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

**January 08, 2008**

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



**Appeal No. 2006AP1780** **Cir. Ct. No. 1999CF1079**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN TOMLINSON, JR.,**

**DEFENDANT-APPELLANT.**

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. John Tomlinson, Jr., appeals from the order denying his WIS. STAT. § 974.06 (2005-06) motion.[1] He argues that he received ineffective assistance of trial and appellate counsel, and that the circuit court erred when it denied his motion without holding a hearing. Because we conclude that the circuit court properly denied Tomlinson's motion without holding a hearing, we affirm.

¶2 In 1999, Tomlinson was convicted of first-degree reckless homicide with a dangerous weapon, as a party to a crime. He was convicted for having beaten a man to death with a baseball bat. Represented by counsel, he appealed his conviction, and we affirmed. The supreme court accepted his petition for review, and also affirmed his conviction.

¶3 Tomlinson, acting *pro se*, then filed a postconviction motion alleging that his trial counsel was ineffective for failing to conduct a proper pretrial investigation, advising his wife to flee the state, telling his only trial witness to "go home" rather than testify, and failing to provide an adequate defense. He also alleged that his postconviction counsel was ineffective for failing to raise these issues. The circuit court found that it had jurisdiction of the issue under ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), and denied the motion without holding a hearing.

¶4 The court found that counsel was not ineffective for failing to call certain witnesses because Tomlinson did not have a viable self-defense claim, and because the testimony of the witnesses would have undercut his defense that he

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

was not involved in the crime. The court also found that the record established that trial counsel provided an adequate defense. Because it found that trial counsel was not ineffective, the court also concluded that postconviction counsel was not ineffective for failing to challenge trial counsel's performance.

¶5 In his appeal to this court, Tomlinson once again argues that he received ineffective assistance of trial and postconviction counsel. He argues here that his trial counsel was ineffective is two respects: (1) for failing to investigate and call at trial witnesses who would have testified that Tomlinson acted in self-defense; and (2) because trial counsel did not follow through on representations made during the opening statement. Tomlinson also argues that the circuit court erred when it refused to conduct a ***Machner*** hearing.[2]

¶6 Tomlinson did not argue in the circuit court that trial counsel was ineffective for failing to follow through on statements made in the opening argument. We will not consider an argument made for the first time on appeal. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). We will, however, address Tomlinson's argument that his trial counsel was ineffective for failing to call certain witnesses.

¶7 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). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant

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

has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. To demonstrate prejudice, "the 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.*** We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic 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) (citations omitted).

¶8 The standard of review applicable to an order of the circuit court denying a request for an evidentiary hearing is two-part. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion alleges facts that entitle the defendant to relief, "the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle the defendant to relief is a question of law that we review de novo." ***Id.*** (citations omitted). If the motion does not allege sufficient facts, however, "the circuit court has the discretion to deny a postconviction motion without a hearing based on one of the three factors …." ***Id.*** at 310-11 (citing ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)). Under the ***Nelson*** factors, a circuit court may refuse to hold an evidentiary hearing "if 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 …." ***Id.*** at 309-10 (citations omitted). This determination is reviewed under the erroneous exercise of discretion standard. ***Id.*** at 311.

¶9 We conclude that the circuit court properly denied Tomlinson's motion without holding a hearing. The record establishes that the theory of defense at trial was that Tomlinson was not the one who inflicted the blows that killed the victim. Tomlinson argues that his counsel should have called the witnesses who would have testified that Tomlinson acted in self-defense. Such testimony, however, would have directly contradicted the defense theory. Trial counsel was not ineffective for failing to call witnesses who would have contradicted the theory of the defense. Because the record demonstrated that Tomlinson was not entitled to relief, the circuit court did not err when it denied the motion without holding a hearing. Consequently, 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.