

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MARCH 12, 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(1), STATS.

NOTICE

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

Nos. 95-2376 & 95-2464

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 95-2376

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINDA R. CAULEY,

Defendant-Appellant.

No. 95-2464

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. CAULEY,

Defendant-Appellant.

APPEALS from orders of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

LaROCQUE, J. Michael and Linda Cauley appeal the denial of postconviction motions to set aside their no contest pleas to misdemeanor theft.¹ The trial court held an evidentiary hearing to address the issue. It denied the motions on grounds the pleas were made knowingly and voluntarily; it found that the Cauleys were merely displeased with the thirty-day jail term as a condition of probation, longer than recommended by the terms of a plea bargain. The State opposes a review of the motions on the merits on grounds the Cauleys failed to raise the issue in their initial appeal as required by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 186, 517 N.W.2d 157, 164 (1994), and also brought a previous § 974.06, STATS., motion in which they failed to show sufficient reason why it was not raised on direct appeal.² This court concludes that the Cauleys have shown good reason for their failure to properly raise the plea withdrawal issue either on direct appeal or in their previous § 974.06 motion. However, because the trial court's findings of fact relevant to the merits of their claims are not clearly erroneous, the Cauleys have failed to meet the manifest injustice standard to mandate granting a plea withdrawal. This court affirms the order denying relief.

**PROCEDURAL HISTORY AND COMPLIANCE WITH
ESCALONA AND § 974.06(4), STATS.**

¹ Because the Cauleys were charged with identical offenses and raise nearly identical issues, this court ordered their appeals consolidated.

² Section 974.06(4), STATS., provides:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Michael and Linda Cauley, husband and wife, were charged in a criminal complaint with a number of misdemeanor theft charges. The parties reached a plea bargain, and the Cauleys entered no contest pleas on the date scheduled for jury trial on March 17, 1993. The Cauleys concede that the record of the plea hearing colloquy met the standards established by *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986). The Cauleys each acknowledged in open court on the record their understanding that the trial court was not bound by the recommended plea bargain that they could be sentenced to anything up to the maximum penalty on each count. Each defendant also affirmatively and unequivocally acknowledged that the plea was made without threat or coercion. They were properly informed of each of their constitutional rights they were waiving by entry of their pleas, informed of the elements of the crimes charged and that each element must be proved prior to entry of a guilty finding. Michael completed three years of college with a degree from a technical college, and Linda, a high school graduate, acknowledged in answer to the court's inquiries, the information necessary to support the court's finding that their pleas were entered knowingly and voluntarily.

The circuit court found the Cauleys guilty and entered a judgment of conviction. It withheld sentence and placed them on probation and required them to serve thirty days jail as a condition. The court's reason for rejecting the recommended five-day jail term was the number and breadth of offenses. Numerous other theft counts were dismissed and treated as read-ins, and similar charges had been made in other counties. The court also noted the significant amount of money the Cauleys had stolen.

Almost immediately, the Cauleys filed a notice of intent to pursue postconviction relief. The state public defender appointed new counsel, Jeffrey Kohler, to pursue the matter. Later, at the postconviction hearing into the present motion, unrefuted evidence, including admissions from Kohler, shows that the Cauleys sought to withdraw their pleas and so informed him and their previous counsel in writing. Kohler failed to read their communications and moved the trial court only for a sentence modification.³ The motion for sentence modification was denied, and the Cauleys appealed. Kohler filed a no merit report with this court, and the trial court's denial of the motion was affirmed. The per curiam decision released on August 16, 1994, states in relevant part:

³ A withheld sentence and imposition of probation is not a sentence, but the misnamed motion is irrelevant because the punishment imposed is no longer an issue on this appeal.

The Cauleys' appellate counsel [Kohler] has filed a no merit report in each appeal pursuant to *Rule 809.32, STATS.*, and *Anders v. California*, 386 U.S. 738 (1976). Each appellant received a copy of his or her report and was advised of the right to file a response. Linda Cauley and Michael Cauley filed a response. Upon consideration of the no merit reports, the response and an independent review of the records, we conclude that there is no arguable merit to any issue that could be raised in either appeal.

The no merit reports address only the trial court's decision to deny the appellants' respective motions to modify sentence. The transcript of the hearing at which the trial court considered the motions for modification convinces us that counsel is correct in his analysis that this issue is without arguable merit. Our further review of the remainder of the records discloses no other potential issues for appeal. Therefore, we affirm the judgments of conviction and relieve Attorney Jeffrey R. Kohler of further representing the appellants in these matters.

In September 1994, the Cauleys filed a pro se petition to review this court's decision with the Wisconsin Supreme Court. Before the petition was decided, Kohler moved the supreme court to withdraw his earlier no merit report, supporting his motion with his affidavit that, for the first time, raised the question of a plea withdrawal. Kohler, however, alleged inadequate facts to support a basis to support a claim of an involuntary plea. Instead, he inaccurately alleged that after the decision of this court accepting his no merit report, the Cauleys expressed a desire to try the case, and that trial counsel had discouraged them from doing so. The supreme court denied both the motion to withdraw the no merit report and the Cauleys' petition to review.

Upon remand, Kohler then advised the Cauleys to immediately pursue a pro se § 974.06, *STATS.*, motion in the trial court, raising the question of the voluntariness of their pleas. Kohler, however, in reliance upon his discharge from further responsibility in the matter of the no merit sentence modification decision, failed to advise the Cauleys of the significance of the *Escalona-*

Naranjo decision. *Escalona-Naranjo* requires a party to show good reason for raising an issue for the first time in a § 974.06 motion after direct appeal. *Id.* at 186, 517 N.W.2d at 164. The Cauleys thus sought plea withdrawal relief under § 974.06 without setting forth any reason, let alone a good reason, for not having raised the matter in their appeal. The trial court, and later this court in a second appeal, denied relief on grounds of their failure to comply with *Escalona-Naranjo*.

Because Kohler advised the Cauleys to pursue a § 974.06, STATS., motion, he should have advised them that *Escalona-Naranjo* required them to show sufficient reason why they did not raise the plea withdrawal issue on appeal. The reason, of course, was Kohler's failure to investigate the Cauleys' written communications setting forth their contentions. Whether or not his omission constituted ineffective counsel in the constitutional sense, his conduct constitutes a "sufficient reason" for not asserting the plea withdrawal motion earlier. We therefore review the trial court's decision on the merits of this second § 974.06 motion.

WITHDRAWAL OF NO CONTEST PLEAS

When a party seeks to withdraw a guilty or no contest plea after conviction and disposition, Wisconsin applies the "manifest injustice" test set forth in the American Bar Association Project on Minimum Standards for Criminal Justice in a tentative draft on Standards Relating to Pleas of Guilty. *State v. Reppin*, 35 Wis.2d 377, 385-86, 151 N.W.2d 9, 13-14 (1967). These standards reflected Rule 32(d) of the Federal Rules of Criminal Procedure. *Id.* at 386, 151 N.W.2d at 14. The four factual situations set forth in the standards are not exhaustive of situations that might constitute manifest injustice. *Id.* The defendant must meet a higher standard of proof, proof by clear and convincing evidence. *State v. Walberg*, 109 Wis.2d 96, 102-03, 325 N.W.2d 687, 691 (1982). This higher burden is used because the presumption of innocence is no longer applicable and, when the record on its face shows a defendant was afforded constitutional safeguards, the defendant should bear the heavier burden. *Id.* at 103, 325 N.W.2d at 691. Once the defendant waives his constitutional rights and enters the plea, the State's interest in finality requires a higher standard to disturb that plea. *Id.* This court may not reverse a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.

Michael alleged as grounds to withdraw his plea that he did not make it knowingly and intelligently, that it was coerced and involuntary and that the interests of justice compelled a withdrawal. The factual allegation to support the motion was a claim of coercion by his trial attorney, Jill Schilling. She allegedly told him she would withdraw from representation prior to trial unless he made an additional payment of \$2,500 toward her attorney fee. Michael did not call Schilling to admit or deny this allegation at the postconviction hearing. The trial court did not expressly find whether Schilling made the alleged statement. The trial court did, however, find that it did not believe Michael's claim that Schilling's statement was the reason for his plea.

This court concludes that Michael's testimony raised two independent factual issues, each relevant to the merits of his motion: (1) Did Schilling make the statement; and (2) if she did, was it a cause of Michael's change of plea. The court addressed the second question directly. It held that it did not believe Michael when he testified that Schilling's statement was the reason for his change of plea. Rather, the court found, Michael weighed the unappealing alternatives of a trial on numerous counts of theft against the offer of a plea bargain and a recommendation for probation, and voluntarily opted for the latter. The trial court's finding that Michael's plea was knowing and voluntary is not clearly erroneous. *See* § 805.17(2), STATS.

The court recited some of the evidence upon which it relied to reach its finding. First, the court concluded that Michael, who testified that Schilling's threat to withdraw was the only reason he changed his plea, was not a credible witness. To support the factual finding that Michael was not credible, the court pointed to several factors. First, the court found an implied inconsistency between his testimony that he was abusive toward his wife, Linda, to get her to change her plea and his testimony that he himself did not reach his decision to change his own plea until the weekend before trial, after his altercation with Linda.

The court also relied upon stronger and more direct evidence. That evidence was Michael's own statement at the plea hearing. The court had inquired of Michael whether there had been any coercion or threats to cause him to plead no contest. Michael's answer was an unequivocal "no." The trial court found the explanation for Michael's conflicting statements was his dissatisfaction with the thirty-day jail sentence. Either Michael's statement to the court at the plea hearing was untrue or his later claim of coercion was

untrue. The fact finder had to resolve which of two conflicting statements was the truth. The trial court did this, and its finding cannot be disturbed on appeal. Section 805.17(2), STATS.

The trial court also found Linda's claims of coercion not credible. She testified that when she telephoned her trial counsel, Christopher Buslee, to tell him she did not want to accept the plea bargain, he disagreed with her. She said he became upset, raised his voice and implied that he might withdraw as counsel if she did not accept the bargain. She said he eventually ended the phone conversation by hanging up on her. She also testified that her husband "push[ed] me just to go ahead and accept the plea." Michael told her they did not have the money to continue, he was "very strong" and "also loud with me." She said this caused her concern because Michael some twelve years earlier had "become very physical with me" and broke her ear canal. Michael corroborated Linda's claim that he pressured her to change her plea. Buslee testified that he did "not recall" receiving the telephone call from Linda, but acknowledged that he may have received one. He did not recall raising his voice, becoming upset with her or threatening to resign as her attorney. He was not asked whether his answers meant that he could have made the remarks or that he did not believe he made them. He also testified that it "would not—certainly would not be in my character to have done that." The trial court found that Buslee did not engage in the telephone conduct ascribed to him by Linda. The court stated that it had problems with the credibility of both the Cauleys.

This court rejects Linda's argument that because Buslee did not directly deny his conversation with Linda, her testimony compelled a finding that her statement was the truth. Linda cites as precedent for her contention *Schulz v. St. Mary's Hosp.*, 81 Wis.2d 638, 260 N.W.2d 783 (1978). *Schulz* repeats an established evidentiary proposition: A fact finder may not disregard positive uncontradicted testimony as to the existence of some fact, or the happening of some event, in the absence of something in the case that discredits the same or renders it against reasonable probabilities. *Id.* at 650, 260 N.W.2d at 786-87.

The trial court could reasonably find that Buslee's statement contradicted Linda's statement, that Linda's own statement that there had been no threats or coercion contradicted her hearing testimony, and that she was motivated to change her statement based upon an unsatisfactory jail term. These findings do not violate the rule set forth in *Schulz*.

Finally, both Cauleys couch part of their argument for withdrawal of plea in terms of ineffective counsel. Michael says that Schillings' threat to withdraw, unaccompanied with the advice that she could not withdraw without the trial court's permission, was ineffective counsel. To prove ineffective assistance of counsel, a defendant must satisfy the two-part test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must show both that his or her attorney's performance was deficient and that the deficiency prejudiced him. *Id.* A party who wishes to claim trial counsel was ineffective must give notice to trial counsel so that counsel's testimony may be presented on the matter. *State v. Lukasik*, 115 Wis.2d 134, 139, 340 N.W.2d 62, 64 (Ct. App. 1983). The failure to call Schilling is reason to deny this aspect of Michael's claim.

Apart from the absence of Schilling's testimony, Michael would lose his argument on the merits based upon the trial court's findings of fact previously discussed. Assuming without deciding that Schilling made the threat and that her statement without the accompanying advice that withdrawal required court approval, the fact that Michael entered his plea for a different reason renders Schilling's statement harmless error.

Linda's ineffective counsel claim is partly based upon a contention that trial counsel's demeanor and implied threat to withdraw constituted ineffective counsel. The trial court found that her allegations were untrue.

Linda also supports her ineffective counsel argument with the claim that Buslee had failed to prepare for trial, which was "the direct cause of the pleas [the Cauleys] entered." This argument does not withstand scrutiny. First, the trial court found as a fact that the evidence did not establish that Buslee was unprepared. Further, Linda did not testify that her plea was influenced by Buslee's lack of preparation. Linda's ineffective counsel claim must therefore be rejected.

By the Court. – Orders affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.