

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2009

David R. Schanker
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. 2008AP599

Cir. Ct. Nos. 2000CF786
2001CF316

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CORNELIUS FLOWERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cornelius Flowers, pro se, appeals from the order summarily denying his motion for postconviction relief which was based on a claim of ineffectiveness of postconviction counsel. While we disagree with the

trial court that Flowers should have raised the challenge in a *Knicht*¹ petition to this court, we nonetheless affirm.

¶2 The State charged Flowers in two different cases. In case number 00CF786, he was charged with three counts of first-degree sexual assault of a child; in case number 01CF316 he was charged with one count of repeated sexual assault of a child and one count of physical abuse of a child. The cases, which involved two different child victims, were consolidated for trial.

¶3 On the third day of trial, the parties entered into a plea agreement. In exchange for his no-contest plea in 00CF786, two first-degree sexual assault charges were dismissed and one was reduced to second-degree. In exchange for his no-contest plea in 01CF316, the physical abuse charge was dismissed and the charging period on the sexual assault charge was amended. The court accepted Flowers' plea. He was sentenced to fifteen years in 00CF786 and a consecutive thirty-five years' imprisonment in 01CF316.

¶4 Represented by new counsel, Flowers moved for postconviction relief pursuant to WIS. STAT. RULE 809.30(2005-06)². He sought to withdraw his pleas on grounds that they were not entered knowingly and voluntarily or, in the alternative, that his counsel was ineffective for, among other reasons, failing to obtain a ruling from the trial court regarding the amendment of the charging dates before advising Flowers to accept the plea offer. After a *Machner*³ hearing, the

¹ See *State v. Knicht*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992)

² All references to the Wisconsin Statutes are to the 2005-06 version except where noted.

³ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

trial court denied Flowers' motion, this court affirmed and the supreme court denied his petition for review. *See State v. Flowers*, No. 02-2590-CR, unpublished slip op. (WI App Oct. 1, 2003), *review denied* (WI Jan. 23, 2004) (No. 02-2590-CR).

¶5 In November 2007, Flowers moved pursuant to WIS. STAT. § 974.06 to withdraw his plea on grounds that postconviction counsel was ineffective for failing to raise several claims of ineffective assistance of trial counsel.⁴ He alleged that postconviction counsel's ineffectiveness was a sufficient reason to bring the claim after his direct appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *see also State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-83, 556 N.W.2d 136 (Ct. App. 1996). The trial court held that under *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), since Flowers had alleged ineffective assistance of trial counsel on his direct appeal, he had to raise his claim of ineffective assistance of appellate counsel in the court of appeals by filing a petition for a writ of habeas corpus. *See id.* at 520. The court therefore denied Flowers' petition without a hearing, and Flowers appeals.

¶6 Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested calls for a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Id.* This determination is a question of law that we review de novo. *Id.* If the motion does, an evidentiary hearing is

⁴ Flowers' WIS. STAT. § 974.06 postconviction motion and this appeal address only case number 01CF316.

required. *Id.* But if the motion raises insufficient facts or presents only conclusory allegations, or if the record conclusively shows that the defendant is not entitled to relief, the court may grant or deny a hearing, a decision we review under the deferential erroneous exercise of discretion standard. *Id.*

¶7 Before moving to the merits, we first address the trial court’s rationale for summarily denying the motion. As both parties observe, the trial court mistakenly reasoned that Flowers needed to bring a *Knights* petition to this court. To bring a claim of ineffective assistance of appellate counsel, a defendant should petition the appellate court that heard the appeal for a writ of habeas corpus. *Knights*, 168 Wis. 2d at 520. Flowers alleged ineffective assistance of postconviction counsel, however, not appellate counsel, making a *Knights* petition improper. See *State ex rel. Rothering*, 205 Wis. 2d at 683-84. A claim that postconviction counsel was ineffective should be raised in the trial court, either by a petition for habeas corpus or a WIS. STAT. § 974.06 motion. *State ex rel. Rothering*, 205 Wis. 2d at 681. Accordingly, we must examine whether denying the motion, although on incorrect grounds, nonetheless is sustainable.

¶8 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove both deficient performance and prejudice from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were “outside the wide range of professionally competent assistance.” *State v. Marshall*, 2002 WI App 73, ¶5, 251 Wis. 2d 408, 642 N.W.2d 571. To prove prejudice, a defendant must show that counsel erred so seriously as to deprive him or her of a fair proceeding and a reliable outcome. See *Marshall*, 251 Wis. 2d 408, ¶5. The alleged facts must be sufficient to establish a reasonable probability

that, but for counsel's errors, the defendant would not have pled no contest. *See Bentley*, 201 Wis. 2d at 312.

