

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 1, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP415-CR**

**Cir. Ct. No. 2013CF191**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES M. KRUGER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Grant County:  
ROBERT P. VANDEHEY, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Fitzpatrick, 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. James Kruger appeals a judgment of conviction for armed robbery, strangulation and suffocation, and false imprisonment, all as a repeater. Kruger argues that the circuit court erroneously exercised its discretion when it denied his motion to withdraw his no contest pleas. Because Kruger did not satisfy his burden of establishing a fair and just reason for plea withdrawal, we affirm.

### BACKGROUND

¶2 In 2013, Kruger was charged with sixteen counts following an incident in which he attacked his uncle, stole money and weapons, and threatened strangers at gunpoint.<sup>1</sup> We take the following facts from the criminal complaint. Early one morning, Kruger arrived at his uncle's house and was acting in an irrational and paranoid manner. He pointed a gun at his uncle, threatened to kill him, grabbed him by the throat, pushed him to the ground, and held his throat while continuing to make threats. Kruger then ordered his uncle to open his safe. As Kruger was attempting to open the safe, Kruger's uncle started to walk out of the house, but Kruger chased him, grabbed him by the throat again, and eventually dragged him back to the safe. After opening the safe, Kruger left his uncle's home with collectible coins and other currency, as well as weapons.

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<sup>1</sup> Kruger's brief identifies the victims by name, which is no longer permitted. *See* WIS. STAT. RULE 809.86(4) (2015-16) (appellate briefs in certain matters, including criminal appeals, "shall not, without good cause, identify a victim by any part of his or her name but may identify a victim by one or more initials or other appropriate pseudonym or designation"). We caution counsel to be mindful of this rule in the future. In addition, we order that the Clerk of the Court of Appeals withdraw Kruger's brief-in-chief from the public record, and we order that counsel for Kruger shall, within twenty days of the date of this opinion, file a substitute brief-in-chief which complies with § 809.86(4). *See* § 809.86(5) ("For good cause, the court may make any order necessary to protect the identity of a victim").

¶3 Kruger then proceeded to accost two strangers, a husband and wife, at gunpoint, entering their home and making various threats to kill himself or to kill them. In order to get Kruger out of his house and away from his wife, the husband offered to drive Kruger to a different location. The husband asked Kruger to leave his weapons behind, but Kruger refused. After driving several miles with Kruger, the husband asked Kruger to drop him off and continue without him, but Kruger refused. The husband eventually alerted authorities during a stop at a gas station, and Kruger was arrested when he crashed the vehicle following a high speed police chase.

¶4 Kruger initially pleaded not guilty to all sixteen charges, as well as not guilty by reason of mental disease or defect (“NGI”). A series of competency hearings ensued over the next two years, with the circuit court repeatedly finding Kruger not competent to proceed, then finding that Kruger had regained competency after treatment. In early October 2015, at a time when Kruger was under a determination that he was competent, Kruger’s attorney indicated that Kruger intended to enter a no contest plea. Specifically, Kruger agreed to concede the facts of three counts and proceed to trial on his NGI defense, leaving the jury to determine whether Kruger was mentally responsible for these crimes. In return, the prosecutor agreed to dismiss the other thirteen counts and to recommend a maximum sentence of twenty-five years, to be served concurrently with a separate federal sentence.

¶5 The circuit court accepted Kruger’s pleas at a hearing in late October 2015. During that hearing, the circuit court confirmed with Kruger that he was not impaired and that he understood the rights that he was waiving by pleading no contest. The circuit court also confirmed with Kruger’s attorney that Kruger was lucid and able to communicate effectively with counsel.

¶6 In early December 2015, Kruger was again determined to be not competent. After Kruger regained competency in February 2016, Kruger informed the court that he was considering whether to withdraw his pleas on the ground that he was not properly medicated at the time of the plea hearing. The circuit court held a hearing on plea withdrawal, and Kruger testified that he had not been taking his regular medications and that he was in a state of psychosis or delusion at the plea hearing. Kruger explained that he wanted to change his no contest pleas to not guilty pleas in order to be able to present the jury with evidence that he was coerced into robbing his uncle by various law enforcement officers. Kruger stated that he was prepared to face the full sentence (sixty years) so long as he had the opportunity to tell the jury about the conspiracy to coerce him to keep quiet and take the guilty plea.

¶7 The circuit court denied Kruger's motion to withdraw his pleas, finding that Kruger had not satisfied his burden of demonstrating a fair and just reason for withdrawal. Kruger proceeded to a responsibility phase jury trial addressing whether he was mentally responsible for the three counts to which he had pleaded no contest. Kruger testified that he committed these crimes as a result of coercion by a vast law enforcement conspiracy. Two medical professionals also testified about Kruger's mental state. The jury found that Kruger was mentally responsible for his crimes. Specifically, the jury determined that Kruger had a mental disease or defect at the time of the crimes, but further determined that Kruger did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. On the armed robbery count, Kruger was sentenced to fourteen years of initial confinement and eleven years of extended supervision, with shorter concurrent sentences imposed

for the other two counts. All sentences were ordered to be served concurrently with Kruger's federal sentence in a separate case. Kruger appeals.

## DISCUSSION

¶8 A circuit court should “freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.” *State v. Jenkins*, 2007 WI 96, ¶2, 303 Wis. 2d 157, 736 N.W.2d 24 (quoting *State v. Bollig*, 2000 WI 6, ¶28, 232 Wis. 2d 561, 605 N.W.2d 199). The defendant has the burden of proving a fair and just reason by a preponderance of the evidence. *Id.*, ¶32.

¶9 The circuit court's decision to deny a motion to withdraw a plea is reviewed for an erroneous exercise of discretion. *Id.*, ¶30. “This discretion gives the circuit court latitude in assessing the defendant's reason and determining whether it is fair and just under the circumstances.” *Id.*, ¶29. We review the circuit court's findings of historical fact and credibility determinations under “a deferential, clearly erroneous standard.” *Id.*, ¶33. Our standard of review means that we will “uphold a circuit court's discretionary decision if there is good justification for the decision present in the record.” *Id.*, ¶35.

¶10 Here, the circuit court determined that Kruger's claim that he was psychotic and delusional at the time of the plea hearing was not credible, based in large part on the court's own observations that Kruger was lucid and in control of his faculties at the time of the plea hearing. The court viewed Kruger's motion for plea withdrawal as an attempt to delay proceedings, based on evidence that Kruger was malingering coupled with the fact that Kruger did not appear to have a viable defense. The court concluded that Kruger did not prove by a preponderance of the evidence that Kruger had a fair and just reason for plea withdrawal.

¶11 Kruger contends that he had a fair and just reason for withdrawing his plea. Specifically, he contends that he was not properly medicated in the weeks before he entered his plea, and he wanted the jury to hear evidence that he was coerced into committing the crimes, on the slim chance that he would be exonerated. Kruger further contends that the circuit court considered improper factors when it evaluated whether he had a fair and just reason.

¶12 We begin with Kruger's argument that he was not properly medicated in the weeks before he entered his plea. Kruger testified that he was not medicated while in the Grant County jail awaiting the plea hearing. Kruger further testified that as a result, he "was in a state of psychosis" at the time he accepted the plea. In denying Kruger's motion for plea withdrawal, the circuit court explained that it was obvious at the plea hearing that Kruger was not delusional or psychotic. To the contrary, both the court and Kruger's attorney observed that he was lucid. The court further explained that Kruger was calm and in control of his faculties during the plea hearing, particularly as compared to his behavior during periods when he was not taking his medications.

¶13 Kruger faces an uphill battle in asking us to reject these findings. *See Jenkins*, 303 Wis. 2d 157, ¶33 (applying a "deferential, clearly erroneous standard" to the circuit court's credibility determinations and findings of historical fact). Kruger relies heavily on a handwritten note that appears on his plea questionnaire, next to the question of whether Kruger had taken any medications or drugs within the last 24 hours. The box for yes is checked, and the notation next to it reads "Lithium (Seroqu[e]) for bipolar and antipsychotic." There is an arrow pointing to another notation which reads, "prescription stopped by jail." Kruger argues that this notation corroborates his subsequent testimony that his prescription medication was not being provided to him. But the plea questionnaire

plainly states that Kruger had taken medication in the last 24 hours, and Kruger's attorney confirmed to the court during the plea hearing that Kruger was medicated and lucid.<sup>2</sup>

¶14 Kruger argues that his interpretation of the note is confirmed by the fact that he was determined to be incompetent several weeks after the plea hearing. This argument relies on a motion from Kruger's attorney to the court file stamped November 24, 2015, requesting a new competency evaluation. The motion refers to reports to Krueger's attorney from Kruger's parents and a jail sergeant that Kruger's behavior and perception had deteriorated over the last week. The motion also refers to a nurse's report that the changes in Kruger's behavior occurred after a new medication was introduced. However, the motion contains no information about when the new medication was introduced, or when the nurse first observed changes. Thus, while the motion helps Kruger establish his mental state as of mid-November, it does not establish that he was improperly medicated, or delusional or psychotic at the time the circuit court accepted his no contest pleas in late October.

¶15 Kruger also argues that there was no evidentiary basis for the circuit court's determination that Kruger was attempting to delay proceedings by withdrawing his pleas. Kruger points out that the record contains no indication that he used competency determinations to delay proceedings; to the contrary, Kruger argues that he challenged a determination that he was not competent to proceed, which suggests that he was actually trying to expedite the trial process.

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<sup>2</sup> Kruger's attorney subsequently informed the court that he may have misspoken. He speculated that it was possible that Kruger had only received one of the medications or had been refusing to take both of his medications. However, speculation does not help Kruger meet his burden of establishing by a preponderance of the evidence that Kruger was not properly medicated at the time of the hearing.

However, Kruger is incorrect in arguing that the circuit court's determination was baseless. Specifically, the circuit court relied on two doctor's reports indicating that Kruger was malingering.

¶16 Moreover, Kruger's contention that he had no reason to delay and every reason to go to trial quickly is undermined by Kruger's own testimony at the plea hearing, when he suggested that the reason he wanted to go to trial was because the prosecutor was unwilling to change the plea deal to which Kruger had already agreed. Specifically, Kruger testified, "We're arguing over six months at this point. We're willing to go to a trial over approximately six months, and I think we should." This testimony further supports the circuit court's concern that Kruger might have been acting strategically when he refused to take his medications.

¶17 Finally, Kruger argues that the circuit court considered improper factors in determining that Kruger did not have a fair and just reason for plea withdrawal. Specifically, Kruger contends that the remote likelihood of success of Kruger's coercion "defense"<sup>3</sup> was not relevant to whether Kruger had offered a "fair and just reason" for plea withdrawal. We disagree. Kruger has the burden of demonstrating an adequate reason for withdrawing his plea. *Jenkins*, 303 Wis. 2d 157, ¶¶31-32 (explaining that belated misgivings about a plea or a desire to have a trial are not adequate reasons for plea withdrawal). The question of whether

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<sup>3</sup> The circuit court explained that Kruger would be able to present his claims of a conspiracy at the NGI phase, and that this was the appropriate phase for the jury to evaluate this information. The court further noted that the federal district court had rejected a defense of coercion. We see nothing in Kruger's brief, or anything in the record, to support the assertion that Kruger's claims amounted to any sort of defense on the merits. Accordingly, to the extent that Kruger is arguing that he had a viable defense, we reject that argument as undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).



Kruger had a viable defense relates to whether Kruger had an adequate reason that went beyond belated misgivings or changing his mind about wanting a trial.

¶18 Kruger also argues that the circuit court erred in relying on the transcript of the plea hearing, and particularly Kruger's assertions that he understood the proceedings. Kruger points out that a person suffering from a mental disorder might not be aware of his own impairments at any given time. However, the transcript was not the sole basis, or even the main basis, for the circuit court's determination. Instead, the circuit court relied primarily on its own observations of Kruger's lucidity at the plea hearing, which were confirmed by Kruger's attorney. To the extent that the transcript supports these observations, the court did not err in relying on it.

¶19 Applying our deferential, clearly erroneous standard of review, we conclude that the circuit court did not clearly err in determining that Kruger was not credible when he testified that improper medication caused him to be delusional or psychotic at the plea hearing. We therefore uphold the circuit court's determination that Kruger did not have an adequate reason for withdrawing his pleas.

## CONCLUSION

¶20 Because Kruger did not satisfy his burden of demonstrating a fair and just reason to withdraw his pleas, the circuit court did not erroneously exercise its discretion in denying his motion for plea withdrawal. We therefore affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

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

