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June 14, 2016

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

2015AP470-CRNM State of Wisconsin v. Jeremy J. Willcox (L. C. No. 2012CF542)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Jeremy Willcox has filed a no-merit report concluding no grounds exist to challenge Willcox's conviction for first-degree sexual assault of a child by sexual contact with a person under age thirteen, contrary to WIS. STAT. § 948.02(1)(e). [1] Willcox was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Willcox with first-degree sexual assault, by sexual contact, of a three-year-old child. Willcox was initially found incompetent to proceed. After a period of commitment, the circuit court determined Willcox's competency was restored. Willcox entered a plea of not guilty by reason of mental disease or defect (NGI), but withdrew his NGI plea after the examining psychologist's report did not support the plea. Willcox's motion to suppress statements made to police officers was denied after a ***Miranda-Goodchild***[2] hearing. Willcox then entered a no contest plea to the crime charged. In exchange for his no contest plea, the State agreed to recommend twenty-five years' initial confinement and fifteen years' extended supervision. Willcox filed a presentence motion to withdraw his no contest plea, and that motion was denied after a hearing. Out of a maximum possible sixty-year sentence, the court imposed a twenty-year term, consisting of twelve years' initial confinement and eight years' extended supervision.

There is no arguable merit to challenge the circuit court's determination that Willcox's competency was restored. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). To

[2] A circuit court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

determine legal competency, the court considers a defendant's present mental capacity to understand the proceedings and assist counsel. ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477. A circuit court's competency determination should be reversed only when clearly erroneous. ***Id.***, ¶45.

The evaluating psychiatrist, Dr. Mark Phelps, submitted a report opining to a reasonable degree of medical certainty that Willcox "has substantial mental capacity to understand the proceedings and assist in his own defense." Doctor Phelps based his opinion on evaluations and observations of Willcox during the period of his commitment. At the competency hearing, Willcox did not contest Dr. Phelps' conclusion, and defense counsel indicated he was likewise satisfied that Willcox was competent to proceed, based both on the doctor's report and his own discussions with Willcox. The record supports the circuit court's determination.

There is no arguable merit to challenge the withdrawal of Willcox's NGI plea. A defendant can withdraw his or her NGI plea through counsel rather than personally, though counsel has no right to act contrary to the defendant's expressed wishes, as the decision ultimately belongs to the defendant. ***State v. Francis***, 2005 WI App 161, ¶23, 285 Wis. 2d 451, 701 N.W.2d 632. "In the absence of an objection, however, counsel acts on the defendant's behalf when counsel withdraws the defendant's NGI plea and may exercise professional discretion in choosing whether or not to do so." ***Id.*** Further, in accepting counsel's withdrawal of an NGI plea, the circuit court need not personally address the defendant to ascertain his or her assent. ***Id.***, ¶24. After an examining psychologist's report did not support an NGI plea, counsel withdrew the NGI plea. Although the circuit court was not required to personally ascertain Willcox's assent, the court engaged Willcox in a colloquy and Willcox confirmed that he had not been pressured to withdraw his NGI plea and that he agreed with the withdrawal of that plea.

The record discloses no arguable basis for challenging the denial of Willcox's motion to suppress his statements to police. Willcox claimed his statements were involuntary. Upon review of lower court proceedings involving ***Miranda-Goodchild*** hearings, this court will not upset the findings of fact unless it appears they are against the great weight and clear preponderance of the evidence. ***Norwood v. State***, 74 Wis. 2d 343, 361, 246 N.W.2d 801 (1976). When determining whether a confession or admission is voluntary, we look to the totality of circumstances. ***State v. Schneidewind***, 47 Wis. 2d 110, 117, 176 N.W.2d 303 (1970). In order to find a defendant's statement involuntary, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes***, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987). In assessing the totality of circumstances, we must balance the personal characteristics of the defendant against any pressures imposed by the police. ***Id.*** at 236. The relevant personal characteristics of the defendant include that person's age, education and intelligence, physical and emotional condition, and prior experience with the police. ***Id.***

Here, police officer Robert Wills testified he read Willcox his ***Miranda*** rights, and Willcox signed a form waiving those rights. Wills acknowledged that Willcox stated he was on a number of medications, but Wills did not specifically recall Willcox indicating the medications were for mental health issues. Wills, however, felt Willcox understood he had the right to refuse to speak to police. Wills testified he did not threaten Willcox and when Willcox became upset and started crying, Wills assured him the police were not going to hurt him. Wills acknowledged he likely told Willcox that children do not usually make up these types of allegations and he would be hurting the child by failing to tell the truth. According to Wills, Willcox initially denied the allegations but later made an inculpatory statement. In turn, Willcox testified he

remembered the officers reading some things to him, but he did not understand exactly what they meant. Willcox further testified that he did not express his confusion because his mind was racing and he was hearing voices telling him to do whatever police told him to do. Willcox acknowledged, however, that he never told police he was hearing voices. Willcox also testified he was scared and felt like police were attacking him.

Based on the hearing testimony, and the circuit court's review of a video recording of Willcox's police interview, the court found there were no undue promises or threats, and no coercion by police. The court further found that although Willcox became very emotional, he was able to understand all of the officer's questions and was able to give a voluntary statement. The circuit court's findings on this matter are given great deference, and any conflicts in the testimony regarding circumstances surrounding the statements must be resolved in favor of the circuit court's findings. ***McAdoo v. State***, 65 Wis. 2d 596, 608, 223 N.W.2d 521 (1974). There is no arguable merit to a claim that the circuit court erred by finding that Willcox knowingly, intelligently, and voluntarily waived his ***Miranda*** rights.

The record discloses no arguable basis for withdrawing Willcox's no contest plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Willcox completed, informed Willcox of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. The court confirmed Willcox's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Willcox of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c).

The circuit court confirmed that the medication Willcox was taking did not affect his ability to understand the proceedings. Acknowledging that Willcox had previously been examined both for competency and for a possible NGI defense, the circuit court stated it had paid attention to Willcox's demeanor and was "convinced that at this time [Willcox] does understand the ramifications of what he's pleading to, and he's doing so knowingly, voluntarily and intelligently." Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Willcox committed the crime charged. The record shows the plea was knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis to challenge the denial of Willcox's presentence motion for plea withdrawal. A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). 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). The decision to grant or deny a presentence motion for plea withdrawal is committed to the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

Here, Willcox claimed that his trial counsel intimidated him into entering a no contest plea by not giving him sufficient time to consider the State's offer and depriving him of relevant information regarding his case. At a hearing on his plea withdrawal motion, Willcox testified

that his counsel presented the State's plea offer sometime in May 2013 and he entered his no contest plea on June 10, 2013. Willcox conceded that counsel informed him the decision whether to enter a no contest plea belonged to Willcox, but Willcox testified: "[T]he problem is when I'm told I'm allowed to have a certain amount of time to make a decision on something that deals with my life, I can't do it in that short amount of time, because my brain doesn't work that way." Willcox also claimed he never saw any discovery, including police reports, before entering his plea.

Trial counsel testified he provided Willcox with a copy of all discovery, including police reports, and showed Willcox his video recorded statement to police, as well as the video recorded interview of the victim. Trial counsel also testified that after receiving the State's plea offer around February 18, 2013, counsel presented the offer to Willcox and both agreed the recommended sentence was high. Although counsel attempted to obtain a more favorable offer from the State, the prosecutor's initial offer remained firm. Counsel stated he continued to discuss the offer with Willcox over the next few months, assessing it as an option during the time they awaited the outcome of the suppression motion and Willcox's attempt to pursue an NGI defense. Counsel testified:

> My recollection was that in late May and early June we basically, [Willcox] and I had talked about, since the statement could come in and the NGI report was going to be unfavorable, that at that point our chances of being successful at trial were going to be greatly reduced and that entering a plea may be our best course, then arguing what the sentencing should be and discuss various sentencing strategies.

Counsel further testified that Willcox was prepared to enter a no contest plea as early as June 6, 2013, and completed a plea questionnaire and waiver of rights form on that day. Counsel recounted that he went through the form with Willcox line by line and if Willcox had questions,

counsel attempted to answer them for him on that date. Counsel further testified that Willcox never told counsel he needed more time, either on June 6 or on June 10—the day he ultimately entered his no contest plea.

In denying the plea withdrawal motion, the circuit court implicitly found counsel's testimony to be credible, noting that counsel countered Willcox's claims. The circuit court, as factfinder, 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). The court also noted the plea colloquy was thorough and the court spent more time than usual on the colloquy in light of Willcox's past competency issues. The court recounted that it wanted to make sure Willcox had enough time to consider what he was doing, and that each time the court asked Willcox if he understood his rights, Willcox answered affirmatively. Ultimately, the court determined Willcox had not established a fair and just reason to warrant plea withdrawal. The circuit court's determination is supported by the record and it reached a conclusion that a reasonable judge could reach.

Finally, the record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offense; Willcox's character, including his criminal history; the need to protect the public; and the mitigating factors Willcox raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Willcox's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Colleen Marion is relieved of further representing Willcox in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals