COURT OF APPEALS DECISION DATED AND FILED

August 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP2301
2004AP2302

Cir. Ct. Nos. 2002CF7134
2002CF7247

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. COLTRANE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Michael L. Coltrane appeals the judgments, entered following his guilty pleas to two counts of armed robbery, threat of force, party to a crime, with one count including a penalty enhancer for concealing identity,

contrary to WIS. STAT. §§ 943.32(2), 939.05, 939.63, and 939.641(2) (2001-02).[1] He also appeals the order denying his postconviction motion. Coltrane argues that the trial court erroneously exercised its discretion both in denying his request to withdraw his guilty pleas before sentencing and in imposing his sentences. Because Coltrane failed to show a fair and just reason for withdrawing his pleas, and because the trial court properly exercised its discretion in sentencing him, we affirm.

I. BACKGROUND.

¶2 Coltrane was arrested and charged in two separate complaints with three counts of armed robbery, threat of force, and, in one count, with the penalty enhancer of concealing his identity. Coltrane's involvement in the robberies came to light after the police found a cell phone linked to Coltrane at one of the scenes, and after the co-defendant in the first robbery implicated him as an accomplice in the first of two armed robberies of taverns and customers present in the taverns.

¶3 After being charged, Coltrane filed motions in each case seeking suppression of his statements given to police. On the scheduled date for the motions, Coltrane elected to withdraw his motions and, instead, pled guilty to two of the charges. In exchange for Coltrane's guilty pleas, the State agreed to dismiss the third count and to recommend sentences of three and one-half years of initial confinement, followed by one and one-half years of extended supervision on each

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The events that led to the charges occurred in November 2002, prior to the amendment of the statute in February 2003.

count, to be served consecutively. The parties stipulated that the criminal complaints could be used as a factual basis for the guilty pleas, and Coltrane filled out a guilty plea questionnaire. The trial court conducted a colloquy with Coltrane, after which the trial court, satisfied that Coltrane was entering his plea knowingly, voluntarily and intelligently, accepted his pleas and ordered a presentence investigation. On the original sentencing date, Coltrane's attorney filed motions seeking to withdraw Coltrane's guilty pleas and to withdraw from the case because one of Coltrane's bases for withdrawal of his pleas was his claim that his attorney pressured him into pleading guilty. The trial court permitted Coltrane's attorney to withdraw.

¶4 Shortly thereafter, Coltrane's new attorney filed a memorandum in support of the motion to withdraw Coltrane's guilty pleas, accompanied by an affidavit from Coltrane that stated his then-attorney rarely communicated with him before the day of the motion hearing, causing him to lose hope of prevailing at a trial, and that the attorney pressured him into pleading guilty. The trial court scheduled a hearing on Coltrane's motion to withdraw his guilty pleas.

¶5 At the hearing, the trial court discussed with Coltrane the fact that, after Coltrane entered his guilty pleas, at which time he admitted his guilt, he told the presentence investigation writer that he was innocent and did not commit the crimes, but that he did have information about the robberies because he had loaned his car to one of the participants who told him he and another man named "Silk" robbed the taverns. The trial court inquired as to which version of the events was truthful—the version Coltrane gave at the guilty plea hearing or the version he gave to the presentence writer. Coltrane told the court that what he said to the presentence writer was the truth. The hearing then proceeded, with Coltrane essentially testifying that he had had limited contact with this first attorney,

causing him to lose hope of success with his case, and that his attorney had pressured him into pleading guilty. His previous counsel also testified and contradicted many of Coltrane's contentions. In denying the motion, the trial court found that Coltrane's testimony was not credible and, as a consequence, that he had not shown a fair and just reason to permit him to withdraw his pleas.

¶6 About two weeks later, the trial court, following the State's sentencing recommendation, sentenced Coltrane to three and one-half years of incarceration, followed by one and one-half years of extended supervision on each count, to be served consecutively. Coltrane then filed a postconviction motion. The trial court denied his motion in a written order, and this appeal follows.

II. ANALYSIS.

A. The trial court properly exercised its discretion in denying Coltrane's motion to withdraw his pleas.

¶7 Coltrane states that "advanced haste, confusion and coercion" employed by his attorney, coupled with his actual innocence of the crimes, are the reasons he should have been allowed to withdraw his pleas. He also contends that the trial court applied the wrong legal standard when denying his request to withdraw his pleas.

¶8 "This court will sustain a circuit court's ruling denying a motion to withdraw a plea unless the circuit court erroneously exercised its discretion." ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). To be sustained, a discretionary decision must "demonstrably be made … based upon facts appearing in the record and in reliance on the appropriate and applicable law." ***Id.*** (citation omitted). "A circuit court should freely allow a defendant to withdraw his plea [before] sentencing if it finds any fair and just reason for withdrawal." ***Id.***

“[F]reely,” however, does not mean “automatically.” ***Id.*** (citation omitted). “A fair and just reason is ‘some adequate reason for [a] defendant’s change of heart … other than [his] desire to have a trial.’” ***Id.*** at 861-62 (citation omitted). The burden is on the defendant to prove a fair and just reason for withdrawal by a preponderance of the evidence. ***Id.*** at 862.

¶9 “A fair and just reason contemplates ‘the mere showing of some adequate reason for defendant’s change of heart.’” ***State v. Bollig***, 2000 WI 6, ¶29, 232 Wis. 2d 561, 605 N.W.2d 199 (citation omitted). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the consequences of the plea, haste and confusion in entering the plea, and coercion by trial counsel. *See* ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). Another relevant consideration in determining whether a defendant has shown a fair and just reason is an assertion of innocence and the promptness with which the motion is brought. *See* ***id.*** at 740.

¶10 We first address Coltrane’s assertion that the trial court applied the wrong legal standard. Contrary to Coltrane’s claim, at the close of the motion hearing, the trial court correctly articulated the applicable standard, stating:

> I honestly cannot find a fair and just reason. My subjective inclination in this kind of a situation, I acknowledge, is always to say, well, alright. Withdraw the plea. Because it seems to me to be just plain wrong for somebody to think that justice has miscarried in this case. I really, really feel and I try to bend over backwards to let people feel that justice has triumphed and justice has prevailed and that they were treated fairly and justly. But if on this record I let you withdraw your guilty plea[s] and I find that there’s a fair and just reason, I don’t know when a plea could stand because you were given every opportunity to say no, Judge, I don’t understand. No, I want more time. You were given every opportunity to say that and you didn’t do that.

¶11 Thus, the trial court rejected Coltrane's reasons for wanting to withdraw his claim. The trial court also did not find Coltrane's explanation worthy of belief:

> [Q]uite honestly, I don't believe you today when you tell me that you didn't understand and that you felt pressured and threatened. You may have felt somewhat pressured but whenever an important decision is made, people feel pressure.

Because Coltrane did not present a believable account of why his pleas should be withdrawn, he failed in his burden of proof. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999) ("[C]redibility assessments are crucial to a determination of whether the evidence offered is a fair and just reason supporting withdrawal and they are consistent with the requirement that the defendant must do more than allege or assert a fair and just reason, that he or she must also show that the reason actually exists.").

¶12 Additionally, the record belies Coltrane's claims. Coltrane decided to accept the State's plea negotiation at a hearing scheduled for his motions seeking to suppress statements he gave to the police. His attorney was beginning his presentation when Coltrane told him that he wished to take the offer presented by the State. The trial court advised him that he had a right to continue with the motion. Coltrane indicated that he wished to plead guilty. During its colloquy with Coltrane, the trial court explored with Coltrane whether he had ample time to consider his change of heart. Coltrane replied that he had had sufficient time and was desirous of entering a plea. The trial court also questioned Coltrane concerning whether there was anything he did not understand. Coltrane responded that he understood the constitutional rights he was giving up by pleading guilty and that he understood everything contained in the guilty plea questionnaire.

Indeed, the trial court directly asked him, "Are you at all confused by anything that you're doing here today?" to which Coltrane answered, "No." As to the coercion allegation, Coltrane's testimony at the guilty plea proceeding and his first attorney's testimony at the withdrawal hearing are contrary to Coltrane's later assertion that he was coerced into pleading guilty. At the guilty plea proceeding, Coltrane advised the trial court that no one had threatened him or promised him anything. He also told the court that he was satisfied with his attorney's representation.

