

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 22, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP1169-CR**

**Cir. Ct. No. 2003CF2084**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CALVIN C. GRAYS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Calvin C. Grays pled guilty to one count of possession of heroin, between ten and fifty grams, with intent to deliver, party to a crime. Prior to sentencing, Grays moved to withdraw his guilty plea. Following an evidentiary hearing, the circuit court denied the motion. Grays was

subsequently sentenced to nine years of imprisonment, comprised of four years of initial confinement and five years of extended supervision, to run consecutive to any other sentence. The only issue on appeal is whether the circuit court erroneously exercised its discretion when it denied the plea withdrawal motion. We conclude that the circuit court properly exercised discretion, and therefore, we affirm the judgment of conviction.

### BACKGROUND

¶2 In his motion, Grays asserted that he “did not fully understand the implications of the [guilty plea] proceeding and was confused about the circumstances of the plea at the time, and was without adequate information and guidance from his attorney.” Grays contended that his “lack of understanding” constituted the requisite “fair and just reason” to allow him to withdraw his guilty plea.

¶3 At the evidentiary hearing, Grays testified that he did not think he was “coming to court” on the date of the plea hearing and that there was only going to be a conference with the judge. Grays testified that his attorney told him to “just say yes” during the hearing. Grays testified that he met with his attorney in the hallway for “[n]ot even two, three minutes” and that counsel told him to “just sign” the plea questionnaire. Grays testified that his attorney knew that he could not read but that counsel did not read the questionnaire to him. Grays testified that he wanted to say something to the judge but his attorney told him to be quiet. He also testified that he did not know he was pleading guilty and did not realize that he had done so until he was remanded into custody at the end of the hearing. Grays testified that he did not know until after the hearing that the “proposed sentence” would include “a significant stretch of prison time.”

¶4 Attorney Patrick Flanagan, who represented Grays at the guilty plea hearing, also testified.<sup>1</sup> Flanagan testified that he had discussed the possibility of a guilty plea with Grays on at least three different occasions. He admitted that he knew that Grays could not read, and therefore, he read the plea questionnaire to Grays. Attorney Flanagan testified that, before the plea hearing, he explained to Grays the constitutional rights that would be waived by a guilty plea and the maximum sentence and that Grays appeared to understand. Attorney Flanagan testified that he did not make any promises about the sentence and told Grays he would recommend a sentence of probation but that there were “no guarantees.”

¶5 In its decision, the circuit court phrased the issue as “whether or not there was a general misunderstanding of the plea.” The court found that Flanagan’s testimony was credible and that Grays’ testimony was not credible. In particular, the court noted that Grays testified that Flanagan told him to “just say yes,” but that Grays expressly answered “guilty” when asked what his plea was to the charge. The court also noted that the appropriate answer to several questions during the plea colloquy was “no.” The court also noted that Grays was asked whether he understood he was giving up his right to a trial and whether he was satisfied with his attorney’s representation – both inquiries that invited Grays to “open the door and raise questions” if he had any. The court also expressed skepticism about Grays’ education and claimed inability to read, noting that Grays’ eyes, head and facial expressions “gave every indication to the Court that he was reading” when presented with a copy of the statement he gave to police shortly after his arrest. The court concluded that Grays “believed his lawyer was

---

<sup>1</sup> The plea withdrawal motion was filed by successor counsel.

going to argue for him for probation, and then everything came crashing down when he was remanded into custody. And suddenly, he was not happy with what happened. That's not a reason for withdrawing his plea."

## DISCUSSION

¶6 Whether to permit a defendant to withdraw a guilty plea prior to sentencing is committed to the discretion of the circuit court. *State v. Shanks*, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). We will uphold the decision to deny the motion if it appears from the record that the circuit 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 (1991).

¶7 A defendant must show a "fair and just reason for withdrawal" and that standard should be given a "liberal rather than rigid" application. *Shanks*, 152 Wis. 2d at 288-89. The "mere showing of some adequate reason" is sufficient unless the State has been substantially prejudiced in relying on the guilty plea. *Id.* However, a motion to withdraw a guilty plea should not be granted "automatically," and the defendant has 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." *Canedy*, 161 Wis. 2d at 582-84.

¶8 A misunderstanding of the consequences of a guilty plea is grounds for withdrawal of the plea. *Dudrey v. State*, 74 Wis. 2d 480, 485, 247 N.W.2d 105 (1976). However, the misunderstanding must actually exist. *Id.* When the record contains conflicting testimony as to whether a misunderstanding existed, the circuit court is faced with a credibility choice, and this court will defer to the circuit court's determination. *Canedy*, 161 Wis. 2d at 585-86.

¶9 In this case, like *Dudrey* and *Canedy*, the circuit court did not believe the defendant's asserted reason for withdrawal of the guilty plea. The circuit court rejected Grays' testimony that he was confused and did not understand the nature of the plea hearing. This court defers to that credibility determination. *Canedy*, 161 Wis. 2d at 585-86. Given that determination, Grays did not show a "fair and just reason" to withdraw his guilty plea. The circuit court properly exercised discretion when it denied Grays' motion.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

