

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2009

David R. Schanker
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. 2008AP2175-CR
2008AP2176-CR
2008AP2177-CR**

**Cir. Ct. No. 2005CF790
2005CF1234
2006CF1101**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. KUCHAR,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. In these consolidated appeals, Daniel Kuchar appeals from judgments convicting him of forgery-uttering, felony bail jumping, disorderly conduct and unlawful use of the telephone. Kuchar also appeals from

orders denying his motion to modify his sentence. On appeal, Kuchar argues that the circuit court should have permitted him to withdraw his no contest pleas prior to sentencing. We conclude that the court did not misuse its discretion in denying this request. The court also did not err when it declined to modify Kuchar's sentence. We affirm.

¶2 Whether to permit plea withdrawal is within the circuit court's discretion. *State v. Jenkins*, 2007 WI 96, ¶6, 303 Wis. 2d 157, 736 N.W.2d 24. We will uphold the circuit court's findings of fact, including its credibility determinations, unless they are clearly erroneous. *Id.*, ¶33. Assessing the credibility of the witnesses was within the province of the circuit court. *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989).

¶3 A defendant should be allowed to withdraw a plea prior to sentencing "for any fair and just reason, unless the prosecution [would] be substantially prejudiced." *Jenkins*, 303 Wis. 2d 157, ¶2. The defendant bears the burden to show the existence of a fair and just reason, which "must be something other than the desire to have a trial or belated misgivings about the plea." *Id.*, ¶32 (citation omitted). In addition to offering a fair and just reason that the circuit court finds credible, "the defendant must rebut evidence of substantial prejudice to the State" if the plea is withdrawn. *Id.*, ¶43.

¶4 On appeal, Kuchar argues that he met his burden to show a fair and just reason: his pleas were entered in haste and confusion, and he was coerced by his trial counsel. Kuchar concedes that the plea colloquy was sufficient. So, the focus is on whether Kuchar demonstrated a fair and just reason based on matters external to the plea colloquy. *See id.*, ¶62.

¶5 After reviewing the plea hearing transcript and the plea withdrawal hearing evidence, the circuit court found that Kuchar had a change of heart about his pleas after meeting with the presentence investigation report author. Kuchar was concerned about the presentence investigation report author's sentencing recommendation and the impact on his ability to interact with his children.

¶6 The court found credible trial counsel's testimony that she and Kuchar spoke at length and repeatedly about the charges and the penalties. Kuchar did not indicate to counsel or to the court during the plea colloquy that he was confused or did not understand the proceeding. The court found Kuchar's claim that he did not expect any serious consequences for the offenses to which he pled "illogical and hard to believe, simply not credible that he could be going through all of these court proceedings, and in the end having nothing happen." The court rejected Kuchar's claim that he was the only one telling the truth about the process by which he entered his pleas, including his prior interactions with his trial counsel. The court concluded that Kuchar did not show a fair and just reason to withdraw his pleas. The court also found that the State would be prejudiced if Kuchar were permitted to withdraw his no contest pleas.

¶7 Essentially, Kuchar asks us to re-weigh the evidence before the circuit court on his plea withdrawal motion. This we cannot do. We are bound by the circuit court's credibility determinations. The circuit court found trial counsel more credible than Kuchar on the question of their interactions prior to entering the pleas and Kuchar's understanding of the pleas.

¶8 Kuchar argues that he maintained his innocence and therefore should be able to withdraw his pleas. Trial counsel testified that Kuchar acknowledged

his guilt of the offenses to which he ultimately entered no contest pleas. The circuit court found trial counsel more credible than Kuchar.

¶9 Our review of the plea withdrawal hearing convinces us that the circuit court's findings of fact are not clearly erroneous. The court did not misuse its discretion in denying Kuchar's plea withdrawal motion.¹

¶10 We turn to Kuchar's challenge to his sentence. Kuchar argues that the circuit court misused its discretion when it denied his sentence modification motion without a hearing. The circuit court sentenced Kuchar to two years of initial confinement and two years of extended supervision. Kuchar moved the court to modify his sentence because the court did not consider his mental health needs or that he complied with bond conditions for eighteen months prior to sentencing. He also claimed that the court gave excessive weight to its view that Kuchar was a danger to the public. The circuit court denied the motion because Kuchar did not show the existence of a new factor.

¶11 In imposing sentence, the court found that Kuchar was a danger to the public and his family. In addition to the crimes of conviction, the court considered the charges that were dismissed and read in as a result of the plea agreement: felony bail jumping, four charges of disorderly conduct and four charges of child abuse-recklessly causing harm. The court found that Kuchar engaged in stalking-type behavior against those whom he could not control. The court considered Kuchar's culpability and lack of remorse, his character, and the seriousness of the offenses, all appropriate sentencing factors. *See State v. Russ*,

¹ Because Kuchar did not establish a fair and just reason to withdraw his plea, we need not consider any arguments relating to the prejudice to the State of permitting plea withdrawal.

2006 WI App 9, ¶14, 289 Wis. 2d 65, 709 N.W.2d 483 (Ct. App. 2005). The weight of these and other sentencing considerations was within the circuit court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶12 That the circuit court did not discuss Kuchar's mental health needs does not undermine the court's proper exercise of sentencing discretion. The court was entitled to give great weight to its finding that Kuchar was a danger to the community.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

