COURT OF APPEALS DECISION DATED AND FILED

September 3, 2008

David R. Schanker
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 No. 2007AP1311-CR

Cir. Ct. No. 2006CF272

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN DIONNE SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Steven Dionne Scott appeals from a corrected judgment of conviction for a forcible sexual assault, and from a postconviction

order denying his motion for sentence credit.[1] The issue is whether the trial court erroneously exercised its discretion when it summarily denied Scott's motion for presentence plea withdrawal. We conclude that Scott is not entitled to an evidentiary hearing on his plea withdrawal motion because the allegations that arguably constitute a fair and just reason are conclusory or are conclusively belied by the record. Therefore, we affirm.

¶2 Scott had been charged with multiple sexual assaults of various women. This appeal involves some of those assaults. Incident to a plea bargain, Scott entered an ***Alford*** plea to the reduced charge of second-degree sexual assault with the use of force, in violation of WIS. STAT. § 940.225(2)(a) (2001-02) (reduced from first-degree sexual assault while armed), in exchange for the dismissal of charges of forcible kidnapping and robbery with the threat of force, and for the State's sentencing recommendation of a five-year consecutive period of initial confinement, leaving the duration of extended supervision to the trial court's discretion.[2] The trial court imposed a fifteen-year sentence to run consecutive to other recently imposed sentences, comprised of nine- and six-year respective periods of initial confinement and extended supervision. The trial court imposed this sentence knowing that a jury had recently found Scott guilty of two sexual assaults and two substantial batteries against two other women for which it had imposed two twenty-five-year consecutive aggregate sentences, comprised of

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[1] Scott did not challenge the postconviction order on appeal.

[2] An ***Alford*** plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970); *accord* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an ***Alford*** plea is discretionary in Wisconsin).

twenty- and five-year respective concurrent periods of initial confinement and extended supervision (including two three-and-one-half-year concurrent sentences for the substantial batteries). Consequently, the trial court was mindful that Scott's terms of initial confinement would expire in forty-nine years, when he was seventy years old.

¶3 On the morning of October 30, 2006, the prosecutor and Scott's defense counsel told the trial court that they were ready to proceed to a jury trial; in fact, the victim had flown in from Colorado for trial. Scott appeared in orange jail clothing, prompting defense counsel to explain that Scott was "still upset from the sentencing last week," and that Scott indicated to his counsel that "he doesn't want to go to trial, he's not ready to go to trial, [and that] he doesn't want me to be the lawyer." The trial court responded that the case would proceed to trial unless Scott had successor counsel who was ready to try the case that day because the trial court "think[s] that it would probably be something that's simply dilatory, as long as everybody else is here and ready to proceed, [because] this case goes back to quite some time [we will proceed]." The trial court also would allow Scott to reconsider his choice of attire, but that it was Scott's choice whether to proceed to a jury trial in civilian or jail clothing. The trial court was concerned about having this case re-assigned because it found Scott to be "unruly," so it adjourned the matter, stating that if Scott sought new counsel, he should reduce that request to writing.

¶4 Counsel and Scott returned that same afternoon and apprised the court that they had resolved the matter. The trial court conducted a plea colloquy and referred to Scott's signed plea questionnaire and waiver of rights form; counsel recited the terms of the plea bargain, and the remainder of the plea colloquy proceeded without incident including Scott's acknowledging that he was

satisfied with his legal representation. At the conclusion of the plea hearing, the prosecutor informed the trial court that he sought to proceed directly to sentencing, presumably to allow the victim, who was scheduled to return to Colorado, to address the trial court. Defense counsel was amenable to proceeding directly to sentencing, and Scott's aunt, who would address the trial court on Scott's behalf, was also available.

¶5 The prosecutor began his sentencing presentation by explaining that this particular conviction was one part of a collection of Scott's sexual assault convictions. He continued by describing the "big picture of Mr. Scott in the Criminal Justice System as a whole." The prosecutor not only described Scott's conduct in this case, but his brutal conduct in other cases, to which Scott, represented by counsel, personally objected. The prosecutor concluded his remarks, which included details of the other assaults, with his negotiated recommendation of a five-year consecutive period of initial confinement, leaving the duration of extended supervision to the court's discretion, explaining that if the trial court followed his recommendation, Scott, then age twenty-one, would remain in initial confinement until he was sixty-six years old.

