

STATE OF WISCONSIN
IN SUPREME COURT

FILED

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**CLERK OF SUPREME COURT
OF WISCONSIN**

No. 2020AP175-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

JUSTIN JAMES DOOLITTLE,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin opposes Justin Doolittle's petition for review of the opinion and order of the Wisconsin Court of Appeals in *State v. Justin James Doolittle*, No. 2020AP175-CR. (Wis. Ct. App. Jan. 19, 2022) (unpublished per curiam opinion). The court of appeals affirmed the circuit court's order denying Doolittle's motion for postconviction relief and denied Doolittle's appeal of its denial of his motion for remand to the circuit court. Doolittle's petition seeks error correction relating to his claims of ineffective assistance of counsel and his request for a remand to supplement the *Machner* hearing record. Both claims were denied by the court of appeals, following well-established law. Neither claim satisfies the criteria for review and, as such, the petition should be denied.

BACKGROUND

A jury convicted Doolittle of both charges against him: second-degree sexual assault by use of force and incest. (Pet. App. 87-88). Doolittle moved for postconviction relief asserting that his trial counsel was ineffective and that he was entitled to a new trial in the interest of justice. (Pet. App. 6). Following a *Machner*¹ hearing, the circuit court denied Doolittle's postconviction motion finding that trial counsel performance was neither deficient nor prejudicial. (Pet. App. 7). The trial court also denied Doolittle's request for a new trial. (Pet. App. 7).

Doolittle appealed his conviction and the postconviction ruling. (Pet. App. 7). Prior to submitting his brief, Doolittle moved the court of appeals to stay his appeal and remand to the circuit court to allow him to present additional evidence

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

which, he claimed, would impeach his trial counsel's testimony at the *Machner* hearing. (Pet. App. 40-69). Doolittle's motion was denied. (Pet. App. 39). He moved for reconsideration (Pet. App. 35-38). This motion was also denied. (Pet. App. 34).

In his appeal Doolittle submitted three requests for relief: (1) a new trial should be ordered because trial counsel was ineffective; (2) a new trial should be ordered in the interest of justice; and (3) the matter should be remanded to the trial court to allow him to present additional evidence and allow the trial judge to reconsider his ruling. (Pet. App. 1-2). The Court of Appeals denied each of Doolittle's requests for relief and affirmed the trial court (Pet. App. 2).

Doolittle submitted three theories why his trial counsel was ineffective. First, he argued that trial counsel's strategy was unreasonable. (Pet. App. 9). Fundamental to this argument was that the strategy employed by trial counsel failed to employ Doolittle's initial claim that the sexual encounter was consensual. The Court of Appeals noted that the trial court had found that trial counsel's strategic choice not to pursue a consent defense was with Doolittle's understanding and agreement. (Pet. App. 10). The court of appeals also pointed out that the trial court had found that Doolittle required trial counsel to provide a defense to both the incest and sexual assault counts and that a consent defense would have virtually conceded the incest charge. (Pet. App. 12). In reviewing the strategy employed by trial counsel, the court of appeals found that it reasonably addressed the evidentiary issues presented at trial, noting that trial counsel "was able to provide alternative explanations for, or discredit, much of the physical evidence the state introduced." (Pet. App. 14). The court of appeals concluded that trial counsel's strategy did not constitute deficient performance. (Pet. App. 10).

Second, Doolittle asserted that his trial counsel failed to adequately cross examine the victim with prior inconsistent statements and to present other witnesses. (Pet. App. 17). The Court of Appeals rejected this claim pointing out that, “[t]he record shows that [trial counsel] thoroughly and effectively impeached [the victim]’s trial testimony.” (Pet. App. 18). In considering the witnesses Doolittle claimed should have been called, the court of appeals reviewed their proffered testimony and ruled that trial counsel’s decision not to call these witnesses was not deficient performance. (Pet. App. 21-26).

Third, Doolittle submitted that trial counsel was ineffective because his trial strategy deprived him of a fair choice of whether or not to testify. (Pet. App. 27). The court of appeals ruled that the trial court’s finding that Doolittle had agreed to the trial strategy, and consistent with that strategy, not to testify at trial, was based on a credibility finding and was not clearly erroneous. (Pet. App. 27-28). The court of appeals also noted that Doolittle had affirmed his personal choice not to testify during a colloquy with the trial judge. (Pet. App. 28). The court of appeals ruled that Doolittle’s trial counsel did not coerce him to decide not to testify and therefore was not performing deficiently when he advised him against doing so. (Pet. App. 28).

Finding that Doolittle had failed to establish deficient performance the Court of Appeals declined to address whether Doolittle was prejudiced by his trial counsel’s performance. (Pet. App. 8).

The Court of Appeals denied Doolittle’s request for a new trial ruling that his was not an exceptional case and it would be a misuse of its discretionary power to grant a new trial merely to allow Doolittle to pursue an alternative defense. (Pet. App. 30).

Finally, the Court of Appeals denied Doolittle's appeal of its denial of a remand to present further evidence to the trial court. The Court noted that Doolittle had failed to provide any authority for review the denial, and that he had failed to demonstrate that his request had any merit. (Pet. App. 32).

