COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2268-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSE SOTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Jose Soto appeals from a judgment convicting him of two counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS. Soto contends that the trial court erroneously exercised its discretion when it denied his pre-sentence motion to withdraw his guilty plea. He also asserts the trial court erroneously applied the law regarding pre-sentence motions to withdraw

a guilty plea and relied on the wrong legal standard. Because the trial court accurately applied the law and the ruling was within the trial court's discretion, we affirm.

Soto was initially charged with two counts of first-degree sexual assault of a child pursuant to § 948.02(1), STATS., and, in a separate case, one count of bail jumping pursuant to § 946.49, STATS. Soto's attorney and the prosecutor negotiated a plea agreement. In return for Soto's guilty pleas to both counts of first-degree sexual assault, the prosecutor agreed to dismiss the bail jumping charge, and to recommend a five-year prison sentence on one count and a lengthy probation period on the other.

Although Soto claims he maintained his innocence throughout the criminal proceeding, he pled guilty to the two counts of sexual assault of a child at his plea hearing. Soto claims he did so because he felt rushed, and his attorney said it was the best solution for him. Soto explained:

> I was not feeling well about it, the situation. I understand what was at hand. I just did not agree. And my conscience was just bothering me so—but I knew that I was stuck, that I had talked with my attorney, and I was following his advice to the best of my ability.

At the plea hearing, the trial court had a plea colloquy with Soto to ensure that he understood what he was doing. During the colloquy, the trial court took a recess when it noticed Soto hesitate. During this time, Soto and his attorney went to a conference room to further discuss the plea agreement. According to Soto, his attorney did not address his concerns regarding the agreement, but instead informed him that the plea "was the best thing for [him] to do, and [he] should do it."

At the conclusion of this break, the court continued its plea colloquy. Soto told the judge that he was ready to plead guilty. Subsequently, the trial court accepted Soto's guilty plea, ordered a pre-sentence investigation and set a sentencing date.

Shortly after pleading guilty, Soto consulted with another attorney after he was unable to contact his first attorney. After substituting attorneys, Soto filed a motion to withdraw his guilty plea. A hearing was held and the trial court denied Soto's motion.

The decision to grant a motion to withdraw a guilty plea is a discretionary determination. *See* ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). "This Court will sustain a circuit court's ruling denying a motion to withdraw a plea unless the circuit court erroneously exercised its discretion." ***Id.***

Soto asserts that the trial court erred in denying his pre-sentence motion to withdraw his guilty plea because the court did not apply the appropriate standard. Soto accurately states the standard for determining a motion to withdraw a guilty plea prior to sentencing. In ***Libke v. State***, 60 Wis.2d 121, 208 N.W.2d 331 (1973), the supreme court held that a defendant should be allowed to withdraw a guilty plea prior to sentencing when the defendant has shown a "fair and just reason" for withdrawal. ***Id.*** at 128, 208 N.W.2d at 335. This standard "reflects the belief that prior to sentencing, when there is a basis for the defendant's motion and the absence of compelling prosecutorial reason for its denial, withdrawal of a plea of guilty or nolo contendere normally should be allowed." ***State v. Canedy***, 161 Wis.2d 565, 581-82, 469 N.W.2d 163, 170 (1991)

(quoting ABA Standards for Criminal Justice—Pleas of Guilty, Standard 14-2.1 (1979)).

The trial court correctly noted that plea withdrawal should be freely allowed before sentencing, but that freely does not mean automatically. *See* ***id.*** at 582, 469 N.W.2d at 170. The defendant must prove by a preponderance of the evidence the facts necessary to show a fair and just reason for plea withdrawal. *See* ***Garcia***, 192 Wis.2d at 862, 532 N.W.2d at 117. "[T]he burden is on the defendant to offer a fair and just reason for withdrawal of the plea." ***Canedy***, 161 Wis.2d at 583-84, 469 N.W.2d at 171. A fair and just reason is "'some adequate reason for defendant's change of heart' … other than the desire to have a trial." ***Id.*** at 583, 469 N.W.2d at 170-71 (quoting ***Libke***, 60 Wis.2d at 128, 206 N.W.2d at 335).

Soto asked to withdraw his guilty plea because he had attempted to tell his attorney he could not enter the guilty plea:

> [B]ut his former attorney did not advise him that he could proceed in any different way; that his previous attorney was upset when the [court] recessed; that his previous attorney told him there was no alternative for him but to take the guilty plea; that he was confused, distraught and frustrated at the time the pleas were entered; that he only entered the pleas of guilty because of how rapidly things were proceeding, and because he felt that he had no other choice but to enter the pleas of guilty.

Whether these reasons presented a "fair and just" reason for defendant's change of heart was within the discretion of the trial court.

The trial court concluded that Soto had not given a fair and just reason to withdraw his guilty plea. Soto contends that the trial court failed to apply the "fair and just" standard. The trial court, however, accurately explained

the legal standards for pre-sentence withdrawal of a guilty plea. It is clear the court understood the "fair and just" standard when it stated:

> And the ***State v. Canedy*** case, [a] withdrawal of guilty plea before sentencing should be freely allowed absent compelling reason for denial. Freely does not mean automatically. [It] [r]equires a showing of some adequate reason for the defendant's change of heart other than a desire to have a trial. The burden of proof is on the defendant by a preponderance of the evidence.

