COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1559-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGG R. MADDEN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

NETTESHEIM, J. Gregg R. Madden appeals from three judgments of conviction for fourth-degree sexual assault and from an order denying his motion for postconviction relief. Madden was convicted following his entry of two guilty pleas and a no contest plea to the charged offenses. Prior to sentencing, Madden moved to withdraw his pleas on the grounds that he had felt pressured by his attorney to enter the pleas, he was innocent and he wished to go to trial.

Madden contends on appeal that the trial court erroneously denied his motion. He also contends that the trial court failed to comply with § 971.08, STATS., when the court accepted his pleas. We reject Madden's arguments. Accordingly, we affirm.

Madden was charged with three counts of fourth-degree sexual assault. An initial appearance was held on March 20, 1997, at which time a continuance was granted based on the possibility that the State and Madden's counsel could negotiate a resolution of the charges. After additional continuances, further proceedings were held on May 1, 1997, when the parties informed the court that a plea agreement had been reached. However, because Madden was not aware that the pleas involved the completion of a short-form presentence investigation, the matter was once again postponed. On May 13, Madden entered a plea of guilty to two counts of fourth-degree sexual assault and no contest to the third count of fourth-degree sexual assault. The trial court set a sentencing date of June 23, 1997.

Following a postponement of the sentencing hearing, Madden filed a motion to withdraw his guilty and no contest pleas on August 27, 1997. Madden alleged that he "entered such a plea only because he felt pressured by his attorney into doing so" and that he was innocent and wished a trial. The trial court held a hearing on Madden's motion on September 5, 1997. The court denied Madden's motion finding that he "failed by any preponderance of the evidence to show … that his plea should be withdrawn and that he should be allowed a trial in this case." Madden was sentenced to nine months in jail with Huber privileges on count one and three years' probation on counts two and three.

On March 31, 1998, Madden filed a motion for postconviction relief again requesting permission to withdraw his pleas. The trial court denied

Madden's request following a hearing on May 8, 1998. Madden appeals from the judgments and the order denying his motion for postconviction relief.

Whether to permit a criminal defendant to withdraw pleas of guilty or no contest prior to sentencing is committed to the discretion of the trial court. *See* ***State v. Shanks***, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). However, a trial court should grant a plea withdrawal motion made prior to sentencing for any fair and just reason unless the prosecution would be substantially prejudiced. *See* ***State v. Canedy***, 161 Wis.2d 565, 582, 469 N.W.2d 163, 170 (1991). While a fair and just reason contemplates "the mere showing of some adequate reason," it must be something more than simply the desire to have a trial. *See* ***id***. at 583, 469 N.W.2d at 170-71 (quoted source omitted). The burden rests on the defendant to convince the court by a preponderance of the evidence that a fair and just reason for withdrawal exists. *See* ***id***. at 583-84, 469 N.W.2d at 171.

Relying on ***Shanks***, Madden contends that he should have been allowed to withdraw his pleas because he felt rushed and pressured by trial counsel when making his decision, he indicated that he had second thoughts about his decision, and he maintained his innocence. In ***Shanks***, we listed several factors for consideration in determining whether a defendant has shown a fair and just reason for withdrawal: (1) an assertion of innocence; (2) a genuine misunderstanding of the plea's consequences; (3) a showing of haste, confusion or coercion during the plea process; (4) swiftness in seeking to withdraw the plea; and (5) evidentiary support in the record. *See* ***Shanks***, 152 Wis.2d at 290, 448 N.W.2d at 266-67. However, "even where the reasons are fair and just, they must be supported by the evidence of record." ***Id***. at 290, 448 N.W.2d at 267. We conclude, as did the trial court, that no such evidence exists in this case.

Here, Madden has satisfied several of the factors which bear upon a plea withdrawal inquiry: he has asserted his innocence and he moved in a timely fashion to withdraw his pleas. *See* ***id***. at 290, 448 N.W.2d at 266-67. However, the trial court nonetheless concluded that the evidence did not support Madden's claim that he was pressured into making his pleas.

First, Madden argues that the trial court's statements at the motion hearing indicate its acceptance of his testimony that he felt pressured to enter his pleas. Specifically, Madden points to the following statements made by the court: "One can easily see how [Madden] would feel pressure to make a decision. The decision to enter a guilty plea to these three misdemeanor charges is not to be taken lightly." However, it is evident upon our review of the record that the trial court was simply acknowledging that the decision whether to enter a plea, while both difficult and momentous, must be made by the defendant at some point prior to trial. Madden testified that he felt pressured because the choice presented to him by his attorney was to "accept [the plea negotiation] or go to trial." However, as was reflected by the trial court's statement above, the pressure attending the decision whether to enter a plea or go to trial is inevitably present in every case. If guilty or no contest pleas may be withdrawn on that basis, plea withdrawal would be a matter of absolute right. That, of course, is not the law.

In arriving at its decision to deny Madden's motion, the trial court further noted that, according to both Madden and his attorney, they spent at least five hours discussing the case prior to the plea entry. The court found that Madden had adequate time to talk to his attorney. Moreover, Madden's attorney testified that she spent more than two hours with him on the day of the plea entry and did not pressure him to enter a plea. The trial court noted that the plea

colloquy was thorough and that Madden had a high school diploma and three years of college education.

We also take note that Madden's trial counsel testified that Madden told her during the plea negotiations that "if we got jail he wanted to withdraw his plea." While Madden's plea withdrawal motion was brought prior to the sentencing, we observe that Madden's motion was brought *after* the presentence report was issued. The report recommended jail time. Madden testified that he did not contact a lawyer to seek plea withdrawal until after he knew the results of the presentence recommendation. Although the trial court noted this testimony, it did not expressly base its ruling on this evidence. Nonetheless, this history demonstrates that the prospect of plea withdrawal was already on Madden's mind when he entered his pleas. Thus, this evidence cuts against Madden's claim that his reason for plea withdrawal was the pressure he felt from his attorney. Rather, this evidence suggests that the reason for the plea withdrawal was the likelihood that Madden would receive a jail sentence.

Based on the evidence presented, we conclude that the trial court reasonably concluded that Madden was not pressured into entering a guilty plea.

Next, Madden contends that the trial court failed to comply with § 971.08, STATS., when accepting his plea. Section 971.08 requires the court, prior to its acceptance of a guilty or no contest plea, to "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted" and "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged."

Madden argues that "the trial court in the instant case relied upon the plea questionnaire to inform the defendant of the constitutional rights which [he]

was waiving and chose not to directly address [him]." Because reliance upon a plea questionnaire form is an accepted means of ascertaining the defendant's knowledge of constitutional rights waived, *see* ***State v. Moederndorfer***, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629 (Ct. App. 1987), we reject Madden's argument.

The plea questionnaire form submitted to the trial court prior to the plea entry indicates that Madden was aware of his constitutional rights and understood that a plea of guilty or no contest would waive those rights. In addition, Madden's signature accompanies the following statement on the form: "I have read … this entire questionnaire and I understand its contents. I have initialed or completed each item to indicate that I understand it." At the plea withdrawal hearing, Madden testified that he had filled out the plea questionnaire form with his attorney and that he had initialed the form. Madden's attorney confirmed that Madden initialed the form.

At the plea hearing, the trial court recited the charges against Madden and the potential penalties for each offense. After accepting Madden's guilty and no contest pleas, the trial court referred to the plea questionnaire form and asked Madden if he had signed and initialed the form. Madden indicated that he had. The trial court then asked Madden to indicate his age and level of education. Madden indicated that he was thirty-five years old and had completed high school and three years of college. The following exchange then took place:

> [THE COURT]: Did you read that form I've shown you?
>
> [MADDEN]: I did.
>
> [THE COURT]: Did you understand it?
>
> [MADDEN]: I did.
>
> [THE COURT]: Do you understand the effect of this form is to tell me that you understand your rights, that you are

> giving your trial rights up, that you are going to be convicted of three misdemeanors, and that the state is going to be free to argue in this case—what is your maximum term?
>
> [STATE]: Nine months in jail.
>
> ….
>
> [MADDEN]: Yes, I do understand that if we argue it will be a maximum term of nine months.
>
> ….
>
> [THE COURT]: [Defense counsel], do you believe your client has freely, voluntarily entered his plea?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [THE COURT]: I'll make such a finding.

The court then informed Madden of the elements of the charged offense and confirmed that he understood those elements. Finally, the court inquired as to whether defense counsel believed that Madden understood the charge and the facts of the case. Counsel indicated that she believed he did.

The trial court's procedure was in keeping with that accepted by this court in ***Moederndorfer***. There, we held that there was no error when "[t]he trial court personally questioned the defendant concerning the form. It asked the defendant if he had signed the form, if his attorney had assisted him in understanding the rights being waived and if he understood each of the paragraphs he had initialed. The defendant replied affirmatively to each question." ***Id***. at 828, 416 N.W.2d at 630 (emphasis omitted; footnote omitted). Here, the trial court referred to the plea questionnaire form to demonstrate that Madden had knowledge of the rights being waived and questioned Madden as to his understanding of the

form. We reject Madden's contention that the trial court failed to comply with § 971.08, STATS., in accepting his pleas.[1]

Finally, we reject Madden's contention that his pleas were not voluntarily, knowingly and intelligently entered. We have already concluded, based on our review of the record, that the trial court's finding that Madden was not pressured into entering his plea were reasonable and that Madden was adequately informed of the rights he was waiving prior to entering his pleas. We affirm the judgments and the order denying postconviction relief.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[1] We note that Madden likens the facts of his case to those presented in ***State v. Van Camp***, 213 Wis.2d 131, 569 N.W.2d 577 (1997). Madden's reliance on ***Van Camp*** is misplaced. In that case, Van Camp's attorney could not recall whether Van Camp had been informed of his constitutional rights at the time of the plea or whether he had gone through a plea questionnaire and waiver of rights form with Van Camp. *See* ***id***. at 138-39, 569 N.W.2d at 582. Furthermore, there was nothing in the plea hearing transcript indicating that the court addressed Van Camp's constitutional rights or inquired as to whether he understood that he was waiving his rights by entering a plea. *See* ***id***. at 142, 569 N.W.2d at 583.