DOOLITTLE'S PETITION SHOULD BE DENIED

The decision of the court of appeals for which Doolittle seeks review involves the application of settled legal precedent to facts found by the trial court and well supported in the record. Doolittle's petition for review fails to refer to any provision of Wis. Stat. § 809.62(1r) which would justify Supreme Court review. Instead, Doolittle's petition resubmits to this court the same factual arguments that were rejected by the trial court and the court of appeals.

Ineffective assistance of counsel. Doolittle argued to the court of appeals that his trial counsel's defense that "no sexual encounter had occurred" was unreasonable because "it was a lie . . ." (Pet. App. 9). Doolittle argued that it was "a lie" because Doolittle had told his attorney that he and the victim had "attempted to have consensual sex." (Pet. App. 9). In requesting Supreme Court review Doolittle barely changes this argument. He now refers to it as a "knowingly false defense."

Doolittle's characterization of the strategy chosen by his trial counsel as "a lie" or "false" is the same factual straw man argument that was rejected by the court of appeals. By making the claim that his consent defense represents truth and the defense presented is "knowingly false" Doolittle presents his appeal as "an issue of first impression" akin to an attorney advising his client to present perjury. (Pet. App. 3). This juxtaposition of true and false hinges on Doolittle's disingenuous argument that his proposed defense explains all the physical evidence and the defense presented explains

none. A candid review of the facts shows that Doolittle's consent defense also fails to explain a number of facts. The court of appeals pointed out that Doolittle's proposed defense failed to provide an explanation for certain physical evidence such as an abrasion to the victim's vagina. (Pet. App. 16). A consensual encounter is also inconsistent with half naked and panicked flight to a neighbor (Pet. App. 3). When the undisputed facts are considered without the disingenuous labels of "true" and "false" Doolittle's claim is that among imperfect defenses his trial counsel should have chosen differently. As thoroughly analyzed by the court of appeals, trial counsel's choice between possible defenses was a strategic choice reasonably made by trial counsel. As further noted by the court of appeals, such a finding "is virtually unassailable in an ineffective assistance of counsel analysis." *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93.

Although Doolittle was entitled to argue to the court of appeals that the *Machner* court was in error, the supreme court is not an error correcting court. To obtain review in the supreme court Doolittle must submit a reason for review that demands the Court's law defining power. Instead, in page after page in his petition Doolittle rehashes the same factual arguments that were rejected at the trial court and then the court of appeals. Supreme Court review of this case would answer no questions regarding federal or state law, nor would review lead to developing, clarifying or harmonizing and law. See Wis. Stat. § 809.62(1r). Review of this matter would serve no proper purpose.

Request to remand to trial court. Doolittle moved the court of appeals to remand to the trial court so he could present evidence to the *Machner* judge that he claimed would impeach trial counsel's testimony at the *Machner* hearing. Doolittle asserts that the court of appeals denied his appeal because he failed to cite any authority to support their review

and, “this court has the authority to review that decision and grant the request to remand to present additional evidence.” (Pet. 32—33).

While it is true that the court of appeals noted that Doolittle cited no legal authority to support review of its discretionary decision denying his motion for remand the court, it did not end its analysis there. (Pet. App. 32). The court of appeals further pointed out that Doolittle’s motion for remand failed on its merits because of Doolittle’s failure to support his motion with sufficient evidence for the Court to rule in his favor. (Pet. App. 32)

Doolittle attempts to paint the court of appeals decision considering his motion for remand as an arbitrary dismissal based on failure to support his argument with legal authority. A fair reading of the court of appeals opinion shows that the court of appeals considered Doolittle’s motion on its merits and found it lacking. A discretionary decision of the court of appeals supported in analysis in its written opinion is not appropriate for Supreme Court review.

CONCLUSION

When properly framed Doolittle’s petition does not satisfy any of the criteria for this Court’s review. There is no real and significant question of constitutional law. Wis. Stat. § 809.62(1r)(a); there exists no need for clarification or harmonization, Wis. Stat. § 809.62(1r)(c); and the court of appeals’ decision does not create any conflict with controlling law, Wis. Stat. § 809.62(1r)(d). Indeed, Doolittle fails to even argue that his petition fits into any Section of Wis. Stat. § 809.62(1r).

Instead, Doolittle resubmits the same factual arguments he put before the *Machner* court and before the court of appeals. The basis for his petition seems to be a hope that the third consideration of his factual claims will prove

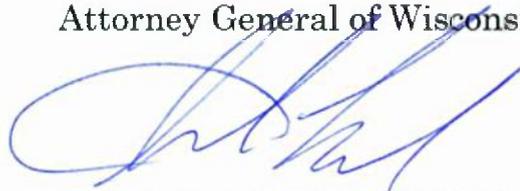
factual findings in its written opinion. Reviewing facts found by the court of appeals is not an appropriate basis for Supreme Court review. The state respectfully requests that Doolittle's petition for review be denied.

Dated this 4th day of March 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is ~~1828~~ words.

Dated this 4th day of March 2022.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of March 2022.

Respectfully submitted,



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