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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2017AP1249-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. FRAZIER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEA ENTERED IN THE COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE ALAN WHITE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

1. Frazier alleged that his trial counsel was ineffective for failing to assert that his confession to police about sexually assaulting his nephew was obtained in violation of *Miranda v. Arizona*,[1] and that postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel on this ground. Did the circuit court erroneously exercise its discretion when it denied Frazier's motion without a *Machner*[2] hearing?

The circuit court concluded that the record showed that Frazier was not in custody at the time he made the statements, and therefore neither trial counsel nor postconviction counsel were ineffective for failing to raise the claim. It denied his motion without a hearing.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case involves only the application of well-established law to the facts, which the briefs should adequately address.

INTRODUCTION

Frazier alleges that he received ineffective assistance of trial and postconviction counsel because neither recognized that he was impermissibly subjected to a custodial interrogation without *Miranda* warnings. He

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

[2] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

admits, though, that his interrogation was not custodial at the outset. Rather, he claims that his voluntary interview was transformed into a custodial interrogation immediately before he confessed because the officer interviewing him made statements suggesting that the officer believed the victim's version of events. Frazier claims that a reasonable person would not feel free to leave in that situation.

But Wisconsin case law makes clear that police officers informing a suspect that the suspect is the target of their investigation does not transform an otherwise voluntary interview into a custodial one. And here, the record shows that a reasonable person in Frazier's position would have felt free to end the interview and leave. Frazier voluntarily came to the police station in his own car. The officer told Frazier that Frazier did not have to talk to him. He told Frazier three times that he was not under arrest. The interview room was not locked. The entire interview was conducted in a conversational tone. The officer never threatened Frazier or lied to him about the evidence or the allegations. Frazier was not restrained in any way and was given water and a bathroom break. The interview lasted only 40 minutes. And the officer never told Frazier that he was not free to leave or suggested that he was not until he formally placed Frazier under arrest after Frazier confessed. He was not in custody when he confessed.

Consequently, trial counsel was not ineffective for failing to file a suppression motion on that ground, and postconviction counsel was not ineffective for failing to raise ineffective assistance of trial counsel. Neither attorney could be ineffective for failing to pursue meritless claims. The circuit court therefore properly denied Frazier's postconviction motion without a *Machner* hearing and his motion to withdraw his plea is barred by *Escalona-Naranjo*. This Court should affirm the decision of the circuit court.

STATEMENT OF THE CASE

On December 14, 2011, RMS told a social worker that when he was six years old, his uncle, Brian Frazier, had pulled RMS's pants and underwear down and anally raped him. (R. 1:1–2.) RMS said that it hurt and made him bleed. (R. 1:1.) RMS also reported that Frazier had slapped him across the face for stealing some of Frazier's pizza. (R. 1:2.) The slap had caused RMS's teeth to cut his cheek. (R. 1:2.)

Lieutenant Dennis Weiner from the Columbus Police Department contacted Frazier and asked him to come to the police station. (R. 86:1.) Frazier did so voluntarily. (R. 105:1.) Weiner told Frazier three times at the outset of the interview that he was not under arrest and asked if Frazier understood. (R. 105:1.) Frazier said that he did. (R. 105:1.) Weiner told Frazier that there were some allegations reported about how he interacted with his brother's children. (R. 105:2.) Frazier asked, "[a]m I being -- something sexual with the kids?" (R. 105:2.) Weiner said they would get to the specifics in a moment but first asked Frazier for some background on their living arrangements. (R. 105:2.)

Frazier said he moved in with his brother, Mark, to help care for Mark's three children in the fall of 2009 after Mark and his wife separated. (R. 105:3–4.) Weiner asked how Frazier got along with the children, because they said Frazier screamed at them a lot. (R. 105:4.) Frazier did not deny that and said the children were unruly. (R. 105:4–5.) When asked if he had ever been physical with the children, Frazier said that if they were really bad he would give them a quick spank, "just one." (R. 105:6.) Weiner asked Frazier directly if he had smacked RMS in the face for stealing his pizza, and Frazier said no. (R. 105:6.) Weiner then asked if Frazier ever had any sexual contact with any of the children and Frazier said "[n]o, no." (R. 105:7.) Weiner asked

specifically about whether Frazier had assaulted RMS, and Frazier again said no. (R. 105:8.)

