COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0249-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HERBERT T. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Herbert Johnson appeals a judgment convicting him of burglary, theft and obstructing an officer, all as an habitual offender. He also appeals an order denying his motions to withdraw his guilty pleas and to modify the thirty-year sentence. He argues that the trial court should have allowed him to withdraw his guilty pleas before sentencing, that the sentence is harsh and

unreasonable, and that his guilty pleas resulted from an unlawful search of the trunk of his car. We reject these arguments and affirm the judgment and order.

Johnson and two accomplices were arrested inside a sporting goods warehouse during the commission of a burglary. Johnson attempted to flee from the police and was ultimately subdued with the use of pepper spray. The police used a key found in Johnson's pocket to open the trunk of his car, which was parked at another location. There they discovered a large quantity of sporting goods. They then closed the trunk and secured a search warrant.

While this matter was pending, Johnson was also charged with solicitation to commit perjury and soliciting a prostitute. One of his codefendants, whom Johnson thought would testify on his behalf, gave a 107-page deposition describing wide-ranging criminal activities and inculpating Johnson. The district attorney filed a motion to amend the information to add seventeen new counts. Johnson then decided to accept the prosecutor's plea bargain and plead guilty to the three crimes originally charged. In addition, one count of intimidating a witness would be read in for sentencing purposes. The court accepted Johnson's pleas. Several months later, but before sentencing, Johnson filed a motion to withdraw his pleas. The trial court denied that motion and sentenced Johnson to consecutive terms totaling thirty years in prison.

A motion to withdraw a guilty plea is committed to the trial court's discretion. *See* ***State v. Garcia***, 192 Wis.2d 845, 861-62, 532 N.W.2d 111, 117 (1995). The burden rests with the defendant to show by the preponderance of evidence a fair and just reason for withdrawing his plea before sentencing. If the trial court does not believe the defendant's asserted reasons for withdrawal of the

plea, there is no fair and just reason for allowing withdrawal of the plea. A desire to have a trial is not a fair and just reason for plea withdrawal. ***Id.***

Several of the reasons Johnson advances for withdrawing his guilty pleas are based on statements the trial court made at sentencing characterizing the criminal enterprise and Johnson's role in it. Johnson argues that he needs a trial to establish whether he was the ring leader, to show his precise involvement in the criminal enterprise, to resolve conflicting statements an accomplice made and to determine the value of the merchandise stolen. To the extent it was necessary to resolve these factual issues, Johnson should have presented this evidence at the sentencing hearing because they relate to sentencing considerations, not his guilt or innocence. It was not necessary to conduct a trial to resolve most of these matters. Because the desire to have a trial does not constitute a fair and just reason for withdrawing the guilty pleas, none of these issues establishes a basis for withdrawing the pleas.

Johnson argues that the prosecutor coerced him into pleading guilty by filing two new charges and threatening to file seventeen others. He also describes his attorney's recommendation that he settle the case as coercion. The record shows no improper coercion. The plea colloquy and the written form Johnson executed establish the absence of coercion. Nothing in the record suggests that the additional charges were unfounded. The fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made. *See* ***Rahhal v. State***, 52 Wis.2d 144, 151-52, 187 N.W.2d 800, 804 (1971). This court must focus on the distinction between a motivation that induces the plea and a force that compels it. Because Johnson was given a fair and reasonable alternative, his choice was not legally coerced. ***Id.***

Johnson next argues that the trial court incorrectly assumed that he knew the content of the presentence report when he sought to withdraw his pleas. The trial court found that the motion to withdraw the plea was made "on the eve of the presentence report when, because of his discussion with the probation agent, Johnson had a pretty good idea what the recommendation would be." Although the presentence report itself had not been produced, we conclude that the trial court could reasonably infer from the timing of the motion that Johnson's conversation with its author amounted to "testing the waters" before sentencing.

Johnson contends that his plea resulted from delays in bringing the case to trial. Johnson withdrew his speedy trial demands. He would have been in prison if he had not been in the county jail. The delay under these circumstances does not provide any basis for challenging the pleas.

Johnson also contends that he did not have adequate time to evaluate his accomplice's deposition. Johnson had several days to review the deposition. Minimal review of the deposition would have revealed that Johnson's accomplice would be an unfavorable witness at his trial. Because Johnson was not charged with the additional offenses described in the deposition, it was not necessary that he have sufficient time to answer each of the allegations before entering his plea. To the extent it was necessary to challenge the truth of the detailed information contained in the depositions, the sentencing hearing would have provided an appropriate forum for litigating the scope of the criminal enterprise and Johnson's role in it.

Johnson also argues that a post-traumatic stress disorder and the absence of medication influenced his pleas. He specifically states, however, that he is not asserting that his plea is involuntary. Other than mentioning the disorder

and absence of medication, Johnson makes no specific argument and presented no evidence to the trial court to establish grounds for withdrawing the pleas on that basis. We conclude that the trial court properly exercised its discretion when it refused to allow Johnson to vacate his pleas.

The trial court also properly exercised its sentencing discretion. There is a strong public policy against interfering with the trial court's sentencing discretion. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). The court properly considered the gravity of the offenses, Johnson's character and the need to protect the public. ***Id.*** The court reasonably characterized these offenses as a very serious large-scale theft and burglary operation set up like a corporation. The court found that Johnson was the leader of the scheme, that the burglary and attempted theft were not isolated acts, but were part of a continuing operation that resulted in more than a $100,000 loss to the business. Johnson was forty-five years old, had a substantial record of previous crimes and imprisonment, was on parole at the time of the offense, and had failed to take advantage of available drug and alcohol therapy. He attempted to intimidate a witness by sending threatening letters from his jail cell. Under these circumstances, the thirty-year sentence does not shock public sentiment. *See* ***Ocanas v. State,*** 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Finally, the trial court properly refused to suppress the evidence seized from Johnson's trunk. That issue is properly before this court despite the guilty pleas pursuant to § 971.31(10), STATS. The trial court found that the officers were conducting an inventory search of the trunk as authorized by ***State v. Weide***, 155 Wis.2d 537, 547, 455 N.W.2d 899, 904 (1990). The police secured the car and, pursuant to established police department policy, determined that it should be impounded and its contents inventoried. Upon discovering a number of

items with the "Nike" brand name, they closed the trunk and postponed the inventory until a search warrant was obtained. Johnson acknowledges that the police had the right to impound the car and open the trunk for inventory. He argues, however, that the search of the trunk was "obviously an investigative search and not an inventory search." He bases this supposition on the officer's decision to search the vehicle before moving it to a municipal parking lot. The trial court was not required to attach any significance to where the inventory search was conducted. Its finding that the purpose of the search was to catalog the contents of the trunk is not clearly erroneous. *See* § 805.17(2), STATS.

By the Court.—Judgment and order affirmed.

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