



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/IV

February 4, 2014

To:

Hon. Wayne J. Marik
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Thomas J. Balistreri
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

W. Richard Chiapete
Assistant District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Mark A. Schoenfeldt
Attorney at Law
135 W. Wells St., Ste. 604
Milwaukee, WI 53203

You are hereby notified that the Court has entered the following opinion and order:

2012AP2120-CR	State of Wisconsin v. Jermaine Conner (L.C. # 2010CF95)
2012AP2121-CR	State of Wisconsin v. Jermaine Conner (L.C. # 2010CF661)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Jermaine Conner appeals from judgments of conviction of two counts of burglary and from an order denying his postconviction motion to withdraw his guilty pleas. He argues his plea was coerced because his trial counsel was not prepared for trial. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgments and order.

On the day of his jury trial in one case, Conner entered guilty pleas to two counts of burglary and four other charges were dismissed and read in. Before sentencing, Conner moved to withdraw his guilty pleas on the ground that he did not fully understand all aspects of the proceeding because he was not on prescribed medication at the time of the plea hearing. After an evidentiary hearing, the circuit court denied the motion finding Conner's testimony not credible and determining that Conner failed to establish that the lack of medication rendered him unable to understand the proceeding. Conner filed a postconviction motion for plea withdrawal and argued that the circuit court erroneously exercised its discretion in denying his presentence motion to withdraw his guilty pleas because his testimony at the evidentiary hearing established that his plea was not voluntary but rather coerced by his trial counsel's failure to adequately prepare for trial.² Acknowledging that Conner's postconviction motion sought plea withdrawal for a reason not raised in the presentence motion—that the plea was the result of pressure or coercion by trial counsel—the circuit court concluded that Conner's complaints about trial counsel were explored at the plea hearing and that during the plea hearing Conner's motivation for entering his guilty pleas was established to be unrelated to trial counsel's performance. The postconviction motion was denied.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² At the evidentiary hearing, Conner's testimony made several references to his trial counsel telling him to take the plea offer because counsel had not called witnesses and that at the plea hearing Conner just said what counsel told him to say.

On appeal, Conner asserts that unrebutted evidence shows that his plea was coerced by trial counsel's lack of preparedness and the involuntary nature of plea presents a fair and just reason permitting plea withdrawal.³ Although the circuit court is to apply the fair and just standard liberally, *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999), “[t]he reason must be something other than the desire to have a trial or belated misgivings about the plea.” *State v. Jenkins*, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted). The circuit court’s decision to deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard. *Id.*, ¶30. “[W]e apply a deferential, clearly erroneous standard to the court’s findings of evidentiary or historical fact.” *Id.*, ¶33. The same is true of credibility determinations. *Id.*

The circuit court found Conner’s testimony at the evidentiary hearing not credible, and that included his testimony that he believed his trial counsel was not prepared for trial and he entered his plea only because his trial counsel told him to. It makes no difference that Conner’s testimony was unrebutted. A witness’s statement need not be contradicted by other evidence in the record as a condition precedent to the circuit court’s review of the witness’s credibility. *See State v. Kimbrough*, 2001 WI App 138, ¶28, 246 Wis. 2d 648, 630 N.W.2d 752.

³ When moving to withdraw a guilty plea before sentencing, the defendant has the burden to show by a preponderance of the evidence that there is a fair and just reason for withdrawal of the plea. *State v. Jenkins*, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. In order to withdraw a guilty plea after sentencing a defendant carries the heavy burden of establishing, by clear and convincing evidence, that the circuit court should permit the defendant to withdraw the plea to correct a “manifest injustice.” *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). Conner did not assert coercion by trial counsel’s lack of preparedness as a ground for plea withdrawal until after sentencing, and we reject any suggestion that the circuit court was obligated to sua sponte declare Conner’s pleas as coerced based on Conner’s testimony at the evidentiary hearing. The State does not argue that the more stringent manifest injustice standard should be applied and we will apply the fair and just standard.

In light of the record made at the plea hearing, the circuit court's credibility finding is not clearly erroneous. During the lengthy plea colloquy the circuit court heard Conner's complaints that his trial counsel had done nothing and was unprepared to present witnesses Conner wanted. The circuit court explored Conner's concern. Conner subsequently confirmed that he believed his attorney would do an adequate job at trial and that he was entering his guilty pleas because he was guilty. The circuit court accepted Conner's guilty pleas specifically finding that Conner was not entering his pleas out of fear that his attorney was not going to adequately represent him at trial. Conner's testimony at the plea withdrawal evidentiary hearing merely exhibited belated misgivings about his pleas. The circuit court properly exercised its discretion in denying Conner's motion for plea withdrawal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals