COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2260-CR **2006CF937**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON M. BRUSH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 NEUBAUER, J. Jason M. Brush appeals from a judgment of conviction for first-degree recklessly endangering safety, battery to a probation officer and false imprisonment, all by use of a dangerous weapon and as a repeat offender. Brush contends that the trial court erred when it applied the wrong legal

standard to his presentence motion for plea withdrawal. We reject Brush's argument. We conclude that the trial court's decision reflects a proper exercise of discretion both in its understanding of the law and its application to Brush's motion. We therefore affirm the judgment.

BACKGROUND

¶2 On August 31, 2006, Brush was charged with attempted first-degree intentional homicide, battery of a probation agent, and false imprisonment, all by use of a dangerous weapon and as a repeater. The charges stemmed from an incident with two probation agents on August 28, 2006. According to the complaint, the agents were transporting Brush from the Milwaukee Secure Detention Facility to the Kenosha County Jail when he wrapped the "belt chains" used to restrain him around the neck of the probation agent who was driving the vehicle. The probation agent could feel Brush pulling hard on the chains and started to pass out. After the probation agent lost control of the vehicle, Brush finally let up on his grip and attempted to flee.

¶3 Following plea negotiations, the State agreed to reduce the charge of attempted first-degree intentional homicide to first-degree recklessly endangering safety by use of a dangerous weapon, as a repeater. The remaining two counts would remain the same. Pursuant to the plea agreement, the State retained "a free hand at sentencing" to recommend the length of sentence but agreed to recommend that the sentences for the three convictions run concurrent to each other. On November 15, 2006, the State filed an amended information reflecting the agreement.

¶4 Brush was represented by his attorney, Patrick Flanagan, at the November 15, 2006 plea hearing. After a colloquy with the trial court, Brush pled

guilty to first-degree recklessly endangering safety and the original charges of battery to a probation agent and false imprisonment, all by use of a dangerous weapon and as a repeater. The trial court accepted Brush's pleas as "freely, voluntarily, intelligently and knowingly" entered and ordered a presentence investigation report to be prepared "out of county" and by an agent who was unfamiliar with the probation agent involved.

¶5 On February 5, 2007, the trial court held a hearing to address Brush's request to obtain new counsel, and Attorney Joseph Cardamone was subsequently appointed to replace Flanagan. The parties next appeared before the trial court on March 29, 2007, for purposes of sentencing. At that time, Cardamone acknowledged receipt of the PSI and indicated that Brush had reviewed the PSI with Flanagan. Cardamone also indicated that Brush intended to seek leave to withdraw his plea. The trial court instructed Cardamone to file a written motion and scheduled a motion hearing date.

¶6 On April 3, 2007, Brush filed a motion to withdraw his plea on the grounds that he had received ineffective assistance of counsel when represented by Flanagan.[1] Specifically, Brush complained that Flanagan had (1) failed to investigate a plea of not guilty by reason of mental defect (NGI), (2) failed to seek the appointment of a special prosecutor despite a possible conflict of interest for the Kenosha district attorney's office, and (3) failed to seek a change of venue

[1] A defendant in a criminal case has a right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to establish ineffective assistance, a defendant must demonstrate that counsel's performance was both deficient and prejudicial. ***Strickland***, 466 U.S. at 687.

despite pretrial publicity. The State opposed Brush's motion arguing that his reasons were inadequate and "this is the classic example of the defendant having second thoughts and getting cold feet after having reviewed the PSI report and the negative recommendations." At the motion hearing on April 9, 2007, the trial court denied Brush's request, finding:

> The Court has listened to everything that's been submitted here and has weighed, I believe adequately, the various positions of the parties with respect to why the plea should and should not be withdrawn. The Court applies the preponderance-of-evidence standard in light of these facts and finds that there is no fair and just reason why this plea should be permitted to be withdrawn. And therefore, the motion to do so will be denied.

The trial court sentenced Brush on April 16, 2007. Brush appeals.

DISCUSSION

¶7 A trial court's discretionary decision to deny plea withdrawal will be upheld on appeal when the court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). While courts should liberally grant plea withdrawal prior to sentencing, withdrawal is not automatic. ***State v. Leitner***, 2001 WI App 172, ¶24, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341. The request to withdraw a guilty plea prior to sentencing may be granted where the defendant proves by a preponderance of the evidence that a fair and just reason exists for doing so. ***Id.***, ¶26. A "fair and just" reason means some adequate reason for a defendant's change of heart other than the desire to have a trial. ***Id.***, ¶25. Once the defendant has met his or her burden, the trial court should grant the motion for plea withdrawal unless there is substantial prejudice to the prosecution. ***Kivioja***, 225 Wis. 2d at 283-84.

¶8 Brush argues that the trial court failed to apply the proper standard of law to his motion for plea withdrawal. In rendering its oral decision, the trial court observed:

> The standard's been referred to numerous times by counsel with respect to the withdrawal of a plea prior to sentencing. The cases have been cited here…. [T]he defendant has no absolute right to withdraw his plea prior to sentencing. The motion is directed to the sound discretion of the Trial Court…. [E]videntiary hearings are to be granted liberally. That's frankly what was to be taken today….. The court says in [***State v. Canedy***, 161 Wis. 2d 565, 469 N.W.2d 163 (1991)] that withdrawal of guilty pleas before sentencing should be freely allowed absent a compelling reason for denial. So it would seem as though the Court is to look to the underlying reasons. And if there's some compelling reason for denial or the absence of some compelling reason for denial, it should be given and granted liberally. I shouldn't say the motion granted liberally to withdraw but the hearing provided liberally.

Citing to the trial court's statement that a hearing should be granted liberally, Brush argues: "The law does not concern the liberal granting [of] a hearing" but rather "the trial court should freely allow (liberally grant) the defendant to withdraw his plea prior to sentencing for any fair and just reason unless the prosecution will be substantially prejudiced." While Brush correctly states the law on this point, *see* ***State v. Jenkins***, 2007 WI 96, ¶2, 303 Wis. 2d 157, 736 N.W.2d 24; ***State v. Bollig***, 2000 WI 6, ¶28, 232 Wis. 2d 561, 605 N.W.2d 199, he ignores the remainder of the trial court's reasoning on this issue, which also correctly states the law.

> The ***Leitner*** case, which has been cited, goes on to say that freely granting such a request does not mean automatically. There has to be a fair and just reason for the defendant's withdrawal-of-plea request. It requires a showing of some adequate reason for the change of heart other than just a desire to have a trial.

We conclude that, while the trial court may have misspoken during the course of its oral recitation of the standard, its statements taken as a whole demonstrate its understanding and application of the correct legal standard. We therefore turn to whether the trial court properly exercised its discretion in denying Brush's motion.

¶9 Brush's motion for plea withdrawal is based solely on his belief that he was provided ineffective assistance of counsel by Flanagan.[2] Brush's affidavit in support of his motion for plea withdrawal alleged that "[h]ad it not been for the ineffective assistance that I received from Attorney Flanagan, I would have sought a jury trial." Brush alleged that Flanagan's representation was deficient in three respects: (1) he failed to investigate the possibility of pleading not guilty by reason of mental disease or defect despite Brush's request that he do so, (2) he failed to seek the appointment of a special prosecutor, and (3) he did not seek a change of venue.[3]

¶10 Despite Brush's allegations as to Flanagan's ineffective assistance, he failed to request an evidentiary hearing on this issue or to present any testimony from Flanagan, either in person or via affidavit, at the April 9, 2007 motion hearing. Generally, an evidentiary hearing at which trial counsel testifies regarding the alleged deficient performance is required for the trial court's

[2] Brush expressly informed the trial court that he was not challenging any aspect of the plea colloquy. Brush's attorney stated: "[T]he basis for the request to withdraw the plea is not, as is often the case, any sort of allegation that there was a flaw with the plea colloquy. I can't fault the Court in terms of the way the plea was taken. There's not an allegation being made specifically that it was in some way done mistakenly or without understanding what was happening."

[3] Brush's motion additionally alleged that trial counsel was ineffective in handling his revocation proceedings in another matter. However, he does not address this ground for plea withdrawal on appeal, and we therefore deem it abandoned. *See* ***State v. Whitaker***, 167 Wis. 2d 247, 259 n.5, 481 N.W.2d 649 (Ct. App. 1992).

consideration of an ineffective assistance of counsel claim. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This is true even when the claims of ineffective assistance of counsel are made in the context of a presentence plea withdrawal. *See, e.g.*, ***State v. Nelson***, 2005 WI App 113, ¶6, 282 Wis. 2d 502, 701 N.W.2d 32 (previous trial counsel testified at hearing on motion for presentence plea withdrawal due to his failure to inform defendant of potential WIS. STAT. ch. 980 commitment).

¶11 Brush's lack of specificity and failure to produce trial counsel's testimony left the trial court to consider whether the allegations made in the affidavit supporting his motion for plea withdrawal were sufficient. Whether those allegations adequately explained Brush's change of heart is up to the discretion of the trial court. *See* ***Kivioja***, 225 Wis. 2d at 284 (citing ***Canedy***, 161 Wis. 2d at 584). Therefore, we will sustain its decision if it 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. ***City of Wisconsin Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 15, 539 N.W.2d 916 (Ct. App. 1995). Here, the trial court addressed each of Brush's claims of trial counsel error and found that none provided a fair and just reason for plea withdrawal.

¶12 Addressing Brush's claim that trial counsel failed to investigate a possible plea of not guilty by reason of mental disease or defect, the trial court found that "[i]f the Court were to countenance such a motion at this time … it would be opening the floodgates to any defendant who wishes to have a plea withdrawn simply to say, 'Oh, I should have made a plea of not guilty by reason of mental disease or defect.'" The trial court's concerns are valid given that Brush's motion did nothing more than allege that counsel failed to investigate the possibility of an NGI plea. Here, we have no testimony from counsel as to

whether Brush in fact requested such an investigation and no specific facts from Brush as to why he might have been entitled to one.

¶13 With respect to counsel's failure to seek a change of venue, the trial court determined that regardless of where the case was tried, the court would ensure, through jury selection, that there would be "fair and impartial jurors sitting in the jury box" and, therefore, venue would not have affected the outcome. Moreover, Brush's motion simply states: "Attorney Flanagan never sought a change of venue, despite the considerable pretrial publicity that this case has had." Again, Brush failed to state any facts underlying his allegation that his trial counsel's failure to seek a change of venue resulted in his desire to withdraw his plea. *See* ***Leitner***, 247 Wis. 2d 195, ¶28 (a defendant fails to meet burden by preponderance of the evidence when motion fails to provide details or specify evidence in support of allegations).

¶14 Likewise, in considering Brush's allegation that counsel had failed to request a special prosecutor despite the working relationship between Kenosha county probation agents and the district attorney's office, the trial court noted that requests for the appointment of a special prosecutor are left to the trial court's discretion and are rarely granted.[4] Other than observing that the probation agent

[4] Pursuant to WIS. STAT. § 978.045(1r)(h) (2005-06), "The judge may appoint an attorney as a special prosecutor if … [t]he district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff."

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

worked in Kenosha county, Brush's allegation on this count contained nothing to suggest a conflict of interest.

¶15 The law is clear that a defendant requesting plea withdrawal prior to sentencing must do more than allege a fair and just reason; he or she must also show that the reason actually exists. ***Kivioja***, 225 Wis. 2d at 291. Brush's motion simply failed to provide the trial court with sufficient facts to support his allegations of a fair and just reason for withdrawal.

¶16 In the end, the trial court viewed Brush's request for plea withdrawal as similar to the request made by the defendant in ***Leitner***. There, the defendant waited for the presentence investigation to be completed before requesting plea withdrawal. ***Leitner***, 247 Wis. 2d 195, ¶33. The presentence investigation report was unfavorable and recommended prison, a fact the trial court found was the real reason for the defendant's plea withdrawal. ***Id.***, ¶¶31-33.

¶17 Expressly referring to ***Leitner***, the trial court noted its concern that Brush did not file a motion to withdraw his plea until after he had reviewed the presentence report and recommendations with Flanagan. The court stated:

> At the time that the Court was first informed of any issue concerning withdrawal of the plea or ineffective-assistance-of-counsel claims, it was only after the presentence report had been prepared and the recommendations had been set forth … which, from having read that report and I'm sure the defendant read it very carefully here, recommends a substantial period of incarceration…. [T]he periods of confinement that are recommended … are substantial in length compared to the potential sentence that's available. This certainly is something that would cause a defendant such as Mr. Brush who is facing sentencing to say to him or herself, "What effect will that have on the Judge's opinion and sentence that's imposed in this case?" That's a slightly different position than a person would be in prior to having read that presentence report.

Apart from the sentencing recommendation, the court additionally noted statements made by two of Brush's fellow inmates just prior to the scheduled March 29 sentencing hearing to the effect that Brush had stated he would rather kill someone than go to prison. These statements, combined with the PSI recommendation, led the trial court to believe Brush's regrets were like those of the defendant in ***Leitner***.

¶18 In ***Leitner***, the court held that "[t]he trial court was entitled to consider the fact that [the defendant] waited until he saw the content of his presentence report before seeking plea withdrawal and infer from that fact, and the surrounding circumstances, that [the defendant's] true reason for seeking plea withdrawal was his fear of a harsh sentence due to the presentence report." ***Id.***, ¶33 (citation omitted). That is essentially the trial court's finding here.[5]

CONCLUSION

¶19 We conclude that the trial court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process in reaching its decision to deny Brush's motion for plea withdrawal based on his failure to demonstrate a fair and just reason for allowing him to do so. We therefore uphold the trial court's exercise of discretion and affirm the judgment.

[5] Such a delay between the entering of the plea on November 15, 2006, and the first mention to the court of plea withdrawal on March 29, 2007, is a factor appropriately considered by the trial court in evaluating a motion for plea withdrawal. *See* ***State v. Shanks***, 152 Wis. 2d 284, 290, 292, 448 N.W.2d 264 (Ct. App. 1989) (factors to be considered in determining whether defendant has shown a "fair and just" reason include the hasty entry of a plea and/or expeditious seeking of plea withdrawal).

By the Court.—Judgment affirmed.

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