

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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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.

No. 00-1970-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY A. SUSLICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Anthony A. Suslick appeals from the judgment of conviction entered against him. The issue on appeal is whether the circuit court erroneously exercised its discretion when it refused to allow Suslick to withdraw his pleas. Because there is support in the record for the circuit court's decision,

we cannot conclude that the court erroneously exercised its discretion. Therefore, we affirm.

¶2 Suslick was charged in 1996 with four counts of second-degree sexual assault, one count of false imprisonment and one count of battery. At the preliminary hearing, the court ordered that Suslick be evaluated to determine his competency. In September 1996, the court found that he was not then competent and ordered him committed with periodic progress reports to be filed. At a competency hearing in January 1997, the court continued Suslick's commitment. At another competency hearing in September 1997, three different experts offered testimony about Suslick's competency. Two of them testified that he was competent and one testified that he was neither competent nor incompetent.¹ The court found Suslick competent and a preliminary hearing was held.

¶3 At the preliminary hearing, Suslick entered pleas of not guilty by reason of mental disease or defect. The doctors appointed by the court to examine Suslick subsequently determined that while he was mentally ill at the time of the crimes, he did not meet the other criteria for not guilty by reason of mental disease or defect. The defense then withdrew these pleas.

¶4 In February 1998, the State and Suslick entered into a plea agreement whereby Suslick pled no contest to one count of third-degree sexual assault, one count of false imprisonment and one count of battery. The State agreed not to make a specific sentence recommendation. The court conducted a plea colloquy with Suslick before accepting his pleas. On the day set for

¹ One of the doctors who testified that Suslick was competent testified at a later hearing that she had been wrong when she concluded he was competent.

sentencing, the defense moved to allow Suslick to withdraw his pleas. The grounds for the motion were that Suslick had repeatedly maintained his innocence, and that he had expressed considerable confusion concerning the pleas, and that as a result of his various mental illnesses and medications, he did not enter his pleas voluntarily and freely. Defense counsel also advised the court that he again doubted Suslick's competency to proceed.

¶5 The court again ordered competency evaluations to be performed. In September 1998, the court determined that Suslick was not competent to proceed with sentencing or the motion to withdraw his pleas. Periodic review reports were filed, and in April 1999, the court suspended criminal proceedings against Suslick.

¶6 In October 1999, the State moved to reexamine Suslick because he had been discharged from his WIS. STAT. ch. 51 (1999-2000) commitment. The court again ordered a competency evaluation. At this competency hearing, the two experts appointed offered conflicting testimony. The expert who testified that Suslick was not competent was one of the experts who had testified at an earlier hearing that he was competent. She testified that she had erred when she previously found Suslick to be competent. The court ruled that Suslick was competent at that time and set the matter for a hearing on his motion to withdraw or for sentencing.

¶7 At the hearing on the motion to withdraw, defense counsel stated that he believed shortly after Suslick entered his pleas that Suslick remained incompetent. Subsequently, the court found that Suslick was not competent. Counsel also argued that Suslick had consistently maintained his innocence. Counsel further stated that in conversations with counsel and doctors after the pleas, Suslick did not remember having entered the pleas. Further, counsel stated

that Suslick believed that he would be sentenced to a hospital and not to prison. Counsel argued that this constituted a hasty entry of the pleas because of his misunderstandings. Counsel concluded that because of the continuing issue of Suslick's competency he could very well have been confused at the time he entered the pleas.

¶8 The State argued that the transcript of the plea hearing did not show that Suslick was confused, but in fact established that he understood the proceedings and what he was doing by entering the pleas. The State argued that there was no evidence to establish a genuine misunderstanding. The State also said that the pleas were not hasty because they were entered two years after Suslick was charged and he waited two months to move for the plea withdrawal. In response to a question from the court, the State also asserted that it would be prejudiced by the delay. Defense counsel then responded that the negotiations on the pleas entered began only a few days before the pleas were entered.

¶9 The court denied the motion. The court first discussed the haste issue and found that Suslick entered the pleas a year and one-half after he was charged, and that he had that entire time period to decide whether he wished to accept the pleas or go to trial. As to his claim of innocence, the court noted that this claim was not new and that Suslick had entered an *Alford* plea.² The court found that since he always claimed that he was innocent, he could have availed himself of a jury trial. As to the claim that he was incompetent at the time he entered the pleas, the court found that the transcript of the plea hearing established that Suslick was competent when he entered the pleas. The court further noted

² *North Carolina v. Alford*, 400 U.S. 25 (1970). Suslick actually entered a plea of no contest.

that the transcript made it clear that the State would be recommending prison time and not hospitalization. Although it stated that it did not need to reach this issue, the court also noted that the State would be prejudiced by the delay if the court allowed Suslick to withdraw his pleas. The court sentenced Suslick to the maximum possible of seventeen years in prison on all three charges.

¶10 A defendant should be allowed to withdraw a guilty plea before sentencing for any fair and just reason unless the prosecution would be substantially prejudiced. *See State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). A fair and just reason “is not an absolute right” but contemplates the showing of some adequate reason for the defendant’s change of heart. *Id.* at 583. “The reason must be something other than the desire to have a trial. In addition, the burden is on the defendant to offer a fair and just reason for withdrawal of the plea.” *Id.* at 583-84 (citations omitted). We review the circuit court’s decision to deny the defendant’s motion to withdraw his or her plea under the erroneous exercise of discretion standard. *Id.* at 579. We will sustain a discretionary act of the circuit court if that court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶11 We cannot conclude in this case that the circuit court erroneously exercised its discretion when it refused to allow Suslick to withdraw his pleas. The court found that there was no evidence at the time Suslick entered his pleas that he was not competent to do so. The court further found that since Suslick had maintained his innocence all along, he was not confused about whether he was guilty or innocent but that, in essence, he was just changing his mind. The court concluded that this was not an acceptable reason for allowing Suslick to withdraw

his pleas. We discount the circuit court's reliance on the fact that Suslick had a year and a half between the time he was charged and the time he entered his pleas as a retort to the claim that haste drove him to accept a plea. The fact is, he was incompetent during much of this time. So, he could hardly be considering whether to plead or stand trial. That finding is clearly erroneous. Nonetheless, the circuit court also found that Suslick was not incompetent and not confused when he actually entered his pleas. That particular finding is not clearly erroneous and drives the result. Based on the circuit court's findings of fact, we agree that the desire to have a trial is not a sufficient reason to withdraw a plea. Consequently, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

