COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP3115-CR **Cir. Ct. No. 2003CF2932**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARNAL LINDEN,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Larnal Linden appeals from a judgment convicting him of two counts of delivery of a controlled substance—cocaine—both as second or subsequent offenses and one count of felony bail jumping. Because the circuit

court did not erroneously exercise discretion when it denied Linden's motion to withdraw his pre-sentencing guilty pleas to these charges, we affirm the judgment.

¶2 Following a full morning of testimony on Linden's first day of trial, he indicated a desire to enter guilty pleas to the charges arrayed against him. The circuit court accepted Linden's pleas and scheduled the matter for sentencing. Before sentencing occurred and after new defense counsel was appointed for Linden, he moved the court to withdraw his guilty pleas, arguing that he had been denied the effective assistance of trial counsel at the time he pled guilty. The circuit court held an evidentiary hearing on the claim and ruled that Linden pled guilty to the charges because he was guilty, that his trial counsel was not ineffective and that Linden was not coerced into entering his guilty pleas. Linden's appeal is limited to whether the circuit court erred in concluding that Linden's motion to withdraw was not based on a fair and just reason.

¶3 A defendant "*should* be allowed to withdraw a guilty plea [before sentencing] for any fair and just reason, unless the prosecution would be substantially prejudiced." ***State v. Canedy***, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991) (emphasis in original; footnote omitted). A fair and just reason, other than the desire to have a trial, is one explaining the defendant's change of heart. ***Id.*** at 583. The defendant carries the burden of demonstrating the existence of a fair and just reason by a preponderance of the evidence. ***Id.*** at 583-84. A motion to withdraw is directed to the circuit court's discretion. ***Id.*** at 584, 586.

¶4 Because the State did not contend below that it would be substantially prejudiced by Linden's plea withdrawal, Linden's appeal and our review is limited to considering whether the circuit court erred in concluding that

Linden's claim of ineffective assistance of counsel presented a fair and just reason for his motion.

¶5 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶6 Linden argues that his counsel was ineffective for failing to subpoena Armanda Woodall and Henry Bates, Linden's accomplices in the drug offenses underlying this appeal, to testify at trial. Both witnesses sent letters to the circuit court indicating that Linden was not actually involved in the drug deliveries.

¶7 At the hearing, Linden's trial counsel testified that at the time of trial, Woodall was unavailable or on the run and counsel had no way of tracking her down. Evidence was submitted at the hearing, too, that both witnesses had given statements to police earlier in the case implicating Linden in both drug deliveries. Trial counsel testified that due to the conflict between the witnesses' statements to police and subsequent letters to the court, he believed the credibility of their purported exculpatory trial testimony would be "close to zero." We note, too, that Linden did not call either witness to testify at the hearing to tell the court what they would have testified to had they been called at Linden's trial although both witnesses were in custody when the motion hearing was held.

¶8 The trial court issued its decision from the bench at the close of testimony:

> [T]here is no proof the defendant was prejudiced by not having either one of those witnesses to testify, first, because there is no indication that they were available; two, there is no indication as to what they would have testified to if they'd been called to testify; and, three, there is a strategic issue, first of all, that the State wasn't introducing and this Court had ruled that those statements were hearsay and inadmissible. The State wasn't seeking to introduce their statements to the police. So there was no testimony by either Woodall or Bates that the defendant was involved in the drug transactions.
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> Had Mr. Krezminski called either one of those individuals and they testified, as apparently may have, they -- in these proposed letters, that clearly there is no proof they actually said what's in those subject exhibits, the State would have cross-examined them on the statements that they made to the officers. And their credibility under those circumstances certainly would have been dramatically affected. And -- but, ultimately, the question is there's no indication, proof in this record as to what they actually would have said under any circumstances.
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> So as to the ineffective assistance of counsel, there is no proof either that he was deficient, nor that there was any prejudice to the defendant by failing to call those individuals.

¶9 The facts found by the circuit court are well supported by the record. A reasonable judge, considering the law and the facts of record and using a rational mental process could have denied Linden's motion to withdraw his guilty pleas as the circuit court did here. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We conclude, therefore, that the circuit court did not erroneously exercise discretion when it denied Linden's motion to withdraw his guilty pleas.

By the Court.—Judgment affirmed.

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