

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 16, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2712-CR**

**Cir. Ct. No. 2002CF2640**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOEVAL M. JONES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Joeval Jones appeals from a judgment of conviction and an order denying his postconviction motion. The issues relate to his plea-withdrawal request made at sentencing. We affirm.

¶2 Jones pleaded no contest to one count of second-degree reckless homicide by use of a dangerous weapon. Jones appeared with counsel at sentencing. When the court offered Jones his right of allocution, Jones stated that he wanted to withdraw his plea. The court then engaged Jones directly in a lengthy discussion to determine the ground for the request. Jones asserted that he had been coerced or intimidated into making the plea by certain other gang members with whom he had been incarcerated at the time. After discussing the issue with Jones directly, the court asked Jones' attorney if she was aware of this claim, and she was not. The court provided a chance for Jones and his attorney to discuss the matter. When the hearing resumed, his attorney said that Jones was not willing to discuss the issue with her and, therefore, "since this is a critical decision, he should have a different lawyer to help him."

¶3 The court did not directly decide the request for a different lawyer. After discussing various portions of the record, the court denied the plea-withdrawal request because the court saw "no basis in it." The court then imposed sentence. After sentencing, represented by postconviction counsel, Jones filed a postconviction motion that again sought to withdraw the plea, on essentially the same grounds. The court denied the motion.

¶4 Jones makes several arguments on appeal. We first address whether the court erred by denying Jones' request to withdraw his plea before sentencing. Our review is based on the record that was before the court at that time. The parties agree that the standard at that stage is whether the defendant has a "fair and just reason" to withdraw the plea. *See State v. Canedy*, 161 Wis. 2d 565, 583-84, 469 N.W.2d 163 (1991).

¶5 The reason Jones gave at sentencing was that certain things were said to him by two other inmates who were placed in a holding cell with him on the day before he entered his plea. According to Jones, one of those people “told me it would be in my best interest to take the first thing they come to me with, because it would help him out a lot, and he said knowing my family circumstances, after I take the plea, would make sure that money stay on my books and that I’m taken care of.” As to this person Jones further stated that “he’s an intimidating guy,” that he admitted to involvement in over a dozen murders, and that he is “the real leader of the Ghetto Boys.” Jones further stated that the other inmate, Bernard Gardner, told him that if Jones could talk a third person into giving Gardner \$5,000, Gardner would withdraw his statement and not testify. As a result of these contacts, Jones said he felt he was “intimidated into taking this plea.”

¶6 We conclude that the circuit court properly denied Jones’ request. It is not enough for a defendant to say that he was intimidated: the circuit court must also believe the facts alleged are true. *See Canedy*, 161 Wis. 2d at 584-86. Although Jones was not sworn and did not testify, the circuit court could properly make a credibility determination based on its discussion with Jones, and could properly decide that there was no factual basis for the plea-withdrawal request. Credibility determinations in this context are for the circuit court, not this court. *State v. Kivioja*, 225 Wis. 2d 271, 289-92, 592 N.W.2d 220 (1999).

¶7 We have also considered whether there is a basis for a claim that Jones’ trial counsel was ineffective by failing to make a request for plea withdrawal. However, even if his attorney had made that argument, it would fail on the prejudice component. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish ineffective assistance of counsel defendant must show that

counsel's performance was deficient and that such performance prejudiced his defense). Jones does not point to anything his attorney could have done to change the court's assessment of the basis for the request.

¶8 Jones next argues that the court erred by allowing him to proceed pro se on his plea-withdrawal request without there being an on-the-record waiver of his right to counsel, as required by *State v. Klessig*, 211 Wis. 2d 194, 206-07, 564 N.W.2d 716 (1997). He also argues that the court erred by “forcing” him to proceed on the request without counsel. We reject these arguments because Jones was not pro se. He was represented throughout the entire time period. The court did not relieve his attorney from representation, and counsel remained present at all times during the proceedings.

¶9 In his appellate brief Jones also makes a reference to being pressured by counsel to accept the plea offer. This was not an issue Jones raised during his discussion with the court before sentencing. To raise this issue, Jones would have to do it in the context of a post-sentencing motion to withdraw his plea on the ground that there had been a manifest injustice. However, his appellate brief does not argue based on the post-sentencing manifest injustice standard, and therefore we understand Jones's argument on appeal to be limited to whether the court erred by denying his presentence plea withdrawal request.

*By the Court.*—Judgment and order affirmed.

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

