COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2506

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREBLE HWORB HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Treble Henderson appeals an order denying his motion for postconviction discovery. We conclude that the trial court properly exercised its discretion in denying the motion and affirm.

¶2 Henderson was charged with aggravated battery and three counts of second-degree sexual assault following a complaint that he had broken into a woman's apartment and forcibly raped her. The trial court ordered tests of Henderson's blood, saliva, and head and pubic hairs to be taken so that they could be compared against samples taken from the victim. Henderson's first attorney requested that the resulting reports be turned over to him. Henderson alleges that the reports were in fact turned over to counsel, and that counsel told him the results were negative. However, Henderson claims that the reports were never turned over to successor counsel, and that the trial court was not made aware of them prior to the time Henderson entered Alford pleas to the charges and was convicted and sentenced. Now, six years after his conviction, Henderson seeks a discovery order requiring that the victim's medical records relating to the sexual assault be released to him.

¶3 As a threshold matter, we question whether material which has already been turned over to the defense qualifies as "discovery." It is unclear why Henderson could not request his former counsel to provide the medical records he seeks. Since neither party addresses this issue, however, we will use the established postconviction discovery framework to analyze whether Henderson is entitled to duplicate copies of the medical records.

¶4 Although Wisconsin provides no statutory mechanism for the postconviction discovery of scientific evidence, such discovery may be obtained upon a showing of materiality. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 319-20, 588 N.W.2d 8 (1999). Sought-after evidence is material, that is, relevant to an issue of consequence, when there is a reasonable probability that its disclosure would produce a different outcome of the case. ***Id***. at 320-21. We will not set

aside the trial court's determination as to the materiality of evidence sought to be discovered in postconviction proceedings unless it is clearly erroneous. ***Id.*** at 322.

¶5 Henderson argues that the medical records he seeks are material because they would support a motion for plea withdrawal. Specifically, he claims that he would not have entered Alford pleas if successor counsel had seen the reports, or alternatively, that the trial court would not have accepted the pleas if the medical reports had been brought to its attention.

¶6 In order to withdraw a plea, a defendant must demonstrate by clear and convincing evidence that the plea was manifestly unjust. ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). "Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred" particularly if it undermines the factual basis for the plea. ***State v. McCallum***, 208 Wis. 2d 463, 473 ¶16, 561 N.W.2d 707 (1997); ***Krieger***, 163 Wis. 2d at 255. A motion for plea withdrawal may be denied without a hearing, however, when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶7 Here the trial court determined that the Henderson's allegations were conclusory in nature and would be insufficient to warrant plea withdrawal. It noted that Henderson had failed to explain how the reports would establish his innocence. As the State points out, the absence of saliva or matching hair samples neither precludes the possibility of sexual assault nor shows that some other person perpetrated the crime. Considerable evidence exists pointing to Henderson's guilt, including the victim's account; the fact that police apprehended Henderson in the victim's apartment after responding to a concerned citizen's

report of screaming; and Henderson's own admission that he dressed as a security guard, broke into the victim's apartment, hit her on the head with a brick when she attempted to escape, and tore off her clothing. In addition, Henderson's previous assertions that he was highly intoxicated and high on valium at the time of the offense, that he was mentally incompetent due to lead poisoning, and that he was very sorry for what he did to the victim, all contradict his current claim of innocence. Thus, the medical reports would not have negated the factual basis for the pleas.

¶8 Finally, we note that Henderson was well aware of the test results prior to entering his pleas, and this undermines his assertion that he would not have entered the pleas if the reports had been turned over to successor counsel. The record shows that Henderson entered his pleas after obtaining an expert opinion which would have made an insanity defense highly unlikely to succeed. In sum, the trial court could reasonably have concluded that Henderson's allegations were insufficient to establish a manifest injustice, and therefore its implied finding that Henderson had failed to show that the medical records were material was not clearly erroneous.

By the Court.—Order affirmed.

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