**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 10, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**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* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 01-0967-CR** **Cir. Ct. No. 99-CF-322**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM D. TAYLOR,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. William D. Taylor appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether Taylor received ineffective assistance of trial counsel. Because Taylor failed to provide the testimony of trial

counsel, we conclude that he waived all issues relating to ineffective assistance of counsel. Consequently, we affirm the judgment and order.

¶2 Taylor was convicted after a jury trial of armed robbery with use of force as a party to a crime, first-degree recklessly endangering safety as a party to a crime, threats to injure/accuse of crime as a party to a crime, and being a felon in possession of a firearm, all with penalty enhancers. He was sentenced to forty-five years on count one, ten years concurrent on count two, fifteen years consecutive on count three, and thirteen years consecutive on count four. He subsequently filed a motion for postconviction relief in which he alleged that he received ineffective assistance of trial counsel. The motion was denied after a hearing and Taylor appeals.

¶3 Taylor asserts that he received ineffective assistance of trial counsel for a number of reasons. At the motion for postconviction relief, however, Taylor did not offer the testimony of his trial counsel. In order to successfully raise ineffective assistance of counsel, trial counsel must appear and testify at a ***Machner*** hearing.[1] In ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998) (citation and footnote omitted), we stated:

> While the ***Machner*** court did not explicitly specify that a hearing was required in every case, we construe it to mean just that. The court held in ***Machner*** that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***Id.*** The hearing is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion. This dual purpose renders the hearing essential in every case where a claim of ineffective assistance of counsel is raised. Here, the lack of

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

> a ***Machner*** hearing prevents our review of trial counsel's performance.

¶4 In this case, where there was a hearing but counsel was not produced, the same logic applies. Trial counsel was not given a chance to explain his actions. The lack of this testimony prevents our review of trial counsel's performance.

¶5 Taylor argues, however, that under ***State v. Lukasik***, 115 Wis. 2d 134, 340 N.W.2d 62 (Ct. App. 1983), the defendant may support his or her argument with corroborating evidence when counsel is not available to testify. In ***Lukasik***, the court noted that the general rule is that "if, for any reason, the attorney whose competency is questioned cannot appear to explain his actions, then the defendant's claim of ineffective counsel cannot be considered." ***Id.*** at 139. In that case, however, trial counsel had died between the time of trial and the motion for postconviction relief. The court concluded that under the circumstances existing in that case, the rule was too harsh. ***Id.*** The court, therefore, allowed the defendant to present other, corroborating evidence. ***Id.*** at 140. ***Lukasik*** presents a very narrow and limited exception to the general rule discussed in ***Curtis***.

¶6 Taylor argues that since counsel was unavailable to testify, he is entitled to offer other, corroborating evidence. But Taylor never established that trial counsel was unavailable. The record shows that his postconviction counsel believed it was the State's burden to produce trial counsel, so he never subpoenaed him. Postconviction counsel was wrong—it was his responsibility to subpoena trial counsel. At the hearing, postconviction counsel offered to subpoena trial counsel if the court would grant an adjournment. The trial court, noting that the motion had been pending for two months, would not adjourn the matter. There

was no evidence that trial counsel was unavailable for any reason; postconviction counsel simply did not subpoena him.

¶7 We conclude, therefore, that by failing to offer trial counsel an opportunity to testify at the ***Machner*** hearing, Taylor has waived any claims relating to ineffective assistance of counsel. But to avoid a petition claiming that postconviction counsel was ineffective, we will address the merits of his claim.

¶8 The first grounds Taylor asserts in support of his claim of ineffective assistance of counsel is that trial counsel did not move to strike for cause a juror who was objectively biased. The standard for determining whether a juror is objectively biased is whether a reasonable person in the juror's position could be impartial. ***State v. Lindell***, 2001 WI 108, ¶38, 245 Wis. 2d 689, 629 N.W.2d 223, *reconsideration denied*, 2001 WI 117, 247 Wis. 2d 1039, 635 N.W.2d 786 (Wis. Sept. 21, 2001) (No. 99-2704-CR). "[W]hether the juror should be removed for cause turns on whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge." ***Id.*** (citation omitted).

¶9 Taylor argues that the juror was objectively biased because she expressed concern about a defendant who did not testify. During voir dire, defense counsel asked questions about the jurors' attitude towards a defendant who did not testify. The juror at issue responded in pertinent part: "I would like to hear his side of the story. He should want to defend himself. If I'm innocent of something, I'm going to let you know I'm innocent, I didn't do it." Defense counsel then continued to question this juror, explaining to her and the other prospective jurors that the defendant had a constitutional right not to testify. The

following exchange then took place between defense counsel and the juror at issue:[2]

> [COUNSEL]: I realize people gave very different perceptions about the way things should be, the way they think things would be fair. Are you able to put those aside, both that opinion that we have to do something and look and evaluate her case based upon everything that comes in?
>
> JUROR: I guess I would have to do that if I was a juror.
>
> [COUNSEL]: And if this judge tells you you have to do it, can you listen to him?
>
> JUROR: Yes.
>
> [COUNSEL]: Because it's an important responsibility you have, right?
>
> JUROR: Yes ….