¶9 Ineffective assistance claims present mixed questions of fact and law. *Marshall*, 251 Wis. 2d 408, ¶6. We uphold the trial court's factual findings unless clearly erroneous. *Id.* Whether counsel's performance was deficient and, if so, whether it then prejudiced the defendant are questions of law. *Id.* The defendant has the burden of persuasion on both prongs of the test. *Id.* Because both elements must be established, failure to prove one of them necessarily defeats the claim and permits us to end our review. *See State v. Williams*, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶10 Flowers first claims his postconviction counsel was ineffective because he did not challenge trial counsel's failure to pursue an alibi defense. As part of the plea agreement, the original charging period of February 1, 1997 to May 1, 1997 for the repeated sexual assaults in 01CF316 was amended to May 1996 through December 1996. Flowers asserts that had trial counsel investigated, he would have learned that Flowers was in the Kenosha county jail during the amended charging period.

¶11 Flowers submitted with his WIS. STAT. § 974.06 motion a copy of an unsigned note entitled "Inmate Request" directed to "Arleen" which purportedly lists the dates he was incarcerated in the Kenosha county jail. Accepting its validity for purposes of this discussion, the document does not help Flowers in regard to the May—December 1996 amended charging period. The note advises that he was incarcerated from September 14 through November 8 of 1996 and again from December 8, 1996 through June 15, 1997. According to the document Flowers provided, he was incarcerated for only 78 days out of the 245-day

charging period. Exploring this defense would not have proved that Flowers was elsewhere at the time the alleged incident took place. See *State v. Harp*, 2005 WI App 250, ¶15, 288 Wis. 2d 441, 707 N.W.2d 304. Flowers therefore was not prejudiced by trial counsel's failure to pursue it, and postconviction counsel was not ineffective for failing to allege ineffectiveness of trial counsel on that ground.

¶12 Flowers next contends postconviction counsel was ineffective for not challenging trial counsel's failure to object to the amended information. In his direct appeal, the court disposed of a similarly stated challenge ("Trial counsel should have obtained a ruling from the trial court regarding amendment to the charge"). A matter litigated may not be relitigated in a subsequent postconviction proceeding, no matter how artfully the defendant may rephrase the issue. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶13 Even if not previously litigated, Flowers' underlying claim that trial counsel was ineffective fails. Trial counsel testified at the *Machner* hearing that he already had investigated Flowers' dates of incarceration and his whereabouts when not in jail. Based on what he learned, he made the judgment call not to press an objection to the amendment because he could see no reason that the trial court would grant it. 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).

¶14 Flowers next contends that postconviction counsel was ineffective for not raising a claim that trial counsel was ineffective for failing to investigate certain allegedly exculpatory witnesses, to wit, three of Flowers' children. He asserts they would have testified they never witnessed any inappropriate conduct between him and the victim.

¶15 Flowers raised the issue of failure to investigate exculpatory witnesses in his first postconviction motion. At the *Machner* hearing, he named five witnesses whose testimony he thought would have benefited him. None of those five were the witnesses he identifies here, however. Counsel's actions usually are based on information the defendant supplies, *State v. Leighton*, 2000 WI App 156, ¶40, 237 Wis. 2d 709, 616 N.W.2d 126, and the reasonableness of those actions "may be determined or substantially influenced by the defendant's own statements or actions." *State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). Flowers offers no explanation for not having identified his three children as witnesses earlier. This claim, therefore, is procedurally barred. *See Escalona-Naranjo*, 185 Wis. 2d 168, 181-82.

¶16 Finally, Flowers submits that postconviction counsel was ineffective for not asserting that trial counsel was ineffective for failing to challenge the factual basis for his plea as it related to the time frame alleged. Before accepting a defendant's no-contest plea, the trial court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b); *see State v. Harvey*, 2006 WI App 26, ¶10, 289 Wis. 2d 222, 710 N.W.2d 482. We review a trial court's determination of a sufficient factual basis under a clearly erroneous standard. *See id.*

¶17 For a court to accept the factual basis underlying the plea, a defendant need not admit to the factual basis in his or her own words. *State v. Thomas*, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836. A court also may look at the totality of the circumstances, including the plea and sentencing hearing records and other portions of the record. *Id.*

¶18 The amended charging dates were May through December of 1996. The record shows that the victim's date of birth is February 11, 1991. She testified that she was five and in kindergarten when Flowers assaulted her "lots of times" when she was kept home to watch her two little sisters while her mother worked. She also testified the assaults occurred until he went to jail in December 1996. The State also advised the court that Department of Human Services records indicate that the residence the victim described was the one where they all lived together between May and December of 1996. The victim's testimony and the totality of the circumstances provide a factual basis for Flowers' no-contest plea.

¶19 We conclude that the record conclusively demonstrates that Flowers is not entitled to relief. *See Allen*, 274 Wis. 2d 568, ¶9. Therefore, the trial court did not erroneously exercise its discretion in denying Flowers' postconviction motion without a hearing.

By the Court.—Order affirmed.

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

