COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2012

Diane M. Fremgen
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 Nos. **2012AP1200-CR**
2012AP1201-CR
2012AP1202-CR
2012AP1203-CR
2012AP1204-CR

Cir. Ct. Nos. **2009CM315**
2009CM316
2009CM699
2009CM989
2009CM1133

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS C. STRONG, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Dennis Strong appeals five judgments of conviction entered upon his guilty pleas. Strong argues he is entitled to withdraw his pleas because he was denied his right to counsel and because he asserts innocence. We reject Strong's arguments and affirm.

BACKGROUND

¶2 Between March 23 and August 11, 2009, the State filed five criminal complaints against Strong, charging him with a total of twenty-two criminal offenses.[2] Throughout the pendency of the cases, Strong was represented by multiple attorneys, and each attorney moved to withdraw because of a conflict of interest or other ethical concerns.

¶3 At the hearing where the court granted Strong's fifth attorney's withdrawal motion, Strong expressed frustration with the delay caused by his attorneys' repeated withdrawals. Strong believed the passage of time was prejudicing him and stated he would "almost feel better to proceed forward pro se where there isn't going to be conflict issues and this doesn't have to be an ongoing thing on the court's calendar." The court advised Strong that, although he could

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The State's first complaint, No. 2009CM315, charged Strong with criminal damage to property, disorderly conduct, and misdemeanor bail jumping. The second complaint, No. 2009CM316, charged Strong with misdemeanor battery, misdemeanor intimidation of a victim, disorderly conduct, and misdemeanor bail jumping. The State's third complaint, No. 2009CM699, charged Strong with disorderly conduct, two counts of misdemeanor battery, and three counts of misdemeanor bail jumping. The fourth complaint, No. 2009CM989, charged Strong with criminal damage to property and three counts of misdemeanor bail jumping. The State's fifth complaint, No. 2009CM1133, charged Strong with disorderly conduct, misdemeanor battery, and three counts of misdemeanor bail jumping.

represent himself, the court would prefer Strong to be represented by an attorney on all of his cases. It adjourned the matters to give Strong time to talk to successor counsel.

¶4 Strong appeared without counsel at the next hearing. Strong advised the court that he wished to proceed pro se and enter into the plea agreement. Strong submitted a signed waiver of right to attorney form and a signed plea questionnaire/waiver of rights form. The court engaged Strong in a colloquy regarding his desire to proceed without counsel and found his waiver to be knowing, voluntary, and intelligent.

¶5 The court then engaged Strong in a colloquy regarding his desire to enter into a global plea agreement. The agreement required Strong to plead to eleven counts listed in the five criminal complaints—four counts of disorderly conduct, three counts of misdemeanor bail jumping, three counts of misdemeanor battery, and one count of criminal damage to property. The remaining eleven counts would be dismissed and read-in, and two additional criminal complaints, Nos. 2010CM425 and 2010CM611, would be dismissed outright. Ultimately, the court accepted Strong's guilty pleas, finding them to be knowing, voluntary, and intelligent. It adjourned the matter for sentencing.

¶6 At the scheduled sentencing hearing, Strong moved for an adjournment, in part, because he wanted an attorney. The court appointed a sixth attorney and adjourned the hearing.

¶7 Strong's sixth attorney filed a motion to withdraw Strong's pleas, and then moved to withdraw as counsel. Strong's seventh attorney filed a second plea withdrawal motion. In the two plea withdrawal motions, Strong cited several

reasons supporting plea withdrawal, including assertions that he was denied his right to counsel and that he was innocent. The court denied Strong's plea withdrawal motions following an evidentiary hearing.

¶8 Before sentencing, Strong's seventh attorney moved to withdraw. Strong's eighth, ninth, and tenth attorneys also moved to withdraw. The court denied Strong's tenth attorney's withdrawal motion and counsel represented Strong at the sentence hearing. The court sentenced Strong to a total of one year in jail.

DISCUSSION

¶9 On appeal, Strong argues the circuit court erred by denying his motion to withdraw his guilty pleas. Strong asserts he is entitled to withdraw his pleas as a matter of right because he was denied his constitutional right to counsel. Alternatively, Strong argues the court erroneously exercised its discretion by refusing to permit him to withdraw his pleas.

¶10 A defendant is entitled to plea withdrawal as a matter of right if the defendant shows he or she was denied a constitutional right. ***State v. Jenkins***, 2007 WI 96, ¶32 n.9, 303 Wis. 2d 157, 736 N.W.2d 24. A criminal defendant has a constitutional right to the assistance of counsel. ***State v. Klessig***, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997). Before a court may allow a criminal defendant to proceed pro se, it must engage the defendant in a colloquy to ensure that the defendant's waiver of counsel is knowing, voluntary, and intelligent, and that the defendant is competent to represent him or herself. ***Id.*** at 203, 206.

¶11 Here, Strong acknowledges that he completed a waiver of counsel form and that the court engaged him in a colloquy regarding his waiver. On appeal, Strong does not point to any deficiency in the court's waiver of counsel colloquy. Rather, Strong argues he only waived his right to counsel because he believed his only option was to proceed pro se. Consequently, he argues that, because his waiver did not reflect a deliberate choice, it was involuntary.

¶12 We disagree. After the court permitted Strong's fifth attorney to withdraw, Strong advised the court that he wanted to proceed pro se. The court told Strong that, given the multiple cases, it would prefer Strong to be represented by counsel. It adjourned the hearing to give Strong time to appear with successor counsel. At the next hearing, Strong appeared without counsel, advised the court he wanted to proceed without counsel, and agreed, among other things, that he had a right to counsel, that an attorney would likely represent his interests better than he could, and that it would be disadvantageous for him to represent himself. When asked if he still wanted to proceed without counsel, Strong responded affirmatively. The court's colloquy and recommendation that Strong be represented by an attorney do not support Strong's assertion that his only option was to waive his right to counsel and proceed pro se. Therefore, Strong's right to counsel was not violated and he is not entitled to withdraw his guilty pleas as a matter of right.

¶13 Strong next argues the circuit court erroneously exercised its discretion by denying his motion to withdraw his guilty pleas. The decision to grant or deny a motion to withdraw a plea before sentencing is subject to the circuit court's discretion. ***Jenkins***, 303 Wis. 2d 157, ¶30. We will affirm a court's discretionary determination if the record shows "the circuit court 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." ***Id.*** (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

¶14 A defendant seeking to withdraw a plea before sentencing must show, by a preponderance of the evidence, that there is a "fair and just reason" for plea withdrawal. ***Id.***, ¶31; ***State v. Kivioja***, 225 Wis. 2d 271, 283-84, 592 N.W.2d 220 (1999). A fair and just reason "contemplates the 'mere showing of some adequate reason for the defendant's change of heart[.]'" ***Jenkins***, 303 Wis. 2d 157, ¶31 (quoting ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973)). "The exercise of discretion requires the [circuit] court to take a liberal, rather than a rigid, view of the reasons given for plea withdrawal." ***State v. Bollig***, 2000 WI 6, ¶29, 232 Wis. 2d 561, 605 N.W.2d 199. However, plea withdrawal before sentencing is not an absolute right. ***Jenkins***, 303 Wis. 2d 157, ¶32. A fair and just reason must be something other than belated misgivings about the plea or the desire to have a trial. ***Id.***

¶15 Here, after determining Strong was not denied his right to counsel at the plea hearing, the circuit court found "there's been no proof that there should be a fair and just reason for why the pleas should be withdrawn." The court observed that Strong had neither testified at the hearing nor waived his right to privileged communication with former counsel. The court reasoned that, although it respected Strong's exercise of these rights, "without further information, the Court has to look at this record, and it's simply insufficient to warrant and to make a finding that there's a fair and just reason as to why the motion or why the plea should be withdrawn."

¶16 On appeal, Strong argues the circuit court erred by refusing to allow him to withdraw his guilty pleas because "his desire to have counsel and his assertion of innocence are sufficient reasons to satisfy the 'fair and just standard.'" We, however, conclude that, because Strong knowingly, voluntarily, and intelligently waived his right to counsel at the plea hearing, his subsequent desire to be represented by counsel at that hearing is not a fair and just reason for plea withdrawal. *See* ***Jenkins***, 303 Wis. 2d 157, ¶63 ("[B]ecause a fair and just reason will nullify both a sufficient plea colloquy and a constitutional valid plea, the court may consider whether the proffered fair and just reason outweighs the efficient administration of justice.").

¶17 As for Strong's assertion of innocence, "[a] claim of innocence alone is insufficient to support a motion to withdraw a guilty plea." ***State v. Rhodes***, 2008 WI App 32, ¶13, 307 Wis. 2d 350, 746 N.W.2d 599 (Ct. App. 2007). "The claim must be backed up with credible evidence to support it." ***Id.*** Here, Strong's assertion of innocence regarding the twenty-two original counts is conclusory. He does not explain of what or why he is claiming innocence. Therefore, his assertion does not amount to a fair and just reason for plea withdrawal. *See* ***id.*** However, to the extent Strong is asserting one of his convictions lacked a factual basis, we observe that, at the plea hearing, Strong advised the court that he read all the criminal complaints and that the court could rely on information in the complaints to serve as a factual basis for his guilty pleas.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.