

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 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. 99-3325

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES L. DAVIES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Charles L. Davies was convicted in 1997 of three counts of first-degree sexual assault of a child. He has now appealed pro se from an order denying his motion for postconviction relief under WIS. STAT. § 974.06

(1997-98).¹ In his motion, Davies sought to withdraw his guilty pleas based on allegations that the prosecutor withheld exculpatory evidence which proves his innocence. He also moved to disqualify the Honorable Bruce E. Schroeder, the judge who accepted his guilty pleas and sentenced him. We affirm the order.

¶2 On appeal, Davies repeats his contention that Judge Schroeder should have disqualified himself and not decided his postconviction motion. He contends that Judge Schroeder presided at his guilty plea and sentencing hearings, and therefore was prejudiced against him and could not impartially consider his postconviction motion.²

¶3 A defendant has a constitutional right to a fair and impartial judge. *See State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). An allegation of bias by a defendant must be reviewed under both a subjective and objective test. *See id.* at 415.

¶4 “The subjective component is based on the judge’s own determination of whether he will be able to act impartially.” *Id.* Because Judge Schroeder did not disqualify himself, it is clear that he believed he could decide Davies’s motion impartially. *See id.* Our inquiry under the subjective test goes no further. *See id.*

¶5 Application of the objective test requires us to determine whether there are objective facts demonstrating that Judge Schroeder was actually biased.

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

² Davies also cites cases dealing with judicial substitution. However, the time limits for substitution in a criminal case under WIS. STAT. § 971.20 expired years before Davies filed his postconviction motion.

See id. at 416. Speculation is insufficient. *See id.* In this case, Davies’s only allegations were that Judge Schroeder was biased against him because he had previously determined Davies’s guilt. Davies contends that granting postconviction relief would have required Judge Schroeder to determine that he had previously erred in convicting Davies, and he therefore would not be able to decide Davies’s postconviction motion fairly.³

¶6 It is a common and accepted practice for the trial court judge who handled a criminal case to handle subsequent postconviction motions. This practice provides no basis for determining that Judge Schroeder was actually biased against Davies, nor does it give rise to the appearance of bias. *Cf. State v. Voight*, 61 Wis. 2d 17, 21-23, 211 N.W.2d 445 (1973). Because Davies presented no other basis for his motion for disqualification, Judge Schroeder properly denied the request.

¶7 Davies’s next argument is that he is entitled to relief because the trial court had an improper, ex parte communication with the prosecutor. He bases this argument on a letter in the record from the trial court to the prosecutor which stated simply: “Enclosed please find a copy of materials which have been submitted to the court regarding the noted case. You are invited, should you desire, to respond within ten days.”

¶8 The letter contains the notation “cc: Charles L. Davies.” Because this notation indicates that a copy of the letter was sent to Davies, the record itself rebuts Davies’s claim that the trial court engaged in any kind of ex parte

³ Contrary to Davies’s contention, it is irrelevant that the trial court addressed the motion for disqualification and the motion for postconviction relief at the same time.

communication with the prosecutor.⁴ Moreover, even accepting Davies's contention that he never received the copy, this claim does not constitute an issue of jurisdictional or constitutional dimension, and therefore provides no basis for relief under WIS. STAT. § 974.06. *See Vara v. State*, 56 Wis. 2d 390, 392, 202 N.W.2d 10 (1972). In addition, because the letter merely transmitted copies of Davies's motion papers to the prosecutor and invited a response, Davies suffered no harm even if he did not receive a copy of the letter, and no relief is warranted. *See State v. Stark*, 162 Wis. 2d 537, 547, 470 N.W.2d 317 (Ct. App. 1991).

¶9 Davies's next contention is that his three sexual assault convictions were multiplicitous. However, this claim was not raised by Davies in his direct appeal. A defendant's failure to raise an issue in his or her direct appeal bars later consideration of that issue, unless this court ascertains that a sufficient reason exists for the defendant's failure to raise it. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 183, 517 N.W.2d 157 (1994). Because Davies has not set forth a sufficient reason for his failure to timely raise this issue, we deem it waived.⁵

¶10 Davies's primary arguments are that the trial court erred by denying his motion to withdraw his guilty pleas without holding an evidentiary hearing, and erred by failing to address his demand for discovery. Both of these arguments are premised on his claim that the prosecutor withheld exculpatory evidence related to a physical examination of the victim. In support of this argument he

⁴ Davies appears to believe that because the record does not contain a separate copy of the copy sent to him, the record establishes that an ex parte communication occurred. However, since the letter itself indicates that a copy was sent to Davies, it would be nonsensical to expect the record to also contain a separate copy of that copy.

⁵ Although Davies's appointed counsel filed a no merit report in his direct appeal, Davies could have raised this multiplicity issue in his response to the report.

contends that he was informed by the victim's father on October 10, 1999, that a medical examination of the victim occurred on June 20, 1997, and that the examination revealed no evidence of physical injury or sexual assault. He further cites to a victim impact statement completed prior to sentencing by the victim's father, stating that the victim "had a sexual assault exam" and that "no physical damage was found."

¶11 Initially, we note that this issue appears to be barred under *Escalona*. Although Davies alleges that he was informed on October 10, 1999, that an examination had occurred, the victim impact statement was filed at the time of sentencing. At the sentencing hearing, Davies's counsel stated that he had gone over the presentence report with Davies "together with the victim impact statement." Because a review of the victim impact statement would have revealed to Davies and his counsel that a sexual assault examination had occurred, any claim that the prosecutor violated Davies's rights by failing to disclose examination results or records should have been raised in Davies's direct appeal and postconviction proceedings.

¶12 Even ignoring any waiver under *Escalona*, we conclude that the trial court properly denied Davies's postconviction motion without a hearing. A trial court, in its discretion, may deny a postconviction motion without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. See *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In addition, when a defendant seeks to withdraw a guilty plea on the ground that the prosecutor withheld exculpatory evidence, he or she must demonstrate: (1) that exculpatory material in the possession of the prosecutor was withheld; (2) that this

constitutional violation caused him or her to plead guilty; and (3) that he or she was unaware of the potential constitutional challenge at the time he or she entered the guilty plea. *See State v. Sturgeon*, 231 Wis. 2d 487, 496-97, 605 N.W.2d 589 (Ct. App. 1999).

¶13 Nothing alleged in Davies's motion provides a basis to conclude that exculpatory material was withheld. The victim impact statement on its face is not exculpatory. It sets forth the statement of the victim's father, who was not a medical expert. Most importantly, although the presence of scarring, tearing or other injury may support a claim of sexual assault, the absence of physical evidence of injury or sexual assault does not prove that an assault did not occur. *See State v. Hernandez*, 192 Wis. 2d 251, 254-55, 531 N.W.2d 348 (Ct. App. 1995), *overruled on other grounds by State v. Eugenio*, 219 Wis. 2d 391, 404, 597 N.W.2d 642 (1998). *See also State v. Truman*, 187 Wis. 2d 622, 626-27, 523 N.W.2d 177 (Ct. App. 1994). This is particularly true here, where the examination is alleged to have taken place months after the final assault alleged in the complaint.⁶

¶14 Because the lack of physical evidence of injury or sexual assault is not exculpatory and does not establish that Davies is innocent of the crimes to which he pled guilty, the trial court properly determined that neither an evidentiary hearing nor postconviction relief was warranted. Absent a showing by Davies that

⁶ We further note that Davies pled guilty to three counts of sexual assault, two of which alleged sexual contact by the touching of the victim's vagina. Only the third count alleged that Davies placed his penis in the victim's vagina. Davies's argument is that he could not have penetrated the vagina of a young girl without injuring her, an argument which appears to relate only to the third count. In any event, for the reasons discussed in our decision, evidence that a medical examination showed no evidence of sexual assault or physical injury is nonexculpatory as to all of the counts.

any medical records were exculpatory, we also reject his argument that the trial court deprived him of his rights by failing to order discovery of any records that might exist.

¶15 The record also provides no basis to conclude that Davies would have gone to trial rather than pleading guilty if he had been aware of the medical examination before he entered his guilty pleas. When a defendant seeks to withdraw a guilty plea on the ground that exculpatory evidence was withheld, “the relevant inquiry is whether there is a reasonable probability that, but for the failure to disclose, the defendant would have refused to plead and would have insisted on going to trial.” *Sturgeon*, 231 Wis. 2d at 503-04. Factors which are relevant to this question include: (1) the relative strengths and weaknesses of the State’s case and the defense; (2) the persuasiveness of the withheld evidence; (3) the reasons expressed by the defendant for pleading guilty; (4) the benefits obtained by the defendant in exchange for his or her plea; and (5) the thoroughness of the plea colloquy. *See id.* at 504.

¶16 Because Davies confessed to the police that he had sexually assaulted the victim on more than one occasion, and because he was a family friend who was well known by the victim, thus eliminating any misidentification concerns, the State’s case must be considered strong. In comparison, nothing in the record provides a basis for concluding that Davies had a strong defense.

¶17 For the reasons previously discussed, evidence that the victim suffered no physical injury as a result of the assaults was not persuasive as to Davies’s innocence. Moreover, the plea colloquy was thorough, and Davies repeatedly expressed his guilt and remorse at both the guilty plea and sentencing hearings. In addition, he gained some benefit from entering his guilty pleas,

including the prosecutor's agreement to dismiss one charge, to recommend probation on two of the three remaining counts, and to refrain from bringing additional charges involving this victim.

¶18 Under these circumstances, we conclude that Davies failed to establish that he was entitled to either a hearing or postconviction relief. Nothing in his motion provided a basis to conclude that exculpatory material was withheld or that the withholding of records of a medical examination of the victim caused him to plead guilty. The trial court therefore properly denied his requests for relief.

By the Court.—Order affirmed.

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

