

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 Nos. 2008AP394
2008AP1874**

Cir. Ct. No. 2001CF464

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER S. STEWART,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
KAREN L. SEIFERT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., Anderson, J.

¶1 PER CURIAM. Christopher Stewart appeals from the orders of the circuit court that denied his motions for postconviction relief under WIS. STAT. § 974.06 (2007-08).¹ Stewart argues that he is entitled to withdraw his plea on the basis of newly discovered evidence and on the basis that there was no factual basis to support the charge against him. Because we conclude that Stewart has not established that he has newly discovered evidence and because the claim that there was no factual basis for the plea is barred by *Escalona*,² we affirm the orders of the circuit court.

¶2 In 2001, Stewart was charged with one count of attempted child enticement. The complaint alleged that Stewart had instant messenger (IM) conversations with an adult woman, Linda Vargus, and arranged with Vargus to meet in a hotel room where he planned to have sex with Vargus's ten-year-old daughter, Mary. Mary did not, in fact, exist. Stewart was arrested at the hotel.

¶3 In 2002, Stewart entered a no contest plea to the charge and the court imposed and stayed a sentence of ten years' initial confinement and ten years' extended supervision and placed him on twenty years of probation. Stewart did not file a direct appeal under WIS. STAT. RULE 809.30 (1999-2000). In June 2006, Stewart filed a motion for postconviction relief asking to be allowed to withdraw his plea on the basis that he had newly discovered evidence. Stewart claimed that he had new evidence that at least one of the IM transcripts relied upon by the State was fraudulent, that the police may have deleted or destroyed exculpatory

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

evidence from Stewart's computer, and that Vargus had made statements that were inconsistent with her allegations. After a hearing and briefing, the circuit court denied the motion in November 2007, concluding that the proffered evidence was not newly discovered. Stewart appealed from this order.

¶4 After the notice of appeal was filed, Stewart moved this court to be allowed to file a "supplemental" postconviction motion. We remanded the case to the circuit court for further proceedings. In that order, we stated that "[t]he circuit court may determine which proceedings are appropriate." Stewart filed a supplemental motion alleging that there was no factual basis for Stewart's plea to a charge of attempted child enticement. In July 2008, the circuit court denied the motion. The court concluded that it had already decided Stewart's motion for postconviction relief in 2007, and it would not allow Stewart to supplement a motion that had already been decided with a completely new issue. Stewart filed a second notice of appeal from this order, and we consolidated the appeals.

¶5 Stewart argues that the circuit court erred when it denied both motions for postconviction relief. He first argues that the newly discovered evidence was that at least one of the IM transcripts upon which the State relied on was fraudulent. Second, he argues that there was no factual basis to support his plea because it was legally impossible for him to have committed the crime of child enticement because "Mary" did not exist. Stewart distinguishes this case from the cases in which an adult posed as a child because Stewart communicated with an adult who represented herself to be an adult.

¶6 Stewart argues that he is entitled to withdraw his plea on the basis of newly discovered evidence. 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. “Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred.” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that “(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.” Once those four criteria have been established, the court looks to “whether a reasonable probability exists that a different result would be reached in a trial.” The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof.

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citations omitted).

¶7 Stewart argued to the circuit court that he had newly discovered evidence because a forensic examiner who analyzed the computer and other evidence testified that at least one of the printouts of the IM conversations had been fabricated.³ The expert also testified that someone had booted up the hard drive of Stewart’s computer after the computer had been seized by the police and that doing so violated good forensic practices because evidence could be

³ This conversation was referred to as the “midnight chat.”

destroyed. The circuit court heard testimony and took briefing on the issues and then denied the motion.⁴

¶8 The circuit court concluded first that the evidence was not new, noting that the defense could have conducted the analysis of the computer and the transcripts years earlier. Further, the court concluded that Stewart was negligent in not seeking the evidence earlier. The court stated that Stewart was “the one person who was in a position to know what was on his computer,” and that if he did not agree with what the State put forth through discovery, “he could have and should have conducted his expert analysis of the computer at that time prior to entering a plea.” The court further concluded that the evidence was not material. The court noted that Stewart knew at the time whether he had the midnight chat, and he could have gone to trial and challenged it then, but he chose instead to enter a plea. The court also noted that there was evidence of other chats that Stewart does not dispute, and these other chats provided similar evidence of Stewart’s intent. The court concluded that the evidence that the midnight chat may have been fabricated was not material.

¶9 Stewart argues here that neither Stewart nor his counsel knew, prior to the time Stewart entered his plea, that the transcript of the midnight chat was “demonstrably” fabricated, that he was not negligent for failing to discover it because he had neither the knowledge nor the means to conduct the analysis prior

⁴ Stewart also alleged in his motion for postconviction relief that he had newly discovered evidence in the form of a transcript of a conversation between Vargas and Stewart’s girlfriend. The circuit court also denied his motion with respect to this evidence. Stewart does not challenge the circuit court’s decision on this issue in his appeal.

to entering his plea, and that the evidence was material because the fabrication could have severely damaged the police credibility.

¶10 We conclude that the circuit court did not erroneously exercise its discretion when it denied Stewart’s motion to withdraw his plea on this basis. We agree with the circuit court that Stewart was negligent in choosing not to pursue this evidence before entering his plea. Stewart had the evidence available to him and he had had a different expert examine the evidence, and he still entered his plea. Further, we agree with the circuit court that the evidence was not material. There were other transcripts of chats between Stewart and Vargas. Stewart arrived at the hotel where Vargas had arranged to meet him, and Stewart had with him items appropriate for a ten-year-old victim. Further, we are also not convinced that there is a reasonable probability of a different result. We conclude that the circuit court properly exercised its discretion when it denied Stewart’s first motion for postconviction relief.

¶11 After the circuit court denied the first motion, Stewart appealed. Represented by new counsel, Stewart decided to bring a “supplemental” postconviction motion. Stewart moved this court to remand the proceedings to the circuit court, and we did so, directing that court to determine what proceedings were appropriate. In the supplemental motion, Stewart alleged that the State had not established a factual basis for the plea. Failure to establish a factual basis is a type of manifest injustice that may justify plea withdrawal. *See State v. Johnson*, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997).

¶12 The circuit court denied the motion, concluding that Stewart could not supplement a motion that had already been decided and “boot strap” a new issue into an appeal. We conclude that our order directed the circuit court to

determine whether Stewart could file a supplemental motion to the circuit court. The circuit court determined that Stewart was not entitled to file a supplemental motion and had not offered a sufficient reason for failing to raise the issue in his first motion for postconviction relief and, consequently, the motion was barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree.

¶13 Stewart argues that he offered a sufficient reason for failing to raise the issue in the first motion by asserting that his previous postconviction counsel was ineffective for not raising the issue. The transcript of the motion hearing, however, shows that current counsel specifically withdrew the ineffective assistance of counsel claim saying that it was “not necessary,” and that it could be raised later. Because his counsel deliberately chose not to pursue the claim of ineffective assistance of counsel, Stewart cannot now assert that as a reason for his failure to include the claim in his first postconviction motion.

¶14 We also reject Stewart’s claims that he has alleged a sufficient reason for failing to raise the issue previously because he was ignorant of the legal basis for the claim against him, and that he was actually innocent of the charged crime. Stewart relies on *State v. Howard*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), for the proposition that subjective ignorance of the legal basis for the claim is a sufficient reason for failing to raise the claim previously. *Howard*, however, does not support his assertion. In that case, the supreme court held that the appellant had established a sufficient reason for failing to raise a claim because the court interpreted a statute such that the construction constituted a “new rule of substantive law.” *Id.* at 287. The supreme court agreed with this court’s conclusion that it was “impractical to expect a defendant to argue an unknown statutory interpretation,” because the new interpretation had not been applied at

the time of Howard's initial appeal. *Id.* In such a case, *Escalona* should not bar a claim. *Howard*, 211 Wis. 2d at 287. Stewart, on the other hand, argues that he was subjectively ignorant of the claim. Unlike *Howard*, in which the court's interpretation of a statute had changed, Stewart argues only that his awareness of the legal argument has changed. This is not sufficient.

¶15 We also reject Stewart's claim that he has offered a sufficient reason because he is actually innocent of the crime. To establish actual innocence, Stewart must demonstrate that "in light of all the evidence," "it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citations omitted). Actual innocence in this context means factual innocence and not mere legal insufficiency. *Id.* at 623-24. Stewart has not met this standard. Stewart does not argue that he is factually innocent, but rather that he is legally innocent of the crime. Further, he has not demonstrated that it is more likely than not that "no reasonable juror would have convicted him of the crime." Because Stewart failed to establish a sufficient reason for failing to include this claim in his first postconviction, we affirm the order of the circuit court dismissing his second motion for postconviction relief.

By the Court.—Orders affirmed.

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

