COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 97-2070-CR
98-0085-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RUDY A. GERARDO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Rudy A. Gerardo has appealed in these consolidated cases from a judgment convicting him upon a no contest plea of burglary as a party to the crime in violation of §§ 939.05 and 943.10(1)(a), STATS.

He has also appealed from an order denying his motion for postconviction relief. We affirm both the judgment and the order.

The sole issue presented for appeal is whether the trial court erroneously exercised its discretion by denying Gerardo's postsentencing motion to withdraw his no contest plea. A court may accept a plea withdrawal following sentencing only if it is necessary to correct a manifest injustice. *See* ***State v. Rock,*** 92 Wis.2d 554, 558-59, 285 N.W.2d 739, 741-42 (1979). The manifest injustice test is rooted in constitutional concepts, requiring a showing of a serious flaw in the fundamental integrity of the plea. *See* ***State v. Nawrocke***, 193 Wis.2d 373, 379, 534 N.W.2d 624, 626 (Ct. App. 1995). The burden is on the defendant to show a manifest injustice by clear and convincing evidence. *See* ***id.*** In discussing the manifest injustice test, Wisconsin courts have explained that disappointment in the eventual punishment imposed is not grounds for withdrawal of a plea. *See* ***id.***

A trial court's decision denying a motion to withdraw a no contest plea will not be disturbed by this court unless the trial court erroneously exercised its discretion. *See* ***State v. Van Camp***, 213 Wis.2d 131, 139, 569 N.W.2d 577, 582 (1997). However, when a defendant establishes a denial of a relevant constitutional right, plea withdrawal is a matter of right. *See* ***id.***

A plea of no contest which is not knowingly, voluntarily and intelligently entered violates due process and provides a basis for withdrawal of the plea. *See* ***id.*** Most commonly, a motion to withdraw a no contest plea alleges that the plea was unknowing and involuntary either because the defendant did not have a complete understanding of the charge or because he or she did not understand the constitutional rights being waived. *See generally* ***id.*** at 139-40, 569 N.W.2d at 582. Under such circumstances, the defendant must make a prima facie

showing that the plea was accepted without the trial court's conformance with § 971.08, STATS., and other mandatory duties imposed by the Wisconsin Supreme Court. *See* ***id.*** at 140-41, 569 N.W.2d at 582-83.

Gerardo alleges not that the plea colloquy was inadequate, but that he was "intimidated and afraid after the judge's actions and attitude during the jury selection," causing him to change his plea from not guilty to no contest. On appellate review, the issue of whether a plea was voluntary, knowing and intelligent is a question of constitutional fact which we review independently of the trial court. *See* ***id.*** at 140, 569 N.W.2d at 582. However, we will not disturb the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***id.***

Both Gerardo and his trial counsel testified at the postconviction hearing that they were prepared to go to trial on the day scheduled for jury trial in this case. The record indicates that after the jury selection commenced before the Honorable Emmanuel Vuvunas, one of the potential jurors (Juror 57) asked to be permitted to answer a voir dire question in private. Judge Vuvunas, the attorneys, the court reporter, Gerardo, his codefendant and Juror 57 then went into the judge's chambers, which was down a hallway from the courtroom. Defense counsel did not object when Juror 57 asked that the defendants not be present, and the defendants were then removed to the judge's office with the door closed. Juror 57 then alleged that she had been abducted and raped by Gerardo approximately twenty years earlier. She was then excused for cause and instructed not to discuss the matter with anyone. Judge Vuvunas, in what Gerardo's trial counsel alleged was a raised voice, then asked Gerardo's counsel: "Didn't your client bother to tell you this, Mr. Smith? He doesn't remember his victims?"

Gerardo and his codefendant were then brought back to the chamber where the questioning of Juror 57 had occurred. They were informed of the reason she was excused, and the voir dire continued in the courtroom until a panel was chosen. A lunch break was taken, after which Gerardo changed his plea to a plea of no contest. In exchange, the prosecutor agreed to abide by the recommendation in the presentence report for purposes of sentencing argument.

Gerardo never alleged that he changed his plea as a result of Juror 57's allegation until six months after sentencing when he filed this postconviction motion.[1] At the postconviction hearing, he alleged that he heard the judge yelling through the closed door, "Doesn't he remember his victims?" He testified that he believed the jurors waiting in the courtroom heard it, too, and that he subsequently changed his plea because he felt intimidated. In alleging intimidation, he also relies on his trial counsel's postconviction testimony that when they returned to the courtroom after the questioning of Juror 57, the other jurors seemed to know that something had happened and there seemed to be something negative towards Gerardo. On appeal, his counsel alleges that his removal during the questioning of Juror 57 also contributed to the intimidation he felt and that no other alternatives were explained to him, rendering his no contest plea coerced.

The trial court denied Gerardo's motion after noting the absence of any evidence that jurors in the courtroom actually heard the judge's in-chambers comment. Based upon the physical layout of the courtroom, the trial court also concluded that it was unlikely that the jurors could have heard anything more than

[1] Although jury selection and entry of the no contest plea occurred before the Honorable Emmanuel Vuvunas, Judge Vuvunas recused himself before sentencing because the presentence report did not refer to the incident alleged by Juror 57. The Honorable Gerald P. Ptacek therefore sentenced Gerardo and decided his postconviction motion.

a loud noise. Based on this determination, the court was not persuaded that the incident involving Juror 57 could have had any effect on the jurors. Based upon Gerardo's answers at the no contest plea hearing, the court also rejected his postconviction testimony regarding his motivation for entering the plea, concluding that he entered it freely and voluntarily after deciding "on his own" that he wanted to take advantage of the plea agreement that was offered.

No basis exists for this court to disturb the trial court's decision. As acknowledged by Gerardo, self-imposed or internal concerns and anxieties are not coercive factors which render involuntary a no contest plea. *See, e.g.,* ***Craker v. State***, 66 Wis.2d 222, 229, 223 N.W.2d 872, 876 (1974) (defendant's religious beliefs and desire to mollify family were self-imposed factors which did not affect voluntariness of his guilty plea); ***Drake v. State***, 45 Wis.2d 226, 233, 172 N.W.2d 664, 667 (1969) (defendant's plea was not involuntary because motive in entering it was to protect his wife from prosecution). When a defendant is given no fair or reasonable alternative to choose from, his or her plea is legally coerced. *See* ***Rahhal v. State***, 52 Wis.2d 144, 152, 187 N.W.2d 800, 805 (1971). However, the fact that a defendant must choose between two reasonable alternatives and take the consequences is not coercive of the choice made. *See* ***id.*** at 151, 187 N.W.2d at 805.

While it is conceivable that Gerardo was surprised and felt some subjective anxiety when he heard about Juror 57's allegations, his internal reaction did not constitute coercion for purposes of rendering involuntary his no contest plea. He always retained the right to choose between two reasonable alternatives—proceeding to trial or entering a no contest plea.

In reaching this conclusion, we also note that nothing in the record supports a determination that Gerardo's right to a jury trial had been tainted and thus no longer presented a reasonable alternative. The other jurors did not hear Juror 57's answer nor, as found by the trial court, could they hear Judge Vuvunas's comment to Gerardo's counsel. Gerardo's right to a jury trial thus remained a viable alternative, as was pointed out to him by the trial court several times during the no contest plea colloquy.

The record also negates Gerardo's claim that his no contest plea was, in fact, induced by concern over Juror 57's statement and the judge's reaction to it. His answers during the plea colloquy clearly indicate that he knew he retained the option of a jury trial and that he personally had elected to change his plea to no contest. In fact, he told the trial court that the reason he was doing so was because some members of the jury had friends who were police officers and he believed they would be more likely to believe the police than him. He indicated that since he thought there was a good chance he would lose at trial, he wanted to take advantage of the plea negotiation. His answers also established that he entered the plea with complete awareness of the nature of the charge, the potential penalty and the constitutional rights that he was waiving.

Testimony by Gerardo's trial counsel at the postconviction hearing also supports a determination that Gerardo's plea was not induced by Juror 57's statement or the trial court's reaction to it. Gerardo's trial counsel confirmed that, as acknowledged by Gerardo when he entered his no contest plea, it was Gerardo who initiated the discussion about changing his plea. Trial counsel testified that he advised Gerardo against changing his plea if he was doing it because of Juror 57's statement or because he was concerned about the judge's reaction to it. He testified that he also explained to Gerardo that they could seek an adjournment and

a new jury panel if he was concerned that the panel was tainted, and that he could take more time to think about the decision. He testified that Gerardo stated that he believed he would be found guilty if he went to trial, that he wanted to resolve the matter that day, and that he believed it was in his best interests to plead no contest.

Based upon this testimony and the statements made by Gerardo when he entered his no contest plea, the trial court properly determined that the decision to enter the plea was made by Gerardo freely and voluntarily. A manifest injustice warranting relief from the plea therefore does not exist.

By the Court.—Judgment and order affirmed.

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