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November 26, 2019

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

2018AP1316-CR State of Wisconsin v. Eric J. Smiley, Jr. (L.C. # 2016CF1138)

Before Brash, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eric J. Smiley, Jr., appeals a judgment entered after he pled no contest to felonious theft of a firearm.[1] He alleges that the circuit court wrongly denied his pretrial motion for plea withdrawal. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] We affirm.

The State charged Smiley with four crimes in this case, and the matters were scheduled for trial on June 13, 2016. On that date, he appeared with trial counsel and told the circuit court that he wanted to resolve the case with a plea agreement. Under its terms, he pled no-contest to the charge of felonious theft of a firearm, and the State moved to dismiss and read in the other three charges. The State also agreed to dismiss and read in all of the charges in a separate case. The circuit court conducted a colloquy with Smiley and accepted his no-contest plea.[3] The matter was then adjourned for sentencing.

Smiley failed to appear for sentencing, and the circuit court issued a bench warrant. He was subsequently arrested, and in March 2017, his original trial counsel withdrew, citing a conflict of interest that arose in conjunction with new charges against Smiley. On April 20, 2017, Smiley's successor trial counsel advised the circuit court that Smiley was considering a motion for plea withdrawal. Three months later, on July 10, 2017, he formally moved to

[1] The notice of appeal in this matter states that Smiley appeals from both the judgment of conviction and from a postconviction order. Smiley's appellate briefs, however, do not address the postconviction order, which denied his motion for an evidentiary hearing to address a claim of ineffective assistance of trial counsel. We deem any challenge to the postconviction order abandoned, *see* ***State v. Ayala***, 2011 WI App 6, ¶22, 331 Wis. 2d 171, 793 N.W.2d 511, and we affirm it without further discussion, *see* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[3] The Honorable Jeffrey A. Wagner accepted Smiley's no-contest plea.

withdraw his no-contest plea. As grounds, Smiley alleged that the plea colloquy was defective because neither the circuit court nor the prosecutor described the plea negotiations, the circuit court did not ascertain on the record that Smiley understood the contents of the plea questionnaire and waiver of rights form that he signed, and because the circuit court failed to explain one of the elements of theft of a firearm, namely, that the item stolen was a firearm. Smiley went on to allege that "[t]he burden is now shifted to the [S]tate to prove by clear and convincing evidence that his plea was knowing, intelligent and voluntary, despite the identified defects."

The circuit court determined that Smiley had demonstrated defects in the plea colloquy, and the matter proceeded to an evidentiary hearing.[4] At the outset, the parties agreed that the purpose of the hearing was to determine if the State could meet its "burden to prove by clear and convincing evidence [that] Smiley entered his no contest plea freely, intelligently, knowingly, and voluntarily."

The State called Smiley's original trial counsel as its sole witness. She testified at length about her discussions with Smiley in regard to his decision to plead no contest and the steps she took to prepare him for his plea. Smiley did not present any evidence or call any witnesses.

At the conclusion of the hearing, the circuit court ruled from the bench that Smiley entered his no-contest plea knowingly, intelligently, and voluntarily, and that he therefore did not present a fair and just reason for plea withdrawal. Thereafter, the matter proceeded to

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[4] The Honorable Thomas J. McAdams reviewed the motion for plea withdrawal and scheduled the matter for an evidentiary hearing. The Honorable Joseph A. Wall presided over the evidentiary hearing, resolved the claim for plea withdrawal, and ultimately entered the judgment of conviction.

sentencing, and the circuit court imposed an evenly bifurcated six-year term of imprisonment. Smiley appeals, challenging the decision denying his motion for plea withdrawal.

A guilty or no contest plea must be entered knowingly, intelligently, and voluntarily to be constitutionally sufficient. *See* ***State v. Baker***, 169 Wis. 2d 49, 71, 485 N.W.2d 237 (1992). To ensure that the plea satisfies due process concerns, a circuit court must conduct a colloquy with the defendant sufficient to fulfill a variety of statutory and common-law duties, and the circuit court may use a plea questionnaire and waiver of rights form to assist in establishing that the plea is knowing, intelligent, and voluntary. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶21, 39, 387 Wis. 2d 119, 928 N.W.2d 590.

A defendant who moves to withdraw a guilty or no-contest plea before sentencing must prove by a preponderance of the evidence that he or she has a fair and just reason for relief. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583-84, 469 N.W.2d 163 (1991). The decision to grant the motion rests in the circuit court's discretion. *See* ***State v. Jenkins***, 2007 WI 96, ¶6, 303 Wis. 2d 157, 736 N.W.2d 24. On review, we will uphold the circuit court's findings of fact and credibility determinations unless they are clearly erroneous, *see* ***id.***, ¶33, and we will affirm the circuit court's discretionary decision if "the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach," *see* ***id.***, ¶30 (citations omitted).

