COURT OF APPEALS
DECISION
DATED AND RELEASED

July 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 95-1162-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EARL A. DREW,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Columbia County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Earl Drew appeals from a judgment convicting him of two counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS., and an order denying his postconviction motion to withdraw his pleas. He seeks to withdraw his pleas because they resulted from ineffective assistance of trial counsel and because he discovered new evidence. He also contends that: (1) the prosecution breached a plea agreement, (2) the trial court

abused its sentencing discretion, and (3) § 948.02, STATS., is unconstitutional. Finally, he asks that we exercise our power of discretionary reversal under § 752.35, STATS.

Because the record reveals that Drew failed to raise his ineffective assistance of counsel claims before the trial court, that the trial court properly found that the testimony introduced by Drew at his postconviction hearing did not meet the criteria for newly discovered evidence, that the prosecution complied with the terms of the plea bargain, that the trial court did not erroneously exercise its sentencing discretion, and that Drew's contention that § 948.02, STATS., is unconstitutional is without merit, we affirm the judgment of conviction and the order denying the motion to withdraw the ***Alford*** pleas. We also decline to exercise our power of discretionary reversal or modify the sentence.

BACKGROUND

Drew was initially charged with thirteen and then twenty-five counts of first-degree sexual assault of a child under the age of thirteen. At a preliminary hearing, five girls, ranging in age from five to ten years and including two of Drew's children, testified that Drew had either molested or had sexual intercourse with them at various times and locations. As part of a plea bargain Drew entered ***Alford*** pleas to two counts of first-degree sexual assault, and three additional counts were read in for sentencing. The remaining counts were dismissed, and the prosecutor recommended a sentence of twenty years in prison for the first count followed by ten years of probation for the second count. The trial court sentenced Drew to fifteen years for each count to be served consecutively.

Drew filed a postconviction motion to withdraw his ***Alford*** pleas based on newly discovered evidence. At a hearing, Drew called witnesses on his behalf. Bonnie Lies, a woman he was dating, testified that she had been told by Glenda Daley, a mother of one of the victims, that "her mother [the victim's grandmother] put her up to" accusing Drew of molesting her daughter. Daley testified that what had really transpired in the conversation was that Lies had offered her $500 to stop the prosecution against Drew. Another witness testified as to what other people thought of Drew's guilt. Finally, Drew

testified that had he known about the Lies-Daley conversation prior to entering a plea, he would have opted for a jury trial. The trial court denied the motion, stating:

> The court is not satisfied by clear and convincing evidence that this information was not discovered until after trial or that the defense was not negligent in seeking evidence. Some of it clearly was available prior to his conviction; some perhaps not. And, ultimately, the court would need to establish or find a reasonable probability that there would be a different result than conviction if this went to trial. And I don't think there's any probability.

INEFFECTIVE ASSISTANCE OF COUNSEL

Drew argues for the first time on appeal that he was denied effective assistance of trial counsel because trial counsel failed to conduct an adequate investigation into the facts of the case, wanted to avoid going to trial, failed to challenge the sufficiency of the complaint and information, failed to "enforce" the sequestration of a potential witness at the preliminary hearing, failed to "enforce" the plea agreement, and failed to challenge the complaint and information as charging "multiplicitous" charges. Drew further asserts that his ***Alford*** pleas were not entered freely or voluntarily because his trial counsel entered the pleas in order to avoid a jury trial.

The record discloses no evidentiary hearing at the trial level on Drew's ineffective counsel claims as required by ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing at which trial counsel is present is a "prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberative trial strategies." ***Id***. at 804, 285 N.W.2d at 908. Accordingly, we will not consider the merits of the ineffective assistance of counsel claim in this case because the trial court has not considered the issue.

NEW EVIDENCE

Drew requests to be permitted to withdraw his pleas and be granted a new trial in order to prevent the manifest injustice of his incarceration in light of newly discovered evidence. A motion to withdraw a plea after sentencing is governed by the "manifest injustice" rule adopted in ***State v. Reppin***, 35 Wis.2d 377, 385-86, 151 N.W.2d 9, 13-14 (1967). New facts which tend to refute the factual basis that supported a plea may create a "manifest injustice" warranting the withdrawal of a plea. ***State v. Krieger***, 163 Wis.2d 241, 255, 471 N.W.2d 599, 604 (Ct. App. 1991). However, a plea may be withdrawn on the basis of new evidence only when "a reasonable probability exists of a different result in a new trial." ***Id.*** at 255, 471 N.W.2d at 604 (quoting ***State v. Coogan***, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990)). "[A] defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct `manifest injustice.'" ***Krieger***, 163 Wis.2d at 249, 471 N.W.2d at 602. The Wisconsin Supreme Court has indicated that "[o]nce the defendant waives his constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea." ***State v. Walberg***, 109 Wis.2d 96, 103, 325 N.W.2d 687, 691 (1982), *rev'd on other grounds sub nom.* ***Walberg v. Israel***, 766 F.2d 1071 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985). The motion to withdraw a plea is addressed to the sound discretion of the trial court, and we will only reverse if the trial court fails to properly exercise its discretion. ***State v. Booth***, 142 Wis.2d 232, 237, 418 N.W.2d 20, 22 (Ct. App. 1987).

