OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

December 10, 2015

To:

Hon. James P. Daley
Circuit Court Judge
Rock Co. Courthouse
51 S. Main St.
Janesville, WI 53545

Hon. Kenneth W. Forbeck
Circuit Court Judge
51 S. Main St.
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main St.
Janesville, WI 53545

Anthony J. Jurek
6907 University Ave., Ste. 191
Middleton, WI 53562-2767

Sara Lynn Shaeffer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Gerald A. Urbik
Asst. District Attorney
51 S. Main St.
Janesville, WI 53545

You are hereby notified that the Court has entered the following opinion and order:

2014AP2177-CR State of Wisconsin v. Quintin T. Harriel (L.C. # 2011CF543)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Quintin T. Harriel appeals a judgment of conviction and postconviction order. Harriel contends that his trial attorney was constitutionally ineffective. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Harriel was charged with three counts of delivery of cocaine, between one and five grams. While Harriel was represented by Attorney Jane Wagner, the State offered to enter a plea agreement under which Harriel would plead guilty to one count, the State would dismiss the other two counts, and Harriel would be placed on probation for four years and serve one year in the county jail as a condition of probation. Harriel rejected the State's offer, dismissed Wagner, and retained Attorney Lane Fitzgerald to represent him.

The matter proceeded to a jury trial. After the jury was sworn in, Harriel moved to suppress audio and video statements of the drug deals because the confidential informant who purchased the drugs from Harriel was deceased. The circuit court denied the motion. The jury found Harriel guilty on all three counts. Harriel was sentenced to five years of initial confinement and five years of extended supervision, followed by five years of probation.

In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.***, ¶21. The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** When a defendant fails to prove either prong, the reviewing court need not consider the remaining prong. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (reviewing court may dispose of ineffective assistance claim on either ground). Counsel is presumed to have provided adequate assistance and we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***State v. McMahon***,

186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.***

Harriel contends that Fitzgerald was ineffective in three respects – falsely representing to Harriel that a suppression motion would be successful; not timely making the suppression motion; and not properly arguing the motion.[2] As explained below, Harriel fails to show that his trial counsel's performance was deficient and prejudicial.

First, Harriel contends that Fitzgerald was ineffective when he "falsely represent[ed]" that there were "strong grounds" to suppress audio and video recordings of the controlled buy because the confidential informant was deceased. Harriel contends that Fitzgerald's representations caused him to fire Wagner and not take the plea agreement. That argument presumes that when Harriel spoke with Fitzgerald he was unsure whether to take the plea offer and that Fitzgerald's representations were material to Harriel's decision. After a ***Machner***[3] hearing at which Wagner, Fitzgerald, Harriel, and the prosecuting assistant district attorney testified, the circuit court found that Harriel "had made his decision" to fire Wagner and reject the plea deal "before he even talked to" Fitzgerald. Therefore, Fitzgerald's assessment of the potential merit to a suppression motion was not material to Harriel's decision to reject the plea agreement and Harriel was not prejudiced.

[2] Harriel also contends that some of the circuit court's factual findings are clearly erroneous. However, Harriel does not explain how any alleged erroneous finding affected the inquiry into Fitzgerald's effectiveness.

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

Second, Harriel argues that Fitzgerald was ineffective because he orally moved to suppress the statements on the morning of trial, after the jury was sworn in and well beyond the Local Rule deadline for filing a suppression motion. However, 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.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (quoted source omitted). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***Id.*** at 464-65.

Fitzgerald testified that he did not file a motion earlier because he wanted jeopardy to attach before raising the issue so that if suppression were ordered, the State would likely have to dismiss the charges with prejudice. Fitzgerald testified that he discussed that matter with Harriel beforehand and that Harriel agreed to wait until after the jury was sworn to raise the suppression matter. Moreover, the circuit court addressed the merits of the suppression motion despite its lateness. Thus, Harriel fails to show that trial counsel's performance was deficient.

Third, Harriel argues that Fitzgerald's argument in support of suppression was so bad that it was ineffective. A defendant does not have a right to the ideal, perfect, or best defense, only to reasonably effective representation. ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992) (quoted source omitted).

The circuit court found that Fitzgerald "was stretching the meaning" of the cases cited in support of suppression but that attorneys often do so when trying to persuade a court. The court suggested that Fitzgerald could have made a "more logical argument[]" but the result would not have changed. Harriel criticizes the cases cited by Fitzgerald but does not offer any alternative argument that might have been more successful. Therefore, Harriel has not shown deficient performance. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272 (a defendant alleging that counsel was ineffective must show how the circuit court's decision would have been different if counsel had made a more specific argument).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals