COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1788-CR **Cir. Ct. No. 2007CF189**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN P. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Sean P. Williams appeals from a judgment convicting him of maintaining a drug-trafficking place. His central challenge is that the court, the Honorable Faye M. Flancher presiding, denied his motion to

withdraw his no-contest plea before sentencing.[1] We agree with the trial court that Williams' explanation for wanting to withdraw his plea demonstrated a change of heart, not a fair and just reason. We affirm.

¶2 According to the complaint, a search warrant City of Burlington police officers executed at Williams' residence yielded a quantity of marijuana, an electronic scale and three boxes of plastic sandwich bags. Williams' former girlfriend, Nicole Church, was present during the arrest and search. Williams told police that Church and another girl came over after calling to see if he "wanted to smoke" and he and Church shared a "joint."

¶3 The State charged Williams with one count each of maintaining a drug-trafficking place, possession of tetrahydrocannabinol (THC) and possession of drug paraphernalia. Williams opted for a jury trial. On the day of trial, the State put forth its final plea offer: if Williams would plead no contest to maintaining a drug-trafficking place, the State would move to dismiss and read in the other two counts. Williams thought the charge should be straight possession, a misdemeanor, and rejected the offer.

¶4 Church, a State's witness, apparently could not be located for some time and a material witness warrant was issued to compel her appearance. Also on the day of trial, before the jury was seated, the assistant district attorney (ADA) advised that Church had appeared on the warrant and the ADA had new information from her that the State planned to use against Williams at trial. Church

[1] Williams' notice of appeal states that he appeals "from the Order entered on January 12, 2009 … wherein the Court denied the defendant's Motion to Withdraw No Contest Plea." As the January 9, 2009, oral ruling was transcribed but not reduced to a written order, we construe the appeal as being taken from the judgment of conviction filed on February 25, 2009.

would testify that she and others frequently came to Williams' house to smoke marijuana. Williams and his attorney, Michael Barth, considered portraying Church as a vindictive ex-girlfriend. After some discussion, however, Williams advised the court that he would accept the State's offer. He entered a plea of no contest to maintaining a drug-trafficking place.

¶5 Four and a half months later, but before sentencing, Williams moved to withdraw his no-contest plea. As grounds, Williams claimed he felt he had no choice but to accept the plea offer because he did not believe Barth had investigated the matter or interviewed witnesses and he lost confidence in Barth when Barth told him "he didn't think he could win the case." Williams also contended he did not understand the plea offer or recommended penalties.

¶6 Barth testified at the hearing on the motion that he had been trying to get the State to amend the charge to a misdemeanor. He also stated that he and Williams had discussions about the chances of success at trial during which he communicated to Williams that he "thought [he] would never prevail." Barth also testified that he had expected Church to testify as she now said she would, which is why he and Williams had been "somewhat happy" that the State at first could not locate her.

¶7 Williams testified that Barth was his second appointed attorney and, like the first, always gave "very vague answers." Barth "seesawed back and forth to I can win this, but then again maybe I can't" to "I don't know if I can." Williams said that on the day of trial Barth got "scared" because that morning the same ADA won a conviction on a case Barth thought would "go a different way." Williams said his confidence in Barth at this point was "[z]ero." Williams said he did not want to accept the State's offer because "I didn't think I was a felon" but

he took it because he was "terrified" and "not thinking very clearly." The court concluded that Williams did not present a fair and just reason to withdraw his plea and denied his motion. Williams appeals.

¶8 A defendant seeking to withdraw a plea before sentencing must present a fair and just reason which the trial court finds credible, and rebut evidence offered by the State that the State will be substantially prejudiced by the plea withdrawal. ***State v. Jenkins***, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by trial counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). "Fair and just" means some adequate reason other than that the defendant simply had a change of mind and desires to have a trial. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The burden is on the defendant to establish a proper reason by a preponderance of the evidence. ***Id.*** at 583-84.

¶9 The decision to permit plea withdrawal prior to sentencing is committed to the sound discretion of the trial court. ***Jenkins***, 303 Wis. 2d 157, ¶30. We apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. ***Id.***, ¶33. If the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach, we will uphold its discretionary decision. ***Id.***, ¶30. In addition, we may independently review the record to determine if it provides a further basis for the trial court's exercise of discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶10 Here, Williams contends the trial court erroneously denied his motion to withdraw his plea because the plea was the product of haste and coercion. He likens his situation to the defendant's in ***Libke v. State***, 60 Wis. 2d 121, 208 N.W.2d 331 (1973). Libke pled guilty early in the proceedings, claiming he was talked into it by his attorney's promise that, if he pled, the attorney would "see what he could do" to help him. ***Id.*** at 122-23. Just a few days later Libke reconsidered and requested new counsel. ***Id.*** at 123. The court concluded that Libke stated a fair and just reason for withdrawing his plea because it resulted from an atmosphere of haste, confusion and pressure from his counsel. *See* ***id.*** at 129.

¶11 Williams argues that here, too, in the space of a half hour he went from rejecting the plea offer to pleading no contest due to Barth's "forceful and coercive" advice. Relatively speaking, the half-hour time frame is brief. The trial court found, however, that Church's eleventh-hour appearance and willingness to provide damaging testimony "put a new spin on things" and gave Barth "an absolute duty" to convey the case's changed complexion so Williams could make an informed choice. It also found that Barth's confidence about the prospect of success was higher while Church's warrant was outstanding and that what Williams took as "vagueness" actually was a proper refusal to guarantee success. The court found that Barth, a "fine and prepared attorney[],"had spent a "significant amount of time" on the case and, if he brought no motions, it was because there were none to bring. Finally, the court found that Barth was ready for trial, implicitly finding that he did not urge Williams to plead based on unpreparedness. *See* ***State v. Echols***, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the trial court."). These findings are not clearly erroneous.

¶12 In addition, the record shows that the court granted Williams several additional opportunities during the earlier plea colloquy to confer with Barth. Williams expressly acknowledged that he was given enough time to discuss his plea with Barth, that he understood what he was doing and that he wished to proceed with the plea hearing. A plea colloquy in compliance with ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), is "clothed with a presumption of its validity." ***State v. Basley***, 2006 WI App 253, ¶17, 298 Wis. 2d 232, 726 N.W.2d 671. Williams' claim that his plea was so hastily made as to justify its withdrawal does not stand up against this record demonstrating a proper plea colloquy. *See* ***Jenkins***, 303 Wis. 2d 157, ¶60.

¶13 Williams next contends Barth's "forceful and coercive" advice pressured him to plead. Williams testified at the plea withdrawal hearing that he felt compelled to plead because, after Barth told him he could not win at trial, he had "zero" confidence in Barth and was "terrified of what was going to happen." Barth acknowledged that when he learned Church would testify he recommended that Williams take the State's offer but:

> I tried very hard not to be convincing. I take the position that this is what it is: you take your shot, you don't take your shot. I mean ultimately it is their decision.
>
> My only concern is that they're making an informed choice. As long as they're making an informed choice, they can be reasonable or unreasonable.

¶14 The trial court found Barth's testimony to be the more credible and that Barth had "an absolute duty" to advise Williams how Church's expected testimony changed his case. In essence, the court found that Barth's advice stemmed from a truthful, and necessary, appraisal of the case. It was not impermissibly forceful because to plead or not remained Williams' choice.

¶15 "[A] defense counsel would be remiss to advise a defendant to go to trial, knowing that a conviction was highly likely." ***State v. Rhodes***, 2008 WI App 32, ¶11, 307 Wis. 2d 350, 746 N.W.2d 599. If Williams felt compelled to plead because he was "terrified," that is self-imposed, not legal, coercion. *See* ***Craker v. State***, 66 Wis. 2d 222, 228-29, 223 N.W.2d 872 (1974). To say otherwise now stands in contrast to his statements during the plea colloquy when he denied that anyone had threatened him to get him to plead and told the court that he was satisfied with Barth's representation.

¶16 The trial court's findings are not clearly erroneous. A defendant cannot merely assert a recognized reason for plea withdrawal; he or she must show that the reason actually exists. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). Since the trial court did not believe that Williams' plea was the product of impermissible haste or coercion, then there is no fair and just reason to allow it. *See* ***id.*** We hold the trial court did not erroneously exercise its discretion when it found no fair and just reason to allow Williams to withdraw his plea. Accordingly, we do not reach the issue of substantial prejudice to the State.

By the Court.—Judgment affirmed.

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