

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 29, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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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.

**Appeal No. 2015AP779-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF5779

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSE A. ALICEA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN and ELLEN R. BROSTROM, Judges. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Jose A. Alicea appeals a judgment convicting him of first-degree sexual assault of a child, contact with a child under the age of thirteen. He also appeals an order denying his postconviction motion to withdraw

his guilty plea. He argues that he is entitled to withdraw his plea because he was not aware that he would be required to register as a sex offender for life after being convicted.<sup>1</sup> We affirm.

¶2 Alicea was charged with two counts of first-degree sexual assault of a child. Pursuant to a plea agreement, he entered a no-contest plea to one count and the other count was dismissed and read in for sentencing. Several weeks after the plea hearing, Alicea decided that he wanted to withdraw his plea. He asked his retained counsel, Attorney Frederick Klimetz, to withdraw, and Attorney Louis Epps was appointed to represent Alicea. Epps moved to withdraw Alicea's plea prior to sentencing, but the circuit court denied the motion. The circuit court sentenced Alicea to twenty months of initial confinement and four years of extended supervision. Alicea moved for postconviction relief, again seeking to withdraw his plea, arguing that he was not aware that he would be required to register as a sex offender for life when he entered his plea.<sup>2</sup> The circuit court denied the motion.

¶3 “A circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution [is] substantially prejudiced.” *State v. Garcia*, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). A defendant who is not aware of a sex offender registry requirement has a fair and just reason for moving to withdraw a plea before sentencing. *See State v. Bollig*, 2000 WI 6, ¶31, 232 Wis. 2d 561, 605 N.W.2d

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<sup>1</sup> The Honorable Ellen R. Brostrom presided over Alicea's plea hearing. The Honorable Stephanie Rothstein presided over the subsequent orders and the judgment entered in this case.

<sup>2</sup> The circuit court did not inform Alicea that he would be required to register as a sex offender for life during the plea colloquy.

199. Where a defendant moves to withdraw his plea *after* sentencing, however, the defendant faces a more significant challenge: the defendant must show by clear and convincing evidence that there will be a manifest injustice if the defendant is not allowed to withdraw the plea. See *State v. Taylor*, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482. The manifest injustice test is met if a defendant receives ineffective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶4 To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his lawyer performed deficiently and that deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court may reject a claim of ineffective assistance of counsel on either ground. *Id.* at 697. “Whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact.” *State v. Hunt*, 2014 WI 102, ¶22, 360 Wis. 2d 576, 851 N.W.2d 434. We will uphold the circuit court’s factual findings unless they are clearly erroneous. See *id.* Whether counsel’s performance was deficient and whether the defendant was prejudiced are questions of law that we decide *de novo* based on the circuit court’s factual findings. See *id.*

¶5 Alicea contends that he received ineffective assistance of trial counsel when Klimetz moved to withdraw his plea before sentencing and Epps moved to withdraw his plea after sentencing. Alicea argues that both lawyers should have argued that he was not aware that he would have to register as a sex offender for life when he entered the plea.

¶6 At the postconviction motion hearing, Klimetz testified that he did not recall discussing the sex offender registry requirement with Alicea before he

entered his plea. Klimetz testified that several weeks after the plea hearing, Alicea told him he wanted to withdraw the plea because he believed the victim's mother had made a false statement to the police and thought that DNA testing might provide him with a defense. Klimetz testified that Alicea never raised concerns with him about being unaware of his obligation to register as a sex offender.

¶7 Epps testified that he represented Alicea after Klimetz withdrew and had over twenty years of experience as a criminal lawyer. Epps testified that his first order of business was to move to withdraw Alicea's plea before sentencing. Alicea told him that he had entered the plea only because he was frightened by the maximum total sentence he faced, which would have been 120 years for both counts. Epps testified that he could not recall whether Alicea said that he was unaware of the sex offender reporting requirement when he entered his plea, although Epps testified that Alicea told him that he did not want to register as a sex offender. Epps testified that he took notes when he met with Alicea, but he did not include anything in his notes that suggested that Alicea said he was confused about the sex offender registry requirement. Epps also testified that if Alicea had asserted that he did not know about the requirement to register, Epps believed he would have made a note of that because it would have provided a fair and just reason for withdrawing the plea before sentencing.

