

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 16, 2011**

A. John Voelker  
Acting 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. 2010AP15-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2006CF1143**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD L. WESLEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Kenosha County:  
DENNIS J. BARRY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Richard Wesley appeals from a circuit court order denying his postconviction motion alleging ineffective assistance of trial counsel. The circuit court denied the motion because Wesley did not testify at the

evidentiary hearing on his motion, and he did not establish that he was prejudiced by his counsel's conduct at sentencing. We affirm.

¶2 Wesley pled guilty to hit and run involving death. We affirmed his conviction. *State v. Wesley*, 2009 WI App 118, 321 Wis. 2d 151, 772 N.W.2d 232 (*Wesley I*). However, we reversed the circuit court order denying Wesley's postconviction motion alleging ineffective assistance of trial counsel, and we remanded to the circuit court for a hearing on Wesley's claim. *Id.*, ¶24. This appeal is taken from the proceedings on remand.

¶3 The plea agreement required Wesley to plead guilty to hit and run involving death; a negligent homicide charge would be "dismissed outright." *Id.*, ¶3. The parties were free to argue at sentencing. At sentencing, the State argued that Wesley drove negligently.

¶4 Postconviction, Wesley argued that his trial counsel was ineffective at sentencing because she did not object to the State's references to negligent driving and to a portion of the presentence investigation report that discussed negligent conduct. *Id.*, ¶6. Wesley argued that because the negligent homicide charge was "dismissed outright," the State breached the plea agreement by these references. *Id.* In the alternative, Wesley argued that if the "dismissed outright" agreement did not prohibit the State from emphasizing Wesley's driving, then Wesley did not understand the plea agreement. *Id.*, ¶7. Wesley claimed that his trial counsel did not explain that the State could use at sentencing the facts underlying the negligent homicide charge. The circuit court denied the motion.

¶5 In *Wesley I*, we concluded that the plea agreement's "dismissed outright" provision was ambiguous. *Id.*, ¶17. "Dismissed outright" could have meant (1) that the negligent homicide charge was dismissed and the facts

underlying the charge could not be referred to at sentencing or (2) even though Wesley no longer faced conviction and sentencing for negligent homicide, the parties were free to argue the underlying facts and their significance for sentencing. *Id.* We concluded that what Wesley understood about “dismissed outright” was relevant to whether he entered a knowing and intelligent plea. *Id.*, ¶24. Therefore, we remanded to the circuit court for an evidentiary hearing under *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). *Wesley I*, 321 Wis. 2d 151, ¶24. We stated that if Wesley testified on remand about his understanding of the plea agreement, the circuit court should make findings of fact. *Id.*

¶6 Wesley declined to testify at the hearing on remand. Wesley argued that what he understood about the plea could be discerned from trial counsel’s testimony. Trial counsel conceded that she should have objected when the State referred at sentencing to negligent driving. The State moved to dismiss the postconviction motion because Wesley elected not to testify about his understanding of the significance of “dismissed outright,” and Wesley did not meet his burden.

¶7 The circuit court agreed with the State that Wesley did not meet his burden because he did not offer evidence about his understanding of the plea and what he believed “dismissed outright” actually meant. The court noted that in the absence of Wesley’s testimony, there was no proof regarding his claimed confusion about the meaning of the plea agreement.

¶8 The court also applied the prejudice prong of the ineffective assistance analysis and concluded that Wesley was not prejudiced during sentencing regardless of what the State argued and trial counsel failed to

challenge. See *State v. Moats*, 156 Wis. 2d 74, 100, 457 N.W.2d 299 (1990) (defendant must establish that counsel's conduct prejudiced him or her). The court did not find credible trial counsel's testimony that she would have objected to the State's argument because she also admitted that she had not reviewed the sentencing transcript prior to testifying at the *Machner* hearing.

¶9 Finally, the court concluded that it properly considered the facts surrounding the incident. The court reviewed its sentencing remarks and concluded that it sentenced Wesley after considering the proper sentencing factors. The court denied Wesley's postconviction motion, and Wesley appeals.

¶10 A defendant may satisfy the manifest injustice standard for plea withdrawal, *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836, by showing that he or she did not knowingly, intelligently and voluntarily enter a plea, *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891, or was denied the effective assistance of counsel, *State v. Rock*, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979).

¶11 On appeal, Wesley argues that he established his ineffective assistance claim as a matter of law even if he did not present his own testimony because trial counsel testified that she should have objected at sentencing. The circuit court did not find trial counsel's concession credible. We are bound by the circuit court's finding regarding trial counsel's credibility. See *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). That finding disposes of Wesley's reliance upon counsel's concession as a basis for his ineffective assistance claim.

¶12 Because trial counsel's testimony was not credible and Wesley did not testify in support of his claim, Wesley did not meet his burden to show prejudice arising from trial counsel's conduct. Wesley did not show that he

misunderstood some aspect of the plea, and he would not have entered the plea had he understood it. *See State v. Bentley*, 201 Wis. 2d 303, 311-312, 548 N.W.2d 50 (1996).

¶13 Finally, we agree with the circuit court that the State properly referred to how Wesley drove on the night in question. The facts of the incident were the facts of the incident, and Wesley agreed at the plea hearing that the complaint established a factual basis for the plea. The trial court cannot be expected to conduct a sentencing in a vacuum. The court has the responsibility “to acquire full knowledge of the character and behavior of the convicted defendant before imposing sentence.” *Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980).

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).