COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP908-CR **Cir. Ct. No. 2004CF233**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL P. CORRAO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Michael P. Corrao appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. Corrao argues that he received ineffective assistance of trial counsel because counsel did not argue that his rights under ***Miranda v. Arizona***,

384 U.S. 436 (1966), were violated, and that the trial court erred when it allowed the use of derivative evidence. Because we conclude that he did not receive ineffective assistance of counsel, and that the trial court did not err, we affirm the judgment and order.

¶2 In 2005, Corrao pled no contest to one count of second-degree sexual assault of a child. A second count was dismissed and read in. The court sentenced him to eighteen years of initial confinement and seven years of extended supervision.

¶3 The defendant brought a motion for postconviction relief alleging that he received ineffective assistance of trial counsel. Corrao alleged that his trial counsel was ineffective because she did not file a motion to suppress a statement Corrao made to a police officer and to suppress the evidence that was derived from that statement. He argued that the officer "did not honor" Corrao's right to remain silent. The testimony established that an officer went to interview Corrao while he was in jail. After Corrao was given his ***Miranda*** warnings, Corrao told the officer, in the absence of his counsel, he would not sign the form acknowledging that he had received his ***Miranda*** rights. The officer then told Corrao that he was there to speak to him about a sexual contact, that it was important for Corrao to cooperate, and that if Corrao changed his mind, he could write a note and the officer would come back down to speak to him. In response, Corrao stated that he wanted to cooperate, but he did not want to sign anything without his attorney. He further said that he knew he had already admitted to the sexual conduct to his probation agent, but that he did not want to admit it to the police without first speaking to his attorney.

¶4 At the ***Machner*** hearing, Corrao's trial counsel testified that she did not bring a motion to suppress Corrao's statement that he had already admitted the contact to his probation agent because she did not think that there had been a resumption of the interrogation, and consequently there was no basis for arguing that the police had not honored Corrao's rights. After hearing testimony, the circuit court denied the motion. The court concluded that the officer was not interrogating Corrao at the time the statement was made, and that Corrao volunteered the statement in response to a statement from the officer. Consequently, there was no ***Miranda*** violation.

¶5 Corrao argues to this court that trial counsel erred because she did not argue that the officer should have honored the defendant's request for counsel and left the jail immediately after Corrao said that he did not want to sign the form without his lawyer. Instead, he argues, the officer engaged him in "useless conversation" that ultimately led to an inculpatory statement.

¶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); ***State v. Flores***, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Strickland***, 466 U.S. 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.*** Counsel 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).

¶7 We agree with the circuit court that Corrao has not established that his ***Miranda*** rights were violated. Under ***Miranda***, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." ***Miranda***, 384 U.S. at 444. Not all statements obtained by the police after a person has been taken into custody are the product of interrogation. ***Rhode Island v. Innis***, 446 U.S. 291, 299 (1980).

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he [or she] is allowed to talk to the police without the benefit of warnings and counsel, but whether he[or she] can be interrogated.* . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

Id. at 300 (citing ***Miranda***, 384 U.S. at 478).

¶8 The test for determining whether the words or actions by the police are likely to elicit an incriminating response from the suspect, is:

> [W]hether an objective observer could foresee that the officer's conduct or words would elicit an incriminating response. Another way of stating the objective forseeability test is to ask whether the police officer's conduct or speech could reasonably have had the force of a question on the suspect.

State v. Cunningham, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988).

¶9 The officer here did not continue the interrogation once Corrao asked for a lawyer, but merely explained why he was there, that cooperation was important, and that Corrao could contact him later if he changed his mind. This statement was not designed to elicit a statement in violation of Corrao's ***Miranda*** rights. After this statement, Corrao then volunteered that he had admitted to his probation agent that he had engaged in sexual contact. An objective observer would not foresee this response to the statement made by the officer in this case. We agree with the circuit court that Corrao did not establish that his ***Miranda*** rights were violated. Because there was no violation, his trial counsel properly decided not to bring a motion on this basis. Corrao has not established that he received ineffective assistance of trial counsel.

¶10 Corrao also argues that the trial court erred when it allowed the use of evidence obtained as a result of Corrao's admission to his probation agent that he had sexual contact with the victim. He argues that a probationer's statements to his agent and any derivative evidence obtained from those statements, may not be used in a criminal prosecution against him. We conclude, however, that the evidence was obtained as a result of the statement Corrao voluntarily made to the officer, in which he said that he had admitted his guilt to his probation agent. The evidence was obtained as a result of this voluntary statement and not as a result of his admission to his probation agent. Consequently, the trial court did not err when it allowed the statement. For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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