¶13 Coltrane's later claim of innocence also rings hollow, as he volunteered to the trial court at the guilty plea hearing that "it was wrong what I did." Finally, while Coltrane did file his motion seeking to withdraw his guilty pleas before his sentencing, he did so nearly two months after he pled guilty. Thus, his change of heart cannot be characterized as "prompt."

¶14 In sum, because the trial court did not believe Coltrane's testimony concerning his claims that he entered his pleas because of haste, confusion, coercion and innocence, he has not met his burden of proof of showing a fair and just reason for the withdrawal of his guilty pleas. Moreover, the record supports the trial court's findings that Coltrane was untruthful in his allegations. Accordingly, the trial court did not erroneously exercise its discretion in denying the motion to withdraw.

B. The trial court properly exercised its discretion in sentencing Coltrane.

¶15 Coltrane next argues that if this court affirms the trial court's denial of his request to withdraw his pleas, then his sentences should be modified because he submits that the trial court erroneously exercised its discretion in sentencing him. In his brief, he claims that the trial court's sentences do not

reflect "the minimum required to advance the protection of the public factor, reflect consideration of the character of the defendant and the gravity of the offense[,]" pursuant to ***State v. Borrell***, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992). Specifically, he complains that the trial court's sentence was excessive, did not take into consideration the sentences given to his accomplice, never addressed the positive factors presented at sentencing, did not consider his need for drug and alcohol treatment, and disregarded the presentence investigation report's recommendation. We disagree.

¶16 At sentencing, the three primary factors the trial court must consider are: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. *See* ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). Besides the primary sentencing factors, the trial court may also consider, in connection with the three primary factors:

> the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶17 There is a strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). Should the trial court fail to articulate the reasons for the sentence, this court is "obliged to search the record to determine whether in the

exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶18 Here, the trial court's remarks were brief, but an examination of the record supports the trial court's determinations. The trial court heard that Coltrane's accomplice, who possessed a gun and shot it during one of the tavern robberies, received a sentence of ten years total, with seven years of initial confinement and three years of extended supervision. Given the fact that Coltrane was not armed but did conceal his identity, the length of his sentences, two consecutive three and one-half years of incarceration and one and one-half years of extended supervision, when compared to his accomplice, are neither unfair nor inappropriate. The trial court was also aware that one of the armed robberies was committed after Coltrane and his accomplice smoked marijuana, making the situation potentially quite dangerous, as the combination of drugs and weapons is often a lethal combination. The trial court also had the benefit of the information contained in the presentence report, which outlined Coltrane's prior record and set forth his personal history reflecting his character, his prior record and other key information about Coltrane.

¶19 Implicit in the trial court's commentary was the fact that the court found the crimes serious, and the public needed to be protected from Coltrane's conduct. The trial court specifically commented on Coltrane's character, including acknowledging Coltrane's alcohol problem:

> You loved to drink alcohol. You've been drinking apparently a lot on a daily basis for a long time and started using marijuana on a daily basis when you were 16. That's all true?
>
> THE DEFENDANT: Yes.

> THE COURT: So you, I believe, have a heavy addiction to controlled substances and alcohol.

Recognizing that Coltrane was in need of treatment, the trial court ordered him eligible for either the Challenge Incarceration Program or the Earned Release Program after he served four years of his sentence, and ordered that, as a condition of his extended supervision, he receive drug and alcohol treatment. Thus, Coltrane is incorrect in his contention that the trial court ignored his drug and alcohol treatment needs.

¶20 We also disagree with Coltrane's contention that his sentences were excessive. The presentence writer recommended total sentences consisting of ten years of initial confinement, to be followed by five years of extended supervision. These sentencing recommendations were premised on the agent's mistaken belief that Coltrane faced only a maximum term of imprisonment of seventy-five years for both crimes, when, in fact, Coltrane faced at least one hundred and twenty years of incarceration. Obviously, the trial court's sentences were well below the maximum exposure allowed by law. Moreover, the State could have charged Coltrane with additional counts of armed robbery, which would have increased his exposure since several of the robberies were never charged.

¶21 Thus, we conclude, after reviewing the record, that the trial court properly exercised its discretion in sentencing Coltrane. For all the reasons stated, we affirm.

By the Court.—Judgments and order affirmed.

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