COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2003

Cornelia G. Clark
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. 02-1134

Cir. Ct. No. 98-CF-383

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Moffett, pro se, appeals an order denying his WIS. STAT. § 974.06 motion seeking postconviction relief from a judgment convicting him of false imprisonment and second-degree sexual assault. He argues that he received ineffective assistance of trial counsel, ineffective

assistance of appellate counsel, and that he is entitled to an evidentiary hearing. We reject his arguments and affirm the order.

¶2 Moffett argues that trial counsel was ineffective by failing to locate two potential witnesses, Byron Vaughns and Kimberly Vaughns. He contends that Kimberly may have testified that the victim "did not appear as if she had been raped" after the assault was said to have occurred. He claims Kimberly's testimony would have strengthened his assertion that he attempted but did not commit the assault. Moffett also argues that Byron's testimony would have shown that the victim was "doing drugs and crack" that Moffett had supplied and that there was "an agreement between the parties to have sex in exchange for drugs and that [the victim] and Moffett were engaged in foreplay while getting high."

¶3 At the ***Machner***[1] hearing, Moffett's trial attorney testified that he could not locate the Vaughns and believed they had left the state and an arrest warrant had been issued against Byron. The prosecutor stated that they had been seeking the Vaughns as well, but that they had apparently relocated to Indiana. Moffett does not indicate that the Vaughns were capable of being located.

¶4 To prevail on an ineffective assistance of counsel claim, a defendant must establish both that his trial counsel's performance was deficient and that this performance prejudiced his defense. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. We may address either the "deficient performance" component or the "prejudice" component first. ***Id.*** "If we

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

determine that the defendant has made an inadequate showing on either component, we need not address the other." ***Id.***

¶5 "Deficient performance requires a showing that defense counsel's representation fell below an objective standard of reasonableness." ***Id.*** at ¶23. We "must review an attorney's performance with great deference, and the defendant must overcome the strong presumption that counsel acted reasonably within professional norms." ***Id.*** "Whether an attorney's actions constitute ineffective assistance of counsel is a question of mixed fact and law." ***Id.*** What the attorney did or did not do is a question of fact, and the trial court's determination on that matter will not be overturned unless it is clearly erroneous. ***Id.*** The ultimate question whether that conduct constitutes deficient representation is a question of law, however, which this court reviews de novo. ***Id.***

¶6 We conclude that Moffett fails to demonstrate deficient performance. There is no indication that a more diligent effort by defense counsel would have resulted in locating the Vaughns. Further, defense counsel testified at the ***Machner*** hearing that the Vaughns' testimony would have been more likely to harm than help the defense. Before trial, Moffett maintained that the victim had fabricated her claim of sexual assault and claimed that they had not engaged in intercourse. Counsel testified that there was a police report, however, stating that when Moffett came out of the bedroom, Kimberly "got on him about, words to the effect of, doing that woman on … your woman's bed and in the police report she indicated that he responded, I did it on the floor." Consequently, defense counsel could have reasonably determined that Kimberly's presence as a witness would have opened the door to the admission of evidence inconsistent with Moffett's defense.

¶7 Similarly, counsel could have reasonably concluded that there would have been no benefit in presenting Byron's testimony that the victim agreed to exchange sex for drugs when, until trial, Moffett maintained that he did not engage in sex with her.[2] Counsel's strategic decisions are virtually unassailable. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1985). Consequently, the record fails to support Moffett's claim of deficient performance on the part of defense counsel.

¶8 Next, Moffett argues that appellate counsel was ineffective by failing to pursue on appeal the issue that defense counsel rendered ineffective assistance by failing to locate and obtain trial testimony from the Vaughns. Because defense counsel was not ineffective by failing to present the Vaughns at trial, appellate counsel could not be ineffective by failing to pursue this argument. Moffett's claims fail because the issue lacked merit. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶9 Finally, Moffett contends that the trial court erroneously denied him an evidentiary hearing on his most recent postconviction motion. We disagree. Moffett explored the issues he seeks to raise at the ***Machner*** hearing on his initial postconviction motion and fails to demonstrate any factual dispute that requires a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996).

¶10 Nonetheless, Moffett argues that he is entitled to an evidentiary hearing on the issue of jury waiver, relying on ***State v. Anderson***, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2d 301. ***Anderson*** holds that the fundamental nature of the

[2] At trial, shortly before he testified, Moffett changed his approach and stated that he attempted sexual intercourse but was unable to obtain an erection.

right to a jury trial requires the use of a personal colloquy in every case where a criminal defendant seeks to waive that right. ***Id.*** at ¶11. Here the record demonstrates that on the day of trial, following jury selection, Moffett decided to forego a jury trial, to seek a continuance and attempt to locate the Vaughns. It was at this point that the prosecution noted that it had also been unsuccessful in locating them. The court engaged Moffett in a personal colloquy regarding his decision to waive his right to a jury and found that Moffett freely, voluntarily and understandingly waived his right.

¶11 In addition, Moffett raised the issue of the validity of his waiver of his right to a jury trial in a previous appeal and his argument was rejected. *See* ***State v. Moffett***, No. 99-2383-CR, unpublished slip op. (Wis. Ct. App. June 13, 2000). This court's determination that the trial court's acceptance of Moffett's jury waiver was valid is the law of the case and is not open to collateral attack on a subsequent postconviction motion. *See* ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338 ("A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts.").[3]

By the Court.—Order affirmed.

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

[3] Because of our disposition, we need not address the State's alternative arguments based on ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).