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DISTRICT I

May 17, 2022

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

2021AP712-CR

State of Wisconsin v. Dwayne Delshawn Jobe
(L.C.# 2014CF1982)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Dewayne Delshawn Jobe appeals a judgment entered upon his guilty pleas to second-degree reckless homicide by use of a dangerous weapon and possession of a firearm as a felon. He claims that the circuit court erroneously denied his presentence motion for plea withdrawal. Upon review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We reject his claim and summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

We take the background facts from documents in the record and from the testimony provided at the plea withdrawal hearing. Early in the morning of May 11, 2014, Jobe and some of his family members were at a Milwaukee tavern in the 2700 block of North 12th Street. At 2:39 a.m., ShotSpotter, a gunshot detection system, alerted police to gunfire in the area. Police were dispatched within a minute.

At 2:42 a.m., police who were responding to the ShotSpotter alert conducted a traffic stop near the tavern.² Jobe was the driver. After a brief detention, the officers released him and proceeded to the tavern. There they found Herman Paige, the tavern owner, unresponsive and bleeding from the mouth. He died at the scene from a gunshot wound to the chest. Patrons at the tavern told police that Jobe was the shooter.

Opal Capels told police that her cousin, Jobe, became upset and argued with Paige when he announced that it was time to close the tavern and insisted that everyone leave. Capels said that she remained near the entrance of the tavern and saw Jobe leave the area on foot, then return minutes later. As he reached the front of the tavern, he raised his hand and fired a gun into the air. Capels said that Jobe next entered the tavern and then she heard three more gunshots. A second witness, Jermaine Butler, told police that he saw his friend and cousin, Jobe, in a fight on the premises. Police showed Butler a still photograph captured from security video recorded at the tavern. Butler identified Jobe as the person pictured pointing and firing a handgun into the tavern.

² The record does not reveal the precise location of the traffic stop, only that it was “very close” to the tavern.

A detective who examined the tavern's surveillance video observed a time stamp reflecting that the shooting occurred during the period from 2:02 until 2:04 a.m. The detective concluded that the time stamp was inaccurate and, based on a comparison of the times reflected on the recording system and other available information, determined that the shooting took place from 2:39 a.m. until 2:40 a.m.

The State charged Jobe with first-degree reckless homicide by use of a dangerous weapon and possession of a firearm while a felon. He entered not guilty pleas and requested a jury trial.

Two weeks before the scheduled trial date, Jobe moved to discharge his two appointed trial attorneys. He asserted that the defense was not ready for trial, his attorneys had not sufficiently reviewed discovery with him, and he had not seen a piece of video evidence. Defense counsel responded that, in counsels' view, the defense had received and reviewed "everything" and was prepared to try the case. The circuit court denied Jobe's motion to discharge his lawyers and ruled that the trial would not be adjourned.

Jobe appeared in court two days later with his trial attorneys and advised the circuit court that he wanted to resolve the charges with a plea agreement. Pursuant to its terms, the State filed an amended information charging Jobe with second-degree reckless homicide by use of a dangerous weapon and with possessing a firearm while a felon. Jobe pled guilty as charged.

Prior to sentencing, Jobe retained new trial counsel and moved to withdraw his guilty pleas. As relevant here, he asserted that his predecessor trial attorneys had failed to show him the video recording of the May 11, 2014 traffic stop before he entered his guilty pleas. Based on his subsequent review of that squad car video, he believed that the timing and location of the traffic stop supported an alibi defense that he wished to pursue.

The circuit court conducted a hearing on the plea withdrawal motion. At the hearing, Jobe's predecessor trial attorneys testified that Jobe had seen the surveillance video from the tavern multiple times on multiple occasions prior to his guilty pleas but that he had not seen the squad car video. Both defense attorneys testified, however, that they had provided Jobe with all of the police reports and other written discovery, including a report that detailed the content of the squad car video, and that counsel had discussed that video and the report with Jobe before he decided to plead guilty. Counsel also described discussions with Jobe about the evidence reflected in the discovery and the ways that the squad car video could variously advance and undermine his defense. One of the attorneys went on to testify about meeting with Jobe immediately after he moved to discharge counsel, and the attorney described showing Jobe the surveillance video from the tavern once again. The attorney testified that he and his co-counsel then gave Jobe "the option to see additional videos, and he declined." The lawyers met with Jobe at least twice more, discussed his potential pleas, and further reviewed the surveillance video. Counsel also asked Jobe if he "want[ed] to see any additional videos before signing the plea questionnaire, and he indicated he did not need to see any other videos."

Jobe testified on his own behalf. He confirmed that he did not see the squad car video before he entered his guilty pleas, and he denied that his trial attorneys reviewed the discovery with him prior to the plea hearing. He testified that he first watched the squad car video after pleading guilty, and he observed that the video showed that police stopped him at 2:42 a.m. He concluded that this reflected a "time discrepancy" that benefitted him in light of the evidence establishing the time of the shooting. On cross-examination, he acknowledged that the times reflected on the videos were also included in the police reports that he had received before he pled guilty.

The circuit court found that Jobe had not watched the squad car video before he entered his guilty pleas, but that he had the opportunity to do so and declined. The circuit court further found that, prior to entering his guilty pleas, Jobe was familiar with the content of the squad car video from the police reports that he reviewed with his trial counsel. The circuit court concluded that Jobe failed to show that he was entitled to relief and denied the motion for plea withdrawal. The matter then proceeded to sentencing, where the circuit court imposed an aggregate thirty-three year term of imprisonment.

Jobe appeals, raising a single issue. He claims that the circuit court erroneously denied his motion for plea withdrawal.

When a defendant moves for plea withdrawal prior to sentencing, the defendant must show by a preponderance of the evidence that a fair and just reason exists to grant the motion. *See State v. Lopez*, 2014 WI 11, ¶61, 353 Wis. 2d 1, 843 N.W.2d 390. To demonstrate a fair and just reason, the defendant must show an adequate reason for his or her change of heart other than a mere desire to have a trial. *See State v. Bollig*, 2000 WI 6, ¶29, 232 Wis. 2d 561, 605 N.W.2d 199. If the defendant makes that showing, the burden shifts to the State to show that it would suffer substantial prejudice if the circuit court were to permit plea withdrawal. *See id.*, ¶34.

The decision to grant or deny a motion for plea withdrawal prior to sentencing rests in the circuit court's discretion, and we will uphold that decision as long as the circuit court has reasonably applied proper legal principles to the facts of record. *See State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. Our standard of review is deferential. *See id.*, ¶33. We accept the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *See id.* "The standard also applies to credibility determinations." *Id.* We defer to

the circuit court's credibility assessments regarding not only the testimony of the witnesses but also the proffered explanation for the plea withdrawal request. *See State v. Kivioja*, 225 Wis. 2d 271, 289-91, 592 N.W.2d 220 (1999).

Here, Jobe sought plea withdrawal on the ground that he entered his guilty pleas with incomplete information because, he said, his trial attorneys failed to show him the squad car video notwithstanding his wish to see it. At the hearing on his motion, the circuit court heard testimony from Jobe and from the two attorneys who represented him before and during the plea hearing. The circuit court credited the attorneys' testimony, finding that it was "strong" and that it correctly described the lawyers' meetings with Jobe outside the courtroom. We accept those credibility assessments, recognizing that the circuit court could observe the demeanor of the witnesses and gauge the persuasiveness of their testimony. *See State v. Carnemolla*, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999).

The circuit court also made numerous factual findings in regard to Jobe's claim, including: (1) defense counsel provided Jobe with all of the discovery materials; (2) Jobe met with his defense counsel "a number of different times" during the course of the pretrial proceedings; (3) his defense counsel reviewed all of the discovery with Jobe; (4) defense counsel discussed with Jobe both the surveillance video recorded at the tavern and the squad car video; (5) Jobe did not watch the squad car video; (6) Jobe declined the opportunity to watch the squad car video; and (7) Jobe "knew what was included in the record." The circuit court's findings of fact are supported by the testimony of his defense attorneys, testimony that the circuit court deemed credible.

On appeal, Jobe renews the arguments that he made to the circuit court in support of his claim that he has a fair and just reason for plea withdrawal because he did not see the squad car video before he pled guilty. He contends that his post-plea review of that video first alerted him to “the closeness of the time between the squad trailing his vehicle and the shooting” and persuaded him that the State would have difficulty proving that he was at the scene when the shooter killed Paige. Jobe also contends that the attorneys who represented him through his guilty plea hearing disregarded his pretrial “demand[s] to see all the videos” and withheld the squad car video. The circuit court, however, did not believe these contentions. The circuit court found instead that prior to the plea hearing, defense counsel discussed all of the discovery materials with Jobe, including the squad car video, “in order to prepare a defense.” While the circuit court found that Jobe did not watch the squad car video, the circuit court also found that the contents of that video “were included in the reports that were being discussed with him.” The circuit court further found that Jobe had opportunities to watch the squad car video prior to his guilty pleas but that he declined those opportunities. As the State correctly asserts, Jobe fails to demonstrate that the circuit court’s factual findings were clearly erroneous or to present any other legally sufficient reason for us to reject those findings. Accordingly, we accept them. *See Jenkins*, 303 Wis. 2d 157, ¶33.

In sum, Jobe contends that he pled guilty without essential information contained in the squad car video, but the circuit court found that he knew what the squad car video showed and the impact it could have at trial. The circuit court also rejected Jobe’s allegation that trial counsel withheld the squad car video and found instead that Jobe declined to watch it. “If ‘the circuit court does not believe the defendant’s asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.’” *Id.*, ¶34 (citation omitted).

The record thus shows that Jobe lacked a fair and just reason to withdraw his guilty pleas. His motion for plea withdrawal reflected only a belated desire to have a trial. Accordingly, the circuit court did not erroneously exercise its discretion by denying relief. *See Bollig*, 232 Wis. 2d 561, ¶29. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of conviction is 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