COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2256-CR
2011AP2257-CR

Cir. Ct. Nos. 2009CF273
2010CF87

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADARIUS DESHAWN WILSON,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Adarius Wilson appeals judgments, entered upon his guilty pleas, convicting him of armed robbery and possession with intent to deliver Ecstasy near a park, both counts as party to a crime. Wilson argues the

circuit court erroneously exercised its discretion by denying his presentence motion for plea withdrawal. We reject Wilson's argument and affirm the judgments.

BACKGROUND

¶2 The State charged Wilson with possession with intent to deliver THC near a park, possession with intent to deliver Ecstasy near a park, armed robbery, theft of movable property and misdemeanor battery, all counts as party to a crime. The charges arose from two Lincoln County Circuit Court cases that were resolved under a plea agreement. On August 23, 2010, Wilson pled guilty to armed robbery and possession with intent to deliver Ecstasy. In exchange for his guilty pleas, the State agreed to dismiss and read in the remaining counts and cap its sentence recommendation at ten years' initial confinement.

¶3 In a letter received by the court on September 17, 2010, Wilson asked the court to discharge his appointed counsel and "dismiss the plea bargain that [he] was persuaded into by [his] attorney." The State Public Defender appointed new counsel, who moved to withdraw Wilson's guilty pleas on November 16, 2010. Wilson's presentence motion for plea withdrawal was denied after a hearing. The court imposed a twenty-two-year sentence on the armed robbery conviction, consisting of ten years' initial confinement and twelve years' extended supervision. With respect to the drug conviction, the court imposed and stayed a ten-year sentence and placed Wilson on probation for seven and one-half years, to run consecutively with the armed robbery sentence. These appeals follow.

DISCUSSION

¶4 A circuit court should freely allow a defendant to withdraw his or her plea prior to sentencing "for any fair and just reason, unless the prosecution would be substantially prejudiced." ***State v. Jenkins***, 2007 WI 96, ¶2, 303 Wis. 2d 157, 736 N.W.2d 24. Withdrawal of a guilty plea before sentencing, however, is not an absolute right. ***Id.***, ¶32. A defendant has the burden to prove by a preponderance of the evidence that he or she has a fair and just reason justifying plea withdrawal. ***Id.*** Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991).

¶5 Our supreme court has held:

> Upon a motion to withdraw a plea before sentencing, the defendant faces three obstacles. First, the defendant must proffer a fair and just reason for withdrawing his plea. Not every reason will qualify as a fair and just reason. Second, the defendant must proffer a fair and just reason that the circuit court finds credible. In other words, the circuit court must believe that the defendant's proffered reason actually exists. Third, the defendant must rebut evidence of substantial prejudice to the State.

Jenkins, 303 Wis. 2d 157, ¶43 (citations omitted). Where, as here, a defendant does not overcome these obstacles in the view of the circuit court, and is therefore not permitted to withdraw his or her plea, the defendant's burden to reverse the circuit court on appeal is "relatively high." ***Id.***, ¶44. Wilson has two additional and substantial obstacles on appeal:

> The first obstacle is the applicable standard of review, which requires the reviewing court to affirm the circuit court's decision unless it is clearly erroneous. The second obstacle is the extensive plea colloquy required of circuit courts. The plea colloquy is designed to secure a knowing, intelligent, and voluntary plea from the defendant and a developed record from which reviewing courts may evaluate the circuit court's decision.

Id.

¶6 Ultimately, the decision to grant or deny a plea withdrawal motion rests within the sound discretion of the circuit court. ***Id.***, ¶29. To sustain a discretionary ruling, an appellate court need only determine that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.***, ¶30. Moreover, even if the circuit court misapplied the law or inadequately explained the reasons for its decision, the reviewing court must independently review the record to find support for the circuit court's decision if the justification is there. *See* ***id.***, ¶35.

¶7 In the present matter, Wilson's letter to the court asked to "dismiss the plea bargain" indicating:

> I only agreed to take the plea deal because my attorney stated to me in a correspondence: "The crime was allegedly committed by an African-American gentleman in a little white northern Wisconsin town you do not think there is going to be some prejudice against black people? Whether it is fair or not, it is reality."

Wilson further stated his belief that based on counsel's statement, he was "being represented in this matter by being given misleading evidence and signs of prejudice."

¶8 At a hearing on the motion to withdraw Wilson's pleas, the court entered into evidence the correspondence Wilson referenced in his letter to the circuit court. The correspondence, which counsel sent to Wilson more than three months before the plea hearing, indicated that counsel was playing "devil's advocate" when pointing out what he saw as "errors in [Wilson's] argument." Wilson had apparently raised what he deemed to be important inconsistencies in the evidence with respect to where he was arrested and what he was wearing. Counsel indicated these inconsistencies were immaterial, noting:

> The problem in this case is the 21 witnesses who say that you did it, they saw you do it and who say they saw you with the loot and cigarettes afterwards, who drove you there, who gave you the gun, who helped you, who picked you up and who drove you around to find evidence afterwards.

Counsel further wrote:

> If you ask any jury member in Northern Wisconsin if they can tell if a black guy is from Chicago just by his voice the answer would be an absolute yes. The crime was allegedly committed by an African-American gentleman in a little white Northern Wisconsin town you do not think there is going to be some prejudice against black people? Whether it is fair or not, it is reality.

¶9 Wilson testified at the hearing that he was twenty-two years old, born and raised in Chicago, and at the time of the hearing, had lived in Lincoln County for one year. With respect to his former counsel's correspondence, Wilson stated, "I felt that it was some sign of prejudice towards me. Basically, telling me that I didn't have no type of chance going to trial in Wisconsin." Wilson also claimed that based on his attorney's correspondence, he felt pressured to enter into the plea agreement. Wilson testified: "[A]t the time he kind of scared me, so that's why I took my plea because I felt I didn't have a chance of going to trial."

