

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2006

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. 2004AP2217

Cir. Ct. No. 1998CF895

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM B. BOWERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Bowers appeals from the order denying his motion for postconviction relief. He argues on appeal that both his trial and appellate counsel were ineffective. Because we conclude that Bowers did not receive ineffective assistance of either trial or appellate counsel, we affirm.

¶2 In 1998, Bowers was charged with two counts of sexual assault of a child under the age of sixteen. Bowers was seventeen at the time of the incidents. Bowers eventually entered a plea of not guilty by reason of mental disease or defect. A court ordered examination did not support the plea, and Bowers withdrew the NGI plea. Bowers then moved to suppress the statements he made concerning the underlying incidents. The circuit court suppressed the statement made by Bowers to his therapist, but refused to suppress the statements Bowers made to a police officer. Bowers then entered *Alford*¹ pleas to both charges. The court sentenced him to twenty years on one count and fifteen years imposed and stayed with twenty years of probation on the other count. On appeal, Bowers' counsel challenged the order denying the motion to suppress. We determined that Bowers' statements were not confidential and affirmed the judgments of conviction. *See State v. Bowers*, No. 2000AP3247-CR, unpublished slip op. (Wis. Ct. App. Nov. 7, 2001).

¶3 In 2004, Bowers brought a motion for postconviction relief alleging that he received ineffective assistance of trial and appellate counsel. The court held a *Machner*² hearing and then denied the motion. It is from this order that Bowers now appeals.

¶4 The State asserts that Bowers' claims are barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A claim of ineffective assistance of postconviction or appellate counsel may overcome the *Escalona* bar. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

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

N.W.2d 136 (Ct. App. 1996). Counsel, however, is not ineffective for failing to make meritless arguments. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Generally, therefore, only when omitted issues are stronger than those presented will the presumption of effective assistance of appellate counsel be overcome. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Consequently, to properly determine whether the claims are barred, we must consider the merits of the arguments. Because Bowers asserts that appellate counsel was ineffective for failing to assert ineffective assistance of trial counsel, we must first consider whether his claims of ineffective assistance of trial counsel have merit, as well as the issues he asserts appellate counsel should have raised.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *See id.* at 697. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶6 Bowers first argues that the trial court's sentence exceeded the maximum allowed by law. The maximum potential sentence was twenty years in prison. Bowers received the maximum on one count. On the other count, Bowers received an imposed and stayed sentence of fifteen years, with twenty years of probation. These sentences do not exceed the maximum.

¶7 Bowers next argues that he was only sixteen years old when he is alleged to have committed the offenses. The record, however, establishes that he was seventeen.

¶8 Bowers next argues that his trial counsel was ineffective for abandoning the NGI plea. The court ordered examination, however, stated that Bowers was competent. Counsel, therefore, properly withdrew the NGI plea.

¶9 Bowers next argues that his trial counsel pressured him into entering the *Alford* pleas. During the plea colloquy, however, the court carefully questioned Bowers about his understanding of the plea. The colloquy establishes that Bowers knowingly entered the plea. There is no merit to this argument.

¶10 Lastly, Bowers argues that his trial counsel “gave up” after they lost the suppression motion. His counsel testified at the *Machner* hearing, however, that the main defense strategy was to have the statements suppressed. If they lost the motion, they would seek a plea agreement and appeal. This is exactly what happened. As a result of the plea, two misdemeanor charges were dismissed, and they appealed the suppression order. This was a prudent trial strategy.

¶11 None of the issues Bowers asserts have merit. Because none of the issues have merit, trial counsel was not ineffective for failing to raise them. And because trial counsel was not ineffective, appellate counsel was also not ineffective for failing to challenge trial counsel’s effectiveness on appeal. Further, the issues, therefore, were not clearly stronger than the suppression issue that was the main thrust of Bowers’ appeal. Bowers has not established that he received ineffective assistance of either trial or appellate counsel. Because we conclude that neither counsel’s performance was ineffective, we need not address the prejudice prong.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2003-04).

