

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1691-CR

Cir. Ct. No. 2010CF411

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Michael Wright, pro se, appeals a judgment, entered upon his guilty pleas, convicting him of robbery by use of force and operating a motor vehicle in an attempt to flee or elude an officer. Wright also appeals the order denying his motion for postconviction relief. To the extent we

can discern Wright's various arguments, they are rejected and the judgment and order are affirmed.

BACKGROUND

¶2 The State charged Wright with robbery by use of force and operating a motor vehicle in an attempt to flee or elude an officer, both counts as a repeater. The charges arose from allegations that Wright struck an 88-year-old woman in the back, knocking her to the ground inside her garage as she returned home from grocery shopping. The complaint further alleged that after knocking her down, Wright grabbed the purse hanging over her left shoulder and tore it from her arm. Officers responding to the victim's home observed an approximately two-inch laceration to her left forearm, noting the skin on her arm appeared to have been ripped away. Officers also observed a cut on the bridge of the victim's nose.

¶3 A neighbor told police she heard the victim scream, and observed the perpetrator "whooping and carrying on, waving his arms above his head in a somewhat celebratory manner." After the neighbor gave a description of the perpetrator and his vehicle, a high-speed vehicle chase ensued, after which the perpetrator's vehicle crashed and the police captured and arrested the perpetrator, ultimately identified as Wright. An eyewitness told police she saw Wright discard a brown object as he was fleeing from the crash site. The victim's brown purse was recovered approximately seventy-five feet from where Wright was taken into custody.

¶4 In exchange for Wright's guilty pleas to the crimes charged, the State agreed to dismiss the repeater enhancers and dismiss but read in other charges arising from a different case. After a colloquy, supplemented by a plea

questionnaire and waiver of rights form that Wright completed, the court accepted Wright's guilty pleas and ordered a presentence investigation report (PSI).

¶5 After the PSI was prepared, Wright filed a presentence motion to withdraw his pleas, asserting that the circuit court failed to establish a factual basis for the pleas. After a status conference at which the parties briefly outlined their legal positions, the court denied the motion. Wright moved for reconsideration and, after an evidentiary hearing, the court denied the reconsideration motion.

¶6 The court ultimately imposed consecutive sentences resulting in eleven and one-half years of initial confinement followed by seven years of extended supervision. Wright, pro se, filed a motion for postconviction relief, claiming ineffective assistance of counsel as it related to his release on bond and alleged inaccuracies in the complaint that were repeated in the PSI. The motion was denied without an evidentiary hearing and this appeal follows.

DISCUSSION

¶7 Although Wright's brief is not organized in a manner readily susceptible to appellate review, we understand that Wright contends he was entitled to 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.

¶8 The main thrust of Wright's arguments is that his attorneys were ineffective by failing to adequately challenge the factual basis for his plea to use-of-force robbery.¹ Specifically, Wright contends there was no factual basis for the use-of-force element of the crime and his attorneys should have refuted "material falsehoods" in the complaint that Wright struck the victim in the back and engaged in celebratory gestures. To show ineffective assistance of counsel, a defendant must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶9 When reviewing a defendant's plea withdrawal motion based on a factual basis claim, our supreme court has held that a defendant need not admit to the factual basis for a plea in his or her own words. *State v. Thomas*, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836. Rather, the court may look at the totality of the circumstances to determine whether a defendant has agreed to the factual basis underlying the plea. *Id.* "The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well the defense counsel's statements concerning the factual basis presented by the state, among other portions of the record." *Id.* So long as the court guarantees that the defendant is

¹ WISCONSIN STAT. § 943.32(1)(a) (2011-12) provides that whoever, with intent to steal, takes property from the person or presence of the owner by "using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property" is guilty of a Class E felony.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

aware of the elements of the crime, and that the defendant's conduct meets those elements, the court may establish the factual basis as it sees fit. *Id.*, ¶22.

¶10 Here, the record establishes that a factual basis existed for Wright's guilty plea to use-of-force robbery. The complaint alleged Wright used force to knock the victim to the ground during the robbery, injuring the victim. Additionally, Wright signed the plea questionnaire form, admitting his guilt to use-of-force robbery. During the plea colloquy, Wright acknowledged that he understood the State charged him with "robbery using force" and further acknowledged that he understood what the State alleged he did to incur the charge. The court, therefore, properly used the complaint narrative as the factual basis for Wright's guilty plea to use-of-force robbery.

¶11 Moreover, after entering his guilty pleas, Wright acknowledged to the PSI writer that he had reviewed the complaint, and that it was "basically" correct but "exaggerated." Wright did not dispute hitting the victim—rather, he indicated he "didn't try to hit her" and he "didn't celebrate afterwards." According to Wright, he was just trying to take the victim's purse and the injury happened as a result of him taking the purse. That there is a difference of opinion regarding how the victim ended up on the ground does not undermine the court's factual basis determination. *See id.*, ¶26 (court's factual basis determination is not undermined where defendant disputes facts that do not implicate elements of the crime). Regardless whether the victim fell because Wright struck her back or whether she fell during the struggle over her purse, there is no dispute that the victim ended up on the ground with injuries because Wright forcefully took her purse. The record establishes that there was a factual basis for the plea, and Wright ultimately fails to establish that his attorneys were ineffective in not adequately challenging the factual basis for his plea.

¶12 Wright alternatively asserts there was another “fair and just” reason that warranted granting his presentence plea withdrawal motion. Specifically, Wright contends the pleas were entered in “haste” and “confusion” as he was “going through [an] emotional state of mind,” exacerbated by the recent deaths of his father and mother-in-law. Wright consequently alleges his attorneys were ineffective by failing to present evidence of the deaths to establish his state of mind and by allowing him to plead guilty to the charges in his altered state. We are not persuaded.

¶13 With respect to Wright’s state of mind, the plea questionnaire form indicated Wright was receiving treatment for depression, but had not taken medication within the last twenty-four hours. During the plea colloquy, Wright confirmed that the lack of medication was not causing him any confusion or anxiety. The court explained its concern that even if Wright was “clear headed because of the lack of ... medications,” being off of them could create anxiety that might prompt Wright to “want to get things over with.” Wright again confirmed that although he needed medication, not taking the medication had no effect on his decision that day.

¶14 After an evidentiary hearing on the presentence plea withdrawal motion, the court recounted its awareness of Wright’s family situation, noting it had modified his bond and gave him “a furlough of some type to deal with the devastating situation with his father.” The court, however, ultimately found Wright’s “testimony that he can’t remember and that he didn’t read the complaint and he didn’t understand the situation” was “incredulous.” The court further found that Wright had merely “changed his mind” about entering guilty pleas. The circuit court, as fact-finder, 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’s credibility determination is supported by the record. Wright, therefore, fails to establish how he was prejudiced by any claimed deficiency on trial counsel’s part to prevent the guilty pleas based on Wright’s state of mind.

¶15 We note that Wright repeatedly complains about his attorneys’ respective failures to ensure his release on bond as he awaited sentencing. Because Wright fails to present a developed argument on this topic and fails to seek any particular relief, we need not address his claims. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments). To the extent Wright intimates that had he been out on bond, he could have engaged in community service leading to a better PSI report and, ultimately, a better outcome at sentencing, this assertion is too speculative to warrant resentencing. *See State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (defendant must offer more than rank speculation to establish prejudice).

¶16 Wright further intimates counsel was ineffective by allowing Wright to be sentenced on the basis of inaccurate information in the PSI regarding Wright’s use of force and subsequent celebration. The record belies this claim. The cited disputes of fact were litigated before sentencing in the context of Wright’s challenge to the factual basis for his plea. Moreover, the sentencing court was aware that there was a “difference of opinion” between Wright and the State as to how the victim ended up on the ground.

¶17 Finally, Wright intimates that the circuit court erred by denying his postconviction motion without an evidentiary hearing. If a postconviction motion

does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). As discussed above, the record demonstrates that Wright is not entitled to relief. Therefore, we conclude that the circuit court properly exercised its discretion when it denied the motion without an evidentiary hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

