

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2334-CR

Cir. Ct. No. 2004CF113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIM D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kim Johnson appeals from a judgment convicting him of two counts of burglary on his guilty pleas. Johnson also appeals from an order denying his postconviction motion to withdraw his pleas due to ineffective assistance of trial counsel in relation to a suppression motion. We agree with the

circuit court that Johnson did not establish that his trial counsel was ineffective, and we affirm.

¶2 Johnson was charged with two counts of burglary in connection with two September 2003 burglaries in Ozaukee County. On October 18, 2003, Johnson was arrested by the Village of Schiller Park, Illinois police after they responded to a burglar alarm. The suspects were seen running from the premises toward a parked van bearing a Wisconsin license plate. The police found Johnson inside the van. Evidence relating to the Schiller Park burglary was seized from the van and the area around the van. Johnson was arrested for the burglary and transported to the Schiller Park police station. Wisconsin Officer Valdes traveled to Illinois to question Johnson about the Wisconsin burglaries while he was in custody for the Schiller Park burglary.

¶3 Johnson moved to suppress an inculpatory statement he made to Officer Valdes on October 23.¹ Johnson claimed that he made the inculpatory statement under continued questioning after he invoked his right to counsel. The circuit court declined to suppress Johnson's statement to Officer Valdes. The court found that Johnson was in lawful custody, received and waived his *Miranda*² rights, and gave a voluntary, inculpatory statement about the Wisconsin crimes. Johnson entered guilty pleas and was sentenced.

¹ Apparently, Johnson gave Officer Valdes the telephone number for his girlfriend in Wisconsin. Police went to the girlfriend's residence and removed allegedly stolen items from the premises.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶4 Postconviction, Johnson sought to withdraw his guilty pleas because his trial counsel ineffectively litigated the suppression motion. Johnson claimed that trial counsel did not present evidence that he invoked his Fifth Amendment right to counsel on October 20 in response to an interview attempt by Schiller Park police and that the October 20 invocation barred Officer Valdes from interviewing him on October 23.

¶5 After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *State v. Booth*, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). A defendant has the burden of proving a manifest injustice by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. *Id.* An ineffective assistance claim must be the subject of a postconviction motion. *State v. Machner*, 92 Wis. 2d 797, 804 n.1, 285 N.W.2d 905 (Ct. App. 1979).

¶6 At the postconviction motion hearing, trial counsel testified that Johnson contacted his office from Illinois, and a colleague told Johnson to invoke his right to counsel. Counsel explained that his focus at the suppression hearing was upon the inculpatory statement Johnson made to Officer Valdes after he invoked his right to counsel. Trial counsel conceded that he had no strategic reason for failing to present evidence that Johnson invoked his right to counsel on October 20, which was the basis for Johnson's postconviction claim that Officer Valdes should not have interviewed him on October 23.

¶7 Johnson testified that he asked to speak to counsel on October 20 after he had been transferred from Schiller Park to the Norridge police department due to space limitations. Johnson received his *Miranda* rights while at Schiller

Park and Norridge. Johnson spoke with another attorney in trial counsel's office on October 20 by telephone, and counsel told him not to make any statements without counsel present. Johnson then invoked his right to counsel vis-à-vis the Schiller Park officers who wanted to interrogate him. However, later on October 20, Detective Henn of Schiller Park came to Johnson's cell at Norridge and took him to an interrogation room for an interview. Johnson denied his involvement in the Schiller Park burglary and told Detective Henn that he had requested counsel. Detective Henn continued questioning Johnson about the Schiller Park burglary, but Johnson did not make any inculpatory statements. On cross-examination, Johnson could not explain why he did not reiterate his request for counsel once Detective Henn continued interviewing him.

¶8 Detective Henn's postconviction testimony largely contradicted Johnson's version of events. Detective Henn testified that he was investigating the October 18 Schiller Park burglary. On October 20, he received a telephone call at the Schiller Park police department from someone at the Norridge police department advising that Johnson wanted to speak with him. Detective Henn traveled to Norridge and met with Johnson in an interrogation room. The detective knew that Johnson had invoked his right to counsel, but he went to Norridge because Johnson had asked to see him. When Johnson entered the interrogation room, the detective reminded Johnson that he had invoked his *Miranda* rights. Although Johnson stated that he had spoken to his attorney and did not want to talk to investigators, he nevertheless told Detective Henn that he wanted to speak with him. The detective then confirmed that Johnson had asked to speak with him, gave Johnson his *Miranda* rights, and once again informed Johnson that he did not have to speak. Johnson responded that he had spoken to

counsel, and that he wanted to speak with Detective Henn. Johnson inculpated others, but not himself, in the Schiller Park burglary.

¶9 In ruling on the postconviction ineffective assistance claim, the circuit court found that trial counsel failed to argue at the suppression hearing that Johnson's invocation of his right to remain silent on October 20 was relevant to his motion to suppress his October 23 inculpatory statement to Officer Valdes about the Wisconsin burglaries. Therefore, counsel was deficient in this respect.

¶10 Turning to the prejudice prong of the ineffective assistance analysis, the circuit court found credible Detective Henn's testimony that his department received a telephone call from the Norridge police department advising that Johnson wanted to speak with him. The court found incredible Johnson's testimony that Detective Henn personally removed him from his cell. Detective Henn confirmed that Johnson wanted to speak with him, gave him his *Miranda* rights, which Johnson waived, and Johnson gave a statement in which he did not incriminate himself. The court found that Johnson's request for counsel and to remain silent was scrupulously honored by police until Johnson initiated contact with Detective Henn and waived his *Miranda* rights. The court concluded that trial counsel's failure to litigate Detective Henn's involvement did not prejudice Johnson because it would not have been a basis to suppress Johnson's statement to Officer Valdes. Therefore, Johnson did not establish the manifest injustice necessary to withdraw his pleas. Johnson appeals.

¶11 On appeal, Johnson argues that Detective Henn's violation of his Fifth Amendment right to counsel on October 20 should have resulted in the suppression of his inculpatory statement to Officer Valdes on October 23.

Therefore, he was prejudiced by trial counsel's failure to litigate this claim at the suppression hearing.

¶12 To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was both deficient and prejudicial. *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752. Whether trial counsel's performance was prejudicial is a question of law we decide independently of the circuit court. *Id.*, ¶27. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). We dispose of Johnson's claim on the prejudice prong.

¶13 A person in custody who has invoked his or her Fifth Amendment *Miranda* rights may nevertheless initiate contact with authorities without consulting his or her attorney. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). If a suspect initiates contact after invoking the right to counsel, the State has the burden to show that the suspect waived his or her Fifth Amendment right to have counsel present during interrogation. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983).

¶14 We agree with the circuit court that Johnson's inculpatory statement to Officer Valdes on October 23 could not have been suppressed on the basis that his Fifth Amendment rights were violated by Detective Henn on October 20. Counsel cannot be faulted for not pursuing a claim that would have failed. *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). The circuit court found Detective Henn's postconviction testimony more credible than Johnson's on the question of how Johnson came to be in the interrogation room with him on October 20. The court found that Johnson initiated the contact, Detective Henn gave

Johnson his *Miranda* rights, and Johnson waived those rights. The circuit court applied the proper legal standards as discussed above, and its findings of fact are not clearly erroneous. See *Kimbrough*, 246 Wis. 2d 648, ¶27. When a circuit court's prejudice determination is rooted in its assessment of the witnesses' credibility, we accept those determinations. *State v. Quarzenski*, 2007 WI App 212, ¶19, ___ Wis. 2d ___, ___ N.W.2d ___, No. 2006AP2509-2511.

¶15 We conclude that Johnson was not prejudiced by his trial counsel's representation on the suppression motion. The circuit court correctly denied Johnson's request to withdraw his pleas due to ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

