COURT OF APPEALS
DECISION
DATED AND RELEASED

April 23, 1997

NOTICE

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.

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

No. 96-0888-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL G. KRUBSACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Paul G. Krubsack appeals pro se from a judgment of conviction of first-degree sexual assault and from an order denying his motion for postconviction relief. He argues that the entry of his no contest plea was void because the trial court never "accepted" the plea and never adjudged him guilty. In the event that we conclude his plea is valid, Krubsack argues that he should be

allowed to withdraw his plea as not intelligently and voluntarily made. We reject his claims and affirm the judgment and the order.

Krubsack was originally charged with first-degree sexual assault of a child under the age of thirteen and misdemeanor battery. Pursuant to a plea agreement which required the State to dismiss the battery charge, Krubsack entered a no contest plea to the sexual assault charge.

Krubsack's claim that his plea was void is an attempt to require the trial court to mouth "magic words" declaring that the plea is accepted and based upon that plea the defendant is found guilty. A trial court is not required to use "magic words" in effectuating its adjudication. *See* ***State v. Echols***, 175 Wis.2d 653, 672, 499 N.W.2d 631, 636 (1993) ("A trial court is not required to recite 'magic words' to set forth its findings of fact."); ***Michael A.P. v. Solsrud***, 178 Wis.2d 137, 151, 502 N.W.2d 918, 924 (Ct. App. 1993) ("the trial court's failure to use the 'magic words' does not amount to reversible error."). We look to the totality of the circumstances to determine if Krubsack's plea was validly entered. *See* ***State v. Coles***, ___ Wis.2d ___, ___, 559 N.W.2d 599, 601-02 (Ct. App. 1997) (the failure to expressly state the adjudication "should not undo what nonetheless is clearly conveyed by the words and the procedure which the court otherwise did use.").

The trial court conducted a plea colloquy with Krubsack which included eliciting from Krubsack his no contest plea. The court found that the plea was freely and voluntarily made. It is obvious from the context of the plea hearing that the trial court found Krubsack guilty of the sexual assault offense. The written judgment of conviction is further evidence that the trial court accepted Krubsack's plea and adjudicated him guilty.

Krubsack's additional claim is that he should have been allowed to withdraw his plea as not intelligently and voluntarily made. In order to withdraw a guilty plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). The defendant bears the burden to establish manifest injustice by clear and convincing evidence. *See* ***id.*** at 237, 418 N.W.2d at 22. A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *See* ***id.***

Krubsack argues that a manifest injustice exists to permit plea withdrawal because trial counsel was ineffective in advising him on his plea. Ineffective assistance of counsel is a recognized factual scenario that could constitute "manifest injustice." *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993).

Determining whether a defendant who has entered a plea has been denied effective assistance of counsel requires the application of a two-part test. *See* ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985). The first inquiry is whether counsel's performance fell below the objective standard of reasonableness. *See* ***id.*** at 57. The second inquiry focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea. *See* ***id.*** at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Id.***

These issues present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). We will not reverse

the trial court's underlying factual findings unless they are clearly erroneous. *See* ***id.*** at 634, 369 N.W.2d at 714-15. The questions of deficient performance and prejudice are questions of law which we decide independently of the trial court's determination. *See* ***id.*** at 634, 369 N.W.2d at 715.

Krubsack contends that trial counsel's pretrial preparation was inadequate because counsel did not provide him with a copy of police reports to review on his own but only read those reports to him. He testified at the postconviction motion hearing that if he had read the reports he would have insisted on going to trial.

As to trial counsel's performance, it was reasonable for counsel to read the reports to Krubsack rather than hand him copies. There is no requirement that a defendant be allowed to personally review the reports.

Krubsack does not point to one bit of information in the police reports which was not brought to light by trial counsel's reading of the documents to him. Rather, he suggests that upon more intense scrutiny, a plausible defense of intoxication would have occurred to him before entry of his plea. Krubsack does not point to any information in the police reports bearing on an intoxication defense of which he was not aware of by virtue of his own presence during the assault. Without some identifiable tidbit in the reports which was overlooked by counsel's reading of the reports to Krubsack, it does not follow that he was prejudiced by trial counsel's failure to give him a copy of the police reports.

Trial counsel testified that she had considered Krubsack's intoxication at the time of the offense. Counsel concluded that a viable intoxication defense did not exist because despite his intoxication Krubsack was aware of what he was doing. Thus, even if Krubsack's personal purview of the

police reports would have caused him to question his attorney about a possible intoxication defense, a strategy reason existed for not pursuing that defense. Again, no prejudice resulted from trial counsel's failure to give the reports to Krubsack. *See* ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984) (strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable on appeal).

Trial counsel was not deficient in pretrial preparations or in advising Krubsack about his plea. No manifest injustice exists to support plea withdrawal.

By the Court.—Judgment and order affirmed.

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