Weiner then told Frazier that "the crux of things" was that RMS made consistent and detailed allegations that Frazier had sexually assaulted him, and told Frazier the details of the allegation. (R. 105:8.) Weiner pointed out that RMS included details that no child his age would know unless the acts had happened. (R. 105:9.) Frazier replied, "[y]eah, I know. That's -- I don't know what's worse, the fact that I'm being accused or the fact that somebody did that." (R. 105:9.) Weiner replied,

> [w]ell, he described it in your room. He was laying on your bed. You pulled his pants down. You pulled his underwear down and he called it your winkie. He pointed to it on an anatomical picture being the penis.
>
> [FRAZIER]: Yeah.
>
> [WEINER]: Called it the winkie, thought that you put it in his butt and it hurt and it made him bleed. That's exactly what he told us. So explain to me how some seven-year-old would just wake up one day and say let's make up this story.
>
> I believe him to be honest and I think Human Services does as well. That's why we're here. That's where your brother was this afternoon. His appointment was with me and with Human Services having this investigated.

(R. 105:9–10.) Frazier said he did not believe it, and Weiner told him that

> [i]t's not really going to make any difference in what's going on here tonight. I mean it really isn't. I mean all I'm looking for is some honesty and if you did something really stupid . . .
>
> And really inappropriate . . . it's best to get it off your chest and we'll move on with things.

> But for him to provide such a detailed account, and again especially taking into account his special needs, just -- I believe him. I absolutely believe him.
>
> [FRAZIER]: You believe that I did it?
>
> [WEINER]: I believe his statement and his statement was that it was you.

(R. 105:10–11.) Weiner told Frazier that he was going to leave the room and give him some time to collect his thoughts, and that he'd be right back with him. (R. 105:11.) Frazier said "I don't believe this. Is it okay if I -- no, can I make a call?" (R. 105:11.) Weiner said, "[n]o, I don't want you calling anybody until we're done talking, okay." (R. 105:11.) He again told Frazier he would give him some time to gather his thoughts, and asked if there was anything Frazier wanted to tell him. He told Frazier, "I mean I'm not judging you, I'm not, and anything you tell me right now is not going to change what's probably going to happen tonight or how we're going to end this." (R. 105:11–12.)

Frazier asked what Weiner meant and Weiner reiterated that RMS's claim was detailed and serious. (R. 105:12.) Frazier asked if he was going to be arrested no matter what he said, and Weiner responded,

> [w]ell, help me understand what happened. . . .
>
> I mean did you -- for some reason did you just do something stupid? . . .
>
> I don't know you. You don't know me. You know what I mean. I mean it sounds like it only happened once and if it was a one time occasion and if it was something really stupid, I mean I want to listen. I want to listen and I want to understand why. That maybe will help me with this thought process of this investigation. That's why we're talking.

(R. 105:12–13.) Frazier then said "[o]h, honesty is always the best policy" and confessed to sexually assaulting RMS.

(R. 105:13.) He claimed it only happened once, as RMS described, and that he was not sexually attracted to young boys. (R. 105:13–16.) He said he was trying it as a form of discipline because "nothing works on these kids. I don't know." (R. 105:15–16.) He said he had only agreed to watch the children to help his brother and that he hated children, he "hated them before and I hate them even more now. I'm trying to -- it was stupid. It didn't fucking work. Nothing works on that boy." (R. 105:16–17.) Weiner told Frazier that he appreciated Frazier being honest and coming clean with him. (R. 105:17.) Weiner asked Frazier for the time frame and more specific details of the assault, which Frazier provided. (R. 105:18–24.)

Weiner told Frazier he would be back in a couple of minutes and asked if he wanted some water. (R. 105:24.) Frazier said yes, and Weiner brought him some. (R. 105:24.) Weiner told Frazier, "[h]ere's what's going on, okay. Um, you are under arrest, and you're going to be taken to the Columbia County jail and you will probably not be seen by a judge until Friday afternoon, and then you'll be arraigned on some charges related to this case." (R. 105:24–25.)

The State charged Frazier with one count of first-degree sexual assault of a child under 12, one count of physical abuse of a child, and one count of first-degree sexual assault of a child under 13 by sexual contact.[3] (R. 24:1.) Frazier agreed to plead guilty to the second and third counts in exchange for the State dismissing the charge of first-degree sexual assault of a child under 12. (R. 101:2–3.) The court accepted the plea and sentenced Frazier to 15 years of initial confinement and seven years of extended supervision. (R. 65:1.)

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[3] The State filed an amended information on November 19, 2013, adding the third charge.

Frazier, represented by Assistant State Public Defender Andrew Hinkel,[4] filed a postconviction motion to withdraw his plea. (R. 40:1.) There, Frazier claimed that his plea was not knowing, intelligent, and voluntary "because he was not adequately informed of, nor did he understand," the definition of "sexual contact." (R. 40:3.) The circuit court denied the motion.[5] (R. 53:3.) Hinkel then submitted a no-merit appeal. (R. 57:1.) Before this Court took action on the no-merit appeal, however, Hinkel became aware of the potential claim raised here, and moved to withdraw the no-merit report and file an additional postconviction motion. (R. 71:1–2.) This Court initially denied the motion because a successive motion would be procedurally barred. (R. 72:1.) Hinkel moved for reconsideration, informing this Court that the public defender's office would appoint successor counsel to litigate whether Hinkel was ineffective for failing to raise ineffective assistance of trial counsel, which would overcome the bar. (R. 73.) This Court granted the motion for reconsideration and reinstated the time for Frazier to file a postconviction motion under Wis. Stat. § (Rule) 809.30. (R. 74:1–2.)

Successor counsel filed a postconviction motion seeking to withdraw Frazier's plea. (R. 81:1.) There, Frazier alleged that trial counsel was ineffective for failing to seek suppression of Frazier's confession. (R. 81:1.) Frazier claimed that his interview with police, while admittedly non-custodial at the outset, became custodial as it progressed. (R. 81:6.) He claimed that Weiner was therefore required to read him his *Miranda* rights mid-interview, and because

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[4] Frazier was originally represented by Assistant State Public Defender Tristan Breedlove, who filed the motion, but she was replaced by Attorney Hinkel.

[5] This motion is not the subject of this appeal.

Weiner had not done so, his confession should have been suppressed due to a violation of the Fifth Amendment. (R. 81:6–9.) He alleged that his sufficient reason for failing to raise this claim in his first postconviction motion was that he had received ineffective assistance of postconviction counsel. (R. 81:9.)

The circuit court denied his motion without a hearing. (R. 86:1.) It reviewed the record and listened to the recording of Frazier's interview, and concluded that they conclusively demonstrated that he was due no relief. (R. 86:1.) The court noted that Frazier voluntarily came to the police station, he was told repeatedly that he was not under arrest, the questioning was conversational, and at no point was there any physical restraint on his liberty. (R. 86:1–2.) Though Weiner told Frazier that he believed RMS was telling the truth, Frazier was never told that he was not free to leave. (R. 86:2.) And though Weiner denied Frazier's request to make a phone call, Frazier never asked to call an attorney; "the request was unspecific in nature." (R. 86:2.) The court concluded that Frazier was not in custody for *Miranda* purposes at the time of his confession, and therefore "[c]learly prior trial counsel and appellate counsel had good reason not to bring a suppression motion." (R. 86:3.) Frazier appeals.

STANDARD OF REVIEW

The sufficiency of a postconviction motion to entitle a defendant to a hearing is a question of law this Court reviews de novo. *State v. Tucker*, 2012 WI App 67, ¶ 6, 342 Wis. 2d 224, 816 N.W.2d 325. If the motion is insufficiently pled or the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695 (citations omitted). A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *Id.* (citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [a court] review[s] de novo." *Id.* (citation omitted).

Additionally, when reviewing whether a *Miranda* violation took place, this Court upholds the circuit court's findings of fact unless they are clearly erroneous. *State v. Torkelson*, 2007 WI App 272, ¶ 11, 306 Wis. 2d 673, 743 N.W.2d 511. "Whether those facts show a violation of *Miranda* is a question of law reviewed without deference." *Id.*

ARGUMENT

The record conclusively demonstrates that Frazier was not in custody during his interview; therefore neither trial nor postconviction counsel was ineffective for failing to raise the issue.

A. Relevant law.

This is Frazier's second postconviction motion pursuant to Wis. Stat. § 974.02. If a defendant filed "a motion under [Wis. Stat.] § 974.02 or a direct appeal or a previous motion under § 974.06, the defendant is barred from making a claim that could have been raised previously unless he shows a sufficient reason for not making the claim earlier." *State v. Romero-Georgana*, 2014 WI 83, ¶ 35, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted); *see also* Wis. Stat. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 193–94, 517 N.W.2d 157 (1994). To state a sufficient reason to overcome *Escalona*, a defendant's motion must

allege specific facts that, if proved, would constitute a sufficient reason for failing to raise his present claims previously. *State v. Allen*, 2010 WI 89, ¶ 91, 328 Wis. 2d 1, 786 N.W.2d 124.

"In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36. A defendant who asserts ineffective assistance of postconviction counsel must demonstrate that postconviction counsel performed deficiently and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

Additionally, "a defendant who alleges . . . that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 4 (citing *State v. Starks*, 2013 WI 69, ¶ 6, 349 Wis. 2d 274, 833 N.W.2d 146). This "clearly stronger" pleading standard is part of the deficient performance prong of the *Strickland* test. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 45, 58; *Starks*, 349 Wis. 2d 274, ¶ 60.

To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"The defendant has the burden of proof on both components" of the *Strickland* test, that is, deficient performance and prejudice. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Strickland*, 466 U.S. at 697.

The circuit court denied Frazier's ineffective assistance claims without a hearing. A *Machner*[6] hearing "is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of . . . counsel." *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (citing *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)). But a defendant does not automatically receive a *Machner* hearing simply by alleging that counsel was ineffective. If the motion fails to allege sufficient facts, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is entitled to no relief, the trial court may, in the exercise of its discretion, deny the motion without a hearing. *State v. Bentley*, 201 Wis. 2d 303, 313–14, 548 N.W.2d 50 (1996).

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[6] *Machner*, 92 Wis. 2d at 804.

B. Frazier's interview with police was non-custodial and therefore *Miranda* warnings were not required.

Under *Miranda v. Arizona*, 384 U.S. 436 (1966), "police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights." *Torkelson*, 306 Wis. 2d 673, ¶ 11. However, the warnings prescribed by *Miranda* are required only when a suspect is "in[ ] custody." *State v. Morgan*, 2002 WI App 124, ¶ 10, 254 Wis. 2d 602, 648 N.W.2d 23. A person is in custody for *Miranda* purposes when his "freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty,* 468 U.S. 420, 440 (1984) (citation omitted); *see also Morgan*, 254 Wis. 2d 602, ¶ 10.

"The test for custody is an objective one." *State v. Goetz*, 2001 WI App 294, ¶ 11, 249 Wis. 2d 380, 638 N.W.2d 386. The court asks "whether a reasonable person in the suspect's position would have considered himself or herself to be in custody." *Id*. When determining whether an individual is in custody for *Miranda* purposes, the court considers the totality of the circumstances. *Morgan*, 254 Wis. 2d 602, ¶ 12. Relevant factors include: the defendant's freedom to leave the scene; the purpose, place, and length of the interrogation; and the degree of restraint. *Id*. When considering the degree of restraint, the court considers "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." *Id.* "The test is not, however, a matter of simply determining how many factors add up on each side." *Torkelson*, 306 Wis. 2d 673, ¶ 18. The factors are simply "reference points that help to determine whether *Miranda* safeguards are necessary." *Id.*

