COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3483-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH L. MOUCHA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

MYSE, J. Kenneth L. Moucha appeals the court's denial of his request to withdraw his no contest pleas to three misdemeanor counts of theft made pursuant to a plea bargain. Moucha argues that the trial court abused its discretion by rejecting his request, and further argues that the pleas were not knowingly and intelligently made. Because this court concludes the trial court properly determined that Moucha's decision to withdraw his pleas was based

solely on his changed desire for a trial, and that the pleas were knowingly and voluntarily made, the judgment of conviction is affirmed.

After his arrest for the alleged theft of electricity, Kenneth Moucha appeared in November 1996 to enter negotiated no contest pleas to three misdemeanor theft charges. In exchange for these pleas, the State agreed to drop a felony charge. The parties did not discuss sentencing recommendations, and no conditions other than dropping the felony charge were made a part of the agreement. The trial court extensively discussed with Moucha his decision to plead no contest, in part because of the court's surprise that Moucha was doing so. Moucha's answers during this discussion eventually convinced the court that Moucha understood the pleas, and that he was entering them knowingly and voluntarily.

A restitution hearing on the theft charge was held about three months later, in February 1997. The State encountered problems proving the total amount of electricity stolen, and the trial court ultimately set restitution at $2,849.59, a figure that was over $3,000 less than that sought by the State. Nevertheless, despite reducing this amount by over half, the court noted that it had been convinced that Moucha had stolen electricity and that it believed the amount of restitution was reasonable.

Moucha's sentencing was set for a month later, and at the sentencing Moucha orally moved to withdraw his pleas. A hearing on that motion was held, with Moucha claiming the following reasons for withdrawal: (1) his innocence; (2) the plea was not truly voluntary; (3) he was pressured by his counsel and the surrounding circumstances to enter his plea; (4) he misunderstood the bargain to be that the State would not recommend jail time as a condition of probation; and

(5) based on his observations at the restitution hearing, he believed the State could not meet its burden of proof at trial. Lester Liptak, Moucha's trial counsel, explained that his discussions with Moucha suggested that the plea was "less than perfectly voluntary," and that Moucha felt intimidated into entering the plea even though he believed he was innocent of the charge. Liptak also stated that he may have mistakenly given Moucha the impression that the State would not recommend jail time. When asked if he had anything to add, Moucha replied that Liptak had "pretty much" covered the issues.

The trial court denied the motion. First, the court concluded that Moucha's personal expectation that jail time would not be recommended was not a fair and just reason to withdraw the pleas because Moucha did not explicitly negotiate sentencing in the plea agreement. The court also believed that Moucha was not unduly pressured into accepting the plea, and concluded that the plea was entered into voluntarily. The court ultimately concluded that Moucha's sole reason for changing his plea was the desire to have a trial based on his belief that the State could not prove its case. The court then sentenced Moucha to three years' probation with conditions, including ninety days' jail and restitution.

Six months later, Moucha's appellate attorney filed a postconviction motion alleging that the trial court erred by denying his motion to withdraw his plea, and that the plea was not made voluntarily and knowingly because Moucha misunderstood that the State would recommend jail time.[1] A hearing was held, and Liptak testified in more detail about the discussions surrounding the plea agreement.

[1] Moucha also alleged ineffectiveness of counsel, but dropped this ground at the hearing.

First, Liptak testified that he conveyed to Moucha that jail was not going to be recommended because jail was never discussed during the plea negotiations. Liptak also testified that he "truly believed" there was no jail involved in the plea bargain, and that this had an impact on Moucha's decision. Liptak acknowledged, however, that he never specifically asked the State about jail time, that he never told Moucha that jail would definitely not be recommended, and that Moucha never asked for clarification of the issue. Liptak also testified that Moucha was not coerced into entering the plea, and that the decision to withdraw probably was made by Moucha after the restitution hearing because Moucha believed the State's case was weak.

The trial court stated its belief that although Moucha probably believed he was not guilty, he nonetheless believed the plea offer was attractive enough because it avoided a felony conviction. The court also concluded that Moucha's stated misunderstanding was not credible and denied the motion. Moucha appeals.

Moucha contends that the trial court erred by denying his presentence motion to withdrawn his no contest pleas. The decision to permit a defendant to withdraw a plea is a discretionary one. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). A trial court's discretionary decision will be affirmed unless its ruling is not based on facts in the record, or is not based on the applicable law. ***Id***.

Moucha claims that the trial court failed to properly apply the law. Our supreme court succinctly described the law as follows:

> A circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been

> substantially prejudiced by reliance on the defendant's plea. But freely does not mean automatically. A fair and just reason is some adequate reason for defendant's change of heart … other than the desire to have a trial. The burden is on the defendant to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence.

Id. at 861-62, 532 N.W.2d at 117 (internal quotation marks and citations omitted). Moucha argues that he proved "fair and just" reasons for withdrawal, but that these reasons were ignored by the trial court.

The first reason for withdrawal, Moucha argues, was his belief that he was innocent. Moucha claims that although the trial court acknowledged at the plea hearing that Moucha believed he was innocent, the court nevertheless failed to address properly this important aspect in its decision. Moucha also argues that this reason should be considered in light of his extreme reluctance to enter the pleas, and in light of the pressure he received from his attorney and the circumstances to agree.

This court does not agree that the trial court erroneously failed to properly consider these factors. The record demonstrates that the trial court reviewed all the reasons Moucha put forth for withdrawing his pleas, and concluded that Moucha's real motive was simply to have a trial because he no longer believed the State could prove its case. Such a credibility determination constitutes a finding of fact. *See* ***id***. at 863, 532 N.W.2d at 118. If a trial court does not believe the defendant's asserted reasons, and if that finding is supported by credible evidence, then "there is no fair and just reason to allow withdrawal of the plea." ***Id***.

The trial court's credibility determinations of Moucha's reasons is supported by the record. While another judge may not have reached this same

conclusion, "it is not our function to take on the role of the trier of fact." ***State v. Canedy***, 161 Wis.2d 565, 586, 469 N.W.2d 163, 172 (1991). The record indicates that Moucha waited four months after making his pleas before moving to withdraw them, and did so only after the State presented its evidence at the restitution hearing. If Moucha in fact wanted to withdraw his pleas because he believed he was innocent or he felt he was unduly pressured, he offers no explanation why he waited four months to do so. The trial court could properly consider this delay as a factor in determining the sincerity of a defendant's reason for withdrawal. ***Id***. at 584 n.10, 469 N.W.2d at 171 n.10 (citing ***Dudrey v. State***, 74 Wis.2d 480, 485, 247 N.W.2d 105, 108 (1976), for the proposition that a four-month delay can operate against a conclusion that a plea was entered in haste or confusion).

This court acknowledges that a claim of innocence is an "important factor" to consider in the analysis of a motion to withdraw a plea. ***Canedy***, 161 Wis.2d at 584 n.12, 469 N.W.2d at 171 n.12. A claim of innocence, however, is not dispositive. ***Id***. This is especially true where, as here, the trial court finds that a defendant's real reason for seeking to withdraw his pleas is for reasons other than a claim of innocence.

Moucha next argues that he misunderstood the plea agreement, and that this constitutes both a "fair and just" reason for presentence withdrawal and a reason for postsentence withdrawal under the "manifest injustice" standard. Moucha claims that Liptak was under the mistaken impression that jail time would not be recommended, and that Liptak communicated this misunderstanding to him. Although Liptak testified concerning his representations to Moucha, Moucha himself never testified.

The trial court rejected this reason for presentence withdrawal after concluding that it went only to Moucha's personal expectations, which the court determined was an insufficient basis for withdrawal. This was not an erroneous exercise of discretion. While unmet personal expectations might amount to a fair and just reason for withdrawal when the defendant truly misunderstands the consequences of a guilty plea, *see* ***Dudrey***, 74 Wis.2d at 485, 247 N.W.2d at 108, there is no contention that Moucha misunderstood the consequences of his pleas. Moucha knew that regardless of the plea bargain, the court was free to impose a jail sentence. Further, Moucha knew that the plea bargain did not address the issue of sentencing. While Moucha may have believed that the State would not actually impose jail time, he took his chances by not specifying this in the plea agreement. It is not "fair and just" to permit Moucha to withdraw his pleas because his expectations of what would ultimately occur were incorrect. ***Id***. at 486, 247 N.W.2d at 108.

Moucha appears to also argue in his brief that he, through his trial attorney, misunderstood that the plea agreement permitted the State to request jail as a condition of probation. In other words, Moucha argues that he and his attorney mistakenly believed that the plea agreement precluded the State from recommending jail. This argument, however, lacks a factual basis in the record. While it is true that Liptak told Moucha that he believed jail time would not be recommended, Liptak never represented to Moucha that the agreement prohibited the State from making that recommendation. This is demonstrated by the following testimony:

> Q And you never told him that I had – that the state, myself, had ever promised not to recommend jail time, did you?

> A I never said that you, Mr. Gay, said that you would not recommend jail time. I told him that my understanding was that based on our conversations, 'cause you and I never really talked about jail in particular, but that based on our conversation and everything, jail was not factored into the equation and that there wouldn't be any jail.
>
> ….
>
> Q You never told Mr. Moucha that jail time would absolutely not be recommended?
>
> A Never say never; never say always, first year of law school. No, I never told Mr. Moucha that absolutely he did not face any kind of jail.

This testimony reveals that the misunderstanding was not about what the State *could* recommend under the agreement, but rather what it *would likely* recommend.

At the hearing on Moucha's postsentence motion to withdraw his pleas, the trial court rejected the argument that Moucha misunderstood the agreement based on Moucha's lack of credibility. This alternate ground also supports the court's discretionary decision. As discussed earlier, the trial court could correctly conclude that Moucha's sole basis for seeking withdrawal was the desire for a new trial based on his belief that the State could no longer prove its case. The fact that Moucha himself never testified that he misunderstood the plea agreement, or that this misunderstanding was a factor in his motion to withdraw the plea, further supports the trial court's conclusion that this claim was not Moucha's genuine basis for seeking to withdraw his plea.

By the Court.—Judgment affirmed.

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