COURT OF APPEALS DECISION DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 99-0201-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN B. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Kevin Johnson appeals a judgment convicting him of two counts of felony criminal damage to property. He also appeals an order denying his motion for a new trial based on ineffective assistance of counsel. He argues that the State improperly aggregated eleven separate offenses into two offenses, denying him his right to a unanimous jury, and that trial counsel was

ineffective for agreeing to the amendment. He also argues that the court erred when it concluded that he was not in custody when he initially confessed to these crimes and that therefore the police were not required to inform him of his rights under ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). We reject these arguments and affirm the judgment and order.

By his explicit agreement, Johnson waived his right to complain about the amendment to the information that aggregated the eleven incidents into two offenses. *See* ***State v. Dietzen***, 164 Wis.2d 205, 209, 474 N.W.2d 753, 755 (Ct. App. 1991). Johnson's counsel advised the court that he had discussed the matter with Johnson and his parents and that they approved the filing of the amended information. They also agreed that they would stipulate that the property damage due to vandalism was more than $1,000 on each count. The court's colloquy with Johnson established that he would stipulate that the damage exceeded $1,000 on each count, but the State would still have to prove that the damage occurred and that Johnson caused it. Therefore, the issue is whether Johnson's attorney's waiver of this issue denied Johnson effective assistance of counsel.

To establish ineffective assistance of counsel, Johnson must show that his counsel's performance was deficient and prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He must show that his counsel's representation fell below an objective standard of reasonableness and must overcome a presumption that the challenged action might be considered sound trial strategy. ***Id***. at 689. The reasonableness of counsel's actions may be determined or influenced by Johnson's own statements and actions. ***Id***. at 691. To establish prejudice, Johnson must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id***. at 694.

Johnson has established neither ineffective assistance nor prejudice from his counsel's agreement to amend the information. The amendment substantially reduced Johnson's exposure by aggregating five felony and six misdemeanor offenses into two felony charges. The stipulation also removed the prejudicial effect of having the prosecutor question each victim regarding the extent of his or her loss. From the evidence presented at the preliminary hearing, it was obvious that some of the victims suffered losses greatly exceeding $1,000, the amount that differentiates felonies from misdemeanors. In addition, Johnson's only defense was that he was not the perpetrator. His confession was the State's only evidence that he was the perpetrator. Under these circumstances, when there was little prospect of securing an acquittal on some of the charges, agreeing to a reduced number of felony charges constituted a reasonable strategic decision that preserved Johnson's right to a jury determination on the critical issue while reducing his exposure.

The trial court properly denied Johnson's motion to suppress his oral and written confessions because Johnson was not in custody at the time he made the initial statements and the police administered ***Miranda*** warnings after his oral confession. Whether a person is in custody for ***Miranda*** purposes is a question of law that this court reviews *de novo*. *See* ***State v. Mosher***, 221 Wis.2d 203, 211, 584 N.W.2d 553, 557 (Ct. App. 1998). The test is whether a reasonable person in Johnson's position would have considered himself in custody given the degree of restraint under the circumstances. ***Id.*** Johnson agreed to go to the police station with officers to discuss a petty theft and damage to a flowerpot. He rode with the officer in the front seat and was not handcuffed. After he admitted to the theft and

arguably to the flowerpot damage, he was not placed under arrest and was not booked. Another officer came into the room and explicitly told Johnson that he was not under arrest and was free to leave. A reasonable person under these circumstances would not have considered himself to be in custody.

By the Court.—Judgment and order affirmed.

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