COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP1392-CR
2012AP1393-CR
2012AP1394-CR

Cir. Ct. Nos. 2009CF384
2009CF745
2010CF83

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. O'BRIEN,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael O'Brien appeals three judgments of conviction entered upon his no contest pleas. O'Brien argues he is entitled to withdraw his pleas because his trial attorney did not know he had been previously convicted of an alcohol-related offense that killed two people. We affirm.

BACKGROUND

¶2 The State filed three complaints against O'Brien, charging him with a total of ten criminal offenses.[1] O'Brien rejected the State's plea offer, which according to O'Brien required him to enter into a joint sentencing recommendation in exchange for pleading to some, but not all, charges. Instead, O'Brien opted to plead as charged without an offer from the State.

¶3 O'Brien submitted a signed plea questionnaire/waiver of rights form, and the court engaged him in a colloquy regarding his desire to plead to the charges. Ultimately, O'Brien pled no contest to all charges except operating with a prohibited alcohol concentration, and the court found him guilty.[2] The court then ordered a presentence investigation (PSI) report. O'Brien advised the court that he was familiar with PSI reports, and he had previously been the subject of a PSI report.

[1] The State's first complaint, No. 2009CF384, charged O'Brien with possession of an electric weapon, possession of cocaine, obstructing an officer, and four counts of misdemeanor bail jumping. All the charges in No. 2009CF384 carried the repeater enhancer. The second complaint, No. 2009CF745, charged O'Brien with felony bail jumping. The State's third complaint, No. 2010CF83, charged O'Brien with operating while intoxicated, fifth or sixth offense, and operating with a prohibited alcohol concentration, fifth or sixth offense.

[2] Upon accepting O'Brien's no contest plea to operating while intoxicated, the circuit court dismissed the operating with a prohibited alcohol concentration charge, presumably based on WIS. STAT. § 346.63(1)(c) (2011-12).

¶4 At the scheduled sentencing hearing, O'Brien's trial counsel successfully moved to withdraw, citing a conflict based on the PSI report. The court appointed O'Brien successor counsel, who ultimately moved to withdraw O'Brien's pleas.

¶5 At the hearing on O'Brien's plea withdrawal motion, O'Brien moved to introduce a letter he had received from his former trial counsel before she had withdrawn. The letter stated, in relevant part:

> I have received and read the PSI report, and am extremely disturbed at some of its contents. I am utterly at a loss to understand why you would fail to tell me that you have prior federal charges stemming from an alcohol related accident where two people were killed. That is information that an attorney *must* have if she is to advise you appropriately, and the advice I gave you would have been different had I been aware of that conviction.
>
> At this point, you are going to need to get a new attorney and discuss with them whether you should withdraw your plea[s]. …

¶6 O'Brien testified that he pled as charged because his former counsel told him his record "didn't look too bad" and he assumed counsel knew everything in his criminal record. When asked if he knew about his prior record at the time he choose to plead no contest, O'Brien stated that he did. O'Brien argued he should be permitted to withdraw his pleas because he pled to the charges based on the advice his attorney gave without knowledge of his full criminal record.

¶7 The court denied O'Brien's plea withdrawal motion. It reasoned that, regardless of the letter counsel sent to O'Brien,

> Mr. O'Brien knew perfectly well what his prior record was. He knew perfectly well that he had spent 41 months of a Federal prison sentence back in 1999 for homicide by negligent use of a motor vehicle. He knew his entire

> record, and he can't come into court now and after he's seen the presentence report recommendation and pull the rug out underneath these pleas. That does prejudice the State. It would be a serious waste of judicial resources because this defendant is not entitled to a trial. He has waived that clearly. He waived it knowing full well what the results might be regardless of what his attorney may have felt about the fact that she was not apprised by him of his prior record.
>
> It is clear from the case law, ***Leitner***[3] in particular, that hoping that a conviction will not show up in a presentence report and then having it show up is not a fair and just reason. Clearly from our case law an unfavorable recommendation in a presentence report is not a fair and just reason. Furthermore, the Court is entitled to consider the fact that the defendant waited until he saw a presentence report to ask to withdraw his pleas. There are no grounds here today. The defendant has not met his burden of proof to show that there is a fair and just reason to withdraw his pleas. Therefore, those motions are denied and I will set a date for sentencing.

The court subsequently sentenced O'Brien. He now appeals.

DISCUSSION

¶8 The decision to grant or deny a motion to withdraw a plea before sentencing is subject to the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. We will affirm a court's discretionary determination if the record shows "the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

[3] ***State v. Leitner***, 2001 WI App 172, ¶33, 247 Wis. 2d 195, 633 N.W.2d 207.

¶9 A defendant seeking to withdraw a plea before sentencing must show, by a preponderance of the evidence, that there is a "fair and just reason" for plea withdrawal. ***Id.***, ¶31; ***State v. Kivioja***, 225 Wis. 2d 271, 283-84, 592 N.W.2d 220 (1999). A fair and just reason "contemplates 'the mere showing of some adequate reason for the defendant's change of heart[.]'" ***Jenkins***, 303 Wis. 2d 157, ¶31 (quoting ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973)). "[T]he exercise of discretion requires the [circuit] court to take a liberal, rather than a rigid, view of the reasons given for plea withdrawal." ***State v. Bollig***, 2000 WI 6, ¶29, 232 Wis. 2d 561, 605 N.W.2d 199. However, plea withdrawal before sentencing is not an absolute right. ***Jenkins***, 303 Wis. 2d 157, ¶32. A fair and just reason must be something other than belated misgivings about the plea or the desire to have a trial. ***Id.*** Furthermore, "because a fair and just reason will nullify both a sufficient plea colloquy and a constitutionally valid plea, the court may consider whether the proffered fair and just reason outweighs the efficient administration of justice." ***Id.***, ¶63.

¶10 On appeal, O'Brien does not point to any defect in the plea colloquy. Instead, he argues the circuit court should have permitted him to withdraw his pleas because he pled to the charges based on the advice of his attorney. He argues that, because his attorney rendered advice without knowing about his federal conviction, his pleas were not "intelligently" made. O'Brien also contends the circuit court's reasons for disallowing plea withdrawal are "problematic" because the circuit court "disregard[ed]" the fact that he proceeded on "admittedly erroneous advice from his trial counsel" and it incorrectly assumed he was motivated to withdraw his pleas based on the unfavorable PSI report.

¶11 We conclude the circuit court did not err by denying O'Brien's plea withdrawal motion. First, to the extent O'Brien suggests he should be permitted to withdraw his pleas because his trial counsel was ineffective for offering advice without knowledge of his federal conviction, O'Brien does not develop any argument regarding a claim of ineffective assistance of counsel. We will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶12 Second, although counsel gave advice she stated she would not have otherwise given had she known about O'Brien's federal homicide conviction, the circuit court discounted counsel's statement, finding that O'Brien both knew of and failed to tell his attorney about the federal homicide conviction before entering his pleas. The court also found that, regardless of what O'Brien's attorney believed, O'Brien knew "full well what the results might be" at sentencing. O'Brien has not established that his purported reliance on counsel's advice, which was based on his own failure to be forthright with his counsel, amounts to a fair and just reason for plea withdrawal.

¶13 Third, we disagree with O'Brien that the circuit court erred by finding his motivation to withdraw his pleas was based on the unfavorable PSI report. In ***State v. Leitner***, 2001 WI App 172, ¶33, 247 Wis. 2d 195, 633 N.W.2d 207, we recognized that, when considering a presentence plea withdrawal motion, a circuit court is

> entitled to consider the fact that [the defendant] waited until he saw the content of his presentence report before seeking plea withdrawal and infer from that fact, and the surrounding circumstances, that [the defendant's] true reason for seeking plea withdrawal was his fear of a harsh sentence due to the presentence report.

O'Brien argues the court erred by concluding the unfavorable PSI report motivated him to withdraw his pleas because he learned his counsel was unaware of his federal homicide conviction before he reviewed the PSI.

¶14 Although O'Brien correctly points out that he had not yet seen the PSI report when counsel sent him the letter or moved to withdraw, the record indicates that, by the time O'Brien moved to withdraw his pleas, approximately six months later, he had seen the PSI report. Specifically, one month before his plea withdrawal motion was filed, O'Brien's successor counsel advised the court that the matter "was rescheduled in part because once the PSI came back there were some issues concerning what we believe to be the accuracy of some of the priors listed in the description of those events." The record supports the circuit court's determination that O'Brien viewed the PSI report and was motivated to withdraw his pleas based on the unfavorable report. We agree with the circuit court that "hoping that a conviction will not show up in a presentence report and then having it show up is not a fair and just reason" for plea withdrawal. This is especially true considering O'Brien advised the court at the plea hearing that he was familiar with PSI reports and had been the subject of such a report in the past.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).