COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3062-CR **Cir. Ct. No. 00-CF-20**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael L. Anderson has appealed from judgments convicting him upon pleas of no contest of two counts of incest in violation of

WIS. STAT. § 948.06(1) (1999-2000).[1] The sole issue on appeal is whether the trial court erroneously exercised its discretion when it denied Anderson's presentencing motion to withdraw his no contest pleas. We conclude that the trial court properly exercised its discretion in denying relief, and affirm the judgments of conviction.

¶2 Anderson entered his no contest pleas on July 17, 2000, the day set for his jury trial. On August 31, 2000, he filed a motion to withdraw his pleas. The trial court denied the motion after a hearing, and subsequently sentenced Anderson to twenty years in prison, followed by consecutive probation.

¶3 Anderson contends that his no contest pleas resulted from confusion, coercion, and haste. Based upon these allegations, and because he promptly moved to withdraw his no contest pleas and maintains his innocence, Anderson contends that a fair and just reason exists for the withdrawal of his pleas.

¶4 An order denying a motion to withdraw a no contest plea will be sustained by this court unless the trial court erroneously exercised its discretion. ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). Prior to sentencing the trial court should freely allow a defendant to withdraw his or her plea provided a fair and just reason exists for withdrawal, and the State has not been substantially prejudiced by reliance on the plea. ***Id.*** However, "freely" does not mean automatically, and the defendant must show some adequate reason for his or her change of heart other than a desire to have a trial. ***Id.*** at 861-62.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

¶5 The defendant has the burden of proving a fair and just reason by a preponderance of the evidence. ***Id.*** at 862. The defendant must do more than allege or assert a fair and just reason; he or she must also show that the reason actually exists. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). "In order to assess whether a reason actually exists, the circuit court must engage in some credibility determination of the proffered reason ...." ***Id.*** We will sustain the trial court's discretionary determination to permit or deny the withdrawal of a no contest plea before sentencing if the trial court reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999).

¶6 Although not precisely defined, fair and just reasons for plea withdrawal have included a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion or misleading advice from counsel. ***Id.*** at 739-40. The assertion of innocence and the promptness with which the motion is brought are also relevant factors for the trial court's consideration. ***Id.*** at 740.

¶7 We accept as true Anderson's assertion that he promptly filed his motion and, except for entering his no contest pleas, has consistently maintained his innocence. However, while these are factors which bear on whether Anderson's proffered reasons of confusion, coercion and haste are credible, they are not determinative of whether a fair and just reason exists for plea withdrawal. ***Id.*** at n.2.

¶8 It is clear from a review of Anderson's arguments and the trial court's response to them that the denial of relief was proper. Anderson premises his claim of confusion on statements made by his trial attorney,

Douglas Henderson, on the morning of trial. When the case was called and in answer to the trial court's inquiry as to whether the case was proceeding to trial, Attorney Henderson stated that Anderson had told him that he did not know that the case was scheduled for trial that day, even though they had talked about it two days earlier. Attorney Henderson also stated that Anderson was telling him that he did not feel prepared to go to trial, and that Anderson was "somewhat in a confused state in terms of what the situation is today." Attorney Henderson further stated that he had "some concerns" in regard to Anderson "being mentally prepared in terms of going through this matter right now."

¶9 After this interchange, the trial court indicated that, as long as counsel were prepared to go to trial, the matter would proceed. After a recess, Attorney Henderson informed the trial court that the State had made a plea offer, and that Anderson needed time to think it over. The trial court then recessed the matter until the afternoon, saying "[w]e can always select a jury this afternoon, but we are going to do something today."

¶10 After the recess, Attorney Henderson reported that Anderson had rejected the plea offer and wished to fire him. After confirming that Anderson was rejecting the plea offer despite the substantial reduction in sentencing exposure it provided, the trial court engaged in a colloquy with Anderson on his request for a new attorney. In response to the trial court's inquiry as to what problem he had with Attorney Henderson, Anderson stated:

> Well, one, I haven't seen him but maybe twice out of this whole thing unless we're in court. He don't come out to see me, and the stuff I've been telling him about is like he ain't interested in it; and then I asked him about an expert witness, and he say I don't need none when I should.

¶11 When asked what he believed an expert witness could do, Anderson admitted that he did not know and was "just asking." Attorney Henderson then discussed his contacts with Anderson, explaining that he and his investigator met with Anderson as often as was deemed necessary given the nature of the case.

¶12 At the conclusion of the colloquy, the trial court determined that Anderson's request for a new attorney was made simply for purposes of delay, not because of any particular problem he was having with Attorney Henderson. The trial court concluded that nothing set forth by Anderson demonstrated that Attorney Henderson was not competent to represent him. It also pointed out that Anderson had never requested a new attorney on the other occasions when he appeared in court. Based upon its determination that the request for a new attorney was made for purposes of delay, and because the remaining witnesses, including the children, were prepared for trial, the trial court concluded that it would be unfair to delay the matter further. It stated: "[T]hat being said, if there is no resolution, let's proceed to bring up the jury and begin the selection process."

¶13 A recess was then taken. When the case resumed, Anderson elected to enter no contest pleas pursuant to the State's offer.

¶14 Anderson contends that he was coerced into entering the no contest pleas when the trial court decided that he would either have to accept the plea offer or proceed to trial with an attorney with whom he was dissatisfied. He also contends that he felt coerced by the trial court's statement that the jury would be brought in to commence the trial.

¶15 The trial court reasonably rejected Anderson's claim that his pleas resulted from coercion. As conceded by Anderson in his reply brief, he is not arguing that the trial court erred when it denied his request to replace Attorney

Henderson. Moreover, the trial court's finding that Anderson's request for a new attorney was made solely for purposes of delay is supported by the record. The record indicates that Attorney Henderson was appointed to represent Anderson on January 20, 2000. Anderson made no complaint to the trial court about Attorney Henderson's representation at any time before the morning of trial on July 17, 2000, despite appearing in court with Henderson at the pretrial conference on June 23, 2000, and at a hearing on May 4, 2000, when the parties jointly moved to adjourn the original trial date. Moreover, when asked by the trial court to explain what defects he perceived in Attorney Henderson's representation, Anderson could provide no basis for his professed dissatisfaction, except to criticize Attorney Henderson for failing to retain an expert witness and failing to meet with him more often. However, as pointed out by the trial court, there was no reason to believe that an expert witness could offer any meaningful assistance in this case. Since Anderson also failed to provide any basis for concluding that Attorney Henderson's contacts with him were inadequate under the circumstances of the case, the trial court reasonably found that Anderson's request for a new attorney was made for purposes of delaying the trial, not because Attorney Henderson was providing inadequate representation.

¶16 Because the trial court properly determined that Anderson's request for a new attorney was made for purposes of delay, its denial of the request and its statement that the case would proceed to trial do not constitute coercion for purposes of plea withdrawal, even under the presentencing standard. Similarly, while the calling of the jury may have added to the stress of deciding between accepting the plea offer or proceeding to trial, stress of this nature is inherent in the criminal system. As cogently described in the State's brief, "[a] trial court is not intended to be a warm and nurturing place; it is a stressful place, where

difficult decisions must be made." However, the pressure Anderson may have felt to make a choice between accepting the State's plea offer and proceeding with the jury trial did not constitute coercion, or a fair and just reason for withdrawing his pleas.

¶17 Anderson's claim that his pleas resulted from confusion was also properly rejected by the trial court. As previously noted, Anderson's claim of confusion is premised primarily on the statements made by Attorney Henderson on the morning of trial regarding Anderson's mental state. He also contends that he appeared in court on the morning of trial intending to ask for an adjournment and a new attorney, leaving him in a confused state when his requests were denied and he was required to choose between the plea offer and a trial.

¶18 As already discussed, while the denial of Anderson's requests may have caused him stress and some confusion, it does not rise to the level of confusion required to constitute a fair and just reason for plea withdrawal. Similarly, Attorney Henderson's contention that Anderson appeared confused, standing alone, does not establish the requisite degree of confusion, particularly in light of the record which belies any representation that Anderson was confused when he entered the no contest pleas.

¶19 In denying Anderson's motion to withdraw his no contest pleas, the trial court concluded that Anderson understood what he was doing when he entered the pleas. This determination is supported by Anderson's statements to the trial court throughout the proceedings on July 17, 2000, which were clear and responsive, even when Anderson was objecting to the trial court's refusal to postpone the trial or to permit him to seek new counsel. In addition, Anderson identifies nothing that he did not understand when he entered his pleas. In

contrast, Anderson's responses to the trial court's inquiries and explanations at the time he entered his pleas establish that he was aware of the nature of the charges to which he was pleading, the factual basis for the charges, the potential penalties which could be imposed, and the constitutional rights he was waiving, including his right to proceed with the jury trial that day. Anderson's understanding was further revealed by his execution of a "Plea Questionnaire/Waiver of Rights" form before the entry of his pleas. Based upon his responses on the form and at the plea hearing, the trial court properly concluded that Anderson understood the meaning and effect of his no contest pleas.[2] *See* ***State v. Canedy***, 161 Wis. 2d 565, 585-86, 469 N.W.2d 163 (1991).

¶20 Anderson's remaining argument is that his pleas were hastily made. While it is true that the plea offer was not made until the morning of trial, the case had been pending for more than six months, and trial had been scheduled for an earlier date and postponed. In addition, the trial court recessed the matter twice after the offer was made, thus affording Anderson adequate time to consider whether he wanted to accept the plea offer or proceed with the trial. During the ensuing plea colloquy, Anderson expressly acknowledged that he had been provided with enough time to discuss his pleas with his attorney and that he understood what he was doing. Because the plea colloquy was conducted carefully and thoroughly, no basis exists to conclude that the pleas were so hastily made as to justify their withdrawal.

[2] In his motion to withdraw his pleas, Anderson also claimed that he was illiterate. This allegation is belied by the motion itself, which is well written. Moreover, even assuming someone helped Anderson prepare the motion, his responses throughout the July 17, 2000 trial court proceedings revealed him to be communicative and responsive, and thus support the trial court's determination that he understood the proceedings regardless of his literacy level.

¶21 The trial court's determinations that the pleas did not result from confusion, coercion or haste were reasonable based upon the record. No fair and just reason for withdrawal therefore existed and Anderson's motion was properly denied.

By the Court.—Judgments affirmed.

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