COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2002

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.

Appeal Nos. 02-0246-CR
02-1096

Cir. Ct. No. 99-CF-283

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY L. KLOTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gary L. Klotz, acting pro se, appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issues on appeal are whether the trial court properly denied Klotz's postsentencing motion to withdraw his plea, whether he is entitled

to a new trial based on newly discovered evidence, and whether the trial court had jurisdiction over his case. Because we conclude that the trial court had jurisdiction and properly exercised its discretion, we affirm.

¶2 Klotz pled no contest to solicitation to commit arson. At the time, he was serving a sentence for the first-degree sexual assault of two girls. The court sentenced him to five years in prison to be served consecutively to the sentence he was already serving. After sentencing, Klotz filed postconviction motions asserting that he had received ineffective assistance of counsel, asking to be allowed to withdraw his plea, and asking for a new trial on the basis of newly discovered evidence. The trial court denied the motion and Klotz appeals.[1]

¶3 While Klotz was serving the prison sentence for sexually assaulting the two girls, he confided to another inmate, Jeremy Wine, that he was upset with the judge who had sentenced him because she opposed his release on parole. Wine then told the judge that he was concerned that Klotz might attempt to harm her. Wine was eventually hired by the Department of Justice to act as an informant into Klotz's intentions.

¶4 Klotz decided that he did not want to harm the judge, but instead wanted to hire someone to set fire to the house where the victims of his assault lived. Wine told Klotz that he had a friend on the outside who could help. The "friend" was, in fact, an agent of the Department of Justice. Klotz drafted a letter with instructions. Wine then showed Klotz a map of the area. Wine was wearing

[1] Klotz appealed first from the judgment of conviction and then from the order denying his motion for postconviction relief. By an order dated April 26, 2002, we consolidated the two appeals.

a body-wire at the time. Klotz told Wine that the map was outdated and drew his own map of the area with specific instructions on how to get to the victims' house. Klotz agreed to pay the "friend" $150 for his expenses, and they agreed that the arson would take place on June 4, 1999. On June 3, 1999, Wine was again body-wired when he talked to Klotz. Klotz confirmed that he wanted to proceed with the plan. Klotz was arrested the next day.

¶5 Klotz argues that the trial court erroneously exercised its discretion when it denied his motion to withdraw his plea after sentencing.[2] After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *See* ***Booth***, 142 Wis. 2d at 237.

¶6 Klotz first appears to be arguing that he was entrapped by Wine. He argues that if he had known about Wine's prior record, he would never have pled to the crime. He asserts that he should be allowed to withdraw his plea because of this newly discovered evidence. We agree with the State that, in essence, Klotz is arguing that he should be allowed to withdraw his plea because it was entered unknowingly and involuntarily.

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[2] We agree with the State that Klotz's pro se brief is very difficult to decipher. The State has ably attempted to distill his arguments into some semblance of order. Because we also have had difficulty deciphering Klotz's arguments, we are adopting the State's formulation of the issues.

¶7 The record simply does not support Klotz's argument. At the plea hearing, Klotz indicated that he understood the elements of the crime charged and the constitutional rights he was waiving. He further stated that he had signed a plea questionnaire and discussed it thoroughly with his attorney. The plea questionnaire contained all the required information and, therefore, may be used to show that the plea was knowingly entered. *See **State v. Moederndorfer***, 141 Wis. 2d 823, 826-29, 416 N.W.2d 627 (Ct. App. 1987). We conclude that Klotz entered his plea knowingly.

¶8 Klotz also appears to be arguing that his plea was not voluntary because he felt pressured and because the State "entrapped" him into entering a plea. We see nothing in the record, however, to support this argument. At the plea hearing, Klotz told the court that he had not been forced to enter his plea. Further, the criminal complaint referred to Wine by name, so Klotz knew, or is presumed to know, that Wine is the person who provided the information to the authorities. At anytime before entering his plea, Klotz could have investigated Wine's record. Instead, however, Klotz chose to plead no contest. We conclude that Klotz entered his plea knowingly and voluntarily, and has not established a manifest injustice entitling him to withdraw his plea.

¶9 Klotz also appears to argue that he is entitled to a new trial because he has newly discovered evidence. The newly discovered evidence is again the information about Wine's prior record and allegedly fraudulent activities while in prison. The requirements for granting a new trial for newly discovered evidence are:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must have not been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be

> merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

Sheehan v. State, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974). If the newly discovered evidence fails to meet any one of these tests, the defendant is not entitled to a new trial. ***Id***.

¶10 We cannot conclude that it is reasonably probable this evidence would cause a different result to be reached at trial. As the United States Supreme Court has said, there is a presumption in the law that evidence not discovered until after trial does not affect the outcome. ***Taylor v. Illinois***, 484 U.S. 400, 414 (1988). The burden is on Klotz to show that the outcome would have been different. He has not met that burden. The evidence against him was strong. He told Wine that he wanted to have the victims' house burned down. He drew a map to show the arsonist where the house was. He withdrew money to pay the arsonist. Given this evidence, there is no reasonable likelihood that there would be a different outcome at trial.

¶11 Furthermore, Klotz must show that he was unaware of the evidence at the time of his plea, or that he was not negligent in failing to discover it. *See* ***Sheehan***, 65 Wis. 2d at 768. Klotz also cannot meet this burden. As we previously discussed, the complaint named Wine as the person who had informed on Klotz. Klotz has not offered any reason why he did not obtain information on Wine's record or conduct in prison before he entered his plea. We conclude that Klotz has not demonstrated that he has newly discovered evidence which entitles him to a new trial.

¶12 Klotz also appears to argue that the court did not have subject matter jurisdiction over him because there was a thirty-three day delay between his arrest

and his arraignment. The complaint, however, charged Klotz with a crime known to Wisconsin law, so the court had subject matter jurisdiction. *See* ***State v. Diehl***, 205 Wis. 2d 1, 10-11, 555 N.W.2d 174 (Ct. App. 1996). Moreover, by pleading no contest, Klotz waived any claim that his due process rights were violated by the delay. *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). And further, he has not shown any prejudice as a result of the delay. We also conclude that this argument is meritless. For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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