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

**March 4, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-0637** **Cir. Ct. No. 00CF000309**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY HOWARD,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Anthony Howard appeals an order denying without a hearing his postconviction motion for plea withdrawal. He claims he should be allowed to withdraw his plea because counsel's failure to file a suppression motion constituted ineffective assistance of counsel. We agree with the trial court that the facts alleged by Howard are insufficient to warrant relief. We therefore affirm.

## BACKGROUND

¶2 The relevant facts are undisputed for purposes of this appeal. The police obtained a warrant authorizing a search of Howard's premises and vehicles for evidence relating to suspected drug activity. The warrant further authorized an unannounced entry for the safety of the officers based on information "concerning the presence of firearms … unless the conditions set forth within the attendant search warrant complaint have changed to render entry without announcement unnecessary."

¶3 The following day, the police arrested Howard outside of his apartment. Officers informed Howard of the search warrant and confiscated his keys. Howard informed the officers that the only people at home in the apartment were a four-year-old child and a two-year-old child. The police proceeded to Howard's apartment and used Howard's key to enter without first knocking and announcing their entry.

¶4 Based in part upon evidence obtained during execution of the search warrant, the State charged Howard, as a repeat offender, with twenty separate offenses. Howard entered no contest pleas to seven of the charges in exchange for the State's dropping the repeater allegations and some other penalty enhancers, dismissing the other thirteen charges (some of which would be read in), and capping its sentence recommendation to a total of fifteen years of initial confinement and fifteen years of extended supervision. The court accepted Howard's pleas, found him guilty of the charges, and sentenced him to concurrent terms resulting in fourteen years of initial confinement and twenty years of extended supervision. Following the imposition of his sentences, Howard filed a postconviction motion seeking to withdraw his pleas based on counsel's failure to

file a suppression motion. The trial court denied the motion without a hearing, and Howard appeals.

## DISCUSSION

¶5 A defendant seeking to withdraw a plea following sentencing must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, evidence that the plea was involuntary, or failure of the prosecutor to fulfill the plea agreement. *See* ***State v. Merten***, 2003 WI App 171, ¶6, 266 Wis. 2d 588, 668 N.W.2d 750; ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). We review the trial court's decision to deny Howard's plea withdrawal motion without an evidentiary hearing under the *de novo* standard, independently determining whether the facts Howard alleged, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996).

¶6 Howard asserts he should be allowed to withdraw his plea because he received ineffective assistance of counsel.

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable.

***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted), *review denied*, 2003 WI 126, 265 Wis. 2d 417, 668 N.W.2d 557 (July 9, 2003) (No. 02-0396-CR). Howard claims that counsel performed

deficiently by failing to file a suppression motion challenging the execution of a no-knock search warrant for Howard's apartment. Howard further contends that he was prejudiced by the failure because he would not have entered into the plea bargain if he had known that some of the evidence against him could be suppressed. Thus, in order to evaluate whether counsel provided ineffective assistance, we must consider whether, given the facts of this case, a reasonable attorney would have filed a suppression motion.

¶7 "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997). "[T]he reasonableness of an officer's decision to enter without knocking and announcing is evaluated by a reviewing court based upon information known to the officer at the time of entry." ***State v. Henderson***, 2001 WI 97, ¶27, 245 Wis. 2d 345, 629 N.W.2d 613.

¶8 Howard argues persuasively that the potential danger to officers cited in the search warrant as a basis for a no-knock entry had substantially diminished prior to the execution of the warrant because the officers knew by that time that the only people in the apartment were two young children. What Howard fails to acknowledge is that, while the danger posed by an announced entry disappeared, the futility of having officers announce their presence prior to entry appeared.

¶9 This court has previously noted that it would be "'futile to require the police to wait for refusal of admittance to a dwelling when no one is home.'"

***State v. Moslavac***, 230 Wis. 2d 338, 346, 602 N.W.2d 150 (Ct. App. 1999) (citing ***Payne v. United States***, 508 F.2d 1391, 1394 (5th Cir. 1975)). Thus, police need not announce their entry into an unoccupied premises, regardless whether or upon what grounds the warrant may have authorized a no-knock entry. ***Moslavac***, 230 Wis. 2d at 342-43, 346.

¶10 The apartment at issue here was not entirely unoccupied, as was the residence in ***Moslavac***. The police knew, however, that neither Howard nor his girlfriend, who might have had a limited privacy interest in the apartment, were inside. The children present in the apartment were too young to be reasonably expected to answer the door and admit strangers. Nor would the children have posed any significant danger to the officers. Furthermore, because the officers had the key to the apartment, their unannounced entry would not have caused any property damage. Therefore, as in ***Moslavac***, the concerns underlying the announcement requirement were not present here. *See* ***id.*** at 345 ("The knock-and-announce rule serves three purposes: (1) protection of the safety of the police officers and others; (2) protection of the limited privacy interests of the occupants of the premises to be searched; and (3) prevention of the physical destruction of property."). We conclude, under the totality of the circumstances known to the officers at the time the warrant was executed, it was reasonable to enter the apartment without first knocking and announcing their presence.

¶11 Because the circumstances of this case do not show a Fourth Amendment violation, counsel did not perform deficiently by failing to file a suppression motion. Therefore, the trial court properly determined without a hearing that Howard's allegations were insufficient to establish a manifest injustice warranting plea withdrawal.

*By the Court.*—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).