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DISTRICT II

October 22, 2014

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

2014AP562-CR State of Wisconsin v. Shawn J. Senkbeil (L.C. #2013CF248)

Before Brown, C.J., Reilly and Gundrum, JJ.

Shawn Senkbeil appeals a judgment convicting him, upon his ***Alford*** plea, of second-degree sexual assault of a child in violation of WIS. STAT. § 948.02(2) (2011-12).[1] He argues that the circuit court should have granted his presentence motion to withdraw his plea. We

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

Senkbeil does not appeal his convictions, entered on no-contest pleas, to two drug-related counts.

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

affirm. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

Forty-five-year-old Senkbeil initially was charged with first-degree sexual assault of a child under sixteen by use or threat of force or violence in violation of WIS. STAT. § 948.02(1)(c). The Class B felony, punishable by up to sixty years in prison, included a mandatory minimum of twenty-five years' initial confinement. *See* WIS. STAT. §§ 939.50(3)(b), 939.616(1r), and 939.616(3). Insisting he was innocent, but fearful of the mandatory minimum, Senkbeil agreed to enter an ***Alford*** plea to the reduced charge.

Sixteen days later, still before sentencing, Senkbeil moved to withdraw his plea. In the supporting affidavit, Senkbeil said he realized that the ***Alford*** plea was "an incorrect choice." Reasserting his innocence, he explained that when he entered his plea, he was "light headed and in an extreme state of psychological stress" due to not sleeping and eating little for four days preceding the hearing, was "very confused" by family members' conflicting advice, and felt "overwhelming stress" and "panic" at the possibility of the mandatory minimum. Senkbeil testified similarly at the ensuing hearing. The court denied the motion, as well as Senkbeil's motion to reconsider. This appeal followed.

Whether to grant a motion to withdraw a plea prior to sentencing is left to the sound discretion of the circuit court. ***State v. Bollig***, 2000 WI 6, ¶28, 232 Wis. 2d 561, 605 N.W.2d 199. Unless the prosecution will be substantially prejudiced, the court should freely allow the withdrawal "for any fair and just reason." ***Id.*** "Fair and just" means some adequate reason for the defendant's change of heart 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. Fair and just

reasons include a genuine misunderstanding of the consequences of the plea, haste and confusion in entering the plea, coercion by trial counsel, and an assertion of innocence. *See* ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). The defendant bears the burden of demonstrating a fair and just reason by a preponderance of the evidence. ***Jenkins***, 303 Wis. 2d 157, ¶32.

The circuit court rejected the notion that Senkbeil was confused. The record bears out the court's finding that he entered the plea knowingly, voluntarily, and intelligently. The court conducted a careful plea colloquy. Senkbeil confirmed that he understood the plea, had reviewed the plea questionnaire with his counsel, and had had enough time to confer with him. Senkbeil also was afforded time to confer with his family. Defense counsel repeated for the court how he had explained an ***Alford*** plea to Senkbeil and told it he was satisfied Senkbeil understood everything in the plea questionnaire.

Tellingly, Senkbeil never indicated either to the court or to his counsel that he was ill, confused, or overly stressed. He denied that he was "panicked" or "confused" when he waived a jury trial just an hour before the plea hearing. Senkbeil's post-plea claims of confusion do not square with his failure to communicate it, his statements to the court that he understood and had no questions, the thoroughness of the colloquies, the written plea questionnaire, and counsel's detailed explanations.

Senkbeil returns to his assertion of innocence and reminds us of his "swift change of heart." Maintaining one's innocence is less compelling in an ***Alford*** plea situation where such a claim is intrinsic to the plea. Further, an assertion of innocence and a prompt motion to withdraw are but factors for the circuit court to consider in evaluating the motion; they are not

themselves fair and just reasons for plea withdrawal. ***State v. Shimek***, 230 Wis. 2d 730, 740 n.2, 601 N.W.2d 865 (Ct. App. 1999).

Senkbeil also did not demonstrate by a preponderance of the evidence a genuine misunderstanding of the consequences of the plea, haste and confusion in entering the plea, or coercion by trial counsel. *See* ***Shanks***, 152 Wis. 2d at 290. Nor was the court persuaded by Senkbeil's claims of nearly immobilizing stress. To constitute a fair and just reason, the defendant's explanation must be credible. *See* ***Jenkins***, 303 Wis. 2d 157, ¶43. The court properly exercised its discretion in concluding that Senkbeil did not state a fair and just reason. Accordingly, we need not examine whether plea withdrawal would substantially prejudice the prosecution. *See* ***Bollig***, 232 Wis. 2d 561, ¶28.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals