

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-1396-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. GAYHART,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. David A. Gayhart appeals from judgments convicting him of two counts of theft and one count of burglary. On appeal, he argues that the circuit court erroneously exercised its discretion when it denied his presentencing motion to withdraw his guilty pleas. We disagree and affirm.

¶2 A court may, in its discretion, permit a defendant to withdraw a guilty plea before sentencing if the defendant establishes a “fair and just reason” to withdraw the plea. *See State v. Kivioja*, 225 Wis. 2d 271, 283-84, 592 N.W.2d 220 (1999). Plea withdrawal is not automatic, *see id.* at 284, and the court may deny a plea withdrawal motion if the court does not believe the defendant’s reasons for withdrawing the plea, *see State v. Garcia*, 192 Wis. 2d 845, 863, 532 N.W.2d 111 (1995). The defendant has the burden to prove a fair and just reason, which must be something more than a desire to have a trial. *See id.* at 861-62. The sufficiency of the defendant’s reasons is committed to the court’s discretion. *See Kivioja*, 225 Wis. 2d at 284. We will uphold the court’s discretionary decision if the court “reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts.” *Id.*

¶3 At the plea withdrawal hearing, Gayhart testified that when he entered his pleas he was still feeling the effects of his father’s recent death and the previous evening’s alcohol. Gayhart asserted his innocence and claimed that he had entered the pleas because he was not ready to go to trial due to the alcohol he had consumed the previous evening. He asserted that he had admitted the charged crimes “out of sarcasm.” He also sarcastically answered “yes” when asked whether his mind was clear and claimed not to have understood the question when he admitted having advance knowledge of the burglary. Finally, Gayhart claimed that he had been rushed into entering a plea.

¶4 On cross-examination, Gayhart stated that he had stopped drinking ten hours before the plea hearing but still felt nauseous. He testified that he had sarcastically answered the court’s questions at the plea hearing in an effort to conclude the hearing more quickly. Gayhart claimed that he informed trial counsel ten days after the plea hearing that he wanted to withdraw his pleas.

¶5 The court then questioned Gayhart about the circumstances under which he entered his guilty pleas. The court confirmed that Gayhart had signed a plea questionnaire and waiver of rights form which stated that he had had sufficient time to discuss the pleas with his counsel, he had not been rushed into a decision to enter a plea, and he had committed the crimes to which he was pleading guilty. The court confirmed that Gayhart had entered a guilty plea several years before and was familiar with the plea process. The court also confronted Gayhart with his admission at the plea hearing that he had arranged to dispose of stolen property. Gayhart continued to maintain that he had not been thinking clearly when he entered his pleas.

¶6 In ruling on Gayhart's plea withdrawal motion, the court found Gayhart's testimony incredible. The court noted numerous inconsistencies between Gayhart's statements to the court during the plea colloquy and his testimony at the plea withdrawal hearing. The court found that Gayhart did not sustain his burden to establish a fair and just reason to withdraw his guilty pleas and that Gayhart was most likely suffering from "buyer's remorse" regarding his decision to enter guilty pleas. The court also found that the plea colloquy was sufficient and confirmed that Gayhart's pleas were knowingly, voluntarily and intelligently entered.

¶7 We affirm the circuit court's findings and conclusions. Even though Gayhart claimed that he was unable to think clearly at the plea hearing, the record does not bear that out. Gayhart's responses to the court during the plea colloquy were appropriate and related to the subject of the court's questions. The record discloses that Gayhart's guilty pleas were knowingly, voluntarily and intelligently entered, *see State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and they had a factual basis, *see State v. Harrington*, 181 Wis. 2d 985, 989, 512

N.W.2d 261 (Ct. App. 1994). The court informed Gayhart about the possible penalties and the constitutional rights waived by a guilty plea. The court told Gayhart that he did not have to enter into the plea agreement if he did not want to. The court asked Gayhart whether he had been drinking that day or had had any drugs in the previous twenty-four hours. In response to a question as to whether his mind was clear, Gayhart answered that he was anxious but of “sound mind.” Gayhart confirmed that he was acting of his free will, had had sufficient time to discuss the plea agreement with counsel and had not rushed into the plea agreement. He stated that he understood the charges against him and pled guilty to them. Gayhart stated that he was “absolutely” aware in advance that the burglary would take place and he agreed to dispose of the property taken in the burglary.

¶8 Other than Gayhart’s plea withdrawal testimony, which the court deemed incredible, there is no indication that Gayhart did not understand the plea process. *See State v. Salentine*, 206 Wis. 2d 419, 431, 557 N.W.2d 439 (Ct. App. 1996) (not understanding the plea process can be a fair and just reason for plea withdrawal). Assessing a witness’s credibility is within the province of the circuit court, not this court. *See State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989).

¶9 Gayhart’s claims of innocence are not dispositive of his presentencing plea withdrawal motion. *See State v. Shanks*, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). The court did not find Gayhart’s assertions of innocence credible and found that Gayhart understood the plea proceedings and his attendant admissions of guilt. The court did not find Gayhart’s “sarcasm” explanation credible. Such credibility-based rulings are permitted, *see Garcia*, 192 Wis. 2d at 863, and we defer to them, *see Owens*, 148 Wis. 2d at 930.

¶9 The plea colloquy confirms that Gayhart's guilty pleas were entered knowingly and voluntarily. The circuit court applied the proper legal standard to a logical interpretation of the facts and concluded that Gayhart did not show a fair and just reason for withdrawing his pleas. The court did not misuse its discretion in denying Gayhart's plea withdrawal motion.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

