COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2182-CR **Cir. Ct. No. 2009CF5**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD B. YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

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

¶1 PER CURIAM. Donald Young appeals a judgment of conviction and an order denying a motion to withdraw his no contest pleas. Young argues the circuit court erroneously exercised its discretion by denying his plea withdrawal motion. We reject Young's arguments and affirm.

¶2 The criminal complaint charged Young with two counts of sexual assault of a child under age sixteen, repeated sexual assault of a child, two counts of child enticement, contributing to the delinquency of a child, possession of THC and possession of drug paraphernalia. Young pled no contest to one count of child enticement (into a vehicle) with intent to have sexual intercourse; one count of contributing to the delinquency of a minor; and one count of possession of THC. The State agreed to dismiss the remaining five counts. The State also agreed to recommend seven years' probation on the felony child enticement charge, with sixty days' jail and psychological assessment as conditions, and withheld sentences with two years' probation on the two misdemeanor counts, concurrently.

¶3 During the plea colloquy, Young waived his right to counsel[1] and to a preliminary hearing. He was also advised of the constitutional rights he waived by pleading no contest. Young acknowledged his understanding of the charges and the maximum penalties. Young assured the court that he understood the elements of the offenses. Young also acknowledged his understanding that the court was not bound by any sentence recommendation and could impose the maximum penalties. Young stated that he had read the criminal complaint and it did not allege anything he disagreed with. The court accepted the pleas and ordered a presentence investigation report.

¶4 The case proceeded to sentencing. The prosecutor again recited the terms of the plea agreement, and Young again waived his right to counsel. Young

[1] Young assured the court that it was his decision to proceed without a lawyer. The court reminded Young that he still had the right to be represented by counsel at sentencing. Young assured the court he had no questions about the proceedings and did not claim at the plea hearing that he desired but was unable to hire counsel.

indicated that he had reviewed the PSI, and made several corrections to it. The court noted the PSI recommended a "considerably stiffer penalty" than recommended by the parties' plea agreement. The circuit court again advised Young that it was not bound by the parties' agreement. When the court asked Young for his sentencing argument, he responded that he did not know what to say because he did not have a lawyer. The court offered to adjourn sentencing to allow him time to consult with a lawyer. Young responded that he could not afford one and the public defender would not appoint one.

¶5 At this point, the circuit court engaged Young in a colloquy concerning Young's assets. The court ascertained that Young earned $1,500 monthly, and owned three acres of land worth $20,000, a mobile home unencumbered by a mortgage, and personal property including boats and photography equipment. The court concluded:

> I think, given your statement that you would like an attorney but you felt you could not afford one, when it's abundantly clear that you can in fact afford one – I think you better give that matter some thought and consult an attorney at this point or at least be prepared to tell me that you've given it thought and you've decided notwithstanding the fact that you have considerable assets that would allow you to retain an attorney you've elected not to. But I want you to think that – I want you to think that over before we proceed.

¶6 Young did not challenge the court's findings in this regard. The court adjourned sentencing to allow Young to decide whether to retain counsel. A week later, the court denied Young's renewed request for appointment of counsel, on the ground that Young had sufficient assets to hire counsel. The next day, Young filed a pro se motion to withdraw his pleas. Over a month later, Young retained an attorney and the court ordered an evidentiary hearing on Young's withdrawal motion.

¶7 Young testified at the evidentiary hearing that he did not know that the child enticement offense had a sexual component to it. Young stated that he thought he was only pleading to smoking marijuana with his then-fourteen-year-old stepdaughter. When confronted with the fact that the court went through the elements of child enticement with him at the plea hearing, Young explained, "I was phasing in and out. Some stuff I heard. Some stuff I didn't." However, Young admitted on cross-examination that he did not tell the court at the plea hearing that he was "phasing in and out" or having difficulty understanding. In fact, Young specifically assured the court that he understood the proceedings. Young also admitted that he told prosecutors during meetings to discuss a plea agreement that he was conferring with a Madison attorney about the case but had not hired him. Nevertheless, Young insisted none of the attorneys he consulted before the plea mentioned anything about sex offender registration or possible WIS. STAT. ch. 980 commitment.[2]

¶8 The circuit court made a preliminary oral ruling denying the plea withdrawal motion, but subject to supplemental briefs addressing the impact of Young's alleged lack of knowledge of the sex offender registry and WIS. STAT. ch. 980 commitment collateral consequences. The court disbelieved Young's claim that he did not understand the charges or the State's burden of proof. The court held that Young's claim is "clearly contradicted by the record here …." The court stated, "I reject as not credible and self-serving" Young's testimony that he believed he was just pleading to drug-related offenses, pointing out that Young did not even make that allegation in his pro se plea withdrawal motion that prompted

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the hearing. The court also found that the State's burden of proof was clearly explained to Young during the plea colloquy. The court went on to find that Young's waiver of his right to counsel at the plea hearing was voluntary and intelligent, noting that Young "hasn't argued that he didn't understand his right to an attorney."

¶9 In its subsequent written decision and order, the court found that the motivation for Young's plea withdrawal motion was not his lack of knowledge of possible collateral consequences, but his dissatisfaction with the PSI author's sentence recommendation. The court stated that the collateral consequences "were merely after-the-fact rationalizations" brought out at the suggestion of retained counsel long after Young had already sought plea withdrawal on other grounds. The court concluded that Young's "true reason" for seeking to withdraw his pleas was that "he developed misgivings when he learned of the sentencing recommendation in the Presentence Report …."

¶10 Young was sentenced to four years' initial incarceration and six years' extended supervision on the child enticement count and six-month jail terms for the two misdemeanor offenses, concurrent to each other and the felony. Young now appeals.

¶11 The decision whether to grant or deny a presentence motion to withdraw a no contest plea is addressed to the circuit court's sound discretion. We will not disturb that decision unless discretion was erroneously exercised. ***State v. Jenkins***, 2007 WI 96, ¶¶6, 29-30, 303 Wis. 2d 157, 736 N.W.2d 24. The defendant challenging his or her plea bears the burden of proving by a preponderance of the evidence that a fair and just reason exists for plea withdrawal. That reason must be more than the desire to go to trial or belated

misgivings about the decision to plead. ***Id.***, ¶¶32, 74. The circuit court's findings of fact and credibility determinations are to be reviewed deferentially and may not be disturbed unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Jenkins***, 303 Wis. 2d 157, ¶33. When a plea satisfies the mandatory procedures set forth in WIS. STAT. § 971.08, as interpreted by ***State v. Bangert***, 131 Wis. 2d 246, 260-75, 389 N.W.2d 12 (1986), a strong presumption is raised that the plea is binding and the defendant bears a heavy burden to show that some alleged misunderstanding outside the record of the plea colloquy serves as a fair and just reason for withdrawal of the otherwise proper plea. *See* ***Jenkins***, 303 Wis. 2d 157, ¶60; ***United States v. Lambey***, 949 F.2d 133, 137 (4th Cir. 1991).

¶12 Here, the circuit court had good reason to doubt the veracity of Young's reasons to withdraw his pleas. We note that Young does not argue that the plea failed to meet the ***Bangert*** requirements. Young also does not argue that the State in any way breached the plea agreement. Moreover, Young does not argue that he failed to understand the circuit court was not bound to follow the partys' recommendations and could sentence him to the maximum. He also fails to argue that the court erroneously ordered a PSI.

¶13 Young argues "the lack of the guiding hand of counsel is a fair and just reason for plea withdrawal." However, the elements of the offenses, including the intent to have sexual intercourse with a child element, were read to Young at the plea hearing. At the circuit court's request, and to ensure Young understood the charge, the prosecutor also retrieved the pattern jury instructions and again read the elements of child enticement. The complaint also described in graphic detail the facts supporting the child enticement charge. It described how Young got the teenage girl drunk and enticed her into his truck where he took off her

pants and had penis-vagina intercourse with her for twenty minutes to show her a "maximum orgasm."

¶14 Young does not explain why he required counsel to tell him that intent to have sexual intercourse is an element of the child enticement offense, or that inserting his penis into the child's vagina is sexual intercourse as a matter of law. Young fails to explain how any defendant, counseled or not, would confuse the sex crime with a drug charge. More importantly, Young fails to explain, if he indeed did not understand the elements of the offense, why he told the court he did understand rather than request clarification.

¶15 It was exceedingly reasonable for the circuit court to find that Young was untruthful when he testified under oath at the plea withdrawal hearing that he did not understand the elements of child enticement and thought he was only pleading to smoking marijuana with the child. That untruth critically undercut the credibility of the remainder of Young's statements under oath at the hearing, and provided firm support for the court's remaining credibility determinations.

¶16 Young suggests he was not told the PSI's author could make a sentence recommendation, but it is unclear how that information could have changed his decision to enter the pleas. Young had expressly acknowledged that he understood the sentencing court "could impose any penalty up to the maximum penalty." Further, the court implicitly rejected this contention by essentially finding Young's withdrawal motion was driven by belated misgivings.

¶17 Young also argues that he was not advised of the collateral consequences of registering as a sex offender or a possible WIS. STAT. ch. 980 commitment. However, any superficial appeal this argument may otherwise have is lost in light of the circuit court's findings of fact and credibility determinations

that the collateral consequences were not motivating factors in Young's decision to seek plea withdrawal, but merely after-the-fact rationalizations. The court found that Young's primary reason for plea withdrawal was displeasure with the PSI's sentence recommendation. The court properly exercised its discretion in concluding that Young's reasons were not credible.[3]

¶18 Finally, Young argues that we should adopt a rule requiring judges to tell pleading defendants whether they are not going to follow the agreed upon sentence recommendation. However, Young concedes that our supreme court has squarely rejected requests to adopt, either by rule-making or in its supervisory capacity, the very rule Young now espouses. *See, e.g.*, ***State v. Williams***, 2000 WI 78, ¶¶16-34, 236 Wis. 2d 293, 613 N.W.2d 132. We have no authority to overrule controlling supreme court precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We will therefore not further address Young's request.

By the Court.—Judgment and order affirmed.

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

[3] Young also complains that the State did not provide discovery before the plea hearing, and that he was only given a copy of the complaint. Because Young waived the preliminary hearing and the no contest pleas were entered before any bind-over, Young had no right to discovery before the plea. *See* ***State ex rel. Lynch v. County Court***, 82 Wis. 2d 454, 463-66, 262 N.W.2d 773 (1978); *see also* ***State v. Schaefer***, 2008 WI 25, ¶¶46, 56-59, 69-70, 82, 95, 308 Wis. 2d 279, 746 N.W.2d 457. Moreover, Young does not explain what in the discovery materials would have caused him to reject the plea agreement and proceed to trial.