

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2012

A. John Voelker
Acting 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. 2011AP172-CR

Cir. Ct. No. 2009CF138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN A. POZNIKOWICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Ryan Poznikowich appeals a judgment, entered upon his no contest plea, convicting him of child enticement. Poznikowich also appeals the order denying his postconviction motion for plea withdrawal or resentencing. Poznikowich argues he is entitled to withdraw his plea based on the

ineffective assistance of his trial counsel. Alternatively, Poznikowich contends he is entitled to resentencing because the circuit court relied on inaccurate information in the presentence investigation report. We reject Poznikowich's arguments and affirm the judgment and order.

BACKGROUND

¶2 An Information charged Poznikowich with sexual assault of a child under sixteen years of age and possession of drug paraphernalia. The sexual assault charge arose from allegations that Poznikowich had sexual intercourse in his home with Andrea V., his then fifteen-year-old neighbor, after asking her to go to his house and feed his fish. In exchange for his no contest plea to an amended count of child enticement, the State agreed to dismiss the possession of drug paraphernalia charge and recommend that the court withhold sentence and impose fifteen years' probation with one year in jail as a condition. Out of a maximum possible twenty-five-year sentence, the court imposed a sixteen-year sentence consisting of six years' initial confinement and ten years' extended supervision. Poznikowich's motion for postconviction relief was denied after a *Machner*¹ hearing. This appeal follows.

DISCUSSION

¶3 Poznikowich argues he is entitled to withdraw his no contest plea based upon the ineffective assistance of his trial counsel. A plea withdrawal motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d

¹ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

795 (Ct. App. 1986). Poznikowich has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See State v. Schill*, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). Ineffective assistance of counsel can constitute a manifest injustice. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶4 To establish ineffective assistance of counsel, Poznikowich must prove both “(1) that his counsel’s representation was deficient and (2) that this deficiency prejudiced him.” *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). To prove prejudice, Poznikowich must demonstrate that “there is a reasonable probability that, but for counsel’s errors, he would not have [pled] guilty and would have insisted on going to trial.” *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶5 Here, Poznikowich argues trial counsel was ineffective by assuring him that he would receive probation if he accepted the State’s plea offer. At the *Machner* hearing, however, trial counsel testified she was “sure” she explained to Poznikowich that while she thought he was likely to receive probation for his crime, she would never tell a client that she guaranteed something. Counsel explained:

My gut was that it was a probation case. But I, of course, go over the maximum possible ... penalty ... and inform him—and I can’t imagine I did anything different with [Poznikowich] than anyone else—that the Judge is not bound by any plea negotiations; the Judge is not bound by any recommendations in any presentence investigations; the Judge is free to sentence up to the maximum.

Although Poznikowich testified that counsel told him he would receive probation if he entered into the plea agreement, he acknowledged that counsel only “pretty much guaranteed” probation. Poznikowich also noted that when reviewing the

presentence investigation report (PSI) with him, counsel “pretty much, without saying guaranteed, pretty much told me I am getting a year in county with Huber.”

¶6 Lorraine Moreno, a friend of Poznikowich who was present at his meeting with counsel, testified that counsel informed Poznikowich of the plea agreement’s terms and advised him to take the deal. Moreno further testified she did not think counsel advised Poznikowich that prison was a possibility, but also never said the judge was bound by the plea agreement.

¶7 In denying relief on this claim, the court noted that it personally informed Poznikowich during the plea colloquy that it was not bound by the sentence recommendations of the PSI writer, the State or defense counsel. The trial court further noted this was “more or less a credibility situation,” and concluded it believed counsel. The circuit court, in its capacity as fact-finder, is the ultimate arbiter of witness credibility, *see State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, and Poznikowich has failed to establish that the court’s credibility determination is clearly erroneous. *See* WIS. STAT. § 805.17(2) (2009-10).² Because the court found that counsel did not give Poznikowich the bad information forming the basis for his argument, we reject the claim that counsel was ineffective in this regard.

¶8 Poznikowich also contends counsel was ineffective by advising him to “just agree with whatever the PSI author said.” Counsel disputed this characterization, testifying that she tells most clients that if they are willing to enter into a plea agreement, “then the time for the PSI is not a time to try to claim

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

you didn't do anything. ... So take responsibility." As noted above, the court found counsel to be more credible. Although the court did not discuss its credibility finding in context of this specific argument, we assume the finding applies to counsel's testimony as it relates to all of Poznikowich's claims. *See State v. Goyette*, 2006 WI App 178, ¶22 n.11, 296 Wis. 2d 359, 722 N.W.2d 731 (we "may assume facts, reasonably inferable from the record, in a manner that supports the circuit court's decision"). Moreover, even were we to assume counsel gave this advice, Poznikowich claimed it was given after he entered his plea. Poznikowich cannot show prejudice justifying plea withdrawal if the claimed deficiency did not influence his plea.

¶9 Alternatively, Poznikowich contends he is entitled to resentencing because counsel failed to correct inaccurate information in the PSI and the circuit court relied on this information when imposing the sentence. A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. *Id.* A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the trial court actually relied on the inaccurate information. *Id.*, ¶31. "Whether the court 'actually relied' on the incorrect information at sentencing was based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" *Id.*, ¶14.

¶10 Poznikowich disputes telling the PSI author that he was horny and lured Andrea to his house because he believed she would engage in sexual activity with him. According to Poznikowich, he called Andrea from a bar because he

needed somebody to feed his fish. Poznikowich argues that the court relied on the misinformation at sentencing because it commented that the crime involved a “grooming situation” in which Poznikowich “saw an opportunity, took [his] time, but eventually figured out a way to get [the victim] to [his] house.” Poznikowich also emphasizes the court’s comments that he “picked on somebody who’s extremely vulnerable, underage,” and it was done “in such a conniving way” that Poznikowich had to be sent to prison.

¶11 Poznikowich intimates that the PSI author concocted Poznikowich’s admission that he lured Andrea to the house. However, the only testimony Poznikowich presented to refute the PSI statement was his own and, as noted above, the court did not find him credible. Further, his denial of any intent to engage in sexual activity with Andrea when he asked her to come to his house is incredible in light of the record. Poznikowich pled no contest to child enticement for causing Andrea to go into his house with the intent to have sexual contact with her. *See* WIS. STAT. § 948.07(1). By his plea, Poznikowich admitted the State could prove beyond a reasonable doubt that he lured Andrea to his house to have sex with her, and he accepted full responsibility for his actions at sentencing.

¶12 Moreover, the State does not dispute that Poznikowich asked Andrea to go to his house and feed his fish. That he asked her there to feed the fish, however, does not mean he was not also attempting to lure her to the house to have sex with her. Finally, Poznikowich has failed to show that his sentence was based on this claimed inaccuracy. The court noted that the sentencing transcript is “replete with the reasons” why it imposed this particular sentence and the claimed inaccuracies were “not material.” In context, the court’s “grooming” comments were made when agreeing with statements about grooming that were made by the victim’s mother. Because Poznikowich fails to establish that the information was

inaccurate or that the sentencing court relied on it, the circuit court properly denied his alternative motion for resentencing.

By the Court.—Judgment and order affirmed.

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

