

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2007

David R. Schanker
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. 2006AP564-CR

Cir. Ct. No. 2004CF1166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ORLANDO C. COTTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Orlando Cotton appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that his sentence was cruel and unusual, and that the circuit court erred when it denied his motion for postconviction relief without a

hearing. We conclude that he cannot raise an issue for the first time on appeal, and that the circuit court did not err when it denied his motion without a hearing. We affirm the judgment and order of the circuit court.

¶2 In 2004, Cotton pled no contest to second-degree sexual assault with use of force.¹ Cotton forced his way into the home of a ninety-year-old woman, assaulted her, and then apparently passed out. It is undisputed that at the time he was under the influence of a mixture of drugs and alcohol. The court sentenced him to twenty years of initial confinement and ten years of extended supervision. In 2006, Cotton filed a motion to withdraw his plea on the grounds that his trial counsel was ineffective because he did not present a viable defense on Cotton's mental state at the time of the offense. The circuit court denied the motion without holding a hearing.

¶3 Although Cotton identifies four separate arguments in his brief, he is arguing, in essence, that he was denied his right to effective assistance of trial counsel when his attorney did not raise the issue of his competency, and he is entitled to a hearing on that issue. He also argues that his sentence was improper.

¶4 A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *Id.* at 235. A defendant has the burden of proving a

¹ The Statement of Facts in the appellant's brief does not contain citations to the record. We admonish appellant's counsel for not complying with the Rules of Appellate Procedure that require "appropriate references to the record." WIS. STAT. RULE 809.19(1)(d) (2005-06).

manifest injustice by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel. *Id.* The defendant must allege facts supporting plea withdrawal in the petition and cannot rely merely on conclusory allegations. *Id.* at 313.

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

¶5 Cotton argued to the circuit court that his trial counsel should have investigated his mental health issues to determine whether he was competent at the time of the offense, or whether he was competent to stand trial and assist in his defense. As the circuit court found, however, the motion was based entirely on possibilities. Cotton did not offer to the circuit court, and has not offered in his brief to this court, any support for his claim that he had a viable defense based on lack of competency. Because his motion did not raise sufficient facts and stated only conclusory allegations, we conclude that the circuit court properly denied his motion without holding a hearing.

¶6 Cotton also argues that his sentence was cruel and unusual because the court did not consider his diminished capacity at the time he committed the offense. It is not clear whether Cotton is arguing that the trial court erroneously exercised its discretion when it sentenced him, or that his counsel was ineffective at sentencing for not raising the competency issue. In either event, he did not raise any issue about sentencing before the circuit court. We will not consider an issue that was not first raised in the circuit court. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

