

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 9, 2010**

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 Nos. 2009AP512-CR  
2009AP513-CR**

**Cir. Ct. Nos. 2002CF1013  
2005CF285**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STEVEN F. ZASTROW,**

**DEFENDANT-APPELLANT.**

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APPEALS from a judgment and an order of the circuit court for Outagamie County: MARK J. MC GINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Steven Zastrow, pro se, appeals a judgment of conviction and an order denying postconviction relief. He argues the circuit court

erred by denying his requests for plea withdrawal or sentence modification. We reject his arguments and affirm.

¶2 This case involves two consolidated appeals.<sup>1</sup> In appeal No. 2009AP513-CR (Outagamie County case No. 2005CF285), Zastrow was originally charged with two counts of issuing worthless checks and five counts of bail jumping arising from five other Outagamie County cases. The charges were subsequently amended to include four more felony charges.<sup>2</sup> In appeal No. 2009AP512-CR (Outagamie County case No. 2002CF1013), Zastrow was charged with three counts of uttering forged checks. Zastrow entered no contest pleas to seven felonies from five separate cases<sup>3</sup> in exchange for seven other counts being dismissed and read in.

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<sup>1</sup> In an order dated May 20, 2009, this court consolidated the two appeals, Nos. 2009AP512-CR and 2009AP513-CR. Each appeal involves one of the five circuit court cases in which Zastrow entered no-contest pleas on September 6, 2006.

<sup>2</sup> The four additional felony charges were: (1) two counts of felony theft by false representation; (2) one more count of issuing worthless checks; and (3) one count of transfer of encumbered property.

<sup>3</sup> Four of the seven counts were from appeal No. 2009AP513-CR. The circuit court imposed a sentence on count 1 of two years' initial confinement and four years' extended supervision. Sentence was withheld on count two and three years' probation imposed consecutive to all prison sentences. The court ordered two years' initial confinement and two years' extended supervision on count 6, and two years' initial confinement and two years' extended supervision on count 7. The sentences for counts 1, 6, and 7 were all consecutive to other sentences and the sentences for counts 6 and 7 were concurrent to each other but consecutive to count 1. In appeal No. 2009AP512-CR, Zastrow was sentenced to five years' initial confinement and four years' extended supervision on count 1 and four years' initial confinement and three years' extended supervision on count 2. These sentences were concurrent to each other concurrent but consecutive to a current sentence.

¶3 Zastrow subsequently filed motions to withdraw pleas or, in the alternative, to modify sentences.<sup>4</sup> A hearing was held on February 4, 2009.<sup>5</sup> The circuit court denied Zastrow's motions, concluding he failed to demonstrate a fair and just reason for plea withdrawal. The court also specifically found Zastrow not credible. The court supplemented its oral ruling with a written decision. This appeal follows.

¶4 Zastrow argues the plea colloquy was defective because the circuit court did not expressly advise him that the court was not bound by the plea agreement, or of the effect of the read-in charges. Zastrow also insists he did not otherwise know or understand the information that should have been presented at the plea hearing. In addition, Zastrow claims he was coerced into entering the pleas by his counsel's lack of preparation for trial.

¶5 The burden of proof for a defendant seeking to withdraw a plea before sentencing was reiterated in *State v. Jenkins*, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24. The burden of production and persuasion is placed on the defendant because a defendant who has pled no contest or guilty no longer enjoys the presumption of innocence. As the *Jenkins* court observed, the defendant faces three obstacles:

First, the defendant must proffer a fair and just reason for withdrawing his plea. Not every reason will qualify as a fair and just reason. Second, the defendant must proffer a fair and just reason that the circuit court finds credible. In

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<sup>4</sup> Zastrow did not seek to withdraw the probationary sentence received for count 2 in Appeal No. 2009AP513-CR.

<sup>5</sup> On May 27, 2008, the Honorable Harold V. Froehlich recused himself because Zastrow filed a lawsuit against him. The Honorable Mark J. McGinnis was then assigned as successor judge.

other words, the circuit court must believe that the defendant's proffered reason actually exists. Third, the defendant must rebut evidence of substantial prejudice to the State.

*Id.*, ¶43 (citations omitted).

¶6 A defendant does not have an automatic right to withdraw a plea merely because of a deficiency in the plea colloquy. Rather, a court may review evidence outside the plea colloquy that substantiates the plea was knowingly and voluntarily made. This prevents a defendant who does understand the information that should have been provided at the plea hearing “[from] gam[ing] the system by taking advantage of judicial mistakes.” *Id.*, ¶56 n.11 (quoting *State v. Brown*, 2006 WI 100, ¶37, 293 Wis. 2d 594, 716 N.W.2d 906). In addition, credibility determinations are subject to a clearly erroneous standard on appeal:

On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. The standard also applies to credibility determinations.

