COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP263-CR **Cir. Ct. No. 2003CF6093**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONNELL BASLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN and THOMAS P. DONEGAN, Judges. *Reversed and cause remanded with directions*.

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Donnell Basley appeals a judgment and an order denying his postconviction motion for plea withdrawal following a remand from this court. We conclude that the circuit court should have granted Basley's motion

based on language in our prior decision. Accordingly, we reverse and remand with directions that Basley be granted a new trial.

BACKGROUND

¶2 Basley was tried in March of 2004 on charges including first-degree and second-degree reckless homicide while armed. The judge declared a mistrial because the jury failed to reach a unanimous verdict. The matter was scheduled for retrial on June 7, 2004. The prosecutor offered to agree to let Basley enter a plea to second-degree reckless homicide. Basley's attorney strongly recommended that Basley accept the agreement and, eventually, Basley agreed. About a week before the scheduled trial, Basley's attorney informed the prosecutor and the judge that Basley intended to enter a plea, and the scheduled trial date was effectively changed to a plea hearing date. On that date, Basley entered a plea of no contest to an amended charge of second-degree reckless homicide.

¶3 Basley subsequently moved to withdraw his plea. Basley alleged that, prior to his plea, he told his counsel that he wanted a trial after all. Basley alleged that his counsel pressured him to accept the plea by threatening to withdraw from the case if Basley did not enter a plea and telling Basley that it might take up to a year before a new attorney would be prepared to take the case to trial. The circuit court denied this motion without a hearing. Basley appealed, and one issue was whether his plea withdrawal motion alleged sufficient facts to

warrant a hearing.[1] We agreed with Basley that his motion was sufficient and, thus, reversed and remanded for a hearing.

¶4 Pertinent here, we stated:

> If [Basley's] trial counsel in fact told him that, if Basley would not agree to the State's proffered plea bargain, counsel would withdraw from representation, thereby forcing a potentially lengthy delay of Basley's trial, Basley's plea was tendered under the duress of his attorney's coercive conduct, rendering his plea involuntary.

State v. Basley, 2006 WI App 253, ¶9, 298 Wis. 2d 232, 726 N.W.2d 671, *review denied*, 2007 WI 120, 304 Wis. 2d 610, 741 N.W.2d 240 (No. 2005AP2449-CR).

¶5 On remand, both Basley and his trial counsel testified. The circuit court found that Basley was not credible and instead relied on counsel's testimony. The court concluded that Basley's plea was voluntary and, therefore, denied the plea withdrawal motion. The remaining facts are summarized in a manner that supports the circuit court's decision. *See* ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

¶6 Trial counsel testified that all of the jurors in Basley's first trial agreed that he was guilty, but disagreed as to whether he was guilty of first- or second-degree reckless homicide. Eleven jurors voted for second-degree, and the hold-out insisted on first-degree. Counsel said that after the mistrial he repeatedly urged Basley to accept an offer by the prosecutor to let Basley plead to second-

[1] We devoted more space to the other issue in the case, the State's argument that, under ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996), the record conclusively showed that Basley was not entitled to relief. *See* ***State v. Basley***, 2006 WI App 253, ¶¶11-18, 298 Wis. 2d 232, 726 N.W.2d 671, *review denied*, 2007 WI 120, 304 Wis. 2d 610, 741 N.W.2d 240 (No. 2005AP2449-CR). We rejected this argument, and it is no longer an issue.

degree reckless homicide, rather than face another chance of being convicted of first-degree. Counsel said he "made every effort" and "did everything in [his] power" to convince Basley that a plea was in Basley's best interest.

¶7 During a telephone conversation a week before the scheduled retrial, Basley indicated he would enter a plea. Counsel notified the court that his client was likely to enter a plea, and told the State it could call off its witnesses. However, when counsel met with Basley the night before the scheduled trial date, which was now effectively scheduled as a plea date, Basley insisted on a trial. Counsel informed Basley that counsel would not be willing to hire an assistant to help during the retrial, as he had during the first trial, because ultimately the first trial had cost counsel more money than he had earned at the public defender rate. Counsel told Basley he again needed such assistance. He told Basley that Basley had already gotten the best trial possible the last time. Basley remained "quite firm" that he wanted to go to trial.

