COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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Nos. 95-1738-CR
95-1739-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HENRY J. BROOKSHIRE,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Henry J. Brookshire appeals from the judgments of conviction, following his guilty pleas, for three counts of armed robbery, party to a crime, and from the trial court's orders denying his postconviction motions. He argues that trial counsel was ineffective and that the trial court erred in denying defense motions for substitution of counsel and withdrawal of his guilty pleas before sentencing. We affirm.

In these consolidated cases, Brookshire pled guilty to participating in the armed robberies of victims in their own residences, on January 30 and February 20, 1994. Although Brookshire had maintained his innocence and alibi defenses throughout pretrial proceedings, on the day of trial he finally pled guilty pursuant to a plea agreement reducing his potential exposure from one hundred years to sixty years. The trial court ordered a pre-sentence report.

Shortly before the sentencing date, Brookshire's counsel notified the trial court of expected motions and, on the sentencing date, counsel moved for substitution of counsel and withdrawal of the guilty pleas. Counsel explained the basis for the motions:

> [Brookshire] indicated to me that there were various grounds for his—for making this motion including, among other things, and I won't get into all the factual basis or the legal grounds for it, but including involuntariness based on actions of trial counsel ... involuntariness based on coercion ... by my pressure to enter the plea, by the pressure of the time constraints within which he—within which he had to act, pressure from family members, pressure from just the totality of the circumstances, his confusion about what was taking place, his confusion as to both factual and legal matters, about his ability to mount a defense.

Counsel contended that new counsel was needed because he (trial counsel) would be a necessary witness testifying on Brookshire's claim that he "overbore his will" and thus coerced Brookshire's guilty pleas. In a brief hearing, the trial court repeatedly asked counsel to specify the ways in which Brookshire alleged that counsel had coerced the pleas. The trial court also questioned Brookshire:

> THE COURT: Mr. Brookshire. What's the problem here, Mr. Brookshire?
>
> THE DEFENDANT: Well, basically, you know, I didn't never really want to take a plea.

THE COURT: You what?

THE DEFENDANT: Basically, I didn't really want to take a guilty plea from jump, always asking my lawyer to go to trial, and he always saying—he kept saying that, you know, it's best for me to go out this way and everything, and the day—the day I wanted to have the trial, he was—he was saying that the three strike rule's against me, all this stuff is against me.

THE COURT: And we went through all of that on the record, right?

THE DEFENDANT: Right, and that was after I took—that was after I signed the plea.

THE COURT: Right. But before I accepted your plea we went through all that on the record. We talked about the three strikes possibility. We talked about whether anybody promised you anything or threatened you in any way, correct?

THE DEFENDANT: It wasn't like a promise or a threat though.

THE COURT: Well, so nobody promised you anything or nobody threatened you in any way to get you to change your plea, right?

THE DEFENDANT: Not verbally threatened, no, no verbally [sic] threat. No, it's just—

THE COURT: And no promises?

THE DEFENDANT: Well, I—they said I got off better. That was the promise that I—you know, if that's—that's what you call a promise, they promised that I'd get off better.

> THE COURT: Because the case was being dismissed against you?
>
> THE DEFENDANT: Right.
>
> THE COURT: And you signed—you went over the guilty plea questionnaire with [defense counsel] before you signed it?
>
> THE DEFENDANT: Just—just briefly and I just signed it.
>
> THE COURT: Right, and we talked about it out here in the courtroom?
>
> THE DEFENDANT: Right.
>
> THE COURT: Before I accepted the plea?
>
> THE DEFENDANT: Correct.
>
> THE COURT: Anything else you want to tell me, Mr. Brookshire?
>
> THE DEFENDANT: No, Your Honor.

The trial court concluded that Brookshire had failed to establish any basis for withdrawal of his pleas, and that he and counsel had failed to allege sufficient facts to warrant the appointment of a new attorney for an evidentiary hearing.

When a defendant requests a different appointed attorney, the trial court must exercise discretion to determine whether new counsel is required. ***State v. Kazee***, 146 Wis.2d 366, 371, 432 N.W.2d 93, 96 (1988). We will not reverse the trial court's decision absent an erroneous exercise of discretion. ***Id.*** at 372, 432 N.W.2d at 96. In exercising discretion, the trial court should balance the defendant's constitutional right to counsel against society's interest in the prompt and efficient administration of justice. ***State v. Lomax***, 146 Wis.2d 356, 360, 432 N.W.2d 89, 91 (1988). This balance must be achieved by first

considering whether the defendant has shown "good cause" for the substitution. ***State v. Clifton***, 150 Wis.2d 673, 684, 443 N.W.2d 26, 30 (Ct. App. 1989). A defendant has shown good cause if the alleged conflict with counsel is so great that it frustrates a fair presentation of the defendant's case. ***Lomax***, 146 Wis.2d at 359, 432 N.W.2d at 90.

We conclude that Brookshire showed good cause and, therefore, that the trial court erred in denying Brookshire substitute counsel to litigate his motion to withdraw his guilty pleas. Although we acknowledge that Brookshire and his lawyer offered relatively vague factual allegations, we agree with Brookshire that counsel's presentation was sufficient to require the appointment of new counsel. As Brookshire argues, it was unrealistic to require trial counsel, allegedly the source of improper coercion, to further specify the ways in which Brookshire believed counsel had coerced his pleas. Such a requirement would have placed counsel in a compromising position—he would have had to elaborate his own alleged ineffective assistance and/or unprofessional conduct, and further advocate that his own conduct warranted the appointment of new counsel. Under these circumstances, counsel's presentation was sufficient to warrant appointment of new counsel to enable Brookshire to litigate whether trial counsel had coerced his pleas.

We also conclude, however, that the trial court's error proved to be harmless. After sentencing, when Brookshire brought a *pro se* motion alleging ineffective assistance of counsel and challenging the trial court's previous denial of his motion to withdraw his pleas, the trial court did appoint new counsel and conduct a full evidentiary hearing.

At that postconviction motion hearing, the trial court stated that it was considering the issue of "ineffective assistance of counsel relating specifically and only to the issue of whether or not Mr. Brookshire was inappropriately pressured into entering a plea of guilty by his then trial counsel." By evaluating that issue, the trial court, in effect, conducted a "retrospective hearing" which is required if a trial court erroneously denies a request for substitute counsel. ***Lomax***, 146 Wis.2d at 364-365, 432 N.W.2d at 92-93. Therefore, as the State argues, at least to the extent that Brookshire gained new counsel to litigate whether his previous counsel's alleged coercion established a fair and just reason to withdraw his plea, Brookshire "eventually achieved his objective."

In his brief to this court, Brookshire clarifies that he "is not alleging any deficiency of counsel other than undo pressure on the defendant and to bring about guilty plea [sic]." Therefore, in both his postconviction motion hearing and on appeal, two issues merge: (1) whether trial counsel was ineffective by coercing Brookshire's pleas, thus rendering them involuntary; and (2) whether Brookshire presented a fair and just reason for withdrawal of his guilty pleas before sentencing. That is, if trial counsel coerced Brookshire's guilty pleas, then Brookshire's pleas were involuntary and, but for the coercion, he would have gone to trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (satisfying the "prejudice" prong requires that a defendant "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

Therefore, the only real issue is whether counsel's alleged pressure rendered Brookshire's guilty pleas involuntary. The trial court concluded that trial counsel was not ineffective and had not coerced Brookshire's pleas. We agree.

Although withdrawal of a guilty plea should be freely allowed prior to sentencing, "'freely' doesn't mean automatically." ***State v. Canedy***, 161 Wis.2d 565, 581-582, 469 N.W.2d 163, 170 (1991). The defendant must prove by a preponderance of the evidence the facts necessary to show a "fair and just" reason for withdrawing the plea. ***Id.*** at 583-584, 469 N.W.2d at 170-171. If the defendant fails to meet this burden, a court properly may deny the motion to withdraw the plea. ***Id.*** at 586, 469 N.W.2d at 172.

A defendant seeking to withdraw a guilty plea on the basis of ineffective assistance of counsel must prove the alleged ineffectiveness by clear and convincing evidence. ***State v. Rock***, 92 Wis.2d 554, 559, 285 N.W.2d 739, 742 (1979). A trial court's findings regarding an attorney's conduct are factual determinations which we will uphold unless clearly erroneous. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The ultimate determination of whether those facts constitute deficient and prejudicial performance, however, are questions of law subject to our independent review. ***Id.*** at 128, 449 N.W.2d at 848.

In this case, the record supports the trial court's conclusion that trial counsel did not coerce Brookshire's guilty pleas and, therefore, was not ineffective. In addition to the guilty plea record and the previously-quoted colloquy with Brookshire, the trial court, at the postconviction hearing, considered the testimony of Brookshire and trial counsel. Although Brookshire testified that counsel "made me feel like ... I had nowhere else to turn, like I had no hope," and that Brookshire "had no alternative but to plead guilty," he acknowledged that counsel never said "that he wouldn't take the case to trial." Moreover, although both Brookshire and counsel related counsel's efforts to persuade Brookshire to accept a plea agreement, neither specified any improper conduct by counsel.

Brookshire's counsel testified that "this is probably the most pressure I ever applied to a client to get him to agree to a plea agreement," but that he did so "because I felt strongly that it was in his best interests." Counsel did, however, have a reasonable basis for trying to persuade Brookshire to plead guilty. He explained his doubts about going to trial in light of the State's strong evidence, the apparent difficulties for the defense given that two co-defendants were pleading guilty and given that Brookshire's alibi theory proved to have no merit, and the reduced potential incarceration under the plea agreement. Nevertheless, because of Brookshire's determination to go to trial, counsel testified that he had been carefully preparing to try the case and was ready to do so. Thus, the testimony of both Brookshire and trial counsel clearly supports the trial court's conclusion that "[t]here is nothing on this record to suggest that [counsel] did anything inappropriate or anything other than what any other good attorney would do."

Lastly, Brookshire asks this court to consider remanding his case for a resentencing with new counsel. We reject his request. A postconviction retrospective hearing was held in which new counsel was appointed and new evidence was heard. It is clear, therefore, that had the trial court initially held an evidentiary hearing with new counsel, it would have concluded that Brookshire had not substantiated his allegation against trial counsel. Thus, the trial court would have denied trial counsel's motion to withdraw and permitted him to remain on the case for sentencing.

By the Court. – Judgment and orders affirmed.

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