

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2012

Diane M. Fremgen
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. 2011AP878-CR

Cir. Ct. No. 2006CF946

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM W. GILMOUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. Adam W. Gilmour appeals from a judgment convicting him of homicide by negligent operation of a motor vehicle. The judgment was entered upon the revocation of his deferred prosecution agreement (DPA). On appeal, Gilmour argues that his inability to afford the cost of a jury

trial was the primary impetus of his no contest plea, thus calling the integrity of the plea into question. The circuit court determined Gilmour was well aware of the circumstances of his plea and requested withdrawal only after the terms of his DPA were no longer favorable to him. Upon our review of the briefs and record, we conclude that Gilmour is not entitled to withdraw his plea because he has failed to credibly establish that his plea was involuntary. We affirm the judgment.

BACKGROUND

¶2 On May 25, 2006, at 1:55 a.m., in the city of Oshkosh, Gilmour lost control of his vehicle while under the influence of alcohol, causing the vehicle to strike a tree on Washington Avenue.¹ The collision injured Adam Davis, the front seat passenger, and caused the death of Daniel Sonkowsky, the backseat passenger. As a result, Gilmour was charged with one count of homicide by negligent operation of a motor vehicle, one count of negligent operation of a motor vehicle, and one count of disorderly conduct.

¶3 Attorney Robert E. Bellin represented Gilmour and engaged in extensive plea negotiations on his behalf. On March 23, 2007, Gilmour pled no contest to felony homicide by negligent operation of a motor vehicle, entering into a four-year DPA on that count. The DPA required Gilmour to commit no crimes, consume no alcohol, make restitution, complete community service, and plead no contest to and receive sentencing for the negligent operation of a motor vehicle

¹ Prior to the crash, all three subjects had been drinking beer and multiple shots of alcohol at a local tavern. At one point Gilmour became physically ill and vomited as a result of his alcohol consumption. However, subsequent testing of Gilmour's blood at the hospital after the crash yielded a blood alcohol content (BAC) of .071, which is below the Wisconsin legal limit of .08 BAC.

and disorderly conduct. The court conducted a colloquy to ensure that the pleas and DPA had been reviewed by Gilmour and Bellin before sentencing. The circuit court confirmed Gilmour's understanding of the pleas and ascertained that Gilmour had not been promised anything or forced in any way to enter his pleas. When asked: "Are you making these pleas of your own free will?"; Gilmour responded, "Yes." Gilmour expressly agreed to the facts as set forth in the criminal complaint and affirmed his understanding of each charge and the associated sentence to the court. The circuit court found a sufficient factual basis for Gilmour's plea to homicide by negligent operation of a motor vehicle, withheld adjudication on that count and accepted the DPA. The circuit court then imposed jail time with work release for the two misdemeanor charges.

¶4 On July 28, 2010, the State filed a motion to revoke the DPA because Gilmour had consumed alcohol and been charged with operating a motor vehicle while intoxicated in violation of the agreement. Gilmour subsequently moved to withdraw his no contest plea to homicide by negligent operation of a motor vehicle, asserting his ignorance of the law when he accepted his plea.² Additionally, Gilmour claimed that he was innocent of that offense and that at the

² Although Gilmour's motion for plea withdrawal and notice of appeal reference his no contest pleas to the misdemeanor charges of negligent operation of a motor vehicle and disorderly conduct, he does not develop any argument as to these charges and the record reflects that he has completed those sentences. We do not further address Gilmour's pleas to these charges.

As to the homicide by negligent operation of a motor vehicle, Gilmour alleged that, when he entered his plea, he was not aware of the elements of the crime and the circuit court did not explain them; he did not "completely and entirely understand the terms of the DPA and the consequences relating thereto"; he did not understand he was waiving his right to a jury trial and to contest the allegations against him. The circuit court rejected each of these allegations and Gilmour does not challenge the circuit court's findings on appeal.

time of his plea he “wished to proceed to jury trial, but believed he could not financially afford to do so.”

¶5 On August 30, 2010, the court held a hearing on the State’s motion to revoke the DPA. Gilmour contested the revocation of his DPA, arguing he had been tricked into having a single alcoholic beverage that he thought was water and that he was speeding because he needed to use the restroom. The circuit court found that Gilmour’s explanations were inconsistent with statements given to the officer on the night of his arrest and that there was no doubt that Gilmour had intentionally consumed alcohol in violation of the DPA conditions. The court accordingly revoked the DPA and adjudicated Gilmour guilty of homicide by negligent operation of a motor vehicle. The court then scheduled a hearing on Gilmour’s motion to withdraw his no contest plea.

