COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP1734-CR
2013AP1735-CR

Cir. Ct. Nos. 2010CF138
2010CM164

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABRIELLA BERNABEI,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Jackson County: MARK L. GOODMAN, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Gabriella Bernabei appeals judgments of conviction for child neglect and negligently mistreating animals. Bernabei

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

contends that, pre-sentencing, she presented a fair and just reason for plea withdrawal and that the circuit court erred when it denied her plea withdrawal motion. I conclude that the record supports the circuit court's finding that Bernabei failed to prove, by a preponderance of the evidence, a fair and just reason. Accordingly, I affirm.

Background

¶2 In 2010, Bernabei was charged with three misdemeanor child neglect counts, 16 misdemeanor animal mistreatment counts, and one felony animal mistreatment count. The charges arose from a home visit and inspection by social workers, a health officer, and deputy sheriffs at Bernabei's rural property.

¶3 The criminal complaints in the consolidated cases allege that there were numerous sick and frail-looking cats inside and outside Bernabei's home, several with "feces matted into their fur and tails." Because there appeared to be ample food and water for the cats, an animal control officer who had been called to the scene speculated that the cats had worms or some sort of parasite. Inside the home, there was a strong odor of cat urine and feces. Cat feces was observed throughout the home, including on floors, on furniture, and on bedding where Bernabei's three children slept. A deputy observed that the three children were currently sleeping, two on the floor and one on a couch, with cat feces on the floor between the two children and what appeared to be cat diarrhea on a pillow that one of the children was sleeping on. More generally, the residence was extremely cluttered and dirty.

¶4 Authorities explained to Bernabei that the conditions were a hazard to the children's health and that Bernabei needed to immediately make

appointments for the children with a doctor and a dentist. Bernabei was also directed to immediately set up an appointment with a veterinarian to find out what was wrong with the cats.

¶5 The authorities returned to Bernabei's residence four days later. Because of reports that Bernabei had dead cats in a freezer, an officer looked in a freezer in Bernabei's garage. The freezer was not running at the time, and the officer immediately smelled the odor of decaying flesh and observed what appeared to be a dead cat inside a box. Inside the residence, Bernabei had taken remedial actions to clean the house, but in a room off the kitchen a deputy found cat feces on the floor. Bernabei had failed to make appointments for her children or for the cats.

¶6 Although I do not find the allegation in the complaints, Bernabei states in her appellate brief that her children were removed from the home due to the presence of cat urine and feces and the generally unsanitary conditions within the house.

¶7 Following a preliminary hearing, the felony animal mistreatment count was dismissed, and, on the morning of September 9, 2011, Bernabei was facing the three misdemeanor child neglect counts and 17 misdemeanor animal mistreatment counts. That morning a jury was selected to decide the animal mistreatment counts.

¶8 After the jury was selected, but before the presentation of evidence, Bernabei and her attorney were informed that a search warrant was being executed at Bernabei's home based on allegations of ongoing animal mistreatment. This prompted the parties to engage in plea agreement discussions, resulting in an agreement that required Bernabei to plead to one count of child neglect and four

counts of animal mistreatment and the prosecutor to recommend probation. The remaining child neglect and animal mistreatment counts would be dismissed but read in. There was no agreement with respect to charges that might arise as a result of the search warrant being executed that day.

¶9 The circuit court engaged in an extended plea colloquy with Bernabei, including questions about her mental health, drugs she was taking at the time, and why she was entering her pleas. Notable here, Bernabei expressed in some detail her distress regarding the search warrant being executed at her home while she was not there and her frustration with the prosecutor. Bernabei told the court she was having trouble understanding what was going on, but when asked what she did not understand, she clarified: "I just don't understand how – how – how the prosecutor just keeps coming at me with more stuff. And I'm just not clear on that." When asked if there was anything else she did not understand, Bernabei said, "I don't think so."

¶10 Bernabei entered a no contest plea to the child neglect count, and entered ***Alford*** pleas to the four animal mistreatment counts. In accordance with the agreement, the remaining charges were dismissed.

¶11 Approximately one week later, Bernabei filed a motion to withdraw her pleas. Hearings on Bernabei's plea withdrawal request occurred on January 19, 2012, February 16, 2012, and October 5, 2012.

¶12 During the hearings Bernabei, her trial counsel, and her therapist testified. As we shall see, the focus of the hearings was on whether Bernabei was having a panic attack when she entered her pleas.

¶13 Bernabei's therapist did not give an opinion as to whether Bernabei had a panic attack during the plea hearing. Rather, she explained panic attacks and their symptoms. The therapist identified particular symptoms that might not be observable. As to Bernabei's testimony, it is sufficient to say here that she said she could not remember entering her pleas while at the same time asserting that, during the plea hearing, she experienced several panic attack symptoms listed by her therapist.

¶14 After hearing evidence, the circuit court acknowledged the therapist's testimony that there were thirteen symptoms "that one could observe in a person or not observe." The court, nonetheless, found that Bernabei did not meet her burden of proving that she had experienced a panic attack. The court stated that Bernabei did not exhibit symptoms of a panic attack during the plea hearing and, plainly, the circuit court declined to credit Bernabei's assertion that she was actually experiencing such symptoms. Bernabei appeals.[2]

Legal Principles And Standard Of Review

¶15 In her appellate brief-in-chief, Bernabei accurately sets forth applicable legal principles and standards. She states:

> A defendant must present a fair and just reason for withdrawing his plea. ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24. What constitutes a fair and just reason has not been precisely defined; instead, it contemplates the showing of some adequate reason other than the desire to have a trial. [***Id.***, ¶31.]
>
> A variety of examples of what could provide a fair and just reason for withdrawal have been recognized, including the defendant's assertion of innocence (which is

[2] The appellant's brief was not filed in this case until the end of November 2013.

> not in and of itself dispositive); genuine misunderstanding of the guilty plea's consequences; hasty entry of the plea; confusion on the defendant's part; coercion on the part of trial counsel; and whether the motion to withdraw the plea was expeditiously filed. ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989).
>
> Whether the defendant has presented a fair and just reason is a discretionary determination. The trial court's decision will be affirmed if it was made based upon the facts appearing in the record and in reliance on the appropriate and applicable law. ***State v. Canedy***, 161 Wis. 2d 565, 579, 469 N.W.2d 163 (1991). However, the exercise of discretion requires the trial court to take a liberal rather than a rigid view of the reasons given. ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

(Footnote omitted.) To these principles and standards, I add the following language from ***State v. Jenkins***, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24:

> Although in recent years the court has consistently articulated a liberal rule for plea withdrawal before sentencing, it has not consistently allowed plea withdrawal in its cases. The overriding reason is that the decision to grant or deny "the motion to withdraw the plea rests within the sound discretion of the circuit court." This discretion gives the circuit court latitude in assessing the defendant's reason and determining whether it is fair and just under the circumstances.
>
> A circuit court's discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard. All that "this court need find to sustain a discretionary act is that 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." [Reviewing courts will] affirm the circuit court's decision as long as it was demonstrably "'made and based upon the facts appearing in the record and in reliance on the appropriate or applicable law.'"
>
> ....
>
> Withdrawal of a guilty plea before sentencing is not an absolute right. The defendant has the burden to prove by a preponderance of the evidence that he has a fair and

> just reason. The reason must be something other than the desire to have a trial, or belated misgivings about the plea.
>
> On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. The standard also applies to credibility determinations. In reviewing factual determinations as part of a review of discretion, we look to whether the court has examined the relevant facts and whether the court's examination is supported by the record.

Id., ¶¶29-30, 32-33 (citations, quoted sources, and footnote omitted).

Discussion

¶16 Bernabei contends on appeal that five factors support the conclusion that there is a fair and just reason supporting plea withdrawal. More specifically, Bernabei contends that (1) her pleas were hastily entered, (2) she was confused, (3) she was coerced by her trial counsel, (4) she promptly filed a plea withdrawal motion, and (5) she asserted her innocence. However, at the plea withdrawal hearing, when the circuit court asked Bernabei's counsel what fair and just reason supported plea withdrawal, counsel gave just two reasons. As to these two reasons, one does not match any of the reasons listed above and one is a subset of the allegation that Bernabei was confused.

¶17 Accordingly, I limit my discussion to the reasons preserved for appeal, that is, those argued by counsel at the plea withdrawal hearing.

A. Bernabei's Desire To Have Her Day In Court

¶18 When Bernabei testified at her plea withdrawal hearing, she did not assert her innocence. Rather, she said she wanted "a fair trial." Following testimony, when the circuit court allowed Bernabei's counsel to state what fair and

just reasons supported plea withdrawal, counsel responded that Bernabei "wants her day in court." Counsel went on to say:

> These cases are very questionable. I think that there are reasons for her to want to fight for this. I mean, not only were her children removed because of it, but also her pets and her way of going about her life, and I think that her beliefs have been challenged in a way that she needs her day in court to be able to explain her reasoning for why she has chosen to live the way that she has.

¶19 Although Bernabei asserts on appeal that a claim of innocence supports plea withdrawal, that is not an assertion or argument that was made at the plea withdrawal hearing. Instead, Bernabei expressed a desire to have a trial, something that is not a fair and just reason. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991) ("The reason must be something other than the desire to have a trial."). Accordingly, the circuit court was justified when it stated: "I understand she wants now to have a trial, but that's not good enough ...."

B. Bernabei's Allegation That She Experienced A Panic Attack

¶20 Bernabei argues in her appellate brief that plea withdrawal is warranted because the record "reflects [her] considerable confusion at the time of the pleas." As part of this argument, Bernabei points both to evidence that she informed the circuit court about her mental health issues and to the plea hearing transcript where she asserts it was difficult for her to understand what was going on in the courtroom. Bernabei also relies on her motion to withdraw her pleas in which she alleged that the plea decision "caused her extreme anxiety such that she was in a fog at the time of the pleas" and that "immediately after court she had to spend hours consulting her psychologist." She also directs my attention to testimony from her therapist informing the circuit court that Bernabei suffers from post-traumatic stress disorder, panic disorder, and dysthymic disorder.

¶21 Although Bernabei's "confusion" argument is broad, at the plea withdrawal hearing her counsel advanced just one confusion-related reason. At the start of the hearing, when asked the reasons why Bernabei was seeking plea withdrawal, Bernabei's counsel said that Bernabei informed counsel that she was suffering from a panic attack during the plea hearing. During testimony, the circuit court gave Bernabei and her counsel clear notice that the court understood the issue they were addressing to be limited to the panic attack allegation. When the prosecutor sought to more broadly challenge Bernabei with respect to fair and just reasons for plea withdrawal, the court sustained an objection to the prosecutor's line of questioning, and stated: "I believe the fair and just reason that she is offering the court in order to allow the court to allow her to withdraw her plea is that she was suffering from a panic attack at the time that she made her plea. And so I think that the scope is fairly narrow ...." Following testimony, counsel made the comments I address in ¶¶18-19 above and made just one more argument, that "there has been enough testimony and evidence to show that [Bernabei] certainly could have been suffering from a panic attack." The circuit court then ruled on whether Bernabei met her burden of proving by a preponderance of the evidence that, during her plea hearing, she had a panic attack.[3]

¶22 Under these circumstances, my review regarding "confusion" is limited to whether the record supports the circuit court's panic attack finding. Accordingly, in the remainder of this opinion, I address only Bernabei's argument

[3] The circuit court briefly addressed Bernabei's testimony that she had been threatened by her trial counsel. While not entirely clear, a reasonable reading of the circuit court's comments on this topic, which the court was not obligated to provide, is that the court rejected Bernabei's threat testimony.

that the circuit court's panic attack finding is contrary to undisputed evidence in the record.

¶23 A careful reading of Bernabei's argument discloses that she asserts that undisputed evidence conflicts with the following three circuit court findings: (1) that Bernabei did not experience a panic attack during the plea hearing because the court did not observe panic attack symptoms, (2) that, if Bernabei had actually experienced a panic attack, she would have called her therapist or alerted someone else sooner after the plea hearing, and (3) that Bernabei's pleas were motivated by her dislike of her attorney. I address each finding below.

1. Observation Of Symptoms

¶24 Bernabei complains that, although her therapist testified that certain panic attack symptoms might not be observable, the circuit court nonetheless found that Bernabei did not have a panic attack because the court did not observe symptoms. I understand Bernabei to be arguing that the circuit court improperly rejected undisputed expert testimony that it was possible for a person to have a panic attack without symptoms being visible to others.

¶25 The simple response to this is that there is no indication in the record that the circuit court rejected this testimony. Nowhere does the circuit court indicate that it does not believe, as the therapist testified, that it was possible for Bernabei to have had a panic attack without it being discernible to the court. Nowhere, for example, does the circuit court say, as Bernabei asserts in her reply brief, that "if [the court] did not notice any symptoms Ms. Bernabei *could not* have been suffering from a panic attack" (emphasis added). Rather, the court's comments are properly read as expressing the belief that the lack of visible signs and, especially, the lack of complaints about symptoms indicate that Bernabei was

not having a panic attack. As we shall see, this was a reasonable inference from the therapist's testimony. Additionally, Bernabei's challenge fails because it is built on the faulty assumption that the circuit court was required to credit the testimony of Bernabei. Let me explain.

¶26 The therapist did not opine that Bernabei was suffering from a panic attack during the plea hearing. Rather, it is only by combining testimony from the therapist (defining a panic attack and suggesting that such *could* have occurred without the court being aware of it) with testimony from Bernabei (regarding how she felt during the plea hearing) that there is support for a finding that Bernabei had a panic attack during the plea hearing. But of course the circuit court was not required to believe Bernabei. And, it is readily apparent that the circuit court did not believe Bernabei's plea withdrawal hearing testimony regarding her symptoms.

¶27 Bernabei testified that, during the plea hearing, she was "sweaty, ... jittery, hard to breathe, dizzy, ... very surreal feeling of time and space, ... [and had] [a]bdominal pains." If true, these assertions would show that Bernabei was experiencing six of the symptoms of a panic attack, easily enough symptoms, according to Bernabei's therapist, to support a finding that Bernabei had in fact suffered a panic attack during the plea hearing. The fact that the circuit court rejected Bernabei's motion is a clear indication that the court did not find Bernabei's assertions credible.

¶28 Apart from Bernabei's testimony, which the circuit court was free to disbelieve, I observe that the testimony of Bernabei's therapist fails to provide much support for the view that Bernabei was experiencing a panic attack during the plea hearing.

¶29 Bernabei's therapist listed thirteen panic attack symptoms and explained that a person must be experiencing at least four of these to qualify as having a panic attack.[4] The therapist was questioned as to whether some of the symptoms could occur without other people being aware of them. In essence, the therapist's response merely was that it was a possibility. Bernabei's therapist declined to give an opinion as to whether Bernabei was having a panic attack during the plea hearing. At best, from Bernabei's point of view, the therapist opined that Bernabei was experiencing a panic attack many hours after the plea hearing during a telephone call with the therapist. But even then the therapist readily admitted that her opinion was based on symptoms Bernabei reported she was experiencing during the call.

¶30 With respect to some symptoms, it is true that the therapist opined that they might be present, but not observable. But the list of symptoms suggests that, as to several, this is not likely. For example, the therapist opined that a person might be experiencing dizziness, "sensations of shortness of breath[,] ... feelings of choking, chest pain or discomfort, nausea, or abdominal distress." In my view, the circuit court could have reasonably accepted the therapist's view that

[4] Bernabei's therapist summarized the thirteen symptoms as follows:

> The first is palpitations or pounding heart, or accelerated heart rate. Sweating is the second one. Third is trembling or shaking. Fourth is that sensations of shortness of breath or smothering feeling. The fifth is a feeling of choking. The sixth is chest pain or discomfort. Seventh is nausea or abdominal distress like a stomach ache kind of feeling. Eight is feeling dizzy, unsteady, light-headed or faint. Ninth is derealization, so a feeling of unreality or depersonalization that you're actually like detached from yourself. Tenth is a fear of losing control or going crazy. Eleven is fear of dying. Twelve is paresthesia, which is a numbing or a tingling sensation in your body. And 13 is chills or hot flash.

such was possible, but also found that it was unlikely that Bernabei had actually experienced multiple such symptoms during the plea hearing because Bernabei did not exhibit or complain about such symptoms.

¶31 Finally, I note that, when Bernabei's therapist was asked if a person providing lucid and rational answers to questions from a judge would "weigh" for or against the conclusion that the person is suffering from a panic attack, the therapist answered "against." Having reviewed the plea hearing transcript, lucid and rational aptly describes several answers and statements Bernabei made during the plea colloquy.

¶32 In sum, Bernabei has failed to demonstrate that the record shows that the circuit court rejected undisputed expert testimony that it was possible for a person to have a panic attack without symptoms being visible to others.

2. Call To Her Therapist

¶33 Bernabei asserts that the circuit court erred when it surmised that, if Bernabei had actually experienced a panic attack, she would have called her therapist sooner after her plea hearing. Bernabei interprets the circuit court's comments as a statement that people who have panic attacks always alert an expert promptly. I disagree with this characterization of the circuit court's comments and, therefore, reject the argument.

¶34 It is undisputed that the plea hearing ended at approximately noon and that, about ten hours later, Bernabei telephoned her therapist. Bernabei telephoned her therapist at 10:30 p.m., and her therapist called her back at 11 p.m. and talked with her for about two hours. The therapist testified, based on "[Bernabei's] report," that Bernabei was experiencing symptoms of a panic attack

during the phone conversation. The therapist did not relate any discussion between her and Bernabei regarding whether Bernabei had experienced a panic attack during the plea hearing or, for that matter, whether Bernabei had experienced such symptoms any time earlier in the day.

¶35 As part of its ruling, the circuit court stated: "[O]ne would think that if [Bernabei] was really in the throes of a panic attack that there might have been some type of either at least a report to her counselor well before that or else even checking in to obtain some type of medical attention." Just before that, the court referenced the therapist's testimony that a "person could be having [a panic attack] but other people ... may not necessarily know that they're having it," and, thus, "[a] lot of people" having a panic attack think they are having a heart attack and go to an emergency room.

¶36 I do not read the circuit court's comments, as Bernabei does, as saying that the fact that Bernabei did not seek help or report symptoms sooner means that she could not have been having a panic attack during the plea hearing. Rather, the circuit court was offering the common-sense observation that Bernabei's failure to alert anyone was a strong indication that she had not actually suffered from the symptoms she alleged.

3. Dislike Of Her Attorney

¶37 Bernabei appears to argue that the circuit court rejected her panic attack assertion based on the court's finding that her pleas were instead motivated by her dislike of her attorney. Bernabei contends that the circuit court erred when it found that she entered, and subsequently moved to withdraw, her pleas "simply because 'she didn't like Mr. Bachman [defense counsel] and at a very late stage tried to have him removed from the case.'" Bernabei points out that the record

instead supports the view that her primary motivation for moving to withdraw her pleas was the police search of her property.

¶38 I agree with Bernabei that the record does not support a finding that her pleas, and later motion to withdraw her pleas, were "simply" motivated by her dislike of her trial counsel. But her characterization of the circuit court's finding is inaccurate. The court did not, as Bernabei says in her brief, indicate that Bernabei was "simply" motivated by her dislike of her attorney. It might be true that the court overstated the matter when the court characterized this issue as "a lot of the problem," but it is also unreasonable to suggest that the court did not understand that Bernabei was primarily motivated to enter her pleas for the reason she gave at the plea hearing: "I feel like if I go forward with the jury trial I'll be hit with worse."

Conclusion

¶39 For the reasons stated, I affirm the circuit court.

By the Court.—Judgments affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.