COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0999-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN T. VADNAIS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Brian Vadnais appeals his conviction for first-degree sexual assault of child, as a repeater, having pleaded no contest. Vadnais's appellate counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Vadnais received a copy of the report and has filed a response. Counsel's no merit report raises one possible argument: the sentence was excessive. Vadnais's response claims that the victim's mother lied

and that his lawyer failed to make a defense based on this and related information. Upon review of the record, we are satisfied that the no merit report properly analyzes the issue it raises; we therefore will not discuss it further. We conclude that Vadnais's *pro se* arguments also have no arguable merit. Accordingly, we adopt the no merit report, affirm the conviction, and discharge Vadnais's appellate counsel of his obligation to represent Vadnais further in this appeal.

In his response, Vadnais states that the victim's mother lied, that she coached her daughter into fabricating the sexual assault, that she has falsely accused someone else in the past, and that his State-paid lawyer extortively demanded $15,000 before he would put on a better defense. Vadnais also states that his lawyer failed to investigate the information Vadnais supplied regarding the victim's mother's background, her motives, her past fabrications, and her ability to fabricate this incident. Vadnais's arguments reduce to one basic point: the victim's mother and his lawyer, not he, are responsible for his conviction. These claims lack merit. First, Vadnais expressed no such concerns at the plea hearing. There he declared satisfaction with his lawyer and would state only that he had no recollection of committing the offense; he refused to rule out his guilt. By failing to consistently maintain his innocence, Vadnais has cast doubt on his current claim that he is innocent and that the victim's mother fabricated the account.

Second, Vadnais cannot set aside his plea and obtain a trial merely by claiming that he has evidence to impeach the victim's mother, by demonstrating that she had motives to fabricate evidence and the experience necessary to carry out such a scheme. Impeachment evidence, offered in isolation, does not supply a sufficient basis for reexamining a criminal case. ***Simos v. State***, 53 Wis.2d 493, 499, 192 N.W.2d 877, 880 (1972). In fact, even witnesses recanting substantive testimony would not be enough to require further proceedings, in the absence of other, new exculpatory evidence. *See* ***State ex rel. Hussong v. Froelich***, 62 Wis.2d 577, 603-04, 215 N.W.2d 390, 404 (1974). Facts short of newly discovered evidence provide no basis for reopening a case. *See* ***State v. Truman***, 187 Wis.2d 622, 625, 523 N.W.2d 177, 178 (Ct. App. 1994); ***State v. Krieger***, 163 Wis.2d 241, 255, 471 N.W.2d 599, 604 (Ct. App. 1991). Vadnais has submitted no new substantive evidence. In the absence of such new substantive evidence, Vadnais's impeachment evidence does not merit postconviction investigation or judicial examination.

Third, if Vadnais has simply changed his mind about pleading no contest, after mulling over what he believes were the mother's motives to fabricate evidence, the time for such examination has passed. Defendants can vacillate before their pleas, not after. ***Nesbitt v. United States***, 773 F. Supp. 795, 802 (E.D. Va. 1991), *aff'd*, 974 F.2d 1333 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1024 (1993). Changes of heart motivated by mere desires to have trials are not enough to vacate no contest pleas, either before or after sentencing. *See* ***State v. Garcia***, 192 Wis.2d 845, 861-62, 532 N.W.2d 111, 117 (1995). When Vadnais pleaded no contest, he was undoubtedly aware of all of the issues and facts he now raises in response to his counsel's no merit report, including the alleged motives of the victim's mother. If Vadnais wanted to litigate her motives, he should have proceeded to trial rather than pleading no contest. His plea was a strategic acknowledgment of the uncertain outcome he would have faced in attempting to impeach the victim's mother. Vadnais may not enter a no contest plea, conceal his knowledge of an accuser's truthlessness, and expect to change his mind later.

Fourth, no contest pleas waive virtually all defects leading up to the plea, including claimed pre-plea incidents of ineffective trial counsel, such as Vadnais's trial lawyer's claimed failure to present a relevant, promising defense. *See* ***Smith v. Estelle***, 711 F.2d 677, 682 (5th Cir. 1983), *cert. denied*, 466 U.S. 906 (1984). At the time of his plea, the trial court expressly informed Vadnais that, by pleading no contest, he would be waiving the right to trial by jury, the right to confront witnesses, and any defenses his trial lawyer could have mounted in a trial. These included the right to have his trial lawyer explore any motive the mother may have had, besides the truth, for charging him with sexual assault of her daughter. Vadnais stated that he understood the waiver of these rights. Under such circumstances, where Vadnais freely, unconditionally, and unequivocally exchanged an uncertain outcome by trial for a certain one by no contest plea, he has no basis to now demand a trial on the ground that his trial lawyer failed to pursue a relevant and promising defense. Vadnais's election of a no contest plea was the last word on the mother's claimed dishonesty.

Finally, if Vadnais is claiming that his plea was involuntary by virtue of the fact that his State-paid trial lawyer allegedly demanded an additional $15,000, this likewise provides no basis for plea withdrawal. Although defendants have the right to withdraw involuntary no contest pleas for manifest injustices, ***Truman***, 187 Wis.2d at 624, 523 N.W.2d at 178, courts,

and therefore postconviction counsel, need not entertain propositions that lack credibility on their face. ***State v. Koerner***, 32 Wis.2d 60, 67, 145 N.W.2d 157, 161 (1966). Vadnais's claim displays such facial incredibility. At the plea hearing, under the trial court's questioning, Vadnais affirmed that no one had made any threats to induce his no contest plea. This prior, directly contradictory position, seriously undermines Vadnais's new one that he entered his plea as a result of his trial lawyer's extortive financial demand. Postconviction counsel may take such discrediting inconsistencies into account when evaluating clients' claims and deciding whether to pursue them. With no explanation for the contradiction, Vadnais's postconviction counsel need not pursue the extortive financial-demand issue further.

Moreover, Vadnais has not explained how his State-paid lawyer expected him to overcome his indigency and obtain the substantial sum of $15,000. This is a gap in proof that destroys any remaining credibility this claim may have and brings to the fore its inherent improbability. Whenever litigants do not explain the absence of evidence someone would reasonably expect proponents to furnish in support of their claims, such proof's absence is itself circumstantial evidence that the true facts are the opposite of what the proponent asserts. *See, e.g.*, ***Booth v. Frankenstein***, 209 Wis. 362, 370, 245 N.W. 191, 193-94 (1932). Further, Vadnais has simply provided insufficient detail on this allegation to make it pursuable by postconviction counsel. Litigants who hope to pursue postconviction challenges must give specific facts, not broad generalizations. *Cf.* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1389 (1995). In sum, Vadnais's response provides no legal basis for further postconviction proceedings or investigation.

By the Court.—Judgment affirmed.