STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP001522-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARTTISTIS B. HALL.

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable Michael J. Hanrahan, Presiding

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REPLACEMENT BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

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CASES CITED

STATUTES CITED

ISSUE PRESENTED

1. Did Mr. Hall present a "fair and just" reason to withdraw his plea prior to sentencing?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Hall takes no position on publication. While Mr. Hall does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The information charged Mr. Hall with two counts of interference with child custody contrary to Wis. Stat. §§ 948.31(1)(a)&(b). (6:1).

Mr. Hall pleaded guilty to an amended charge of contempt contrary to Wis. Stat. §785.03(1)(b). (9:1). He filed two motions to withdraw his guilty plea prior to sentencing. (12; 15). The circuit court, the Honorable Janet Protasiewicz, presiding, denied the motions without an evidentiary hearing. (73:6); (App. 108). Thereafter, Mr. Hall received a probation disposition. (23); (App. 101).

Mr. Hall ultimately filed a Rule 809.30 postconviction motion seeking plea withdrawal. (32).

That motion was denied after an evidentiary hearing. (57).[1]

This appeal follows. (61).

STATEMENT OF RELEVANT FACTS

Underlying Offense

The criminal complaint indicates that Mr. Hall has a child in common with Emerald Flanagan. (2:2). Despite being ordered to return the child to Ms. Flanagan following family court proceedings, Mr. Hall did not comply with that order. (2:2). He also would not tell Ms. Flanagan where the child was located. (2:2). This formed the basis for the two charges of withholding and concealing a child under the statutes governing interference with child custody. (2:1).

Plea

On August 31, 2016, Mr. Hall resolved his case with a plea agreement in which he pleaded guilty to a single misdemeanor count of contempt of court. (67:3). A remaining felony charge of interference with child custody was dismissed and read-in. (67:3). The State agreed to recommend an imposed and stayed jail term but to leave the length of that sentence to the court's discretion. (67:4). It further agreed to

[1] The issues raised in that motion are not pursued on appeal.

request that the court place Mr. Hall on probation for a year. (67:4).

Presentence Motions to Withdraw Plea

On October 11, 2016, the parties appeared for sentencing before the Honorable Janet Protasiewicz. (68:3). However, defense counsel advised the court that Mr. Hall was now requesting to withdraw his plea. (68:3). Counsel did not indicate the basis for the request. (68:3). Mr. Hall explained that he requested materials from the family court which he believed were relevant to his defense and that his lawyer had refused to provide them. (68:4-5). Mr. Hall stated that he wanted to go to trial but that his lawyer "would not do nothing I asked of him." (68:5). The circuit court adjourned the proceedings so that Mr. Hall could discuss this matter with counsel. (68:6).

The parties appeared for another hearing before Judge Protasiewicz on October 25. (69). On that date, counsel again stated that Mr. Hall wished to withdraw his plea. (69:3). The court expressed skepticism at the wisdom of withdrawing the plea, given the favorable amendment at issue. (69:5). Mr. Hall denied that there had been any "back and forth" as to whether he wished to have a plea or a trial. (69:5). Instead, he stated that he consistently wanted a jury trial but that his lawyer "would insist in doing a plea instead." (69:5). The court indicated it was "sure" that defense counsel "did not insist on anything," telling Mr. Hall that he had received a "gift" from the State in terms of the plea he now

wished to withdraw. (69:5). The court then set a deadline for counsel to file a motion to withdraw the plea. (69:6).

On that same day, counsel filed a motion to withdraw Mr. Hall's guilty plea. (12:1). The motion alleged that Mr. Hall suffered from a learning disability, that he believed he would still be able to have a trial even after pleading guilty, that he had been pressured into accepting a plea, and that he was innocent of the charged offenses. (12:1). The motion further stated that Mr. Hall "has a valid and viable defense to the charges." (12:1).

Given the nature of the allegations, counsel moved to withdraw. (70:3). Successor counsel was then appointed. (72:3).