*Jenkins*, 303 Wis. 2d 157, ¶33.

¶7 Moreover, a motion to withdraw rests with the circuit court's sound discretion. *Id.*, ¶29. This discretion gives the court latitude in assessing the defendant's reason and determining whether it is fair and just under the circumstances. *Id.* If the defendant does not overcome the three obstacles in the view of the circuit court, and is therefore not permitted to withdraw his pleas, the defendant's burden to reverse the circuit court on appeal becomes relatively high. *Id.*, ¶44.

¶8 We turn to the issue of whether Zastrow demonstrated a fair and just reason that the circuit court found credible. A plea that is not voluntarily,

knowingly and intelligently entered constitutes a fair and just reason for withdrawal. *See Brown*, 293 Wis. 2d 594, ¶18. In the present case, the circuit court concluded the plea colloquy was technically defective because the predecessor judge did not specifically inform Zastrow that the court was not bound by the plea agreement, or that read-in charges could be considered by the court at the time it imposed its sentence. However, the current court found that Zastrow was not credible in stating he did not know or understand that information.

¶9 Conversely, the court found credible his trial counsel's testimony directly contradicting Zastrow. The court concluded that the record in its entirety conclusively demonstrated Zastrow understood the information that should have been provided at the plea hearing, and thus he entered his pleas voluntarily, knowingly and intelligently.

¶10 The court's credibility findings are supported by the record. At the hearing on the motions to withdraw his pleas, Zastrow admitted on cross-examination he understood the plea questionnaire and waiver of rights forms he signed, which indicated the judge was not bound by any plea agreement and could impose the maximum penalty.<sup>6</sup> Trial counsel also testified that he advised Zastrow the judge could sentence him up to the maximum.

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<sup>6</sup> Zastrow also admitted he understood the constitutional rights he waived by pleading no contest, the elements of the offenses and the potential penalties.

¶11 The court also emphasized Zastrow's extensive criminal history in finding not credible his contention that he did not understand the effect of the read-in charges:<sup>7</sup>

THE COURT: See, Mr. Zastrow, not that I want to interrupt you but I'm going to, because that's where it gets into credibility; and I mean, how many times have you been sentenced before in your life and how many times have other offenses been dismissed and read in and how many times have sentences, judges explained to you those things?

THE DEFENDANT: I never knew that though.

THE COURT: Well, I mean, and then the question is do we believe you when you say that, and see, I don't.

¶12 Zastrow's admissions and history, direct testimony from trial counsel, the plea questionnaire and waiver of rights form, the plea colloquy and other documents in the record support the court's credibility findings. All of this evidence demonstrated Zastrow's level of understanding notwithstanding any technical defects in the plea colloquy.

¶13 Zastrow also argues he was coerced into accepting the pleas because his trial counsel was unprepared to proceed to trial. However, counsel testified he reviewed the police reports and the discovery provided in all of Zastrow's cases. Potential witnesses refuted Zastrow's story, and his defenses to the bail jumping charges seemed invalid. In addition, Zastrow admitted a number of the offenses to counsel.

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<sup>7</sup> Since 1985, Zastrow's only crime-free periods have essentially been the time he was confined.

¶14 Zastrow claims counsel withheld bank documents from him that purportedly showed he had funds in his accounts to cover the checks. Zastrow asserts “the bank Vice President at Wells Fargo in his letter to me stated there was [sic] in fact funds in my account.”

¶15 However, trial counsel testified he investigated Zastrow’s alleged defense and an investigator in the security department at Wells Fargo indicated “all funds deposited into the account were fraudulent and were akin to check hiding ....” Counsel also stated:

You had also indicated to me repeatedly throughout your representation that you had documentation that would establish that there were funds in the account. You kept promising me to get that documentation, specifically information contained in a white envelope. That documentation never materialized.

¶16 Counsel testified, “Ultimately, your final statement or one of your final statements in a meeting was I would have always taken the deal.” Counsel stated that in his opinion Zastrow knowingly, voluntarily and intelligently entered his pleas.

¶17 Quite simply, the circuit court did not believe Zastrow’s asserted reasons for withdrawing his pleas. The court’s credibility findings are not clearly erroneous. The record supports the circuit court’s conclusion that Zastrow entered his pleas knowingly, voluntarily and intelligently. Because Zastrow did not establish a fair and just reason to withdraw his pleas, we need not consider any arguments concerning whether the State would be prejudiced by plea withdrawal.

¶18 Finally, Zastrow seeks the alternative relief of sentence modification to probationary terms. However, there is no developed argument or legal analysis to that effect in his substantive brief. We will not abandon our neutrality to

develop arguments. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

*By the Court.*— Judgment and order affirmed.

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



