COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP920-CR **Cir. Ct. No. 2002CF1569**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE SIMMONS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Maurice Simmons appeals from a judgment of conviction for second-degree reckless homicide, while armed, entered after he pled no contest. Before sentencing, Simmons moved to withdraw his plea. The

circuit court denied the motion and imposed a bifurcated sentence of twenty years, comprised of fifteen years of initial confinement and five years of extended supervision, to be served consecutively to any other sentence. In this *pro se* appeal, Simmons renews his request to withdraw his plea. Because the circuit court properly exercised its discretion when it denied Simmons' motion, we affirm.

Background

¶2 Simmons was charged with first-degree intentional homicide, in connection with the shooting death of Terrill Metcalf. Julian Quezare testified at the preliminary hearing that he saw Simmons fire at least two shots at Metcalf. Quezare also testified that Simmons came to his apartment shortly after the incident and admitted shooting Metcalf.

¶3 After plea negotiations, Simmons pled no contest to an amended charge of second-degree reckless homicide. At the scheduled sentencing date, however, Simmons advised the court that he wanted to withdraw his plea and that he wanted a new attorney. Sentencing was adjourned and new counsel was appointed to represent Simmons.

¶4 By his new counsel, Simmons moved to withdraw the no contest plea. In the motion, Simmons asserted that he "felt pressure" from his former attorney, Nikola Kostich, to plead no contest. He also asserted that he had received a letter from Quezare in which Quezare recanted.

¶5 After several adjournments, resulting in part from difficulties locating Quezare, an evidentiary hearing was held. At that hearing, Simmons' new attorney first informed the court that Quezare could not be located and that

Simmons would not be presenting any evidence on the recantation argument.[1] Simmons, however, did pursue the coercion argument, and he testified in support of his claim.[2]

¶6 Simmons testified that Kostich and his investigator were "just laying it on" him by telling him that a plea would be "the best thing" and he would "be out for [his] kids." Simmons testified that he wanted to go to trial because he was not guilty. Simmons testified that he felt Kostich forced him to enter a plea when Kostich told him that he did not think Simmons could win at trial. Simmons denied simply having a "change of heart" because he "was never comfortable with [the no contest plea] in the first place" and "fel[t] like [he] was forced to take it."

¶7 Simmons also complained about the number of times that Kostich visited him before trial and said that he lacked confidence that Kostich would represent him aggressively at trial. Simmons testified that he "wasn't pretty much understanding everything" during the plea colloquy but that Kostich told him to be quiet and "say yeah." Simmons also testified he telephoned and wrote Kostich after the hearing but that Kostich refused his calls and did not respond to his letters. On cross-examination, Simmons testified that he was "very confused" during the plea colloquy. Simmons did not recall whether the court informed him

[1] At a prior hearing, Simmons' attorney informed the court that Quezare's letters in which he allegedly recanted were "not what I thought they were when I filed the motion" and did not contain an "unequivocal recantation." At the evidentiary hearing, the assistant district attorney informed the court that a State's investigator had spoken with Quezare and that Quezare denied any recantation. Simmons does not pursue the recantation assertion on appeal.

[2] Attorney Kostich did not testify, but contrary to Simmons' suggestion on appeal, Simmons was not prevented from presenting counsel's testimony. In response to the State's inquiry into the need for counsel's testimony, the court replied that it could refer to statements made by Kostich during a prior hearing. Simmons never requested that Kostich testify nor did he request any continuance in order to secure counsel's presence.

of the potential maximum sentence or whether he told the court that the factual allegations of the criminal complaint were true.

Discussion

¶8 On appeal, Simmons does not develop the coercion argument that had been the focus of his motion to the circuit court. Rather, Simmons emphasizes his assertion of actual innocence. Simmons contends that his claim that he is not guilty constitutes a "fair and just reason" to withdraw his plea and that the circuit court "erroneously overlooked this important factor" when it denied Simmons' motion.

¶9 A motion to withdraw a plea should be granted when the defendant has "shown a fair and just reason for withdrawal." ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). The "fair and just reason" standard should be applied with a "liberal rather than a rigid" view of the defendant's reasons for moving to withdraw. ***Id.*** However, permission to withdraw need not be granted "automatically," and the defendant bears the burden to show by the preponderance of evidence that there is a "fair and just reason" other than "the desire to have a trial." ***State v. Canedy***, 161 Wis. 2d 565, 582-84, 469 N.W.2d 163 (1991). An assertion of innocence is a relevant factor, but it does not, in itself, constitute a fair and just reason for a plea withdrawal. ***State v. Shimek***, 230 Wis. 2d 730, 740 n.2, 601 N.W.2d 865 (Ct. App. 1999). Rather, the circuit court may consider a defendant's assertion of innocence when assessing whether a claim of coercion is credible. *See* ***id.***

¶10 Whether to permit a defendant to withdraw a plea of guilty or no contest prior to sentencing is committed to the discretion of the circuit court. ***Shanks***, 152 Wis. 2d at 288. We will uphold a circuit court's decision to deny

such a request if it appears from the record that the court applied the proper legal standard to the relevant facts and reached a reasoned and reasonable determination by employing a rational mental process. ***Canedy***, 161 Wis. 2d at 579-80. The circuit court's "credibility assessments are crucial to a determination of whether the evidence offered is a fair and just reason supporting withdrawal." ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). "In order to assess whether a reason actually exists, the circuit court must engage in some credibility determination of the proffered reason, without which withdrawal would be automatic, a matter of right." ***Id.***

¶11 In its decision, the circuit court stated that it specifically recalled Simmons' plea colloquy. The court stated it "had particular reason to remember" Simmons because Simmons had pled guilty and had been sentenced by the court in a previous case. The court recalled that Simmons and Kostich had talked for "an extensive period of time," and that after approximately one and one-half hours of discussion, Simmons completed a plea questionnaire. The court noted there was not "any hesitation or any doubt" in Simmons' answers during the colloquy and that it did "not remember [Simmons] trying to get Mr. Kostich's attention to ask him questions." The court stated that it did not remember any "flinching" by Simmons prior to entering this plea.[3] The court noted that its recall of the colloquy was "borne out by the transcript" and that nothing in the transcript "expresses any doubt" about Simmons' desire to enter a plea.

[3] The court recognized that Simmons' answer of "pretty much" to the court's inquiry into whether Simmons was satisfied with Kostich's advice was "not unequivocal." However, the court then asked Simmons whether there was any advice that he was not satisfied with, and Simmons replied, "No." The court later observed that Simmons' satisfaction with Kostich's advice was "backed … up by" the decision to plead no contest.

¶12 We reject Simmons' argument that the court did not consider the claim of actual innocence that he made during the plea withdrawal hearing. The court expressly rejected as not credible Simmons' testimony "because it is so inconsistent with my observations … on the plea date, and what is said and recorded here in writing in this transcript." Thus, while the court may not have made particular reference to Simmons' assertion that he was not guilty, the court expressly stated its disbelief of Simmons' testimony. Rather than "erroneously overlook[ing]" Simmons' claim of innocence, the court rejected the claim as not credible, an assessment that this court must accept. *See* ***State v. Gaddis***, 63 Wis. 2d 120, 127, 216 N.W.2d 527 (1974).

By the Court.—Judgment affirmed.

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