

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1764

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM LEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. William Lee appeals a trial court order that denied his WIS. STAT. § 974.06 (1997-98)¹ motion. The motion challenged Lee's 1998

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

conviction for first-degree sexual assault of child, to which Lee had pleaded no contest. The trial court denied the motion without an evidentiary hearing, permitting only argument by the parties. Lee makes several arguments on appeal: (1) the trial court should have held an evidentiary hearing on the motion; (2) ineffective representation by trial counsel rendered Lee's no contest plea invalid; (3) the plea was not knowing and voluntary; (4) the trial court should have furnished Lee a copy of his presentence report (PSI) for his § 974.06 motion; (5) new factors justify sentence modification; and (6) Lee's accusers falsified their allegations, and Lee is thereby not guilty. We reject these arguments and affirm the trial court order.

¶2 The complaint alleged the following facts, as related by the six-year-old boy to a social worker. In May and June 1995, the boy and his family were living with Lee for a short time. During that time, Lee invited the boy into his bed. The boy was wearing shorts and a T-shirt, and Lee was in his underwear. According to the boy, Lee then grabbed the boy's private parts. The boy identified his penis in a drawing as his private parts. The boy claimed that Lee touched his penis through the boy's clothing. When the boy's father and step-mother came home, the boy told them of the incident. The whole family moved out of Lee's home soon after. The boy's mother and step-mother confirmed that the boy had made comments to others about the incident. Lee received a nine-year prison term for his crime.

¶3 We first conclude that the trial court correctly refused to hold an evidentiary hearing on Lee's ineffective trial counsel claim. Lee failed to secure his trial counsel's presence for the hearing. An ineffective counsel claim cannot go forward without counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 803-04, 285 N.W.2d 905 (Ct. App. 1979). Trial counsel's testimony may explain

why he took particular action on Lee's defense. *See id.* Without counsel's presence, the hearing would have served no purpose. For the same reason, we have no basis to review Lee's ineffective counsel arguments. A *Machner* hearing with counsel's presence is a precondition to appellate review. *See State v. Speese*, 191 Wis. 2d 205, 227, 528 N.W.2d 63 (Ct. App. 1995).

¶4 We reject Lee's argument that the plea procedures were inadequate. He needs to show that his plea was unknowing and involuntary. *See State v. Bangert*, 131 Wis. 2d 246, 283-84, 389 N.W.2d 12 (1986). At the postsentencing stage, Lee also needs to demonstrate that his conviction was a manifest injustice. *See State v. Rock*, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). Lee's claim contradicts his representations at the plea hearing. Lee assured the trial court there that he understood his rights and that his plea was voluntary. He provided similar information in his plea questionnaire. The trial court resolved Lee's conflicting claims in favor of those from the plea hearing. Its decision had a reasonable basis. The trial court viewed Lee at the plea hearing and was the judge of credibility. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). As the arbiter of credibility, the trial court could continue to accept Lee's plea assurances over his contrary postjudgment claims. In short, Lee showed no manifest injustice.

¶5 We reject Lee's argument that he is now entitled to a copy of his PSI. Lee's trial counsel reviewed the PSI at sentencing and identified errors for the trial court. Lee never asked to personally review the PSI, however, and raised no concern over any inaccuracies. That inaction was a waiver. *See State v. Romero*, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988). Beyond that, while defendants have a right to review PSI's at sentencing, *see State v. Skaff*, 152 Wis. 2d 48, 57-58, 447 N.W.2d 84 (Ct. App. 1989), their right to see one later is

limited. PSI's are confidential, *see* WIS. STAT. § 972.15(4), and Lee is required but failed to show relevance and a substantial need for postconviction review. *See State v. Zanelli*, 223 Wis. 2d 545, 562, 589 N.W.2d 687 (Ct. App. 1998). He made no threshold showing that any trial court sentencing findings rested on erroneous information.

¶6 Lee has shown no new factor warranting sentence modification. New factors are facts highly relevant to the sentence but not known at sentencing because the facts did not then exist or the parties unknowingly overlooked them. *See State v. Toliver*, 187 Wis. 2d 346, 361-62, 523 N.W.2d 113 (Ct. App. 1994). Here, Lee claims that the victim and victim's father made false accusations against him. Lee and his counsel both raised these matters at sentencing, however, and the trial court is presumed to have considered them before rendering sentence. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Since these matters were known to Lee at sentencing they do not qualify as new factors. They therefore give Lee no basis to seek sentence modification.

¶7 Last, we will not examine Lee's arguments that he is not guilty of the crime. Lee's no contest plea constituted a waiver of all nonjurisdictional defects. *See Bangert*, 131 Wis. 2d at 293. Beyond the waiver stemming from the plea, Lee expressly waived his rights to testify, to call witnesses, and to confront his accusers by stipulation in his plea questionnaire and again at the plea hearing. If Lee wanted to contest the charges, he should not have pleaded no contest. Lee may vacillate before the plea, not after. *See State v. Garcia*, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). Under these circumstances, Lee has no basis to protest his guilt.

By the Court.—Order affirmed.

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

