

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 26, 1997

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. 96-2627-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

COLLIN D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Collin Jones appeals a judgment convicting him of theft, § 943.20(1)(a) and (3)(c), STATS., and an order denying him postconviction relief. Jones pled guilty to the charge. The sole issue is whether the trial court erred by denying his postconviction motion to vacate the plea. We conclude that the trial court properly denied relief, and therefore affirm.

The State charged Jones with stealing his parent's ATM card and making twenty-three unauthorized withdrawals from their account over a two-month period. Those withdrawals totaled \$2,625. The State combined all twenty-three withdrawals into one count, resulting in a Class C felony charge. As a repeater, Jones therefore faced a maximum prison sentence of sixteen years. Had the withdrawals totaled under \$2,500, Jones would have faced a Class E felony charge, and an eight-year maximum sentence as a repeater. Section 943.20(1)(a) and (3)(b), STATS.

In exchange for Jones's guilty plea, the State dropped the repeater allegation. He received an eight-year prison sentence consecutive to a six-year term imposed at the same time on prior convictions for which probation had been revoked.

Jones moved after sentencing to withdraw his plea on the ground that he received ineffective assistance from trial counsel. He alleged that counsel failed to adequately investigate whether he actually made fewer than twenty-three unauthorized withdrawals and, as a result, was only guilty of a Class E felony theft of less than \$2,500. At the hearing on this motion, counsel testified that he knew there were one or two instances where Jones's father thought it possible he (the father) might have made the withdrawals in question. Counsel further testified that he knew this to be a potential defense to the Class C felony charge, and thoroughly discussed the matter with Jones. In the end, Jones chose not to take the matter to trial because he did not want his parents to testify against him. Additionally, counsel and Jones realized that the benefit to Jones was not that great, because rejecting the plea bargain and going to trial would only have reduced his exposure from ten-years to eight-years maximum imprisonment. (Ten years as a Class C felon with the repeater dismissed versus eight years as a Class E

felon with the repeater.) Also, counsel advised Jones that he might benefit from a combined sentencing on the probation revocation and the present offense because a “package” sentence from one judge in all matters, even with the greater theft charge, might result in a shorter overall sentence than with two judges sentencing at different times.

Neither Jones nor any witnesses other than his defense counsel testified at the postconviction hearing. The trial court found counsel’s testimony credible and concluded that he effectively represented Jones.

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 behavior 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 or incomplete view of the facts 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).

Trial counsel provided Jones with effective representation under these standards. Jones contends that counsel should have inquired into the amount of the victim’s insurance settlement, inquired whether the bank videotaped the one or two questionable withdrawals and made further inquiries about an affidavit Jones’s father allegedly gave the bank in which he totaled the loss at \$2,475. Such further investigation might have been necessary had Jones wished to try the issue.

As it was, however, in testimony expressly deemed credible, counsel explained that he fully informed Jones of the potential defense, and Jones decided not to pursue it for both personal and strategic reasons. Counsel also reasonably explained why the father's figure of \$2,475 was probably an arithmetic error. In any event, counsel's investigation up to that point gave Jones the information he needed to make a fully informed choice to plead, and counsel's strategic advice on the advantages and disadvantages of the plea bargain was reasonable.

By the Court.—Judgment and order affirmed.

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