On January 17, 2017, successor counsel filed a second motion to withdraw the plea, which alleged that Mr. Hall's "plea was entered: (1) hastily and in confusion; (2) without adequate consultation with prior defense counsel; (3) with coercion by prior defense counsel; and (4) despite the assertion of innocence." (15:1). The motion referenced a letter that Mr. Hall ostensibly wrote to the Court. (15:3).[2]

On January 12, 2017, Judge Protasiewicz held a hearing on the motion. (73); (App. 104). The court stated: "I don't think the Defense's motion establishes

[2] No such letter is present in the court record.

a factual basis for me to grant relief." (73:3); (App. 105). Defense counsel asserted:

> But what he's alleging is that he was -- he did the plea; he did it while he was in jail to get out of jail; he felt like he -- that he basically made the decision based on that; that he didn't actually do this, he feels; and, yet, he signed that. He acknowledges that he signed it, that he did that voluntarily. He just felt pressured to get out of jail and that's why he -- why he went forward with the plea. But he's saying he didn't do it.
>
> He also said that when he got out of jail on the 28th of September, that he actually had told his attorney then, and the attorney took until October 11th. So it's a little bit earlier than what is asserted in here. So he has no problem with his prior counsel. That's really not the issue. It's more a personal decision that he made to get out of jail.

(73:4); (App. 106).

The court examined the plea colloquy and stated that the colloquy was sufficient. (73:5-6); (App. 107-108). It denied the defense motion. (73:6); (App. 108).

SUMMARY OF ARGUMENT

Here, the circuit court failed to apply the controlling legal standard to Mr. Hall's plea withdrawal claim. In independently reviewing his motions and his statements to the court, it is clear that Mr. Hall has articulated a sufficient explanation

for his desire to withdraw the plea. Accordingly, he should be entitled to that remedy on remand.

ARGUMENT

I. The circuit court erroneously exercised its discretion in denying Mr. Hall's presentence motion to withdraw his plea.

A. Legal principles and standard of review.

"The appropriate and applicable law in the case before the court, is that a defendant *should* be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be substantially prejudiced." *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991) (emphasis in original). This standard "contemplates the mere showing of some adequate reason for the defendant's change of heart." *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973). Thus, "the circuit court is to look only for a fair and just reason and freely allow the withdrawal" when requested by the defendant. *State v. Kivioja*, 225 Wis. 2d 271, 287, 592 N.W.2d 220 (1999). The defendant bears the burden of proving that a fair and just reason exists by a preponderance of the evidence. *State v. Jenkins*, 2007 WI 96, ¶ 32, 303 Wis. 2d 157, 736 N.W.2d 24.

Review of the denial of a pretrial motion to withdraw a plea involves a mixed standard of review. "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." *Id.*, ¶ 30. In order for the circuit court's determination to pass muster on appeal, the record must demonstrate 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." *Loy v. Bunderson*, 107 Wis. 2d 400, 414-415, 320 N.W.2d 175 (1982). "Where the circuit court provides an inadequate account to show an application of the facts to the proper legal standard, [this Court must] 'independently review the record to determine whether the trial court's decision can be sustained when the facts are applied to the applicable law.'" *Jenkins*, 2007 WI 96, ¶ 35 (quoting *Libke*, 60 Wis. 2d at 129)).

However, the Wisconsin Supreme Court has also asserted that "When there are no issues of fact or credibility in play, the question whether the defendant has offered a fair and just reason becomes a question of law that we review de novo." *Id.*, ¶ 34.

B. The circuit court erroneously exercised its discretion in denying the motion as Mr. Hall has presented a "fair and just reason" for plea withdrawal.

Here, the record is clear that the circuit court applied the incorrect legal standard in assessing Mr. Hall's motion(s). It also did not take testimony from Mr. Hall or his attorney in order to evaluate the credibility of his claims, which appears to be a legal

prerequisite for relief. *Jenkins*, 2007 WI 96, ¶ 43. Instead, the circuit court merely reviewed the transcript of the plea colloquy and determined that:

- Mr. Hall had been advised of the maximum penalties. (73:5); (App. 107).
- Mr. Hall had been advised that the circuit court "didn't have to follow the plea negotiation." (73:5); (App. 107).
- Mr. Hall had been asked about his education. (73:6); (App. 108).
- Mr. Hall stated, during the plea colloquy, that he understood "what's happening." (73:6); (App. 108).
- Mr. Hall was asked whether he was under the influence of medication or drugs. (73:6); (App. 108).
- Mr. Hall had been informed of his rights. (73:6); (App. 108).
- Mr. Hall expressed no dissatisfaction with appointed counsel during the colloquy. (73:6); (App. 108).

However, the circuit court's inquiries failed to properly focus on the legal issues presented in Mr. Hall's motions and statements–i.e., whether a "fair and just" reason supported his request for plea withdrawal.

