COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1253-CR **Cir. Ct. No. 2004CF554**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURTIS M. WILLEMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL WILK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kurtis Willems appeals from a judgment of conviction of two counts of child abuse by recklessly causing great bodily harm. He argues that his motion to withdraw his no contest plea before sentencing should have been granted and that he was entitled to the appointment of new

counsel before entry of his no contest plea. We reject his claims and affirm the judgment of conviction.

¶2 Willems was originally charged with three counts of intentionally causing great bodily harm to a child. Trial was set for February 14, 2005. At the final pretrial on January 5, 2005, appointed counsel moved to withdraw on the ground that Willems had discharged him. The trial court concluded that Willems's only reason for discharging trial counsel was that counsel did not understand him. It denied counsel's motion to withdraw.

¶3 On February 8, 2005, the parties appeared before the court with a possible plea agreement except Willems personally informed the court that he had questions to explore with his attorney before accepting the plea agreement. The matter was set over to February 9, 2005, and Willems then entered a no contest plea to the reduced charges of recklessly causing great bodily harm to a child.

¶4 On April 5, 2005, trial counsel filed a motion to withdraw Willems's plea and to withdraw. New counsel was appointed. At the evidentiary hearing on Willems's motion to withdraw his plea, Willems argued that he thought he was entering a plea to a reckless conduct crime that only resulted in bodily harm under WIS. STAT. § 948.03(3)(b) (2005-06),[1] rather than a crime resulting in great bodily harm under § 948.03(3)(a), as stated in the amended information. He also claimed that the plea was entered in a state of haste and confusion. The trial court denied the motion to withdraw the plea. Sentencing occurred thereafter.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 A motion to withdraw a no contest plea, filed prior to sentencing, is addressed to the discretion of the trial court. ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). We review the trial court's resolution of the motion for an erroneous exercise of its discretion. *See* ***id.*** at 289.

¶6 A defendant has the burden to show by a preponderance of the evidence that there is a "fair and just reason" for withdrawal of the plea. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583-84, 469 N.W.2d 163 (1991). In meeting this burden of proof, it is enough that the defendant presents plausible fair and just reasons that are supported by evidence in the record. *See* ***Shanks***, 152 Wis. 2d at 290. "The 'fair and just' standard contemplates the mere showing of some adequate reason for the defendant's change of heart." ***Id.*** at 288. Where the defendant has met this burden, the motion should be granted unless the state has shown that it will be substantially prejudiced. ***Id.*** at 288-89. In ***Shanks***, we specified a number of factors that should be considered in resolving whether a defendant should be permitted to withdraw the plea: (1) an assertion of innocence, (2) the actual existence of a genuine misunderstanding of the plea's consequences, (3) hasty entry of the plea, (4) confusion on the defendant's part, (5) coercion on the part of defense counsel, and (6) prompt filing of the motion to withdraw the plea which indicates a swift change of heart. *See* ***id.*** at 290.

¶7 At the outset we reject Willems's contention that by focusing on the plea colloquy the trial court applied the more rigorous manifest injustice standard applicable to a motion to withdraw a plea after sentencing. *See* ***State v. Booth***, 142 Wis. 2d 232, 235, 237, 418 N.W.2d 20 (Ct. App. 1987) (to withdraw a guilty plea after sentencing, a defendant must establish by clear and convincing evidence that a manifest injustice would result if the withdrawal were not permitted). In rendering its decision, the trial court first acknowledged that withdrawal of a plea

before sentencing is to be freely allowed when the defendant shows a fair and just reason. The trial court recited the proper standard for determining the motion to withdraw the plea. Although the trial court extensively reviewed the plea colloquy, it did so for the purpose of assessing the credibility of Willems's claims that he did not understand that he was still pleading to a crime that involved great bodily harm and that the plea was entered in a state of haste and confusion. The trial court's credibility determination is critical to whether a fair and just reason actually exists. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

¶8 It is the trial court's implicit credibility determination that sustains the decision to deny the motion for plea withdrawal. Willems's post-plea testimony that he thought the crimes involved only bodily injury stands in contrast to what occurred at the plea hearing. During the plea colloquy the trial court twice recited that the crime involved great bodily harm to the child. Twice Willems confirmed that he understood the crime and its elements. The plea questionnaire stated that the crime involved great bodily injury and referenced the attached jury instruction defining the elements of a WIS. STAT. § 948.03(3)(a) offense.[2] Willems's claim that he would not have entered a plea to a crime alleging a broken femur and a brain injury is incredible in light of the fact that during the plea colloquy the trial court read from the amended information that the broken femur and brain injury formed the basis for each count. Moreover, the trial court found that Willems conducted his own legal research to suggest the possibility of a reduced charge and was therefore aware of the elements of the crime.

