

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 30, 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. 2005AP1845-CR**

**Cir. Ct. No. 2001CF130**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHNNY RAINEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Johnny Rainey appeals from the judgment of conviction and the order denying his motion for postconviction relief. He argues on appeal that the circuit court erred when it denied his motion alleging ineffective

assistance of trial and postconviction counsel without holding an evidentiary hearing. Because we conclude that the circuit court did not err, we affirm.

¶2 Rainey was convicted after a jury trial of felony murder-armed robbery as a party to a crime. The underlying incident involved a group of men who followed an SUV with gold rims, killed one of the people in the SUV, and stole the SUV. Rainey was accused of driving the car the men used to follow the SUV. The court sentenced Rainey to twenty-five years of initial confinement and fifteen years of extended supervision. In 2003, Rainey's postconviction counsel filed a motion seeking a new trial on the grounds that he had received ineffective assistance of trial counsel. The court held a *Machner*<sup>1</sup> hearing at which trial counsel testified. In his motion, Rainey argued that his trial counsel was ineffective because he did not pursue an alibi defense and instead pursued the defense that Rainey abandoned the conspiracy.

¶3 The circuit court denied the motion, finding that trial counsel's decision to abandon the alibi defense was reasonable in light of statements made by Rainey's mother and Rainey's own statement to the police. Subsequently, Rainey's postconviction counsel was removed by this court because she did not pursue Rainey's appeal. The court ordered the state public defender to appoint new counsel to represent the appellant and current counsel was appointed.

¶4 New counsel then moved the circuit court for a new trial, alleging that Rainey received ineffective assistance of trial counsel and ineffective assistance of postconviction counsel for failing to claim ineffective assistance of

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

trial counsel. The circuit court once again denied the motion, this time without a hearing. The court again found that Rainey had not established that he received ineffective assistance of trial counsel. The court also concluded that since trial counsel was not ineffective, then postconviction counsel was not ineffective for failing to challenge trial counsel's effectiveness.

¶5 Rainey argues on appeal that the trial court erred when it denied his motion without holding an evidentiary hearing. The standard of review applicable to an order of the circuit court denying a request for an evidentiary hearing is two-part. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." *Id.* at 310 (citation omitted). If the motion does not allege sufficient facts, however, "the circuit court has the discretion to deny a postconviction motion without a hearing based on ... one of the three factors ...." *Id.* at 310-11. A circuit court may refuse to hold an evidentiary hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief ...." *Id.* at 309-10 (citations omitted). This determination is reviewed under the erroneous exercise of discretion standard. *Id.* at 311.

¶6 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he 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. *Id.* at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* We will not “second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.’ A strategic 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).

¶7 We conclude that the circuit court properly denied Rainey’s request for an evidentiary hearing. In support of his argument that trial counsel failed to pursue an alibi defense, Rainey offered the affidavits of his two sisters as well as his own. One of the affidavits contained only conclusory factual allegations and, as the circuit court explained in its thorough and well-reasoned decision, the record as a whole shows that Rainey was not entitled to relief.

¶8 The decision of whether to pursue the defense that Rainey abandoned the conspiracy or the alibi defense was a tactical decision and one counsel was entitled to make. Further, there was evidence to support the defense that trial counsel chose to pursue, and the evidence in support of the alibi defense was contradicted by much of the evidence presented by the State, including the statements of Rainey and his mother. Because the abandonment defense would be contradicted by the alibi defense, trial counsel was not ineffective for failing to pursue the alibi defense. We conclude that trial counsel’s decision to pursue the alibi defense was a reasonable exercise of trial strategy. For the reasons stated, we affirm the judgment and order of the circuit court.

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

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