¶6 The victim addressed the trial court, recounting the effects of this horrific experience, explaining, "I relocated. Moved me and my kids away, away from my friends and my family because I just did not feel safe any longer here in Milwaukee." She concluded by recommending that the trial court impose the maximum sentence.

¶7 Defense counsel then called Scott's aunt, who was apologetic on Scott's behalf, and expressed surprise and confusion because she had spoken with Scott recently, "and he had me believing that he didn't do this. That he knew this

young lady [and that they were dating and he had keys to her house]. And I'm feeling bad now that he's coming in here taking a plea, a guilty plea, and told me something different."

¶8 Then defense counsel addressed the trial court. He began by stating that he agreed with the State's five-year recommendation, and continued that "I don't want to minimize this offense and say that -- you know -- five years is more than enough. Maybe --". At that point, Scott interjected, "I object." As defense counsel attempted to continue, Scott again interrupted and said, "Your Honor, I object. I reject my plea." Despite Scott's repeated outbursts, the trial court continued with sentencing. Scott did not file a written motion for plea withdrawal, as his spontaneous outburst was in open court in the midst of defense counsel's sentencing remarks. Scott's reasons for seeking plea withdrawal, however, were that: (1) he did not lie to his aunt; (2) his trial counsel lied to him; (3) he belatedly received his paperwork and no one reviewed that paperwork with him; (4) he personally was not prepared to proceed to trial; and (5) "[his] case don't got s___ to do with no kids." In his appellate brief, Scott also alleges that (6) he did not understand his plea or the waiver of his constitutional rights.

> ¶9 Upon a motion to withdraw a plea before sentencing, the defendant faces three obstacles. First, the defendant must proffer a fair and just reason for withdrawing his plea. Not every reason will qualify as a fair and just reason. Second, the defendant must proffer a fair and just reason that the [trial] court finds credible. In other words, the [trial] court must believe that the defendant's proffered reason actually exists. Third, the defendant must rebut evidence of substantial prejudice to the State.

State v. Jenkins, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24 (citing ***State v. Canedy***, 161 Wis. 2d 565, 582-85, 469 N.W.2d 163 (1991)).

¶10 Three of Scott's reasons do not constitute a fair and just reason for plea withdrawal: (1) he did not lie to his aunt; (2) he personally was not prepared to proceed to trial; and (3) the victim's children have nothing to do with his case. The allegations relating to his not lying to his aunt and those regarding the victim's children (who were compelled to move with their mother) provide no connection to plea withdrawal. Being unprepared for trial (mindful that Scott's counsel repeatedly professed that he was ready for trial) is not a reason for plea withdrawal.

¶11 Insofar as Scott did not waive his right to claim that his ***Alford*** plea was invalid (by raising this issue initially on appeal), the trial court *sua sponte* responded during Scott's outbursts, "[w]e have already gone through your plea colloquy, sir, and your plea that was taken by this Court and the Court was explicit as to the voluntariness of your plea and the Court is satisfied that you waived your constitutional rights." Consequently, to the extent that Scott has not waived this claim by failing to raise it in the trial court, it was not found by the trial court to be credible.

¶12 Scott's remaining two allegations are that his trial counsel lied to him, and that he belatedly received his paperwork, which no one reviewed with him. The former reason and arguably the latter would constitute fair and just reasons for plea withdrawal. It is unnecessary to determine whether the trial court believed Scott however, because his allegations are insufficient to warrant an evidentiary hearing.

¶13 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶14 Scott's allegation that trial counsel lied to him to encourage him to enter a plea to second-degree sexual assault, as opposed to proceeding to trial on first-degree sexual assault, kidnapping and robbery charges, is conclusively belied by the record because Scott answered unequivocally during the plea colloquy that he was satisfied with his legal representation. Furthermore, if trial counsel was lying so that he could "go on vacation," and "get the case over with," that is belied by trial counsel's representations to the trial court that he was prepared to try the case that very day.

¶15 The remaining allegation, that Scott belatedly received the paperwork, which had not yet been reviewed with him, is wholly conclusory. Scott does not identify what this paperwork was, or why it was necessary for him

to review the paperwork to determine whether to proceed to trial or plead to the reduced charge.

¶16 Scott was given the opportunity to proceed to trial; he rejected that option and elected to plea-bargain the charges pursuant to ***Alford***. His alleged reasons do not meet the fair and just standard for plea withdrawal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).