As Mr. Hall told the court, his lawyer had failed to obtain materials related to the family court case—the court proceedings from which this criminal case arose—prior to his plea. (68:4). He also stated that his lawyer had pressured him to take a plea, despite his expressed desire to have a jury trial. (68:5). In the first motion, Mr. Hall repeated his allegation of being pressured, coupling that allegation with an assertion that he was learning disabled and that he may have misunderstood the criminal court process. (12:1). The motion contained an explicit assertion of innocence along with an acknowledgement that there was a "valid and viable defense" available to Mr. Hall. (12:1). In his second motion, Mr. Hall continued to assert that his lawyer pressured him to plead guilty, stating that he did not wish to sign the plea form. (15:3). At the hearing, his lawyer told the court that Mr. Hall had an intense desire to be let out of jail and that this desire fueled his decision to take the plea. (73:5); (App. 106).

At no point, however, did the circuit court address these concerns. In fact, the circuit court explicitly abdicated its role in refusing to determine whether these facts and circumstances satisfied the "fair and just reason" standard it was obligated to apply. Instead, it denied the motion without ever citing that legal standard and without giving Mr. Hall the opportunity to further develop his claims through testimony.

In light of this record, the circuit court clearly failed to appropriately exercise its discretion as it

applied the wrong legal standard. *See State v. Jackson*, 2014 WI 4, ¶43, 352 Wis. 2d 249, 841 N.W.2d 791. ("A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.")

That is, in focusing on the plea colloquy, the circuit court appears to have conflated the standard for a post-sentencing plea withdrawal motion based upon an insufficient plea colloquy as articulated in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) with the more liberal standard of a "fair and just reason" applicable to a pre-sentence plea withdrawal motion. While a prima facie showing of a plea colloquy defect would be necessary to obtain post-sentencing relief under *Bangert*, no such showing is necessary under the more liberal pre-sentencing standard. *See Jenkins*, 2007 WI 96, ¶ 62. (Plea colloquy defect is a sufficient, but not necessary, condition for pre-sentencing plea withdrawal).

Here, Mr. Hall's pleadings—accompanied by his statements in open court—demonstrate the existence of a "fair and just reason" for plea withdrawal. Mr. Hall's motion went beyond "the desire to have a trial […] or belated misgivings about the plea," *Jenkins*, 2007 WI 96, ¶ 32, and therefore satisfied the legal standard by alleging "some adequate reason" for his decision to withdraw the plea. *Libke*, 60 Wis. 2d at 128.

Here, Mr. Hall informed the circuit court that he had concerns about the sufficiency of his attorney's investigation. (68:4). His lawyer did not contest the allegation that he did not acquire the materials which Mr. Hall believed to be relevant. (68:4). That allegation is suggestive, especially when it is placed in context of Mr. Hall's repeated allegation that his lawyer pressured him to take the plea. (12:1; 15:3; 68:5). Although the circuit court agreed that these allegations required trial counsel's withdrawal, no further testimony was developed which would rebut Mr. Hall's claim. Moreover, Mr. Hall also stated that he was additionally pressured as a result of his ongoing incarceration while this case pended. (73:5); (App. 106). In addition, Mr. Hall is learning disabled and appeared to have had some confusion about the court process. (12:1). Mr. Hall's pleadings show that, despite his plea, he was adamant in his innocence and that he had an actual defense to present at trial. (12).

Putting all of this together, it is clear that Mr. Hall proffered "some adequate reason" which would explain his change of heart. Mr. Hall's lawyer did not conduct necessary tasks that would enable Mr. Hall to feel comfortable about the plea and, instead, pressured him to take a plea that he did not want. Mr. Hall appears to have been particularly susceptible to this pressure as a result of his learning disability, his misunderstandings about the criminal justice system, and the psychological pressures created by pretrial incarceration.

Accordingly, Mr. Hall satisfactorily proved the existence of a "fair and just reason" for plea withdrawal. This Court should therefore reverse the circuit court's order denying the motion and remand for further proceedings.

CONCLUSION

Mr. Hall therefore respectfully requests that this Court reverse the ruling of the circuit court and to remand so that he may withdraw his guilty plea.

Dated this 31st day of January, 2019.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,293 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of January, 2019.

Signed:

_____

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 31st day of January, 2019.

Signed:

Christopher P. August
Assistant State Public Defender

APPENDIX

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