**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 29, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP539** **Cir. Ct. No. 2003CF1505**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DENELL JACKSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Denell Jackson appeals from the order denying his motion for postconviction relief. He argues that he received ineffective assistance of postconviction counsel, and that the circuit court erred when it denied his

postconviction motion without holding a hearing. Because we conclude that the circuit court did not err, we affirm the order.

¶2 Jackson pled guilty to four counts of first-degree sexual assault of a child and one count of incest with a child. The court sentenced him to thirty years of confinement on one of the sexual assault counts, and a total of forty-five years of initial confinement and twelve years of extended supervision, to be served consecutively, on the remaining counts. His appointed appellate counsel filed a no-merit report, Jackson filed a response, and we affirmed. *See* ***State v. Jackson***, No. 2004AP818-CRNM, unpublished slip op. (WI App Jan. 10, 2006).

¶3 Jackson, acting *pro se*, subsequently filed a motion for postconviction relief asserting that he received ineffective assistance of postconviction counsel because counsel did not raise ineffectiveness of trial counsel. He specifically alleged that his trial counsel was ineffective because trial counsel did not move to suppress statements Jackson made to the police, and because trial counsel did not interview witnesses who would have established that one of the child victims was coerced into giving evidence against him. He also alleged that he had newly discovered evidence because his daughter, one of the victims, had recanted. The circuit court denied the motion without holding a hearing.

¶4 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 ex rel. Flores v. State***, 183 Wis. 2d 587, 619–620, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697. If this court

concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** To demonstrate prejudice, "[t]he 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.*** "In determining whether there was any act or omission which would constitute deficient performance, the standard is one of reasonable professional judgment or reasonable professional conduct." ***Flores***, 183 Wis. 2d at 620. Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). When a defendant files a postconviction motion making allegations that, if true, would require relief, the trial court must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

> "[I]f 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, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

***Id.*** at 309–310 (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497–498, 195 N.W.2d 629 (1972)). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. ***Id.*** at 311.

¶5 Jackson first argues that his postconviction counsel should have argued that trial counsel was ineffective for failing to move to suppress the statements he made to the police. He further alleges that if his trial counsel had conducted a proper investigation, including reading police reports and interviewing witnesses, she would have moved to suppress his statements and would not have advised him to accept the plea offer. A knowing and voluntary

guilty plea waives all defects leading up to the plea, except jurisdictional defects. ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986). By entering a guilty plea, Jackson waived his right to challenge trial counsel's performance on the suppression issue. Even if Jackson had not waived the issue, however, the circuit court found that a motion to suppress his statements would not have been successful because Jackson had indicated by his signature and initials on the statements, that he had been read his ***Miranda*** rights prior to giving the statements.[1] We agree with the circuit court's conclusion that under these circumstances, trial counsel was not ineffective for failing to move to suppress the statements.

¶6 Jackson also alleges that his trial counsel was ineffective for failing to interview certain witnesses who would have established that one of the victims was coerced into making statements against him. The circuit court found that his allegations of ineffective assistance of trial counsel on this basis were "factually inadequate" to establish the claim. We agree with the circuit court that Jackson has stated only conclusory allegations that he received ineffective assistance of trial counsel. Since he has not established that his claim against trial counsel had merit, then his postconviction counsel was not ineffective for failing to raise it.

¶7 Jackson also asserts that he is entitled to withdraw his plea on the basis that one of the victims had recanted.

> After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. The withdrawal of a plea under the

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> manifest injustice standard rests in the circuit court's discretion. We will only reverse if the circuit court has failed to properly exercise its discretion. An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion.
>
> Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred. For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. Finally, when the newly discovered evidence is a witness's recantation, we have stated that the recantation must be corroborated by other newly discovered evidence.

***State v. McCallum***, 208 Wis. 2d 463, 473–474, 561 N.W.2d 707 (1997) (citations omitted).

¶8 In this case, the circuit court denied Jackson's motion based on the victim's recantation because the recantation was not corroborated by other newly discovered evidence, and was contradicted by existing evidence. The record supports the circuit court's decision. We conclude that the circuit court did not err when it denied Jackson's motion for postconviction relief without holding a hearing. For the reasons stated, we affirm the order of the circuit court.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).