

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2011

A. John Voelker
Acting 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 No. 2010AP2848-CR

Cir. Ct. No. 2008CF962

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL L. BOOKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Samuel L. Booker has appealed from a judgment convicting him of first-degree reckless homicide in violation of WIS. STAT.

§ 940.02(1) (2009-10).¹ Because we conclude that the trial court properly denied Booker's presentence motion to withdraw his guilty plea, we affirm the judgment.

¶2 The sole issue on appeal is whether the trial court erroneously exercised its discretion when it denied Booker's presentence motion to withdraw his guilty plea. The charges against Booker arose from an incident in which he was alleged to have fired multiple gunshots at a car in the parking lot of a Racine gas station, killing one of the passengers. At the preliminary hearing, George Thomas, who was with Booker at the time of the shooting, testified that Booker was the shooter. Booker entered a plea of guilty after the original charge of first-degree intentional homicide was reduced to first-degree reckless homicide. In exchange for his plea, two counts of attempted first-degree intentional homicide and three counts of bail jumping were also dismissed and read-in for purposes of sentencing.

¶3 Booker moved to withdraw his guilty plea approximately one week after he entered it. In his motion, Booker alleged that when he entered the guilty plea, he did not understand that, despite his contention that he was not the shooter, the sentencing court could consider all of the facts of record, determine that he was the shooter, and sentence him accordingly. After an evidentiary hearing at which Booker testified, the trial court found that, even though Booker maintained that he was not the shooter when he entered his plea, he agreed that Thomas' preliminary hearing testimony provided a factual basis for the plea, and that the trial court could rely on that testimony. The trial court concluded that Booker understood that he was agreeing that the trial court could rely on Thomas'

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

testimony that Booker was the shooter. The trial court therefore determined that Booker had not established a fair and just reason for withdrawing his guilty plea.

¶4 A trial court's decision to grant or deny a motion to withdraw a guilty plea made before sentencing is reviewed under an erroneous exercise of discretion standard. *State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. This court will affirm the trial court's discretionary decision if it was demonstrably made and based upon facts of record and in reliance on the appropriate and applicable law. *Id.*

¶5 Withdrawal of a guilty plea prior to sentencing is not an absolute right. *Id.*, ¶32. The defendant has the burden to prove by a preponderance of the evidence that he has a fair and just reason for plea withdrawal. *Id.* The reason must be something other than a desire to have a trial or belated misgivings about the plea. *Id.* The reason proffered as fair and just by the defendant must be found credible by the trial court. *Id.*, ¶43. In other words, the trial court must believe that the proffered reason actually exists. *Id.* The trial court's findings of evidentiary or historical fact, including its credibility determinations, will be upheld unless they are clearly erroneous. *Id.*, ¶33.

¶6 Before accepting a guilty plea to an offense, the trial court must ascertain that there is a factual basis for the plea. *State v. Howell*, 2007 WI 75, ¶56 n.33, 301 Wis. 2d 350, 734 N.W.2d 48. The trial court's obligation to establish a sufficient factual basis helps ensure that the defendant's plea is knowing and intelligent. *Id.*, ¶67.

¶7 On appeal, Booker contends that his guilty plea was not knowing and voluntary because he was confused about the factual basis for the plea when he entered it. He contends that the discussions at the plea hearing and his

testimony at the post-plea evidentiary hearing establish that he failed to fully appreciate and understand the factual basis for the plea, and did not believe that he was going to be convicted and sentenced as the shooter.

¶8 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 defendant will ordinarily have difficulty showing a fair and just reason for plea withdrawal if the reason is based on grounds that were adequately addressed in the plea colloquy. *Jenkins*, 303 Wis. 2d 157, ¶¶60, 63. As determined by the trial court in denying Booker's motion to withdraw his guilty plea, the plea colloquy establishes that Booker understood that Thomas' preliminary hearing testimony identifying Booker as the shooter would serve as the factual basis for his guilty plea.

¶9 At the plea hearing, the trial court explained the elements of the amended charge to Booker, stating that in order to convict Booker of first-degree reckless homicide regarding the death of Lance Youngblood, the State would have to prove beyond a reasonable doubt that Booker caused the death of Youngblood, that he caused it by criminally reckless conduct, and that the circumstances of Booker's conduct showed an utter disregard for human life. Booker stated that he understood.

¶10 In his brief on appeal, Booker characterizes the subsequent discussion of the factual basis for the plea as confusing and convoluted. However, the record of the plea colloquy does not support his contention.

¶11 In discussing the plea colloquy, defense counsel acknowledged that Thomas' testimony at the preliminary hearing provided a factual basis for the plea. He acknowledged that Thomas testified that he, Booker, and two others were in

the gas station parking lot, that there was a dispute of some sort between their group and a group of men in another car, that the other car nearly ran into Thomas and one of the men with him, and that as the other car drove away, Booker fired shots into the back of it. Defense counsel acknowledged that evidence also indicated that the people in the other car identified the shooter as wearing a red shirt, and that the crime lab identified a biological sample on a red shirt seized from the back of the vehicle in which Booker was riding as belonging to Booker.

¶12 Defense counsel acknowledged that this evidence provided a factual basis for Booker's guilty plea, and that Booker had made the decision to accept the plea, even though he continued to take the position that he was merely part of the group at the scene, and was not the shooter. The trial court then asked the prosecutor whether the State would stipulate to Thomas' testimony at the preliminary hearing as providing a factual basis for the plea, and the prosecutor agreed. The trial court then stated: "Mr. Booker, you heard what your lawyer just said. Do you agree the Court could use that testimony as providing a factual basis for your plea?" Booker replied: "Yes, sir."

¶13 The plea colloquy thus provides no basis to conclude that Booker did not understand that the trial court would rely on Thomas' preliminary hearing testimony as a factual basis for his guilty plea, and would accept Thomas' testimony that Booker was the shooter at the scene, despite Booker's denial. In addition, after hearing Booker's post-plea testimony, the trial court found that Booker was not confused and, despite denying that he was the shooter, was willing to allow the trial court to rely on Thomas' testimony that he was the shooter in accepting his guilty plea.

¶14 In reaching this conclusion, the trial court discussed the guilty plea questionnaire executed by Booker, the discussions during the plea colloquy, and Booker's express agreement that the trial court could rely on Thomas' testimony, despite denying that he was the shooter. The trial court noted that Booker was present at the preliminary hearing when Thomas unequivocally identified him as the lone shooter at the scene. The trial court rejected Booker's argument that he did not completely understand the plea proceedings because he had only an eighth-grade education and a learning disability for which he required medication. The trial court found that Booker gave no indication of mental impairment, and that even though he had only an eighth-grade education, his answers during the plea colloquy were responsive and reflected an understanding of the proceedings.

¶15 As stated above, credibility determinations are for the trial court. The trial court's findings that Booker understood the proceedings, and agreed that the trial court could rely on Thomas' testimony that he was the shooter, despite his denial, are not clearly erroneous. Based on the record and the trial court's findings, no basis exists to conclude that the trial court erroneously exercised its discretion in determining that Booker failed to establish a fair and just reason to withdraw his guilty plea.

By the Court.—Judgment affirmed.

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

