

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 3, 1996

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(1), STATS.

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

No. 96-1646-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. MCKINNEY,

Defendant-Appellant.

APPEAL from judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

LaROCQUE, J. William J. McKinney appeals his conviction for possession of a controlled substance and the denial of his motions for postconviction relief. McKinney asserts that his trial counsel's performance was constitutionally deficient. Because McKinney has failed to present the testimony of trial counsel regarding his representation of McKinney, this court affirms.¹

¹ The State failed to submit a brief in this appeal. By order dated November 6, 1996, this court proceeded solely on the basis of McKinney's brief.

McKinney was charged with possession of cocaine contrary to § 161.41(3m), STATS., and possession of marijuana, contrary to § 161.41(3r). McKinney waived his right to a jury trial and proceeded to a trial before the court. The court found McKinney guilty of the charges and proceeded immediately to sentencing.

McKinney argues that his defense counsel was ineffective at trial, citing *Strickland v. Washington*, 466 U.S. 668 (1984). In particular, McKinney argues that trial counsel was ineffective in advising him to waive his right to a jury trial. McKinney asserts that there is "no showing" that trial counsel discussed this issue with him and that the decision to waive his right to a jury "is a clear indication of ineffective assistance of counsel" Furthermore, McKinney argues that trial counsel was ineffective at sentencing for failing to bring to the attention of the court mitigating factors such as McKinney's employment record, family connections or rehabilitation efforts.

This court considers McKinney's arguments waived. McKinney bears the burden of proving ineffective assistance of counsel. See *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). In *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), this court held that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." In this case, the ineffective assistance of counsel argument was not raised before the trial court. No *Machner*-type hearing was conducted, and the record is devoid of any testimony by McKinney's trial counsel regarding his representation of McKinney. McKinney has not explained his failure to preserve such testimony for appeal. This court therefore will not consider McKinney's claim further.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.