

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 29, 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

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No. 97-0343-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. MINNIECHESKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. James Minniecheske appeals his conviction for theft of movable property, as a repeater, having pleaded no contest to the charge. Minniecheske pleaded no contest to having cut down trees on government owned real estate his family had lost due to a tax lien foreclosure. The facts and circumstances permitted an inference that he cut down the trees as an retributionist

act against local government officials. After sentencing, the trial court denied Minniecheske's postconviction motion for permission to withdraw his no contest plea. In order to withdraw his plea, Minniecheske needed to show a manifest injustice. See *State v. Woods*, 173 Wis.2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992). On appeal, Minniecheske makes several arguments: (1) the trial court wrongly denied his pre-plea motion to substitute counsel; (2) the restitution the trial court ordered exceeds Minniecheske's financial capacity; (3) the trial court should have let him withdraw his no contest plea on the ground that he misunderstood the scope of the trial court's ruling on the prosecution's motion in limine; and (4) the sentence was excessive. We reject these arguments and therefore affirm Minniecheske's conviction.

Minniecheske's no contest plea waived his counsel substitution issue. Generally, no contest pleas waive all nonjurisdictional defects. See *State v. Bangert*, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). Any trial court error on the issue was nonjurisdictional. Nonetheless, we note, *arguendo*, that the trial court correctly denied counsel's substitution. Minniecheske sought substitution one day before trial, and the trial court held the motion untimely. This was a relevant factor, see *Phifer v. State*, 64 Wis.2d 24, 31, 218 N.W.2d 354, 358 (1974), and represented an important part of the trial court's discretionary analysis. See *State v. Lomax*, 146 Wis.2d 356, 359, 432 N.W.2d 89, 90 (1988). Minniecheske's prosecution had already experienced considerable delay over attorney substitutions, attorney-client conflicts, and Minniecheske's delay in retaining counsel. Moreover, counsel's substitution would have caused further delay with no discernible benefit, thereby hindering society's interest in prompt justice. See *id.* at 360, 432 N.W.2d at 91. We also see no prejudice or other unusual circumstances. The trial court expressed confidence in counsel's

competence, and the court's ruling did not bar a fair presentation of Minniecheske's case. *See id.* at 359, 432 N.W.2d at 90. Last, we note that Minniecheske later expressed satisfaction with his counsel at the plea hearing.

Minniecheske also has no basis to challenge his almost \$5,400 restitution obligation. The trial court had no duty to inquire into Minniecheske's financial capacity at sentencing, unless he specifically raised the issue. *See State v. Szarkowitz*, 157 Wis.2d 740, 749-50, 460 N.W.2d 819, 822-23 (Ct. App. 1990). Minniecheske did not. Moreover, this was not ineffective trial counsel. Minniecheske is overstating the importance of his current poverty and unemployment. Temporary poverty is not a per se exemption from restitution. Criminal wrongdoers are fully aware of their own financial conditions at the time they choose to engage in criminal activity. At the same time, crime victims suffer damage regardless of criminal wrongdoers' short-term financial reverses. Restitution seeks to remedy this wrong. *See State v. Perry*, 181 Wis.2d 43, 54, 510 N.W.2d 722, 726 (Ct. App. 1993). Wrongdoers' short-term financial conditions are often more relevant to the repayment time frame and future elongations of repayment schedules. At this early stage of a restitution obligation, Minniecheske's concern is premature. His economic circumstances may improve, and if they remain the same, he may always ask the trial court for relief later. *See State v. Dugan*, 193 Wis.2d 610, 625, 534 N.W.2d 897, 902 (Ct. App. 1995). We therefore see no ineffective counsel in this issue. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Minniecheske may not withdraw his no contest plea on the ground that he misunderstood the scope of the trial court's ruling in limine and that his trial counsel never disabused him of this misunderstanding. The trial court's ruling in limine barred him from attacking the tax lien foreclosure's legality.

Minniecheske claims that had he known better, he would have defended himself on a different ground: he neither knew the physical boundaries of the property affected by the foreclosure judgment nor appreciated that he was cutting trees off family property. According to Minniecheske, this made his plea unknowing and involuntary, *see State v. James*, 176 Wis.2d 230, 236-37, 500 N.W.2d 365, 368 (Ct. App. 1993), and the result of ineffective trial counsel. *See Strickland*, 466 U.S. at 687. We reject this argument. First, the trial court gave Minniecheske a warning that his plea would forfeit the right to present a defense and to make the prosecution prove his guilt beyond a reasonable doubt. This warning effectively put him on notice that he was giving up not only known, but also unknown defenses, by making plain to him the benefits of a trial. Second, courts have never allowed defendants to withdraw pleas on the ground that they did not appreciate all aspects of defense strategy. Defendants who enter a plea must understand the elements of the crime, *see State v. Garcia*, 192 Wis.2d 845, 864-65, 532 N.W.2d 111, 118-19 (1995). It is not required they know every detail of how those elements might apply to the evidence.

Moreover, Minniecheske's trial counsel testified that he explained to Minniecheske his right to apply this defense strategy. This directly refuted Minniecheske's claim to the contrary, and the trial court had to resolve this conflict in the evidence. Trial courts, not appellate courts, measure the credibility of witness and the weight of their testimony. *See Laribee v. Laribee*, 138 Wis.2d 46, 54-55, 405 N.W.2d 679, 683 (Ct. App. 1987). Here, the trial court could reasonably infer that trial counsel was a more credible witness than Minniecheske, who was facing a stayed five-year prison term, eight years' probation, a six-month jail term, and almost \$5,400 of restitution. *See MCCORMICK ON EVIDENCE* § 43, at 84-90 (2d ed. 1972). Besides, Minniecheske has made no showing that this

defense had any prospect of success. The trial court could reasonably infer that a rational jury would not likely accept such a claim. As a result, Minniecheske has shown neither a violation of his substantial rights, *see State v. Weber*, 174 Wis.2d 98, 109, 496 N.W.2d 762, 767 (Ct. App. 1993), nor a manifest injustice. *See Woods*, 173 Wis.2d at 140, 496 N.W.2d at 149. Defendants who believe that they have unknowingly jettisoned valid defenses must show a manifest injustice in order to withdraw their pleas.

Last, Minniecheske has not shown that the trial court issued an excessive sentence. The trial court made a discretionary decision. *See State v. Macemon*, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983). Relevant factors include the gravity of the offense, the character of the wrongdoer, the public's need for protection, and the interests of deterrence. *See State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Here, the trial court's sentence comported with these factors. Minniecheske committed a serious crime: he cut down someone else's trees in utter disregard of private property rights. Minniecheske's five-year stayed prison sentence, eight years' probation, six-month jail term and almost \$5,400 of restitution were proportionate to his culpability, his repeater status, his dangerousness to private property and the State's need to deter him and like-minded wrongdoers from committing such crimes. Further, the trial court had no obligation to give much weight to Minniecheske's claim that he was merely following his father's orders; this does not excuse his criminal wrongdoing or mitigate the extensive damage he caused. Finally, we see nothing in any of the trial court's remarks that requires resentencing; the trial court was simply voicing concern over the lawlessness exhibited by Minniecheske's crime.

By the Court.—Judgment and order affirmed.

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

