COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2443-CR **Cir. Ct. No. 2007CF196**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY ROBERT LUCIUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: MICHAEL T. LUCCI and KELLY J. THIMM, Judges.[1] *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

[1] The Honorable Michael T. Lucci entered the judgment of conviction. The Honorable Kelly J. Thimm entered the order denying the defendant's postconviction motion.

¶1 PER CURIAM. Timothy Lucius appeals a judgment, entered upon his no contest pleas, convicting him of intentionally contributing to the delinquency of a minor and second-degree sexual assault of a child. Lucius also appeals the order denying his postconviction motion for plea withdrawal. Lucius argues he is entitled to withdraw his pleas based on the ineffective assistance of his trial counsel. We reject Lucius's argument and affirm the judgment and order.

BACKGROUND

¶2 An Information charged Lucius with two counts of sexual assault of a child under sixteen years of age and one count each of contributing to the delinquency of a minor and exposing his genitals or pubic area. In exchange for his no contest pleas to contributing to the delinquency of a minor and one of the sexual assault charges, the State agreed to dismiss the remaining charges. Consistent with the parties' joint recommendation, the court imposed and stayed concurrent ten-year sentences consisting of four years' initial confinement and six years' extended supervision, and imposed five years' probation with nine months' jail as a condition. In April 2009, Lucius's probation was revoked. This court subsequently granted Lucius's motion to extend the time for pursuing a direct appeal from the underlying conviction and, in July 2010, Lucius filed a postconviction motion for plea withdrawal. The motion was denied after a ***Machner***[2] hearing and this appeal follows.

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

DISCUSSION

¶3 Lucius argues he is entitled to withdraw his no contest pleas 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 795 (Ct. App. 1986). Lucius 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, Lucius 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, Lucius 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, Lucius argues his counsel was ineffective by failing to share exculpatory evidence prior to the entry of his no contest pleas. Specifically, Lucius contends counsel failed to share a crime lab report that indicated no male DNA was detected on swabs and combings from the victim. At the ***Machner*** hearing, Lucius testified that his counsel never discussed the DNA report with him prior to entering his pleas. Lucius further testified that he first saw the results three days after entering his pleas, when counsel mailed him a copy of the report. Lucius indicated that he had informed counsel of his belief that the tests would

come back negative for his DNA. He nevertheless claimed he would not have entered his pleas had he actually seen the report.

¶6 In turn, counsel testified that on the day before the plea hearing, he showed Lucius the DNA report and discussed its results and other evidence with him. Counsel explained he typically does not give copies of documents to his clients at the jail. Rather, he provides documents with a letter so there is a record of what was sent. Counsel further explained that although his letter to Lucius did not mention that they had spoken regarding the report, counsel would not include that type of information in such a letter. Counsel also confirmed that Lucius never approached him about withdrawing his pleas or helping him pursue postconviction relief.

¶7 The circuit court found counsel to be more credible than Lucius, and further found that counsel presented Lucius with the DNA report before the plea hearing. The court also determined that, regardless, the DNA report would not have made a difference in Lucius's decision to enter no contest pleas because he anticipated what the results would be. Finally, the court found that the precipitating factor behind Lucius's motion was not some error on the part of counsel but, rather, Lucius's revocation from probation.

¶8 The underlying premise of Lucius's argument on appeal is that counsel failed to share the DNA report before the plea hearing. This premise, however, runs directly contrary to the circuit court's factual findings and credibility determinations. We accept the circuit court's findings of fact if not clearly erroneous. WIS. STAT. § 805.17(2) (2009-10). Moreover, the circuit court, as fact finder, "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort***

Villas, Inc., 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Lucius fails to show that any of the circuit court's factual findings were clearly erroneous. In light of those findings, Lucius has not shown that his attorney's performance constitutes a manifest injustice necessitating plea withdrawal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).