COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP856-CR **Cir. Ct. No. 2007CF561**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. WOLFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Jeffrey L. Wolff appeals from a judgment convicting him of mental harm to a child, physical harm to a child, and lewd and

lascivious conduct and from an order denying his postconviction motion seeking reconsideration of the denial of his presentence motion to withdraw his pleas. Wolff argues that the circuit court erroneously exercised its discretion when it denied his motions to withdraw his no-contest pleas before sentencing. For the following reasons, we affirm the judgment and the order.

¶2 Wolff initially was charged with two felonies, sexual assault of a child under thirteen and exposing his genitals. On the morning of his jury trial, the parties resumed their stalled plea negotiations. After two hours, Wolff entered no-contest pleas to the reduced charges. He filed a motion to withdraw his pleas later that same day on grounds that he made a mistake in pleading to "something [he] didn't do," that he felt pressured to plead, and that he did not understand the charges. The court denied the motion after a hearing.

¶3 Wolff's attorney withdrew. Assisted by successor counsel, Wolff moved to have the court reconsider its prior ruling. The court granted a second hearing. The court concluded that Wolff's decision to withdraw his pleas stemmed from a change of heart, not confusion or undue pressure.

¶4 After sentencing, represented by yet another appointed counsel, Wolff filed a motion for postconviction relief, styled as a reconsideration of his plea-withdrawal motion.[1] Besides his previous arguments, Wolff offered new evidence of a "medium to profound hearing loss" detected in the prison-intake process. He was granted a third hearing. The court again concluded that Wolff

[1] Prior to this motion, Wolff filed a pro se motion for postconviction relief, which the court denied without a hearing.

had not shown a fair and just reason to withdraw his pleas and denied the motion. Wolff appeals.

¶5 A defendant should be allowed to withdraw his or her plea before sentencing "for any fair and just reason, unless the prosecution would be substantially prejudiced." ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24. The reason must be something other than the desire to have a trial or belated misgivings about the plea, and the defendant must prove it by a preponderance of the evidence. ***Id.***, ¶32. The circuit court must find the defendant's reason credible. ***Id.***, ¶43. Assessing the adequacy of the reason given for the change of heart lies within the discretion of the court. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). We will affirm if the court's decision was demonstrably based on the facts of record and in reliance on the applicable law. ***Jenkins***, 303 Wis. 2d 157, ¶30.

¶6 Wolff testified to the following at the first motion hearing before Judge William H. Carver. Wolff had met with his attorney, Nila Robinson, multiple times over the years. She explained the charged offenses and the State's various offers, including their consequences. He did not understand the pleas "100%" but wanted "to get this whole thing over with." He understood that he could have proceeded to trial and did not have to accept the State's offer, but he felt rushed into accepting it and "was under the impression that [he] could withdraw [his] plea within a reasonable amount of time." Robinson told the court that "a significant part of the negotiations" was to structure an agreement that included charges with no sexual component and that she believed Wolff understood the pleas, their consequences and the risk inherent in going to trial. The prosecutor confirmed that Wolff wanted to avoid sex offender registration.

¶7 Wolff had told the court at the plea hearing that he understood the charges to which he was pleading, their consequences, the rights he was waiving and that he entered the pleas voluntarily. The court ended each statement or question by asking Wolff if he understood. Eighteen times he answered "yes." Based on the plea colloquy, the plea questionnaire, Wolff's hearing testimony, his education, his lack of mental disabilities, and his representation by competent counsel, the court concluded that he did not meet his burden of proving a fair and just reason. It rejected his claim of being rushed because the case had been going on for over two years and he knew that on the date set for trial "[e]ither we're going to trial or you and your attorney and the District Attorney would work out perhaps some other charges that were acceptable to you." Assessing the credibility of the witnesses was within the province of the circuit court. ***Kivioja***, 225 Wis. 2d at 289.

¶8 Judge Barbara H. Key presided over the hearing to reconsider the first ruling. Robinson testified. She said Wolff was emotional before entering his plea but denied that she told him he could withdraw it if he changed his mind. Wolff testified for the first time that, while deciding whether to enter a plea, he saw a detective enter the jury room and grew concerned that he would not get a fair trial. Also for the first time, he testified that he had no confidence in Robinson, in contrast to the first hearing where he agreed that she did a "pretty good job" representing him.

¶9 The court reviewed the prior transcripts and considered Wolff's and Robinson's testimony. It found Wolff's testimony not credible, inconsistent and self-serving and concluded that his "buyer's remorse" did not state a fair and just reason. The court denied the motion.

¶10 Judge Key also presided over the postconviction motion hearing at which Wolff presented the new evidence of his hearing loss. An audiologist testified that a person with hearing loss like Wolff's "very often says, I hear him talk. I'm just not sure what they said." Wolff did not testify. He thus did not establish that the audiologist's comment described his situation or present evidence as to what information he did not hear or understand at the plea colloquy or in plea discussions. The court found that prior transcripts revealed that Wolff asked for clarification if needed, answered responsively, and never indicated that he did not understand what was happening. It declined to find that his hearing impairment constituted a fair and just reason.

¶11 Wolff contends that the circuit court applied the stricter "manifest injustice" standard applied to plea withdrawal after sentencing. *See* ***id.*** at 286. We disagree. The case was over two years old and Wolff knew that negotiations had been ongoing. The record reveals that he wanted to avoid sex offender registration and charges with a sexual component. He does not assert that he ever refused to plead to anything at all. The circuit court should freely grant the motion in the face of a fair and just reason it finds credible. Wolff did not shoulder that burden. Our review of the plea withdrawal hearings convinces us that the circuit court's findings of fact are not clearly erroneous and that it properly applied the "fair and just" standard. The court did not misuse its discretion in denying Wolff's plea withdrawal motions.[2]

[2] Because Wolff did not establish a fair and just reason to withdraw his plea, we need not consider any arguments relating to the prejudice to the State.

¶12 Wolff submits that the following factors add up to a fair and just reason for plea withdrawal: (1) the promptness of his motion; (2) his assertion of innocence; (3) his confusion about the charges; (4) the last-minute nature of the agreement; (5) his eleventh-grade education and limited exposure to the criminal justice system; (6) his significant hearing loss; and (7) his claim that he thought he could withdraw his pleas within a reasonable time. *See* ***State v. Shimek***, 230 Wis. 2d 730, 739-40, 601 N.W.2d 865 (Ct. App. 1999). To so conclude would require that we reweigh the evidence the circuit court evaluated. That is not the function of a reviewing court. *See* ***Kivioja***, 225 Wis. 2d at 289.

By the Court.—Judgment and order affirmed.

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