"While the 'fair and just' reason test is a liberal test," *see* ***State v. Timblin***, 2002 WI App 304, ¶20, 259 Wis. 2d 299, 657 N.W.2d 89, more is required "than the desire to have a trial or belated misgivings about the plea," *see* ***Jenkins***, 303 Wis. 2d 157, ¶32 (internal citation omitted). A defendant seeking plea withdrawal prior to sentencing must overcome three obstacles. *See* ***id.***,

¶43. First, the defendant must offer a fair and just reason for withdrawing the plea, and "not every reason will qualify." *See* ***id.*** Second, the circuit court must find the defendant's proffered reason credible. *See* ***id.*** If the defendant clears these hurdles, then "the defendant must rebut evidence of substantial prejudice to the State." *See* ***id.***; *see also* ***State v. Lopez***, 2014 WI 11, ¶61, 353 Wis. 2d 1, 843 N.W.2d 390.

In the circuit court proceedings here, Smiley pointed to defects in the plea colloquy to support his claim for plea withdrawal. The ***Jenkins*** court observed that a circuit court's failure to perform its mandatory duties during the plea colloquy will likely constitute a fair and just reason for plea withdrawal if "the defendant asserts misunderstanding because of" that failure. *See* ***id.***, 303 Wis. 2d 157, ¶62. Accordingly, the circuit court construed Smiley's reliance on a defective plea colloquy as incorporating an allegation that his no-contest plea was not entered knowingly, intelligently, and voluntarily. Both parties concurred.

On appeal, Smiley alleges that the circuit court decided his motion using the wrong standard, erroneously focusing on whether he entered his plea knowingly, intelligently, and voluntarily rather than on whether he had a fair and just reason for plea withdrawal. We disagree. When rendering the decision, the circuit court stated that the motion for plea withdrawal presented the questions of "whether there is a fair and just reason for [Smiley] to withdraw his ... plea" and "whether his plea was made knowingly, voluntarily, and intelligently without any pressure." The circuit court then explained that those two issues "merge for the purpose of making a decision here on the defense request." The circuit court thus clearly understood that it was required to decide whether Smiley had presented a fair and just reason for plea withdrawal. Equally clearly, the circuit court understood that the allegedly fair and just reason Smiley offered was that he entered the plea involuntarily and without the knowledge

necessary for a valid plea.[5] As we have previously recognized, this analysis is entirely proper. *See* ***State v. Rhodes***, 2008 WI App 32, ¶14, 307 Wis. 2d 350, 746 N.W.2d 599.

Smiley next asserts that, even if the circuit court used the right standard and correctly focused on the question of whether he offered a fair and just reason for plea withdrawal, the circuit court nonetheless erred in denying him relief because the evidence at the hearing demonstrated "that he felt pressured to enter his plea." In support, Smiley summarizes some of his trial counsel's testimony generally describing his concerns about entering a no-contest plea and, more specifically, he points to trial counsel's testimony that Smiley "might have been under pressure [because] it was the jury trial date," because his girlfriend was pregnant, and because "he didn't want all these charges." Citing ***Libke v. State***, 60 Wis. 2d 121, 129, 208 N.W.2d 331 (1973), Smiley asserts that "such rationale has already been determined to satisfy the 'fair and just' reasoning standard."

Smiley is wrong. Wisconsin courts have consistently recognized that the kind of pressure he describes is self-imposed and therefore not the kind that vitiates the voluntary nature of a guilty or no-contest plea. *See* ***State v. Goyette***, 2006 WI App 178, ¶¶29-31, 296 Wis. 2d 359, 722 N.W.2d 731 (citing cases for the propositions that psychological needs, the urgings of family

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[5] We observe that the circuit court put the burden on the State to prove that Smiley's plea was knowing, intelligent, and voluntary when in fact the State's only burden when a defendant seeks plea withdrawal prior to sentencing is to make a showing of substantial prejudice in the event that the defendant proves a fair and just reason for plea withdrawal. *See* ***State v. Lopez***, 2014 WI 11, ¶61, 353 Wis. 2d 1, 843 N.W.2d 390. This allocation of the burden of proof does not, however, provide Smiley any grounds for relief. Smiley took the position both in his written motion and orally at the outset of the hearing that the State had the burden to prove that his plea was knowing, intelligent, and voluntary in order to defeat his request for plea withdrawal. The circuit court adopted that position, and Smiley cannot complain now that the circuit court did so. *See* ***State v. Johnson***, 2001 WI App 105, ¶10, 244 Wis. 2d 164, 628 N.W.2d 431 (explaining that judicial estoppel prevents a litigant from convincing a court to adopt a position and then repudiating that position on appeal).

members, and religious scruples do not render a plea involuntary). The ***Libke*** court, by contrast, concluded that a defendant showed a fair and just reason for plea withdrawal when he demonstrated that his *trial counsel* pressured him and "led [him] down the wrong way." *See* ***id.***, 60 Wis. 2d at 129. Indeed, coercion by trial counsel is long recognized as a potentially fair and just reason for plea withdrawal. *See, e.g.*, ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). In the instant case, however, Smiley does not point to any evidence that his trial counsel pressured him to enter a no-contest plea. To the contrary, trial counsel testified that in her eleven years of practice, she had never pressured a client to enter a guilty or no-contest plea and that she had not pressured Smiley to do so. Rather, she said "[i]t was ... Smiley's decision. It was his choice to enter into this plea."

