COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0162-CR **Cir. Ct. No. 00-CF-000061**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD D. SHAMPO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

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

¶1 HOOVER, P.J. Donald Shampo appeals an order denying his motion to withdraw his plea as well as the underlying judgment of conviction. Shampo contends the trial court erroneously exercised its discretion by both applying the wrong legal standard to his motion and denying the motion. He also argues that the court's failure to comply with the procedural mandates of WIS.

STAT. § 971.08[1] resulted in a defective plea. We reject Shampo's arguments and affirm the judgment and order.

Background

¶2 Shampo faced nine sexual offense felonies and one drug charge. The court appointed counsel for him, and eventually a plea hearing was held on September 8, 2000. Shampo pled no contest to three of the charges—child enticement, second-degree sexual assault of a child, and second-degree sexual assault of a child as party to a crime—with the habitual offender enhancer. The parties were free to argue the sentence following completion of a presentence investigation report.

¶3 On September 11, 2000, Shampo, pro se, apparently notified the court he wished to withdraw his plea, although the first formal motion in the record, also pro se, is dated October 11, 2000. On October 11, the court heard the motion to withdraw. It denied the motion because it could not find any manifest injustice would result without withdrawal.

¶4 On October 30, 2000, Shampo filed another pro se motion to withdraw his plea. New counsel was appointed, and a second hearing was held

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

January 3, 2001, on Shampo's motion to withdraw the plea. The court concluded that there was no fair and just reason to justify the withdrawal.[2] Shampo appeals.

Discussion

¶5 This court will sustain a circuit court's ruling denying a motion to withdraw a plea unless the court erroneously exercised its discretion. ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). To be sustained, a discretionary decision must demonstrably be made based upon facts appearing in the record and in reliance on the appropriate and applicable law. ***Id.***

¶6 A circuit court should freely allow a defendant to withdraw his plea before sentencing if it finds any fair and just reason for withdrawal. ***Id.*** "Freely," however, does not mean "automatically." ***Id.*** A fair and just reason is some adequate reason for a defendant's change of heart other than his desire to have a trial. ***Id.*** at 861-62. The burden is on the defendant to prove a fair and just reason for withdrawal by a preponderance of the evidence. ***Id.*** at 862.

¶7 Shampo alleges first that the trial court applied the wrong legal standard to his motion to withdraw. He claims the trial court used the "manifest injustice" standard. To withdraw a plea after sentencing, a defendant must show that a manifest injustice would result without the withdrawal. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. This is a higher standard for the defendant to meet than the "fair and just reason" standard.

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[2] There was also apparently a motion to withdraw the plea filed on April 23, 2001, but no hearing took place on this motion. The record is not clear as to why not, although we note that the motion references only the October motion hearing and not the January hearing. The April 23 motion was dismissed for statutory reasons. Shampo makes no arguments on appeal regarding that motion.

¶8 It appears from the transcripts that the trial court initially applied the manifest injustice standard at the October hearing, relying on the State's incorrect recitation of the applicable standard. However, any harm that might have come from this misapplication of the law was remedied when the trial court held the January hearing and applied the correct "fair and just reason" standard. In the second hearing, the trial court clearly references the appropriate standard it is to apply.

¶9 Shampo's more substantive complaint is that the trial court erroneously exercised its discretion at the second hearing when it declined to find a fair and just reason for Shampo's plea withdrawal. A fair and just reason for withdrawal includes a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, or coercion on the part of trial counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). Shampo essentially complains that he did not understand the consequences of his plea, that he was confused as to what rights he was giving up, and that his trial counsel coerced him to take the plea agreement without doing any investigation into the case.[3] We conclude, however, that the record indicates the trial court appropriately based its decision on the facts of record and the applicable law. ***Garcia***, 192 Wis. 2d at 861.

¶10 The record reveals that at the original plea hearing, the court explained the elements of each of the three offenses to Shampo, as well as the

[3] To the extent that Shampo's motions allege his trial counsel was ineffective, at no point did he request a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

maximum penalty he faced for each charge. The court asked whether Shampo understood the charges and penalties, to which Shampo replied, "Yes."

¶11 The court explained that a no contest plea meant that Shampo would be found guilty and would have a criminal felony record and that he would never again be able to own or possess a firearm. It explained the habitual criminal enhancement. The court further informed Shampo that he would be giving up certain constitutional rights.[4] Shampo indicated he understood all of these consequences.

¶12 The court ascertained that Shampo was forty years old, that although he had not finished high school he could read and write, and that he had never been treated for a mental illness. The court inquired whether any threats or promises other than the plea agreements had been made to persuade Shampo to plead no contest, and Shampo replied, "No." The court inquired whether Shampo had any questions. He did not. The court asked if Shampo had sufficient time to consult with his attorney and whether he was satisfied with his attorney's representation. Shampo answered yes to both questions. Following all of these inquiries, the court concluded that Shampo's plea was knowing and voluntary.

¶13 Shampo then filed his first pro se motion to withdraw the plea,[5] alleging his trial counsel was ineffective by failing to investigate potential alibi

[4] These included Shampo's rights to have a trial, to have the State prove its case beyond a reasonable doubt, to question the State's witnesses, to put on his own witnesses, to testify in his own behalf, and to have a unanimous jury decide his fate.

[5] Because the record does not contain the September 11 letter, the "first" motion refers to the October 11 motion.

witnesses. In his second motion, he further alleged confusion as to the rights he was surrendering and haste in entering the plea.

¶14 To the extent Shampo challenges his trial attorney's failure to investigate, we decline to consider the argument. A defendant who alleges a failure to investigate on the part of counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Shampo makes no such allegations for us to consider.

¶15 With new counsel at the second motion hearing, Shampo testified that his trial attorney convinced him to take the plea bargain by calling it the best Shampo could get and without investigating a defense. Shampo's trial attorney testified that until a case progressed past the pretrial stage and was set for trial, he would generally not conduct extensive investigation. This, the attorney explained, was because trial preparation would be a waste of time if the case ended with a plea agreement. The attorney also indicated that Shampo had taken a proactive role in the plea discussion. The district attorney made a similar indication at the first motion hearing, suggesting that it was Shampo's idea to plead to three of the ten charges.

¶16 Ultimately, the trial court rejected Shampo's testimony and claims of confusion, stating:

> I find out that he's been through court in other cases, at least a couple of times, and this person who's not very knowledgeable of the system and doesn't understand that he had a right to a jury trial supposedly is the same defendant that filed a motion for discovery about two weeks or three weeks after he was charged. Before he even had a lawyer he filed his own motion for discovery. That shows a person with a great deal of insight into the court system. …

He's filed his own motion, he filed a motion for appointment of counsel, a continuance, a request for transcripts; he's filed a motion to withdraw his plea and an amended motion to withdraw his plea[.] … It's citing me standards. It covers not only his … motion to withdraw, but it covers his need for transcripts, the standards for withdrawal of the plea, and argument regarding mere [recitation] of elements versus actually explaining them and making sure he understands.

It's quite in depth research on the subject, and it's signed by him. So, I'm getting a picture. … [I]f I'm to believe Mr. Shampo, he doesn't have a clue what's going on here. …

Mr. Shampo is arguing that he doesn't know about his defenses. …

[T]here is reason to believe … that we're dealing with a person that has some familiarity with the court system and that he is taking more of an active role in his own defense than most defendants would … and I'm having difficulty believing Mr. Shampo in all that he says.

I have difficulty believing that he didn't have a clue what a jury trial was and I am having difficulty believing that he relied so heavily on his attorney's advice … when, in fact, I believe that Mr. Shampo did become very aggressively involved in his own plea bargaining and actually negotiated the plea bargain ….

I realize that at this point in the proceedings the Court is supposed to be quite liberal in granting these motions, and the Court is supposed to look for a fair and just reason to withdraw [the plea]. …

….

I'm satisfied that Mr. Shampo is a lot more knowledgeable about the system than he lets on. I think he knew about the law more than he says he did. …

He had an opportunity to withdraw his plea at that time [of the plea hearing], and I guess the fact that he sent the letter two days after he got out of court leads me to believe that he's manipulating the system.

[M]y impression is that he went for the best plea bargain he could get and then turned around and filed a withdrawal of the plea, knowing full well that he was gonna do that all of

> the time and blame it on [defense counsel], and I don't see any grounds to allow him to withdraw the plea, so I won't.

¶17 While Shampo seems to view the "fair and just reason" standard as requiring the court to allow a plea withdrawal anytime a defendant *alleges* a "fair and just reason," he must still meet the burden of proof. The trial court rejected Shampo's credibility as to his confusion and his attorney's actions, accepting instead the testimony of the trial attorney and district attorney. The trial court is the arbiter of witness credibility. WIS. STAT. § 805.17. It determined that Shampo had a full understanding of the proceedings and the trial attorney represented Shampo appropriately. In other words, Shampo failed to demonstrate a fair and just reason for withdrawing his plea by a preponderance of the evidence. We see no reason to upset this determination.

¶18 Shampo also alleges three substantive errors related to WIS. STAT. § 971.08: Although the court advised Shampo he would not be allowed to possess a firearm, it failed to advise Shampo of the penalties of possession; the court failed to advise him of the possibility of deportation; and the court failed to inquire whether the district attorney had complied with WIS. STAT. § 971.095(2). Shampo asks us to use our discretionary authority to reverse the trial court based on these errors.

¶19 WISCONSIN STAT. § 971.08 states in pertinent part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> ….
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

> (d) Inquire of the district attorney whether he or she has complied with s. 971.095 (2).
>
> (2) If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

¶20 We note first that nowhere in this statute is the court required to advise Shampo of the consequences of possessing a firearm. Instead, the directive to the court to advise the defendant is in WIS. STAT. § 973.033 and the prohibition and penalties are in WIS. STAT. § 941.29. However, it is sufficient that the trial court advised Shampo he could not possess a firearm. *See* ***State v. Phillips***, 172 Wis. 2d 391, 394-95, 493 N.W.2d 238 (Ct. App. 1992).[6]

¶21 With regard to failure to warn about deportation, it is true that the harmless error analysis does not apply. ***State v. Douangmala***, 2002 WI 62, ¶42, 253 Wis. 2d 173, 646 N.W.2d 1. WISCONSIN STAT. § 971.08(2) requires two showings before the defendant may withdraw the plea. First, the defendant must show that the warning under § 971.08(1)(c) was not given. Here, this element is undisputed.

¶22 Second, Shampo must show "that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of

[6] Shampo does not tell us whether he objects to a failure of the court to warn him of state penalties or federal penalties. However, to the extent federal law may apply to Shampo as a convicted felon, we have held that defendants have no due process right to be informed of potential federal penalties. *See* ***State v. Kosina***, 226 Wis. 2d 482, 489, 595 N.W.2d 464 (Ct. App. 1999). This is because any federal penalties would be collateral to a state conviction.

naturalization ….” WIS. STAT. § 971.08(2). Shampo makes no mention of his nationality, citizenship status, or any other information that would demonstrate he is anything but a citizen of the United States. Even assuming Shampo is not a citizen, he has failed to present any evidence or argument that this plea would result in deportation, exclusion from admission, or denial of naturalization. Shampo therefore fails to meet the § 971.08(2) criteria for plea withdrawal based on the court's failure to notify him of the provisions of § 971.08(1)(c).

¶23 Regarding an inquiry of the district attorney under WIS. STAT. § 971.08(1)(d), harmless error analysis applies. The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Fischer***, 2003 WI App 5, ¶38, 259 Wis. 2d 799, 656 N.W.2d 503. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction. ***Id.***

¶24 Shampo, however, contends that because harmless error is inapplicable to WIS. STAT. § 971.08(1)(c) under ***Douangmala***, it cannot apply to any part of § 971.08. He cites no authority for this proposition and we reject it. Importantly, the supreme court held harmless error inapplicable to § 971.08(1)(c) because of § 971.08(2)'s explicit remedy. ***Douangmala***, 253 Wis. 2d 173, ¶46. No remedy appears for violations of other sections, however, leaving us to apply the harmless error rule.

¶25 WISCONSIN STAT. § 971.08(1)(d) asks whether the district attorney has complied with § 971.095(2). This second section states:

> In any case in which a defendant has been charged with a crime, the district attorney shall, as soon as practicable, offer all of the victims in the case who have requested the opportunity an opportunity to confer with the district attorney concerning the prosecution of the case and the

> possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations. The duty to confer under this subsection does not limit the obligation of the district attorney to exercise his or her discretion concerning the handling of any criminal charge against the defendant.

¶26 This section conveys no rights or protections to a defendant. The court inquires about this factor to ensure the district attorney has considered the impact of a plea on the victim. Even if the district attorney failed to comply with this section, we can conceive of no situation where the State's failure to notify the victims of a plea has any impact whatsoever on a defendant's conviction, particularly when "this subsection does not limit the obligation of the district attorney to exercise his or her discretion" in handling a criminal prosecution on behalf of the entire populous of this state. Thus, the court's failure to inquire about the district attorney's compliance with WIS. STAT. § 971.095(2) was harmless.

Conclusion

¶27 Although the trial court initially applied an incorrect standard in determining whether to allow Shampo to withdraw his plea, it remedied the error when it held a second motion hearing where it applied the correct standard. Shampo failed to meet is burden of proof, and the trial court did not erroneously exercise its discretion by denying his motion. As to the substantive errors alleged, Shampo was appropriately advised of the firearm restrictions, he failed to show that his conviction might subject him to deportation as required by WIS. STAT. § 971.08(2) before a remedy is available, and the court's failure to inquire whether the district attorney had notified Shampo's victims is a harmless error.

By the Court.—Judgment and order affirmed.

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