Soto claims the trial judge failed to explain how the facts do not meet the "fair and just" standard. Although the trial court could perhaps have better explained why the defendant's assertions do not constitute a fair and just reason to withdraw his plea, it is clear that the court doubted Soto's contentions. This is within the trial court's discretion. If the trial court does not believe the defendant's asserted reasons for plea withdrawal, there is no fair and just reason to permit plea withdrawal. *See* ***Garcia***, 192 Wis.2d at 863, 532 N.W.2d at 118. The trial court asked questions during the plea colloquy to see if Soto understood what he was doing. It was convinced Soto understood his actions. The court explained:

> I got all of the answers to all of those questions and then some. We took a break at one point in the proceeding ….
>
> ….
>
> The point is, I don't know how, what I would have to say to do more than that. Now, I've got a motion before the Court that basically says to me, I didn't understand this, I didn't understand that. And it's [my attorney's] fault because he forced me into it. This Court cannot find by a preponderance of the evidence that there is an adequate reason for the changing of Mr. Soto's heart as it relates to his plea.

Obviously the court did not believe Soto's reasons for his attempted plea withdrawal, and this credibility determination is the trial court's to make.

Soto contends that the trial court's reliance upon the fact that it engaged in a plea colloquy with the defendant is an erroneous exercise of discretion because ***Libke*** and its progeny have never relied upon the plea colloquy as a factor in the determination of whether a defendant has presented a "fair and just" reason. Soto is partially correct. A judge cannot use the fact that he or she properly gave a plea colloquy as required by ***State v. Bangert,*** 131 Wis.2d 246, 389 N.W.2d 12 (1986), as a reason to deny a motion to withdraw a guilty plea. ***Bangert*** requires trial courts to perform a proper plea colloquy to ensure the defendant knows his or her constitutional rights and understands the charges to which he or she is pleading. ***Id.*** at 265-66, 389 N.W.2d at 22. ***Bangert*** is not intended to ensure that the defendant does not change his or her mind later in the process. In fact, ***Libke*** suggests that a pre-sentence plea withdrawal should be liberally granted for the purpose of efficient administration of criminal justice by reducing the number of appeals and avoiding the difficulties of "disentangling such claims" and ensuring that the defendant is not denied a right to trial by jury. ***Libke***, 60 Wis.2d at 127-128, 208 N.W.2d at 335. ***Bangert*** and ***Libke*** therefore require different standards for different steps of our criminal procedure. Using ***Bangert*** as a basis to deny a pre-sentence motion to withdraw a guilty plea would not be proper.

However, it is within the trial court's discretion to disbelieve the defendant. Soto's responses to the trial court's questions during the plea colloquy provided a basis for the court to determine the defendant's credibility when he tried to withdraw his plea. Although a court cannot deny a motion to withdraw a guilty plea solely because of an adequate plea colloquy as required by ***Bangert***, the thoroughness of the colloquy may aid a court in determining the defendant's credibility when the defendant tries to withdraw his or her plea at a later time.

The trial court engaged in an extensive plea colloquy. In fact, when Soto hesitated during his plea hearing, the trial court requested that he and his attorney recess until they resolved any unsettled questions. The judge meticulously asked the proper questions to ensure that Soto knew what he was doing, and did not proceed until he was comfortable with Soto's answers. It was within the trial court's discretion to rely on Soto's answers to the colloquy and to doubt Soto's subsequently proffered reasons for a plea withdrawal.

Soto also contends that the trial court erroneously relied on the victim's constitutional right to have the matter finalized. By doing so, Soto claims that the trial court ignored his constitutional rights, including the right to a trial. Soto suggests that the "fair and just" standard requires the trial judge to examine only a defendant's constitutional rights.

We disagree. Soto fails to discuss the second half of the fair and just reason test. "The appropriate and applicable law … is that a defendant should be allowed to withdraw a guilty plea for any fair and just reason, *unless the prosecution would be substantially prejudiced.*" ***Canedy***, 161 Wis.2d at 582, 469 N.W.2d at 170 (emphasis added).

The trial court's discussion of the victim's constitutional rights was a response to the prosecutor's claim that the State would suffer prejudice if the trial court permitted the plea withdrawal. The prosecutor told the court that it was unlikely the victim would cooperate if the matter proceeded to trial after plea withdrawal. Furthermore, the victim has a constitutional right to finality. "This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have … timely disposition of the case." WIS. CONST. art. I, § 9m. This was what the trial court

was referring to when it stated that a victim has constitutional rights that must be considered. It was reasonable to consider the impact a plea withdrawal would have on the State's key witness. It is an appropriate use of the court's discretion to conclude that Soto's reasons for plea withdrawal were not fair and just when considered in light of the negative impact a plea withdrawal would have had on the victim and the ability of the State to proceed.

Soto's final argument is that the trial court erred in not granting his motion to stay sentencing until this appeal was concluded. We find no reason to discuss this issue because it is moot. Appellate courts will not consider a question the answer to which will not have "any practical effect upon an existing controversy." *See* ***State ex rel. La Crosse Tribune v. Circuit Court,*** 115 Wis.2d 220, 228, 340 N.W.2d 460, 464 (1983). Because we have affirmed Soto's judgment of conviction, his request for a stay is moot.

By the Court.—Judgment affirmed.

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