COURT OF APPEALS DECISION DATED AND FILED

February 23, 2010

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. 2009AP1136-CR

Cir. Ct. No. 2007CF1768

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL L. WATSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 FINE, J. Paul L. Watson appeals an amended judgment of conviction, and the postconviction order denying his motion to withdraw his plea.[1] Watson claims the circuit court erroneously exercised its discretion when it denied his pre-sentencing motions for plea withdrawal. We affirm.

I.

¶2 In April of 2007, Watson was charged with two counts of first-degree sexual assault for having "sexual contact with Ashleigh W. … born July 8, 1994" and for having "sexual contact with Arianna W.-W., date of birth 5/20/95." Watson pled not guilty and demanded a speedy trial. Trial was set for July 23, 2007, with a final pretrial date of July 12, 2007. On July 12, 2007, the parties told the circuit court that they had reached a plea bargain: Watson would plead no contest to both counts, and, in exchange, the State would recommend a sentence of five- to eight-years' initial confinement, followed by ten- to twelve-years' extended supervision. The circuit court asked Watson about the charges, the facts alleged in the criminal complaint, and whether he understood his rights and what he was giving up by pleading no contest. After it accepted the pleas, the circuit court noticed that the wrong statute was cited in count two of the information. Instead of referencing WIS. STAT. § 948.02(1)(b) like count one, count two referred to WIS. STAT. § 948.025(1). The circuit court thus modified the information to reference the correct statute and explained to Watson what it was doing. Watson and his lawyer consented to the modification.

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[1] The Honorable William W. Brash presided over this case through the plea hearing on July 12, 2007, and then the case was transferred to the Honorable Patricia D. McMahon who presided over all subsequent proceedings.

¶3 In August of 2007, Watson filed a *pro se* motion to withdraw his plea. He contended that: (1) his attorney told him there was a videotape of him committing the charged crimes, but he, Watson, had not viewed the tape; and (2) his attorney "frightened him" into entering pleas.[2] Based on this motion, Watson's lawyer asked to be removed, and the circuit court granted the request. Watson's newly-appointed lawyer filed a motion to withdraw Watson's no-contest pleas, and asserted that Watson contended that he did not see the "videotaped interviews of the two alleged victims, the audiotape of his own interrogation by police," and that he did not know the DNA tests were negative.

¶4 In January of 2008, the circuit court held a hearing on the motion at which Watson and his first lawyer testified. Watson told the circuit court that he wanted to withdraw his pleas because: "It was a mistake to … take the plea…. [b]ecause I was innocent." He said that he "entered the plea agreement because I really wanted to see the [DNA] test results. I wanted to slow the process down. It was moving too fast." Watson admitted that he knew the DNA results were negative, but said that he wanted a copy of the results to send to his parents.

¶5 Watson's first lawyer testified that he discussed the DNA results with Watson, and that Watson wanted his lawyer: "[t]o get him the best offer in exchange for a plea." The lawyer also testified that Watson understood what was happening, did not seem rushed, and "didn't seem to be confused." The circuit court found "that the credible evidence is that the defendant did know the results

[2] There were no videotapes of Watson committing the crime. Apparently, Watson was referring to videotaped statements that the victims gave. In any event, the only reference to videotapes on this appeal is Watson's assertion that he wanted to withdraw his no-contest pleas because he did not see the tapes of statements; he does not contend on appeal that there are or were tapes of the crimes.

of the DNA test before entering his plea," and that Watson did not explain how viewing the victims' videotapes, the substantive content of which he admitted he knew, would have changed his plea decision. The circuit court further found "no basis" for Watson's claim that he was rushed into pleading no contest. The circuit court concluded that Watson "just changed his decision to enter the plea now." The circuit court applied the "clear and convincing standard," even though Watson's motion to withdraw his plea was before the circuit court imposed sentence. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583–584, 469 N.W.2d 163, 170–171 (1991) (pre-sentence burden is whether defendant has shown a "fair and just reason" by a "preponderance of the evidence" to withdraw his or her plea).

¶6 After the circuit court sentenced Watson, Watson filed another motion to withdraw his plea, pointing out that the circuit court had erroneously applied the clear and convincing burden of proof to his plea-withdrawal motion. The State conceded error and the circuit court held a second hearing on the plea-withdrawal motion. Only Watson's first lawyer testified at the second hearing. The circuit court found:

> I think the evidence is clear, the defendant wanted a reasonable and acceptable offer. That is what he got, after negotiating with the State and getting another offer more to his liking. He accepted that offer. They had time to go over the plea documents and plea colloquy was engaged in. He entered his plea and I think it is buyer's remorse. I think he thought he could have gotten something better. Something more could have happened and I think that is not a fair and just reason for withdrawing the plea. That kind of buyer's remorse or cold feet is not a fair and just reason.

II.

¶7 Watson claims the circuit court should have granted his motion for plea withdrawal because his first lawyer rushed him into taking the plea bargain. We disagree.

¶8 As we have seen, the standard governing plea withdrawal motions brought before sentencing is whether the defendant has provided a "fair and just reason." ***Ibid.*** A defendant does not meet this standard by the mere desire to have a trial. ***Id.***, 161 Wis. 2d at 583, 469 N.W.2d at 170–171. Further, the defendant must show the "fair and just reason" by a preponderance of the evidence. ***Ibid.*** The circuit court's decision whether to grant or deny the motion is discretionary. ***State v. Jenkins***, 2007 WI 96, ¶6, 303 Wis. 2d 157, 165, 736 N.W.2d 24, 28. A circuit court's findings of fact will be sustained on appeal unless they are "clearly erroneous." WIS. STAT. RULE 805.17(2).

¶9 Here, Watson's claimed "fair and just reason" is that he felt rushed into taking the plea, he did not get a paper copy of the DNA results before his plea, he did not see the victims' videotaped statements before his plea, and he wanted to go to trial. As we have seen, a mere desire to go to trial is not enough to grant plea withdrawal, *see* ***Canedy***, 161 Wis. 2d at 583, 469 N.W.2d at 170–171, and his other reasons were rejected by the circuit court as insufficient to establish a fair and just reason for plea withdrawal. First, the circuit court's finding that he was not rushed into pleading was not clearly erroneous because that was the testimony of Watson's lawyer. Second, Watson admitted that he knew the DNA test results were negative before he entered his pleas, and the fact that he did not have a paper copy is immaterial to a decision whether to plead or to go to trial. Thus, the circuit court pointed out correctly: "That has nothing to do with the

question of entering the plea." Third, the circuit court's finding that there was no substantive difference in what Watson knew the victims' allegations to be and what was on the videotapes is also not clearly erroneous given Watson's access to the police reports and his discussions with his lawyer. The circuit court did not erroneously exercise its discretion in denying Watson's motion to withdraw his no-contest pleas.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.