

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2001

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.

No. 00-3418-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
DENNIS FLYNN, Judge. *Affirmed.*

Before Nettlesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeffrey White appeals from the judgment of conviction entered against him. The issue on appeal is whether White should have been allowed to withdraw his plea prior to sentencing. Because we conclude that the circuit court properly denied White's motion to withdraw his plea, we affirm.

¶2 White was charged with first-degree intentional homicide and first-degree sexual assault of a child, both as an habitual offender, as a result of the death of the eight-year-old daughter of the woman with whom White lived. The child died as a result of strangulation and asphyxiation. An autopsy revealed the presence of semen in her mouth, throat and stomach. DNA testing demonstrated that White was the source of the semen.

¶3 White initially pled not guilty to the charges and the case went to trial. Shortly after the trial began, the victim's mother was testifying. As part of her testimony, the State asked her to identify pictures of the child which showed the child as she was found after she had been killed. While the jury was looking at these photographs, White asked his attorney to ask for a recess. A recess was granted and during the recess White decided that he wanted to change his plea. A plea agreement was ultimately reached with the State whereby White pled no contest to first-degree reckless homicide and child abuse—intentionally causing great harm. As part of the agreement, White received a letter from the district attorney which stated that in his opinion White was not a likely candidate for commitment under WIS. STAT. ch. 980. The court held an extensive plea colloquy with White and found that White was knowingly, intelligently and voluntarily entering his plea. The court accepted the plea and ordered a presentence investigation.

¶4 Before sentencing, White, acting pro se, moved to withdraw his plea. The court then asked his counsel to withdraw and asked the public defender to appoint new counsel. With new counsel representing White, the court held an evidentiary hearing on White's motion to withdraw his plea. White asserted two bases for withdrawing the plea: (1) that he had relied on erroneous information regarding the potential for a WIS. STAT. ch. 980 petition to be filed against him;

and (2) that he entered the plea because his counsel had told him that it would be a way to get an adjournment, and he could move to withdraw his plea later.

¶5 After hearing testimony, the court denied the motion. The court found that White's testimony was not credible and that the State would be prejudiced if White were allowed to withdraw the plea. The court then sentenced White to sixty years in prison. White appeals.

¶6 A defendant should be allowed to withdraw a guilty plea before sentencing for any fair and just reason unless the prosecution would be substantially prejudiced. *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). A fair and just reason "is not an absolute right" but contemplates the showing of some adequate reason for the defendant's change of heart. *Id.* at 583. "The reason must be something other than [the defendant's] desire to have a trial. In addition, the burden is on the defendant to offer a fair and just reason for withdrawal of the plea." *Id.* at 583-84 (citations omitted). We review the circuit court's decision to deny the motion to withdraw his plea under the erroneous exercise of discretion standard. *Id.* at 579.

¶7 On appeal, White argues only that he should have been allowed to withdraw his plea because he received erroneous information concerning the potential exposure to a WIS. STAT. ch. 980 petition. He states that his counsel and the prosecutor both erred in their assessment that he would not be subject to such proceedings and, therefore, he has established a fair and just reason for withdrawing his plea.

¶8 We agree with the circuit court, however, that White got what he bargained for: an opinion from the prosecutor that he was not a candidate for WIS. STAT. ch. 980 proceedings. As the circuit court found, the testimony at the

hearing established that White was told that the prosecutor's opinion was not binding on other agencies of the State but was merely the prosecutor's opinion. Further, the court found that the plea agreement did not require that the opinion be objectively correct as a matter of law. The court concluded that what White requested was an opinion and that is what he got. We agree.

¶9 Further, although not raised on appeal, the initial reason White asked to withdraw his plea has some bearing on this matter. White, acting pro se, asked to withdraw his plea because he said his attorney told him to do it to get an adjournment. At the hearing both counsel and an investigator, who was present during counsel's discussions with White, testified that this was simply not true. The court found White's testimony on this point to be incredible and manipulative.

¶10 The court further found that the timing of White's decision to enter the plea was also important. White asked the court to change his plea as the victim's mother was testifying and the jury was viewing horrific pictures of the victim. The court found that the defendant was having his jury trial and then intervened in an attempt to subvert the trial. The court ultimately concluded that White had not established a fair and just reason to withdraw his plea.

¶11 We conclude that White has not established that the circuit court erroneously exercised its discretion when it denied his motion. The court concluded that White's testimony was incredible and there is no reason to disturb that finding. Further, as part of the agreement the prosecutor agreed to provide White with a letter stating his opinion that White would not be a candidate for WIS. STAT. ch. 980 proceedings and that is exactly what White got. Finally, the court found that White initially entered the plea in an attempt to subvert the trial, anticipating that he would be allowed to withdraw his plea later. Such a finding

amounts, in essence, to a conclusion that White merely changed his mind about the plea. Merely wanting a trial does not constitute a fair and just reason to withdraw a plea.

¶12 For the reasons stated, the judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

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

