COURT OF APPEALS DECISION DATED AND FILED

November 16, 2004

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. 04-0436-CR

Cir. Ct. No. 03CF000086

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE M. FREDRICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Wayne M. Fredrich appeals a judgment convicting him of physically abusing his two-year-old son. He also appeals an order denying his motion to withdraw his no contest plea based on ineffective assistance of trial

counsel. He argues that his counsel failed to inform him that reasonable parental discipline is a defense to the charge.[1] Because the evidence supports the trial court's finding that Fredrich would have accepted the plea agreement and would not have gone to trial even if he was aware of the parental discipline defense, we affirm the judgment and order.

¶2 Fredrich spanked his son, leaving a four to six inch bruise on the son's buttocks. He reported the incident to his wife stating he "beat his ass" because he refused to go to bed and awakened their infant. Fredrich told the police that he spanked the boy because he was throwing a temper tantrum after receiving a bath. He later stated that the toddler had struck the infant in the face. Fredrich's story eventually evolved into an accusation that the toddler struck the infant with such force that the infant's eyes rolled up and he was shaking, causing Fredrich to think the toddler may have killed the infant. On that basis, he claims on appeal his spanking constituted reasonable parental discipline, a defense his attorney never considered or explained to him.

¶3 A defendant may withdraw a plea to correct a manifest injustice. *See* ***State v. Clement***, 153 Wis. 2d 287, 292, 450 N.W.2d 789 (Ct. App. 1989). Defense counsel's failure to inform the defendant of a viable defense would constitute ineffective assistance of counsel if the defendant could establish a reasonable probability that, but for counsel's deficient advice, he would not have pled no contest and would have insisted on going to trial. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Although the question involves a defendant's subjective

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[1] Fredrich also argues that the change in the penalty for child abuse enacted when truth in sentencing took effect constitutes a new factor justifying a reduced sentence. That argument was rejected in ***State v. Torres***, 2003 WI App 199, 267 Wis. 2d 213, 670 N.W.2d 400.

beliefs, proof of prejudice substantially depends on an objective evaluation of whether a defendant would have gone to trial to present that defense. ***Id.*** The strength of the State's case and the viability of the defense are relevant factors in assessing a defendant's claim that he would have gone to trial had he known of a defense.

¶4 Overwhelming evidence supports the trial court's finding that Fredrich would not have gone to trial even if he had known of the defense. First, the defense requires "reasonable" discipline of a child. Inflicting a substantial bruise on a two-year-old child does not constitute reasonable parental discipline. Second, Fredrich received a favorable plea agreement from the State. Because he was on probation at the time of the offense and had a substantial prior record, including domestic abuse, the State's recommendation for probation with jail time concurrent with another sentence provided substantial incentive for Fredrich to accept the plea agreement regardless of the existence of a defense. Third, Fredrich's trial attorney testified at the postconviction hearing that he would have recommended accepting the plea offer even if he had been aware of the parental discipline defense. Fourth, the defense depends entirely on Fredrich's credibility. His credibility is undermined by nine prior adult convictions and his early statements to his wife and the police that depict his unreasonable reaction to the child's misbehavior. His final version of the toddler's injury to the infant lacks credibility because Fredrich did not seek medical attention for the infant and did not report the infant's injury to his wife. Under these circumstances, the trial court appropriately found that Fredrich would not have foregone the State's generous plea agreement for the remote possibility that the jury would have accepted his weak defense.

By the Court.—Judgment and order affirmed.

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