[2] Neither Willems nor trial counsel could recall having reviewed the jury instruction. The trial court found that the instruction was attached to the plea questionnaire.

¶9 As to Willems's claim that the plea was entered in haste or confusion, the trial court noted that Willems was given extra time to consider the plea. During the plea colloquy Willems twice indicated he had adequate time to talk to his trial counsel about the matter. Again Willems's post-plea dissatisfaction with trial counsel's explanation of the plea agreement stands in contrast to the approval Willems gave counsel's performance during the plea colloquy. The trial court found that by filing pro se motions, Willems demonstrated that he was articulate and detailed in understanding the case and in awareness of the law. That the plea agreement was the product of Willems's own suggestion of what he would be willing to enter a plea to further demonstrated that there was not haste or confusion in entering the plea.

¶10 We acknowledge that Willems maintained his innocence and promptly sought to withdraw his plea. However, an assertion of innocence and a prompt motion to withdraw are not in themselves fair and just reasons for a plea withdrawal. ***State v. Shimek***, 230 Wis. 2d 730, 740 n.2, 601 N.W.2d 865 (Ct. App. 1999). In short, the trial court did not find Willems's claims that he did not understand the nature of the crime and that he entered the plea in haste to be credible. Thus, no fair and credible reason for withdrawing the plea was demonstrated and the trial court did not erroneously exercise its discretion in denying the motion for plea withdrawal. *See* ***Canedy***, 161 Wis. 2d at 586.

¶11 Willems argues he was denied his choice of counsel when the trial court refused to grant trial counsel's motion to withdraw at the final pretrial conference. The right to counsel does not include the right to have counsel of the defendant's choice. ***Rahhal v. State***, 52 Wis. 2d 144, 147, 187 N.W.2d 800 (1971). The question of whether an appointed counsel should be relieved requires

the exercise of discretion by the trial court. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988).

¶12 Willems contends the trial court failed to conduct an adequate inquiry as to why new counsel was sought. *See* ***id.*** at 362 ("[A] judge should make a meaningful inquiry when the motion for change of counsel is made …."). We do not agree. Willems's trial counsel explained that Willems's complaint was that counsel had not visited him enough in jail as the trial was approaching. Willems was provided the opportunity to indicate whether or not he was discharging counsel. Willems indicated that he had filed a complaint about trial counsel with the state public defender's office but that he had not discharged counsel. Willems then indicated he wanted to discharge counsel but did not offer any reason why. The trial court reviewed the file which included many pro se letters with complaints about appointed counsel. When the court indicated that Willems was having difficulty with attorneys,[3] Willems merely agreed and stated that he wanted somebody that would defend him. We cannot conclude that an adequate inquiry was not made just because consideration of the motion took only moments. The trial court's inquiry need not satisfy a particular formula. ***State v. Kazee***, 146 Wis. 2d 366, 372, 432 N.W.2d 93 (1988). "If the reasons for the defendant's request are made known, or are apparent, the court may exercise its discretion without further inquiry." ***Id.***

¶13 The trial court found that Willems's only reason for discharging counsel was a claim that counsel did not understand him. Good cause is required

[3] Counsel first appointed to the case withdrew due to a breakdown in the attorney-client relationship, Willems's dissatisfaction with counsel's performance, and Willems's insistence on trial strategy deemed inappropriate by counsel.

to warrant the substitution of appointed counsel. ***State v. Robinson***, 145 Wis. 2d 273, 278, 426 N.W.2d 606 (Ct. App. 1988). There must be a showing of conflict of interest, a complete breakdown in communication, or an irreconcilable conflict. ***Id.*** at 279. A mere showing that an attorney-client relationship is not harmonious does not establish a complete breakdown in communication between the defendant and counsel. *See* ***State v. Batista***, 171 Wis. 2d 690, 702, 492 N.W.2d 354 (Ct. App. 1992), *overruled on other grounds by* ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

¶14 Willems's complaints that counsel had not visited him enough and did not understand him were too general to compel the substitution of counsel. The request for new counsel came only one month before trial. The trial court expressed its desire to keep the trial calendared, an appropriate consideration. *See* ***Lomax***, 146 Wis. 2d at 360 (the court is to balance the defendant's constitutional right to counsel against societal interest in the prompt and efficient administration of justice). The trial court did not erroneously exercise its discretion in denying trial counsel's motion to withdraw or foreclosing the appointment of new counsel.

By the Court.—Judgment affirmed.

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