

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 15, 1995

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.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-0469-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**PETER BEKERSKY,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Peter Bekersky appeals from a judgment convicting him of first-degree intentional homicide and carrying a concealed weapon. He also appeals from the order denying his motion for postconviction relief. The conviction resulted from a guilty plea. Bekersky contends that the trial court erroneously exercised its discretion by denying his presentence

motion to withdraw his plea, and by imposing an illegal sentence. We reject these arguments and affirm.

Bekersky killed James Engelke by firing three bullets into his head. In exchange for his plea, the State agreed to drop an armed robbery charge, and to withhold a recommendation on Bekersky's parole eligibility date. At the plea hearing, Bekersky admitted his guilt. Six months later, the presentence report was filed with a recommendation for a parole eligibility date in thirty years. Two months later, with new counsel, while still awaiting sentencing, Bekersky moved to vacate the plea.

At the hearing on his motion, Bekersky testified, among other things, that even before receiving the presentence report, he had consistently maintained to counsel that he did not intentionally kill Engelke. The trial court denied the motion, based in part on the determination that Bekersky had not consistently asserted his innocence to counsel, and that the record contained no other evidence that Bekersky had consistently maintained his innocence. The trial court also concluded that Bekersky was fully aware of the consequences of the plea, that he fully understood the proceeding, that he was not unduly pressured to consent to the plea by his counsel or the district attorney, and that the unfavorable presentence report, rather than other more legitimate reasons, prompted the motion.

At sentencing, Bekersky received a life term, with parole eligibility in twenty-five years, "plus penalty enhancer--consecutive term 5 years," for using a dangerous weapon in his crime.<sup>1</sup>

In his postconviction motion, Bekersky asked for reconsideration on the motion to vacate, arguing that the trial court ignored or misconstrued statements to an investigating officer and to the presentence investigator in which he purportedly denied intentionally killing Engelke. The trial court discounted those statements, however, in view of the other inculpatory statements Bekersky made, including his admission of guilt at the plea hearing.

---

<sup>1</sup> Bekersky also received a concurrent sentence on the weapons charge that is not at issue on appeal.

Bekersky also unsuccessfully argued that the trial court erroneously sentenced him to a separate consecutive sentence on the weapons penalty enhancer.

The trial court should allow a defendant to withdraw a guilty plea if there is a fair and just reason for doing so, without substantial prejudice to the prosecutor. *State v. Canedy*, 161 Wis.2d 565, 580-81, 469 N.W.2d 163, 169 (1991).<sup>2</sup> Determining whether a fair and just reason exists lies within the trial court's discretion. *Id.* at 579, 469 N.W.2d at 169. In exercising that discretion, the trial court should consider the following factors:

1. the defendant's assertion of innocence;
- 2.a genuine misunderstanding of a guilty plea's consequences;
3. the defendant's confusion;
4. hasty entry of the plea;
5. coercion by trial counsel; and
6. delay in bringing the withdrawal motion.

*State v. Shanks*, 152 Wis.2d 284, 290, 448 N.W.2d 264, 266 (1989).

If the trial court erred by overlooking Bekersky's purported assertions of innocence, that error was harmless. Those two assertions consisted, first, of a statement to a police investigator that he did not want to kill Engelke, while at the same time admitting that he pointed the gun at Engelke's head and fired three shots. The second assertion, made to a presentence investigator, is that he remembered accidentally shooting Engelke, although he immediately acknowledged that his recalled version of the event made no sense. In each case, Bekersky offered a contradictory, ambivalent description of his intent, greatly at odds with other contemporaneous or prior statements.

---

<sup>2</sup> This is the test used when a defendant moves to withdraw his plea prior to sentencing. *State v. Canedy*, 161 Wis.2d 565, 580-81, 469 N.W.2d 163, 169 (1991).

Bekersky cannot reasonably argue that the trial court would have granted his motion had it credited those statements as valid assertions of innocence. The court considered all six *Shanks* factors, at length, and concluded that none favored Bekersky. The court's finding that Bekersky failed to assert his innocence before he filed his withdrawal motion played only a very small part in its decision.

Bekersky is not entitled to a five-year reduction in his sentence. He correctly notes that the penalty for using a dangerous weapon may increase his sentence, but is not a "consecutive term" as his judgment of conviction indicates. See § 939.63(1)(a), STATS. However, the sentencing court's intent controls the determination of the sentence. *State v. Brown*, 150 Wis.2d 636, 642, 443 N.W.2d 19, 22 (Ct. App. 1989). The record plainly indicates that the trial court's intent was to add five years to Bekersky's life sentence, as allowed by § 939.63(1)(a)2. Use of the phrase "consecutive term" was incorrect, but does not change the ultimate effect of what is a legal sentence. Bekersky's proper sentence is life plus five years.

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

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.