

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

January 30, 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. 96-0078-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**LESTER H. COOK,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed.*

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

PER CURIAM. Lester H. Cook appeals from a judgment of conviction for sexual assault and from a postconviction order summarily denying a motion to withdraw his guilty plea. The issues are whether Cook alleged sufficient facts, which if true, would entitle Cook to relief and whether the trial court erroneously exercised its discretion in denying Cook's motion without an evidentiary hearing (summary denial). We conclude the motion

alleged insufficient facts and that the court properly exercised its discretion in summarily denying the motion for plea withdrawal because Cook made only conclusory allegations. Therefore, we affirm.

Cook is a borderline mentally retarded adult charged with sexual intercourse and sexual contact with a child. Cook is alcohol-dependent and also suffers from some memory loss. Incident to a plea agreement, Cook pled guilty to second-degree sexual assault of a child, contrary to § 948.02(2), STATS., and the parties jointly agreed to recommend a five-year term of probation. However, the presentence investigator recommended the maximum ten-year prison sentence, which was imposed by the trial court. After sentencing, Cook moved to withdraw his plea, contending that it was not entered intelligently and voluntarily. The trial court refused to hold an evidentiary hearing and summarily denied the motion.

To prevail on a postsentencing motion for plea withdrawal, the defendant must show, by clear and convincing evidence, that "withdrawal of the plea is necessary to correct a manifest injustice." *State v. Johnson*, 105 Wis.2d 657, 666, 314 N.W.2d 897, 902 (Ct. App. 1981) (citation omitted). The trial court has the discretion to summarily deny a postconviction motion for plea withdrawal "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or *presents only conclusory allegations*, or if the record conclusively demonstrates that the defendant is not entitled to relief ...." *State v. Bentley*, 201 Wis.2d 303, 309-11, 548 N.W.2d 50, 53 (1996) (emphasis supplied). A motion presents only conclusory allegations if it does contain factual assertions of sufficient specificity to allow the trial court to meaningfully assess the defendant's claim for plea withdrawal. *Id.* at 314, 548 N.W.2d at 54-55. Whether the motion alleges sufficient facts which, if true, would entitle the defendant to relief is a question of law, which we review de novo. *Id.* at 310, 548 N.W.2d at 53.

Cook does not claim that the trial court did not comply with the mandatory procedures for accepting a guilty plea. See § 971.08, STATS.; *State v. Bangert*, 131 Wis.2d 246, 261-62, 267-70, 274-75, 389 N.W.2d 12, 21, 23-24, 26-27 (1986). He claims that his plea was constitutionally infirm because it was entered unintelligently and involuntarily in that he did not understand that by pleading guilty to the amended charge, he could be facing a maximum penalty of ten years in prison. In his motion, Cook's claims are that he "is mildly

retarded and functionally illiterate" and that, despite the trial court's statement to him that this "felony crime [is] punishable by imprisonment not to exceed ten years" and warning that it was not required to follow the attorney's recommendation of probation, he did not understand that he could be facing ten years in prison.

After reviewing the record of the plea hearing, the trial court denied Cook's request for an evidentiary hearing, explaining its decision as follows:

[The court has] look[ed] at the record as a whole, not just the sentencing hearing, and of course we spent great amounts of time and considerable amounts of money in having experts evaluate Mr. Cook to determine whether he could understand the nature of the charges and the punishment that he faced and so we have an extensive record. But limiting it to the hearing itself, the court did have a colloquy. The court was asking the defendant nearly at the end of every sentence whether he was understanding. The understanding was good throughout. There was never any misunderstanding and the court immediately before taking the plea identified the date that we were talking about, the sexual contact which we already talked a lot about and that we were talking about the person that we were talking about. The court then stated, '[t]his would be a felony crime punishable by imprisonment not to exceed ten years.' We went on from there and the defendant, again, although he was not asked specifically concerning that particular sentence, I think the record as a whole would indicate that the defendant was advised that there is no reason whatever to question his understanding. The language is certainly clear enough and the language does reference this would be a felony crime punishable by imprisonment not to exceed ten years. He entered his plea immediately thereafter. So, the court finds that the record does support the

understanding of the nature of the charges and the penalty that he faced sufficiently to pass muster and the court will therefore deny the motion on that basis.

The transcript of the plea hearing also shows that the trial court asked Cook periodically if he understood what it was telling him, including its warning about not being bound by the sentencing recommendation. Each time the trial court asked Cook if he understood, Cook responded affirmatively.<sup>1</sup>

In his postconviction motion, Cook alleges that: (1) he is "mildly retarded and functionally illiterate;" (2) "[h]e did not understand that the court could sentence him to ten years;" and (3) the trial court "fail[ed] to advise [him] of the potential ten years incarceration as a result of his no contest plea . . . ." We conclude that the third allegation is contradicted by the record,<sup>2</sup> and that the remaining allegations are merely conclusory.

The phrase mildly retarded is not synonymous with a lack of understanding. Cook does not claim that the trial court's language was too

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<sup>1</sup> An excerpt from the transcript of the plea hearing shows the trial court's specific explanation about the potential sentencing exposure and Cook's affirmative responses that he understood that explanation:

THE COURT: Do you understand that those recommendations from the attorneys are recommendations to me but that they are not binding on me. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: A judge has to be free to impose the sentence that he believes is needed even if it differs from what the attorneys recommend. Do you understand?

THE DEFENDANT: Yes.

<sup>2</sup> Although Cook's allegation is that the trial court failed to tell him about the potential sentencing exposure, he explains that his actual contention is that the trial court did not explain this aspect of his guilty plea as clearly as it could have.

legalistic or technical. He does not explain how his mild retardation affected his failure to understand the trial court's explanations at the plea hearing, particularly when the record demonstrates that he claimed to understand the ramifications of pleading guilty. Consequently, the bare allegation that Cook is mildly retarded is merely conclusory. The allegation of functional illiteracy does not permit a meaningful assessment of Cook's claims because he does not allege that he could not read a specific document, or that the trial court failed to tell him of his potential sentencing exposure.<sup>3</sup>

Cook's claim that he did not understand that the court could sentence him to ten years in prison is nothing more than a conclusory allegation. He does not explain how or why he did not understand the court's direct statements to him, particularly when the trial court asked him directly "[if he is] having trouble understanding what I am saying to you," to which Cook responded, "[n]o." There is no specific explanation in his motion as to why he did not understand that he could be sentenced to ten years in prison, when the trial court told him that. Cook's general allegations, in the context of this record, do not permit the court to meaningfully assess the merits of his claimed lack of understanding.

Because Cook has presented only conclusory allegations, the trial court has the discretion to summarily deny the motion. See *Bentley*, 201 Wis.2d at 310, 548 N.W.2d at 53 (citations omitted). Reviewing its oral decision and the record as a whole, we cannot conclude that the trial court erroneously exercised its discretion, particularly when Cook's conclusory allegations contradict his own admissions at the plea hearing.

*By the Court.*— Judgment and order affirmed.

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

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<sup>3</sup> The trial court did not rely on Cook's understanding of the plea questionnaire. See *State v. Moederndorfer*, 141 Wis.2d 823, 827-29, 416 N.W.2d 627, 629-30 (Ct. App. 1987). It thoroughly explained the ramifications of pleading guilty directly to Cook.