COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0045-CR **Cir. Ct. No. 00-CF-51**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. HANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A DUKET, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Daniel Hanson appeals a judgment convicting him of fifth or greater offense driving with a prohibited blood alcohol content (BAC). He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of counsel, but does not specifically challenge that order in this brief. Hanson argues that the trial court should have allowed him to withdraw

his no contest plea before sentencing to allow him an opportunity to present a necessity defense. Because we conclude that the trial court properly exercised its discretion when it denied the motion, we affirm the judgment and order.

¶2 An officer stopped Hanson for driving 80 miles per hour in a 35 mile-per-hour zone. A subsequent blood test measured Hanson's BAC at .176 %. The complaint charged him with driving while intoxicated, driving with prohibited BAC, and two counts of bail jumping for violating two conditions of his bail on a previous charge which prohibited both drinking and driving.

¶3 Pursuant to a plea agreement, Hanson pled no contest to fifth or greater offense driving with a prohibited BAC and the State dismissed the remaining charges. Hanson then discharged his attorney, Hans Ribbens, and hired substitute counsel. He moved to withdraw his no contest plea, claiming dissatisfaction with Ribbens's representation because Ribbens did not adequately consider presenting a necessity defense. Hanson testified that he was driving his friend, Richard Johnson, to the hospital after Johnson fell into a bonfire at Hanson's residence. He testified that he could not call an ambulance because both of his telephones were inoperable, his closest neighbor was 300 feet away and it was too late in the evening to awaken a neighbor. He testified that Ribbens did not adequately examine the possibility of a necessity defense.

¶4 Ribbens testified that he did explore the necessity defense with Hanson. He advised Hanson to accept the plea offer for three reasons. First, the necessity defense might not apply because it would allow Hanson to drive only if "the pressure of natural physical forces" necessitated driving. *See* WIS. STAT. § 939.47 (1999-2000). Second, the jury might find that Hanson's driving was not the only means of preventing death or great bodily harm to Johnson. The jury

could find that Hanson should have awakened his neighbors to use their telephone or to have them drive Johnson to the hospital. The jury might also disbelieve Hanson's testimony that his telephones did not work. When another friend suggested that he call 911 immediately after the accident, Hanson did not mention that his phones did not work. Third, the necessity defense would not apply to the charge that Hanson violated a condition of his bail by drinking. Therefore, Ribbens advised Hanson to accept the State's offer to plead no contest to one five-year offense rather than risking almost certain conviction on a sixteen-year offense.

¶5 The trial court found Ribbens's testimony more credible than Hanson's. The court found that Ribbens explored the possibility of an emergency defense with Hanson before he entered his plea and that Hanson merely changed his mind at a later date. This court is bound by the trial court's findings that are based on the witnesses' credibility. *See* ***Leciejewski v. Sedlak***, 116 Wis. 2d 629, 636-37, 342 N.W.2d 734 (1984). Because this finding removes the factual underpinning for Hanson's motion to withdraw his plea, the trial court properly exercised its discretion when it denied the motion. Although withdrawal of a plea is more freely granted before sentencing, "freely" does not mean automatically. *See* ***State v. Canedy***, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). Hanson was required to establish something other than a desire to have a trial. *See* ***Libke v. State***, 60 Wis. 2d 121, 127, 208 N.W.2d 331 (1973). Because Ribbens adequately explained the possibility of presenting a necessity defense and Hanson presented no evidence of other grounds for withdrawing his plea, the trial court properly denied the motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).