COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1504-CR **Cir. Ct. No. 2013CF138**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN L. PAHOLKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: JAY N. CONLEY, Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Shawn Paholke appeals a judgment of conviction and an order denying his motion to withdraw his no-contest pleas prior to

sentencing. Paholke contends the circuit court erred by denying his motion. We conclude the circuit court did not erroneously exercise its discretion when it determined Paholke did not provide a fair and just reason for plea withdrawal. Accordingly, we affirm.

BACKGROUND

¶2 Paholke was charged on September 23, 2013, with twelve felony offenses based on allegations of abuse against his two children. The abuse largely related to Paholke's alleged failure to provide appropriate medical and other care to the children and his exposing them to harmful physical settings. At an April 8, 2015 pretrial hearing, Paholke entered no-contest pleas to six of the charged counts. The remaining counts were dismissed and read in. Between the time he was charged and the time he entered his pleas, Paholke had been represented by three different attorneys, the last having been appointed on September 24, 2014.[1]

¶3 Prior to sentencing, Paholke filed a motion to withdraw his pleas. His reasons for withdrawing his pleas included his having recently received a written report from one of his expert witnesses, psychiatrist Dr. Ralph Baker. Based on Baker's review of the youngest child's medical records, Baker stated there was "significant evidence that [she] was suffering from the effects of Autism and was not placed on proper medications to control her behavior." Baker also believed these diagnoses and treatments allegedly caused Paholke to handle that child in the manner he did but without him intentionally committing abuse. Specifically, Baker stated:

[1] Only this third attorney's conduct and representation are germane to this appeal. We refer to Paholke's third attorney as "trial counsel" throughout this opinion.

> There is also evidence that Sean Paholke adopted measures and treatment recommendations made by physicians and informed them of measures taken in the parental home. Sean Paholke's parental involvement is not viewed as intentional abuse to [his younger child] but rather following the advice of physicians whom [sic] may have mis-diagnosed and mis-medicated [the younger child] leading to worsening behavior conditions.

Paholke claimed Baker's opinions would have buttressed his defense, and he would not have pled no contest if he had known about them.

¶4 Paholke appeared to raise four other reasons for plea withdrawal: (1) he learned after his pleas that the Department of Social Services would prevent him from seeing the victims; (2) his successive attorneys each did not properly prepare for trial; (3) he had learned of new photographic evidence from which he no longer believed he caused burns for which one of the children required medical treatment; and (4) he received an expert opinion from a "witchcraft expert" regarding the role his girlfriend's alleged witchcraft practices had on the youngest child's behavior. The State filed a response to Paholke's motion, which included an "Affidavit of Substantial Prejudice" from the prosecutor.

¶5 At a hearing on Paholke's motion, Paholke repeatedly testified that he entered the pleas because his trial counsel told him they were not ready to go to trial, they would lose, and Paholke should take the State's plea offer. Also, Paholke testified that at the time he pled, Dr. Baker had not provided a written analysis. Until he received Baker's report, Paholke claimed he did not realize the severity or importance of the younger child's autism or the fact she may have been misdiagnosed. He claimed his actions toward the child were based on entirely different diagnoses. He also surmised that the medications his daughter was prescribed worsened her behavior. Paholke testified it was Baker's opinion that

Paholke was "doing everything right," but that the victim had been improperly diagnosed and some of her medications "could have actually been making things worse." For these reasons, Paholke now believed he had a plausible defense; he stated that, had he known of the specific opinions in Baker's report, he would not have entered his pleas.

¶6 Paholke testified his decision to seek plea withdrawal was not merely a change of heart. However, he admitted he had retained Dr. Baker prior to making his pleas, and that Baker was hired specifically to opine about the younger victim's "behavior and PTSD and the various different things that she was previously diagnosed." Paholke also testified he had asked for Baker's opinion before the pleas, but he did not receive Baker's "results" until after his pleas. Meanwhile, Paholke admitted he had stated during the plea hearing that he did not need to review anything else before making his pleas, and that he had enough time to go over the case with his trial counsel. Paholke also stated that he understood the allegations against him. In addition, he admitted his trial counsel said at the plea hearing that counsel had discussed with Paholke the strengths and weaknesses of the case, what the relevant defenses would be, and that counsel had also said that Paholke understood the potential defenses. At the plea hearing, Paholke also had admitted that there was a factual basis for the allegations against him, based on the complaint.

¶7 The circuit court concluded that none of Paholke's proffered reasons for plea withdrawal was substantiated by the evidence. Notably, the circuit court "did not find Mr. Paholke to be a credible witness" in testifying at the plea withdrawal hearing, which the court said was a determination "that really applies

to all the decisions" the court was making.[2] In particular, the court reasoned that Paholke was either lying at the plea hearing or lying at the plea withdrawal hearing. Similarly, the court said it was "not impressed" with Paholke's "laundry list of complaints" about his attorneys that he offered as grounds for plea withdrawal, especially given Paholke's plain statements during the plea hearing that he thought his counsel had done a good job representing him. The court specifically found Paholke was not coerced into entering his pleas.

¶8 The circuit court also found there was substantial prejudice to the State based primarily on the holding in ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, regarding the adverse effects of a long delay on a child witness's memory and recollection. Accordingly, Paholke's motion was denied, and he now appeals. Additional facts will be provided below as needed.

DISCUSSION

¶9 A defendant seeking to withdraw a guilty or no-contest plea prior to sentencing must show, by a preponderance of the evidence, that there is a "fair and just reason" for doing so. ***State v. Kivioja***, 225 Wis. 2d 271, 283, 592 N.W.2d 220 (1999); ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). A fair and just reason requires the showing of some adequate reason for defendant's change of heart, other than a mere desire to have a trial. ***Bollig***, 232 Wis. 2d 561, ¶29. Under Wisconsin law, withdrawal of a guilty plea before sentencing is not an absolute right. ***State v. Canedy***, 161 Wis. 2d 565, 582-83, 469 N.W.2d 163

[2] Two witnesses testified at the plea withdrawal hearing: Paholke and Kayla Soper, a social worker with the Oconto County Department of Health and Human Services. The matter on which Soper testified presented a scenario in which she and Paholke directly contradicted each other. In finding Paholke incredible, the circuit court noted it found Soper very credible on the matter over which they disagreed.

(1991). Although plea withdrawal should be freely allowed before sentencing, "freely" does not mean automatically. ***Garcia***, 192 Wis. 2d at 861.

¶10 While what constitutes a "fair and just reason" is not precisely defined, Wisconsin courts have deemed the following to be such reasons: (1) the defendant's genuine misunderstanding of the plea's consequences; (2) haste and confusion in entering the plea; (3) coercion on the part of the defendant's trial counsel; and (4) confusion resulting from misleading advice from defense counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). A defendant's assertions of innocence and the promptness with which the motion is brought are also factors the circuit court may consider in determining whether the defendant's evidence is credible. ***Id.*** at 740 & n.2; *see also* ***State v. Leitner***, 2001 WI App 172, ¶25, 247 Wis. 2d 195, 633 N.W.2d 207 (observing an assertion of innocence is "important, but not dispositive").

¶11 A proffered reason must be supported by the evidence of record. ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). In other words, the defendant must do more than allege that a fair and just reason exists; he or she must show that the reason actually exists. ***Kivioja***, 225 Wis. 2d at 291. Therefore, the circuit court must find credible the defendant's proffered fair and just reason, and it must actually believe that the fair and just reason exists. ***State v. Jenkins***, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. "A circuit court's discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard." ***Id.***, ¶30. Importantly, this discretion includes the circuit court's determination of whether a defendant's reason adequately explains his or her change of heart. ***Id.***, ¶31. However, when there are no issues of fact or credibility

at issue, the question of whether the defendant has offered a fair and just reason becomes a question of law that we review de novo. ***Id.***, ¶34.

¶12 As the State notes, proof of substantial prejudice to the State is necessary in order to defeat a motion for plea withdrawal only if the defendant has first proven a fair and just reason for plea withdrawal. *See* ***Bollig***, 232 Wis. 2d 561, ¶34. In his appellate brief-in-chief, Paholke argued only that the State failed to prove it would suffer substantial prejudice if he were allowed to withdraw his pleas before sentencing. He did not address whether a fair and just reason existed, other than to assert the circuit court "assumed that Dr. Baker's report was sufficient to constitute a 'fair and just reason' for plea withdrawal."

¶13 The State contends Paholke mischaracterizes the circuit court's ruling. In the State's view, the court determined that the evidence submitted in support of Paholke's motion, including Baker's report, failed to substantiate any of his proffered reasons for plea withdrawal. In particular, the State stresses that the court found Paholke incredible while testifying at the plea withdrawal hearing. The State argues this adverse credibility finding applied to Paholke's testimony regarding how Baker's retention and report affected Paholke's decision-making processes, both in choosing to plead and in deciding to move to withdraw his pleas.

¶14 Although the State's response brief addressed each of Paholke's proffered reasons supporting his plea withdrawal, Paholke's reply brief only defends his reason related to Dr. Baker's report. As such, Paholke is deemed to

have conceded any arguments related to the other offered reasons.[3] *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶15 In addressing Baker's report, Paholke contends the circuit court's adverse credibility finding against him has no bearing on this offered reason, because the relevant facts are undisputed. Paholke's argument is essentially that he knew neither that his own expert, Baker, could opine in a manner helpful to his defense, nor the content of that opinion, until after he entered his pleas. This alone, Paholke contends, constitutes a fair and just reason for him to withdraw his pleas.

¶16 As an initial matter, we reject Paholke's characterization of the circuit court's decision as having concluded Dr. Baker's report constituted a fair and just reason for plea withdrawal. To the contrary, the court clearly concluded that Baker's report was an inadequate basis for presentence plea withdrawal. Paholke improperly latches on to the court's laudatory statements regarding Baker's expertise and a passage in which the court noted that Baker's newfound opinion was the closest Paholke had come to offering a fair and just reason.[4]

[3] In his reply brief, Paholke also summarily "cites" as a fair and just reason the acquisition of his trial counsel's post-plea research allegedly showing that his younger daughter's burns could not have occurred as the State said they did. We disregard this argument as being both undeveloped, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and improperly raised for the first time in a reply brief, *see* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396.

[4] In this regard, the circuit court stated Dr. Baker's report was the "most troubling" of the matters presented in Paholke's motion, because "Dr. Baker clearly is finding things that would be supportive of Mr. Paholke, and … [he] could be a useful witness for Mr. Paholke." However, the court also determined it was "not clear" exactly what Baker was saying as it pertains to whether the letter consisted of Baker's opinions or merely his interpretation of the record. The totality of the record demonstrates that, although the court considered Baker's report potentially useful to Paholke's defense, the report was not highly exculpatory in the way Paholke argues.

Nowhere in the motion hearing transcript or elsewhere in the record does the circuit court conclude Baker's report constituted a fair and just reason. The court's comment regarding the "arguable" nature of Paholke's claim relating to Baker's report appears to have been intended to introduce its alternative conclusion that the State proved it would be substantially prejudiced if Paholke was allowed to withdraw his pleas.

¶17 Furthermore, while we agree with Paholke that many of the facts related to Baker's retention—including the timing and content of his report—are undisputed, that does not mean our review is de novo.[5] *Cf.* ***Jenkins***, 303 Wis. 2d 157, ¶43. Paholke's argument ignores the rule that the discretion accorded the court's conclusions here includes its determination of whether the circumstances surrounding Baker's report adequately explain Paholke's decision to seek plea withdrawal. ***Id.***, ¶31. Moreover, to the extent Paholke was required to explain why he pled despite knowing Baker's work was ongoing, the credibility of Paholke's responses in that regard was a matter within the circuit court's province. In all, we read the circuit court's ruling here as having concluded Paholke's explanation was inadequate to account for why Baker's "opinion" caused him to change his mind on pleading.

¶18 Under these circumstances, we conclude our review is properly undertaken using the "erroneous exercise of discretion" standard. A circuit court properly exercises its discretion when it applies the applicable law to the facts of

[5] We note that Baker's report has nothing to do with the older child. Still, we agree with Paholke that a defendant's proffered fair and just reason for withdrawing his pleas in a multi-count complaint need not relate to every count addressed in the context of the plea agreement.

record and reaches a conclusion a reasonable judge could reach. ***Muellenberg v. DOT***, 2015 WI App 48, ¶20, 363 Wis. 2d 582, 866 N.W.2d 746.

¶19 The circuit court reasonably determined that the arrival and substance of Dr. Baker's written report after Paholke's no-contest pleas is not a fair and just reason for him to withdraw his pleas. First, the court found Paholke was "well aware" of the potential defense that would be based on Baker's opinion, both before and at the time he pled. Paholke and his trial counsel explained that they retained Baker specifically to provide support for the defense that Paholke had "done everything right" and he was simply following the doctors' advice. They had consulted with Baker on this matter before Paholke pled. Yet Paholke still chose to enter his pleas.[6]

¶20 Under these circumstances, the circuit court reasonably concluded that if Dr. Baker's opinions were critical to Paholke's decision to plead, then Paholke could have required Baker to expedite his work so as to reach an opinion—even if it was not reduced to writing—before Paholke went ahead and pled. Indeed, the delay in receiving Baker's opinion appears to have been caused by Baker being on vacation for a few weeks prior to the pleas. Paholke knew about this fact at the time he pled.

¶21 The circuit court also found Paholke's reasons for plea withdrawal incredible based in part upon "his own remarks to [the court] at the time of the plea." During the circuit court's thorough plea colloquy, the court specifically asked Paholke if there was anything more he needed to review before going

[6] Indeed, the circuit court stated at a hearing on Paholke's motion to adjourn the trial (which hearing happened a few weeks before Paholke pled), that it was not going to postpone the trial "based on theories that may or may not come out" from those experts.

forward with his pleas. Paholke answered in the negative. Because the circuit court raised at the plea hearing the possibility that defense matters of which Paholke was aware might affect his decision to plead no contest, and Paholke disclaimed any need to further review such matters, Paholke faces additional difficulty showing a fair and just reason for plea withdrawal. *See* ***Jenkins***, 303 Wis. 2d 157, ¶60.

¶22 Here the circuit court's adverse credibility finding comes into play. When Paholke was specifically asked at the motion hearing about this exchange from the plea hearing, his only response was to say he still pled without having Baker's opinions because his trial counsel essentially coerced him into making the pleas. But the court made an express finding counsel did *not* coerce him into entering his pleas. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Muellenberg***, 363 Wis. 2d 582, ¶20. At the motion hearing, Paholke also admitted that neither he nor his counsel ever alerted the court during the plea hearing that he was waiting for a report from Baker.

¶23 The foregoing leads us to conclude that the circuit court reasonably exercised its discretion. Paholke has failed, both before the circuit court and on appeal, to articulate any cogent argument connecting his decision to plead and Dr. Baker's opinion and report, which matters Paholke undisputedly knew were "in the works" at the time of his pleas. Furthermore, given the circuit court's specific inquiry at the plea hearing on whether Paholke needed to review anything else before entering a plea, Paholke had the express opportunity and invitation to address Baker's forthcoming expert opinion. Under these circumstances, it was not a matter completely "outside the plea colloquy record." ***Jenkins***, 303 Wis. 2d 157, ¶62. The absence of Baker's opinion and report could have been raised during the plea hearing; Paholke chose not to.

¶24 In addition, the circuit court reasonably concluded that Dr. Baker's report was vague and not very probative in the overall context of Paholke's case. These deficiencies support the circuit court's determination that Paholke inadequately explained why Baker's opinions caused him to change his mind on pleading no contest. For example, it was quite unclear what Baker was actually opining and why he was so opining, given the way the report was phrased. The report stated that the younger victim had a certain level of autism, and thus provided some support for Paholke's allegation that she was "perhaps" misdiagnosed. *See supra* ¶3. And while the report stated in a conclusory fashion that "Paholke's parental involvement is not viewed as intentional abuse to [his younger child]," this statement is belied by the rest of the evidence in the record. Indeed, Baker never offered any truly exculpatory opinion, either on Paholke not having committed the acts of which he was accused or on the objectively abusive nature of some of those acts.[7]

¶25 The circuit court also explained that Baker was a "cold witness." According to the court,

> [h]e didn't talk to any of the kids, he didn't personally deal with any of this. He's being basically brought in to give his color commentary and opinions on what others have done who did have hands-on treatment, and he's named as a witness so he was available at the trial to do that.

In other words, both Baker's failures to conduct any real investigation or in-person medical evaluation, as well as the vagueness and other limitations of his written

[7] For example, the complaint alleged such conduct as: (1) Paholke locking the children in their bedrooms "all of the time," letting them out only to exercise, perform chores, and eat; and (2) Paholke zip-tying one child's hands above her head to a pole near a swimming pool on a very hot day, causing her to get very hot, eventually pass out, and suffer severe burns.

opinion, militate against finding this opinion constitutes a fair and just reason for plea withdrawal. This is not a case in which, after entering a plea but prior to sentencing, a defendant learns of genuinely exculpatory evidence or expert opinions, and then seeks to withdraw his or her plea. These were reasonable critiques by the circuit court of Paholke's proffered reason for plea withdrawal.

¶26 Finally, we note that existing case law does not appear to support a conclusion that the issues surrounding Dr. Baker's retention represent a fair and just reason for Paholke to withdraw his pleas. While determinations of whether a fair and just reason exist are inherently done on a case-by-case basis, ***Jenkins***, 303 Wis. 2d 157, ¶43, our courts' prior decisions are informative and were properly considered by the circuit court when exercising its discretion. The circumstances surrounding Baker's report and Paholke's decision to plead do not fit within some of the broad categories that have been found to constitute such a reason. *See, e.g.*, *supra* ¶10. Furthermore, Paholke cites to no authority permitting plea withdrawal in circumstances analogous to those present in this case.

¶27 We find our supreme court's analysis in ***Jenkins*** somewhat analogous and supportive of the State's position. In ***Jenkins***, the defendant sought to withdraw his plea before sentencing, claiming he misunderstood the consequences of his plea because he thought that he would be guaranteed the opportunity to work with law enforcement so as to potentially affect his sentence. ***Jenkins***, 303 Wis. 2d 157, ¶3. Ultimately, that opportunity did not occur. ***Id.***, ¶¶17, 20. In agreeing with the circuit court's decision to deny Jenkins' plea withdrawal, the supreme court stated:

> The circuit court did not explicitly state during the motion for plea withdrawal that it did not believe that Jenkins misunderstood the consequences of his plea, but the court rejected the proffered misunderstanding when it stated that

> Jenkins simply had a "hope that did not come to fruition." The circuit court made this statement right after it heard Jenkins explain what he thought was going to happen.
>
> The circuit court's statement supports the inference that the circuit court found that Jenkins understood the consequences of the plea and simply took his chances on whether he would be able to meet with law enforcement and benefit from that encounter. Like the defendant in ***Dudrey*** [***v. State***, 74 Wis. 2d 480, 247 N.W.2d 105 (1976)], when Jenkins realized that his chances had passed, he decided to withdraw his plea. As we have stated, "[t]he defendant must show some reason more than a mere desire to have a trial." There must be some fair and just reason for a "change of heart." In its post-conviction decision, the circuit court explicitly found that Jenkins did not misunderstand the consequences of his plea.

Jenkins, 303 Wis. 2d 157, ¶¶73-74 (citations omitted).

¶28 While the circumstances here and in ***Jenkins*** are obviously different, we still find the supreme court's analysis analogous and helpful to our review of the circuit court's decision. We understand the circuit court to have found Paholke knew he would eventually get a report with an opinion from Baker. The opinion may have helped his defense, or it may not have. Knowing this, he still chose to plead, presumably believing the report would not be helpful. When he found out otherwise (at least in his mind), he decided to withdraw his pleas.

¶29 In sum, based on the totality of the circumstances regarding Dr. Baker's report as well as Paholke's no-contest pleas, the plea colloquy, and his motion to withdraw his pleas, the circuit court reasonably exercised its discretion in concluding Paholke had not adequately explained his change of heart so as to provide a fair and just reason for plea withdrawal. Necessarily then, all that remains is the conclusion that Paholke's desire to withdraw his pleas is based on a

mere change of heart. That is insufficient, and the circuit court did not err in denying Paholke's motion to withdraw his pleas before sentencing.[8]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16).

[8] Because we conclude the circuit court reasonably denied Paholke's motion based upon his failure to advance a fair and just reason for allowing him to withdraw his pleas, we need not address the State's alternative argument that it proved it would suffer substantial prejudice if Paholke was allowed to do so.