

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 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. 95-2518

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN MOLDENHAUER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Vergeront, J., and Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. John Moldenhauer appeals from a judgment convicting him on two counts of child abuse, § 948.03(3)(b), STATS. He also appeals from an order denying postconviction relief. Just before trial, Moldenhauer pleaded no contest to the two charges. In exchange, the State dismissed twenty-four other child abuse charges. The issue is whether trial

counsel forced Moldenhauer to accept the plea by ineffectively preparing his defense. We conclude that counsel effectively represented Moldenhauer and therefore affirm.

The complaint alleged that Moldenhauer physically abused the three children of his live-in girlfriend (who is now his wife). At Moldenhauer's postconviction hearing, he testified that he gave trial counsel the names of numerous witnesses who would provide exculpatory evidence for him. Counsel testified that Moldenhauer only gave him the names of two witnesses, one of whom gave counsel damaging information. The trial court found counsel's recollection credible, and Moldenhauer's not credible. The court also concluded that Moldenhauer's additional witnesses would not have substantially aided his defense, even if contacted by counsel.

Moldenhauer argues that he provided the more credible evidence and that the trial court should have believed his testimony rather than counsel's. However, credibility determinations are not subject to review. *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977).

Alternatively, Moldenhauer contends that even if he did not tell counsel the names of additional witnesses, counsel should have discovered those witnesses in the course of his own investigation. At the postconviction hearing, Moldenhauer introduced testimony from five such witnesses. None of the witnesses were able to testify as to any specific allegation. The trial court characterized their testimony as indefinite and not probative. We agree, at least with regard to four of the witnesses. Two of those were relatives who testified that they never saw Moldenhauer abuse the children during family visits. Two others, a psychologist and school guidance counselor, offered limited testimony about the children's behavioral problems, none of which shed any light on whether Moldenhauer abused them. Only the fifth witness, a friend of Moldenhauer's, offered even marginally significant testimony. He claimed at the hearing that the oldest of the three children told him of plans to frame Moldenhauer. However, this witness did not explain why he did not come forward with this information earlier. Because he did not, it is not readily apparent how counsel could have known of him. Moldenhauer sheds no light on that question.

To establish ineffective assistance of counsel, the defendant must show that counsel's errors or omissions were prejudicial. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Prejudice results when there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Id.* at 642, 369 N.W.2d at 719. For the reasons discussed above, Moldenhauer has not shown that he would have rejected the plea and gone to trial if counsel had conducted a broader investigation of the case.

Moldenhauer faults counsel in two other specific respects for not interviewing the victims and for not seeking witnesses to two instances of alleged abuse that occurred in public. In neither case has Moldenhauer shown that doing so would have produced exculpatory evidence. Again, Moldenhauer has not made the necessary showing of prejudice.

By the Court.— Judgment and order affirmed.

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