COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP20 **Cir. Ct. No. 1999CF113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD FRANK,

DEFENDANT-APPELLANT.

APPEAL from 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. Ronald Frank, pro se, appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.[1] Frank argues his

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel and the trial court erroneously exercised its discretion when it denied his ineffective assistance of counsel claim without conducting an evidentiary hearing. We reject Frank's arguments and affirm the order.

BACKGROUND

¶2 In January 2001, Frank was convicted upon a jury's verdict of having sexual contact with a child under the age of thirteen, contrary to WIS. STAT. § 948.02(1). In his direct appeal from that conviction, Frank argued that (1) the trial court erred when it ruled that other acts evidence would be admissible; (2) it was plain error when the trial court admitted evidence of a polygraph examination and statements made during and immediately following that examination; and (3) the trial court's evidentiary rulings prevented the real controversy from being tried. This court affirmed the judgment of conviction, concluding that Frank waived his right to appeal the other acts ruling by entering into a ***Wallerman***[2] stipulation, any error regarding the polygraph examination was not plain and the real controversy was tried. ***State v. Frank***, 2002 WI App 31, 250 Wis. 2d 95, 640 N.W.2d 198.

¶3 Frank subsequently filed a WIS. STAT. § 974.06 motion with the circuit court, arguing that he was denied the effective assistance of postconviction

[2] In ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), this court held that a defendant can concede elements of a crime to avoid the introduction of other acts evidence.

counsel.[3] The circuit court denied Frank's motion without a hearing and this appeal follows.

DISCUSSION

¶4 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶5 To determine the validity of an ineffective assistance of counsel claim, Wisconsin employs the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). To succeed on his claim, Frank must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Id.*** Further, we may reverse the order of the tests and avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. ***Id.*** at 697.

¶6 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the

[3] Although Frank's underlying claims would otherwise be procedurally barred under both WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Frank avoids the strictures of ***Escalona*** by arguing that postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel or pursue various issues during his initial postconviction proceedings. In ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996), this court acknowledged "that ineffective postconviction counsel could be a sufficient reason for permitting an additional motion for postconviction relief under [§ 974.06], thereby making the remedy under § 974.06 an adequate and effective remedy for the alleged errors."

'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶7 The prejudice prong of the ***Strickland*** test is satisfied when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694.

¶8 Here, Frank alleges numerous instances of ineffective assistance of trial counsel. First, Frank claims trial counsel was ineffective for coercing him into a ***Wallerman*** stipulation. On direct appeal, Frank argued that Wisconsin law required him to enter into a ***Wallerman*** stipulation once his motion in limine to exclude other acts evidence was denied. ***Frank***, 250 Wis. 2d 95, ¶4. This court held that the law did not require Frank to enter into a ***Wallerman*** stipulation. Rather, Frank had a choice to either enter into a ***Wallerman*** stipulation, thus precluding the admission of other acts evidence at trial, or decline to enter into a

Wallerman stipulation, thereby allowing the introduction of other acts evidence. ***Id.***, ¶14. In his present appeal, Frank does not argue that the law forced him into a ***Wallerman*** stipulation but, rather, that his trial attorney coerced him into the stipulation. As the State notes, the crux of Frank's arguments in both appeals is that he had no choice whether to enter into the ***Wallerman*** stipulation. A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the issue is rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Although Frank is arguably barred from relitigating the ***Wallerman*** issue, we nevertheless conclude that his argument lacks merit.

¶9 Although Frank contends his trial counsel used "scare tactics" to coerce him into the ***Wallerman*** stipulation, Frank's descriptions of the alleged "scare tactics" amount to nothing more than a defense attorney informing a client of the options available at trial and the possible consequences of various choices. To the extent Frank claims that his attorney's advice caused him to give up his right to a jury trial on the two stipulated issues, this court noted in Frank's direct appeal that he had no defense to present on the issues of intent and purpose. ***Frank***, 250 Wis. 2d 95, ¶16. Therefore, even if counsel's advice was somehow deficient, Frank cannot establish that he suffered any prejudice as a result. *See* ***Strickland***, 466 U.S. at 694.

¶10 Frank's claim that he did not agree to the stipulation is belied by the record. Both Frank and his attorney signed the ***Wallerman*** stipulation and the trial court held a separate hearing on the ***Wallerman*** issue. At that hearing, Frank confirmed that he understood the court's explanation of the stipulation, that Frank was agreeing that the State did not have to prove all of the elements of the crime. The prosecutor clarified that the stipulation would remove the intoxication

defense. Ultimately, the record reveals that the trial court carefully questioned Frank, informing him of his right to have the jury determine all of the issues, and Frank unequivocally agreed with the stipulation.

¶11 Next, Frank claims counsel was ineffective for failing to discuss an intoxication defense with him. On direct appeal, this court noted that Frank's defense was that he did not touch the victim and, "[i]f Frank invoked an intoxication defense, he would be admitting the actions but claiming he lacked intent because he was intoxicated." ***Frank***, 250 Wis. 2d 95, ¶16. This court therefore concluded that Frank was not prejudiced by having to choose between defenses that are "diametrically opposed and patently inconsistent." ***Id.*** This court also noted that Frank's own testimony belied an intoxication defense because he testified that he remembered the date of the assault very well and was "clear what [he] did [that] evening." ***Id.*** at ¶¶ 18-19. Counsel was not deficient for failing to discuss a defense that, by Frank's own admission, was unavailable.

