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DISTRICT II

November 23, 2022

To:

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Circuit Court Judge
Electronic Notice

Angela Conrad Kachelski
Electronic Notice

Kristina Secord
Clerk of Circuit Court
Walworth County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1832-CR

State of Wisconsin v. Aaron M. Martinez (L.C. #2017CF98)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Aaron M. Martinez appeals from a judgment of conviction based on the denial of his presentence motion seeking plea withdrawal.¹ 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 (2019-20).² We affirm.

¹ The Honorable Phillip A. Koss presided over the plea hearing. The Honorable Daniel S. Johnson denied Martinez's plea withdrawal motion and entered the judgment of conviction.

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Martinez’s appeal raises the question of whether the circuit court erroneously exercised its discretion when it denied his presentence motion to withdraw his guilty plea. Martinez pled guilty to one count of first-degree sexual assault of a child under the age of thirteen. The charge arose from photographs found on Martinez’s cell phone of a girl—later determined to be the niece of Martinez’s girlfriend—lying down and showing her “genital and buttock area with clothing on her” and one photo showing an adult hand on the young girl’s buttock. A detective involved in the search believed the hand was Martinez’s because a noticeable cut on the hand in the photo matched a cut on Martinez’s hand. Another photo depicted the same young girl lying on her stomach and displayed “a male penis near the young girl.”

Before sentencing, Martinez moved to withdraw his plea, alleging that he had not understood the sexual-contact element of the crime prior to his plea. He contended that he had received ineffective assistance of counsel because his counsel did not attach the jury instruction that defines “sexual contact” to the plea questionnaire. *See* WIS JI—CRIMINAL 2101A. He further alleged that the plea colloquy was defective because the circuit court did not explain the element of sexual contact in violation of WIS. STAT § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

As Martinez requested in his motion, the circuit court held an evidentiary hearing at which he and his counsel testified. At the conclusion of the hearing, the court denied Martinez’s motion, finding that his testimony was not credible. The court found that Martinez failed to show that, when he pled guilty, he did not understand that the State would need to prove that the sexual contact was done for the purpose of sexual arousal or gratification or to degrade or humiliate the victim.

This court will affirm an order “denying a motion to withdraw a plea unless the circuit court erroneously exercised its discretion.” *State v. Garcia*, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). Prior to sentencing, the “circuit court should freely allow a defendant to withdraw his plea,” provided a fair and just reason exists for withdrawal and the State has not been “substantially prejudiced by reliance on the defendant’s plea.” *Id.* However, “‘freely’ doesn’t mean automatically.” *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). The defendant must show “some adequate reason for [his] change of heart.” *Id.* at 583 (quoting *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973)). A mere “desire to have a trial” is not enough. *Garcia*, 192 Wis. 2d at 862 (quoting *Canedy*, 161 Wis. 2d at 583). The defendant must establish a fair and just reason by a preponderance of the evidence.³ *Garcia*, 192 Wis. 2d at 862.

“[T]he defendant must do more than allege or assert a fair and just reason, ... he ... must also show that the reason actually exists.” *State v. Kivioja*, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). “In order to assess whether a reason actually exists, the circuit court must engage in some credibility determination of the proffered reason.” *Id.* The court must find the reason proffered as fair and just by the defendant to be credible. *State v. Jenkins*, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. “In other words, the circuit court must believe that the defendant’s proffered reason actually exists.” *Id.* “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

³ If the defendant meets this burden, then “the burden shifts to the State to show substantial prejudice so as to defeat the plea withdrawal.” *State v. Bollig*, 2000 WI 6, ¶34, 232 Wis. 2d 561, 605 N.W.2d 199.

the plea.” *Id.*, ¶34 (quoting *Garcia*, 192 Wis. 2d at 863). “[B]elated misgivings about the plea” do not constitute a fair and just reason for plea withdrawal. *Jenkins*, 303 Wis. 2d 157, ¶32.

This court will affirm the circuit court’s discretionary determination to grant or deny a motion for plea withdrawal before sentencing if it is “demonstrably ... made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.” *Canedy*, 161 Wis. 2d at 579-80 (quoting *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981)). If the circuit court fails to adequately explain its decision on the record, this court will “independently review the record to determine whether the [circuit] court’s decision can be sustained” based on the facts as applied to the applicable law. *State v. Shanks*, 152 Wis. 2d 284, 289, 448 N.W.2d 264 (Ct. App. 1989).

The circuit court did not erroneously exercise its discretion in denying Martinez’s motion. It applied the correct legal standard and identified the central issue as whether Martinez understood the definition of sexual contact at the time he entered his plea. Having heard the testimony of Martinez and his counsel and reviewed transcripts of prior hearings in the case, the court concluded that Martinez’s professed ignorance was not supported by the record.

Specifically, at the contested preliminary hearing in March 2017, which Martinez attended, the State explained that the photos from Martinez’s cell phone satisfied the element of sexual contact because they supported an inference that the contact “was done either for a sexual arousal or gratification or to degrade or humiliate the victim.”

Five months later, during the plea colloquy in August 2017, Martinez affirmed that he had gone over the plea questionnaire and attached jury instruction for first-degree sexual assault of a child with his counsel.⁴ Martinez then affirmatively declined the court's offer to explain the sexual contact element again, saying that he remembered what the State would have to prove. Martinez conceded that the State could prove him guilty of the sexual assault charge and agreed that he signed the plea questionnaire forms "only after [he] went through them, understood them, and agreed with them." He affirmed that he did not have any questions about anything that had been discussed during the plea colloquy or about the forms or his rights. After Martinez's counsel explained how she went through the plea questionnaire with him "the same way I always do with my clients in my own language" and indicated that she believed Martinez understood everything, the court found that Martinez's plea was voluntary and intelligent and ordered a presentence investigation.

