COURT OF APPEALS
DECISION
DATED AND RELEASED

August 01, 1995

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

NOTICE

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

No. 94-2853-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH EDWARD COOPER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Keith E. Cooper appeals from a judgment of conviction, upon a no contest plea, for second-degree reckless homicide, contrary to § 940.06, STATS., and from an order denying his motion for postconviction relief. Cooper argues that the trial court twice erroneously exercised its discretion by denying his motions to withdraw his no contest plea—once prior to sentencing, and once after sentencing. We disagree. The trial court properly determined that no fair and just reason existed for

withdrawal of Cooper's no contest plea prior to sentencing. Further, the trial court properly concluded that Cooper failed to establish by clear and convincing evidence that a manifest injustice would result if his postconviction motion to withdraw his plea was denied. In neither case did the trial court erroneously exercise its discretion; thus, we affirm.

On October 4, 1993, the State charged Cooper with the second-degree reckless homicide of his three-month-old son. The following facts were adduced in a statement that Cooper gave to police prior to his charging. On September 17, 1993, Cooper shook his infant son "pretty hard" because he was crying. After the infant did not respond to his voice, he shook the boy again and then called 911 for emergency help. The infant died twelve days later at Children's Hospital. An autopsy revealed that the death resulted from a massive bilateral retinal hemorrhage (or "Shaken Infant Syndrome"). The Milwaukee County Medical Examiner ruled the infant's death a homicide.

Cooper originally pleaded not guilty to the charge, but prior to trial, he entered a no contest plea. Prior to sentencing, however, Cooper moved to withdraw the no contest plea. The trial court denied the motion and sentenced Cooper to six years of incarceration. Cooper later filed a postconviction motion to withdraw his no contest plea, which the trial court denied, concluding that Cooper failed to establish that a manifest injustice would result if the plea withdrawal was denied.

It is within the trial court's discretion whether to grant either a pre- or post-sentencing motion to withdraw a plea. ***State v. Shanks,*** 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989); ***State v. Harrell,*** 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). We will not reverse the trial court's determination absent an erroneous exercise of the trial court's discretion. *See* ***Shanks,*** 152 Wis.2d at 288, 448 N.W.2d at 266; ***Harrell,*** 182 Wis.2d at 414, 513 N.W.2d at 678.

1. Presentence motion to withdraw plea.

Prior to sentencing, "a defendant *should* be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be

substantially prejudiced." ***State v. Canedy,*** 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). Withdrawal of a guilty plea or no contest plea prior to sentencing is not an absolute right. ***Id***. at 583, 469 N.W.2d at 170. The defendant must have a reason other than a desire to have a trial in order to withdraw a plea. ***Id***. at 583, 469 N.W.2d at 170-171.

In deciding whether to grant a defendant's pre-sentencing motion to withdraw a plea, the trial court should take a liberal rather than a rigid view of the defendant's reason for seeking a plea withdrawal. See ***Shanks,*** 152 Wis.2d at 288, 448 N.W.2d at 266. For the trial court to accept a plea of guilty or no contest, the defendant must understand the nature of the charge, including the essential elements of the crime. ***State v. Duychak,*** 133 Wis.2d 307, 312-313, 395 N.W.2d 795, 798 (Ct. App. 1986).

Cooper argues that he neither understood the nature and consequences of his no contest plea, nor voluntarily entered the plea. As the trial court pointed out in denying the motion to withdraw the no contest plea, the record belies this argument. Prior to accepting the no contest plea, the trial court carried out an extensive colloquy with Cooper. At each stage of the questioning, Cooper stated that he understood the nature of the charge, his plea, and the forfeiture of certain constitutional rights. The trial court specifically discussed with him that the facts as alleged in the complaint, preliminary hearing transcript, and Cooper's statement to police, were sufficient to support a conviction for second-degree reckless homicide. The trial court then continued to thoroughly question Cooper concerning the nature of the charge and the elements of the crime.

From this record, the trial court could properly conclude that Cooper failed to provide a fair and just reason to withdraw his plea. ***Canedy***, 161 Wis.2d at 582, 469 N.W.2d at 170. In reaching its conclusion, the trial court applied the correct legal standard and gave a liberal construction to Cooper's reason for withdrawal of his plea. We conclude there is nothing presented on appeal that supports Cooper's contention that the trial court erroneously exercised its discretion in reaching its conclusion. Thus, the trial court properly denied the motion.

2. Post-sentencing motion to withdraw plea.

After sentencing, "a defendant wishing to withdraw a plea of guilty or no contest has the burden of showing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. James,*** 176 Wis.2d 230, 236-237, 500 N.W.2d 345, 348 (Ct. App. 1993). To satisfy this heavy burden of "manifest injustice," the defendant must demonstrate "a serious flaw in the fundamental integrity of the plea." ***State v. Krieger,*** 163 Wis.2d 241, 252, 471 N.W.2d 599, 603 (Ct. App. 1991).

A plea that is not intelligently, knowingly, and voluntarily entered, creates a manifest injustice. ***State v. Harrell,*** 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). The trial court should not accept a defendant's plea unless it was made after the defendant received proper advice from counsel and the defendant fully understood the consequences of the plea. ***State v. Booth,*** 142 Wis.2d 232, 239, 418 N.W.2d 20, 23 (Ct. App. 1987).

Cooper argues that he was confused, did not have sufficient time to consult with his attorney, and that he never agreed to the factual basis which supported his no contest plea. Again, Cooper's claims are not supported by the record.

As discussed above, the trial court carried out a lengthy colloquy with Cooper before accepting the plea. From this colloquy, the trial court could properly conclude that Cooper fully understood the consequences of his plea and that it was entered intelligently, knowingly, and voluntarily. ***Harrell,*** at 414, 513 N.W.2d at 678. In denying Cooper's postconviction motion to withdraw his plea, the trial court cited ***Booth***, and concluded that Cooper did not show that a manifest injustice would result if withdrawal of his no contest plea was denied. The trial court did not erroneously exercise its discretion in reaching this conclusion.

By the Court.—Judgment and order affirmed.

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