

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2005

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 Nos. 2004AP2518
2004AP2519**

**Cir. Ct. Nos. 2004CV3777
2001CF3412**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

No. 2004AP2518

STATE OF WISCONSIN EX REL. TOMMY SMITH, JR.,

PETITIONER-APPELLANT,

V.

DAREN SWENSON, WARDEN, PRAIRIE CORRECTIONAL FACILITY,

RESPONDENT-RESPONDENT.

No. 2004AP2519

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMY SMITH, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Tommy Smith, Jr., appeals from an order denying relief on his petition for a writ of habeas corpus and denying his postconviction motion under WIS. STAT. § 974.06 (2003-04).¹ The trial court rejected arguments that Smith received ineffective assistance from his postconviction counsel following his conviction for second-degree sexual assault and child enticement—exposure of a sex organ.² We affirm.

¶2 Postconviction counsel represented Smith on an appeal from his convictions. We affirmed those convictions in August 2003, after which the supreme court denied Smith’s petition for review. In this proceeding, Smith alleges that counsel neglected to raise numerous meritorious issues in postconviction proceedings, including:

- (1) the State’s unconstitutional seizure of his blood sample;
- (2) the State’s failure to disclose exculpatory photographs;
- (3) the State’s use of perjured testimony; (4) trial counsel’s ineffectiveness in failing to call an important defense witness, making inappropriate remarks in closing argument, and deliberately failing to provide competent

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

² Smith filed a petition for habeas corpus. The circuit court treated Smith’s petition as both a petition for habeas corpus and a motion for postconviction relief under WIS. STAT. § 974.06. Therefore, Smith’s petition was filed in both case No. 2004CV3777, the habeas matter, and case No. 2001CF3412, the underlying criminal matter. The circuit court issued a single order denying Smith’s relief.

representation; and (5) the trial court's decision to exclude certain evidence including records of phone calls and an in court demonstration by Smith.

Smith also faults appellate counsel for failing to adequately consult him before commencing the appeal.

¶3 A defendant claiming ineffective assistance of counsel must establish both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). However, counsel's performance is neither deficient nor prejudicial if the defendant bases the claim on counsel's failure to present a legal challenge that would not have succeeded. *State v. Ziebart*, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369. Smith's claim of ineffectiveness therefore succeeds or fails depending on whether he could have prevailed in postconviction proceedings on any of the issues listed above.

¶4 Smith could not have succeeded on a challenge to the State's seizure of his blood sample. The State obtained the sample pursuant to a search warrant, and Smith does not challenge the probable cause determination supporting that warrant. He contends, instead, that he was unconstitutionally deprived of counsel at the time of the blood draw. However, the State drew the blood before charging Smith, and therefore before his right to counsel accrued. *See State v. Meitzel*, 95 Wis. 2d 191, 198, 289 N.W.2d 828 (1980) (no right to counsel in conjunction with pre-charging gathering of scientific evidence).

¶5 Smith has not presented a meritorious claim that the State withheld exculpatory evidence from him. His defense to the sexual assault charge was the victim's alleged consent. He asserts now that the State withheld photographs of the victim that would have impeached testimony that she came away from their encounter with visible bruises. However, the photographs are not of record.

Smith's claim that they are exculpatory rests on nothing more than his conclusory allegation. He has not satisfied his burden of proof.

¶6 Smith has also failed to demonstrate reversible error based on the State's alleged use of perjured testimony. The victim's therapist testified at trial that the victim reported that Smith raped her. In a statement to police, the therapist reported the victim saying that Smith had sex with her. Smith asks this court to infer prosecutorial misconduct from this discrepancy. We decline to do so. The therapist told police that the victim reported having sex with Smith, and that it was a frightening and painful experience. We see no significant discrepancy between describing an incident as rape and describing it as a frightening, painful sexual encounter. Even if there were a discrepancy, there is no evidence that it resulted from prosecutorial misconduct or that it constituted perjury.

¶7 Smith's claims of trial counsel misconduct are meritless. He contends that counsel should have called a police detective to testify that Smith did not show the physical injuries other witnesses attributed to her. In support, he points to the officer's testimony at his parole revocation hearing. However, that testimony was not exculpatory. The officer testified that he did not see any visible injuries on the victim, but added that he never looked for any either. His testimony was neutral at best.

¶8 Smith also contends that counsel made inappropriate remarks at closing, when he described Smith's act toward the victim as "despicable" and possibly "criminal." However, Smith never denied having sex with his seventeen-year-old victim. His defense was consent. Counsel's remarks were consistent with that defense, because what he described as "despicable" and "criminal" was

Smith's decision to have consensual sex with an immature seventeen year old. In no way did the comments undermine the consent defense.

¶9 Finally, Smith claims that counsel deliberately provided poor representation because of an earlier disagreement over attorney fees. Smith's allegations are conclusory. He provides no evidence of record to support those allegations.

¶10 The trial court properly excluded certain evidence as cumulative. Smith sought admission of telephone records showing calls between him and the victim, and him and the victim's mother. The fact of the phone calls was not disputed, only their content. Although there was a minor discrepancy in testimony concerning the number of calls, that discrepancy had no bearing on the outcome of the trial. The phone records were therefore cumulative and unnecessary.

¶11 Smith also wanted to arrange chairs, and to lie on them, to show the jury the layout of his van, where the charged incident took place. He wanted the demonstration over his attorney's objection, and the trial court properly determined that the decision whether to conduct the demonstration was a matter of trial tactics for counsel to decide. The evidence Smith wanted to present was cumulative, in any event.

¶12 Smith's contention that appellate counsel did not adequately consult with him provides no basis for relief. Regardless of the truth of Smith's allegation, he has demonstrated no prejudice. He has failed to demonstrate that additional consultation would have improved his chances in postconviction proceedings. As this opinion holds, Smith would not have succeeded on the additional issues he wanted counsel to pursue.

By the Court.—Order affirmed.

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

