COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2980-CR **Cir. Ct. No. 2005CF628**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON D. KENNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Jason Kenney appeals a judgment convicting him of stalking. He entered a no-contest plea to the charge and then moved to withdraw it. The trial court denied the motion to withdraw his plea and Kenney challenges that decision on appeal. We affirm.

¶2 Kenney moved to withdraw the plea before he was sentenced. To withdraw a guilty plea before sentencing, the defendant must show a fair and just reason. *See* ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). Fair and just means some adequate reason for a defendant's change of heart other than the desire to have a trial. ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). Whether a defendant may withdraw his plea is left to the trial court's discretion. ***State v. Bollig***, 2000 WI 6, ¶28, 232 Wis. 2d 561, 605 N.W.2d 199.

¶3 In moving to withdraw his plea, Kenney argued that counsel's negligence left him unaware when he entered the plea that he had a viable NGI (not guilty by reason of insanity) defense. He offered medical diagnoses of obsessive compulsive disorder, panic disorder and adjustment disorder in support of his contention that the undisclosed defense was, in fact, viable. However, the trial court concluded that Kenney failed to show a reasonable possibility of success on a NGI defense, and we agree. A successful NGI defense requires proof that the defendant lacked substantial capacity to either appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the law. WIS. STAT. § 971.15(1) (2005-06).[1] Kenney's medical evidence did not indicate that he could meet this standard. Because he could not show a viable defense, the court reasonably concluded that he lacked a fair and just reason to withdraw the plea.

¶4 Kenney also contended that, after the plea hearing, when he began taking medication for his previously untreated mental disorders, he became better situated to understand and evaluate his legal options. However, that conclusory

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

assertion did not, by itself, mandate plea withdrawal. Kenney did not contend nor attempt to show that he was unable to understand the consequences of his plea, or that his disorders compelled his plea. In fact, he expressly disavowed a competency challenge to the plea.[2] The trial court could reasonably determine that a fair and just reason for withdrawal based on an improved mental state required evidence that Kenney's prior mental state precluded an informed and voluntary decision. He submitted no such evidence.

By the Court.—Judgment affirmed.

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

[2] Because Kenney expressly disavowed in the trial court a competency challenge to the plea, we do not address this issue on appeal. *See* ***State v. Mark***, 2006 WI 78, ¶34 n.13, 292 Wis. 2d 1, 718 N.W.2d 90.