

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 31, 2011**

A. John Voelker  
Acting 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. 2010AP1218-CR**

Cir. Ct. Nos. 2007CF277  
2008CF830

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROY R. KING,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Roy R. King has appealed from a judgment convicting him of two counts of first-degree sexual assault of a child under the age

of thirteen, and from an order denying his motion to withdraw his pleas of no contest. We affirm the judgment and order.

¶2 The issue on appeal is whether the trial court erroneously exercised its discretion when it denied King's presentence motion to withdraw his no contest pleas. King entered pleas of no contest to two counts of first-degree sexual assault of a child under the age of thirteen on the day his trial was scheduled to begin. The victims of the two offenses were two of his children. In exchange for his pleas, three counts of incest with a child and two additional counts of first-degree sexual assault of a child under the age of thirteen were dismissed. The remaining count of first-degree sexual assault of a child under the age of thirteen, which involved another of King's children, was dismissed and read in. As part of the plea agreement, the State also agreed not to issue any additional charges relating to the children.

¶3 The record indicates that King appeared for trial on the morning of March 16, 2009, and stated that he was ready to proceed to trial. In response, the prosecutor asked the trial court to conduct a *Ludwig* hearing,<sup>1</sup> and placed the plea offer on the record.<sup>2</sup> The prosecutor also provided King with an affidavit of Heather Beasy, dated March 12, 2009, which attested that on March 10, 2009, one of King's sons, an alleged victim of some of the offenses in this case, discussed additional sexual assaults by King that had been disclosed by the victim at a

---

<sup>1</sup> *State v. Ludwig*, 124 Wis. 2d 600, 369 N.W.2d 722 (1985) (addressing the defendant's right to be informed of the State's plea offer and to personally accept or reject it).

<sup>2</sup> King's trial counsel stated that such an offer had not been made "in so many words" before, but that a similar offer had been "conveyed a couple of times in the past."

counseling session a week earlier. The prosecutor stated that if King entered pleas pursuant to the State's plea offer, no additional charges would be filed.

¶4 At King's request, the trial court granted a recess so that King could discuss the plea offer with his trial counsel. After consulting with counsel and executing a plea questionnaire and waiver of rights form, King informed the trial court that he wanted to enter pleas of no contest as set forth above. After conducting a plea colloquy with King as required by WIS. STAT. § 971.08 (2009-10)<sup>3</sup> and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the trial court accepted King's no contest pleas and scheduled the matter for sentencing.

¶5 Later that same day, King wrote a letter to the trial court stating that he had a learning problem and a "problem understanding legal issues," that he did not "want a plea," and that he wanted to go to trial. He reiterated his wish for a trial in letters dated March 20, 2009, April 5, 2009, and April 21, 2009, alleging that he did not understand the plea and objecting that he had not been adequately represented by his trial counsel.

¶6 Based on King's desire to withdraw his pleas, King's trial counsel moved to withdraw as counsel to him, alleging a conflict of interest. The trial court denied counsel's motion at a hearing held on April 21, 2009. At that hearing, the trial court asked King to explain his reasons for wanting to withdraw his no contest pleas. King replied that he "didn't understand anything" and did not understand "[t]he way the charges are." However, he acknowledged that he understood that he had entered pleas of no contest to two counts of sexually

---

<sup>3</sup> All references to the Wisconsin Statutes are to the 2009-10 version.

assaulting his own children. He stated: “You know, I’ve been sitting here. I’m 40 years old. No one has to go out, no one—just like a bang. I wanted to have a trial.” When the trial court then queried as to whether what concerned him was the sentence, King replied, “Yes.”

¶7 On May 5, 2009, after the trial court denied trial counsel’s motion to withdraw from representation, King filed a motion to withdraw his no contest pleas, alleging, among other things, that he was medicated with Prozac at the time of his pleas, which made it hard for him to stay focused and affected his ability to understand the proceedings. He also alleged that he became “scared and distracted” upon reading the Beasy affidavit detailing further allegations of assault, which the State indicated might lead to additional charges. In addition, King alleged that he did not commit the charged offenses, and pointed out that he had acted promptly in seeking to withdraw his pleas.

¶8 The trial court denied King’s motion to withdraw his no contest pleas at a hearing held on May 12, 2009. After sentencing, King filed a motion for postconviction relief, alleging that the trial court erroneously exercised its discretion when it denied his presentence motion to withdraw his no contest pleas.<sup>4</sup> After the trial court again denied plea withdrawal, King appealed.

¶9 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

---

<sup>4</sup> In his postconviction motion, King also challenged the length of the terms of extended supervision imposed by the trial court. An amended judgment of conviction was entered granting his request for relief on that matter.

sentencing the trial court should freely allow a defendant to withdraw his 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 change of heart other than a desire to have a trial. *Id.* at 861-62.

¶10 The defendant has the burden of proving a fair and just reason by a preponderance of the evidence.<sup>5</sup> *Id.* at 862. The defendant must do more than allege or assert a fair and just reason; he 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.* The reason proffered as fair and just by the defendant must be found credible by the trial court. *State v. Jenkins*, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. In other words, the trial court must believe that the proffered reason actually exists. *Id.*

¶11 This court will affirm the trial court’s discretionary determination to grant or deny a motion for plea withdrawal before sentencing if the trial court’s decision is demonstrably made and based upon facts of record and in reliance on the appropriate and applicable law. *Id.*, ¶30. If the trial court fails to adequately explain its decision on the record, this court will independently review the record to determine whether the trial court’s decision can be sustained based on the facts as applied to the applicable law. *Id.*, ¶35.

---

<sup>5</sup> If the defendant meets this burden, then the burden shifts to the State to show substantial prejudice so as to defeat the plea withdrawal. *State v. Bollig*, 2000 WI 6, ¶34, 232 Wis. 2d 561, 605 N.W.2d 199.

¶12 Although not precisely defined, fair and just reasons for plea withdrawal have included a genuine misunderstanding of the plea's consequences or haste and confusion in entering the plea. *State v. Shimek*, 230 Wis. 2d 730, 739-40, 601 N.W.2d 865 (Ct. App. 1999). The assertion of innocence and the promptness with which the motion is brought are also relevant factors for the trial court's consideration. *Id.* at 740.

¶13 On appeal, King contends that he was scared and distracted after learning on the day of trial of the Beasy affidavit and the potential additional charges. He contends that these circumstances established a fair and just reason for plea withdrawal. He also relies on the fact that he promptly filed his motion to withdraw and has consistently alleged that he is innocent. He contends that the trial court erroneously exercised its discretion by misconstruing the facts of record, mistakenly finding that King did not express his desire to withdraw his pleas until he was contacted to be interviewed for the presentence investigation report (PSI) and the PSI was filed. King alleges that the record clearly establishes that he expressed his desire to withdraw his no contest pleas before being interviewed for the PSI or knowing what the PSI writer was recommending. He also alleges that the trial court erroneously exercised its discretion by focusing its attention only on the adequacy of the plea colloquy. He points out that a defendant may proffer a fair and just reason, including misunderstanding and changed circumstances, based on matters outside the plea colloquy record. *Jenkins*, 303 Wis. 2d 157, ¶62. He contends that this is what he did, asserting that the new revelations of sexual misconduct contained in the Beasy affidavit scared and distracted him, causing him to accept a plea offer which he did not truly wish to accept.

¶14 We conclude that the trial court properly exercised its discretion when it denied King's presentence motion to withdraw his no contest pleas. While

the promptness of King's requests for relief and his allegations of innocence are factors which bear on whether his proffered reason for plea withdrawal is credible, they are not determinative of whether a fair and just reason exists for plea withdrawal. *Shimek*, 230 Wis. 2d at 740 n.2. As contended by the State, the trial court found that King understood what he was doing when he entered his no contest pleas. It thus implicitly found that he was not distracted so as to misunderstand his decision and its consequences, or so scared by the Beasy affidavit as to warrant a finding that his emotional state impaired his decision making. See *State v. Martwick*, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 (when a trial court fails to make an express finding of fact that is supported by the record, this court can assume that the trial court determined the fact in a manner that supports its ultimate decision). The trial court implicitly found that King's change of heart was based on his desire to have a trial, not distraction, fear, and confusion. Because the record supports this determination, no basis exists to disturb the trial court's conclusion that King failed to establish a fair and just reason for plea withdrawal.

¶15 In affirming the trial court's decision, we also reject any argument that it misunderstood the standard to be applied or focused on the wrong issue or facts. The trial court did not determine that merely because the plea colloquy was procedurally adequate, King's motion failed. However, it considered the substantive responses given by King during the plea colloquy in assessing whether he understood what was happening, as it was entitled to do. See *Jenkins*, 303 Wis. 2d 157, ¶¶60-62 (although a fair and just reason to withdraw a plea before sentencing does not depend upon either a deficient plea colloquy or the existence of a constitutionally invalid plea, a comprehensive plea colloquy helps ensure that a plea is knowing, intelligent, and voluntary).

¶16 As determined by the trial court, the responses given by King during the plea colloquy indicated that he understood the charges, the plea agreement, the potential punishment, and the rights he was waiving. The plea colloquy also included trial counsel's statement that the Beasy affidavit entered into the decision to enter the no contest pleas because the plea agreement would "close the book" on additional charges. This statement reflected an intelligent and reasoned assessment of how to respond to the potential additional charges, not confusion and distraction. Consistent with the trial court's statement that King had never appeared confused or unsure of himself at any of his court appearances, nothing in the plea colloquy provided a basis to conclude that King was so scared and distracted by the possibility of additional charges that he could not or did not make a rational decision to enter the no contest pleas.<sup>6</sup> Based upon its review of the plea colloquy and the remainder of the record, the trial court could reasonably conclude that King understood the meaning and effect of his no contest pleas and knowingly and voluntarily entered them, that fear and distraction were not factors that led to entry of the no contest pleas, and that King was not entitled to change his mind after entry of the pleas merely because, as he stated in his letters and at the April 21, 2009 hearing, he wanted a trial.

¶17 In upholding the trial court's decision, we also reject King's argument that he is entitled to relief based on the trial court's mistaken belief that he did not express his desire to withdraw his pleas until after the PSI was being prepared or filed, and he became concerned about a lengthy sentence. As

---

<sup>6</sup> As discussed by the State, King was already facing sentences totaling 420 years for the offenses charged, rendering it even more doubtful that the new allegations impacted him in any material way.



previously noted, at the April 21, 2009 hearing, King replied affirmatively when the trial court asked him whether what concerned him was the sentence. Moreover, two of King's letters were written after the PSI was completed, indicating that the trial court's assessment of the time frame was partially correct. Most importantly, even accepting that the trial court was mistaken as to when King first began expressing his wish to withdraw his no contest pleas, its error does not undermine its decision. As previously discussed, even if a trial court fails to adequately explain the reasons for its decision, this court must independently review the record to find support for the trial court's decision if the justification is there. *Id.*, ¶46. For all the reasons already discussed, the trial court properly concluded that a fair and just reason did not exist to permit King to withdraw his no contest pleas. The judgment and order therefore are affirmed.

*By the Court.*—Judgment and order affirmed.

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

