COURT OF APPEALS DECISION DATED AND FILED

December 21, 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.

No. 99-1852-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. FOLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

¶1 FINE, J. William J. Foley was convicted on no-contest pleas of seven misdemeanor counts of intentionally failing to pay to the State of Wisconsin sales tax collected from customers of his restaurant. *See* §§ 77.60(11), 943.20, STATS. He appeals. We affirm.

I.

¶2 The State originally charged Foley with seven felony counts of theft of sales tax, alleging Foley's failure to pay to the State more than $2,000 collected in November, 1991; more than $2,000 collected in December, 1991; more than $2,000 collected in January, 1992; more than $2,000 collected in February, 1992; more than $1,000 collected in March, 1992; more than $1,000 collected in April, 1992; and more than $1,000 collected in May, 1992. *See* § 940.20(3), STATS. On the day of trial, after the trial court refused to permit him to testify that he did not know that not paying to the State the sales tax he collected from customers was a crime, and after the State agreed to reduce the charges to misdemeanors, Foley entered his pleas. That was on August 10, 1998, and the matter was adjourned for sentencing until August 28, 1998.

¶3 On August 21, 1998, the State filed its sentencing recommendation, which asked the court to sentence Foley to two consecutive six-month terms of incarceration, followed by five consecutive six-month stayed terms of incarceration coupled with four years of probation. On August 28, 1998, Foley filed with the court a motion to withdraw his no-contest pleas. As he requested, the trial court adjourned the sentencing, and set the matter down for an evidentiary hearing. The only issue presented to the trial court that Foley has argued on this appeal is his contention that he did not have enough time to make a reasoned decision as to whether to plead or to go to trial.

¶4 On direct-examination by his lawyer at the evidentiary hearing, Foley testified that he had "maybe three minutes" to consider the State's offer to reduce the seven charges from felonies to misdemeanors. He also testified that on August 17, 1998, one week after he entered his pleas, he decided that he wanted to

withdraw his pleas. He claimed that he had "regretted" entering the pleas "as we were doing it." He did not tell his lawyer that he wanted to withdraw the pleas, however, until August 22, 1998. In response to probing questions by the trial court, Foley admitted that he discussed with his lawyer over a thirty to thirty-five minute lunch on August 10 the possibility of entering the pleas, and had called noted criminal-defense lawyer James Shellow and received an "opinion from him" on whether he should plead or go to trial. The trial court denied Foley's motion to withdraw his plea.

II.

¶5 A defendant seeking to withdraw a plea of guilty or no contest before sentencing must show that there is a "fair and just reason," for allowing him or her to withdraw the plea. Should a defendant make this necessary showing, the court should permit the defendant to withdraw his or her plea unless the prosecution has been substantially prejudiced. While the circuit court is to apply this test liberally, the defendant is not entitled to an automatic withdrawal.

> As for the practical application of the test, this court has held that a "'fair and just reason'" contemplates the "'mere showing of some adequate reason for defendant's change of heart.'" Whether a defendant's reason adequately explains his or her change of heart is up to the discretion of the circuit court. A circuit court's decision with respect to this discretionary ruling will not be upset on review unless it was erroneously exercised. A reviewing court will uphold a discretionary decision on appeal if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts.

State v. Kivioja, 225 Wis.2d 271, 283–284, 592 N.W.2d 220, 227 (1999) (citations and footnote omitted). Moreover, a trial court's findings of fact may not be

overturned on appeal unless they are "clearly erroneous." RULE 805.17(2), STATS. (made applicable to criminal proceedings by § 972.11(1), STATS.).

¶6 Among the factors to be considered in determining whether a defendant has established a "fair and just reason" to withdraw a plea are:

- Whether the defendant credibly asserts innocence;
- Whether the defendant misunderstood the consequences of the plea;
- Whether the plea was entered with haste;
- Whether the defendant was confused;
- Whether the defendant was forced by his or her lawyer to plead;
- Whether the defendant expeditiously seeks to withdraw the plea.

See ***State v. Shanks***, 152 Wis.2d 284, 290, 448 N.W.2d 264, 266–267 (Ct. App. 1989). As noted, the only issue pursued by Foley on this appeal is his allegation that his plea was entered in haste. The trial court found that it was not. As the trial court recounted in its extensive oral decision, Foley was given all the time he wanted to make his decision whether to accept the plea bargain—he was neither rushed nor badgered.

¶7 The trial court's findings are well-supported by the record. Additionally, the trial court applied the correct legal principles. Accordingly, it acted well within its discretion in denying Foley's motion to withdraw his plea.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.