¶8 The next morning, counsel told Basley that his case would not be tried that day because counsel had already told the State and the court that the matter was going to settle. Counsel repeated that he was not interested in retrying the case because Basley would have been found guilty of the second-degree charge at the first trial but for the "fluke" of one juror holding out for a higher charge, and that counsel did not "want [it] on [his] shoulders" if Basley was found guilty of the first-degree charge. Counsel told Basley that he would move to withdraw if Basley did not enter a plea, and was "relatively firm" about "saying that if the case were to go to trial, it would have to be with another defense attorney." Counsel also explained that it would "take some time" for the new attorney to prepare for trial, "to go through all this information, to interview

witnesses and whatever they need to do." At some point after being told all of this, Basley again agreed to enter a plea.

¶9 Counsel acknowledged that Basley "wasn't thrilled" and "was not happy about the whole thing." Counsel also noted that "even a day delay in [Basley's] mind was too much because he was incarcerated for a long time as it was."

STANDARD OF REVIEW

¶10 "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citations omitted).

DISCUSSION

¶11 In our published ***Basley*** opinion, we held that, "[i]f his trial counsel in fact told him that, if Basley would not agree to the State's proffered plea bargain, counsel would withdraw from representation, thereby forcing a potentially lengthy delay of Basley's trial, Basley's plea was tendered under the duress of his attorney's coercive conduct, rendering his plea involuntary." ***Basley***, 298 Wis. 2d 232, ¶9. Thus, we instructed the circuit court that Basley was entitled to plea withdrawal if it was determined at a hearing on remand that Basley's counsel told Basley that, if he did not plead to the amended charge of second-degree reckless homicide, counsel would withdraw. We held that if those conditions were met, Basley's plea was involuntary. As our summary of facts

shows, those conditions were met and, therefore, we must reverse the circuit court with directions that Basley be restored to the position he was in prior to his plea. We are bound by our prior decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶12 If our prior ***Basley*** decision was not published, we would be faced only with law of the case, and would not be bound to follow it now. The law of the case doctrine is a "'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783 (quoting ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989)). The law of the case doctrine is not, however, "an absolute rule that must be inexorably followed in every case. Courts have the power 'to disregard the rule of "law of the case" in the interests of justice' and to reconsider prior rulings in a case." ***Moeck***, 280 Wis. 2d 277, ¶25 (quoted source omitted). Thus, for example, if the opinion had not been published, the circuit court would have been free to apply the normal analysis and assess all of the facts to determine whether Basley's plea was involuntary. We are unsure where that analysis might lead, but it does not matter because we are bound by our published decision.

¶13 We now question whether we should have made any attempt to lay out general circumstances in which Basley is entitled to plea withdrawal. Although there are exceptions, *e.g.*, ***State v. Williams***, 2003 WI App 116, ¶1, 265 Wis. 2d 229, 666 N.W.2d 58 (a plea entered following a judge's participation in plea negotiations is involuntary), the general rule is that courts look at all of the circumstances and make voluntariness determinations on a case-by-case basis, *e.g.*, ***State v. Hunter***, 2005 WI App 5, ¶¶7-19, 278 Wis. 2d 419, 692 N.W.2d 256

(Ct. App. 2004) (assessing all of the circumstances after rejecting defendant's argument that the circuit court participated in plea negotiations).

¶14 An example exposes the problem. Suppose the facts are the same as here except that Basley's attorney has, since the first trial, developed health problems that preclude him from participating in another lengthy trial. If this hypothetical attorney had informed Basley that he would represent him if he entered a plea, but otherwise there would be a delay while a new attorney got up to speed, we doubt we would conclude that Basley's plea was involuntary. We note that indigent defendants have no right to choose their attorneys. *See* WIS. ADMIN. CODE §§ PD 2.03 and 2.04. And, despite speedy trial rights, defendants must often endure delays if they choose to exercise their right to a trial, rather than enter a plea.

¶15 Accordingly, we reverse and remand with directions that Basley be granted a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).