Drew argues that had he been aware of the potentially favorable witnesses prior to entering his plea, he would have opted to go to trial. However, this contention does not fall within the "manifest injustice" rule for new evidence under ***Krieger***. The trial court ultimately denied Drew's motion because it saw no reasonable probability of a different outcome at trial based on the testimony at the postconviction hearing. It found that this testimony, even if admissible, was clearly outweighed by the testimony of the five victims. In fact, the trial court questioned whether any of the testimony, including that of Lies regarding Daley, was even material to the issue of Drew's guilt because his conviction was based solely on the testimony of his five victims and not that of Daley. In light of the contradicted testimony introduced at the postconviction hearing, we conclude that Drew would probably be found guilty at a new trial.

We therefore conclude that the trial court did not erroneously exercise its discretion by denying Drew's motion.

UNCONSTITUTIONAL STATUTES

Drew asks this court to take judicial notice that § 948.02, STATS., is unconstitutional. This issue was not presented to the trial court and the argument is obscure, undeveloped, and lacking relevant authority. We decline Drew's invitation to take judicial notice that Wisconsin statutes prohibiting sexual assault and molestation of children are unconstitutional. We further note that, in any event, judicial notice is not a device to determine the constitutionality of statutes, but a means to recognize the existence or truth of facts without the production of evidence. *See* BLACK'S LAW DICTIONARY 848 (6th ed. 1990).

PLEA AGREEMENT

Drew contends the prosecution breached its plea agreement by not arguing forcefully enough that the trial court should follow the sentencing arrangement contemplated by the agreement. He cites ***United States v. Brown***, 500 F.2d 375 (4th Cir. 1974), for the proposition that failure to argue strongly for a sentence recommendation pursuant to a plea agreement violates the requirement that the prosecution keep its part of a plea bargain as required under ***Santobello v. New York***, 404 U.S. 257 (1971). Therefore, Drew argues he is entitled to have his sentence modified in accordance with the plea bargain or, alternatively, be allowed to withdraw his plea. In ***Brown***, the district attorney, at sentencing, failed to explain to the court why the disposition he was recommending as part of a plea agreement was appropriate and expressed personal reservations about the terms of the agreement. ***Brown***, 500 F.2d at 377. In contrast, at Drew's sentencing, the prosecution argued at some length why the sentence it was recommending was the appropriate disposition of the case, citing rights of the public, the victims' families, and the victims themselves. The prosecution expressed no reservations about the sentence or terms of the plea bargain. We conclude that the prosecution complied with its obligations under the plea agreement.

SENTENCING

Drew contends that the trial court erroneously exercised its sentencing discretion when it failed to follow the sentencing recommendation made by the prosecution. Sentencing lies within the discretion of the trial court and our review is limited only to whether the trial court abused its discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). A trial court is not bound by a plea agreement and may accept a guilty plea while rejecting the sentence recommendations. ***Melby v. State***, 70 Wis.2d 368, 385-88, 234 N.W.2d 634, 642-43 (1975). First-degree sexual assault of a child is a Class B felony, which was punishable by up to twenty years in prison. Section 939.50(2)(b), STATS., 1991-92.[1] The imposition of a fifteen-year sentence for each count was within the limits prescribed by the legislature. The record indicates Drew was properly informed that the trial court was not bound to follow the sentencing terms of the plea bargain. The trial court also explained why it was not following the plea agreement or the optional sentencing guidelines and considered the proper factors, including Drew's unwillingness to admit guilt. The trial court properly exercised its sentencing discretion.

DISCRETIONARY REVERSAL

Finally, Drew requests this court to exercise its power of discretionary reversal under § 752.35, STATS., and set aside his conviction and order a new trial or, alternately, discharge Drew from incarceration in the interest of justice. Drew argues he has been subject to false arrest and imprisonment because the statutes he is accused of violating are unconstitutional and therefore "null and void." This court may reverse a judgment or order on appeal if it appears from the record that the real controversy has not been tried or that justice for any reason has been miscarried. Section 752.35, STATS. We do not see how either of these situations present themselves in this case and therefore decline to grant a discretionary reversal.

By the Court.—Judgment and order affirmed.

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[1] For Class B felonies occurring after April 1, 1994, the maximum penalty is forty years in prison. Section 939.50(2)(b), STATS.; *see* Historical and Statutory Notes, Wis. Stat. Ann. § 939.50 (West 1996).

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