

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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 Nos. 01-3426-CR
01-3427-CR**

**Cir. Ct. No. 99-CF-1052
00-CF-655**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS E. FITCH,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Douglas E. Fitch appeals from judgments convicting him of two counts of repeated sexual assault of the same child on his guilty plea and from orders denying his postconviction motion to withdraw his

guilty plea. We conclude that the circuit court properly exercised its discretion in denying the plea withdrawal motion and affirm.

¶2 Before he entered his guilty plea, Fitch faced numerous charges of sexual assault of the same child and incest arising out of his sexual contact with two young family members. On the date scheduled for trial, Fitch pled guilty to two counts of repeated sexual assault of a child; the incest counts were dismissed and read-in. Fitch received a thirty-five year sentence on both counts to be served consecutively. Post-sentencing, Fitch moved to withdraw his plea on the grounds that his trial counsel caused confusion and misled him about whether Fitch's wife wanted him to enter the guilty plea. As a result of the confusion and misstatements, Fitch contended that he entered a guilty plea when he would not otherwise have done so. Fitch further contended that his plea was not knowing and voluntary because it resulted from counsel's inadvertence or mistake in advising Fitch and his wife of the other's opinions about entering a guilty plea.

¶3 At the postconviction motion hearing, trial counsel testified that plea negotiations had been ongoing and that prior to the morning of trial, Fitch had been interested in entering a plea but would not admit to a factual basis for the plea. Counsel declined to participate in entering a plea without a factual basis, but nevertheless believed that a plea was in Fitch's best interest in light of the evidence scheduled to be presented at trial. On the morning of trial, Fitch seemed receptive to entering a plea and asked counsel to speak with Mrs. Fitch about whether the family would support his decision to enter a plea and acknowledge some factual basis for the plea. Counsel told Mrs. Fitch that Fitch was leaning in the direction of entering a plea but wanted to know her view on it. Initially, Mrs. Fitch was adamant that she wanted to go to trial. After conversations with counsel and the family, Mrs. Fitch decided to support Fitch's decision to enter a guilty plea

and counsel related that to Fitch. Counsel told Fitch that his family would support him in entering a plea, but counsel never told Fitch that his wife wanted him to enter a plea. When Mr. and Mrs. Fitch encountered each other in the courtroom shortly before Fitch entered his plea, Mrs. Fitch gave Fitch her support and did not say anything that deterred Fitch from entering a plea. Fitch raised the possibility of withdrawing his plea before sentencing, but he decided against it. Fitch did not raise plea withdrawal with counsel after sentencing. Counsel first learned of Fitch's dissatisfaction when he received a copy of the postconviction plea withdrawal motion.

¶4 Mrs. Fitch testified that counsel did not tell her prior to the morning of trial that a plea agreement was possible. Counsel approached her and said that he was considering a plea bargain but had not yet talked to Fitch about it. Mrs. Fitch told counsel she did not want a plea bargain. After counsel talked with Fitch, he told Mrs. Fitch that Fitch wanted to enter a plea. Mrs. Fitch was adamant that Fitch should go to trial. Counsel consulted with Fitch and then returned to Mrs. Fitch, telling her that Fitch wanted her support for a plea agreement. Thereafter, Mrs. Fitch agreed to support Fitch's decision to enter a plea. When Fitch entered the courtroom, Mrs. Fitch told him not to enter a plea. Four days later, when Mrs. Fitch and Fitch spoke, Fitch told her that he entered a plea because he thought she wanted him to do so. Mrs. Fitch contended that she only supported Fitch's decision to enter a plea because counsel told her that Fitch wanted to enter a plea.

¶5 James Fitch, the couple's son, testified that he was with his mother when she spoke with counsel about a plea. Counsel told Mrs. Fitch that Fitch wanted to enter a plea and he heard his mother say that she would support Fitch if he decided to enter a plea. He did not speak with his parents after the plea,

sentencing or at any time prior to postconviction counsel's inquiries. On cross-examination, James testified that he understood that his father was considering a plea when counsel raised the issue with Mrs. Fitch.

¶6 Fitch testified that he first learned of a possible plea agreement on the morning of trial. Fitch responded that he wanted a trial. Counsel reiterated his concerns about the outcome of a trial and said he would talk to Mrs. Fitch about a plea agreement. Counsel returned and said Mrs. Fitch was supportive and wanted him to enter a plea. When Fitch and counsel entered the courtroom, Mrs. Fitch told Fitch, "No, don't do it." Before Fitch could respond, the sheriff took him away because the proceedings were being adjourned to await the arrival of the victims. Fitch then said he wanted to go to trial, and counsel went to speak with Mrs. Fitch and returned to tell Fitch that Mrs. Fitch wanted him to accept a plea agreement. When Fitch and his wife spoke later about the plea agreement, they discovered that each had been told by counsel that the other wanted a plea agreement. They approached counsel about plea withdrawal, but counsel recommended against it. If Fitch had not been told by counsel that his wife wanted him to enter a plea, he would not have done so. Fitch conceded that he knew that whether to enter a plea was his decision and that counsel had told him he would lose at trial. Prior to sentencing, counsel told Fitch that if he wanted to withdraw his plea, he should do so before sentencing.¹ Fitch did not alert the circuit court at sentencing that he was concerned about the plea process or that he had been misled by counsel.

¹ Fitch also testified that counsel told him he would not represent him on plea withdrawal, and Fitch could not afford new counsel.

¶7 At the close of evidence at the postconviction motion hearing, the circuit court found that Fitch was able to make his own decision about whether to enter a plea, even though his wife’s opinion was important to him. During the plea colloquy, Fitch stated that his plea was voluntary and that he had sufficient time to discuss the matter with counsel. Fitch received a benefit by having other charges dismissed. Fitch also told the court that he understood what he was doing by entering a plea. The court also noted counsel’s testimony that counsel was fully aware that Mrs. Fitch did not favor a plea agreement, but that she would support Fitch’s decision to enter a plea. Fitch had an opportunity to tell the court at sentencing that he made a mistake entering a plea, but he did not raise the issue until after he received a substantial sentence. The court found that counsel was more credible than Fitch because Fitch was motivated to be less than truthful due to the substantial prison sentence he received. The court concluded that Fitch did not meet his burden to withdraw his plea.

¶8 To withdraw his plea after sentencing, Fitch needed to establish by clear and convincing evidence that failure to allow plea withdrawal would result in a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. In other words, Fitch was required “to show ‘a serious flaw in the fundamental integrity of the plea.’” *Id.* (quoting *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995)).

¶9 On appeal, Fitch argues that the circuit court applied the wrong legal standard to his motion to withdraw because the court commented that “[t]here is a heavier burden to withdraw a plea when we are dealing with children who have been the victims of sexual assault.” We agree that the circuit court misstated the law, see *State v. Van Camp*, 213 Wis. 2d 131, 154, 569 N.W.2d 577 (1997), but

conclude that this misstatement did not play a role in the court's refusal to permit Fitch to withdraw his guilty plea.²

¶10 We conclude that the circuit court's credibility determination supports its discretionary decision to deny Fitch's request to withdraw his plea. *See State v. Fosnow*, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883, review denied, 2001 WI 88, 246 Wis. 2d 166, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 00-0122). The court assessed the motives of Fitch and counsel and found counsel more credible than Fitch on the question of the circumstances surrounding entry of the guilty plea. The court accepted counsel's testimony that Fitch was leaning toward a plea, counsel told Fitch's wife of his interest in a plea, and counsel told Fitch that he had his wife's support. Credibility determinations were for the circuit court to make. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). There is a basis in the record for the court's discretionary decision to deny plea withdrawal because Fitch did not present credible evidence to meet his burden to show that a manifest injustice would result if he could not withdraw his plea.

By the Court.—Judgments and orders affirmed.

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

² The circuit court correctly noted that a defendant bears a heavier burden to withdraw a plea after sentencing. *See State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836.