And later on:

> [COUNSEL]: [B]ut everyone is able to put aside those things and listen to the law the way it's laid out by the judge, right?
>
> JUROR: Uh-huh.
>
> [COUNSEL]: You can do that, [Juror A. B.-H.], can you do that?
>
> JUROR: Yes, I can.

¶10 In ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998), *overruled on other grounds by* ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223, a juror expressed his belief that a defendant who does not testify was guilty of wrongdoing. The juror continued to express this belief despite

[2] The juror is not identified by name in the transcript. We infer from the context of the discussion, as quoted, and the fact that at one point defense counsel used the juror's name, that the discussion was between defense counsel and the juror at issue.

counsel's and the court's explanation of a defendant's absolute constitutional right not to testify in his own defense. ***Id.*** at 500. The court continued to question this juror and eventually he stated that he "would certainly try" to set his bias aside. ***Id.*** "In all, the discussion regarding Ferron's Fifth Amendment right to be free from self-incrimination produced four pages of dialogue in the record, which included two instructions on the law from defense counsel and four instructions from the court. Yet in the end, the most the circuit court was able to ascertain as to [the juror's] willingness to set aside his obvious bias against defendants who choose not to testify on their own behalf was '[p]robably.'" ***Id.*** at 500-01.

¶11 In this case, however, the juror expressed her concern, listened to defense counsel's explanation of the law, and then said without reservation that she would be able to abide by the court's instructions. We cannot conclude that this juror was objectively biased. Since the juror was not objectively biased, then counsel was not ineffective for not asking that the court strike the juror for cause.

¶12 Taylor also argues that his counsel was ineffective for failing to assert that his Fourth Amendment rights were violated. Taylor argues that the police violated his rights because a search warrant was issued based on inadequate and misleading information, and because he was arrested illegally and without probable cause.

¶13 The facts underlying the issuance of the search warrant are as follows. The police received a call that an armed robbery occurred at a grocery store in Racine within seconds of it occurring. The police immediately went to the store where an eyewitness described one of the suspects by the eyeglasses he was wearing, and stated that she knew him from a certain area of the city. The police were able to put a possible name to this person and then put together a photo line-

up. The eyewitness selected the picture of Sylvester Neasman. Eyewitnesses also told the police that the suspects had driven away in a white, older model Cadillac.

¶14 The officers went to Neasman's address and saw two cars, one of which was a white Cadillac. The hood of the car was warm to the touch and there were fresh tire marks from it. Neasman then came out of the residence and the police arrested him. Neasman told the police that the only other person inside was his girlfriend. The police knocked on the door and when a woman answered the door, the police saw a man lying on the couch. The police called him to the door, and the man came out to the porch. He matched the description of the second suspect so the police arrested him, too. He was later identified as Taylor. The police subsequently obtained a search warrant for the premises and the second car.

¶15 Taylor argues that the search warrant was improperly obtained because the warrant stated that the eyewitness had identified Neasman, and that this information was false and misleading. A search warrant may issue on the basis of a finding of probable cause by a neutral and detached magistrate. ***State v. DeSmidt***, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990). Whether probable cause exists

> is determined by analyzing the "totality of the circumstances."
>
> > The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
>
> This court has stated that the warrant-issuing judge must be apprised of "sufficient facts to excite an honest belief in a

> reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." "The quantum of evidence necessary to support a finding of probable cause for a search warrant is less than that required for a conviction or for bindover following a preliminary examination."

***Id.*** (citations omitted).

¶16 Taylor asserts that the eyewitnesses only identified Neasman by his glasses, and that this was false and misleading information. That is simply not true. The eyewitness described Neasman by his unique eyeglasses, and then picked out his picture from a photo line-up. This identification led the police officers to Neasman's residence where they found a car which matched the description of the car used by the robbers. We conclude that this information provided more than adequate probable cause to issue the search warrant, and that the information was not false and misleading.

¶17 Taylor also argues that his Fourth Amendment rights were violated when the police entered Neasman's residence without Neasman's consent and arrested Taylor. The facts, however, do not support Taylor's argument. The police knocked on the door, asked Neasman to come here, he came out to the porch and was arrested there. Taylor has not established that his Fourth Amendment rights were violated.

¶18 Taylor also complains that the police did not have probable cause to arrest him. Again, we disagree. An officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant committed an offense. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). The officer's observations supporting an arrest need not be sufficient to

prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more likely than not. ***State v. Mitchell***, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992). It is only necessary that the evidence would lead a reasonable officer to believe that guilt is more than a mere possibility. ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971). "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Id.*** (quotations and citations omitted).

¶19 A prudent police officer, armed with the information discussed above, would have a reasonable suspicion not based on legal technicalities that Taylor was likely to be the other robber. The facts and circumstances were that Neasman had been identified as one of the robbers; there were two robbers; the car used in the robbery was found at the residence; the police found Taylor in Neasman's home; Taylor matched the description of the second robber; and Neasman had just lied to them about the number of people who were in the house. This was sufficient to give the police probable cause to arrest Taylor.

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

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