

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 8, 1998

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. 97-1792-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOSEPH H. HARRINGTON,**

**DEFENDANT-APPELLANT.**

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

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Joseph H. Harrington has appealed from a judgment convicting him after a jury trial of one count of burglary in violation of § 943.10(1)(a), STATS. His conviction was as a party to the crime and as a habitual offender under §§ 939.05 and 939.62(1)(b), STATS. Harrington has also appealed from an order denying his motion for postconviction relief.

Harrington argues on appeal that the trial court erred when it denied his postconviction motion for an order directing the Wisconsin State Crime Laboratory to test items of clothing which were found in his car and were allegedly worn by him on the night of the burglary. He wanted the items tested to determine whether they contained paint chips from the safe that was broken into by the burglars. He also argues that his trial counsel rendered ineffective assistance when he failed to request such testing prior to trial. We reject these arguments and affirm the judgment and the order.

In *State v. Lee*, 192 Wis.2d 260, 266, 531 N.W.2d 351, 353 (Ct. App. 1995), *vacated in part on other grounds*, 197 Wis.2d 959, 542 N.W.2d 143 (1996), this court held that whether to grant a defendant's request for crime lab testing on his or her behalf is a discretionary determination for the trial court. This court held that the standards to be applied by the trial court in considering whether to grant a request for testing include the potential value of the test results to the defendant and the extent to which the tests might aid in the presentation of evidence at trial. *See id.* at 267, 531 N.W.2d at 354.

We recognize that the portion of the court of appeals' opinion in *Lee* which was vacated by the Wisconsin Supreme Court was the portion discussing the standards for granting and reviewing a motion by a defendant seeking crime lab testing under § 165.79(1), STATS. This portion of the decision was vacated on the grounds that the court of appeals should have dismissed the appeal based on the notice of voluntary dismissal which had been filed by the State before the decision was released. *See State v. Lee*, 197 Wis.2d 959, 962, 542 N.W.2d 143, 143-44 (1996).

While both parties also recognize that this portion of the court of appeals' decision was vacated, in their briefs on appeal they both cite and rely on the standards set forth in the court of appeals' opinion. While recognizing that the court of appeals' decision in *Lee* is no longer of precedential value, we agree that the standards discussed therein are correct and adopt them for purposes of this appeal.

Because the trial court's order denying testing involves the exercise of discretion, we will uphold its determination if it examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion. See *State v. Pittman*, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79-80 (1993). Based upon these standards and the evidence, the trial court reasonably determined that the test results would have little potential value to Harrington and that testing therefore should be denied.

At trial, the State introduced evidence from crime lab testing indicating that paint chips on a prybar seized from Harrington's vehicle matched samples taken from the safe that had been robbed. Harrington argues that the crime lab would not have found such paint chips on the items of clothing taken from his car and that the absence of such evidence would tend to negate other evidence that he participated in the burglary.

As discussed by the trial court, even if testing revealed the absence of paint chips on the clothing, this fact was unimportant in light of the remaining strong evidence of Harrington's guilt, the lack of any testimony indicating that he actually wore all of these clothes at the time of the burglary, and the fact that he could have participated in the burglary without getting paint chips on his clothing. Evidence at trial included testimony by Harrington's accomplice,

Matthew Chappa, who not only confessed his own involvement in the crime but offered direct testimony that Harrington planned and helped commit the burglary. Kathy Arenz, another friend of Harrington's, testified that she heard Harrington and Chappa discuss breaking into the safe on the night of the burglary. Floyd Proctor, an acquaintance of Harrington, also testified that Harrington spoke with him about his plans for the burglary before committing it. In addition, the owner of the burglarized tavern testified that about a year before the burglary Harrington discussed the safe with him, including how strong it was and how much money was kept in it.

In conjunction with evidence that some marks on the burglarized safe were from a prybar taken from Harrington's vehicle and evidence that paint chips on the prybar matched paint samples from the safe, the case against Harrington was clearly overwhelming. Based on the strength of the remaining evidence against Harrington, the trial court reasonably determined that testing of his clothing would be of little potential value, particularly since he could have participated in the burglary, even to the extent of prying the safe open, without having paint chips land upon and remain on his clothes. Moreover, Harrington was convicted as a party to the crime of burglary. Because the evidence of his participation in the burglary clearly established his guilt as a party to the crime even if he was not the individual who actually forced open the safe, *see State v. Simplot*, 180 Wis.2d 383, 401-02, 509 N.W.2d 338, 345 (Ct. App. 1993), no basis exists to disturb the trial court's order denying Harrington's motion for testing.

Harrington's second argument is that his trial counsel's failure to request testing of the clothing prior to trial constituted ineffective assistance of counsel. To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See*

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, we need not consider whether counsel's performance was deficient absent a showing that any alleged deficiencies prejudiced the defendant's case. See *State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349 (Ct. App. 1994). This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. See *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. See *id.* at 129, 449 N.W.2d at 848. A reasonable probability constitutes a probability sufficient to undermine confidence in the outcome. See *id.*

For the reasons already discussed, in light of the strength of the remaining evidence against him the testing sought by Harrington had little potential value. Our confidence in the outcome of the trial is therefore not undermined by trial counsel's failure to seek such testing.

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

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

