COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1725

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LOUIS M. ELIZONDO, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

DEININGER, J.[1] Louis Elizondo appeals an order denying his postconviction motion to withdraw his pleas of guilty to two counts of misdemeanor welfare fraud, in violation of § 49.12(1), STATS., 1991-92. He claims that his pleas were not voluntary because he was under stress from back and leg pain at the time he entered them, and that he should be allowed to

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

withdraw the pleas because he has an absolute defense to the two charges to which he pleaded. We reject both claims and affirm.

BACKGROUND

This is Elizondo's second appeal on these convictions. In ***State v. Elizondo***, No. 95-3595, unpublished slip op. (Wis. Ct. App. July 18, 1996), we held that the trial court had not erred in accepting Elizondo's waiver of counsel, but that Elizondo had alleged sufficient facts in his plea withdrawal motion to merit an evidentiary hearing on the motion. We remanded to the circuit court for a hearing on the merits of Elizondo's motion to withdraw his guilty pleas. The trial court held an evidentiary hearing on February 5, 1997, at the conclusion of which the court denied Elizondo's motion.

As further background, we quote the following factual summary from our prior opinion:

> The facts are not in dispute. Elizondo was initially charged with felony welfare fraud--in particular, that in applying for public welfare he failed to disclose his ownership of a parcel of lakefront property in Adams County. At his first appearance on the charges, the court advised Elizondo of his right to be represented by an attorney and that if he could not afford an attorney, one would be appointed for him. The court explained the charges and possible penalties to him and asked whether he wished to be represented by an attorney. He responded: "At this point, no, sir," explaining that he needed more information to decide whether he needed an attorney. The court went on to tell him that he was charged with a serious crime and that an attorney would be able to explain his many options to him. At that point, the prosecutor stated that if Elizondo wished to discuss the charges with him, he would do so--but he felt he could meet with Elizondo only if he was willing to waive counsel.
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> When Elizondo stated to the court that he would like to talk to the prosecutor, the court questioned him briefly. In response to a question about his education and employment history, Elizondo stated that he had completed two years of college and worked as a construction inspector

for the Wisconsin Department of Transportation until he became disabled as the result of an injury. The court then asked Elizondo whether he wished to waive his right to an attorney, and he replied that he did, whereupon the court found that he was competent to waive counsel and was freely and voluntarily doing so.

After a recess to allow the two of them to meet, Elizondo and the prosecutor returned to court and the prosecutor stated that they had reached a plea agreement to the effect that, in exchange for his plea of guilty, the State would reduce the felony charges to misdemeanors and would recommend that he be placed on probation for two years and make restitution of $4,332.11. The prosecutor represented to the court that Elizondo had asked whether he could be released from probation early if he completed the restitution in less than two years, and that he advised him that that would be up to his probation officer and the court. The prosecutor then read the amended misdemeanor complaints for the two charges and, in response to the court's question, Elizondo indicated that he wished to proceed without counsel.

The court then went over the amended charges with Elizondo, pointing out the maximum penalties he was facing, that the court was not bound by the plea agreement, and that, by pleading to the charges, Elizondo was giving up a variety of constitutional rights--including the right to remain silent, the right to call witnesses in his defense and to cross-examine prosecution witnesses, the right to a trial by jury, and the right to be convicted only upon a unanimous jury verdict of guilt beyond a reasonable doubt on each element of the offenses--which the court summarized for Elizondo. At each point in the colloquy, Elizondo indicated that he understood the court's admonitions. His answers were polite and responsive to the court's questions.

The court, finding that Elizondo understood the proceedings, the nature of the charges and possible penalties, the constitutional rights he was giving up by pleading, and that his pleas were freely, voluntarily and intelligently made, adjudged him guilty. When Elizondo did not respond when the court asked whether he wished to say anything prior to sentencing, the court asked him: "Why did you do this?" He responded: "To tell you the truth, sir, when it was done it was done. I don't know this was happening, sir. I didn't know. I didn't know, sir." The prosecutor then pointed out to the court that Elizondo and his wife knew quite well what they were doing, and realized that they "would have to pay back the money if [they were] caught." The court then imposed the agreed-upon sentence.

State v. Elizondo, No. 95-3595, unpublished slip op. at 2-5 (Wis. Ct. App. July 18, 1996) (footnote omitted).

Elizondo testified at the motion hearing on February 5, 1997, that when he entered his pleas on June 2, 1993, he was "stressed out" from back and leg pain stemming from injuries he sustained in 1987, for which he had received extensive medical treatment. He said that he had been without his medications for two days while he was incarcerated, but acknowledged that while in court he did have the use of a TENS unit "that helped in keeping me from being all the way stressed." In response to questions from his own counsel, Elizondo stated that he "must have" known what he was doing when he entered his pleas, and that he entered them "voluntarily."

Elizondo testified further that he wanted to withdraw his pleas because he wasn't guilty of the charges. His convictions for welfare fraud were based upon applications he filed in June and November of 1990. He introduced into evidence a copy of a handwritten quit claim deed bearing a date of April 16, 1988, which was notarized and recorded on August 13, 1993, and which conveyed the Adams County property to his father and mother. He testified that he gave the deed to his father on April 16, 1988, and that his father had the deed notarized and recorded on August 13, 1993. Elizondo's father testified, however, that Elizondo himself had the deed notarized in 1988.

The trial court found Elizondo's testimony at the hearing to be "more and more vague … evasive, not responsive and not too credible." The court concluded that Elizondo had failed "to show that the withdrawal of [his] pleas are necessary to correct a manifest injustice." With regard to his "absolute defense" based on the quit claim deed, the court stated:

> We have a document that was notarized. I don't know when it was signed but it was notarized two months after the sentencing date by this Court and as I indicated before, I find your testimony in connection with that document to be incredible and does not warrant any further discussion by the Court.

The court entered an order denying Elizondo's motion from which he now appeals.[2]

ANALYSIS

We have described our scope of review and the defendant's burden when he or she seeks to withdraw a plea of guilty or no contest as follows:

> Whether to permit a defendant to withdraw an accepted plea of guilty or no contest is discretionary with the trial court, and we will not upset the court's ruling unless an abuse of discretion is shown. ***Hatcher v. State***, 83 Wis.2d 559, 564-65, 266 N.W.2d 320, 323 (1978). The question on appeal is not whether the plea should have been accepted in the first place, but rather "whether there was an abuse of discretion in the trial court's denial of the motion to withdraw." ***White v. State***, 85 Wis.2d 485, 491, 271 N.W.2d 97, 100 (1978). And the defendant has the burden of showing, by clear and convincing evidence, that "the withdrawal of the plea is necessary to correct a manifest injustice." ***[State v.] Johnson***, 105 Wis.2d [657,] 666, 314 N.W.2d [897,] 902, quoting ***State v. Schill***, 93 Wis.2d 361, 383, 286 N.W.2d 836, 847 (1980).

State v. Spears, 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). We will not set aside a trial court's discretionary ruling "where the record shows that the [trial] court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39

[2] Elizondo was represented by counsel at the postconviction evidentiary hearing on his plea withdrawal motion. After his postconviction counsel notified Elizondo of counsel's intent to file a no-merit report, we granted counsel's motion to withdraw so that Elizondo could bring this appeal pro se. *See* § 809.32, STATS.

(Ct. App. 1991) (footnote omitted) (citation omitted). We conclude that the trial court here properly denied Elizondo's plea withdrawal motion.

Even though the trial court's denial of Elizondo's motion to withdraw his pleas is, for the most part, a discretionary act, whether the pleas were voluntary is a question of constitutional fact which we review de novo, since the trial court "has no discretion" to deny a plea withdrawal if a defendant's constitutional rights have been violated. ***State v. Bangert***, 131 Wis.2d 246, 283, 389 N.W.2d 12, 30 (1986) (citation omitted). We have no difficulty, however, affirming the trial court's denial of Elizondo's first ground for withdrawal because our independent review of the record indicates that he has not established that his pleas were involuntary. There is no hint in the transcript of the plea hearing that Elizondo was in physical pain, "stressed out" or not proceeding according to his own free will. Moreover, when we consider his concessions during the post-remand evidentiary hearing that he "must have known" what he was doing during the plea hearing and that he entered the pleas "voluntarily," whatever merit this claim may have otherwise had evaporates completely.

It is apparent from his testimony at the plea withdrawal hearing that Elizondo's real complaint is that he is innocent of the charges and that he only pleaded guilty to them as an expedient to allow him to resolve charges pending against him in other counties, and, allegedly, to shield his wife from criminal liability. A mere change of heart, by itself, is not a sufficient basis upon which to withdraw a guilty plea, either before or after sentencing. *See* ***State v. Canedy***, 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). Although Elizondo cites no authority for the proposition, had Elizondo indeed established his innocence of the charges, we would consider carefully whether it was an erroneous exercise of trial

court discretion to deny his request to withdraw his pleas. Elizondo, however, did not establish his innocence.

The trial court found his testimony that he had deeded the Adams County property to his father in 1988, prior to his 1990 applications for welfare benefits, to be incredible. We customarily defer to a trial court's determination of historical facts and its assessments of credibility because of its superior vantage point for making factual and credibility determinations. *See* § 805.17(2), STATS., ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Moreover, given that the deed was not notarized or recorded until August 1993, after Elizondo had been convicted and sentenced for welfare fraud, and that Elizondo's and his father's testimony regarding the transaction was confusing, evasive and contradictory, we readily accept the trial court's finding that there was no factual basis for Elizondo's postconviction claims of innocence.

For the foregoing reasons, we affirm the order denying Elizondo's motion to withdraw his guilty pleas.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.