In December 2017, at what was to have been Martinez's sentencing hearing, the court and counsel discussed statements Martinez made during the interview for the presentence investigation about not having had sexual contact with the victim. Martinez's counsel raised questions about whether he actually touched the victim. In response to the court's questions, Martinez affirmed that when he entered his plea, he understood that the offense required not only sexual contact but also the specific intent for sexual arousal or gratification or to degrade or humiliate the victim:

⁴ The instruction for first-degree sexual assault of a child, WIS JI—CRIMINAL 2102E, cross-references the instruction that defines "sexual contact," WIS JI—CRIMINAL 2101A.

THE COURT: All right.

Mr. Martinez, do you understand that at the time you entered your plea or before you entered your plea, you had gone over the jury instructions with Ms. Frost regarding that sexual assault of a child? Do you understand that? Do you remember that?

THE DEFENDANT: Yes. Yes, sir.

THE COURT: And not only did it require contact of a child under sixteen or twelve, depending on the age, but it also required that that contact was for a very specific intent, to be either sexually aroused or gratified, or to humiliate the victim, or that it would commit the elements of a battery which I doubt in this case that would apply. But do you recall that very specific intent that the [S]tate would have to prove beyond a reasonable doubt; either that you did it to humiliate the child, or with the intent to become aroused or gratified, not that necessarily you were aroused or gratified, but just with that intent? Do you understand that?

THE DEFENDANT: Yes, I do. I just, um, I—

Following this exchange, the court asked Martinez whether the State could prove him guilty of that element, and Martinez said he was “doing my best to be home as soon as possible for my kids. I—I missed my daughter’s birthday, my son’s first birthday. I just want to do my best to get home.” At that point, Martinez’s counsel asked for a moment to confer with her client, which the court allowed. After conferring with his counsel, Martinez declined to seek withdrawal of his plea and stated that he was prepared to proceed to sentencing. He specifically acknowledged that the State “could prove beyond a reasonable doubt that [he] had contact with the victim and that that was for sexual purposes.”

In addition to the statements from the prior hearings discussed above, evidence presented at the July 2018 hearing on Martinez’s plea withdrawal motion also supports the circuit court’s determination that Martinez’s reason for wanting to withdraw his plea was not credible. At that hearing, the State played a tape of a jail phone call made by Martinez prior to his plea in which Martinez claimed that the victim grabbed his penis and that her actions in doing so put “it” in his

head. Martinez testified at the plea withdrawal hearing that he lied in the jail phone call when he said the minor victim put her hands on his penis. Martinez also testified that he lied at the December 2017 hearing when he testified that he had understood the specific intent element of the crime during the plea colloquy, and he confirmed that he “definitely had a change of heart” about pleading guilty in the case. In addition, Martinez testified to only taking three photos of the victim, but later testimony by a detective established that he took “at least 50.” Finally, Martinez testified that he did not understand which provision of the sexual contact element he pled to, even at the time of the plea withdrawal hearing.

In denying Martinez’s motion, the circuit court acknowledged that Martinez’s counsel testified at the plea withdrawal hearing that she likely did not go through the jury instruction defining sexual contact with Martinez before the August 2017 plea hearing because it was not attached to the plea questionnaire. Nevertheless, the court noted, Martinez acknowledged that he understood the sexual contact element at the December 2017 hearing. The court took his testimony at the December hearing “at face value.” The court also noted that Martinez had an opportunity to discuss the sexual contact element with his counsel during the December hearing, and that after doing so he affirmed that he did not want to withdraw his plea. Again, at the December hearing, Martinez acknowledged that the State “could prove beyond a reasonable doubt that [he] had contact with the victim and that that was for sexual purposes.”⁵ Based on Martinez’s prior testimony, the court concluded that his testimony at the plea withdrawal hearing

⁵ The circuit court’s remarks during the withdrawal hearing could be construed as expressing a belief that the December hearing may have cured a deficiency in the August plea colloquy because plea withdrawal and confirmation were both addressed. We need not reach this issue because the analysis herein is on whether Martinez understood the nature of the charge *at the time of his plea* in August. See WIS. STAT. § 971.08(1)(a).

professing a lack of understanding was not credible. We accept the court’s credibility findings because they are not clearly erroneous. *See State v. Domke*, 2011 WI 95, ¶58, 337 Wis. 2d 268, 805 N.W.2d 364 (“We will uphold the circuit court’s credibility determination unless it is clearly erroneous.”).

The record shows that, after the specific intent required for sexual contact was identified at the preliminary hearing, Martinez advised the plea-taking court that it did not need to go over it again, as he remembered what the State would need to prove. Ignoring the preliminary hearing transcript, Martinez now suggests that the plea hearing reflects his agreement to a specific intent that was not explained when his counsel reviewed the jury instruction with him and which he did not understand. However, as the circuit court concluded, Martinez’s affirmation at the December hearing that he had understood the specific intent that was required and his agreement that the State could prove the same directly undermine his contention. Martinez’s testimony at the plea withdrawal hearing that he lied to the court further undermined his credibility. The “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 Jenkins*, 303 Wis. 2d 157, ¶30 (quoting *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982)).

Accordingly, we are satisfied that the circuit court did not erroneously exercise its discretion in denying Martinez’s motion to withdraw his guilty plea.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals