COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2991-CR **Cir. Ct. No. 2003CF95**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN P. ALSTEEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kevin Alsteen appeals his judgment of conviction for second-degree sexual assault and the circuit court's order denying his postconviction motion to withdraw his plea to that charge. Because the circuit

court properly found that Alsteen did not provide a fair and just reason why the plea should be withdrawn, the judgment and order are affirmed.

BACKGROUND

¶2 Alsteen's conviction is based on a January 30, 2003 incident in which he sexually assaulted his then-wife Kelly. According to Kelly, Alsteen came home intoxicated at approximately 2:30 a.m., woke her up, tied her arms with a sash from a bathrobe, beat her and forced her to engage in various sexual acts against her will.

¶3 Alsteen was charged with four crimes, including second-degree sexual assault contrary to WIS. STAT. § 940.225(2)(a).[1] A jury trial began on August 11, 2004. On the first day of trial, the State presented testimony from Kelly, her father, and one other witness. As part of Kelly's testimony, the State introduced a number of large, color photos of Kelly's severely beaten face taken the morning after the incident.[2] Those photos were admitted into evidence over Alsteen's counsel's objection.

¶4 Alsteen intended to defend against Kelly's accusations by arguing that the sex was consensual, and that Kelly had incurred her injuries either at work or had intentionally sustained them in some unknown way in order to gain advantage when the couple divorced. However, before the trial resumed on the second day, Alsteen's attorney, Charles Koehn, advised Alsteen that the trial was

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] According to testimony, the left side of Kelly's face was so badly beaten that she required plastic surgery to repair damage to her ear.

not going well and that Alsteen would face a lengthy sentence, perhaps the maximum, if he was found guilty by a jury. Koehn advised Alsteen to seek a plea agreement.

¶5 Alsteen consulted with his sister and with Koehn for approximately ten minutes before deciding to seek a deal. The State agreed that if Alsteen would plead no contest to the sexual assault charge, the other three charges would be dismissed and read in. Alsteen spent another twenty-five minutes going over the plea questionnaire with Koehn, after which Alsteen entered his plea.[3] As part of a detailed plea colloquy, Alsteen told the court that he believed the plea was "in the best interest of everybody." The court then accepted the plea, found Alsteen guilty and scheduled sentencing for November 8.

¶6 On September 22, 2004, about six weeks after the aborted trial, Alsteen wrote a letter to the court asking to withdraw his plea. The court forwarded the letter to both attorneys, and addressed the matter at the November 8 hearing. Koehn told the court that he was still examining evidence in the presentence report to determine if it contained any exculpatory evidence, and that Alsteen would decide whether to file a motion after Koehn finished reviewing the evidence. The court adjourned the hearing and set a November 30 deadline for any motion to withdraw the plea. Koehn never filed a motion. On January 24, 2005, Alsteen was sentenced to three years of confinement and seven years of extended supervision.

[3] Alsteen argues that the total time he had to consider the plea, including his discussion with Koehn, was only twenty-five minutes. However, it appears from the record that there was a discussion, followed by a request by Koehn for a twenty-five minute recess. After the recess, the plea colloquy took place.

¶7 Alsteen filed a postconviction motion on August 25, 2005, alleging that Koehn was ineffective because he failed to file a timely motion for plea withdrawal on Alsteen's behalf. The court determined that Koehn had been ineffective, and therefore addressed Alsteen's post-sentencing motion to withdraw his plea as if it were a timely filed pre-sentence motion. It then denied the motion, finding that Alsteen had failed to assert any fair and just reason why the plea should be withdrawn.

STANDARD OF REVIEW

¶8 The parties disagree on the applicable standard of review. The State argues that the court's action should be reviewed deferentially, while Alsteen argues that it is to be reviewed without deference. We agree with the State.

¶9 The parties' dispute over the standard of review is based on divergent positions on what the circuit court actually decided. Ordinarily, a plea withdrawal motion is reviewed deferentially. That is, a circuit court's decision to deny or allow a plea withdrawal prior to sentencing will be sustained unless the court erroneously exercised its discretion. ***State v. Bollig***, 2000 WI 6, ¶14, 232 Wis. 2d 561, 605 N.W.2d 199. However, this case also involves a claim of ineffective assistance of counsel, a claim that is reviewed as a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500.

