

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 28, 1997

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, 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. 96-1279-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES D. LUEDTKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County:
JOHN P. HOFFMANN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. James Luedtke appeals from a judgment convicting him as a felon in possession of a firearm. Luedtke pled no contest to the charge. He raises numerous issues on appeal, none of which have merit. We therefore affirm.

Police officers arrested Luedtke immediately after he sold a firearm to a police informant. After the State commenced this proceeding, Luedtke moved to suppress evidence seized after his arrest on the grounds that it was made without probable cause. The trial court denied that motion and, soon after, Luedtke agreed to plead no contest in exchange for sentencing concessions. Luedtke then proceeded to enter his no contest plea, as he had previously in eight other criminal prosecutions. When Luedtke initially indicated his reluctance to plead, the trial court advised him that the matter would proceed directly to trial if Luedtke chose that option. Luedtke then affirmed that he was freely, voluntarily and knowingly entering his plea. He also acknowledged that the State had sufficient evidence to convict him.

Before sentencing, Luedtke filed two motions to withdraw his plea and received hearings on both. In each case, Luedtke alleged that he was intimidated into pleading by the police, and that he received ineffective assistance of trial counsel. He also raised allegations concerning biases of the prosecutor and the assigned judge. However, Luedtke was never able to provide any facts to support his conclusory allegations in these matters. The trial court therefore concluded that Luedtke had not provided a fair and just reason for withdrawing his plea. The court subsequently sentenced him to a five-year prison term, consecutive to the sentence he was presently serving after revocation of his parole. The court denied him sentence credit on the grounds that his incarceration prior to conviction was credited to his sentence on a previous conviction for which his probation/parole had been revoked. The court offered to reconsider the credit issue if the facts proved otherwise.

The trial court properly found probable cause for Luedtke's arrest. The facts showed that police received information that a man named Bryan

Johnson was planning to buy a gun from Luedtke. The police contacted Johnson who agreed to cooperate. He was given marked money to buy the gun, and instructed to signal police after he completed his transaction with Luedtke. The police then observed Johnson, Luedtke and Luedtke's brother meeting inside a building. When Johnson left, he gave the signal that he had purchased the gun. Probable cause consists of evidence that would lead a reasonable police officer to believe that the defendant had probably committed a crime. *State v. Drogsvold*, 104 Wis.2d 247, 254-55, 311 N.W.2d 243, 247 (Ct. App. 1981). In this case, the facts known to the police, as described above, constituted probable cause that Luedtke sold the gun to Johnson.

Luedtke failed to present evidence of coercion, or any other reason, to allow him to withdraw his plea. The trial court should consider allowing a plea withdrawal before sentencing for any fair and just reason. *See State v. Canedy*, 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). Here, however, Luedtke presented nothing more than conclusory allegations of coercion and ineffective representation. In contrast were his unambiguous declarations at the plea hearing that his plea was voluntary, and that he was satisfied with counsel. The trial court reasonably concluded that unsupported allegations that contradicted Luedtke's own prior statements did not constitute a fair and just reason for withdrawal.

Luedtke has failed to adequately preserve his ineffective assistance of trial counsel claim. Before a defendant can succeed on that claim, the issue must be the subject of a hearing in the trial court and trial counsel must have the opportunity to testify as to the alleged ineffectiveness. *See State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 909 (Ct. App. 1979). Luedtke raised the issue only tangentially during the hearings on his motions to withdraw. He never called counsel to testify.

We need not address Luedtke's challenges to his sentence because he never presented them to the trial court. Absent compelling circumstances, which are not present here, a motion to correct a sentence should be directed to the trial court before it is challenged on appeal. *State v. Meyer*, 150 Wis.2d 603, 606, 442 N.W.2d 483, 485 (Ct. App.1989).

Luedtke raises several other issues in his one-page brief. All are either waived by his plea, his failure to raise them in the trial court, or, in the case of appellate counsel's refusal to represent him, because they are not appropriately raised on appeal from the conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5.,
STATS.

