

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 26, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-0564-CR
95-0565-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL E. LAFAVE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: SUSAN E. BISCHER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Daniel LaFave appeals a judgment convicting him of three counts of first-degree sexual assault and an order denying his motion to withdraw his guilty pleas. He argues that his pleas were not knowing and voluntary because his trial counsel mistakenly informed him and he reasonably believed he could appeal two pretrial evidentiary decisions despite the guilty

plea. The trial court found that LaFave was not misinformed about his right to appeal an order denying his motion to allow medical evidence that one of the victims tested positive for a venereal disease and LaFave tested negative. The trial court further ruled that LaFave was misinformed about his right to appeal the decision allowing the State to present other crimes (*Whitty*)¹ evidence, but he did not rely on that advice in reaching his decision to plead guilty. Because the record supports the trial court's findings of fact and those findings defeat LaFave's claim of a manifest injustice, we affirm the judgment and order.

At the time of the guilty plea, the trial court had not finally decided whether to allow the medical evidence. Rather, the court found that the defense had not made a satisfactory offer of proof, but allowed an opportunity for the defense to present additional information. LaFave's trial counsel investigated the matter further and concluded that he had no medical evidence that would support LaFave's innocence. He then commenced plea negotiations without securing a final decision from the trial court. LaFave contends that his trial counsel told him, or at least he understood, that he could appeal the decision despite entering a guilty plea.

The record supports the trial court's finding that LaFave's trial counsel did not misinform him of his right to appeal the medical evidence ruling. It is reasonable to infer from counsel's testimony at the postconviction hearing that he did not inform LaFave that he could appeal the medical evidence ruling because no final ruling had been made. Section 971.31(10), STATS., allows a postjudgment appeal from an order denying a motion to suppress evidence despite entry of a guilty plea. Because counsel knew that no final decision had been made and no appeal could be taken unless the trial court decided the action, it is unlikely that counsel would misinform his client that he could appeal a decision that had not yet been made.²

LaFave's entire argument that he reasonably believed he could appeal the medical evidence ruling or could appeal his "whole case" is based

¹ *State v. Whitty*, 86 Wis.2d 380, 272 N.W.2d 842 (1978).

² We need not address whether an order denying a defendant the right to present certain evidence is appealable under § 971.31(10), STATS.

solely on his testimony. While LaFave's briefs repeatedly refer to trial counsel's statements that LaFave could appeal "suppressed evidence," counsel's testimony stated only that he could appeal an order denying a motion to suppress evidence. An order denying the defense motion to present medical evidence cannot be fairly described as an order denying a motion to suppress evidence. The trial court found that LaFave's testimony regarding his understanding of his appeal rights was not credible. Throughout the postconviction hearing, LaFave testified to matters that were directly contradicted by statements he made at the plea hearing. The trial court reasonably found that LaFave lacked credibility on numerous matters, including whether he misunderstood his right to appeal. In the absence of credible testimony establishing a misunderstanding of his appellate rights, LaFave has not established by clear and convincing evidence that he should be allowed to withdraw his guilty pleas to correct a manifest injustice. See *State v. Krieger*, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991).

The record also supports the trial court's finding that LaFave's decision to plead guilty was not influenced by his counsel's erroneous advice on his right to appeal the order allowing the State to present *Whitty* evidence. LaFave relies on the fact that his trial counsel testified that LaFave asked about his right to appeal the decision on *Whitty* evidence at some point before LaFave made the decision to plead guilty. While that testimony might support an inference that LaFave based his guilty pleas on that assurance, it was not the only evidence the trial court considered. The trial court noted that LaFave's postconviction motion and his testimony did not refer at all to the *Whitty* motion. When asked by the prosecutor what pretrial motions he was talking about, LaFave answered "there was a negative herpes test and there was a negative sexual assault test." It is the trial court's function to assess the credibility of the witnesses, weigh the evidence and draw inferences from the evidence. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). LaFave's complete failure to mention a desire to appeal *Whitty* evidence until after his trial counsel testified supports the trial court's finding that counsel's erroneous advice on the appealability of *Whitty* evidence had "no significant impact" on his decision to plead guilty.

By the Court.—Judgment and order affirmed.

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