COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2014

Diane M. Fremgen
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 Nos. 2013AP1560-CR
2013AP1561-CR

Cir. Ct. Nos. 2008CF1458
2009CF1175

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY M. BURNS,

DEFENDANT-APPELLANT.

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

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Timothy M. Burns appeals from judgments convicting him of first-degree sexual assault of a child

under twelve and of threat to a judge and from an order denying his motion for postconviction relief. Burns argues that the circuit court erred in not allowing him to withdraw his no-contest pleas before sentencing. We affirm.

¶2 Burns has a long history of mental health issues. While in the Kenosha county jail on the sexual-assault charge, Burns appeared before a court commissioner on an unrelated family matter. The commissioner refused Burns's demand that he be allowed to see his daughter. Burns screamed obscenities and became so disruptive he had to be picked up and dragged out by deputies.

¶3 Burns later passed notes to an officer at the jail. One read:

> To the judge that won't let me see my daughter. I'm going to kill you bitch I'm going to chop you in pieces and then I am going to cook you and eat what's left of your body bitch. How bout I take your daughter away from you Bitch Bitch Bitch Bitch Bitch Bitch Bitch Bitch Bitch Bitch Bitch Bitch

A second note threatened, in part, to "bomb this jail and kill everyone in it." Burns was charged with threat to a judge, bomb scare, and disorderly conduct.

¶4 Meanwhile, Burns's competency to proceed was at issue and he planned to enter a plea of not guilty by reason of mental disease or defect (NGI). He was assessed at Mendota Mental Health Institute several times and eventually withdrew the NGI plea in May 2010. Issues then arose regarding his psychiatric medications. Burns claimed the jail was withholding them; the jail nurse said

Burns was refusing them. The defense and the State debated whether the core issue was competency or behavior.[1]

¶5 On February 8, 2011, Psychiatrist Dr. John Pankiewicz evaluated Burns at the jail and opined that he was competent to proceed. On February 14, Burns entered a no-contest plea to first-degree sexual assault of a child under twelve and threat to a judge; the remaining counts were dismissed and read in.

¶6 About six weeks later, Burns told the court he wanted to fire his lawyer and withdraw his plea. New counsel filed a motion for plea withdrawal on grounds that Burns's hasty plea, significant mental health issues and not being on his medications constituted a fair and just reason to withdraw his plea. The court denied the motion after a hearing. Burns renewed his motion to withdraw his plea after sentencing. That motion also was denied. This appeal followed.

¶7 To withdraw a plea before sentencing, a defendant must proffer a fair and just reason for withdrawing the plea, the circuit court must find that reason credible, and the defendant must rebut evidence of substantial prejudice to the State. ***State v. Jenkins***, 2007 WI 96, ¶43, 303 Wis. 2d 157, 736 N.W.2d 24. The decision to grant or deny the motion rests within the circuit court's sound discretion. ***Id.***, ¶29. On appeal from the denial of such a motion, the defendant faces two "additional and substantial obstacles": the standard of review and the extensive plea colloquy required below. ***Id.***, ¶44. The reviewing court applies "a

[1] Besides the charges described above, Burns racked up other charges for his disruptive conduct in jail: threats to injure or accuse, prisoner throwing/expelling bodily substances, interfering with fire fighters/alarms, violating state/county institution laws, two counts each of bail jumping and disorderly conduct, and three counts of criminal damage to property.

deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact" and to its credibility determinations. ***Id.***, ¶33. Comprehensive colloquies ensure that pleas are knowing, intelligent, and voluntary, but also make it more difficult for defendants to withdraw their pleas. ***Id.***, ¶60.

