COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1092-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARVIN PRINCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

DEININGER, J. Marvin Prince appeals a judgment convicting him of attempted first-degree sexual assault and substantial battery, in violation of §§ 940.225(1)(b) and 940.19(3), STATS. He claims the trial court erred in not permitting him to withdraw his no contest pleas to the two felonies prior to his sentencing. He cites two reasons for his plea withdrawal request: his

misunderstanding of the elements of the attempted sexual assault charge, and the State's failure to provide Prince and his defense counsel a certain crime lab report prior to his entering the pleas. We conclude that, on this record, the trial court did not erroneously exercise its discretion when it determined that neither constitutes a "fair and just reason" that would require the court to grant the request.

BACKGROUND

The State initially charged Prince with the two charges of which he was ultimately convicted, and for which he faced a potential twenty-five years in prison. At the preliminary hearing, the complaining witness testified that Prince held a knife to her throat and ordered her to remove her clothing; that when she resisted, Prince fought with and struck her; and that as a result of the struggle, she lost consciousness, suffered broken bones and teeth, and incurred other injuries. The State then filed an information which replaced the substantial battery count with a charge of first-degree reckless injury while possessing a dangerous weapon, thereby increasing the potential maximum incarceration on the second count from five years to fifteen years.

Prince, through his initial defense counsel, negotiated a plea agreement whereby the State agreed to file an amended information alleging the original two charges, thereby reducing Prince's potential imprisonment from thirty-five to twenty-five years. On his pleas of no contest, a presentence investigation would be jointly requested, and each party would be free to argue sentencing without limitation. On July 1, 1996, at a court appearance scheduled for the entry of his pleas, Prince declined to go forward with the plea agreement. On July 11, 1996, however, he entered no contest pleas to both counts of the amended information. The court then ordered a presentence investigation and

scheduled the matter for sentencing. Relevant details of the plea proceeding will be discussed in the analysis which follows.

At the sentencing hearing on August 29, 1996, Prince acknowledged that he had received and reviewed the presentence investigation report. Prince then informed the court that he wanted to discharge his defense counsel and withdraw his pleas. Prior to that time, Prince had not informed his counsel of his desire to withdraw his pleas or to have a new attorney. Sentencing was continued to allow Prince to obtain new counsel and to file a motion requesting plea withdrawal. His new counsel filed a plea withdrawal motion on November 6, 1996, and the court heard the motion on November 11 and 13, 1996.

Prince testified that, until a few days before the motion hearing, he had not seen a copy of a crime lab report dated March 25, 1996, which provided the results of fingerprint analyses on items of evidence in Prince's case. He stated that if he had known about this report at the time, he would not have entered no contest pleas to the charges in the amended information on July 11th. The text of the crime lab report is as follows:

> The following items were examined and processed for the presence of identifiable finger and/or palm prints:
>
> Item A - One serrated kitchen knife
> Item B - Two latent print lifts (same print).
>
> The latent fingerprint in item B is of possible value for identification purposes. A visible fingerprint on the knife blade (item A) in apparent blood was photographed and then processed for more detail. The latent print (item B) is the only print of value on this case.
>
> The latent print was compared with the inked fingerprints bearing the names:
>
> Item C - Marvin Prince
>
> [A. H.] F/W, D.O.B. 2-21-65
> Wisconsin S.I.D. #282126.

> No identification was effected.
>
> The latent print will be retained on file pending any future comparisons you may request.

The prosecutor informed the court that the latent print referred to in the report was lifted from the victim's car. Prince testified that he understood that the crime lab report "says that it is not my fingerprint on the knife."

Prince also testified that neither his former counsel nor the court had reviewed the elements of the sexual assault count with him; that he had not understood what "sexual contact" and "attempted" meant; and that had he understood those terms, he would not have entered a no contest plea to the first count. During cross-examination, Prince denied or could not recall responses he had made during his plea colloquy with the court. He also denied that his former counsel had gone over the State's case with him, claiming that "[h]e barely even came to see me…. He never talked the case over with me." When questioned by the court, Prince stated that he thought the charge of attempted sexual assault was a "rape charge," for which his definition would be "physically raping" or intercourse. He also acknowledged that he had understood the nature of the substantial battery count at the time of his plea.

Prince's initial defense counsel testified that he represented Prince from March 6 through August 29, 1996, and during that time they had ten face-to-face meetings, either in court or at the jail. Counsel acknowledged that he had received over two hundred pages of discovery materials from the prosecutor, including various crime lab reports; that he had reviewed the materials and discussed the State's evidence with Prince; and that he had explained to Prince what the State would have to prove with respect to each of the charges, although he did not review with Prince the jury instructions for the charges. Counsel, who

has practiced criminal law "about 30 years" and represented "[t]housands" of defendants, stated, "[i]t was my understanding that [Prince understood the nature of the charges against him]." He also testified that he had not received the March 25, 1996, crime lab report regarding the fingerprint analyses prior to Prince's pleas; that he understood the report to say "that no identification was affected [sic] by the Crime Lab in respect to finger prints on the knife"; and that the report would have been "a very important item to discuss" with Prince prior to making a plea decision.

At the conclusion of the motion hearing, the trial court denied Prince's plea withdrawal motion. The court concluded that Prince's interpretation of the crime lab report was incorrect: "It does not say, as the defense believes, that the defendant's print was not on the knife." The court further concluded that, despite some acknowledged inadequacies in the plea colloquy, Prince did understand the charges to which he pleaded. As to Prince's credibility, the court commented that "[h]e remembered and knew what he wanted to know, and didn't know what he didn't want to know. So I give very little weight to his testimony in this matter." Further, given that Prince first requested new counsel and stated a desire to withdraw his pleas at his scheduled sentencing on August 29, 1996, the court noted that Prince's plea withdrawal request may have been "motivated by seeing the pre-sentence report." The court then expressed its final conclusion that "[t]here is not a fair and just reason under the circumstances to let Mr. Prince withdraw his plea in this case."

The court subsequently sentenced Prince to eighteen years imprisonment on the attempted sexual assault conviction, and to four years consecutive on the substantial battery. He appeals his judgment of conviction, citing as error the trial court's denial of his motion to withdraw his pleas.

ANALYSIS

a. Standard of Review

Whether to permit a criminal defendant to withdraw pleas of guilty or no contest prior to sentencing is committed to the discretion of the trial court. ***State v. Shanks***, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). We will uphold a trial court's decision to deny such a request if it appears from the record that the trial court applied the proper legal standard to the relevant facts and reached a "'reasoned and reasonable determination'" by employing a "'rational mental process.'" ***State v. Canedy***, 161 Wis.2d 565, 580, 469 N.W.2d 163, 169 (1991) (quoted source omitted); ***State v. Simpson***, 200 Wis.2d 798, 802-03, 548 N.W.2d 105, 107 (Ct. App. 1996).

Although a trial court's decision on a motion to withdraw pleas prior to sentencing is discretionary, Wisconsin courts have emphasized that such requests should be "freely allowed." ***Canedy***, 161 Wis.2d at 582, 469 N.W.2d at 170; ***Libke v. State***, 60 Wis.2d 121, 127-28, 208 N.W.2d 331, 334-35 (1973). Requests should be granted when the defendant has "shown a fair and just reason for withdrawal," and this standard is to be given "liberal rather than a rigid" application, such that "a mere showing of some adequate reason" is sufficient unless the prosecution has been substantially prejudiced in relying on the pleas. ***Shanks***, 152 Wis.2d at 288-89, 448 N.W.2d at 266. Permission to withdraw need not be granted "automatically," however, and the burden to show by the preponderance of evidence that there is a "fair and just reason" other than "the desire to have a trial" is on the defendant. ***Canedy***, 161 Wis.2d at 582-84, 469 N.W.2d at 170-71.

In his brief, Prince initially seems to agree with the foregoing statement of the standard for our review, and he cites ***Canedy*** and ***Shanks*** for descriptions of the scope of our review of the trial court's discretionary ruling on his motion. Next, however, he urges us to abandon that standard and to review the denial of Prince's plea withdrawal request de novo because "the facts surrounding the state's failure to turn over the Crime Lab report to Mr. Prince before his plea are undisputed" and because "the trial court does not appear to have applied the 'fair and just reason' standard correctly to the facts." In support of this argument, Prince cites ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996), but the standard discussed there was that to be applied when reviewing a trial court's decision to not conduct a hearing on a plea withdrawal motion. ***Id***. at 308-10, 548 N.W.2d at 52-53. When reviewing a claimed error in the trial court's decision on the *merits* of the withdrawal motion itself, ***Bentley*** reaffirms that the "deferential erroneous exercise of discretion standard" applies. ***Id***. at 311, 548 N.W.2d at 53. Here, the trial court conducted a hearing on Prince's motion, and denied it only after considering the evidence and arguments presented by the parties. Thus, our review is of the trial court's discretionary decision to deny the motion.

Prince also finds support for a de novo review in ***Shanks***, where we indicated that when a trial court fails to show on the record "an application of the facts to the 'fair and just' standard[, w]e must … independently review the record to determine whether the trial court's decision can be sustained when the facts are applied to the applicable law." ***Shanks***, 152 Wis.2d at 289, 448 N.W.2d at 266. While we stand by the quoted statement, it only speaks to our methodology in the face of a trial court decision that is inadequately explained on the record. Once we have "independently reviewed the record" to discern the facts, we will still apply a deferential standard of review to the trial court's discretionary decision, and we

will overturn it only if discretion was erroneously exercised. Moreover, the trial court here adequately explained its reasoning and the facts upon which it relied in denying Prince's motion. There is no cause for us to do anything other than to inquire whether the trial court examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process. ***Bentley***, 201 Wis.2d at 318, 548 N.W.2d at 57.

b. Plea Withdrawal: Factors, Reasons

This court has identified a number of factors that may be considered when determining whether a defendant has shown a "fair and just" reason for a plea withdrawal prior to sentencing. In ***Shanks***, we listed the following factors: (1) an assertion of innocence; (2) a genuine misunderstanding of the plea's consequences; (3) a showing of haste, confusion and coercion during the plea process; (4) swiftness in seeking to withdraw the plea; and (5) evidentiary support in the record for the reason cited for seeking withdrawal. ***Shanks,*** 152 Wis.2d at 290, 448 N.W.2d at 266-67. We conclude that Prince has failed to establish that any of these factors are present to support his request to withdraw his pleas.

Prince never claimed during the plea proceedings or thereafter that he was innocent of the charges to which he pleaded. After his pleas, but prior to his scheduled sentencing on August 29, Prince wrote several letters to the trial court in which he expressed his remorse for the harm he had caused the victim. At the August 29, 1996, court proceeding, when he first communicated his desire to have a new attorney and to withdraw his pleas, he did not assert innocence of the charges. Rather, he told the court, "I just want to try a new attorney out." During his testimony at the subsequent plea withdrawal hearing, he professed to have not understood the terms "attempted" and "sexual assault," but he never testified that

he was innocent of the charge. In fact, he explained to the court that when he entered the plea to count one, he thought he was pleading to "actual physical rape," or "intercourse" with the victim. This is a far cry from a protestation of innocence. If anything, the statement leads to an inference that Prince considered himself guilty of conduct at least as culpable as the charge to which he pleaded.

By the same token, Prince does not claim that he did not understand the plea's consequences. He was correctly informed of the potential penalties that he faced on each charge during the plea colloquy. When given the opportunity to ask the court "any questions," Prince inquired as follows: "Can I ask how much time are you talking about out of this?" In response, the court informed him, correctly, that "we don't know"; that a presentence investigation would be ordered; that the court would consider that report, as well as arguments of counsel and any statements Prince might make; that the potential maximum would be twenty-five years in prison and a fine of $10,000; and that the court could not "promise [Prince] anything or give [him] any indication of what the sentence would be." Immediately after the court gave that explanation, Prince tendered his no contest pleas.

While Prince makes some attempt to argue on this appeal that there was haste and confusion surrounding his pleas, the record indicates otherwise. His initial defense counsel testified that he did not have the opportunity to talk with Prince on the day he entered his pleas, because Prince was in "lock-up" until the time of his court appearance. It also appears that counsel may have gone over a plea questionnaire with Prince on the day of his first scheduled plea hearing, July 1, 1996, but he did not do so on the day the plea was entered, July 11, 1996. There is no completed and signed questionnaire in the record. Nonetheless, Prince did not claim at the plea withdrawal hearing that he was rushed or coerced into

pleading, only that he did not understand certain terms in the first charge and that he did not timely receive the crime lab fingerprint report.

We do not find in the record any evidence of haste and confusion surrounding Prince's pleas. Prince's preliminary hearing was held on March 7, 1996, more than three months prior to the date he entered his pleas. His counsel testified that, between that date and the first scheduled plea hearing on July 1st, he met with Prince on at least five occasions, and that he discussed with Prince what the State had to prove to obtain convictions and what evidence it had with which to do so. Then, after Prince declined to proceed with a plea on July 1st, counsel met with him again on July 8, 1996, to discuss the case, after which Prince decided to accept the plea agreement. In short, this is not a case where a defendant has hastily pleaded to charges soon after their filing, with no opportunity to consider the evidence against him, the potential consequences of conviction, or to weigh the comparative risks and advantages of pleading or going to trial.

By the same token, the record refutes any claim that Prince underwent a swift change of heart after entering his pleas. Prince entered his pleas on July 11, 1996, and he first informed his attorney and the court of his desire to withdraw the pleas on August 29, 1996, when he was scheduled to be sentenced for the crimes. By then, he had seen and reviewed the presentence investigation report and was aware that he might well receive a lengthy prison sentence. A change of heart seven weeks after pleas are entered and first communicated at the time set for sentencing after the recommendations of a presentence investigation report are known does not bespeak the '"swift change of heart'" that serves as '"a strong indication that the plea was entered in haste and confusion.'" ***Shanks***, 152 Wis.2d at 290, 448 N.W.2d at 266-67 (quoted source omitted).

Finally, we consider whether the evidence of record supports the reasons Prince advances for the withdrawal of his plea, that is, are those reasons "plausible." *See* ***id.*** at 290, 448 N.W.2d at 267. We agree with Prince that if the record were to show that he sought to withdraw his pleas either because (1) he had not received a crime lab report which established that his fingerprints were not those that were on the knife allegedly used in the attempted sexual assault, or (2) he did not understand key terms employed in the elements of the sexual assault charge; then a fair and just reason would exist for withdrawal, and it would have been an erroneous exercise of discretion for the trial court to have denied his plea withdrawal request prior to sentencing. Mindful that Prince bears the burden of establishing that his proffered reasons for withdrawal actually exist and that they formed the basis for his withdrawal request, ***Canedy***, 161 Wis.2d at 583-86, 469 N.W.2d at 171-72, we review the evidence cited in support of Prince's two reasons for withdrawal.

(1) Prince's Understanding of the Sexual Assault Charge

Prince cites two items in the record as support for his assertion that his plea to the attempted sexual assault charge was not knowingly entered: the inadequacy of the plea proceedings and his testimony that he had not understood the terms "sexual contact" and "attempted." When a defendant bases a request to withdraw his or her plea on a claim that the plea was not knowing or voluntary, we employ a two-step process to review a trial court's decision to deny the request. ***State v. Bangert***, 131 Wis.2d 246, 274-75, 389 N.W.2d 12, 26 (1986). Although the ***Bangert*** analysis is often employed in determining whether a defendant has shown a "manifest injustice" that would permit plea withdrawal even if the request is first made after sentencing, a defendant may also move before sentencing to withdraw a plea because it was unknowingly entered. ***Canedy,*** 161 Wis.2d at 583

n.9, 469 N.W.2d at 170. As we have discussed above, the motion to withdraw made before sentencing will be "judged by different criteria," ***id***., that is, by the "fair and just reason" standard in lieu of the more stringent "manifest injustice." Nonetheless, to establish a fair and just reason for withdrawal, the record must still show that a misunderstanding in fact occurred at the time of the plea. ***Id.*** at 585, 469 N.W.2d at 171. Thus, we conclude that the two-step ***Bangert*** test is appropriately applied here to determine whether the record supports Prince's claim that he did not understand the sexual assault charge to which he pleaded.

