

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 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. 99-0451-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMIE L. RABE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed.*

NETTESHEIM, J. Jamie L. Rabe appeals from a judgment of conviction for disorderly conduct and resisting an officer. He also appeals from the trial court's order denying his motion for postconviction relief. Rabe argues he was denied effective assistance of counsel because his trial counsel failed to pursue motions filed by his predecessor counsel challenging the validity of his arrest and failed to request a jury instruction as to the legality of the warrantless

arrest. We hold that Rabe's trial counsel employed a reasonable trial strategy. We therefore reject Rabe's arguments and affirm the judgment and order denying postconviction relief.

1. FACTS

On February 23, 1998, the State filed a criminal complaint against Rabe charging him with felony theft contrary to § 943.20(1)(a), STATS.; disorderly conduct contrary to § 947.01, STATS.; and resisting or obstructing an officer contrary to § 946.41, STATS.

The complaint alleged that on December 19, 1997, Corporal J. Collins of the City of Neenah Police Department was dispatched to 432 Sherry Street in the city of Neenah to investigate a reported theft of a firearm. At the scene, Collins was told by William Ellenbecker that his recently purchased 9 mm Beretta handgun had been stolen from his apartment. Ellenbecker also told Collins that Rabe was the only other person who knew where the gun was kept. Further, Ellenbecker told Collins that when confronted, Rabe confessed to stealing the gun but was unable to return it to him. In his signed statement to police of the same date, Ellenbecker also stated that Rabe had expressed suicidal thoughts to him, apparently as a result of the remorse he felt over his actions. Margaret Fenske, who was also present, told Collins that she also heard Rabe's confession.

Based on this information, Collins proceeded to seek out Rabe for questioning, eventually finding him at his residence. Collins told Rabe he was there about the stolen weapon and wanted to know where it was. Rabe told Collins that he did not know where it was and could not get it back. Collins then told Rabe that he was under arrest for theft of a firearm. When Collins and Officer Fuerst, also of the City of Neenah Police Department, tried to take Rabe into

custody, he fled into the residence towards a back bathroom. Rabe was quickly captured, restrained and handcuffed. Rabe offered physical resistance to the officers as they removed him from the residence and placed him in the back of the squad car.

Once in the back seat of the car, Rabe continued to violently resist, yelling profanities and spitting at the officers. Rabe also began pounding his head against the side window and communicating his desire to die. Because of Rabe's behavior, he was transported to Theda Clark Regional Medical Center. While there, Rabe continued to cause a disturbance with spitting and attempts to bite doctors and nurses on duty. Rabe was eventually placed in restraints to prevent him from injuring himself or others.

Prior to trial, Rabe's original attorney, David Keck, filed a motion to suppress statements made by Rabe to the police and a motion to dismiss the resisting charge on grounds that the officers were not acting with lawful authority as required by § 946.41, STATS. These challenges were based on Rabe's belief that he had been illegally arrested in his home without a warrant.

On June 4, 1998, the trial court granted Keck's motion requesting permission to withdraw as Rabe's counsel because of a conflict. On June 15, 1998, Attorney Leonard Kachinsky filed a notice of retainer on Rabe's behalf. Rabe's case went to trial on June 29, 1998. The jury found Rabe not guilty of the felony theft charge but guilty of resisting an officer and disorderly conduct, both misdemeanors. Rabe was placed on probation for one year and ordered to serve ninety days in jail.

On November 30, 1998, Rabe's postconviction counsel filed a motion to vacate the judgment or, in the alternative, for a new trial. Rabe

contended that the convictions should be vacated because the factual circumstances underlying the offenses should have been suppressed as fruits of an unlawful warrantless arrest inside Rabe's residence. In the alternative, Rabe contended that if his challenge to the warrantless entry was deemed waived, he was denied his right to the effective assistance of counsel. In support of this claim, Rabe pointed to Kachinsky's failure to pursue the pretrial motions to suppress and to dismiss and his further failure to request a jury instruction as to whether the officers were acting with lawful authority at the time of Rabe's alleged resistance.

The trial court denied Rabe's motion based on the warrantless arrest. Following a *Machner*¹ hearing, the trial court also ruled that Rabe was not denied effective assistance of counsel. The court found that Kachinsky's strategy in not pursuing the pretrial motions was reasonable in light of the evidence of exigent circumstances justifying the arrest. Specifically, the court pointed to reports the officers had of Rabe being suicidal and potentially armed. The court denied Rabe's motion. Rabe appeals.

DISCUSSION

Rabe challenges the trial court's denial of his postconviction motion to vacate the convictions. He also challenges the trial court's rejection of his claim of ineffective assistance of counsel. Because both of Rabe's appellate issues concern his claim that his warrantless arrest was illegal, we address them in a single discussion.

¹ See *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his or her defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *See id.* at 697. "An attorney's performance is not deficient unless it is shown that, 'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" *State v. Guck*, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993) (quoted source omitted). We must assess whether such performance was reasonable under the circumstances of the particular case. *See State v. Hubanks*, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992).

We affirm the trial court's findings of fact unless they are clearly erroneous, but the determinations of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985).

Rabe contends that because the warrantless entry into his home was illegal, Kachinsky was deficient in failing to pursue the pretrial motions filed by Keck. In addition, Rabe contends that Kachinsky was ineffective for failing to seek a jury instruction on the question of whether the police were acting lawfully at the time of his alleged resistance.

In support of his claim that the warrantless entry was illegal, Rabe points to case law that states that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). Further, searches and arrests executed

inside a home without a warrant are presumptively unreasonable. *See Laasch v. State*, 84 Wis.2d 587, 594, 267 N.W.2d 278, 283 (1978). The only exceptions to this rule are if there is consent to entry or exigent circumstances exist. *See id.* at 596, 267 N.W.2d at 284. The State conceded that there was no valid consent in this case, instead relying on exigent circumstances to justify the warrantless entry and arrest.

In Wisconsin, the existence of exigent circumstances is analyzed by the following objective test:

Whether a police officer under the circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape.

State v. Smith, 131 Wis.2d 220, 230, 388 N.W.2d 601, 606 (1986). Some circumstances under which warrantless entry may be permissible are:

- (1) An arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence would be destroyed, and (4) a likelihood that the suspect would flee.

Id. at 229, 388 N.W.2d at 605. Here, as noted, the State argues that the warrantless entry was justified by the officers' concern for Rabe's own safety.

Rabe acknowledges that Collins had probable cause to arrest him based on the reports of suicidal statements provided by Ellenbecker. Rabe also believes it was sound police work for the officers to be concerned about his safety, based upon the facts as they knew them before approaching his home. He contends, however, that any possible concerns for exigent circumstances were dispelled by the time the officers decided to enter without a warrant. In support, Rabe points to the following portions of Collins's testimony. Before knocking on the front door and entering the home, Collins saw Rabe through a window sitting

in a chair and watching television. Rabe argues that “sitting and watching television does not pose, nor is it indicative of an imminent threat to one’s safety or the safety of others.”

Rabe also claims that when he answered the door he was neither visibly distraught, nor did he express a desire to harm himself or others. In support, he points to Collins’s testimony stating that, while Rabe was intoxicated when they spoke, he was not obnoxious or belligerent.

We reject Rabe’s argument. Under the facts of this case, and pursuant to *Smith*, Collins reasonably believed that a delay in procuring a warrant would create a threat to the safety of Rabe or others. Collins had been told by a citizen victim that Rabe had threatened to kill himself. Collins reasonably deduced that Rabe had the means to carry out his threat based upon the victim’s report that Rabe was the person who likely had stolen his gun. Shortly thereafter, Collins located Rabe at his residence. Even though Rabe did not appear in distress when Collins located him at his residence, that circumstance did not negate the reasonable concern which Collins still held for Rabe’s safety. We hold that exigent circumstances allowed Collins to dispense with a warrant.

Kachinsky came to the same conclusion. At the *Machner* hearing, Kachinsky testified to giving thought to the motions and theories that form the basis of this appeal:

I think I did consider it at some point prior to trial, whether that [the lawfulness of the arrest] would be an issue to be raised at trial; and after reviewing the police reports I came to the conclusion that arrest would have been a lawful one based on the stated purpose of the police officer of being able to go into the house because of the suicide threats; so that would not be successful.

With that determination in place, Kachinsky decided to pursue a different strategy. He chose a theory of defense which directly challenged Ellenbecker's credibility. Kachinsky challenged whether the theft ever took place and whether Rabe had actually confessed to Ellenbecker. Kachinsky questioned whether the firearm even existed because there was no receipt. He highlighted that there were no witnesses, other than Ellenbecker, who ever claimed to have seen Rabe with the gun. Kachinsky also maintained there were others with the same access to the place where Ellenbecker claimed to store the gun.

Kachinsky also took a different view of the misdemeanor charges. Rather than attacking the admissibility of evidence on the lesser charges, he chose to argue that the evidence simply did not prove what the State claimed. He maintained that the State overstated the violence of the confrontation, claiming Rabe never offered much physical resistance and was not that upset. More than anything, Kachinsky's strategy was to focus attention on the felony theft, even if at the expense of the lesser charges. This is borne out by his testimony at the *Machner* hearing where he expressed a belief that the felony theft charge should be the central strategy of the defense because of its seriousness.

Kachinsky maintained this theory of defense on the two misdemeanor charges throughout the trial. He rejected the option of changing this strategy during the trial, even after Collins gave testimony that may have led to the inference that exigent circumstances were not present at the time of the warrantless entry. Kachinsky was concerned that a change of strategy during the trial might damage the defense's credibility and confuse the jurors. We deem this strategic decision to be a reasonable one in light of all of the circumstances of this case.

Central to any claim of ineffective assistance of counsel is the defendant's burden to show that the representation received fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688. "That trial counsel's trial strategy was unsuccessful does not mean his performance was legally insufficient." *State v. Teynor*, 141 Wis.2d 187, 212, 414 N.W.2d 76, 85 (Ct. App. 1987). Here, Kachinsky had a reasonable basis to believe that the suppression motion would not prevail. Instead, he selected a different, but plausible, theory of defense to the lesser charges. In addition, Kachinsky focused primarily on the felony charge and won an acquittal on that charge.

CONCLUSION

We conclude that Kachinsky's representation of Rabe was not deficient. We agree with the trial court that the strategy chosen by Rabe's trial counsel was a reasonable one in light of the circumstances in this case. That there were other theories of defense available does not make Kachinsky's choice unreasonable. Accordingly, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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

