

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2017

Diane M. Fremgen
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 No. 2016AP542-CR

Cir. Ct. No. 2014CF550

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES O. TUCKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. James O. Tucker appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his motion to withdraw his guilty plea and suppress evidence. We reject Tucker's argument and affirm.

¶2 In 2014, the State filed a complaint against Tucker for attempted first-degree intentional homicide, first-degree reckless injury, and aggravated battery, all while using a dangerous weapon. The charges stemmed from an altercation between two groups of people, during which Tucker fired multiple shots at an individual named M.M., hitting him once in the leg.

¶3 After the shooting, Tucker accompanied Manuel Turner and several others to an apartment where Turner's mother, Sonya Coleman, lived. There, they slept for a few hours before police telephoned Coleman. During that phone call, police asked everyone to exit the apartment for questioning and obtained Coleman's consent to search the apartment for two reasons: (1) to ensure that everyone left and (2) to retrieve a gun belonging to Coleman's other son.

¶4 In their search of the apartment, police found an orange checkered shirt in a bedroom closet. M.M. and other witnesses had said that the shooter wore an orange checkered shirt. In his interview with police, Tucker admitted to having worn the shirt found in the apartment. One witness later identified Tucker from a photo lineup as the person in the altercation who wore the orange checkered shirt.

¶5 Attorney Steven Kohn represented Tucker in the case. Kohn did not file any motions to suppress evidence. Instead, he negotiated an agreement in which Tucker pled guilty to first-degree reckless injury without the dangerous weapon enhancer. In return, the State agreed to dismiss and read in the other two charges. The circuit court accepted the agreement and sentenced Tucker to eleven years of initial confinement followed by six years of extended supervision.

¶6 After sentencing, Tucker filed a motion for postconviction relief. He sought to withdraw his guilty plea and suppress evidence recovered from the

search of Coleman’s apartment and his interview with police. Tucker accused Kohn of ineffective assistance for failing to file a motion to suppress.

¶7 Following a hearing on the matter, the circuit court denied the motion for postconviction relief. The court concluded that Tucker lacked standing to challenge the search of Coleman’s apartment. It further concluded that the police’s interview of Tucker was lawful. Finally, the court determined that, even if a motion to suppress had been successfully filed, Tucker failed to show that he would not have pleaded guilty. This appeal follows.

¶8 A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way to establish a manifest injustice is to demonstrate that the defendant received ineffective assistance of counsel. *State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44.

¶9 To prevail on an ineffective assistance claim, a defendant must show that counsel’s performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice in the context of a request for plea withdrawal, a defendant must demonstrate “that there is a reasonable probability that, but for the counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

¶10 Our review of an ineffective assistance claim presents a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We uphold the circuit court’s findings of fact unless they are clearly

erroneous. *Id.* However, the ultimate determinations of whether counsel's performance was deficient and prejudicial are questions of law that we review independently. *Id.*

¶11 On appeal, Tucker contends that the circuit court erred in denying his motion to withdraw his guilty plea and suppress evidence. In making this argument, he focuses on whether he had standing to challenge the search of Coleman's apartment.

¶12 We need not address whether Tucker had standing to challenge the search of Coleman's apartment. That is because the circuit court correctly concluded that Tucker failed to show that he would not have pleaded guilty, even if a motion to suppress had been successfully filed.

¶13 At the hearing on the motion for postconviction relief, Kohn testified as a witness. He said that he discussed different options with Tucker, including the filing of various motions. Kohn advised Tucker that any motion filed would not "make the case go away" because there was other evidence to implicate him that could not be suppressed. This included the witnesses who said that the shooter wore an orange checkered shirt and the witness who identified Tucker as the person in the altercation who wore the orange checkered shirt. Ultimately, Kohn said that he and Tucker made a "strategic decision" to approach the State with a plea offer, which the State accepted.

¶14 Given Kohn's testimony, which the circuit court found credible, we cannot say that Tucker was prejudiced by Kohn's failure to file a suppression motion. Such a motion would not have been dispositive to the case. Thus, Tucker

still would have had every incentive to resolve the matter on the favorable terms that he secured.¹ Because Tucker failed to show that he would not have pleaded guilty, he cannot prevail on an ineffective assistance claim. Because he cannot prevail on an ineffective assistance claim, he cannot meet his burden of showing that plea withdrawal is necessary to avoid a manifest injustice. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).

¹ At the hearing on the motion for postconviction relief, Tucker denied discussing any motions with Kohn and insisted that he would have taken the matter to trial had he won a motion to suppress. The circuit court found Tucker's testimony to be self-serving and not credible. Those findings are not clearly erroneous.