Here, the totality of the circumstances show that the circuit court was correct that Frazier was not in custody when he confessed. Frazier came to the police station voluntarily. (R. 86:1.) *See State v. Lonkoski*, 2013 WI 13, ¶ 7, 346 Wis. 2d 523, 828 N.W.2d 552 (the suspect's voluntarily coming to the police station and submitting to questioning are indicative of noncustodial questioning). He was not restrained in any way and the interrogation-room door was not locked. (R. 86:2.) *State v. Koput*, 142 Wis. 2d 370, 381, 418 N.W.2d 804 (1988) (lack of restraints or patting-down the suspect indicated lack of custody); *Lonkoski*, 346 Wis. 2d 523, ¶ 7. Weiner told Frazier three times that he was not under arrest, and that Frazier did not have to talk to him if he did not want to. (R. 105:1; 106:00:39–54.)[7] Frazier replied that he understood. (R. 105:1; 106:00:54–57.) The tone remained conversational during the entire interview and Weiner did not become combative or aggressive. (R. 86:1–2; 106:17:46–39:19.) *See State v. Kilgore*, 2016 WI App 47, ¶ 24, 370 Wis. 2d 198, 882 N.W.2d 493 (defendant's cooperative demeanor indicative of noncustodial setting). The interview was not lengthy; the audio recording reveals that it lasted about only 40 minutes. (R. 106:00:01–39:19.)[8] *See Lonkoski*, 346 Wis. 2d 523, ¶ 31 (the "relatively short" 30-minute interrogation indicated that the defendant was not in custody). And Frazier was provided with water and an opportunity to use the restroom. (R. 105:24, 27.) Under these circumstances, no reasonable person in Frazier's position would have considered himself in custody until Weiner

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[7] The State will refer to points on the audio recording by record number, followed by the minutes and seconds displayed by the audio recording.

[8] Though the audio recording is roughly an hour long, the interview concludes at 39 minutes 19 seconds.

informed Frazier that he was under arrest. (*See* R. 86:1–3.) *See Koput*, 142 Wis. 2d at 380–81.

Weiner did tell Frazier that he believed RMS was telling the truth because it would be unlikely that a boy RMS's age would know the type of details he gave without having experienced a sexual assault. (R. 105:8–12.) He also told Frazier that "anything you tell me right now is not going to change what's probably going to happen tonight or how we're going to end this." (R. 105:12.) When Frazier asked, "what do you mean?" Weiner replied "I mean I'm looking for some facts. . . . his information was too detailed for him to just make it up." (R. 105:12.) Weiner then told Frazier that RMS "was very articulate about what happened to him . . . and who did it," and told Frazier, "[i]t's obviously serious. I mean I should have been home with my family an hour and twenty minutes ago, but I'm here because of this so it's obviously real and it's obviously serious." (R. 105:12.) Frazier then said, "Yes. Well, what do you -- so no matter what I say I'm going to be under arrest?" (R. 105:12.) Weiner did not answer Frazier's question and said, "[w]ell, help me understand what happened." (R. 105:12.)

Frazier claims that the interview became custodial when this exchange took place because it "revealed [Weiner's] intention to arrest Frazier." (Frazier's Br. 6.) At that point, Frazier claims, a reasonable person would not have felt free to leave and *Miranda* warnings were required. (*See* Frazier's Br. 6–8.) He cites several cases from foreign jurisdictions as support. (Frazier's Br. 7.)

But none of the cases Frazier cites are binding on Wisconsin, and the Wisconsin courts have held the opposite: that officers tell a suspect that he is the prime target of their investigation does not transform an interview into a custodial interrogation. *State v. Bartelt*, 2017 WI App 23, ¶ 34, 375 Wis. 2d 148, 895 N.W.2d 86. *Bartelt* is factually identical to this case. There, the defendant voluntarily came

to the police department. *Id.* ¶ 29. He was led to an interview room, but the door was not locked. *Id.* At the outset of the interview Bartelt was told he was not under arrest, and he was never frisked or restrained in any way. *Id.* ¶ 30–31. The detectives never made any show of authority, and the interview was about only 35 minutes long. *Id.* The detectives began by telling Bartelt they were investigating an incident in a park and asked him if he had been there. *Id.* ¶ 2, 7. However, "as the interview progressed, Bartelt was increasingly 'treated . . . like the target of a serious felony investigation'" as the detectives pointed out holes in Bartelt's story and encouraged him to "[j]ust be honest" and that he "had to know that this would be coming." *Id.* ¶¶ 7–14, 32. Just like Frazier, Bartelt argued that the detectives' communicating that he was the target of their investigation was "indicative of custody," and therefore his ultimate confession was obtained in violation of *Miranda*. *Id.* ¶ 32.

This Court disagreed. *Id.* ¶ 34. The Court observed that "[c]ertainly the detectives applied some psychological pressures on Bartelt to persuade him to confess, but, unlike custodial interrogations, the other circumstances present here . . . did not suggest that Bartelt could not have terminated the interview and left." *Id.* ¶ 35.

