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

June 17, 2020

To:

Hon. Mark F. Nielsen
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Abigail Potts
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

George Tauscheck
4230 N. Oakland Ave., #103
Milwaukee, WI 53211

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

2019AP1134-CR State of Wisconsin v. Dajon D. Daniel (L.C. #2016CF1722)

Before Neubauer, C.J. Reilly, P.J., and Gundrum, J.

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).

Dajon D. Daniel appeals from a judgment convicting him of attempted first-degree intentional homicide as a repeater. The sole issue in this case is whether the circuit court erred by denying Daniel's presentence motion to withdraw his no contest plea. 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 (2017-18).[1] We affirm as the circuit court did not erroneously exercise its discretion in determining that Daniel failed to establish a credible, fair and just reason for plea withdrawal.

In 2016, Daniel was charged with two counts of attempted first-degree intentional homicide as a repeater based on his firing a gun at a car with two occupants. The victims were able to drive off unharmed, and both identified Daniel in photo lineups. A year later, Daniel reached a plea agreement with the State and pled no contest to one count of attempted first-degree intentional homicide. At the plea hearing, the circuit court confirmed that Daniel understood his plea, had discussed the plea with his attorney, was satisfied with his attorney's representation, and knew the rights he was giving up. The court found that Daniel's plea was knowing, intelligent, and voluntary.

Two weeks later, prior to sentencing, counsel moved to withdraw as Daniel wished to withdraw his plea, and she anticipated the need to testify at the plea withdrawal hearing. The court granted the motion to withdraw, and a new public defender was appointed. Daniel's new counsel filed a motion to withdraw his plea.

The court held a hearing on the motion, where former counsel and Daniel testified. Former counsel explained that while Daniel was "unhappy with the entire situation," he did not appear confused about his plea. She indicated that Daniel had rejected previous plea offers from the State, but when the State became aware of phone calls Daniel made from jail purportedly offering to pay the victim not to testify in court and admitting he fired the gun, the State

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

threatened to file additional charges against Daniel. In former counsel's mind, the incriminating telephone calls "put the last nails in the coffin." Counsel testified that she advised Daniel that it would be in his best interest to plead, but she did not tell him he had to accept the plea, threaten him, or make him any promises. Daniel testified that he "was confused" and "felt like I was getting pushed to do it, go fast and get this over with." He explained that after he entered his plea, he looked at the jury instructions for the first time in a law book, and he did not believe he had committed the crime.

The circuit court denied Daniel's motion. The court acknowledged the law regarding plea withdrawal prior to sentencing, explaining that Daniel had stated a fair and just reason to withdraw his plea, but the court did not find Daniel's reasons to be credible or supported by the record. The court sentenced Daniel to twelve years' initial confinement and thirteen years' extended supervision. Daniel appeals.

It is well established that whether to grant plea withdrawal is a discretionary decision by the circuit court, which we will uphold on appeal if the court "reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts." ***State v. Leitner***, 2001 WI App 172, ¶24, 247 Wis. 2d 195, 633 N.W.2d 207 (citation omitted). "While courts should liberally grant plea withdrawal prior to sentencing, withdrawal is not automatic." ***Id.*** Prior to sentencing, a defendant may withdraw his or her plea upon a showing by a preponderance of the evidence of a "fair and just reason" for the defendant's "change of heart" beyond "the desire to have a trial" or "belated misgivings about the plea," provided the prosecution is not substantially prejudiced. ***State v. Jenkins***, 2007 WI 96, ¶¶28, 31-32, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted); ***Leitner***, 2001 WI App 172, ¶¶24, 27 (citation omitted). Importantly, the fair and just reason must be found credible by the circuit court.

Jenkins, 303 Wis. 2d 157, ¶43. "In other words, the circuit court must believe that the defendant's proffered reason actually exists." ***Id.***; *see also* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

Daniel argues that the circuit court erroneously exercised its discretion as it found that Daniel's reasons for withdrawal were both fair and just, but the court relied too heavily on the plea questionnaire and colloquy to determine that Daniel's claims were incredible. We disagree as the record supports the circuit court's credibility determinations such that its decision is not clearly erroneous.

Daniel claimed in his plea withdrawal motion that "he was 'talked in' to the plea, did not have enough time to make an informed decision and felt pressured [into] taking the State's plea by [former] counsel." First, the circuit court found former counsel's testimony credible, namely that she reviewed the charges and the jury instructions with Daniel prior to his plea; that she never used threats or promises to force Daniel to accept the plea agreement; that, while Daniel was unhappy about his situation, he never said he did not want to accept the plea; that Daniel did not seem confused about his plea nor did he ask for additional time to contemplate the plea deal; and that she merely provided Daniel with her professional opinion that he should accept the plea based on the circumstances of the case. We are satisfied that there was no coercion, undue force, or pressure by counsel, only an appropriate recommendation that Daniel should accept the plea.

Second, the record does not support Daniel's claim that he had insufficient time to make an informed decision: Daniel had a year to decide whether to enter a plea, one month to consider the impact of the recorded telephone call and the terms of the final plea offer, and overnight to review the actual plea questionnaire documents before signing them.

And finally, the circuit court found that the plea colloquy conducted in this case contradicted Daniel's claims, specifically that the court reviewed the charges and the elements of the crime with Daniel, reminded him multiple times that he had a right to proceed to trial, confirmed that he had reviewed the plea questionnaire form with counsel, and had enough time to discuss his plea with counsel.[2] The record bears out the court's finding that he entered the plea knowingly, voluntarily, and intelligently. As the circuit court explained, there is no doubt that Daniel felt "pressured," but "[t]here is pressure inherent in that situation."

Accordingly, we conclude that the court properly exercised its discretion in concluding that, while fair and just, Daniel's stated reasons for seeking to withdraw his plea were not credible.[3]

Upon the foregoing reasons,

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

[2] Daniel argues that the circuit court relied too heavily on the plea colloquy, noting that "by the time of the colloquy, [Daniel] had already succumbed to the pressure … and apathetically complied with the plea-taking procedure." As the State notes, however, Daniel cites no legal authority to support his claim that the circuit court cannot consider the plea colloquy in assessing the credibility of Daniel's reasons for plea withdrawal.

[3] We note that the State has not claimed substantial prejudice in this case; therefore, we address the issue no further.

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

Sheila T. Reiff
Clerk of Court of Appeals