¶6 Gilmour’s hearing on the motion to withdraw his no contest plea occurred October 4, 2010. Gilmour asserted his innocence of the underlying charges and testified in detail about the underlying incident. Gilmour, who previously had no memory of the accident, testified that he now remembered Sonkowsky pulled the vehicle’s emergency brake, causing it to spin out of control and crash. Gilmour asserted that he decided to take the DPA because he could not afford a \$25,000 trial retainer and “didn’t even fathom asking [his] parents for help with that.” As to the discussions leading up to the DPA agreement, Bellin testified:

[A]ll I can tell you is that I had to leave it up to Mr. Gilmour to decide if he wanted to take the State’s offer or not and a trial would be costly. A trial would be difficult on him and his family and friends. Difficult on the victim’s family and Mr. Gilmour expressed a lot of concerns about that.

I do believe cost was an issue. There [were] questions about whether an expert would have been needed, and in the end, this is what I recall having multiple discussions with Mr. Gilmour about ... did he want to enter pleas, spend time in jail but have his future in his own hands in the sense that he's got to follow the DPA and then he can guarantee himself no felony record.

So it's up to his control or does he want to leave it in the control of a jury, and even though he had an excellent defense, you just don't know what a jury is going to do. And, ultimately, obviously, he chose to go the DPA route.

¶7 After both Gilmour and Bellin testified, the circuit court found that Gilmour went into the DPA “with his eyes wide open.” It found Gilmour’s testimony to be “self-serving, disingenuous and totally incredible,” noting that his recent recollections about the accident came to light only after his violation of the DPA. The court reviewed the plea colloquy and found it to be sufficient. The court found that there was no fair and just reason to allow Gilmour to withdraw his plea. The court denied Gilmour’s motion. He appeals.

DISCUSSION

¶8 To withdraw a plea associated with a DPA after sentencing, the defendant bears the burden of establishing by clear and convincing evidence that the withdrawal is necessary to correct a manifest injustice. *State v. Daley*, 2006 WI App 81, ¶¶14, 18, 292 Wis. 2d 517, 716 N.W.2d 146. An involuntary plea constitutes a manifest injustice. *Id.*, ¶20 n.3. The withdrawal of a plea under the manifest injustice standard rests in the circuit court’s discretion. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *See Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Finally, we will accept the

credibility determinations of the circuit court acting as finder of fact. *State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379.

¶9 Here, the circuit court concluded that Gilmour had not met his burden of establishing a manifest injustice. In reaching this conclusion, the court assessed the evidence before it and made a credibility determination. The court found Gilmour's testimony throughout the DPA revocation and plea withdrawal proceedings to be "self-serving, disingenuous and totally incredible." The circuit court found the plea colloquy to be sufficient and stated its belief that this was a case of "buyer's remorse" brought about only by the revocation of the DPA. While the circuit court did not expressly address Gilmour's assertion that he pled no contest to felony negligent vehicular homicide because he could not afford the costs associated with trial, its rejection of this explanation is implicit in its credibility determination and ultimate denial of Gilmour's plea withdrawal.

¶10 On review, we note that while Gilmour testified that he decided to take the DPA because he could not afford the trial retainer, he did not present any evidence in support of his claim. Gilmour did not testify as to his income, financial status, or ability to borrow or raise funds at the time of the plea negotiations. Bellin testified that while Gilmour was concerned with the cost of a trial, he was also concerned about the effect of a trial on him, the victim's family, and Gilmour's own family and friends. Clearly, the circuit court rejected Gilmour's testimony in support of his claim of financial coercion. *See State v. Canedy*, 161 Wis. 2d 565, 585-86, 469 N.W.2d 163 (1991) (this court will not disturb a circuit court's exercise of discretion where the defendant's testimony is the only support for plea withdrawal and the circuit court disbelieves that testimony).

CONCLUSION

¶11 As noted above, the circuit court is in the best position to evaluate witness credibility and, accordingly, we defer to the circuit court's credibility determinations. *See* WIS. STAT. § 805.17(2) (2009-10) (due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses). Here, the only evidence supporting Gilmour's claim was his testimony, which the circuit court found incredible. Given that Gilmour otherwise failed to establish he was coerced into pleading no contest due to the cost of going to trial, we conclude that the circuit court appropriately exercised its discretion in denying Gilmour's motion for plea withdrawal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

