COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2590-CR

Cir. Ct. No. 00-CF-786
01-CF-316

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CORNELIUS FLOWERS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Cornelius Flowers has appealed from judgments convicting him upon pleas of no contest of one count of second-degree sexual assault of a child in violation of WIS. STAT. § 948.02(2) (1999-2000), and one count of repeated sexual assault of a child in violation of WIS. STAT. § 948.025(1)

(1999-2000). He has also appealed from an order denying his motion for postconviction relief.

¶2 Flowers raises three issues on appeal: (1) whether he presented a fair and just reason for withdrawal of his no contest pleas prior to sentencing when petitions for termination of his parental rights to all of his children were filed after entry of his no contest pleas; (2) whether he was entitled to withdraw his no contest pleas after sentencing because they were involuntary, based upon his mistaken belief that he could appeal all issues arising prior to the entry of his no contest pleas; and (3) whether his trial counsel rendered ineffective assistance when, prior to the entry of Flowers' no contest pleas, counsel failed to explain the limited right of appeal that exists after entry of a no contest plea. We conclude that the trial court properly rejected these arguments, and affirm the judgments and order.

¶3 Flowers was charged in these consolidated cases with three counts of first-degree sexual assault of a child, one count of repeated sexual assault of a child, and one count of physical abuse of a child. He faced possible prison terms totaling 170 years. On the third day of a jury trial, he entered his no contest pleas. In exchange for his pleas, two of the first-degree sexual assault charges were dismissed, and the third count was reduced to second-degree sexual assault of a child. In exchange for his plea to the repeated sexual assault charge, the physical abuse charge was also dismissed. Based upon the no contest pleas, the potential term of imprisonment faced by Flowers was reduced from 170 years to 60 years.

¶4 At the beginning of the sentencing hearing, Flowers' counsel informed the trial court that Flowers wanted to withdraw his no contest pleas and proceed to trial. Counsel indicated that termination of parental rights (TPR)

petitions had been filed against Flowers after he entered his no contest pleas, and that Flowers was concerned that his convictions would lead to the termination of his parental rights.[1] The trial court denied the motion and declined to adjourn the sentencing hearing, stating that the effect of the pleas on the TPR petitions was a collateral consequence which did not affect the voluntariness of the no contest pleas. The trial court concluded that Flowers was merely changing his mind about entering his pleas. It then sentenced Flowers to thirty-five years in prison for the repeated sexual assault conviction, and a consecutive term of fifteen years in prison for the second-degree sexual assault conviction.

¶5 After sentencing, Flowers filed a postconviction motion to withdraw his no contest pleas. In the motion, he stated that the TPR petitions against him alleged that termination of his parental rights to all of his children was warranted because he had been convicted of a serious felony offense against one of the children. Flowers contended that he did not know of the TPR consequences when he entered his no contest pleas, and that this constituted a fair and just reason to withdraw his pleas. He further alleged that he pled no contest with the mistaken understanding that he had the right to appeal all issues arising prior to the entry of his pleas. He stated that if he had known that his no contest pleas constituted a waiver of all nonjurisdictional defects and defenses except those related to the suppression of evidence, as provided in ***State v. Damaske***, 212 Wis. 2d 169, 188, 567 N.W.2d 905 (Ct. App. 1997), he would not have entered the pleas. He further

[1] The record indicates that Flowers' children were in foster care prior to his trial, and that the TPR petitions were originally filed on September 19, 2001, one week after he entered his no contest pleas. Originally, the petitions alleged abandonment, continuing need for protection and services, and failure to assume parental responsibility. They were later amended to include the commission of a serious felony against one's child as an additional ground for termination.

alleged that his trial counsel rendered ineffective assistance when, in response to Flowers' inquiry as to whether he would be able to appeal his case after entering a no contest plea, counsel answered "yes," without clarifying the limited nature of the issues that may be raised on appeal when a no contest plea is entered.

¶6 After a hearing at which both Flowers and his trial counsel testified, the trial court denied the postconviction motion. It determined that Flowers had failed to show a fair and just reason to support his presentencing motion to withdraw his pleas. It further concluded that he had failed to show that the granting of his postsentencing motion was necessary to correct a manifest injustice, and that trial counsel did not render ineffective assistance.

¶7 On appeal, Flowers reiterates the argument that his discovery that his no contest pleas could provide a basis for terminating his parental rights constituted a fair and just reason for withdrawal of his pleas before sentencing. An order denying a motion to withdraw a no contest plea will be sustained by this court unless the trial court erroneously exercised its discretion. ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). Prior to sentencing, the trial court should freely allow a defendant to withdraw his or her plea provided a fair and just reason exists for withdrawal, and the State has not been substantially prejudiced by reliance on the plea. ***Id.*** However, "freely" does not mean automatically, and the defendant must show some adequate reason for his or her change of heart other than a desire to have a trial. ***Id.*** at 861-62.

¶8 Although not precisely defined, fair and just reasons for plea withdrawal have included a genuine misunderstanding of the plea's consequences. ***State v. Shimek***, 230 Wis. 2d 730, 739-40, 601 N.W.2d 865 (Ct. App. 1999). The defendant has the burden of proving a fair and just reason by a preponderance of

the evidence. ***Garcia***, 192 Wis. 2d at 862. The defendant must do more than allege or assert a fair and just reason; he or she must also show that the reason actually exists. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). "In order to assess whether a reason actually exists, the circuit court must engage in some credibility determination of the proffered reason." ***Id.*** We will sustain the trial court's discretionary determination to permit or deny the withdrawal of a no contest plea before sentencing if the trial court reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts. ***Shimek***, 230 Wis. 2d at 739.

¶9 At the postconviction hearing, Flowers reiterated the contention first made by him at the sentencing hearing; namely, that he did not understand that his no contest pleas could lead to the termination of his parental rights, and would not have entered the no contest pleas if he had known. For purposes of this decision, we accept that in the proper case, the amendment of a TPR petition before sentencing to include a criminal conviction as grounds for termination might constitute a fair and just reason for withdrawal of a no contest plea. However, in denying Flowers' postconviction motion, the trial court expressly found Flowers' testimony to be incredible, and did not believe that the TPR proceedings affected his decision to enter the no contest pleas. In making this determination, the trial court noted that after two days of testimony, the trial was not going well for Flowers. The trial court also noted that Flowers' no contest pleas were only one ground for the TPR petitions, and that three other grounds were also stated which were not based upon his pleas, thus belying his claim that he would not have entered no contest pleas if he knew those pleas might provide a basis for terminating his parental rights.

¶10 The trial court's finding that Flowers' testimony was incredible is also supported by the testimony of Flowers' trial counsel, who testified that Flowers first contended that he wanted to withdraw his pleas after reviewing the presentence report, and objecting to statements and the recommendation contained in it. Because the trial court's finding that Flowers' testimony was incredible is not clearly erroneous, it will not be disturbed by this court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Based upon the trial court's determination that Flowers was incredible when he testified that he would not have entered the no contest pleas if he had known that they would provide possible grounds for termination of his parental rights, no fair and just reason existed for withdrawal of the no contest pleas.

¶11 After sentencing, Flowers first argued that his no contest pleas were involuntary because they were based upon his mistaken belief that he could appeal all pretrial and trial issues arising prior to his pleas. In a related argument, Flowers contends that his trial counsel rendered ineffective assistance when, in response to his inquiry as to whether he would be able to appeal his case after entering a no contest plea, counsel answered "yes," without clarifying the limited nature of the issues that could be raised on appeal when a no contest plea was entered. Both Flowers and his trial counsel testified that when completing the plea questionnaire prior to the entry of his no contest pleas, Flowers asked his trial counsel if he could appeal, and trial counsel answered "yes," without further discussion of the matter. Flowers testified that when he entered the pleas, he believed he could appeal all issues in the case, including those that arose prior to the entry of the no contest pleas. He testified that he would not have entered the no contest pleas if his counsel had informed him of the limited right to appeal.

¶12 A court may accept a plea withdrawal following sentencing only if it is necessary to correct a manifest injustice. ***State v. Nawrocke***, 193 Wis. 2d 373, 378, 534 N.W.2d 624 (Ct. App. 1995). The manifest injustice test is rooted in constitutional concepts, requiring a showing of a serious flaw in the fundamental integrity of the plea. ***Id.*** at 379.

¶13 The burden is on the defendant to show a manifest injustice by clear and convincing evidence. ***Id.*** A plea of no contest which is not knowingly, voluntarily and intelligently entered violates due process and provides a basis for withdrawal of the plea. *See* ***Van Camp***, 213 Wis. 2d at 139. On appellate review, the issue of whether a plea was voluntary, knowing and intelligent is a question of constitutional fact which we review independently of the trial court. ***Id.*** at 140. However, we will not disturb the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. ***Id.***

¶14 The manifest injustice test is also met if the defendant was denied effective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. ***Bentley***, 201 Wis. 2d at 311-12. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). The second inquiry focuses on whether counsel's performance affected the outcome of the plea process. ***Id.*** at 59. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have

pleaded guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis. 2d at 312.

¶15 In the appropriate case, an attorney's failure to advise the defendant regarding the limited scope of appeal after the entry of a no contest plea might provide a basis to conclude that the plea was involuntary. However, Flowers' contention that his no contest pleas were involuntary, resulting from incomplete advice regarding his appeal rights, fails. As already noted, in determining that a manifest injustice was not shown, the trial court expressly found Flowers' testimony to be incredible.

¶16 The record supports the trial court's determination that Flowers was incredible when he testified that he entered his no contest pleas believing that he could pursue all issues on appeal, and would not have entered the pleas if he had known his right to appeal was limited. As noted previously, the trial court considered that the trial was going poorly for Flowers when he entered his pleas. In finding that Flowers was not a credible witness, the trial court also considered his testimony that he did not understand what he was pleading to and did not pay attention when the trial court spoke to him at the plea colloquy, concluding that this testimony was belied by the plea hearing record. It also considered that much of Flowers' testimony was disputed by his trial counsel, including his allegations that counsel did not discuss the case with him.

¶17 These factors support the trial court's determination that Flowers lacked credibility when he testified that he would not have entered the no contest pleas if he had known that his right to appeal was limited. The trial court's determination is also supported by the fact that Flowers' sentencing exposure was greatly reduced by the no contest pleas; by trial counsel's testimony that Flowers

did not state that he wanted to withdraw his pleas until after he reviewed the recommendation and allegations of the presentence report; and by trial counsel's testimony that in discussing the pleas before their entry, Flowers never mentioned issues he wanted to preserve for appeal.[2] In addition, as is undisputed by Flowers on appeal, the plea colloquy provides no basis for concluding that his pleas were involuntary, or made without an understanding of the charges to which he was pleading, the possible penalties, or the constitutional rights he was waiving.

¶18 Because the trial court could properly reject as incredible Flowers' testimony that he entered the no contest pleas in reliance on a mistaken belief that he could appeal all issues, we affirm its determination that Flowers failed to prove that his pleas were involuntary. Because it could therefore also conclude that trial counsel's failure to inform Flowers of the limited scope of appeal did not affect his entry of the pleas, no basis exists to conclude that counsel's performance was prejudicial to Flowers, or that he is entitled to relief based on his ineffective assistance of counsel claim.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

[2] It is also noteworthy that at the plea hearing and sentencing, Flowers never mentioned that he wanted to preserve issues for appeal, nor stated that he believed he was preserving any trial or pretrial issues.