COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 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. 95-2113-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUANE JOSEPH LIESKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO and JEFFREY A. KREMERS, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Duane Joseph Lieske appeals from a judgment entered after he entered an ***Alford*** plea to one count of first-degree sexual assault, contrary to § 940.225(1)(d), STATS. He also appeals from an order denying his motion for postconviction relief. Lieske claims the trial court erred in denying his motion to withdraw his plea and erred in denying him a

Machner[1] hearing on his ineffective assistance of counsel claim. Because the trial court did not err in either respect, we affirm.

I. BACKGROUND

Lieske was charged by criminal complaint with two counts of second-degree sexual assault of a child, one count of first-degree sexual assault, and two counts of child enticement. Lieske is the grandfather of each of the four victims involved. Prior to trial, Lieske agreed to enter an ***Alford*** plea to one count of first-degree sexual assault, and the State agreed to dismiss the other four counts.

The trial court accepted the plea, using the facts as alleged in the criminal complaint and the testimony from the preliminary hearing as the factual basis for the plea. The trial court adjudged Lieske guilty of one count of first-degree sexual assault and ordered a presentence investigation. Sentencing was set for October 21, 1993.

On the date set for sentencing, Lieske filed a motion to withdraw his plea alleging that he was confused when he entered the plea, that he entered the plea to save his family from going through the stress of a trial, and that new information about threats made against defense witnesses had been discovered. The trial court adjourned the sentencing and set a date for hearing the motion to withdraw the plea. Following the hearing, the trial court denied Lieske's motion, reasoning that Lieske had failed to show a fair and just reason to withdraw his plea. Lieske was sentenced to a fifteen-year prison term.

Lieske filed a postconviction motion alleging ineffective assistance of trial counsel. Although a ***Machner*** hearing was originally scheduled, it was later cancelled because the trial court determined that the motion papers failed to allege facts specific to show that he was prejudiced by any deficient performance. As a result, the trial court concluded that a ***Machner*** hearing was not required. Lieske now appeals.

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[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

II. DISCUSSION

A. Denial of Motion to Withdrawal Plea.

Lieske first challenges the trial court's denial of his motion to withdraw his plea. To withdraw a guilty plea before sentencing, the defendant must show a fair and just reason. ***State v. Shanks***, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). Whether a defendant meets this burden is a decision that lies within the trial court's discretion. ***Id.*** To properly exercise that discretion, the trial court must liberally apply the fair and just standard. ***Id.*** However, even where the reason is fair and just, it must be plausible and supported by facts of record. ***Id.***, 152 Wis.2d at 290, 448 N.W.2d at 267. It must be something more than the desire to try the case. ***State v. Canedy***, 161 Wis.2d 565, 583, 469 N.W.2d 163, 170-71 (1991).

The trial court denied Lieske's motion because it found that the reasons Lieske asserted for withdrawing his plea were inconsistent with what Lieske had stated at the plea hearing. The trial court found that Lieske's statements at the plea hearing were more credible than his testimony at the hearing to withdraw his plea. This determination of credibility is left to the trial court. ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107, 293 N.W.2d 155, 159 (1980). We will not disturb it unless the finding is clearly erroneous. ***Id.*** The record supports the trial court's credibility determination and, therefore, we cannot say the finding was clearly erroneous. Based on this credibility determination, we conclude that the trial court did not erroneously exercise its discretion in denying Lieske's motion to withdraw his plea because Lieske failed to submit any credible fair and just reason to grant his motion.[2]

B. Machner Hearing.

[2] Lieske offers additional reasons on appeal as to why he should have been allowed to withdraw his plea. He failed to assert these additional reasons before the trial court, however, and therefore, we decline to address them. ***State v. Rogers***, 196 Wis.2d 817, 827, 539 N.W.2d 897, 901 (Ct. App. 1995) (new theories, which were not presented to the trial court, will not be considered on appeal).

Lieske also claims that the trial court erred in refusing to hold a ***Machner*** hearing on his ineffective assistance of trial counsel claim. The trial court denied Lieske's request for a hearing because his motion papers failed to state how any of the alleged deficiencies of his trial counsel prejudiced him.

We review a trial court's decision not to hold a ***Machner*** hearing *de novo*. ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). A trial court must hold an evidentiary hearing on ineffective assistance of counsel claims if a defendant alleges sufficient facts in his motion to raise a question of fact for the court. ***Id.*** at 360, 523 N.W.2d at 118. The motion must raise a question of fact regarding whether trial counsel's performance was deficient *and* how the deficient conduct prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984) (setting forth two-prong ineffective assistance of counsel test).

We have reviewed Lieske's motion. We agree with the trial court that his motion fails to raise a question of fact as to how trial counsel's conduct prejudiced him. The motion simply alleges that trial counsel failed to engage in certain conduct.[3] He does not allege that the outcome probably would have been different if trial counsel had not performed deficiently. Accordingly, we conclude that the trial court did not err in refusing to hold a ***Machner*** hearing.

By the Court. – Judgment and order affirmed.

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

[3] Specifically, the motion alleges that trial counsel: "failed to thoroughly investigate this matter," failed to request psychiatric exams of the victims, failed to request the medical records of the victims, felt an appeal should be brought based on his ineffective assistance, failed to explain counts "read-in" for purpose of sentencing, failed to object to factual errors in the pre-sentence report, failed to apprise the court of Lieske's mental deficiencies, erroneously informed Lieske of the length of the probable prison term, and failed to investigate the possibility of other suspects.