COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP361-CR
2012AP362-CR
2012AP363-CR

Cir. Ct. Nos. 2009CF728
2010CF107
2010CF433

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THADDEUS M. LIETZ,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Outagamie County: MARK J. McGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Thaddeus Lietz, pro se, appeals judgments, entered upon his no contest pleas, convicting him of misdemeanor theft, two counts of

felony bail jumping and two counts of criminal trespass. Lietz also appeals the order denying his motion for postconviction relief. Lietz argues the circuit court erred by denying his pre-sentence and postconviction motions for plea withdrawal. He also raises challenges to his sentence. We reject Lietz's arguments and affirm the judgments and order.

BACKGROUND

¶2 The State charged Lietz with four counts of felony bail jumping, four counts of criminal trespass, three counts of disorderly conduct and one count each of burglary of a building or dwelling, obstructing an officer and misdemeanor theft—the fifteen charges arising from several circuit court cases. In exchange for his no contest pleas to one count of misdemeanor theft and two counts each of felony bail jumping and criminal trespass, the State agreed to dismiss and read in the remaining counts. The State also agreed to recommend four years' probation on the two felony counts and a total of one year of incarceration on the misdemeanor counts. After a lengthy colloquy, the court accepted Lietz's no contest pleas and ordered a presentence investigation report.

¶3 Lietz filed a presentence motion to withdraw his pleas. After a hearing, the court denied the motion and the matter proceeded to sentencing. The court imposed two years' initial confinement followed by two years' extended supervision on one of the bail jumping convictions, and a consecutive 120-day jail term on one of the criminal trespass convictions. With respect to the remaining convictions, the court withheld sentence and imposed a total of three years' probation, consecutive to Lietz's prison sentence. Lietz's motion for postconviction relief was denied after a hearing. This appeal follows.

DISCUSSION

¶4 Lietz contends the circuit court erred by denying his presentence motion to withdraw his pleas. A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The decision to grant or deny a presentence motion for plea withdrawal is committed to the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

¶5 Lietz argues there was either miscommunication between the parties or a misrepresentation of his wishes with respect to the plea agreement. Specifically, Lietz claims the State failed to follow the plea agreement he offered in a letter during plea discussions. In the letter, Lietz expressed an unwillingness to enter an inculpatory plea to the theft of a woman's underwear. The letter, however, is merely evidence of negotiation. Lietz conceded there had been no breach of the plea agreement as it was described on the record at the plea hearing. Further, Lietz's attorney testified that he was not aware of any deviation between the parties' plea agreement reached before the plea hearing and the agreement recited on the record.

¶6 The circuit court determined that Lietz had failed to show a fair and just reason for plea withdrawal, noting that Lietz's testimony was not credible and

he had not been manipulated into a plea agreement with the State. The court noted that Lietz was "a smart guy" and entered into the plea agreement freely, voluntarily and intelligently after discussions with his attorney and a detailed colloquy with the court. The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS. STAT. § 805.17(2) (2011-12). The court's credibility determination is supported by the record and it reached a conclusion that a reasonable judge could reach.

¶7 Lietz alternatively argues the circuit court erred by denying the numerous arguments raised in his postconviction motion. The motion was denied for reasons stated on the record at a hearing. Lietz, however, failed to include the postconviction motion hearing transcript in the appellate record. We must, therefore, assume that the transcript supports the circuit court's determination. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted).

¶8 In any event, the arguments Lietz raises in his appellate brief are without merit. First, Lietz insists that because he denied committing the misdemeanor theft charge at the plea hearing, the circuit court should have rejected his no contest plea to that charge. In a postconviction motion for plea withdrawal, the defendant carries the heavy burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest

injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The manifest injustice standard requires the defendant to show "a serious flaw in the fundamental integrity of the plea." ***Id.***

¶9 During the plea colloquy, Lietz conceded that he was found with a pair of women's underwear. Lietz claimed, however, that the underwear was his and that he wore women's underwear to deal with an "inflammatory balls problem." Lietz nevertheless acknowledged that the underwear had been identified as belonging to the woman whose apartment he had entered without permission. After then being informed of the elements of theft, Lietz knowingly, voluntarily and intelligently entered a no contest plea to the charge, effectively abandoning his claim that the underwear was his. His renewed ownership claim does not establish a manifest injustice requiring plea withdrawal.

¶10 Lietz also intimates he was improperly sentenced based on inaccurate information regarding his departure from college. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. At the outset of the sentencing hearing, defense counsel corrected a reference in the presentence investigation report, indicating Lietz left college because of poor academic achievement, not misconduct. Lietz's claim that he was sentenced based on this inaccuracy in the PSI consequently fails.

¶11 Finally, Lietz contends the sentencing court engaged in some form of misconduct by asking Lietz's father questions about Lietz's upbringing. "[A] sentencing court, when fashioning a sentence, should consider all relevant and available information." ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Lietz's father asked to address the court, and Lietz provides no authority

for his claim that it was improper for the court to seek additional information that might assist the court in its sentencing decision.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).