

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 24, 2002**

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. 01-2032-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CF-691**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**EMLIN E. LANDRETH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Emlin E. Landreth appeals from a judgment convicting him of soliciting a child for prostitution contrary to WIS. STAT.

§ 948.08 (1999-2000)<sup>1</sup> and an order denying his postconviction motion to withdraw his no contest plea. Because we conclude that the circuit court properly exercised its discretion in denying Landreth's plea withdrawal motion, we affirm.

¶2 A defendant is entitled to withdraw a no contest plea if the defendant establishes by clear and convincing evidence that failure to allow the withdrawal would result in a manifest injustice. *State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. A manifest injustice exists if the defendant's plea was not knowingly, voluntarily and intelligently entered, *State v. Giebel*, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995), or if there was ineffective assistance of counsel, *State v. Washington*, 176 Wis. 2d 205, 213-14 n.2, 500 N.W.2d 331 (Ct. App. 1993). We review the circuit court's denial of a motion to withdraw a no contest plea under an erroneous exercise of discretion standard. *Giebel*, 198 Wis. 2d at 212.

¶3 The information charged Landreth with three counts of soliciting a child for prostitution, child enticement, exposing a child to harmful materials, using a child for illegal drug distribution and five counts of dispensing intoxicating beverages to a minor. The State and Landreth reached a plea agreement which required Landreth to plead no contest to one count of soliciting a child for prostitution. Another soliciting charge was dismissed and read-in; the other charges were dismissed.

¶4 After sentencing, Landreth moved to withdraw his no contest plea. He alleged that at the time he entered his plea, it was of the "utmost importance"

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

to him that he avoid having to register as a sex offender under WIS. STAT. § 301.45. Landreth alleged that he expressed this preference to counsel, and counsel assured him he would not have to register if he pled no contest to solicitation. After sentencing, Landreth learned that he had to register as a sex offender. Landreth alleged that trial counsel was ineffective because he mistakenly advised Landreth that he would not be required to register, and this advice led him to enter a no contest plea when he would otherwise have insisted on trial. Landreth also contended that counsel's advice rendered his no contest plea unintelligent and involuntary.

¶5 At the postconviction motion hearing, Landreth, his sister and his girlfriend testified that they and Landreth wanted to avoid a sexual predator designation. They apparently equated being a sexual predator with the requirement that Landreth register as a sex offender. The sister and the girlfriend testified that they made this clear to trial counsel, and trial counsel assured them that Landreth would not have to register if he pled no contest to the solicitation charge.

¶6 Landreth testified that trial counsel told him he would not have to register as a sexual predator. Landreth felt registration was degrading and had counsel not assured him he would not have to register, he would have insisted on a trial. Landreth denied that trial counsel informed him of the possibility of a WIS. STAT. ch. 980 commitment. Landreth conceded that in entering a plea, he reduced his potential sentence from ninety-two to twenty years.

¶7 Trial counsel testified that he informed Landreth, his sister and his girlfriend of the possibility of a WIS. STAT. ch. 980 commitment, and that he sought to avoid a conviction which would expose Landreth to that possibility.

Counsel told Landreth that the plea agreement eliminated the possibility of a ch. 980 commitment.<sup>2</sup> Counsel was particularly concerned about a ch. 980 proceeding because Landreth had a sexual assault conviction from the early 1970s. Counsel testified that he most likely used the phrase “sexual predator” because a reference to “chapter 980” would not have been meaningful to laypersons. Counsel did not explain to Landreth and his supporters the distinction between a ch. 980 sexual predator and a WIS. STAT. § 301.45 sex offender registrant. Counsel denied advising Landreth that he would not have to register as a sex offender.

¶8 In ruling on Landreth’s plea withdrawal motion, the circuit court reviewed Landreth’s plea questionnaire, the plea hearing and the testimony at the plea withdrawal hearing. The court noted that even though none of Landreth’s witnesses was asked to define what he or she meant by “sexual predator,” the law clearly states that a child enticement conviction falls within WIS. STAT. ch. 980, while a conviction for soliciting a child for prostitution does not. The court found that trial counsel understood the ch. 980 risk to Landreth. During the plea colloquy, the court asked Landreth whether any promises had been made to him other than those discussed on the record as part of the plea agreement. Landreth did not allege any promises relating to sex offender registration. The court found that registration was not a concern of Landreth’s at the time he entered his plea and that he knew what he was doing when he entered his plea. Most importantly,

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<sup>2</sup> Violations of WIS. STAT. § 948.07, child enticement, are included in the definition of a “sexually violent offense” under WIS. STAT. § 980.01(6)(a). Violations of WIS. STAT. § 948.08, soliciting a child for prostitution, are not included in that definition. Violations of §§ 948.07 and 948.08 are included within the definition of “sex offense” under WIS. STAT. § 301.45(ld)(b) for which a defendant must register as a sex offender.

the court rejected Landreth's claim that trial counsel told him he would not have to register as a sex offender.

¶9 In an ineffective assistance claim, the defendant must prove that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant. *State v. Smith*, 207 Wis. 2d 259, 273, 558 N.W.2d 379, 386 (1997). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See id.*

¶10 Here, the circuit court made findings of fact which are not clearly erroneous and which are based on the circuit court's assessment of the credibility of the witnesses. This assessment was within the circuit court's province as the finder of fact. *See Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We are bound by the circuit court's findings that trial counsel did not tell Landreth he would not have to register as a sex offender and that registration did not concern Landreth at the time he entered his plea. Therefore, there was no factual basis for plea withdrawal on the grounds of either ineffective assistance or lack of voluntariness of the plea.

¶11 We note that Landreth's argument on appeal diverges from his argument in the circuit court. At the postconviction motion hearing, Landreth contended that he told counsel of his concern with the sex offender registry. On appeal, Landreth claims that counsel permitted Landreth's impression regarding the sex offender registry to persist. Landreth's change in emphasis is inappropriate. The

circuit court did not find Landreth and his witnesses credible, and this credibility determination also disposed of Landreth's claim that he made his concern about the sex offender registry a factor in the plea agreement. Whatever impression Landreth had, the circuit court rejected his claim that trial counsel contributed to it.

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

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