Under ***Bangert***, we must first review the plea hearing transcript to determine whether the defendant has made a prima facie showing that the trial court did not comply with the procedures required by § 971.08, STATS.[1] ***State v. Mohr***, 201 Wis.2d 693, 697, 549 N.W.2d 497, 498 (Ct. App. 1996). To make the prima facie showing, a defendant must allege that he or she did not know or understand some part of the information required to be provided at the plea hearing, and the defendant must show that the trial court failed to follow the procedures necessary to properly accept a plea. ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26. If the defendant makes the prima facie showing, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant entered the plea knowingly, voluntarily and intelligently. ***Id***. Whether a defendant has made a prima facie showing that the plea hearing procedures were

[1] Section 971.08(1)(a), STATS., states in relevant part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

defective is a matter of law which we review de novo, owing no deference to the trial court's determination. ***State v. Issa***, 186 Wis.2d 199, 205, 519 N.W.2d 741, 743 (Ct. App. 1994).

Before a trial court may accept a no contest plea, it is required "to determine a defendant's understanding of the nature of the charge at the plea hearing," ***Bangert***, 131 Wis.2d at 267, 389 N.W.2d at 23, and it must establish that the defendant has "an awareness of the essential elements of the crime." ***Id.;*** *see* § 971.08(1)(a), STATS. The trial court may accomplish this in any one of three ways: (1) by personally summarizing the elements for the defendant; (2) by asking defense counsel whether he or she explained the elements to the defendant, and then asking the lawyer to reiterate what was explained to the defendant; or (3) by expressly referring to the record or other evidence of the defendant's knowledge of the nature of the charge established prior to the plea hearing. ***Id***. at 268, 389 N.W.2d at 23-24. This list is not "exhaustive," but rather indicates that the method chosen by the trial court must do more than "merely ... perfunctorily question the defendant about his understanding of the charge" or record "a perfunctory affirmative response by the defendant." ***Id***. at 268, 389 N.W.2d at 24.

Here, the State concedes that the plea colloquy was deficient, acknowledging in its brief that the plea transcript is "arguably inadequate." The trial court, as well, noted in its comments at the hearing on Prince's motion that "I am the first to admit that I wish now that we had gone through the jury instructions and gone through the elements and read the entire instruction because if we had, we wouldn't be in this situation." We will not further belabor the point. We accept the State's concession that the plea proceeding was facially inadequate in that the transcript falls short of establishing that Prince had an awareness of the essential elements of the charge in the first count of the amended information.

Thus, unless the State has met its burden to show by evidence elsewhere in the record that Prince's plea was entered knowingly, we would be required to conclude that it was not and that he should have been allowed to withdraw his plea on this ground. We conclude, however, that the State has met its burden. As the trial court noted, Prince's testimony at the plea withdrawal hearing was contradictory and self-serving, and the court deemed it incredible. His counsel, contrary to Prince's testimony, testified as to numerous meetings with Prince to review and discuss the charges against him and the evidence to support them. Counsel, an experienced criminal defense attorney, further stated his belief that Prince understood the attempted sexual assault charge at the time of his plea.

While the trial court did not read Prince the formal elements of attempted sexual assault at the time of his plea, it did inform him as follows:

> THE COURT: On count one, if you had a trial, the District Attorney would have to prove beyond a reasonable doubt that in Dane County, on February 24th, 1996, you attempted to have sexual contact with another person, [A. H.], without her consent and that you made this attempt by use of a dangerous weapon, in this case a knife. Do you understand what they have to prove?
>
> THE DEFENDANT: Yes.

