



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 2, 2016

To:

Hon. Kathryn W. Foster
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Susan Lee Opper
District Attorney
515 W. Moreland Blvd. Rm. G-72
Waukesha, WI 53188-2486

Sara Heinemann Roemaat
P.O. Box 280
Pewaukee, WI 53072

Sandra L. Tarver
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2015AP705-CR

State of Wisconsin v. Gary P. Abt (L.C. #2013CF161)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Gary P. Abt appeals from a judgment convicting him of first-degree sexual assault of a child. He contends that the circuit court erred in denying his presentence motion to withdraw his guilty plea. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the judgment of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

Abt was convicted following a guilty plea² to first-degree sexual assault of a child. The charge stemmed from allegations that between August 1, 2012, and February 7, 2013, Abt had sexual contact with a child who had not attained the age of thirteen.³

Prior to sentencing, Abt obtained a new attorney and filed a motion to withdraw his guilty plea. In it, he alleged that he was confused at the time of his plea hearing. He later clarified that he did not understand that he was pleading to first-degree sexual assault. Abt also claimed that his former trial attorney led him to believe that the court could find him guilty of a less severe offense.

The circuit court reviewed the plea hearing transcript and conducted an evidentiary hearing on the matter. It ultimately denied Abt's motion, concluding that he had not established a fair and just reason to withdraw his guilty plea. This appeal follows.

A circuit court's decision to grant or deny a motion to withdraw a guilty plea made before sentencing is reviewed under an erroneous exercise of discretion standard. *State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. This court will affirm a circuit court's discretionary decision if it was demonstrably based on the facts of record and in reliance on the applicable law. *Id.*

Withdrawal of a guilty plea prior to sentencing is not an absolute right. *Id.*, ¶32. The defendant has the burden to prove by a preponderance of the evidence that he or she has a fair

² The judgment of conviction indicates that Abt pled not guilty by reason of mental disease or defect. Although this was his initial plea, he later changed it to a guilty plea.

³ The child was born in 2009.

and just reason for plea withdrawal. *Id.* The reason must be something other than a desire to have a trial or belated misgivings about the plea. *Id.* The reason proffered as fair and just by the defendant must be found credible by the circuit court. *Id.*, ¶43. In other words, the circuit court must believe that the proffered reason actually exists. *Id.* The circuit court’s findings of evidentiary or historical fact, including its credibility determinations, will be upheld unless they are clearly erroneous. *Id.*, ¶33.

On appeal, Abt contends that the circuit court erred in denying his motion to withdraw his guilty plea. He renews his arguments that he did not understand what he was pleading to and believed he would be found guilty of a less severe offense.

At the plea hearing, the circuit court confirmed with Abt that he was pleading guilty to the charge that he had sexual contact with a person under the age of thirteen. The court described the offense in a manner that tracked the language of the applicable statute and stated the elements of the offense. Given this record, Abt plainly understood the nature of the charge against him. *See State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (“To understand the nature of the charge, the defendant must be aware of all the essential elements of the crime.”).⁴

⁴ Abt complains that he never heard the words “first-degree sexual assault” at the plea hearing. However, he cites no authority for the proposition that courts are obligated to ensure that defendants understand the degree/classification of sexual assault to which they are pleading. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider arguments unsupported by references to legal authority). In any event, Abt was made aware of the seriousness of the charge when the circuit court informed him that the maximum penalty he would face as a result of his plea was sixty years’ imprisonment.

Meanwhile, at the evidentiary hearing, the circuit court heard testimony about Abt's understanding about the effect of his plea. According to Abt, his former trial attorney made him think there was a possibility that the court could find him guilty of a less severe offense. Abt's former trial attorney, who had over thirty-four years of criminal practice experience, adamantly denied this, saying:

I have never done anything like that. I tell them you are pleading to this and the judge will find you guilty. You plead guilty to that charge, the judge will find you guilty. If you plead no contest, the judge will find you guilty of that charge. I never—I think it would be malpractice to suggest to someone that you are going to plead to this but, don't worry, the judge is going to find you guilty of something less. It is just not true.

Ultimately, the circuit court found that Abt's former trial attorney would not have told Abt that the court could find him guilty of a less severe offense. The court also found that the attorney "more than adequately prepared Mr. Abt for that plea process...." On this record, we cannot say that these findings are clearly erroneous.

Although Abt maintains that his testimony was credible given his inexperience in the criminal justice system, the circuit court was not obligated to accept it. Rather, the court was free to determine that it did not believe that Abt was confused about the effect of his plea. *See Jenkins*, 303 Wis. 2d 157, ¶¶43, 73.

Based on the record and the circuit court's findings, no basis exists to conclude that the court erroneously exercised its discretion in determining that Abt failed to establish a fair and just reason to withdraw his guilty plea. Accordingly, we affirm the judgment.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals