**COURT OF APPEALS DECISION DATED AND FILED**

**April 17, 2007**

**David R. Schanker**
**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. 2006AP869-CR**

**Cir. Ct. No. 2003CF7288**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEMETRICE D. KEITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA LAMELAS, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Demetrice D. Keith pled guilty to two counts of second-degree intentional homicide, while armed, party to a crime. *See* WIS.

STAT. §§ 940.05(1), 939.63 and 939.05 (2003-04).[1] Prior to sentencing, Keith moved to withdraw his plea as not knowingly, voluntarily and intelligently entered. The circuit court denied the motion, and sentenced Keith to concurrent terms of sixty years of imprisonment, each comprised of forty years of initial confinement and twenty years of extended supervision. Postconviction, Keith renewed his motion to withdraw his plea. The circuit court again denied the motion. Keith now appeals, and the only issue on appeal is whether Keith should have been allowed to withdraw his guilty plea. We affirm.

*Background*

¶2 Keith was charged with two counts of first-degree intentional homicide, while armed, and one count of attempted armed robbery, all as party to a crime. The homicide charges stemmed from the shooting deaths of two men who had arranged to purchase some marijuana from Keith and some friends. The attempted armed robbery occurred when Keith and friends went to the house of a suspected cocaine dealer in search of cocaine and money, but they found nothing of value to steal. Both incidents took place on December 11, 2003.

¶3 While the charges were pending, a question as to Keith's competency to proceed was raised. *See* WIS. STAT. § 971.14(2). Psychological examinations were conducted, and on June 4, 2004, the circuit court determined that Keith was not competent but that he was likely to become competent within twelve months. *See* WIS. STAT. § 971.14(5). The underlying criminal prosecution was suspended, and Keith was committed for treatment. After three months of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

treatment, Dr. Gary Maier opined that Keith was now competent. *See* WIS. STAT. § 971.14(5)(b). Keith contested that finding, and additional examinations were conducted. After a multiple-day hearing during which four doctors testified, the circuit court found that Keith was competent to proceed, and it reinstated the criminal proceedings on January 14, 2005. *See* WIS. STAT. § 971.14(4)(c).

*The Plea Hearing*

¶4 Keith moved to suppress statements given to police, and a ***Miranda-Goodchild***[2] hearing was scheduled for May 5, 2005. At the outset of the hearing, Keith requested new counsel. Keith told the circuit court that he did not think his attorneys[3] were "doing good enough." He also said that he "don't want to take no plea, and pretty much I think I'm being pressured to take this plea, and I don't want to." The circuit court told Keith that he did not have to plead guilty and that it was his decision whether to have a trial. The attorneys told the circuit court that they were prepared to try the case.

¶5 The circuit court denied Keith's request for new counsel. The circuit court noted that the case had been pending for a long time and that trial was imminent. The circuit court noted that a change in attorneys would delay the trial and that Keith had not offered a "reason for a new lawyer." The circuit court told Keith that his attorneys are required to tell him about any offered plea bargains and to discuss the advantages and disadvantages of going to trial or accepting a plea bargain. The circuit court told Keith that such a discussion did not mean that

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[3] Keith was represented by Attorney Cynthia Wynn and Attorney Robin Dorman.

they would not do their best if the case went to trial or that he had to accept the plea bargain. The court explained to Keith that he could have a trial if he wanted one.

¶6 After a recess, Keith's attorneys told the circuit court that he had decided to accept the plea bargain offered by the State and that he would not be proceeding with the suppression motion. The circuit court explained that his motion would not be heard, and Keith told the court he understood.

¶7 The State outlined the terms of the plea bargain—Keith would plead guilty to being party to a crime of two counts of second-degree intentional homicide, and the State would recommend fifteen years on each count "to run one after the other." The State told the circuit court that the "while armed" enhancer to the homicide charges would be dismissed. The State also agreed to dismiss the attempted armed robbery count.[4] The State explained that the "mitigating circumstance" underlying the amendment was "unnecessary defensive force." *See* WIS. STAT. §§ 940.05(1)(b), 940.01(2)(b). The State also explained that if the guilty plea did not go forward, it would withdraw its concession that a mitigating circumstance existed. Keith told the circuit court that the State's explanation made sense.

¶8 The circuit court then asked Keith whether the State had correctly set forth the terms of the plea bargain. He replied, "What you mean, like have you told me or --." The circuit court asked the State to restate "what [the State] is

[4] The State indicated that it also had agreed to dismiss an unrelated hit-and-run charge, but that charge could not be resolved at this time because the State had not yet notified and consulted with the victim. *See* WIS. STAT. §§ 950.04(1v)(g), 971.095.

willing to do in exchange for [Keith's] guilty pleas." After the State did so, and Keith's attorney agreed that the plea bargain was accurately described, the circuit court again asked Keith if that was his understanding of the plea bargain. Keith replied, "No. I could have sworn it was a reckless, second degree reckless homicide." One of Keith's attorneys then asked Keith if he remembered co-counsel "read[ing] … word-for-word the jury instruction from the homicide, second degree intentional homicide?" Keith replied, "[a]ll right," and he then agreed that the State had correctly described the plea bargain.

¶9 The circuit court and the State then described the factual underpinnings of each charge, as amended by the plea bargain, and explained that, in each instance, Keith had caused the death of the victim, with intent to kill and with the belief that he was in imminent danger of death or great bodily harm. Further, although the force used to defend himself was necessary, Keith's belief that he was in imminent danger was unreasonable. When the circuit court asked Keith if he understood the charges, Keith replied that he did, but then said that he did not understand the meaning of "amended." The circuit court explained that "amended" means a change, and Keith then told the circuit court that he understood and did not have any questions.

¶10 The circuit court went on to conduct a plea colloquy with Keith. The circuit court described the maximum sentence and told Keith that it could impose the maximum sentence and did not have to follow the State's recommendation. Keith said he understood. The circuit court explained that a term of incarceration would contain both periods of initial confinement and extended supervision and that good time and parole no longer existed. Keith said he understood.

¶11 Keith told the circuit court that he had signed the plea questionnaire and waiver of rights form after reviewing it with his lawyers and that he understood the information on the questionnaire and form. Keith told the circuit court that his attorneys had explained the constitutional rights that he was giving up by pleading guilty. The circuit court then explained each right to Keith who again said that he understood the right and that his guilty plea would waive the right. Keith told the circuit court that he also reviewed the addendum to the plea questionnaire and form with his attorneys, and that he understood he was giving up the right to "challenge the constitutionality of the way that the police officers acted" and that he was giving up any defenses "except in the way that [self-defense exists in] the charge." The circuit court then asked Keith if he had any "questions about any of this" Keith replied, "no," and said he was "sure" about that answer.

¶12 The circuit court told Keith that the elements of a crime are "the component parts" that "the [S]tate has to prove … beyond a reasonable doubt." The circuit court explained the elements of second-degree intentional homicide and Keith said he understood them. Keith told the circuit court that his lawyers had read the jury instructions for the crime to him and that he understood them. The circuit court explained what it meant to be a party to a crime, and Keith asked why he was "being charged with aiding and abetting, party to a crime, a homicide, … [because] it seems like [he's] the only one that's been charged?" The State explained that it believed Keith to be the "shooter" but because Keith denied being the shooter in one of his statements to police and because another person was with Keith, the State had charged him as party to a crime. Keith's attorney rejected the State's offer to drop the party to a crime allegation. The circuit court explained that the State was "taking the position … that whether you

were the shooter or the other person was the shooter," Keith was "still guilty as party to a crime." Keith then told the circuit court that he understood.

¶13 Keith told the circuit court that he had not been promised anything other than the terms of the plea bargain and that no one had threatened him. Keith denied using any drug, alcohol or medication that day. He told the circuit court he was pleading guilty because he was guilty and that he was satisfied with his lawyers' representation. The circuit court found that Keith was entering his guilty pleas freely, voluntarily, and intelligently, with an understanding of the crimes, the possible penalties and the constitutional rights waived by the pleas. Keith told the circuit court that his lawyers had read the Criminal Complaint to him and that the information in the Criminal Complaint was correct. Keith's lawyer agreed that the circuit court could rely on the allegations of the Criminal Complaint as a factual basis for the guilty pleas.

*Motion for Plea Withdrawal*

¶14 On May 26, 2005, Keith sent a letter to the circuit court in which he indicated that he wanted to withdraw his guilty pleas. New counsel was appointed to represent Keith, and a formal motion to withdraw was filed. In the motion, Keith asserted that he did not knowingly, intelligently and voluntarily enter his guilty pleas. He also asserted he "was hastily and inadequately informed of potential defenses" and that he "was pressured by his attorneys to change his plea and enter guilty pleas." Keith claimed that "he was confused and upset by his lawyers' handling of his case" and that "his potential defenses [were] … brushed aside."

¶15 The circuit court held two evidentiary hearings on the motion, at which Keith and both of his former attorneys testified. Keith testified at the first

hearing. Keith testified that he wanted to withdraw his guilty pleas because he was "innocent" and "did not kill anybody." When asked why he admitted to the crimes at the plea hearing, Keith said that his "lawyers [were] talking me into taking the plea, [and] cohersing [sic] me into taking the plea." Keith said that he did not have enough time to talk with them before he pled guilty. Keith testified that he talked with his lawyers about once a month while the case was pending. He complained that they did not come to see him unless he called, and they did not "tell [him] anything unless it's a plea been [sic] offered." Keith testified that he did not understand "the consecutive part" of the plea bargain and that he thought the plea bargain called for concurrent sentences. Keith testified that he asked for a new lawyer because his lawyers were not "supporting [him] right" and they were not "going to fight for [him] at trial." He testified that they repeatedly told him to plead guilty, and that he would "get life" if he did not plead guilty. Keith testified that he told his lawyers that he wanted to go to trial because he was innocent.

¶16 Keith testified that after the circuit court denied his request for a new lawyer, "there was the plea offered to me" and his attorneys "said they wanted to talk to me in the back." They reviewed "some plea agreement papers" with him for fifteen or twenty minutes. He acknowledged signing the plea questionnaire and waiver of rights form. Keith testified that he did not ask questions during the colloquy because he "kind of gave up." Keith testified that he did not understand the information on the addendum about giving up any defenses. He also testified that he pled guilty because he "was pressured by [his] lawyer" who "kept telling me to plead guilty" and "talked me into pleading guilty." Keith testified that he "really didn't want to plead guilty" and "really wanted to go to trial." Keith admitted that he understood the charges but that he was "confused" because he "thought it was reckless homicide" and because the State "was trying to give [him]

a deal for party to a crime a second degree intentional homicide, self-defense; and why would you all do that [when] you all said [he was] the shooter."

¶17 On cross-examination, Keith admitted that when he asked questions during the plea hearing and when the circuit court explained things to him, he understood, but he "didn't really, you know, in my heart agree with it." Keith testified that "part of it I kind of understood, and I kind of didn't" and he "really gave up." When asked whether he was lying when he told the circuit court that he understood, Keith replied that he "was going along with [his] lawyer and taking the plea." Keith testified that he did not remember the circuit court's explanation of the elements and that he "said yes to a lot of things" during the hearing. Keith testified that his lawyers first talked to him about the State's offer and a possible plea "about two weeks" before the hearing. Keith testified that his lawyers read the Criminal Complaint to him "back in 2003."

¶18 At the next hearing date, both of Keith's former trial attorneys testified.[5] Cynthia Wynn testified that she and her co-counsel, Robin Dorman, had represented Keith since he was charged in 2003. During that time, she spoke with Keith more than twenty-five times, and she had visited him in jail and at Mendota Mental Health Institute when he was committed. Given the length of her representation, Wynn acknowledged that Keith's claim of monthly visits may be accurate. She testified that Dorman talked with Keith more often than she did.

¶19 Wynn testified that she first talked with Keith about the proposed plea bargain after he was found competent, probably in February or March, 2005.

[5] The circuit court first ascertained that Keith knowingly and voluntarily was waiving attorney-client privilege. *See* WIS. STAT. § 905.03.

During that time, she saw him twice in jail, and spoke with him on the telephone two or three times. She testified that Dorman took the lead in explaining the proposed plea bargain and Keith told them that he was not interested and that he wanted a trial.

¶20 Wynn testified that they had a "lengthy visit" with Keith the evening of May 4, the night before the scheduled suppression hearing. Wynn met with Keith for about one hour that night and Dorman stayed longer. She and Dorman "really explained the plea, the pros and cons to him, and he listened, and we talked about it, and then ultimately, he said no, I want to have a trial." They explained the difference between consecutive and concurrent sentences to Keith, and he appeared to understand. Wynn admitted telling Keith that if he were convicted at trial, he could be sentenced to life in prison without parole. Wynn denied telling Keith he would definitely go to prison for the rest of his life.

¶21 Wynn testified that after the circuit court denied Keith's request for new counsel on May 5, she and Dorman "talked to him briefly" and Keith said he wanted to plead guilty. Dorman began reviewing the plea questionnaire and waiver of rights form with Keith while she went to get the relevant jury instructions. Wynn testified that she had previously reviewed the jury instructions with Keith, and that Dorman again explained second-degree intentional homicide after Keith said he wanted to plead guilty.

¶22 Wynn testified that she had "encouraged" Keith to take the plea bargain because she believed it to be a "good deal" and she did not think he "had a good chance of getting a better resolution" at trial. Wynn admitted telling Keith that he would be a "poor witness." She told Keith that taking the plea bargain was in his "best interest." She denied threatening or coercing him. She also told Keith

that there was a "strong possibility" of being convicted at trial. She and Dorman told Keith they were prepared for trial and that he could have a trial. Wynn testified that she reviewed the Criminal Complaint with Keith in 2003 and "periodically" thereafter. Wynn testified that they always allowed Keith to ask questions and when he did so, some would be "appropriate" and others would not be "really following the topic." They had discussed potential defenses, including self-defense, with Keith, and he seemed to understand. Wynn admitted that Keith never said he would accept the plea bargain before the May 5 hearing.

¶23 Dorman testified that she visited Keith at least once a month and talked with him on the telephone "numerous times." Wynn had negotiated the matter with the State, and they would have discussed the proposed plea bargain with Keith as soon as it was offered. She usually saw Keith alone, although Wynn was with her on May 4. Dorman admitted that they talked about the plea bargain during that meeting, in addition to preparing for the suppression hearing. Dorman testified that Wynn had prepared colored charts that outlined the pros and cons of going to trial because they knew that Keith could not read well. The charts listed potential trial witnesses and their probable testimony. They talked about the sentence that could be imposed if Keith were convicted of two counts of first-degree intentional homicide and what evidence they could present at sentencing. Dorman testified that she probably told Keith that the likelihood of winning at trial was "not good" and that the suppression motion was an "uphill battle." Dorman encouraged Keith to accept the plea bargain. She testified that he sometimes appeared "close" to doing so, but never agreed to do so before the May 5 hearing.

¶24 Dorman testified that Keith "is limited" so they "tried to break [concepts] down for him" but he knew "jail lingo." She told Keith that if he lost at trial, he could go to prison for life. Dorman admitted she was concerned about

"how [Keith] would present as a witness" at trial. She denied threatening Keith and described herself and Wynn as "persuasive." She testified that Keith knew they were preparing for trial.

¶25 Dorman testified that Keith was "deflated" and "sort of submissive … subdued, and quiet" after the circuit court denied his request for a new attorney. He then told her he wanted to plead guilty. Dorman reviewed the plea questionnaire and waiver of rights form, its addendum and the jury instructions with him. Dorman did not recall if Keith asked any questions during the discussion.

*Discussion*

¶26 "A defendant seeking to withdraw a plea of guilty or no contest before sentencing must show that there is a 'fair and just reason,' for allowing him or her to withdraw the plea." ***State v. Kivioja***, 225 Wis. 2d 271, 283, 592 N.W.2d 220, 227 (1999) (citation omitted). "The defendant bears the burden of proving a fair and just reason by a preponderance of the evidence." ***State v. Leitner***, 2001 WI App 172, ¶26, 247 Wis. 2d 195, 208, 633 N.W.2d 207, 213. A fair and just reason is "some adequate reason for defendant's change of heart … other than the desire to have a trial." ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163, 170–171 (1991) (internal quotation marks and citation omitted).