The elements of first-degree sexual assault, in violation of § 940.225(1)(b), STATS., are set forth as follows in WIS J I—CRIMINAL No. 1203:

> First, that the defendant had sexual [contact] [intercourse] with (name of victim).
>
> Second, that (name of victim) did not consent to the sexual [contact] [intercourse].
>
> Third, that the defendant had sexual [contact] [intercourse] with (name of victim) by the use or threat of use of (a dangerous weapon) ….

The pattern instruction goes on thereafter to define some of the terms used in the elements, and it suggests that WIS J I—CRIMINAL No. 1200A also be given when the charge is based on sexual contact in order to define that term for the jury.

Had the trial court read the three elements from the instruction, with the appropriate word choices, instead of from the amended information as was apparently done, we fail to see that much more information about the nature of the charges would have been communicated to Prince. And, assuming that he would have also answered that he understood the charge after the reading of the elements in this form, there would have been no reason for the court to go further in discussing or defining "sexual contact."[2]

The most telling indication in the record, however, that Prince's claimed misunderstanding of the first count was not genuine, but more likely a pretense, comes from his own testimony at the plea withdrawal hearing. In response to an inquiry from the court as to what he understood the first count to be, the following colloquy ensued:

> Q. Count 1 is the attempted sexual assault count. What did you think the State had to prove --
>
> A. What did I think?
>
> Q. -- to convict you in that case?
>
> A. That -- What I thought it was was [sic] a rape charge.

[2] Prince also testified that he did not know what "attempted" meant in the first count. The trial court did not specifically define the term at the plea proceeding, nor did it read from WIS J I—CRIMINAL No. 580, the elements of attempt (an intent to commit the crime plus acts which demonstrate unequivocally that he intended and would have completed the crime but for some intervening person or factor). Again, given that Prince raised no question when informed by the court that the State would have to prove that he "attempted to have sexual contact" with the victim, we question whether a reading of Instruction No. 580 would have added to his lay understanding of the term "attempted."

> Q. Okay. As opposed to sexual contact charge?
>
> A. Far -- Yeah. As far as that other stuff, I didn't have the meaning of that until I started asking questions about it.
>
> Q. What do you mean by rape?
>
> A. Rape? I mean rape, I guess physically raping.
>
> Q. Intercourse?
>
> A. Yeah.

Thus, Prince would have the trial court and this court believe that he was prepared to enter the plea when he thought he was being charged with "physically raping" the victim, but that if he had understood that the State alleged that he had "attempted" to have "sexual contact" with her, as those terms are defined in the jury instructions, he would not have pleaded no contest. Prince's first reason for withdrawal of his plea is thus at least implausible, if not incredible, as the trial court concluded. To constitute a fair and just reason for plea withdrawal, the record must show the reason to be "plausible," ***Shanks***, 152 Wis.2d at 290, 448 N.W.2d at 267, and the record before us does not do so.

(2) The Crime Lab Report on Fingerprints

Prince argues that the trial court was required to accept his belated receipt of the crime lab report as a fair and just reason for plea withdrawal because there is no dispute that neither he nor his counsel saw the report until several months after the plea was entered. He also asserts that even if his subjective understanding of what the report says is wrong, that fact is irrelevant, because Prince testified that he would not have pleaded no contest to the first charge if he had seen the report. We disagree on both points.

This court might well be persuaded to conclude that the trial court erred in failing to deem the late receipt of the report as a fair and just reason for

plea withdrawal under one or more of the following circumstances: if the report had indicated that the fingerprints on the knife were those of someone other than Prince or the victim, that is, exculpatory evidence; if the report had contradicted other reports or information in the State's possession that indicated his prints *were* on the knife; if the State had misled Prince or his counsel by asserting that it had proof that Prince's fingerprints were on the knife; or if there were indications that the State consciously withheld the report in question in order to induce a plea from Prince. Prince has not shown that any of these circumstances existed. Moreover, the State introduced evidence at the withdrawal hearing to show that at the time of his pleas, Prince and his counsel had been given voluminous discovery materials, including crime lab reports of blood and DNA analyses which were highly probative of Prince's commission of the crimes alleged.

