COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2308-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS ALAN DHEIN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Thomas Alan Dhein appeals from judgments convicting him of first- and second-degree sexual assault of a child contrary to § 948.02(1) and (2), STATS., and from a postconviction order denying his motion to withdraw his no contest pleas. Because we conclude that the trial court did not

misuse its discretion in denying Dhein's presentence motion to withdraw his pleas, we affirm.

Dhein was charged with two counts of first-degree sexual assault (by sexual intercourse) of children under the age of thirteen, T.G. and L.G., and one count of second-degree sexual assault (by sexual intercourse) of a person under the age of sixteen, R.T. As part of a plea agreement, Dhein agreed to plead no contest to first-degree sexual assault of T.G. and to second-degree sexual assault of R.T. The charge of first-degree sexual assault of L.G. was dismissed along with a sexual assault charge in a separate case. Dhein executed a plea questionnaire and waiver of rights form.

During the plea colloquy, Dhein affirmed that he had had sufficient time to discuss with counsel his decision to enter no contest pleas. The court discussed the elements of the sexual assault by sexual intercourse charges to which Dhein had agreed to plead. The court specifically noted that the charges involved intercourse, not sexual contact. Dhein affirmed that no one had made any threats or promises to him in connection with his pleas and that he did not have any questions of the court. The court accepted the parties' stipulation that the criminal complaint formed the factual basis for the pleas.

A little over one month later, Dhein moved the court to withdraw his no contest plea to sexually assaulting T.G.[1] Dhein testified at the hearing on the motion that he did not commit the crimes to which he entered no contest pleas and that a medical opinion that there was no evidence of sexual intercourse had not

[1] At the end of the plea withdrawal hearing, Dhein affirmed that he did not seek to withdraw his plea relating to R.T.

been made available to him in a timely fashion before he entered his pleas. The medical report was provided to defense counsel under cover of an October 1, 1996 letter. The plea hearing was held the next day. The report on T.G. stated that there was no evidence of trauma to the genitals.

Dhein also claimed that his trial counsel rushed him into entering his plea, that he did not have time to reflect, and that he entered his plea because counsel was not ready for trial and counsel believed that Dhein would lose at trial. Dhein testified that he wanted a trial after he read the medical report. He acknowledged receiving the medical report from counsel the day of his plea hearing. The medical report differed from the police report Dhein had seen earlier because the medical report discussed only T.G. The police report stated that the investigating officer met with a physician who advised that T.G.'s and L.G.'s vaginal areas looked normal but that both girls' hymens were extended inward. The physician could not state that this condition was caused by sexual intercourse. Both girls alleged that penis to vagina intercourse occurred several times. Dhein explained that he was handed the medical report just after he signed the plea agreement and the plea questionnaire and as the judge was entering the courtroom.

Although he informed the court during the plea colloquy that he understood the sexual intercourse charge, Dhein testified at the motion hearing that he was operating under counsel's advice that sexual intercourse and sexual contact were equivalent. Dhein testified that he did not understand that sexual contact had to be for the purpose of sexual gratification or arousal and did not know that there are different elements for sexual intercourse and sexual contact. Although Dhein indicated on the plea questionnaire that he was satisfied with counsel's representation, he testified at the motion hearing that he was not.

Trial counsel testified that prior to the plea, he described the charges to Dhein and they reviewed the jury instructions relating to sexual intercourse. The instructions included a statement that sexual contact had to be for the purpose of sexual gratification or arousal of the defendant. However, counsel could not specifically recall whether he discussed the elements of sexual contact with Dhein. Counsel concluded that the medical report did "not prove [intercourse] one way or the other." Counsel had shared all discovery with Dhein, including police reports, several months before the plea hearing. Counsel testified that he had no indication that Dhein was confused about the charges to which he had agreed to plead.

In ruling on the plea withdrawal motion, the trial court reviewed the plea questionnaire and the plea colloquy. During the colloquy, the court inquired of Dhein regarding the voluntariness of his pleas, his knowledge of the elements of the offense, whether Dhein had any questions and whether he had sufficient time to confer with counsel. The court found that Dhein knew all that was relevant regarding the medical findings before he entered his pleas and before the actual medical report was provided to his counsel. The court deemed credible trial counsel's testimony that he had discussed the elements of the charged offenses with Dhein. The court concluded that although Dhein had a change of heart, he had not presented a fair and just reason to withdraw his no contest plea to sexually assaulting T.G.

We will sustain the court's refusal to permit Dhein to withdraw his plea if the trial court properly exercised its discretion in so ruling. *See* ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). A defendant should be allowed to withdraw a plea prior to sentencing if there is a fair and just reason for withdrawal, i.e., an "adequate reason for defendant's change of heart ... other than the desire to have a trial." *See* ***id.*** at 861-62, 532 N.W.2d at 117 (quoted

source omitted). The defendant has the burden to prove a fair and just reason by a preponderance of the evidence. *See* ***id.*** at 862, 532 N.W.2d at 117. If the trial court does not believe the defendant's asserted reasons for plea withdrawal, there is no fair and just reason to permit plea withdrawal. *See* ***id.*** at 863, 532 N.W.2d at 118. If the trial court's findings of fact regarding Dhein's reasons for withdrawing his plea are correct, there is no legal basis for withdrawing the plea. *See* ***id.***

On appeal, Dhein argues that because he decided to withdraw his plea shortly after the plea hearing, withdrawal should be permitted. The timing of the plea withdrawal motion is one of many factors to be weighed by the trial court in its discretion; it is not dispositive of the motion. *See* ***id.*** at 862-63, 532 N.W.2d at 117. The court must also consider the defendant's reasons for seeking plea withdrawal and be convinced that they amount to a fair and just reason.

The trial court's findings regarding the significance of the late delivery of the medical report to his counsel are supported in the record. Dhein and his counsel acknowledge that they had access to and reviewed the police report well in advance of the plea hearing. The police report summarizes information found in the medical report. While Dhein focuses on his understanding of the admissibility of the police report and the medical report, it is the substantive information conveyed by them and whether Dhein knew of this information when he entered his plea which controls here. The trial court's findings regarding Dhein's knowledge of the relevant medical information are supported in the record.

Dhein argues that he was misinformed regarding the elements of sexual contact. Dhein claimed at the plea withdrawal hearing that if the medical evidence did not indicate that sexual intercourse occurred, he could have been

charged with sexual contact. Therefore, he should have been informed of the elements of that crime as part of his decision to plead to sexual intercourse. This argument is without merit because Dhein was not charged with sexual contact; he was charged with sexual intercourse. Under the facts of this case, Dhein's focus on sexual contact is misplaced and unpersuasive. The record reveals that Dhein was properly advised and informed as to the elements of sexual intercourse.

We also reject Dhein's complaint that he felt rushed into entering his pleas. At the plea withdrawal motion hearing, Dhein testified that he felt coerced by counsel to accept the plea agreement. The trial court did not find this testimony credible, and we are bound by the trial court's determination. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). Dhein affirmed at the plea colloquy that he had had sufficient time to consult with counsel regarding the plea. Counsel recommended that Dhein accept the plea agreement the afternoon before the scheduled trial; the pleas were entered the next day. The fact that Dhein pled no contest because his counsel believed Dhein's case was weak is not a reason to withdraw the plea. Counsel was giving Dhein his opinion of the likelihood of success at trial. It does not amount to coercion to enter a plea.

We conclude that the trial court applied the correct legal standard to the facts before it and did not misuse its discretion in denying Dhein's motion to withdraw his plea. Dhein did not establish a fair and just reason to withdraw his plea.

By the Court.—Judgments and order affirmed.

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