¶27 Whether to permit a defendant to withdraw pleas of guilty or no contest prior to sentencing is committed to the discretion of the circuit court. ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). We will uphold a circuit court's decision to deny such a request if it appears from the record that the circuit court applied the proper legal standard to the relevant facts

and reached a reasoned and reasonable determination by employing a rational mental process. ***Canedy***, 161 Wis. 2d at 579–580, 469 N.W.2d at 169.

¶28 "Whether a defendant's reason adequately explains his or her change of heart is up to the discretion of the circuit court." ***Kivioja***, 225 Wis. 2d at 284, 592 N.W.2d at 227. In considering evidence, the circuit court may assess the credibility of the proffered explanation, and "credibility assessments are crucial to a determination of whether … [there] is a fair and just reason supporting withdrawal." ***Id.***, 225 Wis. 2d at 291, 592 N.W.2d at 230. "If a [circuit] court finds the defendant's proffered reason for plea withdrawal incredible, it may deny the motion." ***Leitner***, 2001 WI App 172, ¶26, 247 Wis. 2d at 208, 633 N.W.2d at 213.

¶29 When it denied Keith's motion to withdraw his guilty pleas, the circuit court indicated it had reviewed the transcript of the plea hearing, the testimony of Keith and former counsel, and "other documents" in the Record, specifically, a letter from a psychologist at Mendota sent to the circuit court near the end of Keith's commitment. In that letter, the psychologist stated that Keith's behavior had "become increasingly unmanageable and dangerous … not due to mental illness but instead due to his firmly entrenched Antisocial Personality Disorder." The psychologist also indicated that Keith thought he had "beat the system" and was "untouchable." The circuit court noted that the psychologist's letter suggested that Keith "manipulates the system."

¶30 Turning to the plea hearing, the circuit court found that Keith "well understood what he was doing." The circuit court stated that Keith's question about pleading "to a reckless shows a very sound understanding of the different levels of homicide." The circuit court observed that Keith "was not at all shy

about asking questions" during the hearing and that he did not appear "deflated by the experience." The circuit court noted that Keith's question about the party to a crime allegation showed an "active engagement" in the process. The circuit court noted that it had reviewed the constitutional rights and the addendum with Keith and that he consistently said he understood.

¶31 The circuit court found that several of Keith's assertions in his motion were "simply not credible." The circuit court rejected Keith's claim that he did not know the difference between consecutive and concurrent sentences or that he did not understand "big words." The circuit court noted that Keith "brought up the idea that he thought he was pleading guilty to reckless" homicide and the claim of coercion.

¶32 The circuit court further found that Keith "was represented ably by two very experienced" criminal defense attorneys. The circuit court found that Keith was "visited … regularly." The circuit court found that the use of the colored chart was "a dedicated effort to explain … as graphically as possible" Keith's options. The circuit court found that both attorneys believed that Keith's "best defense was to accept" the plea bargain offered by the State and by so advising him, "they were discharging their responsibility." Therefore, the circuit court implicitly rejected Keith's claim that he was pressured or coerced by his attorneys into pleading guilty. The circuit court concluded that Keith's decision to plead guilty was knowing, voluntary and intelligent and that he had not shown a fair and just reason to withdraw his plea.

¶33 On review, this court defers to the circuit court's credibility determinations. *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 283–284 n.1, 607 N.W.2d 621, 624 n.1. In this case, the circuit court rejected as "not

credible" Keith's claim that he did not understand what he was doing when he pled guilty. By endorsing the actions of Keith's attorneys, the circuit court also rejected Keith's claim that they had pressured him into pleading guilty. Because the circuit court rejected as incredible Keith's proffered reasons for plea withdrawal, the denial of Keith's motion was a proper discretionary determination. *See* ***Leitner***, 2001 WI App 172, ¶26, 247 Wis. 2d at 208, 633 N.W.2d at 213.

*By the Court.*—Judgment and order affirmed.

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