COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 6, 1995

No. 94-3103-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL P. MC GHEE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

ANDERSON, P.J. Daniel P. McGhee appeals from a judgment of conviction of second-degree sexual assault of a child contrary to § 948.02(2), STATS. We conclude that the trial court did not err in denying his motion for presentence withdrawal of his plea. Accordingly, we affirm.

The criminal complaint alleged that McGhee repeatedly touched a

minor's genitals in violation of § 948.02(2), STATS. On December 20, 1993, prior to trial, McGhee entered into a plea agreement with the State. McGhee pled no contest to one count of second-degree sexual assault.

During the plea hearing, the trial court questioned McGhee regarding the plea questionnaire. The court asked whether McGhee had checked the box next to the word yes and across from each right given up, to which McGhee answered in the affirmative. The court specifically questioned McGhee as follows:

Q Has anyone forced, coerced or threatened you in any way in order to get you to enter this plea?
A No.

McGhee, however, did not check the box on the plea questionnaire that stated: "No threats were made to me to get me to give up these rights." The trial court accepted McGhee's plea, finding that the plea was entered freely, voluntarily and intelligently.

On January 21, 1994, McGhee's attorney, John Anthony Ward, filed a motion to withdraw as attorney of record. Ward indicated that McGhee had told him that he wanted to withdraw his plea on the basis that Ward coerced him into entering the plea. McGhee's new attorney filed a motion to withdraw the plea, and in his affidavit asserted grounds supporting McGhee's claim that he was coerced at the time of his plea based on what McGhee had told him.

A hearing was held on the motion to withdraw the plea. McGhee testified that he felt pressure to make a plea. He testified that he was told that

there would be more counts made against him if he went to trial. Ward also testified at the hearing. The trial court denied McGhee's motion, stating that the record did not substantiate a fair and just reason for withdrawing the plea. McGhee appeals.

We must decide whether the trial court erred in denying McGhee's motion to withdraw his no contest plea. We will sustain a court's decision denying a defendant's motion to withdraw his or her plea as long as the court did not erroneously exercise its discretion. *See* ***State v. Canedy***, 161 Wis.2d 565, 579, 469 N.W.2d 163, 169 (1991). In order for this court to sustain a trial court's determination, it must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. ***Id.*** at 579-80, 469 N.W.2d at 169. Importantly, a court's discretionary decision must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. ***Id.*** at 580, 469 N.W.2d at 169.

A defendant "should be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be substantially prejudiced." ***Id.*** at 582, 469 N.W.2d at 170. The burden is on the defendant to give a fair and just reason for withdrawal of the plea. ***Id.*** at 583-84, 469 N.W.2d at 171. The standard of proof is the preponderance of the evidence. ***Id.*** at 584, 469 N.W.2d

at 171. Withdrawal motions made before sentencing are to be freely allowed.[1] ***Id.*** at 582, 469 N.W.2d at 170. However, this does not mean that these motions should be allowed automatically. ***Id.***

In a recent Wisconsin Supreme Court opinion, the court stated: "This Court held in ***Canedy*** that if the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea. Thus, if the circuit court's factual findings were correct, its ruling was supported by law." ***State v. Garcia***, 192 Wis.2d 845, 863, 532 N.W.2d 111, 118 (1995) (citations omitted). In the prior case of ***Canedy***, the trial court did not believe the defendant's contention that he misunderstood the meaning of "depraved mind" when he entered the plea. ***Canedy***, 161 Wis.2d at 585, 469 N.W.2d at 171. The Wisconsin Supreme Court

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[1] After sentencing, the defendant's burden of proof becomes higher. ***State v. Nawrocke***, 193 Wis.2d 373, 379, 534 N.W.2d 624, 626 (Ct. App. 1995). "[A]fter sentencing the criterion of 'manifest injustice' is required to withdraw a plea. The 'manifest injustice' test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea." ***Id.*** at 378-79, 534 N.W.2d at 626 (citations omitted). A defendant who seeks a postsentence withdrawal must show the manifest injustice by clear and convincing evidence. ***Id.*** at 379, 534 N.W.2d at 626.

stated:

> While we recognized that another judge or another court may not have reached the same conclusion in this case, it is not our function to take on the role of the trier of fact. A reasonable judge, considering the law, the facts, and using a logical reasoning process could have denied Canedy's motion to withdraw this plea as did the circuit court in this case. We conclude that there was no abuse of discretion in the case.

Id. at 586, 469 N.W.2d at 172 (citations omitted).

In the present case, the trial court explained in its oral decision that it had listened to the testimony of Ward and McGhee. The court stated that it remembered McGhee's entry of his plea and that the court had been satisfied, based upon what it was told, that McGhee was not forced, coerced or threatened in regard to entering the plea. The court noted Ward's testimony and that certain advice he gave to McGhee was a matter of strategy. The court stated:

> There is sufficient evidence to believe—to show he was not coerced or forced into entering this plea. The colloquy with the Court will not substantiate any force or coercion. … *There are certain things that Mr. McGhee has indicated here that just do not ring true.* … The record does not substantiate any fair and just reason for withdrawal of the plea, and on that basis, the Court is going to withdraw the motion.

After a review of Ward's testimony and the hearing transcripts, we conclude that a reasonable judge, considering the law, the facts, and using a logical reasoning process could have denied McGhee's motion to withdraw his plea as the circuit court did in this case. *See* ***Canedy***, 161 Wis.2d at 586, 469

N.W.2d at 172. Although McGhee left blank the box stating that "No threats were made to me to get me to give up the above rights" on the plea questionnaire, he orally informed the court that he had not been pressured or coerced into making the plea. Additionally, the impact of McGhee's assertion that he is not guilty is lessened by testimony that McGhee had no recollection of the incident.[2]

Most importantly, the court did not believe McGhee's assertions. We reiterate the supreme court's sentiment in ***Canedy*** that while another court may not have reached the same conclusion in this case, it is not our function to take on the role of the trier of fact. Based on our review of the record and the trial court's explanation for denying McGhee's motion, we conclude that the court did not erroneously exercise its discretion.

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[2] Attorney Ward testified at the hearing on the motion to withdraw the plea that: "We, specifically, went into the fact that Mr. McGhee had no recollection of the incident. That he was too drunk to remember what had occurred." At the hearing, the court relied on similar information in the presentence investigation report:

> The Court did—was aware of and when the presentence came in, I read the presentence, and the Court noted what was further born out in what he told the presentence writer. He just doesn't remember what happened. He didn't think he could do such things. He doesn't remember what happened because he was too drunk.

Although not prejudicial to the defendant in the present case, it is preferable that a trial court not consider information contained in the presentence investigation report in its decision to deny a motion to withdraw prior to sentencing.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.