

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 2004AP2415-CR

Cir. Ct. No. 2002CF743

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE E. WESBECHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Bruce Wesbecher appeals a judgment convicting him of theft by a contractor and an order denying his postconviction motion to withdraw his no contest plea. He argues that he established a manifest injustice justifying plea withdrawal because the victim's concession that he allowed

Wesbecher to use \$20,000 of the construction money for personal expenses means there was no factual basis to support the nonconsent element. The State argues Wesbecher abandoned or is judicially estopped from raising that issue. We need not address most of the issues on appeal because we conclude there was an adequate factual basis for the plea despite the victim's concession.

¶2 Withdrawal of a plea is within the trial court's discretion. *State v. Johnson*, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). A challenge to the factual basis of a plea, however, turns on a question of law: whether the facts in the record support every element of the offense. *See State v. Merryfield*, 229 Wis. 2d 52, 61, 599 N.W.2d 67 (Ct. App. 1999). The elements of theft by a contractor are: (1) an agreement for the improvement of land; (2) that the defendant received money from the owner under the agreement; (3) that the defendant intentionally used any of the money for a purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvement before all claims were paid in full; (4) use of the money was without the owner's consent and contrary to the defendant's authority; and (5) that the defendant knew use of the money was without consent and contrary to his authority. *See WIS JI—CRIMINAL 1443* (2003).

¶3 The victim, Alexander Hall, hired Wesbecher to remodel his home. He made payments totaling \$70,000. After Wesbecher completed approximately 75% of the promised work, he refused to complete the project or return Hall's money. He used \$20,000 of Hall's payments to purchase a house for himself.

¶4 Wesbecher pled no contest to theft by a contractor, and his attorney stipulated there was a factual basis for the plea. Before sentencing, Wesbecher moved to withdraw his plea based on "new evidence" that Hall consented to

Wesbecher using \$20,000 for a downpayment on his own house. At the motion hearing, Hall testified that Wesbecher requested and received permission for a “\$20,000 advance on the contract” to purchase a house. On that basis, the trial court granted Wesbecher’s motion to withdraw the plea.

¶5 Later that day, Wesbecher asked the court to reinstate his no contest plea and withdrew his motion to withdraw the plea. The court granted that motion and reinstated the conviction. After sentencing, Wesbecher filed a postconviction motion to withdraw his plea on the same ground, that Hall’s consent to use the \$20,000 for downpayment on a house meant there was no factual basis for the plea. The trial court denied that motion and Wesbecher appeals.

¶6 Wesbecher focuses on Hall’s consent to use \$20,000 cash to buy a house. He ignores other aspects of Hall’s testimony that establish an adequate factual basis for the plea. Hall testified that he paid Wesbecher for new cabinets and trim for his house that were never purchased or installed. Hall did not consent to using the money paid for cabinets and trim for any other purpose. Regardless of Hall’s permission to use \$20,000 for other purposes, his testimony that Wesbecher failed to deliver specific goods that were paid for constitutes an adequate factual basis for the plea.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

