

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2010

David R. Schanker
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. 2009AP2136-CR

Cir. Ct. No. 2004CF155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN R. LOCKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Brian Locke appeals an amended judgment convicting him of assault by a prisoner, based upon an Alford plea. He claims that: (1) he should have been allowed to withdraw his plea prior to sentencing because he was induced to enter it by false promises from counsel to help him on

another case and counsel failed to follow up on certain mental health evidence; (2) the DOC destroyed potentially exculpatory evidence by erasing or taping over a videotape of the incident; (3) the district attorney knew about the destruction of the videotape; (4) the district attorney also engaged in prosecutorial misconduct by destroying a letter that explained that the videotape had been erased or taped over; (5) and the judge engaged in various forms of judicial misconduct at postconviction hearings regarding the withdrawal of counsel. We affirm the judgment of conviction for the reasons discussed below.

¶2 A defendant may withdraw a plea prior to sentencing upon showing any fair and just reason for his change of heart, beyond the simple desire to have a trial. *See State v. Garcia*, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). In considering whether a fair and just reason exists, the trial court may assess the credibility of the proffered explanation for the plea withdrawal request and resolve disputes among the testimony of various witnesses. *See State v. Kivioja*, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). Such credibility determinations are not subject to appellate review. *Id.* at 291-92.

¶3 Here, the trial court made a determination that Locke's proffered reasons for wanting to withdraw his plea were not credible, and that the real motivation for his plea withdrawal motion was that the presentence report had recommended the maximum sentence. We must accept that credibility determination which the trial court was in the best position to make. Given the court's finding of Locke's real motive, we agree with the trial court that a desire to test the weight of potential punishment before going to trial does not provide a fair and just reason for plea withdrawal. *Dudrey v. State*, 74 Wis. 2d 480, 485, 247 N.W.2d 105 (1976).

¶4 By entering a plea, Locke waived all nonjurisdictional claims. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. That would include any claims that either the DOC or prosecutor destroyed potentially exculpatory evidence, particularly since Locke should have been aware of the possible existence of a videotape since taking the deposition of the victim nearly a year prior to the entry of his plea.

¶5 Finally, we agree with the State that the trial court's actions or comments made at postconviction hearings on the withdrawal of counsel are beyond the scope of this appeal, which is limited to matters which occurred before the judgment of conviction was entered.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

