COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1540-CR **Cir. Ct. No. 2008CF304**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR G. SIMMONS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Arthur Simmons, Jr. appeals from a judgment of conviction and an order denying his postconviction motion to withdraw his ***Alford***[1] pleas. We affirm.

¶2 Simmons entered ***Alford*** pleas to misdemeanor theft and felony substantial battery. Four other counts were dismissed. The circuit court denied Simmons' three plea withdrawal motions. Simmons appeals.

¶3 Simmons argues that the circuit court should have permitted him to withdraw his pleas before sentencing. Whether to grant a plea withdrawal motion is within the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶6, 303 Wis. 2d 157, 736 N.W.2d 24. When a plea withdrawal motion is filed before sentencing, the court applies the "fair and just reason" standard. ***Id.***, ¶28. The defendant has the burden of proving the existence of a fair and just reason. ***Id.***, ¶32. "The reason must be something other than the desire to have a trial, or belated misgivings about the plea." ***Id.***, ¶32 (citations omitted). We review the circuit court's findings of fact and credibility determinations under the clearly erroneous standard. ***Id.***, ¶33.

¶4 At the plea hearing, the parties set out the following agreement: Simmons would enter ***Alford*** pleas to theft as a repeat offender and substantial battery. The parties would jointly recommend eighteen months of initial confinement and two years of extended supervision for the battery with a concurrent two-year term of probation for the theft. Among other things, the court

[1] An ***Alford*** plea is a conditional guilty plea in which the defendant maintains his or her innocence of the charge while at the same time pleading guilty or no contest to it. ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970).

confirmed Simmons' understanding of the charges and the maximum penalties, and that being convicted of theft as a repeat offender meant that his sentence could be increased by up to two years due to the repeater enhancement. The court advised Simmons that it was not bound by the parties' sentence recommendations and could impose the maximum penalties, and that no one had promised Simmons anything other than what was put on the record at the plea hearing. Simmons stated that he understood all of the court's warnings about the pleas and their consequences.

¶5 At the hearing on Simmons' first pre-sentence motion to withdraw his pleas, Simmons testified that he did not understand that entering a plea to theft as a repeat offender exposed him to a greater sentence. He claimed that he did not recall any pre-plea hearing discussions about the repeater enhancement on the theft sentence or that the court mentioned the repeater enhancement at the plea hearing. Simmons testified that he did not understand that the plea agreement itself could result in prison time or that pleading to theft could result in prison time because of the repeater enhancement. Simmons thought that the repeater enhancement merely meant that he faced two years of probation for theft.

¶6 Trial counsel testified that she told Simmons he faced a two-year sentence enhancement for theft as a repeat offender. The court pointed out to Simmons that he agreed at the plea hearing that he understood the possibility of a two-year sentence enhancement for theft.

¶7 The court found that the plea hearing transcript substantiated that Simmons was informed of the penalties, including the enhanced penalty for theft as a repeat offender, and that Simmons stated he understood that information. The court found that Simmons was attentive at the plea hearing and manifested his

understanding of the proceeding and the plea agreement. The court found that Simmons did not meet his burden to show a fair and just reason to withdraw his pleas because misgivings about the plea agreement were not a basis for plea withdrawal under ***Jenkins***.

¶8 Simmons then filed a second motion to withdraw his pleas reiterating that he did not understand the potential two-year repeater enhancement. The court denied the motions because Simmons understood the plea agreement and voluntarily entered his pleas.

¶9 The court also rejected Simmons' argument that he should be permitted to withdraw his pleas because of an alleged breach of the plea agreement in connection with the presentence investigation report. A police officer told the presentence investigation report author that Simmons should receive a sixty-five-year term, and the presentence investigation report author would have recommended a longer sentence than that contained in the plea agreement. The court did not regard the officer's letter or the presentence investigation report author's opinion as a breach of the State's agreement. The State also affirmed its intention to argue at sentencing for the agreed upon sentence. The court again found that Simmons had merely reconsidered his desire to enter pleas, and this was not a sufficient reason to permit plea withdrawal.

¶10 At sentencing, the State argued for the agreed upon sentence. For the misdemeanor theft, the court imposed a two-year term with no probation. For the battery, the court imposed three years and six months to be served consecutively.

¶11 Postconviction, Simmons filed a third motion to withdraw his pleas because he did not understand that the repeater enhancer exposed him to more

prison time. The court treated the motion as a request to reconsider the previous denials of Simmons' motions to withdraw and therefore applied the fair and just reason standard. The court found that Simmons understood that by entering his pleas, he would be convicted and sentenced. The court found that Simmons knew he faced an enhanced prison sentence for theft. The court denied the motion. Simmons appeals.

¶12 On appeal, Simmons argues that he established a fair and just reason to withdraw his pleas because he did not understand the pleas or their consequences. The circuit court found on three occasions that Simmons understood the pleas and their consequences. The circuit court made credibility determinations, and the court's findings are not clearly erroneous. *See* ***Jenkins***, 303 Wis. 2d 157, ¶33. In addition, the plea colloquy complied with the requirements of ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794, for the entry of knowing, voluntary and intelligent pleas. The circuit court did not misuse its discretion in denying all of Simmons' motions to withdraw his pleas under the fair and just reason standard.

¶13 Relying on ***State v. Matson***, 2003 WI App 253, 268 Wis. 2d 725, 674 N.W.2d 51, Simmons argues that the police officer's advocacy to the presentence investigation report author for a lengthier sentence constituted a breach of the plea agreement. ***Matson*** does not control.

¶14 In ***Matson***, the investigating detective wrote directly to the sentencing judge on police department stationery to request the maximum sentence for Matson, which was at odds with the parties' joint recommendation in the plea agreement. ***Id.***, ¶3. The court attributed the detective's statement to the prosecutor, who was barred from undercutting the plea agreement by words or

conduct. ***Id.***, ¶25. Therefore, the detective's letter on police department stationery was a breach of the plea agreement. ***Id.***, ¶26.

¶15 In this case, the presentence investigation report author spoke with an officer who gave his opinion about the recommended sentence. The officer did not have direct contact with the court, unlike the officer in ***Matson***. The circuit court correctly determined that the officer's remarks did not constitute a breach of Simmons' plea agreement.

¶16 Simmons next challenges as inherently suggestive the in-court identification of him at the preliminary hearing and subsequent hearings.[2] For this proposition he cites ***State v. DuBose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. ***DuBose*** addresses out-of-court identification procedures. ***Id.***, ¶1. Simmons has not made a convincing argument that ***DuBose*** applies to in-court identifications.

¶17 Simmons next argues that he was arrested illegally and therefore any evidence obtained as a result of that arrest should be suppressed.[3] We will assume without deciding that Simmons' arrest in Eau Claire County by Chippewa County officers was unlawful. However, Simmons does not identify the evidence obtained as a result of this arrest which should have been suppressed. Simmons' argument is not adequately developed, and we will not develop his argument for

[2] The State argues that this issue is waived because Simmons entered ***Alford*** pleas. The State is wrong. To the extent Simmons litigated this issue in the circuit court before entering his ***Alford*** pleas, the pleas did not waive this issue on appeal. WIS. STAT. § 971.31(10).

[3] The State again argues that this issue is waived by Simmons' ***Alford*** pleas. Simmons litigated this issue in the circuit court. Therefore, the issue is not waived. WIS. STAT. § 971.31(10).

him. *See* ***Vesely v. Sec. First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

¶18[4] We turn to the contents of the appellant's appendix. The appellant's brief contains the required WIS. STAT. RULE 809.19(2)(b) certification by counsel, Stephen Willett, that the appendix contains "portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues." RULE 809.19(2)(a). The issues Willett argued in the appellant's brief related to the circuit court's denial of Simmons' motions to withdraw his ***Alford*** pleas and his motions relating to in-court identification and an allegedly unlawful arrest. Willett, however, did not include in the appendix copies of the transcripts of the hearings at which these issues were addressed. These transcripts were essential to understand the issues Willett raised, and it is self-evident that the appendix, at minimum, should have included these transcripts.[5] The appendix contained only a copy of the judgment of conviction and the order denying the postconviction plea withdrawal motion. These materials did not enlighten us as to the circuit court's rulings. Consequently, we question whether these omissions from the appendix violate RULE 809.19(2) such that a penalty should be imposed.

[4] Paragraphs eighteen and nineteen are modified pursuant to a December 13, 2011 order of the Wisconsin Supreme Court granting a petition filed by Attorney Stephen D. Willett, ***State ex rel. Stephen D. Willett v. Wisconsin Court of Appeals***, No. 2011AP1143-W, and remanding our April 20, 2011 decision in this appeal for the purpose of modifying paragraphs eighteen and nineteen consistent with ***State v. Nielsen***, 2011 WI 94, ___ Wis. 2d ___, ___ N.W.2d ___.

[5] We acknowledge that the appendix to the State's respondent's brief provided many of these transcripts. However, the State's action does not remedy the omissions in the appendix to the appellant's brief.

¶19 The purpose of an appendix certification is to foster increased compliance with WIS. STAT. RULE 809.19(2)(a) and "thereby improve the quality of appendices filed with the appellate courts." ***State v. Bons***, 2007 WI App 124, ¶21, 301 Wis. 2d 227, 731 N.W.2d 367. There, we also held that "[f]iling a false certification with this court is a serious infraction not only of the rule, but it also violates SCR 20:3:3(a) (2006). This rule provides, 'A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal.'" ***Bons***, 301 Wis. 2d 227, ¶24. A false certification and the omission of essential record items places an unwarranted burden on the court and "'is grounds for imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate. WIS. STAT. [RULE] 809.83(2) (2005-06).'" ***Bons***, 301 Wis. 2d 227, ¶25. By separate order pursuant to ***State v. Nielsen***, 2011 WI 94, ___ Wis. 2d ___, ___ N.W.2d ___, we require Attorney Willett to show cause in writing why a violation of WIS. STAT. RULES 809.19(2)(a) and (b) should not be found and why counsel should not be required to pay $150 as a sanction for failing to include in the appendix portions of the record that may have been essential to an understanding of the appellate issues. Alternatively, Attorney Willett may pay the $150 sanction within thirty days of this order.

By the Court.—Judgment and order affirmed.

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