

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 2, 2004

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. 03-2804-CR

Cir. Ct. No. 02CF005407

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: RUSSELL W. STAMPER and VICTOR MANIAN, Judges.
Affirmed.

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Kenneth Lee appeals a judgment convicting him on three felony counts and an order denying postconviction relief. Lee entered guilty pleas to the charges. His postconviction motion alleged that trial counsel provided ineffective representation, undermining the voluntariness of his pleas.

The issue is whether the trial court properly denied postconviction relief without a hearing on the ineffectiveness claim. We affirm.

¶2 The State charged Lee with armed robbery, possession of five grams or less of cocaine with intent to deliver it, felon in possession of a firearm and resisting an officer. Trial counsel subsequently filed motions to suppress Lee's postconviction statements to police and his identification by the armed robbery victim. The trial and a hearing on the suppression motions were both scheduled for January 13, 2003, with the hearing set first at 8:30 a.m.

¶3 At 11:30 a.m. on January 13, 2003, the trial court cancelled the proceeding because Lee's trial counsel had not yet appeared. Later that day, the proceeding reconvened and the parties announced a plea agreement, under which Lee would enter guilty pleas to the felonies and the State would dismiss the misdemeanor charge and its repeater allegations. During the plea hearing, Lee acknowledged that he had reviewed a standard plea questionnaire/waiver of rights form and discussed it with his attorney. He further acknowledged that he understood the form and that he had signed it. He stated that he had no questions about the form. It contained the following statement: "I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." The court sentenced Lee to concurrent sentences requiring him to serve eight years of initial confinement followed by eight years of extended supervision.

¶4 Lee's postconviction motion alleged that his plea was involuntary because counsel coerced him into entering the plea bargain. The relevant allegations are as follows:

Mr. Lee represented that, when Attorney Schnake appeared late in the morning on the scheduled trial date, he was immediately placed under pressure from Attorney Schnake for purposes of entering a plea, specifically, that his motion to suppress identification would not be successful and that he had no alternative but to plea. In addition, Mr. Lee was under immediate pressure to do so and was not given thorough explanations as to what was occurring and why he should now be entering a plea. Mr. Lee represents, as well, that matters deteriorated between Attorney Schnake and himself and, at one point, Attorney Schnake had to arrange for a deputy to speak to him in order to calm Mr. Lee down and to listen to his attorney. Mr. Lee represents that this entire process put extreme stress and pressure upon him as to the voluntariness of his plea.

Mr. Lee represented that he believed his identification was faulty and that, as a result of that identification, he was pressured into an involuntary confession by law enforcement.

Mr. Lee represented to your affiant that, if he did not enter a plea, he would certainly be convicted at trial, that he had no witnesses, and that he would face an extremely lengthy prison sentence should he proceed to challenge identification and ask for a trial. Mr. Lee represented that he was assured by Attorney Schnake that the sentence he would most likely receive by entering a plea would be a minimum sentence, that it would likely be concurrent to his revocation, and that the only alternative to him was to do so. Mr. Lee also indicated that he was informed by trial counsel that it was in his best interests to have this matter resolved by Judge Stamper, rather than having it adjourned and heard before Judge Manian.

Mr. Lee represented, as well, that he, in fact, entered his plea under these pressures and that, again, contrary to the representations of counsel, had little or no time to consider his position.

Specifically, Mr. Lee represented that he only pled guilty because he was placed, by counsel, in the position of not knowing the true facts of what was occurring in court and, that if he did not do so, he would suffer extreme consequences by going to trial.

The trial court denied the motion without a hearing after concluding that the motion failed to state a viable claim of ineffective assistance.

¶5 Ineffective assistance of trial counsel may provide grounds to withdraw a plea. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). However, the defendant is not automatically entitled to a hearing on an ineffectiveness claim. The trial court may properly deny a hearing, and deny the motion, if the defendant relies on conclusory allegations or fails to allege both deficient performance and prejudice with specificity or if the record conclusively shows that the defendant is not entitled to relief. *Id.* at 309-11. Whether the allegations of the motion are sufficient to require a hearing is a question of law this court reviews independently. *Id.* at 310. If the trial court refuses to hold a hearing based on a finding that the record conclusively demonstrates that the defendant is not entitled to relief, we review that determination under the erroneous exercise of discretion standard. *Id.* at 318.

¶6 Lee's motion fails to present sufficient facts to show that counsel performed deficiently. According to the motion, counsel felt strongly that Lee should accept the plea bargain and avoid going to trial and gave Lee several reasons why. These included the weakness of his suppression arguments and the chances of a more lenient sentence with the plea and with this particular judge. Without more, Lee has merely shown that his counsel did what attorneys must do in this situation, which is provide advice. There are no facts offered to show that the advice was negligent or that it constituted undue pressure. Although Lee maintained that he did not understand the "true facts of what was occurring in court" and that he had meritorious suppression arguments, these were nothing more than conclusory allegations. Without more, they do not justify a hearing.

By the Court.—Judgment and order affirmed.

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

