

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2641-CR

Cir. Ct. No. 2008CF270

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. MARSHALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. David Marshall, pro se, appeals his judgment of conviction for seven counts of identity theft and one count of fraudulent use of a

credit card, and an order denying postconviction relief. Marshall seeks to withdraw his pleas.¹ We affirm.

¶2 A criminal complaint charged Marshall as a party to the crime of seven counts of identity theft for financial gain and a single count of fraudulent use of a credit card. All counts bore a repeater enhancement based on a prior conviction for forgery/uttering. It was further alleged that Marshall had been identified through surveillance cameras at banks and gas stations. Through a warranted search of Marshall's apartment, victims' credit cards, personal identification and checks were seized, along with false driver's licenses created by using the victims' identities.

¶3 After a jury was selected for Marshall's trial and opening statements were given, Marshall entered a plea to all eight charges. The State agreed to cap its sentence recommendation at ten years' initial confinement and twelve years' extended supervision, with restitution. At sentencing, the court noted Marshall's use of aliases, victimization of individuals for decades and incarceration in four states. The court stated, "You are what you are, and you are a thief, a professional, lifelong thief. ... So, I think the best I can do is, unfortunately, just house you for [a] significant period of time in the Wisconsin Prison System to protect the public." The court imposed eight consecutive terms: three terms of one year initial confinement and two years' extended supervision; one term of three years' initial confinement and one year extended supervision; one term of four years' initial confinement and one year extended supervision; two terms of

¹ Marshall uses the phrase, "abused its discretion." Our supreme court changed the terminology in 1992 from "abuse of discretion" to "erroneous exercise of discretion." See *State v. Plymessa*, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

five years' initial confinement and two years' extended supervision; and a nine-month term on a misdemeanor count.

¶4 Marshall changed attorneys but before his new attorney had formally entered the case, Marshall filed a pro se motion to withdraw his no-contest pleas on the ground that the State withheld exculpatory evidence. This new evidence was recordings of conversations with an accomplice while Marshall was in custody in which Marshall allegedly emphasized the need to get property out of his residence.² Marshall claimed that while the evidence might not make much difference to the defense generally, he should be allowed to withdraw his pleas because his desire to explore the evidence raised a possible basis for challenging the voluntariness of the pleas. Significantly, defense counsel went out of its way to emphasize at the hearing that Marshall was not claiming his trial attorney had rendered ineffective assistance of counsel in this regard.

¶5 The court denied Marshall's plea withdrawal motion. The court doubted whether the recordings were really evidence of anything material, and questioned whether they presented "even ... one billionth of one percent of a chance [to have] an effect on this case. To me it's just a grasping at any possible straw you can get because he wants to withdraw his plea." In sum, the court concluded that no new evidence, exculpatory or inculpatory, had been discovered and that Marshall was merely hopeful that an order for a trial might result in a more favorable outcome at a rescheduled trial. The court stated, "... I think this

² It does not appear the recordings or a transcript of the recordings were ever introduced into evidence.

motion has no weight whatsoever, not a scintilla of fabric to it, and I deny your motion to withdraw the plea.”

¶6 A postconviction/appellate attorney was appointed for Marshall. Marshall disagreed with his attorney’s decision to close the case without a postconviction motion or appeal, and he elected to proceed pro se. Because his attorney had not made an appearance in the case, we allowed him to do so without a formal withdrawal motion from his counsel. Shortly thereafter, Marshall filed a pro se postconviction motion, asserting that his trial counsel was ineffective for failing to discover or investigate the recorded conversations between Marshall and his associate, and their connection to the search of his apartment. Marshall also alleged that the circuit court erred by denying his prior plea withdrawal motion without listening to the recordings.

¶7 The circuit court denied Marshall’s motion in a written decision. The court observed that it had denied Marshall’s earlier plea withdrawal motion based on the recorded conversations and that Marshall had waived any claim of ineffective assistance of counsel by forswearing any such claim in his argument on the motion. Accordingly, the court regarded Marshall’s motion as a mere attempt to reargue his earlier unsuccessful plea withdrawal motion. Marshall now appeals.

¶8 A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. *State v. Garcia*, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). A “fair and just reason” has been defined as “some adequate reason for defendant’s change of heart ... other than the desire to have a trial.” *Id.* at 861-62 (citation omitted). Even where the defendant establishes a fair and just reason for

plea withdrawal, the circuit court may consider in its discretion whether the prosecution would be substantially prejudiced by granting the request. *State v. Bollig*, 2000 WI 6, ¶¶34, 43, 46, 232 Wis. 2d 561, 605 N.W.2d 199. After sentencing, the court should only permit the defendant to withdraw a plea to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836.

¶9 The circuit court properly exercised its discretion by denying Marshall's presentence plea withdrawal motion. The record contains no legitimate reason to conclude the recordings were exculpatory in nature. In fact, defense counsel conceded at the hearing in Marshall's presence that the evidence at issue was not actually exculpatory. Marshall did not dispute his counsel's representation. In any event, we agree with the State's argument at the hearing that words to the effect of, "Get that property out of my residence" would be very helpful to the State's case and incriminating.

¶10 In addition, Marshall offers no good reason why the discovery of this evidence had any bearing on his pleas. It was entirely reasonable for the circuit court to infer that the real reason for Marshall's plea withdrawal motion was his desire to avoid the consequences of his pleas and take a chance at a trial. Remorse over a plea decision does not provide a legitimate basis for plea withdrawal. Marshall failed to prove any fair and just reason for plea withdrawal.

¶11 The circuit court also properly denied Marshall's postconviction plea withdrawal motion. This motion asserted the new claims that his trial counsel had been ineffective in failing to discover and investigate the recordings, and their connection to the search of his apartment. Marshall also challenged the

appropriateness of the circuit court's denial of his earlier plea withdrawal motion without listening to the recordings.

¶12 First, the circuit court correctly concluded that Marshall waived his claims of ineffective assistance of counsel. Marshall had secured a new attorney after he entered his pleas but before sentencing. His attorney specifically stated at the presentence plea withdrawal hearing that Marshall was not pursuing a claim that his trial attorney had rendered ineffective assistance with regard to the recordings. The court properly held Marshall to that decision.

¶13 But even if the ineffectiveness claim had not been waived, nothing in Marshall's postconviction plea withdrawal motion alleged facts that, if proven, would have established deficient performance. Marshall did not allege with specificity what significant evidence would have been discovered had counsel investigated the recordings, or how such evidence would have altered the outcome of his prosecution. *See State v. Leighton*, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶14 With regard to the search warrant, Marshall does not challenge the lawfulness of its issuance. Rather, he contends the evidence seized was outside the scope of the warrant. The search warrant for Marshall's apartment had identified a "[r]ed woman's wallet" and "[i]dentification cards, credit cards, social security cards, and other papers in the name of 'Joy Bougie.'" The items seized included items belonging to other victims. When the items with the names of other persons were found in the apartment, police suspected Marshall had victimized those individuals as well. While the authorities were still in Marshall's apartment, they contacted area law enforcement authorities to determine if those other persons had reported theft of personal identifying information. Four other

victims were confirmed in this manner during the search. Through their additional inquiries, the officers appropriately determined that Marshall's possession of those personal items was illegal. The items were properly seized. Contrary to Marshall's perception, items belonging to victims other than Bougie were not subject to exclusion as outside the scope of the warrant.

¶15 Finally, in the absence of an inference that the recordings contained any matter of significance to this case other than incriminating evidence, there is no merit to Marshall's contention that the circuit court improperly denied his plea withdrawal motion without listening to the recordings.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

