COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2848-CR **Cir. Ct. No. 2011CF5**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS C. STRONG, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Dennis Strong, Jr., appeals a judgment of conviction and an order partially denying his motion for postconviction relief. Strong argues the circuit court erroneously rejected his request to withdraw his no-contest pleas prior to sentencing. We reject Strong's argument and affirm.

BACKGROUND

¶2 Strong was charged with sixteen crimes, including three felonies. Strong was initially represented by counsel, but he decided to proceed pro se, and the court appointed his prior attorney as standby counsel. The parties appeared for a scheduled jury trial, and the court had a jury panel waiting. While discussing various pretrial matters, Strong realized that none of his witnesses were present. Strong's standby counsel brought this to the court's attention, and Strong explained he did not subpoena witnesses because he believed the court would do so based on comments the court made during its prior colloquy with Strong regarding his decision to appear pro se. The end result was that Strong did not want to proceed to trial without his witnesses, and the court indicated it would grant him a continuance.

¶3 However, during a break in the proceedings, the parties reached a plea agreement. The prosecutor explained the plea agreement as follows:

> Today we have worked out an agreement in which Mr. Strong would plead to Counts 3, [4], [8], and 14 as charged. The [S]tate will remain silent at sentencing.
>
> Mr. Strong is free to argue whatever disposition he feels is appropriate.
>
> We are not—or I should say, the [S]tate is waiving a preparation of a new Presentence Investigation[1] and is ready to go to sentencing today.

[1] Strong had been previously convicted of the charges in this case, but he was granted a new trial based on the State's failure to timely disclose evidence.

Strong confirmed that was his understanding of the agreement as well. He also agreed he had adequate time to discuss the matter with standby counsel during the break.

¶4 The court then conducted a thorough plea colloquy with Strong, and he entered no-contest pleas pursuant to the plea agreement. However, prior to the court's acceptance of the pleas, the State indicated: "I would like to point out that the charges that are being dismissed are being dismissed and read in. … I don't know if the Court had the colloquy." The following exchange occurred:

> THE COURT: I'll ask you that, Mr. Strong, as well. Do you understand the remaining counts that were contained in the Third Amended Information, the intent of the agreement was all of those counts would be dismissed and read in, basically considered for sentencing purposes?
>
> THE DEFENDANT: I don't think that part was brought up; but, yes.
>
> THE COURT: Do you want a few minutes to discuss that with [standby counsel]?
>
> THE DEFENDANT: No.
>
> THE COURT: You are agreeing then with the understanding that all of the remaining counts would be dismissed and read in for sentencing purposes?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you still want me to accept your pleas?
>
> THE DEFENDANT: Yes.

¶5 The court then addressed the facts underlying the charges, determined there was a factual basis to accept the pleas, and found Strong knowingly, voluntarily, and willingly entered his pleas. However, the court was then advised it had not again engaged in a waiver-of-counsel colloquy, which it then conducted. After that colloquy, the court addressed Strong as follows:

> THE COURT: Then, again, Mr. Strong, I'll give you one more opportunity to withdraw your pleas if you would want to do so at this point. Do you want me to accept your pleas to those counts?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And with the understanding that has been already indicated on the record, correct?
>
> THE DEFENDANT: Yes.

The Court then accepted the pleas again and indicated it would reconvene for sentencing in approximately thirty minutes, after reviewing the PSI. However, before recessing, the court engaged Strong in a PSI-waiver colloquy.

¶6 Upon reconvening, the court made some preliminary comments and asked Strong whether he still wished to waive his right to a new PSI. Strong's standby counsel then informed the court Strong wished to withdraw his pleas, noting, "I just found that out within the last 60 seconds before you came in here." Strong stated:

> I was under the interpretation there wasn't going to be a PSI at all to be considered by the Court. I was under that understanding and under the understanding I was pleading to certain [counts] as far as the dismissed and read in part. I didn't really realize that until right during the colloquy, right in the colloquy itself, right in the moment of it being brought up ….

Strong was then placed under oath, and he confirmed he wished to continue pro se. Next, he stated:

> When the settlement offers were juggled back around this one here, I just gave you a copy of it here that I was provided, and then there was a handful of different negotiations that went back and forth, and talks that were said this morning, and I was under the clear understanding, like, with—what took place with the terms of it, and I didn't really come—I'm even digesting it even more, and during the colloquy itself, when I was entering the plea, Your Honor, I was realizing a misunderstanding exactly

> right then and there. That's why I actually paused and said over to counsel, over to standby counsel, about the issue with the counts being outright dismissed or dismissed and read in. I conferred with him on that, and conferred with him on the PSI thing, too. I thought there was going to be just no PSI, period, to be considered by the Court. So, a few of them factors, you know. It's not like I waited until after the colloquy, because even during the colloquy it was kind of clicking in my head.

¶7 Following additional discussion between Strong and the court, the State interjected a request that the court find Strong's statements were disingenuous, as the State felt Strong was "frankly incredible." The court replied:

> And I'm going to make that factual finding at this point, that Mr. Strong was advised of the dismissal and read ins. He was asked if he understood that; that, in fact, he conferred with his standby counsel at the time and was given an opportunity to withdraw his pleas if he wanted to at that time. He stated that he wanted to proceed and he still wanted the Court to accept his pleas.

The court added that Strong could still have a new PSI or alternative PSI.

¶8 Strong again asked to withdraw his pleas, stating:

> Your Honor, I would like to withdraw. I, honestly, because —if they find it disingenuous, I'm asking within 60 minutes of discussion, and I think that's reasonable, because given the timeliness, I mean, I knew the pressure the entire jury was in this room waiting on us, and for me to answer and go through the series of questions and stuff like that, Your Honor, I'm being honest with you, I'm not being disingenuous.

The court denied Strong's request to withdraw his pleas, explaining:

> You, … in this Court's estimation, clearly understood the agreement that was reached regarding your entry of a plea in this case, and you were told that the other charges would be dismissed and read in, which just means they are considered by the Court as part of what occurred on the day in question. And you—I will also note that this Court is … aware that you have attempted to withdraw pleas in the past in another court, that you have had … appeals regarding

> that issue. That you clearly know what it means to enter a plea, and you understand what procedures are in court regarding entering a plea; that you were advised on the record by [the prosecutor] as to what the [S]tate's understanding was of the agreement. You had substantial opportunity to discuss it with your standby counsel. The Court recessed for a lengthy period of time to allow you to do so, and did not—did not pressure either standby counsel or counsel for the [S]tate to hurry up and try to reach an agreement. I didn't even know that, that was occurring. I gave you as much time as you needed.
>
> You were asked on the record whether you had sufficient time, whether you understood the agreement, whether you had enough time to talk with your standby counsel. You answered yes to all of those questions.
>
> This Court finds absolutely no reason, no meritorious reason to allow you to withdraw your plea at this time.

¶9 Strong moved for postconviction relief seeking, inter alia, to withdraw his no-contest pleas. Strong argued he was forced to make a hasty decision, emphasizing he immediately moved to withdraw his pleas. The circuit court rejected Strong's assertion, stating:

> I completely disagree with that based upon what happened in court that day, what had all gone forward in the case, and that, in fact, Mr. Strong had been advised that the Court was going to grant his motion for a continuance, and he was not, in my opinion, under duress in terms of entering a plea.

The court added, "I don't believe in this case there was genuine misunderstanding of the pleas' consequences, that there was undue haste or confusion in entering the plea[.]" Further, the court explained:

> And, one of the reasons this Court denied Mr. Strong's original motion to withdraw his plea was that it did not find Mr. Strong's confessed confusion to be genuine. In general, Mr. Strong's actions have been contradictory throughout this case. On many occasions he appears to be making decisions according to their potential to disrupt proceedings more than any strategic motive to protect his interest.

> I see reasons to doubt Mr. Strong's credibility.
>
> ….
>
> The court also considers Mr. Strong's experience with the justice system in finding his alleged confusion regarding the entering of this plea incredible. This was not Mr. Strong's first exposure to court proceedings or to entering a plea.
>
> ….
>
> While I acknowledge that Mr. Strong's plea occurred during the course of several hours as a result of the trial not proceeding, the Court finds this case to be more analogous to [***State v. Canedy***, 161 Wis. 2d 565, 469 N.W.2d 163 (1991)], where the defendant's reasons to withdraw his plea were not []credible in light of the many opportunities to ask questions, state opposition, and, in fact, not enter a plea.[2]

Accordingly, the court concluded Strong failed to show a fair and just reason to withdraw his plea by a preponderance of the evidence, and it denied that portion of his postconviction motion.[3] Strong appeals.

DISCUSSION

¶10 Strong argues the circuit court erroneously rejected his request to withdraw his no-contest pleas prior to sentencing. When a defendant seeks to withdraw a plea prior to sentencing, the circuit court "should freely allow" the defendant to do so for any fair and just reason, unless the prosecution would be substantially prejudiced. ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24 (citations omitted).

[2] The transcript of the motion hearing reads: "reasons to withdraw his plea were not incredible." We agree with the State that, in context, it is apparent either the court misspoke or the transcript contains a typographical error.

[3] The other postconviction issues Strong raised had been resolved by the time of the hearing. They are not relevant to this appeal.

¶11 While a "fair and just reason" has not been precisely defined, a proper exercise of discretion requires circuit courts to take a liberal, rather than a rigid, view of the defendant's reason for plea withdrawal. ***Id.***, ¶31. Courts have previously considered the following grounds to be fair and just reasons: genuine misunderstanding of the plea's consequences; haste and confusion in entering the plea; and coercion from counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739-40, 601 N.W.2d 865 (Ct. App. 1999). In addition, the promptness with which the motion is brought is a relevant factor. ***Id.*** at 740. "A swift change of heart is in itself a strong indication that a plea is entered in haste and confusion." ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995).

¶12 Despite the liberal standard, withdrawal of a guilty plea before sentencing is not an absolute right. ***Jenkins***, 303 Wis. 2d 157, ¶32. The defendant has the burden to prove a fair and just reason by a preponderance of the evidence. ***Id.*** The reason must be something other than the desire to have a trial or belated misgivings about the plea. ***Id.*** "Whether a defendant's reason adequately explains his or her change of heart is up to the discretion of the circuit court." ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). On review, we apply a deferential, clearly erroneous standard to the court's fact findings and credibility determinations. ***Jenkins***, 303 Wis. 2d 157, ¶31. "All that 'this court need find to sustain a discretionary act is that 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.***, ¶30 (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

¶13 Strong argues he has shown a fair and just reason for plea withdrawal because he did not learn until near the end of the plea colloquy that the dismissed charges would be read in for sentencing purposes. He contends this fact

proves the plea was entered in haste and confusion. The State does not dispute the fact that the read-in term of the plea agreement was previously overlooked. However, when the circuit court immediately afforded Strong an opportunity to discuss the issue further with standby counsel, Strong declined and stated he still wished to enter his pleas. After an additional colloquy, the court offered to allow Strong to withdraw his pleas, and he again declined. Further, although the transcript does not reflect when it occurred, Strong acknowledged—and the circuit court found—that he did discuss the dismissed-charges issue with standby counsel during the hearing. Then, during the break, Strong did not inform his standby counsel of his change of heart until literally the last minute before the judge reentered the courtroom.

¶14 The court found Strong's explanation for his change of heart incredible, and it explained its reasons for doing so at length, both immediately at the time of Strong's withdrawal request and subsequently at the postconviction hearing. The court found Strong had repeatedly taken actions intended to disrupt the proceedings and rejected his claim that he misunderstood the plea agreement. "If 'the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" ***Jenkins***, 303 Wis. 2d 157, ¶31 (quoting ***Garcia***, 192 Wis. 2d at 863). The court analyzed the facts, set forth its rationale, and reached a conclusion that a reasonable judge could reach. We therefore must affirm the court's exercise of discretion. *See* ***Loy***, 107 Wis. 2d at 414-15.

By the Court.—Judgment and order affirmed.

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