COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1789-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SPRING A. LONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Spring Long pled no contest to one count of armed robbery, contrary to WIS. STAT. §§ 943.32(1)(b) and (2).[1] After being convicted

[1] All statutory references are to the 1997-98 edition.

and sentenced, she sought to withdraw her plea by claiming that her trial counsel was ineffective. Long is a member of the Menominee Tribe. Although the armed robbery occurred in Shawano County, Long was arrested on the Menominee Reservation. She argued that her trial counsel was ineffective for failing to challenge her extradition and a show-up identification. The circuit court denied her postconviction motion, and we affirm the judgment and order.

FACTS

¶2 On February 18, 1998, Long entered a gas station in Shawano County. Threatening the attendant with a knife, Long stole two cases of beer, two packs of cigarettes, gasoline and a plastic container holding money. The station attendant gave police a physical description of the robber and the getaway car, along with a partial license plate number. Later that day, Menominee Tribal Police stopped a vehicle matching the description within the boundaries of the Menominee Reservation. Long and another woman were riding in the vehicle, and two cases of beer were found in the back seat. A Shawano County investigator also arrived and concluded that Long met the physical description given by the victim. After learning that Long was a member of the Menominee Tribe, the investigator asked her whether she would consent to being taken off the Menominee Reservation. Long refused and was therefore transported to the Menominee Tribal Jail.

¶3 At the jail, police conducted a show-up where the victim was unable to make a positive identification. Tribal police interviewed Long, however, and she confessed to committing the robbery. The next day, FBI agents threatened Long with the possibility of facing federal charges. Long then decided to waive extradition and was transferred to Shawano County. No formal proceedings

occurred before her transfer. In exchange for a dismissed count of carrying a concealed weapon, she pled no contest and was sentenced to ten years in prison. Long later filed a postconviction motion seeking to withdraw her plea. She claimed that her trial counsel was ineffective for failing to pursue dismissal of the action based on the State's failure to comply with extradition requirements. She also alleged that counsel was ineffective for failing to seek suppression of the show-up identification on the ground that it was conducted in an impermissibly suggestive manner.

¶4 The circuit court held a ***Machner*** hearing,[2] where trial counsel explained that he did not pursue motions challenging Long's extradition or the identification procedure because he concluded that he would not have been successful. The circuit court denied Long's motion, concluding that the State did not violate Long's extradition rights and that the show-up was not overly suggestive. This appeal followed.

LEGAL STANDARDS

¶5 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced her defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must identify acts or omissions of counsel that are not the result of "reasonable professional judgment." ***Id.*** at 690. Even if it appears in hindsight that another tactic would have been more effective,

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), requires an evidentiary hearing to address a claim of ineffective assistance of counsel.

a strategic decision will be upheld as long as it is founded on rationality of fact and law. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶6 Trial counsel's failure to pursue a course of action does not prejudice the defense unless the action would have been likely to succeed. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, she would not have pled no contest and would have insisted on going to trial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶7 A defendant's failure to establish either deficient performance or prejudice is dispositive. *See* ***Strickland***, 466 U.S. at 697. The court may address the tests in the order it chooses. *See* ***id.*** If the defendant fails to establish either prong, the court need not address the other. *See* ***id.***

¶8 Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law that we review de novo. *See* ***Pitsch***, 124 Wis. 2d at 634.

EXTRADITION

¶9 At the ***Machner*** hearing, Long's trial counsel explained that he chose not to challenge Long's extradition because Long signed a form agreeing to be extradited. Counsel further explained that even if Long's waiver was invalid and her extradition was illegal, Long was not entitled to suppression of evidence

or dismissal. We agree with this analysis. Even assuming that Long was illegally extradited, counsel's performance was not deficient because we conclude that this would not require dismissal of the charges or suppression of evidence obtained before her extradition.

¶10 Long concedes that there is no extradition treaty between the Menominee and the State of Wisconsin. Long also fails to specifically identify any violation of Menominee extradition procedure and, therefore, we conclude that none was violated.[3] Moreover, Long does not dispute that she freely and voluntarily signed a waiver form agreeing to extradition. Even if Long was illegally extradited, however, she is not saved from criminal prosecution. *See* ***United States v. Alvarez-Machain***, 504 U.S. 655, 656 (1992); ***Frisbie v. Collins***, 342 U.S. 519, 522 (1952).[4]

¶11 Alternatively, Long contends that unlawful extradition requires suppression of evidence. However, we note that challenged evidence must in some sense be the *product* of illegal government activity. *See* ***Nix v. Williams***, 467 U.S. 431, 444 (1984). Long completely fails to explain how any evidence was

[3] Long has not identified and we are unaware of any violations of Menominee extradition procedure. In fact, it is unclear whether the Menominee have any extradition procedures. Although we proceed under the assumption that some protections are inherent in extradition from sovereign countries, we do not address that issue. Long does rely on an ordinance that requires a hearing procedure before transferring a defendant from tribal to county jail. She acknowledges, however, that by its own terms, that ordinance had not yet become effective.

[4] Under a rule known as the ***Ker-Frisbie*** doctrine, "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" ***Frisbie v. Collins***, 342 U.S. 519, 522 (1952) (quoting ***Ker v. Illinois***, 119 U.S. 436 (1886)). This general rule does admit of some exceptions; for instance, an extradition treaty may provide that it is "the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." ***United States v. Alvarez-Machain***, 504 U.S. 655, 664 (1992). There is also support for a "very limited" exception for certain cases of "'torture, brutality, and similar outrageous conduct.'" ***United States ex rel. Lujan v. Gengler***, 510 F.2d 62, 65 (2d Cir. 1975)). None of these exceptions applies here.

tainted by her extradition. Her confession and other significant evidence linking her to the robbery were obtained *before* she was extradited.

¶12 As she is unable to argue that the seized evidence could have been tainted by her extradition, Long claims that her unlawful extradition invalidates her initial arrest. In support of her argument that her otherwise lawful arrest should be invalidated, Long cites two New Mexico cases that the State contends, and we agree, are easily distinguishable. *See* ***State v. Yazzie***, 777 P.2d 916 (N.M. Ct. App. 1989); ***Benally v. Marcum***, 553 P.2d 1270 (N.M.1976). In both cases, state police arrested, without involvement from tribal authorities, Navajo Indians on Navajo land and transported them off the reservation for incarceration in a state facility. *See* ***Yazzie***, 777 P.2d at 917; ***Benally***, 553 P.2d at 1271. This violated the Navajo Tribal Code, which stated that only tribal police were authorized to arrest a suspect on the reservation. Both courts concluded that the state police arrests violated tribal sovereignty because they were contrary to adopted extradition procedures. *See* ***id.*** These cases do not support Long because tribal police arrested her and because there was no violation of extradition procedures.[5]

¶13 Because no Menominee extradition procedure was violated and Long agreed to be extradited, there is no basis upon which the tribe's sovereign immunity could be impaired. Long provides no legal support or reasonable explanation why the exclusionary rule should be extended even if she was illegally extradited. Long agreed to be extradited because she wanted to avoid possible federal charges. She could not have successfully claimed that the evidence obtained by the tribal police should have been suppressed based on her extradition.

[5] Also, these cases do not support her proposition that evidence obtained before state involvement should be suppressed.

Because the trial counsel's decision not to challenge the extradition procedure was founded on rationality of fact and law, there was no deficient performance.

SHOW-UP

¶14 Long was part of a show-up at the tribal jail where the victim was asked to identify the perpetrator through a small window. Only one person was shown at a time, and the tribal authorities asked Long to wear a sweatshirt found in her possession when she was arrested. The victim was hesitant to identify Long as the perpetrator and never made a positive identification. Long contends that the show-up was impermissibly suggestive because she was forced to wear a sweatshirt that fit the victim's description of the perpetrator. At the ***Machner*** hearing, trial counsel explained that he made a tactical decision not to challenge this show-up based on the other overwhelming evidence the State had to identify Long.

¶15 Because the issue is dispositive, we immediately discuss whether Long was prejudiced by her counsel's failure to challenge the show-up even if the evidence should have been suppressed. *See* ***Strickland***, 466 U.S. at 697. To establish prejudice, Long must demonstrate that there is a reasonable probability that, but for counsel's errors, she would not have pled no contest and insisted on going to trial. *See* ***Bentley***, 201 Wis. 2d at 312. We agree with the State that "[w]here, as here, the defendant confessed to having committed the crime charged, the exclusion of a pre-trial identification by the victim is not likely to appreciably improve the defendant's chances of acquittal."

¶16 We conclude that there is no reasonable probability that Long would have insisted on going to trial because even if the victim's less than positive identification of Long was suppressed, Long had already confessed to the robbery

and there was substantial evidence linking her to the crime. She was not denied effective assistance of counsel because even if the evidence was illegally obtained, she was not prejudiced by trial counsel's decision not to challenge it.

By the Court.—Judgment and order affirmed.

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