intercourse with a Child over the age of 16 years as a Repeater**, on March 28, 1996 in Kenosha Circuit Court File 96-CF-149 at which time the defendant was in custody. Judge Schroeder withheld the defendant's sentence and placed the defendant on probation for three years, consecutive to the defendant's probation revocations. The defendant remained in custody as of June 21, 2000, on File 94-CF-502, and was housed in prison in Tennessee. Each of the judgements of convictions referenced remain "of record" and have not been reversed.

¶28 A person is a repeater if he or she was convicted of a felony or three misdemeanors during the five-year period immediately preceding the commission of the crime for which the actor presently is being sentenced. WIS. STAT. § 939.62(2). Section 939.62(2) also provides that in computing the preceding five-year period, time which the defendant spent in actual confinement serving a criminal sentence must be excluded. The interpretation of the habitual criminality statute presents a question of law that we review de novo. ***State v. Price***, 231 Wis. 2d 229, 234, 604 N.W.2d 898 (Ct. App. 1999).

¶29 Everts argues that while on probation in case no. 94-CF-502, his probation was revoked and he was thus confined but that the procedure utilized to revoke his probation was later ruled to be unlawful in ***State v. Horn***, 226 Wis. 2d 637, 594 N.W.2d 772 (1999). Thus, according to Everts, the time he spent incarcerated on this probation revocation was unlawful and should not have been excluded from the calculation of the five-year repeater period. Everts argues that if this period of unlawful incarceration were included in the calculation of the five-year period, the repeater status would not survive.

¶30 The State does not dispute that Everts' probation revocation was unlawful. The State argues that pursuant to ***Price*** and ***State v. Crider***, 2000 WI App 84, 234 Wis. 2d 195, 610 N.W.2d 198, Everts' incarceration was "actual confinement" as that term is used in WIS. STAT. § 939.62(2). While we agree with the State that this time was actual confinement, ***Price*** and ***Crider*** do not directly address the issue at hand.

¶31 In ***Price***, the issue before us was whether confinement time that the defendant spent on various parole holds qualified as "actual confinement serving a criminal sentence," thereby extending the five-year period under WIS. STAT.

§ 939.62(2). ***Price***, 231 Wis. 2d at 230. We concluded that the time spent under the parole holds was confinement under a criminal sentence within the meaning of the habitual criminality statute and was therefore properly excluded in the computation of the five-year period. ***Id***. at 231.

¶32 In ***Crider***, the issue on appeal was whether the jail time the defendant spent as a condition of probation qualifies as actual confinement serving a criminal sentence, thereby extending the five-year period. ***Crider***, 2000 WI App 84 at ¶6. We concluded that time imposed as a condition of probation was time spent in actual confinement serving a criminal sentence. ***Id***. at ¶1.

¶33 ***Price*** and ***Crider*** are the only cases cited by the State in support of its position. However, both ***Price*** and ***Crider*** presume the validity of the parole hold that led to the incarceration or the probation and conditional jail sentence; here, we have a case where the revocation that precipitated confinement was invalid. Despite the differences between the situation presented here and those presented in ***Price*** and ***Crider***, we conclude that the principles governing our decisions in ***Price*** and ***Crider*** are equally applicable here.

¶34 With WIS. STAT. § 939.62(2), the legislature has decreed that for a period of five years preceding the commission of a crime, an offender's prior criminal record may serve as the basis for an enhanced sentence. ***Price***, 231 Wis. 2d at 234. However, the legislature has excluded from this five-year calculation any time during which the offender was actually confined serving a criminal sentence. ***Id***. at 234-35. When that situation exists, the five-year period is expanded by the amount of such confinement. ***Id***. at 235. The legislature built this provision into the statute because a sentenced offender who is actually

confined, whether by imprisonment or subsequent parole hold, is off the streets and no longer able "to wreak further criminal havoc against the community." ***Id***.

¶35 The purpose of the habitual criminality statutes is to increase the punishment of those persons who "do not learn their lesson or profit by the lesser punishment given for their prior violations of criminal laws." ***Id***. (citation omitted). Inclusion of time served in actual confinement on parole holds would subvert the purpose of the statute. ***Id***. Thus, the five-year term is a "testing" period during which the offender's ability to comport with the criminal law can be assessed. ***Id***. Including periods of confinement during that period runs counter to that purpose. ***Id***. Despite the invalidity of the revocation procedure and the postrevocation incarceration, excluding time Everts served after revocation when he was off the streets and unable to commit further crimes furthers the purpose of WIS. STAT. § 939.62.

¶36 Furthermore, as the State points out, ***Crider*** holds that if a defendant is entitled to sentence credit for any jail time served as a condition of probation, then it is incongruous for the law to determine that jail time could not be excluded from calculations for the habitual offender. ***Crider***, 2000 WI App 84 at ¶8. Everts had the benefit of sentence credit for the time served on the sentence after probation revocation, *see* WIS. STAT. § 973.155(1)(a), and the invalidity of that revocation did not interfere with that sentence credit. The legislature's purpose for the habitual criminality statute was to exclude time that an offender is removed from society and is unable to violate the criminal law. ***Crider***, 2000 WI App 84 at ¶1. Thus, even though the revocation itself was invalid, the time Everts spent in confinement on that invalid revocation was properly excluded from the five-year computation of WIS. STAT. § 939.62(2).

## CONCLUSION

¶37 We conclude that Everts' trial defense counsel was not ineffective for failing to secure the testimony of the seventeen witnesses Everts requested or in Everts' decision to not testify on his own behalf. Furthermore, we conclude that the trial court did not err in denying his motion to dismiss the repeater allegations. We therefore affirm the judgments and order.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.