¶8 Burns told the circuit court he was "going crazy" from not taking his medication. The court took care to ascertain his capacity to enter his pleas:

> Q: Okay. But now, when you say going crazy, on the record it sounds like you mean you're going crazy.
>
> A: No. I—I'm just not—not literally crazy. It's just that I needed because I—I'm real sleep[-]de[p]rived without my medications, and I don't—I don't get hardly any sleep, and—and I—I suffer from depression. So, I—you know, I need it for my depression and, you know, to keep me—
>
> ….
>
> Q: Now, what I need to know today is if you understand what you're doing.
>
> A: Yes, ma'am.
>
> Q: You do?
>
> A: Yes, ma'am.
>
> Q: Okay. Even though you're not taking your medicine?
>
> A: Yes, ma'am.
>
> Q: And you're sleep[-]deprived and you're tired?
>
> A: Yeah.
>
> Q: But you still understand that you're entering pleas that will convict you of first[-]degree sexual assault of a child under the age of 12 as a repeater and convict you of threat to a judge?
>
> A: Yes, ma'am.

Q: As a repeater.

A: Yes, ma'am.

Q: And you understand that?

A: Yes, ma'am.

….

Q: Are you entering these pleas freely, voluntarily, intelligently, and understandingly, after having consulted with your attorney, Mr. Rose?

A: Yes, ma'am.

Q: Now, you're not on your medication; and Mendota says you should be on some medication because it helps you function better. Other than that factor have you taken any other medication or alcohol or anything else?

A: No, ma'am.

Q: Okay. Now, are you thinking clearly?

A: Yes, ma'am.

Q: Did you read the criminal complaints in both of these cases?

A: Yes, ma'am.

Q: And did you understand what you read?

A: Yes, ma'am.

….

Q: Are you at all confused about anything that we're doing here today?

A: No, ma'am.

Q: Is there anything about this plea procedure that you do not understand or any question that you would like to either ask me right now or [Attorney] Rose?

A: No, ma'am.

> Q: Are you pleading no contest to each of these charges because you believe that the State can prove beyond a reasonable doubt to a reasonable jury that you are guilty of these two charges?
>
> A: Yes, ma'am.
>
> Q: You understand the elements?
>
> A: Yes, ma'am.
>
> Q: You understand the penalties?
>
> A: Yes, ma'am.
>
> ….
>
> Q: Okay. Any question at all?
>
> A: No, ma'am.

¶9 The record establishes that Burns had been on Trazodone and Seroquel. Burns dwells on the *fact* of his being off those medications at the plea hearing as a fair and just reason to withdraw his pleas, implying that their purpose was to restore him to mental competency. The better question is whether being without those specific drugs affected his comprehension and competency. For several reasons, we do not think it did.

¶10 Dr. Pankiewicz's February 2011 letter to the court summarized his evaluation of Burns's competency to stand trial. He opined that Burns's primary problems are behavioral in nature, that Burns requires medication for behavioral control, rather than for mental illness, and that Burns "understands the criminal trial process, the roles of principal participants, the available pleas and the potential consequences of court proceedings" and was able "to assist counsel in his

own defense with respect to cognitive issues." Dr. Pankiewicz expressed concern about Burns's "behavioral competence," however—his "capacity to maintain composure throughout the criminal trial process and not suffer periods of acute agitation impairing his capacity to proceed." Dr. Pankiewicz opined that Trazodone and Seroquel could prevent such episodes and recommended that the court order those medications so that Burns could maintain control in front of a jury. So while Burns was not on the Trazodone and Seroquel at the plea hearing, he also did not exhibit acute agitation there. Rather, as the above colloquy shows, he was coherent and responded appropriately to questions.

¶11 The circuit court noted that Burns was found to be competent just before his plea hearing and, based on its substantial interaction with him, also found that he understood the plea and its ramifications; entered the plea knowingly, freely, voluntarily and intelligently; thoroughly discussed his case with his counsel over at least fifteen meetings; and showed no sign that he did not know or understand what he was doing. The court also found that there was no evidence that he was rushed or forced into deciding to plead. These findings are not clearly erroneous.

¶12 A pro se letter Burns wrote to the court in March 2011 confirms that the decision to deny his motion to withdraw his plea represents a proper exercise of discretion. In it, Burns clarifies that the true reason he wanted to withdraw his plea was that his exposure of "62 years is too much," and he wanted a "cap or a

better plea deal." Belated misgivings about one's plea does not constitute a fair and just reason for plea withdrawal. ***Jenkins***, 303 Wis. 2d 157, ¶43.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).