¶10 Alsteen argues that the court did not in fact grant or deny a plea withdrawal motion. He insists that the court denied an ineffective assistance claim. Alsteen argues that the court's discussion of plea withdrawal was part of its analysis of ineffective assistance. The State, on the other hand, argues that the

trial court resolved Alsteen's ineffective assistance claim in his favor, and as a remedy treated Alsteen's motion as if it had been filed prior to sentencing.

¶11 We agree with the State's interpretation of the decision. The trial court stated:

> I conclude that Mr. Koehn's representation of Mr. Alsteen with respect to the limited issue of failure to file a motion to withdraw plea was ineffective. I further conclude however that such ineffective assistance does not form a basis upon which the defendant should, per force, be permitted to withdraw his plea. At best, it placed the defendant in a position where he can seek to withdraw his plea as if the same were filed prior to sentencing.

The court proceeded to order that "defendant's motion to withdraw his no contest plea, applying the appropriate standard … [as if the] motion was made prior to sentencing is denied."

¶12 It is true that both counsel at Alsteen's postconviction motion hearing approached this issue as part of Alsteen's ineffective assistance claim. However, the circuit court's decision makes clear that it determined that Koehn's assistance had been ineffective, and remedied it by treating the plea withdrawal motion as if it had been filed prior to sentencing. Because the circuit court decided Alsteen's motion for a plea withdrawal, we review that motion deferentially, as we would any other motion for a plea withdrawal filed prior to sentencing.[4]

[4] Alsteen does not challenge the circuit court's authority to grant this remedy. We therefore assume without deciding that the circuit court had the authority to treat Alsteen's motion as if it had been filed prior to sentencing.

DISCUSSION

I. The "fair and just reason" standard

¶13 When a defendant seeks to withdraw a plea prior to sentencing, the court must allow the defendant to do so if a fair and just reason can be shown why the plea should be withdrawn. ***Bollig***, 232 Wis. 2d 561, ¶28. Fair and just reasons include, among others, genuine misunderstanding of the plea's consequences, hasty entry of the plea, confusion on the defendant's part and coercion by trial counsel. ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989) (citations omitted).

¶14 This test is to be applied liberally; however, the defendant is not entitled to an automatic withdrawal. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). A bald claim of innocence, without more, is not a fair and just reason. ***State v. Leitner***, 2001 WI App 172, ¶25, 247 Wis. 2d 195, 633 N.W.2d 207. In addition, the defendant must convince the court that evidence supporting his reason exists, and that the stated reason is not merely a pretext for some impermissible reason. ***Id.*** ¶¶29-31; ***Kivioja***, 225 Wis. 2d at 284.

II. The circuit court's application of the standard

¶15 In his postconviction motion, Alsteen argued that he had a sufficient reason to withdraw his plea due to coercion by Koehn, his consistent claims of innocence, the fact that he asked to withdraw his plea within six weeks of entering it, and the relatively quick time period in which to decide whether to plead. On appeal, he argues only one grounds for withdrawal: that the plea was hastily entered. We conclude that the circuit court correctly exercised its discretion when it denied that claim.

¶16 In its decision, the circuit court correctly noted the fair and just reason standard and applied it to circumstances of Alsteen's decision to plead. While the court did not specifically use the word "hasty," the court considered the short time period that Alsteen had to consider his decision and deemed it adequate.

¶17 Perhaps more importantly, the court indicated that the true reason Alsteen wanted to withdraw his plea was that he believed that new evidence would clear him at trial. However, Alsteen failed to support this assertion with any evidence. He was evasive when asked at the postconviction hearing just what the new evidence was, other than to indicate that some pictures in conjunction with police reports would show that Kelly and her father were lying. The trial court found that Alsteen's story was "basically an assertion … unsubstantiated by anything other than the position of the defendant."

¶18 The court's finding that Alsteen's decision was not hasty is supported by the record. Alsteen was present during the first day of trial, and he was able to hear Kelly's testimony and see the damaging photos of Kelly's face that had been admitted into evidence. He was able to consult with counsel. He was able to consult with his sister, who was his trusted confidante. He had the opportunity to change his mind as he completed a lengthy plea questionnaire that listed the rights he was giving up. And he also had the chance to reconsider his decision during the plea colloquy with the court. We are satisfied that the circuit court correctly exercised its discretion when it denied Alsteen's motion to withdraw his plea.

By the Court.—Judgment and order affirmed.

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