

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-3747

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN THE INTEREST OF ADAM C.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

ADAM C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed in part, reversed in part and cause
remanded with directions.*

WEDEMEYER, P.J.¹ Adam C. appeals from a dispositional order
adjudging him delinquent after a jury found him guilty of one count of second-

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

degree sexual assault and one count of first-degree sexual assault of a child, contrary to §§ 940.225(2)(a) and 948.02(1), STATS. He also appeals from an order denying his postconviction motion, which alleged ineffective assistance of trial counsel. He claims the trial court erred in denying his postconviction motion without holding a *Machner* hearing² to address whether counsel was ineffective for failing to introduce evidence regarding the victim's sexual advances toward Adam C. and for failing to adequately prepare for the defense of the case. Because Adam C.'s motion alleges sufficient facts to raise a question of fact necessitating a *Machner* hearing, this court reverses the postconviction order and remands with directions that the trial court conduct a *Machner* hearing.³

I. BACKGROUND

The convictions in this case arise out of conduct that occurred on or about February 17, 1996, while the victim, Richard B., and Adam C. both resided at Homme Home, a group home located in Wittenberg, Wisconsin. Richard alleged that Adam forced Richard to perform oral sex on Adam. After a trial to a jury, Adam was convicted.

Adam filed a postconviction motion alleging ineffective assistance of trial counsel on two grounds: (1) counsel failed to offer evidence of prior sexual conduct initiated by the victim with Adam, which would have established a motive for the victim's fabrication of the allegations; and (2) counsel failed to prepare favorable witnesses for the defense prior to trial. The trial court denied

² See *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

³ It is not necessary at this juncture to reverse the dispositional order. Therefore, this court affirms that order.

the motion without conducting an evidentiary hearing, concluding that “the record as a whole does not demonstrate that trial counsel’s performance was deficient.” Adam now appeals.

II. DISCUSSION

As a defendant in a criminal case, Adam has the right to effective assistance of trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to show that he received ineffective assistance, Adam must demonstrate that his counsel’s performance was both deficient and prejudicial. *See id.* at 687. In assessing ineffective assistance claims, an evidentiary hearing at which trial counsel testifies regarding the alleged deficient performance is generally required. *See State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). A hearing, however, is not automatically granted in every case. Rather, a hearing should be granted only when a postconviction motion alleges “facts which, if true, would entitle the defendant to relief.” *Nelson v. State*, 54 Wis.2d 489, 497, 195 N.W.2d 629, 633 (1972).

In reviewing a trial court’s refusal to hold a *Machner* hearing, this court independently reviews the postconviction motion “to determine whether it alleges facts sufficient to raise a question of fact necessitating a *Machner* hearing.” *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).

Adam’s motion alleges specific, substantial allegations that are sufficient to require an evidentiary hearing. He alleges that:

[d]uring the course of the trial, defense counsel learned from the Defendant that the victim had made various sexual advances toward the Defendant requesting oral sex from the Defendant and that these advances occurred very often while both of them resided a [sic] juvenile treatment facility.

He further states that trial counsel:

inquired during cross-examination of the alleged victim whether he had at any time made sexual advances toward the Defendant. However, after an offer of proof on the record stating that there [sic] instances where the victim made sexual advances toward the Defendant, defense counsel withdrew the examination of the victim's sexual history with the Defendant prior to the trial court rendering any definitive ruling ... [and t]he reasons for counsel's withdrawal of the inquiry are not expressed in the record.

If these allegations are true, that is, if the victim did make prior sexual advances toward Adam, which were rejected, this evidence very well may be admissible pursuant to § 972.11(2)(b)1., STATS.⁴ Because the defense theory argued was that the assault never occurred, but rather was fabricated, this evidence appears to be highly significant to the credibility of the complaining witness. Without any opportunity for trial counsel to testify as to why this line of questioning was abandoned, it is not possible to assess whether such conduct was deficient.⁵ Further, without counsel's explanation, this court cannot independently conclude that failure to introduce this evidence was not prejudicial. Adam alleges

⁴ Section 972.11(2)(b)1., STATS., provides in pertinent part:

(b) If the defendant is accused of a crime under s. 940.225, 948.02, ..., any evidence concerning the complaining witness's prior sexual conduct ... shall not be admitted into evidence during the course of the hearing or trial ... except ...:

1. Evidence of the complaining witness's past conduct with the defendant.

⁵ Two possible explanations appear to be presented: either trial counsel believed the trial court had ruled to exclude this evidence or, after consulting defense witnesses, trial counsel independently decided to abandon this line of questioning. Nevertheless, because of this uncertainty, and because this court is in no position to evaluate the prejudicial effect of counsel's decision, and until this court knows what counsel did and why, this court must reverse and remand for a *Machner* hearing.

that the credibility of the witnesses was essential to the case and that without the introduction of the abandoned evidence, the victim's testimony was "infinitely [more] credible."

Given the specific factual allegations in Adam's postconviction motion, the trial court should have conducted an evidentiary hearing in order to assess whether counsel's conduct was deficient and, if so, whether the deficient conduct was prejudicial.

Therefore, this case is remanded to the trial court for a *Machner* hearing.⁶

By the Court.—Orders affirmed in part, reversed in part and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

⁶ This court also concludes that a *Machner* hearing is necessary to determine whether trial counsel was ineffective for failing to properly prepare witnesses that were favorable to the defense.

