

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2006

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. 2006AP35-CR

Cir. Ct. No. 2002CF787

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTEN L. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Justen Carter appeals a judgment convicting him of sexually assaulting a five-year-old girl. The trial court denied Carter's

presentencing-motion to withdraw his *Alford*¹ plea, finding that withdrawal of the plea would result in substantial prejudice to the State. Carter argues that the State unnecessarily delayed the proceedings in order to meet its burden of showing substantial prejudice. Because the record supports the trial court's findings that the State did not deliberately slow down the process or improperly delay resolution of the issue, we reject Carter's argument and affirm the judgment.

¶2 A presentencing-motion to withdraw a plea should be freely allowed, but is not automatic. See *State v. Leitner*, 2001 WI App 172, ¶24, 247 Wis. 2d 195, 633 N.W.2d 207. A defendant seeking to withdraw a plea before sentencing must prove by the preponderance of evidence that there is a fair and just reason for withdrawal and "some adequate reason for [his] change of heart ... other than the desire to have a trial." *Id.* at ¶25. Once a defendant makes this initial showing, the burden shifts to the State to prove that it will suffer substantial prejudice if the defendant is allowed to withdraw his plea. *State v. Bollig*, 2000 WI 6, ¶34, 232 Wis. 2d 561, 605 N.W.2d 199. The trial court's discretionary decision whether to allow plea withdrawal will be upheld on appeal if the court reached a reasonable conclusion based on a proper legal standard and a logical interpretation of the facts. *Leitner*, 247 Wis. 2d 195, ¶24.

¶3 Carter entered his *Alford* plea on March 12, 2003, and moved to withdraw the plea on May 30. Because of delays attributable to Carter, a hearing on his motion to withdraw the plea was not held until January 9, 2004. At that hearing, the court determined that Carter met his burden of showing a fair and just reason for withdrawing his plea and the burden shifted to the State to establish

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

substantial prejudice. The State moved for reconsideration regarding the “fair and just reason” ruling which the court denied on June 29, 2004. At a hearing held September 21, the State’s expert testified that the victim was nervous and anxious when the subject of the sexual assault was raised and would not discuss the specifics. In her professional opinion, trying to get further information out of the child would be psychologically damaging and, at this point, the child would withdraw and could not give a concrete description of what happened.

¶4 Carter notes that the State’s expert indicated that a year before the September 2004 hearing, the victim was still talking about the incident and her recall would have been “pretty good” at that point. Carter faults the State for the delay in proving prejudice, although he identifies no specific improper action that caused delay and the State’s burden of proving prejudice had not yet arisen at the time the expert indicates the child had good recall.

¶5 The burden of proving prejudice shifted to the State after the January 9, 2004 hearing and arguably only after reconsideration was denied on June 29. Regardless of whether it is measured from the January 9 or the June 29 hearing, the record supports the trial court’s finding that the State did not unreasonably delay presenting evidence of prejudice. At the January 9 hearing, the trial court indicated that proving trauma to the victim would not be sufficient. Rather, the State needed to produce evidence that the lapse of time interfered with its ability to prosecute the case. The court recognized the difficulty of producing this evidence and indicated it may take time because the victim was still quite young and would have to develop a relationship with a professional before the professional asked her about the sexual abuse. The State indicated in April 2004 that it had difficulty locating a qualified expert in the area where the victim had

relocated. As of July, its expert had not been able to arrange a meeting with the victim.

¶6 Producing evidence of prejudice was made more difficult by the facts that the victim had moved from Wisconsin, her mother did not want to cooperate, and the victim no longer talked about the abuse and was putting it behind her. The delay was the product of the difficult and sensitive nature of the evidence, and reflected no deliberate or unreasonable delay by the prosecutor. Therefore, the trial court properly exercised its discretion when it denied Carter's motion to withdraw his *Alford* plea.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