Wilson acknowledged, however, that he had confirmed that his plea was knowing and voluntary when he signed the plea waiver form, and that he told the court at the plea hearing that he was satisfied with his attorney's representation.

¶10 The circuit court denied Wilson's motion, outlining its consideration of six factors. First, the court reviewed the content of counsel's letter to Wilson, noting that counsel's stated purpose for the letter was to play devil's advocate to Wilson's stated challenges to the State's case. The court noted that counsel was doing his job by pointing out the errors he saw in Wilson's proposed arguments. The court acknowledged that although counsel's opinion regarding his perception of "reality" could have been worded differently, the letter did not say that it was impossible for Wilson to get a fair trial in Lincoln County. Further, the letter did not coerce or pressure Wilson to take any type of action or make any decision at that time—it merely provided legal advice.

¶11 Second, the court noted that Wilson had signed a "Statement as to Negotiated Plea" acknowledging that he read the document and, after discussing the matter with his attorney, believed the negotiated plea was in his "best interest." Third, the court reviewed the plea questionnaire and waiver of rights form. Based on extensive handwritten marks on the document, the court concluded that Wilson and his attorney reviewed it in detail before Wilson signed the form.

¶12 Fourth, the court considered the plea hearing transcript, noting that Wilson confirmed his review of both the "Statement as to Negotiated Plea" and plea questionnaire form. Wilson acknowledged that he understood the terms of the plea agreement and that no one made any promises or threats to get him to enter his plea. When asked during the plea colloquy whether Wilson was satisfied that he understood what he was doing, Wilson answered affirmatively.

¶13 Additionally, counsel confirmed to the court that he had discussed the cases, including possible defenses and mitigating circumstances, with Wilson. Counsel also confirmed his belief that Wilson understood the elements of each offense and effects of each plea, and was entering the pleas freely, voluntarily and intelligently. Wilson agreed that he had sufficient time to discuss both cases and the plea decision with his attorney and ultimately confirmed that he was satisfied with the legal representation he received.

¶14 The court determined that Wilson had not provided grounds to disregard "the solemn answers" he gave during the plea colloquy. The court continued:

> The only matter that's outside the plea colloquy [Wilson] can point to is the three sentences in a letter that [counsel] wrote three and one-half months before the plea.
>
> And yet [at the plea hearing] Mr. Wilson indicated he had sufficient time to discuss this matter with [counsel], including possible defenses, possible mitigating circumstances, and that he was satisfied with [counsel]'s representation.
>
> Then, approximately twenty-three days after the plea colloquy Mr. Wilson writes the [court] indicating he is not adequately represented in his mind. This puts in doubt [Wilson]'s credibility, given his answers in the plea colloquy.

¶15 Fifth, the court noted that Wilson had not asserted his innocence of the crimes. The court observed that although such an assertion is not necessary, it helps the court evaluate whether the defendant has provided a fair and just reason for plea withdrawal. Sixth and finally, the court noted that Wilson filed his motion for plea withdrawal two and one-half months after entering his pleas, one and one-half months after replacement counsel's appointment and two to three weeks after

the presentence investigation report was filed. While noting that a change in attorneys can delay proceedings, it did not deem the motion "promptly filed."

¶16 The court denied the plea withdrawal motion concluding that based on its "analysis and considering the burden of proof upon the defendant," the fair and just reason Wilson proffered was not credible. The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS. STAT. § 805.17(2).[1] The court's credibility determination is supported by relevant facts in the record and it reached a conclusion that a reasonable judge could reach.

¶17 Wilson argues, however, that the taint of what he deems to be a coercive statement in his counsel's letter was not dispelled by subsequent events, especially when considering "Wilson's subjective isolation that rendered him vulnerable to coercive statements." Wilson, however, fails to identify what evidence of his "subjective isolation" the court should have factored into its analysis, as Wilson presented no evidence of his purported isolation. To the extent Wilson intimates that his age, race, and Chicago upbringing created isolation, he fails to explain how this background makes him acutely vulnerable to what the court deemed to be a letter that merely provided legal advice. Further, Wilson fails to explain why, in the months between the May letter and his August pleas, he signed statements indicating he was pleading voluntarily. Wilson also fails to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

explain why his colloquy with the court confirmed that his pleas were uncoerced and that he was satisfied with his counsel's representation.

¶18 Wilson nevertheless contends that counsel's statement injected "pernicious racism into this case" and created a pervasive racial atmosphere that rendered the "solemn" statements Wilson made during the plea colloquy a "transparent sham." We disagree. There is no evidence in the record of a pervasive racial atmosphere in the underlying proceedings that led to Wilson's pleas. As the circuit court noted, counsel's three-sentence statement was made in the context of a letter explaining to Wilson why he was going to have difficulty succeeding on the merits of his case.

¶19 Finally, Wilson contends that the circuit court committed clear error in its analysis of the timing considerations and in weighing the fact that Wilson did not protest his innocence.[2] Even assuming the court improperly assessed these two factors, we conclude that its consideration of the other factors adequately supported its decision to deny Wilson's plea withdrawal motion.

By the Court.—Judgments affirmed.

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

[2] Although Wilson concedes that his formal motion for plea withdrawal was filed two and one-half months after he entered his guilty pleas, Wilson emphasizes that his letter asking to "dismiss" the plea bargain was promptly submitted three weeks after the plea hearing.