

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2004

Cornelia G. Clark
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 No. 03-3541-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 02CF001634
02CF001635**

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL R. BRZYCKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Paul R. Brzycki appeals from a judgment entered after he pled guilty to one count of burglary and one count of first-degree recklessly endangering safety, use of a dangerous weapon, contrary to WIS. STAT.

§§ 943.10(1)(a), 941.30(1) and 939.63 (2001-02).¹ Brzycki contends that the trial court erred when it failed to hear his *pro se* motion to withdraw his plea. Because Brzycki abandoned the motion and proceeded with sentencing, he waived his right to raise the issue on appeal. Therefore, we affirm.

BACKGROUND

¶2 On March 15, 2002, Brzycki physically assaulted Shirley Murphy, the elderly woman who had permitted Brzycki to live in her home. He then stole money from the upper residence of the home. Brzycki was charged with burglary, substantial battery, first-degree recklessly endangering safety while armed, and committing a violent felony against an elderly person with the use of a dangerous weapon.

¶3 On June 24, 2002, Brzycki entered a not guilty by reason of mental disease or defect plea and requested that a psychological exam be conducted to determine competency. After the exam was completed, counsel indicated the report would not be submitted to the court. On September 11, 2002, the defense moved to withdraw the special plea and Brzycki changed his plea to “not guilty” on all counts. On September 24, 2002, Brzycki entered guilty pleas to the crimes of burglary and first-degree recklessly endangering safety with the use of a dangerous weapon.

¶4 On October 7, 2002, the court received a *pro se* letter from Brzycki alleging he was receiving ineffective assistance of counsel. On November 22,

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

2002, Brzycki sent the court a *pro se* motion seeking a “competency hearing” because he received ineffective assistance of counsel resulting in an involuntary plea.

¶5 At the sentencing hearing, the motion/letter sent *pro se* by Brzycki was not addressed. On the burglary charge, Brzycki was sentenced to a fifteen-year term, to be served as ten years’ incarceration and five years’ extended supervision. On the endangering safety charge, Brzycki was sentenced to a fifteen-year term, to be served as ten years’ incarceration and five years’ extended supervision, consecutive to the burglary sentence.

¶6 Judgment was entered. Brzycki now appeals.²

DISCUSSION

¶7 Brzycki contends that the trial court erroneously exercised its discretion by failing to hear his *pro se* motion seeking to withdraw his plea.³ We disagree.

¶8 The record does not reflect whether the trial court decided not to address Brzycki’s *pro se* motion because Brzycki was represented by counsel or because it was simply unaware that the motion had been filed. In either event, we cannot conclude that the trial court erroneously exercised its discretion.

² Brzycki filed a postconviction motion seeking sentence modification, which was orally denied on December 2, 2003. At the time this appeal was filed, however, that decision was not reduced to a written order. We ruled that we cannot review this decision for lack of jurisdiction, until the trial court enters a written order on the motion.

³ Brzycki’s *pro se* motion has been construed to be a motion seeking plea withdrawal, even though it was not labeled as such.

¶9 At the time Brzycki filed the *pro se* motion, he was represented by counsel. A defendant has no right to concurrent self-representation and representation by counsel. *Moore v. State*, 83 Wis. 2d 285, 297-302, 265 N.W.2d 540 (1978). Accordingly, a trial court that fails to entertain a defendant's *pro se* motion when the defendant is represented by counsel has not erroneously exercised discretion. *See State v. Wanta*, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999).

¶10 In the event that the trial court was simply unaware of the motion, Brzycki is the party responsible for the failure. Brzycki was the party required to raise the issue with sufficient prominence so that the trial court knew it was being called upon to rule on the motion. *See State v. Edwards*, 2003 WI App 221, ¶8, 267 Wis. 2d 491, 671 N.W.2d 371. If a party fails to pursue a motion after it has been filed, the motion is deemed abandoned. *State v. Woods*, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988). “The burden is on the party making a motion to obtain a ruling from the court and failure to do so constitutes a waiver of the motion precluding its consideration on appeal.” *Berna-Mork v. Jones*, 173 Wis. 2d 733, 739-40, 496 N.W.2d 637 (Ct. App. 1992) (citation omitted).

¶11 Here, the record reflects that Brzycki personally appeared at the sentencing hearing on November 22, 2002. The court addressed Brzycki regarding counsel's representation about adjourning the sentencing:

THE COURT: Is that correct, sir? You want to go ahead with the sentencing today?

PAUL BRZYCKI: Yes, right.

THE COURT: And you had enough time to talk to [your attorney] in the back?

PAUL BRZYCKI: Right, I did.

At no time during the sentencing hearing did Brzycki mention the plea withdrawal motion. Brzycki did not raise it, did not ask the court if it had been received, and did not ask the court to rule on the motion. When the court asked Brzycki if there was anything else he wanted to say before receiving his sentence, Brzycki replied, “No, sir.”

¶12 Based on the foregoing, we conclude that Brzycki waived his right to raise this issue on appeal because he abandoned the plea withdrawal motion when he proceeded to sentencing without raising the issue. Brzycki had a clear opportunity to bring this issue to the court’s attention. He chose not to, and therefore waived his right to seek appellate review on the trial court’s failure to rule on his *pro se* motion.

¶13 Therefore, whether the trial court declined to address the *pro se* motion on the basis that Brzycki was represented by an attorney or on the basis that Brzycki abandoned the issue, we cannot conclude that the trial court erroneously exercised its discretion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

