

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 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. 2008AP5
STATE OF WISCONSIN**

Cir. Ct. No. 2002CF3278

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERTO I. LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roberto I. Lopez pled guilty to two counts of felony murder. He appeals from the judgment of conviction and from the order denying his postconviction motion to withdraw his pleas. We affirm.

BACKGROUND

¶2 According to the criminal complaint, Lopez and several co-actors robbed two occupants of a Milwaukee duplex at gunpoint on July 29, 2001. After taking money and cocaine, the robbers sealed the victims' noses and mouths with duct tape. Both victims suffocated. Lopez was arrested in the Dominican Republic approximately five years later and extradited to Wisconsin. The State charged Lopez with two counts of first-degree intentional homicide and one count of armed robbery by use of force, all as party to a crime. *See* WIS. STAT. §§ 940.01(1)(a), 943.32(2), 939.05 (2001-02).¹

¶3 On the day set for trial, Lopez and the State entered into a plea agreement. The State would file an amended information charging Lopez with two counts of felony murder and would make certain favorable sentencing recommendations in exchange for Lopez's guilty pleas to the amended charges. Following a lengthy guilty plea colloquy, the circuit court accepted Lopez's pleas and found him guilty. The court ordered preparation of a presentence investigation report and adjourned the matter for sentencing.

¶4 Although Lopez participated in the presentence investigation, he told the investigator that he was innocent and that he wished to withdraw his pleas and proceed to trial. On the day set for sentencing, he moved for plea withdrawal. Lopez cited unspecified "new evidence" in support of his motion, and the circuit court granted his request for additional time to "flesh out" the issue. Lopez's trial counsel subsequently filed a written motion seeking plea withdrawal on the

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

grounds that: (1) Lopez continued to maintain his innocence; (2) Lopez felt “somewhat” under pressure to make a plea decision on the day of trial; and (3) Lopez discovered after entering his pleas that a police detective “had tried to recruit a jail inmate” to persuade Lopez to confess. Under separate cover, Lopez submitted a letter *pro se* in which he reiterated his claim of innocence and stated that he felt “pressured and coerced” by trial counsel.

¶5 The circuit court held a hearing on Lopez’s motion for plea withdrawal at which Lopez offered neither sworn testimony nor documentary evidence outside of his letter. The State presented testimony from two police officers to support its opposition to plea withdrawal. The circuit court concluded that Lopez’s motion was based on nothing more than a change of heart and that the State would be substantially prejudiced if Lopez withdrew his pleas.² The circuit court denied the motion, and the matter proceeded to sentencing.

¶6 With the assistance of appellate counsel, Lopez next brought a postconviction motion to withdraw his pleas. He again asserted his innocence, and he further asserted that his trial counsel was ineffective in pursuing the earlier motion for plea withdrawal. The circuit court determined that the postconviction motion contained only conclusory allegations and denied relief without holding a hearing. Lopez appeals, contending that the circuit court erroneously resolved both his presentence motion and his postconviction motion for plea withdrawal.

² The State surmises that the penalty recommendations contained in the presentence report triggered Lopez’s decision to move for plea withdrawal. The circuit court, however, did not make such a finding.

DISCUSSION

¶7 We first consider whether the circuit court properly denied Lopez’s presentence motion for plea withdrawal. The decision to permit plea withdrawal prior to sentencing is committed to the sound discretion of the circuit court. *State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. We will uphold the circuit court’s discretionary decision if “the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.* (citation omitted).

¶8 A defendant may withdraw a guilty plea prior to sentencing upon showing a fair and just reason for doing so if the State has not been substantially prejudiced by reliance on the plea. *State v. Shanks*, 152 Wis. 2d 284, 288-89, 448 N.W.2d 264 (Ct. App. 1989). The defendant has the burden of proving a fair and just reason by the preponderance of the evidence. *State v. Canedy*, 161 Wis. 2d 565, 584, 469 N.W.2d 163 (1991). To meet that burden, the defendant is required to show an adequate reason for his or her change of heart. *State v. Kivioja*, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999).

¶9 Fair and just reasons for plea withdrawal include “genuine misunderstanding of the plea’s consequences; haste and confusion in entering the plea; and coercion on the part of trial counsel.” *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). An assertion of innocence and a prompt motion to withdraw are not themselves fair and just reasons for plea withdrawal, but they are factors for the circuit court to consider in evaluating the motion. *Id.* at 740 n.2. The circuit court may also consider whether the fair and just reason

proffered outweighs the efficient administration of justice. *Jenkins*, 303 Wis. 2d 157, ¶63.

¶10 Here, Lopez claimed that he felt pressured and coerced by his trial counsel. A defendant must do more, however, than assert a recognized reason for plea withdrawal. *Kivioja*, 225 Wis. 2d at 291. The defendant “must also show that the reason actually exists.” *Id.* Lopez did not carry that burden.

¶11 Lopez included nothing in his motion or letter demonstrating any improper pressure on the part of his trial counsel, and he did not supplement his written submissions with testimony. Further, Lopez’s postconviction allegations conflicted with his responses during the plea colloquy. The circuit court discussed the plea proceedings at length in considering Lopez’s motion, noting that Lopez expressed satisfaction with his attorney’s representation, denied that he was threatened or promised anything to induce his plea, and admitted committing acts constituting felony murder. Lopez also acknowledged understanding the procedural rights he forfeited by entering a plea. The circuit court found that Lopez was truthful during the plea colloquy, and the court rejected the representations in support of plea withdrawal because they were “belied by the record.”

¶12 Credibility determinations rest with the circuit court. *Turner v. State*, 76 Wis. 2d 1, 18, 250 N.W.2d 706 (1977). The circuit court was free to find both that Lopez was credible during the plea colloquy and that Lopez’s letter was not credible. *See Jenkins*, 303 Wis. 2d 157, ¶¶83, 87. Based on the colloquy, the circuit court had sufficient evidence to conclude that Lopez was not coerced by his trial counsel. *See id.*, ¶¶83-84.

¶13 Lopez’s suggestion that the actions of law enforcement warranted plea withdrawal is also unavailing. Although Lopez alleged that a police detective took steps to persuade Lopez to confess, the detective testified at the hearing and denied the allegation. The circuit court believed the detective. “[I]f the circuit court does not believe the defendant’s asserted reasons for withdrawal of the plea[s], there is no fair and just reason to allow withdrawal of the plea[s].” *State v. Garcia*, 192 Wis. 2d 845, 863, 532 N.W.2d 111 (1995).

¶14 The circuit court found that Lopez demonstrated no more than second thoughts as a justification for his change of heart. Therefore, the court determined that Lopez failed to offer proof of a fair and just reason for withdrawing his pleas. The court reached a reasonable conclusion based on the credible evidence of record. In light of our deferential standard of review, we must sustain that conclusion. *See Jenkins*, 303 Wis. 2d 157, ¶44.

¶15 Because the circuit court concluded that Lopez did not have a fair and just reason for withdrawing his pleas, the State was not obliged to show substantial prejudice stemming from reliance on the pleas. *See Kivioja*, 225 Wis. 2d at 283-84. The State nevertheless made such a showing. Officer Katherine Hein testified that a critical witness lived out of state and did not have a permanent address. Officer Hein explained that she was no longer able to locate this transient witness. The circuit court concluded that the State would be substantially prejudiced if Lopez withdrew his pleas.

¶16 Lopez argues that the State’s efforts to find its elusive witness were insufficient to permit a conclusion that the witness could not be found. The circuit court, however, believed Officer Hein. “[A]s to the credibility of disputed testimony in relation to evidentiary facts, this court will not substitute its judgment

for that of the [circuit] court.” *Turner*, 76 Wis. 2d at 18. The circuit court’s conclusion that the State would be substantially prejudiced if Lopez withdrew his pleas was based on credible evidence, and we will not disturb it.

¶17 The circuit court examined relevant facts in light of the applicable standard of law. Based on its findings, the circuit court reasonably exercised its discretion by denying Lopez’s presentence motion for plea withdrawal.

¶18 We next consider whether the circuit court erroneously denied Lopez’s postconviction motion for plea withdrawal without a hearing. A defendant who moves to withdraw a guilty plea after sentencing has the burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. “[T]he ‘manifest injustice’ test is met if the defendant was denied the effective assistance of counsel.” *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To demonstrate ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Lopez must show that trial counsel’s performance fell “outside the wide range of professionally competent assistance.” *See id.* at 690. To prove prejudice, Lopez must show “that there is a reasonable probability that, but for the [trial] counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *See Bentley*, 201 Wis. 2d at 312 (citation omitted).

¶19 In his postconviction motion, Lopez contended that his trial counsel performed ineffectively by coercing his guilty pleas and by failing to call witnesses at the presentence plea withdrawal hearing. A defendant is entitled to a

hearing on a postconviction motion only when he or she “states sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶14, 274 Wis.2d 568, 682 N.W.2d 433. The facts alleged must “allow the reviewing court to meaningfully assess [the defendant’s] claim.” *Id.*, ¶21 (citation omitted, brackets in original). Generally, this requires the defendant to allege “five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *Id.*, ¶23. Lopez failed to satisfy this requirement.

¶20 Lopez offered only conclusory assertions to support his claim that trial counsel failed to call witnesses at the presentence plea withdrawal hearing. An allegation that counsel failed to call witnesses must include information regarding who the witnesses are, why they are important, and what they would say. *See id.*, ¶24. Lopez did not include these details in his moving papers.

¶21 Lopez also failed to show that his trial counsel coerced his pleas with “incorrect” advice. As Lopez recognizes in his appellate submissions, the facts he alleged concerning his trial counsel’s coercion boil down to two: (1) counsel informed Lopez that the circuit court would impose mandatory life sentences if Lopez did not resolve the charges by entering guilty pleas; and (2) counsel provided that information while Lopez was in a holding cell on the day of trial. These facts, if true, do not entitle Lopez to relief. On the day of trial, Lopez faced two counts of first-degree intentional homicide. *See* WIS. STAT. § 940.01(1)(a). The mandatory penalty for first-degree intentional homicide is life in prison. *See* WIS. STAT. § 939.50(3)(a). Trial counsel’s warning to that effect was not “incorrect,” and trial counsel did not perform deficiently by presenting Lopez with accurate information.

¶22 Lopez suggests that he is entitled to a hearing to elaborate on “the level and severity of [trial counsel’s] coercion.” He is wrong. “[T]he facts supporting

plea withdrawal must be alleged in the petition and the defendant cannot rely on conclusory allegations, hoping to supplement them at hearing.” *Bentley*, 201 Wis. 2d at 313. On the record here, the circuit court correctly determined that Lopez failed to show grounds 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).

