COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1728-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIN D. LENOIR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Devin Lenoir appeals from a judgment convicting him of robbery, and an order denying postconviction relief. The issue is whether the trial court properly denied Lenoir's postconviction motion without an evidentiary hearing. We affirm.

The State charged Lenoir with armed robbery. At the preliminary hearing, the victim testified that Lenoir was holding a gun and that a shot was fired at him. Lenoir subsequently pleaded guilty to a reduced charge of robbery, and received a ten-year prison sentence. He subsequently moved to vacate his plea, alleging that: (1) the State failed to provide exculpatory results of a powder burn residue test, (2) Lenoir had newly discovered exculpatory evidence, (3) the prosecutor failed to timely disclose the status of the prosecution against his accomplice, (4) the State did not have sufficient evidence to convict him, and (5) as a result of these and other factors, his plea was involuntary and unknowing.

Upon review of the State's letter brief and response, the court informed the parties that it did not believe the motion stated any grounds upon which Lenoir could obtain an order vacating his plea. Consequently, the court set oral argument by counsel on the question of whether Lenoir could obtain an evidentiary hearing on his motion. At the close of that hearing, the trial court denied the postconviction motion. The court ruled that no evidence was needed because Lenoir's issues were either waived or he failed to present the necessary factual predicate to proceed further, either in his motion or at the hearing.

On appeal, Lenoir contends that he had a right to testify and present evidence on his motion. However, that right is not absolute.

> [I]f the defendant fails to allege sufficient facts in his 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, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

State v. Bentley, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996) (quoting ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972)).

Allegations are conclusory, and therefore insufficient, if they do not allow the reviewing court to meaningfully assess the claim. ***Bentley***, 201 Wis.2d at 314, 548 N.W.2d at 55.

In Lenoir's first claim, he alleged that a powder burn residue sample was taken after he was arrested in this matter, but that no testing result was ever submitted to him. Furthermore, he believes that the testing was exculpatory. However, Lenoir waived this issue by not raising it before he entered his plea. ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). If he contends that this is newly discovered evidence, his motion failed to explain why it was not discovered before his conviction.

In Lenoir's second claim he alleged that "one Brian Vandolah furnished some type of information, indicating that a witness had disclosed that the defendant Lenoir was not guilty ...." At oral argument, Lenoir's counsel did not substantially elaborate on that allegation. Accordingly, the trial court reasonably concluded that it could not meaningfully assess this claim of newly discovered evidence.

Lenoir's third claim alleged that the prosecutor failed to divulge the fact that Lenoir's accomplice was not prosecuted. The trial court reasonably concluded that the prosecution or nonprosecution of his accomplice was an easily discoverable fact during Lenoir's prosecution, and that the status of the accomplice's case was not material in any event absent a showing that Lenoir intended to use the accomplice as a witness. Newly discovered evidence warrants withdrawal of a plea only if, among other things, the defendant was not negligent in seeking the evidence, and the evidence is material. ***State v. Krieger***, 163 Wis.2d 241, 255, 471 N.W.2d 599, 604 (Ct. App. 1991).

Lenoir's fourth claim alleged that the evidence was insufficient to convict him of robbery. More specifically, he contended that the only evidence against him was the victim's identification, and the victim was not a credible witness because of his prior criminal convictions and unspecified inconsistent prior statements. If Lenoir intended to claim that the evidence did not prove his guilt beyond a reasonable doubt, that issue was also waived by his plea. ***Aniton***, 183 Wis.2d at 129, 515 N.W.2d at 303. If he was alleging that his guilty plea lacked an adequate factual basis, that argument also fails. The complaint unequivocally states that the victim identified Lenoir. He also unequivocally identified Lenoir as the perpetrator in his testimony at the preliminary hearing. The trial court had an adequate factual basis to accept the plea, even if a hypothetical trier of fact might disbelieve the victim's statements in a trial.

Finally, Lenoir alleged that his plea was unknowing and involuntary not only because of the issues identified previously in his motion, but also because he did not understand the potential penalties he faced. The latter allegation is disproved by Lenoir's unequivocal statement at his plea hearing that he did, in fact, know the potential punishment for robbery, right after the trial court informed him on the record of that potential punishment. In any event, he neither alleged nor attempted to show that the trial court violated its duty to insure a knowing and voluntary plea. *See* ***State v. Giebel***, 198 Wis.2d 207, 216, 541 N.W.2d 815, 818-19 (Ct. App. 1995) (defendant challenging plea must show prima facie violation of § 971.08(1)(a), STATS., or other mandatory duties, and must allege he or she did not in fact know or understand the information that should have been provided).

By the Court.—Judgment and order affirmed.

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