¶12 Frank also claims counsel was ineffective for failing to present six defense witnesses. Although Frank does not identify these witnesses, he claims they would have testified there was animosity between the complaining witnesses and Frank. Frank testified in his own defense, however, that the victim may have been biased against him because Frank had a dispute with the victim's mother. Because the jury was aware of this theory, testimony of other witnesses to that effect would have been merely cumulative. Even if other witnesses had testified regarding the alleged animosity between Frank and the victim's mother, nothing in the record suggests there is a reasonable probability that their testimony would have resulted in a different outcome at trial. *See* ***Strickland***, 466 U.S. at 694.

¶13 Frank claims counsel was ineffective for failing to inform him of the option of entering an ***Alford***[4] plea. Frank contends that shortly before trial, the prosecutor offered him a plea agreement under which the State would recommend two years' imprisonment and several years of probation "for his guilty plea." Frank does not claim, however, that the State ever offered him the option of entering an ***Alford*** plea. Moreover, the trial court indicated in its order denying Frank's WIS. STAT. § 974.06 motion that it would not have accepted an ***Alford*** plea. Because the State did not offer that option and the trial court would not have accepted it had it been offered, Frank has failed to establish how he was prejudiced by his counsel's alleged failure to inform him of the ***Alford*** plea option. Additionally, as Frank concedes, the trial court could have imposed the same sentence regardless of any sentence recommendation that would have been made had the parties entered into a plea agreement. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 633, 579 N.W.2d 698 (1998) (Even if the trial court accepts an ***Alford*** plea, a defendant nevertheless becomes a convicted offender and is treated no differently than he or she would have been had the conviction arisen from a jury's verdict.).

¶14 Frank claims counsel was ineffective for failing to challenge witness testimony that improperly commented on the truthfulness of another witness's testimony. Specifically, Frank contends that the victim's grandmother "was permitted to testify that [the victim] was being truthful because little children do not lie before an all knowing God." The record belies his assertion.

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[4] ***State ex rel. Jacobus v. State***, 208 Wis. 2d 35, 54, 559 N.W.2d 900 (1997); an ***Alford*** plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. S*ee also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

¶15 At trial, the victim's grandmother testified about the circumstances surrounding the victim's revelation of the sexual assault. The grandmother testified that she was talking to the victim about a friend who had been baptized twice and that she told the victim: "God knows everything that has happened in the past and in the present and in the future, and that he sees what's going to happen in the future, and … he knows that we're sitting here right now in the dining room talking about him." The grandmother testified that the victim then responded, "Well, I've got a secret that I have had for a long time and I have only told one person, but I don't think she believed me." The grandmother further testified about the victim's allegation against Frank and added, "and I knew that she was telling the truth because—." At that point, defense counsel objected and the court ruled, "[W]e can't let you comment on that." The grandmother's testimony was admitted to show the context in which the victim made her original allegation against Frank and defense counsel's objection prevented the admission of any improper testimony. We discern no error.

¶16 Frank also contends trial counsel was ineffective for failing to object to the admission of what he claims was improper testimony regarding a polygraph test. Specifically, Frank claims that "the results and testimony of the [polygraph] examiner were admitted into court." As this court stated in its decision on Frank's direct appeal, it was permissible for the investigating police officer to testify that he asked Frank if he would take a polygraph. ***Frank***, 250 Wis. 2d 95, ¶¶23-24. The jury heard only that Frank volunteered to take a polygraph. There was no testimony that he failed that examination. The only admissible result of the examination was Frank's statement to the examiner (identified at trial as an

"expert forensic interviewer") after the examination.[5] This court has already concluded that there was no error in allowing the polygraph examiner, who was not identified at trial as such, to testify concerning Frank's postexamination statements. ***Id.***

¶17 To the extent Frank claims the police engaged in misconduct by "hounding [him] to take a lie detector test," the jury never heard that Frank failed the polygraph examination. Regardless of whether he was "hounded" to take the test, Frank ultimately voluntarily appeared for the polygraph examination and was allowed to leave after the examination. Nothing in the record supports a conclusion that Frank was in custody or that his postexamination statement was solicited by any law enforcement officer. Counsel was not deficient for failing to raise a meritless objection. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

¶18 Although Frank also contends that the results of his polygraph examination were improperly admitted into evidence, the record belies his assertion. The results were never admitted into evidence, nor did the jury hear testimony about the results. To the extent Frank contends his statement to the polygraph examiner somehow constituted "results of the polygraph examination," this court rejected that argument on direct appeal. ***Frank***, 250 Wis. 2d 95, ¶¶ 23-25.

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[5] At trial, the examiner testified that he interviewed Frank about an alleged sexual assault. The examiner indicated that after asking Frank a series of questions, he had a conversation with Frank in which Frank stated that he was very intoxicated and did not remember having sexual contact with the victim. According to the examiner, Frank qualified that statement by adding, "Sexual contact could have taken place but I don't remember details." Frank also told the examiner that "he woke up in [the victim's] bed on one occasion and on another occasion he was nude when he woke up at [the victim's] home."

¶19 We conclude that because trial counsel was not ineffective, postconviction counsel was not ineffective for failing to raise Frank's claims regarding the ineffective assistance of trial counsel. Counsel is not required to raise on appeal under WIS. STAT. RULE 809.30 every nonfrivolous issue the defendant requests. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983).

¶20 Finally, to the extent Frank claims the circuit court erred by denying his postconviction motion without a hearing, the circuit court has the discretion to deny a postconviction motion without an evidentiary hearing if a defendant fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Frank's motion was properly rejected without a hearing because the record demonstrates that Frank is not entitled to relief.

By the Court.—Order affirmed.

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