Trial counsel's testimony also addressed the alleged deficiencies in the plea colloquy that Smiley raised in his motion for plea withdrawal. Specifically, trial counsel testified that she reviewed the plea questionnaire and waiver of rights form with Smiley and that he signed the form, indicating to her that he understood everything on it. She said that she wrote the terms of the plea agreement on the form, and she explained that her practice is always to review the terms of a plea agreement with the defendant before he or she enters a no-contest plea. She said that she would not have allowed the plea to go forward if Smiley seemed not to understand the terms of the plea agreement or to have unanswered questions about it.

Trial counsel further testified that she and Smiley reviewed the pattern jury instruction for theft and that Smiley understood he was pleading no contest to the crime of theft of a firearm. Although the pattern instruction for theft does not reflect that the State must prove the stolen item was a firearm, trial counsel testified that she also read the complaint to Smiley and explained to him that the "item described in the theft offense was a firearm." *See* ***State v.***

Brown, 2006 WI 100, ¶¶46-48, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted) (explaining that a defendant's understanding of the nature of the charge may be established in one or more ways, including by showing that the defendant reviewed the jury instructions with counsel and that the "complaint has been read to the defendant"). Trial counsel testified that, in her opinion, Smiley understood the elements of the crime.

At the conclusion of the testimony, the circuit court found that trial counsel was "very very credible." Based on her testimony, the circuit court found that trial counsel was not "short" with Smiley, that she did not rush him through the plea proceeding, and that, while Smiley may have felt pressure because he had reached his trial date, trial counsel nonetheless "would not have allowed him to go forward" with a no-contest plea unless he did so "freely." The circuit court also credited trial counsel's testimony that she and Smiley together reviewed the plea questionnaire and waiver of rights form, the elements of the offense, and the terms of the plea agreement, and that Smiley understood those matters at the time he entered his no-contest plea.

Additionally, the circuit court examined the transcript of the plea colloquy and found that Smiley did not express any misgivings about entering a no-contest plea or suggest that he was coerced to enter a no-contest plea against his will. Further, the circuit court found that the colloquy reflected Smiley's understanding of the penalties he faced and his knowledge that the circuit court was not bound by the plea agreement.

The circuit court went on to find that Smiley was an intelligent person who was "not ... naïve" about the criminal justice system, given his two prior criminal convictions in 2014 and an

additional charge arising in 2015.[6] Therefore, although the circuit court acknowledged that the plea colloquy was incomplete in some ways, the circuit court concluded that the deficiencies did not undermine its confidence that Smiley understood the plea questionnaire and waiver of rights form that he signed, the elements of the crime, and the terms of the plea agreement in light of trial counsel's explanation and thorough review of those matters before the hearing.

Finally, the circuit court considered that Smiley waited ten months to notify it that he might seek plea withdrawal and thirteen months to file the motion. The circuit court observed that this delay "does not favor a finding of a fair and just reason" to withdraw a plea. *See* ***Rhodes***, 307 Wis. 2d 350, ¶12 (stating that a swift request for plea withdrawal favors the defendant and concluding that a three-month delay weighs against granting relief).

Based on the totality of the record, the circuit court concluded that Smiley entered his no-contest plea knowingly, intelligently, and voluntarily and that he did not present any reason justifying plea withdrawal "based on the record ... or based on the legal principles that control that determination." The circuit court therefore rejected Smiley's claim that he had a fair and just reason to withdraw his plea.

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[6] Smiley's appellate counsel argues that the circuit court "relied on Mr. Smiley's father's criminal history" to support a conclusion that Smiley was a sophisticated defendant. The record shows, however, that when the circuit court described the electronic docket of a 1997 proceeding as reflecting charges against Smiley, Smiley's successor trial counsel interrupted to advise the circuit court that Smiley's father was the defendant in the 1997 proceedings. The circuit court responded: "I'm sorry. I stand corrected," and subsequently reiterated that it was "setting aside [its] incorrect recitation of the three charges apparently against [Smiley's] father." Accordingly, the record refutes any claim that the circuit court relied on Smiley's father's criminal record to make findings about Smiley. We remind appellate counsel that we expect members of the bar to take particular care in discussing the record. *See* ***State v. Lass***, 194 Wis. 2d 591, 605, 535 N.W.2d 904 (Ct. App. 1995).

The circuit court considered appropriate factors, applied the applicable law, and reached a conclusion that a reasonable judge could reach. Accordingly, the circuit court properly exercised its discretion in denying Smiley's motion to withdraw his plea. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (explaining that our inquiry is whether the circuit court exercised discretion, not whether the circuit court could have exercised discretion differently). Because we conclude that the circuit court properly rejected the claim that Smiley had a fair and just reason for plea withdrawal, we need not consider whether Smiley rebutted evidence that plea withdrawal would substantially prejudice the State. *See* ***Lopez***, 353 Wis. 2d 1, ¶61. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals