COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0260-CR **Cir. Ct. No. 01CF002342**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTREAVOUS L. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Montreavous L. Gray appeals from a judgment of conviction, following his guilty plea, of one count of operating a motor vehicle without owner's consent. Gray claims that the circuit court erred in denying his motion to withdraw his guilty plea. Because we conclude that the circuit court did

not erroneously exercise its discretion when it ruled that Gray failed to present a fair and just reason for the motion, we affirm.

I. BACKGROUND.

¶2 Gray was initially charged with one count of operating a motor vehicle without owner's consent and one count of second-degree reckless endangerment. Gray waived the preliminary hearing and the State filed an information repeating the charges contained in the complaint.

¶3 On the day of trial, October 29, 2001, Gray entered into a plea agreement with the State providing that he would plead guilty to one count of operating a motor vehicle without owner's consent, that the State would dismiss the count of second-degree reckless endangerment but permit it to be read-in at sentencing, and that the State would remain silent as to sentencing. Gray and defense counsel agreed on the record to the prosecutor's recitation of the plea agreement. A handwritten statement encapsulating the agreement appears on a "Plea Questionnaire/Waiver of Rights" form filed with the court when Gray entered his plea. The form, signed by Gray, indicated that defense counsel informed Gray of the constitutional rights his guilty plea waived and the maximum penalty he faced under the terms of the guilty plea. The form also asserted that Gray understood the charge to which he was pleading, understood the rights he was waiving and was entering "this plea of [his] own free will."

¶4 During the plea hearing, the circuit court went over each section of the plea questionnaire with Gray to determine independently that Gray understood the rights he was waiving and that he had not been "pressured or threatened" to plead guilty. Gray also stated at the hearing that "everything" alleged in the

complaint was "true and accurate." As the plea colloquy drew to an end, the following exchange took place:

> THE COURT: … Mr. Gray, is there anything I've talked with you about today that you're confused about or don't understand?
>
> THE DEFENDANT: No.
>
> THE COURT: Any questions?
>
> THE DEFENDANT: No.
>
> THE COURT: Is there any answer you've given me this morning that you now want to change?
>
> THE DEFENDANT: No.
>
> THE COURT: Has everything you said to me been truthful?
>
> THE DEFENDANT: Yes.

Upon receiving these assurances from Gray, the court accepted his plea and adjudged him guilty. The trial court maintained Gray's cash bail and scheduled his sentencing for a later date.

¶5 On November 28, 2001, Gray moved the court to withdraw his guilty plea, claiming he entered his plea under duress. At the first plea-withdrawal hearing held January 17, 2002, certain testimony indicated that the plea agreement included the provision that in the event Gray provided significant, helpful information to law enforcement, the trial court could consider Gray's cooperation at sentencing. Gray specifically testified that "I thought the plea agreement would be if I produce some kind of evidence [for law enforcement], that I would get out and I wouldn't really be pleading guilty …." Gray testified that he didn't pay attention to his counsel when they reviewed his plea questionnaire together and that he thought the guilty plea hearing was "just pretend."

¶6 Gray filed an amended motion for plea withdrawal on March 8, 2002.[1] This motion alleged that Gray was "misled, inadvertently, to believe that his plea agreement provided for release from custody for purposes of providing cooperation to drug trafficking investigation in the Metro Milwaukee area." Gray indicated that he would not have entered a guilty plea and would have insisted on a jury trial in the absence of this understanding of the plea agreement. He also asserted that he gave "untrue answers" during the plea colloquy as he believed it was a "sham" proceeding.

¶7 At the subsequent evidentiary hearing on the amended motion, the prosecutor cross-examined Gray, asking whether Gray understood that his plea agreement required him to plead guilty to the charge of operating a motor vehicle without owner's consent: "I'm thinking if I was going to get out and produce something for law enforcement officials that my time can be reduced or my sentence would be reduced. That's the way it—That's the proposal that I received." Gray conceded that, as a previously convicted criminal, he knew he would not be sentenced unless he was first found guilty of a crime. Nevertheless, Gray alleged that his trial counsel had led him to believe that he would be released from custody "before the week [was] out in order for me [to] produce something for law enforcement officials." Gray also asserted that his central perception of the plea negotiations was "that I was going to get out."

[1] Because Gray's motion involved discussions he had with his trial counsel, Attorney Seth Hartigan, successor counsel was appointed for Gray.

¶8 The prosecutor then had the following exchange with Gray:

> Q Did anyone ever tell you you would be getting out?
>
> A From my understanding by you and the judge is agreeing that I can work with law enforcement officials, that that means that I would be getting out to produce some evidence for the law enforcement officials.
>
> Q So no one ever told you you were getting out, correct?
>
> A From my recollection, that's what was happening when—I thought if I agree, if you and the judge agree for me to work with law enforcement officials, I'm thinking that that means for me to get out and make something—some kind of bust or something.
>
> Q No one told you you were getting out, correct?
>
> A It wasn't word for word, but I'm saying I'm thinking that's what pertaining to what's going on with working with law enforcement officials.
>
> Q So what you thought but no one told you you were getting out, correct?
>
> A From my recollection, I thought that I was getting out. I'm think that's what you telling me that I was getting out. That you—If—You told me and the judge told me that I was getting out if I produce, if I work with law enforcement officials, if I plead guilty to the count 1.
>
> Q One more time. You thought that, but no one told you you were getting out, correct?
>
> A You did tell me.
>
> Q I told you you were getting out?
>
> A He [Attorney Hartigan] told me that you were letting [me] work with law enforcement officials, and judge agreed that I would work with law enforcement officials.
>
> Q But I never told you you were getting out, correct?
>
> A How would I work with law enforcement officials?

¶9 Attorney Seth Hartigan, Gray's trial counsel at the time he entered his guilty plea, testified that he and Gray discussed potential benefits if Gray cooperated with police:

> Mr. Gray and I discussed—We did discuss the possibility of him being released and[,] as I recall it[,] I told [Gray] that again based on my practice[,] if law enforcement made that request, then I would bring that to the Court and ask for a modification of the bail.

Attorney Hartigan testified that although he promised to facilitate Gray's cooperation with police, he did not tell Gray that the prosecutor promised that Gray would be released from custody as part of the plea agreement.

¶10 The trial court denied Gray's motion to withdraw his plea, concluding that his reasons for withdrawal lacked credibility. The circuit court imposed a three-year sentence, consecutive to any other sentence, consisting of one year of confinement followed by two years of extended supervision. Gray appeals the circuit court's order denying his motion to withdraw.

II. DISCUSSION.

¶11 When a motion to withdraw a plea is made prior to sentencing, permission to withdraw a plea should be granted if the defendant presents a fair and just reason for withdrawal and if withdrawal does not substantially prejudice the prosecution. ***State v. Canedy***, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). The burden is on the defendant to offer a fair and just reason, ***id.*** at 583-84, and the reason must be supported by evidence in the record, ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). A defendant does not have an absolute right to withdraw a guilty plea, *see* ***Canedy***, 161 Wis. 2d at 583, although the trial court is to take a liberal rather than a rigid view of the proffered reasons,

see ***Shanks***, 152 Wis. 2d at 288. The determination of whether the reason offered is adequate is within the discretion of the trial court. ***Id.*** As with any discretionary decision, that determination will be upheld on appeal if the trial court examined the relevant facts, applied the proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** at 289.

¶12 Here, the circuit court rejected Gray's motion, concluding that he had not met his burden of demonstrating a fair and just reason for withdrawing his guilty plea because his testimony in support of his motion was wholly incredible:

> This motion turns entirely in my view on whether or not I believe either of the asserted reasons or any of the asserted reasons that Mr. Gray has given in affidavit, in motion papers and under oath for plea withdrawal. In other words, the State has indicated in its brief that there have been a couple of reasons asserted. I've reviewed all of the reasons asserted at any time by Mr. Gray and I conclude that the defense has failed to meet its burden of proof to show a just and fair reason for the plea withdrawal.
>
> The reason that I come to that conclusion is based entirely on considerations of credibility. I have watched and listened during Mr. Gray's testimony over a couple of occasions in this hearing; that is, the hearing took place over a couple of different occasions and he demonstrates extreme evasiveness and in a sense a selective memory about what he wishes to recall and what he doesn't. I don't find under all the considerations of credibility that are listed in criminal jury instruction number 3400, including reasonableness of the testimony, whether the testimony make sense, the defendant's demeanor and conduct while testifying, all of those considerations of credibility, motive to falsify and the like, I do not find that he is worthy of belief in his assertions in respect to his request for plea withdrawal.
>
> Accordingly, I find that—or I conclude as I've mentioned that the State—the defense has failed to meet its burden of proof to show a just and fair reason even under the liberal standard that I apply here.

¶13 Credibility assessments are critical to the circuit court's determination of whether the defendant has shown a fair and just reason to allow withdrawal of a guilty plea. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). In other words, a defendant must demonstrate that the proffered fair and just reason exists. *See* ***id***. Here, Gray failed to convince the circuit court that his misunderstanding of the benefit actually conferred by the plea agreement was genuine. The trial court's credibility determination was dispositive. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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