Like the detectives in *Bartelt*, Weiner certainly applied some psychological pressures to get Frazier to confess, but that did not change the nature of the interview into a custodial interrogation. And while "[a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned," *State v. Mosher*, 221 Wis. 2d 203, 215–16, 584 N.W.2d 553 (Ct. App. 1998) (citation omitted), "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue." *Stansbury v. California*, 511 U.S. 318,

325 (1994). Furthermore, the Wisconsin Supreme Court has rejected the argument "that *Miranda* applies when custody is 'imminent.'" *Lonkoski*, 346 Wis. 2d 523, ¶ 7. Weiner's statements were not aggressive, and he did not tell Frazier that he was under arrest or even that he would be under arrest. The statements merely conveyed to Frazier that he was the target of Weiner's investigation. The statements therefore "did not transform [Frazier's] interview into a custodial interrogation." *Bartelt*, 375 Wis. 2d 148, ¶ 34.

Frazier further claims that Weiner could only refuse Frazier's request to make a phone call if Frazier were in custody at the time, but he is wrong. (Frazier's Br. 8.) As explained above, the test for custody is whether a reasonable person in Frazier's position would have believed he was free to leave. The police do not have to acquiesce to a suspect's every request to prevent the questioning from becoming a custodial interrogation. *Cf. Montejo v. Louisiana*, 556 U.S. 778, 795 (2009) ("When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering."). When Frazier asked if he could make a phone call, Weiner said "[n]o, I don't want you calling anybody until we're done talking, okay." (R. 105:11.) Weiner did not physically prevent Frazier from doing so, nor did he make any statement implying that Frazier was not free to end the interview and call whomever he wanted. (R. 105:11.) Weiner just said he did not want Frazier to call anyone "until we're done talking." (R. 105:11.) At that point, Frazier had not even made any incriminating statements. A reasonable person would recognize that he or she could have simply told Weiner, "okay, we're done talking," ended the interview, and made a phone call.

Under the totality of the circumstances, a reasonable person in Frazier's position would have believed he could end the conversation and leave. *Lonkoski*, 346 Wis. 2d 523, ¶ 38 (citation omitted). He therefore was not in custody until

Weiner formally arrested him and no *Miranda* warnings were required until that point. *See Koput*, 142 Wis. 2d at 380–81. A motion to suppress Frazier's statements on this basis would have failed.

C. Because a motion to suppress Frazier's statements would have failed, neither his trial counsel nor his postconviction counsel was ineffective and the circuit court properly denied his motion without a hearing.

Because a motion to suppress Frazier's statements would have failed, Frazier cannot show that his trial counsel performed deficiently by failing to file one. "Counsel does not render deficient performance for failing to bring a suppression motion that would have been denied." *State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583. Nor can he show that he was prejudiced by his counsel's failure to file a suppression motion that would not have succeeded. Had Frazier's trial counsel filed a motion to suppress, it would have been denied, and Frazier would have been in the same position he was before he accepted the plea. In other words, there is not a reasonable probability that Frazier would not have pled guilty and would have insisted on going to trial had counsel filed a meritless suppression motion. *See Bentley*, 201 Wis. 2d at 312.

It therefore follows that postconviction counsel cannot have rendered ineffective assistance for failing to raise a claim of ineffective assistance of trial counsel. Because the suppression motion would have failed, trial counsel was not deficient for failing to bring one. A claim of ineffective assistance of trial counsel, then, would have been meritless. And counsel is not deficient for failing to make meritless arguments. *See State v. Tolivar*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Additionally, because the claim is meritless, it cannot be clearly stronger than the claim that

Frazier did not understand the definition of "sexual contact" that postconviction counsel raised. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 45, 58.

Consequently, the record conclusively demonstrates that Frazier did not receive ineffective assistance of postconviction or trial counsel. *Sulla*, 369 Wis. 2d 225, ¶ 30. Therefore, he has not shown a sufficient reason for failing to raise his *Miranda* claim in his first postconviction motion. His motion to withdraw his plea is therefore barred by *Escalona-Naranjo*. *See State v. Balliette*, 2011 WI 79, ¶ 62, 336 Wis. 2d 358, 805 N.W.2d 334. The circuit court properly denied Frazier's motion without a *Machner* hearing.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 6th day of February, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5127 words.

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LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of February, 2018.

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