Prince argues that this court need not accept the State's or the trial court's interpretation of the fingerprint report. We agree, because the report "says what it says." We disagree, however, that even if Prince's understanding of it was wrong, the trial court was required to accept the belatedly released report as sufficient reason for a withdrawal of Prince's plea to count one. The report is quoted in its entirety in the Background section of this opinion. It says, though perhaps not as clearly as it might, that the latent print lifted from the victim's car did not match the sample of Prince's fingerprints provided to the crime lab, and that the bloody print on the knife blade was not "of value on this case," presumably because it was of insufficient quality to use for identification purposes. Prince's former defense counsel testified that he read the report to say only that "no identification was affected [sic] by the Crime Lab in respect to finger prints on the knife." Assuming that counsel would have so informed Prince had the report been available prior to the entry of his plea, Prince would have then

been aware only that the State could not prove his fingerprints were on the knife. This is not the equivalent of proof that his fingerprints were not on the knife, as he purportedly thought. We find this distinction significant and conclude that the trial court did not err in evaluating the impact of the report by what it actually would have communicated to the defense prior to the plea, not by what Prince may erroneously believe it would have communicated.

Furthermore, just as with Prince's claim to a misunderstanding of the elements of count one, the strongest indication that the belated receipt of the crime lab report was perhaps a pretense for his plea withdrawal request, comes from Prince's own statements in the record. He clearly communicated his desire to withdraw his pleas on August 29th, some two months before he or his successor counsel became aware of the crime lab fingerprint report. When asked by the prosecutor at the withdrawal hearing if the basis for his plea withdrawal request was his understanding that the crime lab report said "that it is not [his] fingerprint on the knife," Prince replied:

> A. More than that. It's more than that I want to withdraw my plea. Due to the incompetency [sic] of [my first defense counsel]. You and him being friends tried to railroad me to prison for no reason. You withheld this information.

This statement is consistent with Prince's statements to the court on August 29, when, just prior to informing the court that he wanted to retract his plea, he stated that he did not think that his first defense counsel "was working in my favor," and that he wanted a new lawyer "[t]o go through the whole case again."

Prince raised no issue in the trial court, nor does he on this appeal, regarding the effectiveness of his trial counsel at or prior to the entry of his pleas, although it seems clear that as of August 29, Prince was not happy with his first

counsel. The timing of his withdrawal request and his various statements to the trial court would support a conclusion that Prince sought to withdraw his pleas largely because, after seeing the presentence investigation report, he came to realize that a significant prison sentence was likely. It was then that he quite openly told the court that he wanted a new lawyer "[t]o go through the whole case again" and that he wanted "to try a new attorney out." His second trial counsel was thereafter able to discover deficiencies in the plea colloquy and a crime lab report that had not been received by the defense, which formed the basis for Prince's motion. We cannot conclude, on this record, that the trial court erroneously exercised its discretion when it discounted the stated reasons for Prince's motion and determined that Prince had failed to establish a fair and just reason for withdrawal of his pleas.

CONCLUSION

A decision to grant or deny a defendant's request to withdraw pleas of guilty or no contest prior to sentencing is committed to the discretion of the trial court. While "another judge or another court may not have reached the same conclusion in this case, it is not our function to take on the role of the trier of fact." ***Canedy***, 161 Wis.2d at 586, 469 N.W.2d at 172. Our review of the record persuades us that the trial court did not erroneously exercise its discretion in denying Prince's motion to withdraw his pleas. The court's determination that neither Prince's purported misunderstanding of count one nor his belated receipt of the crime lab fingerprint report constituted a fair and just reason to withdraw his plea, was based on the correct law and the relevant facts of record. On this record, the trial court's action represented a '"reasoned and reasonable determination,'" ***id***. at 580, 469 N.W.2d at 169 (quoted source omitted), and we will thus not disturb it.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.