COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0313-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY KANE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Kane appeals from a judgment convicting him of two counts of robbery by use or threat of a dangerous weapon and two counts of intimidation of a victim, all as party to the crime. On appeal, he

challenges the circuit court's refusal to permit him to withdraw his ***Alford***[1] pleas and alleges the violation of his right to a speedy trial. We conclude that the circuit court did not misuse its discretion in denying Kane's motion to withdraw his ***Alford*** pleas. We further conclude that because a properly entered ***Alford*** plea waives a defendant's speedy trial right, we need not address the merits of that appellate claim.

¶2 On the first day of trial, Kane entered ***Alford*** pleas. However, at sentencing, Kane moved to withdraw his pleas because he was coerced by counsel to accept a plea agreement, did not feel counsel was prepared for trial, did not have sufficient time to consider the plea offer and continued to assert his innocence. The circuit court denied the plea withdrawal motion because Kane's claims were not supported by the record. Kane appeals.

¶3 A motion to withdraw a plea prior to sentencing is addressed to the discretion of the circuit court. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). We review the court's resolution of the motion for an erroneous exercise of discretion. *See* ***id.*** A defendant has the burden to show by a preponderance of the evidence that there is a "fair and just reason" to withdraw the plea. *See* ***id.*** at 861-62.

¶4 The circuit court took testimony on Kane's factual basis for withdrawing his pleas. Therefore, we apply the clearly erroneous test to the court's findings. *See* WIS. STAT. § 805.17(2) (1997-98).[2] We note that the circuit court

[1] An ***Alford*** plea is a conditional guilty plea in which the defendant maintains his or her innocence of the charge while at the same time pleading guilty or no contest to it. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970); ***State v. Spears***, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988).

[2] All references to the Wisconsin Statutes are to the 1997-98 version.

had the obligation to assess the credibility of the witnesses at the plea withdrawal hearing. *See* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989).

¶5 In a thorough and thoughtful written decision, the circuit court addressed whether Kane made the necessary showing to withdraw his plea prior to sentencing. The court concluded that while Kane had asserted the type of reasons which could be deemed fair and just, those reasons were not supported by the record as required by ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989).

¶6 Kane claimed that he had only forty-five minutes to an hour to discuss the plea agreement with his trial attorney and that the offer had only been received that morning. However, trial counsel testified that Kane had sufficient time to call his sister and an attorney handling postconviction matters in Milwaukee county to discuss the plea agreement, that Kane knew a plea agreement was a possibility, and that he and Kane had previously discussed what type of plea agreement would be beneficial to Kane. The court found that Kane was familiar with the subject of a plea agreement, and the court did not believe that Kane was "blindsided" by an option he had never considered.

¶7 The court also found that Kane had more than forty-five minutes to make his decision. Substantial time and events separated Kane's morning meeting with trial counsel at which the State's plea offer was discussed and the afternoon proceeding at which Kane entered his pleas. Trial counsel testified that Kane did not make his final decision until after the jury had been selected later that afternoon and that Kane changed his mind about entering a plea three times during the day. Finally, the court found that during the plea colloquy, Kane stated that he had had ample opportunity to discuss the plea agreement with trial counsel. Based

on this evidence, the court did not find Kane's contention that he was rushed into a plea agreement credible.

¶8 The circuit court also found Kane's claims of confusion and agitation when he entered his pleas implausible on the record. Kane did not manifest or claim any confusion during the plea colloquy. The court relied upon that absence of confusion during the colloquy in rejecting Kane's postplea claim of confusion. *See* ***State v. Simpson***, 200 Wis. 2d 798, 803-04, 548 N.W.2d 105 (Ct. App. 1996).

¶9 Furthermore, the court found credible evidence that Kane knew what he was doing when he entered his pleas and fully understood the consequences and benefits of the plea agreement. For instance, Kane told the presentence investigation author that he entered pleas because he knew he would be convicted anyway and he wanted to receive concurrent sentences. On at least two occasions, Kane discussed with trial counsel the benefits of a plea agreement with a feature of concurrent sentences. Finally, the court found that the likelihood that Kane was confused when he entered his pleas was substantially reduced by his past experiences with the criminal justice system. The court found that this was Kane's fourth plea agreement in four years.

¶10 Kane claimed that his pleas were involuntary because his trial counsel coerced him and his codefendant had an undue influence over him. The court found that both of these claims lacked support in the record. The court found counsel's testimony regarding his interaction with his client and the fact that counsel arranged for Kane to discuss the plea agreement with his sister and another attorney more credible than Kane's coercion claim. The court also cited

Kane's statement during the plea colloquy that he was satisfied with trial counsel's representation.

¶11 The court also rejected Kane's claim regarding the influence of his codefendant. Kane had originally decided not to enter a plea, but when he learned that his codefendant had done so, Kane changed his mind. When the codefendant then changed his mind, Kane followed suit. The court found that Kane and his codefendant had limited contact during the day they decided to enter pleas and that Kane's decision to follow his codefendant's lead was a voluntarily adopted strategy on Kane's part.

¶12 Finally, the court discounted Kane's repeated assertions of innocence. As the court correctly noted, an ***Alford*** plea permits a defendant to maintain his or her innocence even while entering a no contest or guilty plea in order to accept an advantageous plea agreement. *See* ***Garcia***, 192 Wis. 2d at 856-57. Therefore, Kane's assertions of innocence were consistent with his ***Alford*** pleas and, without more, insufficient to justify plea withdrawal.

¶13 The circuit court concluded its decision with the following observations. Kane entered his pleas because he thought he was getting a good deal as illustrated by his comments to the author of the presentence investigation report that he was hoping for concurrent sentences. Kane's plea withdrawal grounds were substantially undermined by his statement that one of the main reasons for attempting to withdraw his pleas was the fact that he had been unsuccessful in postconviction proceedings in a Milwaukee county case which

rendered the ***Alford*** plea agreement less advantageous to Kane.[3] Also, Kane waited almost two months before he sought to withdraw his pleas. Overall, the court found that Kane "delayed his [plea withdrawal] motion until he had the opportunity to test the weight of potential punishment," which was not a fair and just reason to withdraw the plea. *See* ***Dudrey v. State***, 74 Wis. 2d 480, 485, 247 N.W.2d 105 (1976). The totality of the record did not support Kane's contentions and therefore he did not establish a fair and just reason to withdraw his pleas.

¶14 On appeal, Kane does not contend that any particular finding of the circuit court is unsupported by the record. Rather, he argues that the court's findings are at odds with his testimony. We have already observed that it was the circuit court's function to weigh the credibility of the witnesses. We do not perform that function. We uphold all of the circuit court's findings because they are not clearly erroneous based on the record.

¶15 Having held that Kane did not have grounds to withdraw his ***Alford*** pleas, we conclude that the entry of those pleas waived his right to challenge the alleged denial of a speedy trial. *See* ***Hatcher v. State***, 83 Wis. 2d 559, 563, 266 N.W.2d 320 (1978).

By the Court.—Judgment affirmed.

[3] The State and Kane had agreed that if Kane succeeded in obtaining sentence modification in the Milwaukee county case, the State would not oppose a sentence modification hearing in the ***Alford*** pleas case.

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