¶8 Alicea testified that Klimetz did not tell him that he would have to register as a sex offender before he entered his no-contest plea. Alicea testified that he learned about the sex offender registry from other inmates after he pled no contest and he would not have entered the plea if he had known. Alicea said that he told Klimetz that he wanted to withdraw his plea because he did not want to live the rest of his life as a registered sex offender. Alicea then testified that he told Epps he would never have entered the plea if he had known about the registry

requirement and told Epps that he could not live the rest of his life as a registered sex offender. Alicea testified that he was surprised that Epps did not raise the issue during the hearing on the motion to withdraw because he expected him to do so. Alicea then testified, in apparent contradiction, that Epps told him that the fact that he did not know about the sex offender registry requirement was not important. Alicea also testified that even though he received only twenty months of initial confinement and would be released shortly, and knew that he faced a maximum of 120 years of imprisonment if he withdrew his plea, he nevertheless wanted to withdraw his plea.

¶9 The circuit court explained that its ruling turned on the credibility of the witnesses. The circuit court pointed out that Epps gave careful answers to questions during his testimony. Epps testified that he did not remember Alicea saying that he was not aware that he had to register as a sex offender. The circuit court explained that it doubted Alicea's credibility because he had previously moved to withdraw his plea on two different grounds, but had not raised the sex offender registry issue at that time, and was raising it now only after his other attempts to withdraw his plea had been unsuccessful. The court also found that Alicea's assertion that he discussed the matter with Epps was not credible.<sup>3</sup>

¶10 We will uphold the circuit court's factual findings and credibility determinations unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2)

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<sup>3</sup> In the transcript, the circuit court states: "I don't find [Alicea] to be credible in his assertion that he did not discuss this with Mr. Epps." It is clear from the context of the statement, however, that the circuit court meant "I don't find [Alicea] to be credible in his assertion that he discussed this with Mr. Epps."

(2013-14).<sup>4</sup> The circuit court’s determination finding Epps to be credible and specifically finding that Alicea did not tell Epps that he wanted to withdraw his plea prior to sentencing because he did not understand the sex offender registry requirement are not clearly erroneous. We agree with the State that “[c]ontext matters,” and therefore the circuit court properly considered Alicea’s previous attempt to withdraw his plea and “the complete absence of any reference to the sex offender registry in the previous motion and hearings.” Klimetz could not recall discussing the sex offender registry with Alicea, but understood that he wished to withdraw his plea based on other grounds. Epps, who was an experienced criminal lawyer, could not recall Alicea telling him that he did not understand the registry requirement, but testified that if he had, Epps would have understood that reason to satisfy the fair and just standard. Alicea asserted that he told both Klimetz and Epps that he did not know about the sex offender registry requirement, and gave somewhat conflicting testimony about his interaction with Epps about the matter. Based on the conflicting testimony, the circuit court acted properly by assessing the credibility of the witnesses and finding that Alicea’s version of events not credible. Therefore, we uphold the circuit court’s finding that Alicea did not tell Epps that he was not aware that he would have to register as a sex offender prior to sentencing.

¶11 Because Alicea did not tell Epps that he did not understand that he would be required to register as a sex offender if he pled no contest before Epps filed the first motion to withdraw Alicea’s plea, Epps did not perform deficiently by failing to raise the issue prior to Alicea’s sentencing, in which case Alicea

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<sup>4</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

would have been permitted to withdraw his plea under *Bollig*, 232 Wis. 2d 561, ¶31. We therefore reject Alicea's claim that he is entitled to post-sentencing plea withdrawal based on ineffective assistance of counsel.

*By the Court.*—Judgment and order affirmed.

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

