COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2795-CR **Cir. Ct. No. 2006CF106**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DYLAN J. SULLIVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washburn County: MICHAEL J. GABLEMAN and KENNETH L. KUTZ, Judges. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dylan Sullivan appeals a judgment of conviction for repeated sexual assault of a child and an order denying his postconviction motion. Sullivan argues incriminating disclosures he made during his sex offender

treatment were improperly considered when he was sentenced. He concedes in his reply brief that this argument must be raised as an ineffective assistance of counsel claim because his trial counsel did not object to the inclusion of the disclosures. However, because he did not develop an ineffective assistance argument, we conclude he has abandoned the claim. We therefore affirm the judgment and order.

BACKGROUND

¶2 In May 2007, Sullivan pled guilty to one count of repeated sexual assault of a child. At the time, Sullivan was on probation for another conviction for similar acts involving the same victim as in this case. As a condition of his probation, Sullivan was required to participate in a sex offender treatment program. The program required him to take a polygraph examination to provide his sexual history for treatment purposes. Sullivan took the examination in September 2007, approximately two weeks before he was scheduled to be sentenced in this case. During the polygraph, he admitted to sexually assaulting three other minors—two teenagers and a young child—several years earlier. This information was shared with his probation agent and his treatment provider. Sullivan's agent submitted an addendum to the presentence investigation report describing Sullivan's disclosures, and his sentencing was set over to allow the parties to address the new information. In February 2008, the circuit court sentenced Sullivan to fifteen years' initial confinement and fifteen years' extended supervision.

¶3 Sullivan filed a postconviction motion, arguing the disclosures he made during the polygraph examination were compelled and that considering them at sentencing violated the self-incrimination clause of the Fifth Amendment. He

also argued his trial counsel was ineffective for failing to object to their admission and requested a ***Machner*** hearing to address this issue. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶4 The circuit court denied Sullivan's motion. It concluded Sullivan forfeited his Fifth Amendment argument because his trial counsel did not object to the inclusion of the polygraph disclosures. Alternatively, it concluded that even if Sullivan had not forfeited the argument, the disclosures were properly admitted. It also concluded Sullivan was not entitled to a ***Machner*** hearing because he failed to show either deficient performance or prejudice.

DISCUSSION

¶5 On appeal, Sullivan's opening brief simply restates his contention that Fifth Amendment protections should apply to the statements he made in his sex offender treatment program. However, he completely ignores the court's primary conclusion: that he forfeited this argument. As a result, Sullivan also does not address the court's conclusion he was not entitled to a ***Machner*** hearing. Instead, he summarily concludes:

> For all the reasons set forth above, the respondent-appellant respectfully requests that this court remand this matter for a new sentencing. If the court deems it appropriate or necessary, defendant-appellant respectfully requests that the court remand this matter back to the circuit court for a hearing pursuant to ***State v. Machner***.

¶6 The State argues—and Sullivan concedes in his reply brief—that Sullivan did not preserve his Fifth Amendment argument for appeal because his trial counsel did not object to the inclusion of the disclosures. ***State v. Huebner***, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727. Therefore, the State contends—as Sullivan again concedes in his reply—this argument must be raised

as an ineffective assistance of counsel claim. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1985). The State acknowledges Sullivan requested and was denied a ***Machner*** hearing, but asserts that to be entitled to a remand for such a hearing Sullivan was required to actually argue this on appeal. We agree.

¶7 An issue raised in the trial court but not raised on appeal is deemed abandoned. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). In his reply brief, Sullivan does not dispute that he did not raise his ineffective assistance of counsel claim. Instead, he contends he did not abandon this claim because he could not appeal a determination of whether he received effective assistance of counsel unless the postconviction court actually held a ***Machner*** hearing. This is so, he asserts, because ***Machner*** requires the preservation of trial counsel's testimony—testimony that could only be acquired in a ***Machner*** hearing—as a prerequisite to an ineffective representation claim on appeal. ***Machner***, 92 Wis. 2d at 804.

¶8 We agree that a ***Machner*** hearing is a precondition to finding a defendant received ineffective assistance of counsel. But if Sullivan wished to challenge the court's denial of his request for a hearing, he needed to argue he was entitled to one. His explanation that his ineffective assistance claim rises and falls on the success of his Fifth Amendment claim misses the mark. While it may be true that his ineffective assistance argument depends on his Fifth Amendment argument, it does not follow that if there were merit to the latter he would automatically be entitled to a ***Machner*** hearing.

¶9 The standard for granting a postconviction motion, such as a request for a ***Machner*** hearing, is whether the defendant has alleged "facts which, if true, would entitle the defendant to relief." ***Nelson v. State***, 54 Wis. 2d 489, 499, 195

N.W.2d 629 (1972). Within the context of an ineffective assistance of counsel claim, this consists of alleging facts which, if true, show: (1) defendant's counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment;" and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (citation omitted). Conclusory allegations that a defendant's counsel was ineffective are not sufficient. *See* ***Nelson***, 54 Wis. 2d at 499.

¶10 We discern no reason the standard for appealing the denial of a ***Machner*** hearing should be lower than the standard for requesting one in a postconviction motion. Sullivan simply did not argue on appeal that his trial counsel's failure to object at the sentencing hearing to the admission of information obtained through his polygraph examination fulfilled the ***Strickland*** test. This fails to meet the standard required for granting a postconviction motion and it fails to meet the standard for appellate consideration.

¶11 We have previously observed that the "well known rule of law [that issues not raised on appeal are deemed abandoned] … mean[s] that in order for a party to have an issue considered by this court, it must be raised and argued within its brief." ***A.O. Smith Corp.***, 222 Wis. 2d at 491; *see also* WIS. STAT. RULE 809.19(1)(e) (2007-08) (appellate argument must "contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). Therefore, we must conclude Sullivan has abandoned the argument that he is entitled to a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).