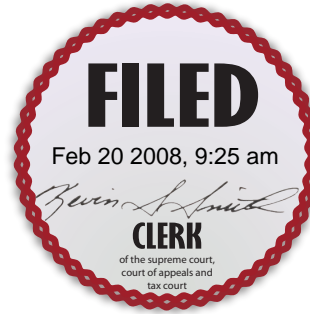


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

JAMES D. CRUM
BRANDI A. GIBSON
Coots, Henke & Wheeler, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT GUNNELL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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) No. 29A05-0707-CR-377
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)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pflieger, Judge
Cause No. 29D02-0707-MR-154

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robert Gunnell pled guilty to felony murder,¹ but before entry of conviction and sentencing asserted his innocence and filed a motion to withdraw his guilty plea. The court denied his motion, entered the conviction, and sentenced him. He raises two issues, which we consolidate and restate as: whether the trial court abused its discretion by denying his pre-conviction motion to withdraw his guilty plea under Ind. Code § 35-35-1-4(b). Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

While working undercover, Detective Scott Jackson purchased drugs from Gunnell on June 23 and 28, 2005. Jackson set up another deal with Gunnell on June 29. While delivering the drugs, Gunnell disregarded a stop sign and struck a car driven by Alyssa McCann, who sustained fatal injuries.

Gunnell was charged with felony murder and attempted dealing in a narcotic drug.² On March 5, 2007, Gunnell agreed to plead guilty to felony murder. The trial court conducted a hearing the same day and verified Gunnell understood the charges against him, his rights, and the terms of the plea agreement. The State provided the following factual basis for felony murder:

Your Honor, if Count 1 were to proceed to trial, the State . . . would be able to [prove] that here in Hamilton County on June 29, 2005, the defendant Robert L. Gunnell did kill another human being, to-wit: Alyssa McCann while attempting to commit Dealing in Cocaine, to-wit: while operating a gold Ford automobile and attempting to deliver cocaine, Robert Lee

¹ Ind. Code § 35-42-1-1(3)(A).

² I.C. § 35-48-4-1 (dealing in a narcotic drug); § 35-41-5-1 (attempt).

Gunnell disregarded a stop sign . . . and crashed into the automobile operated by Alyssa McCann thereby inflicting mortal injuries upon Alyssa McCann including severe blunt force trauma to the head causing Alyssa McCann to die . . ., all of which the State could prove beyond a reasonable doubt through the testimony of the aforementioned witnesses if such were to proceed to trial.

(Tr. at 18-21.)

The trial court questioned Gunnell concerning the factual basis:

Q Mr. Gunnell, did you hear what [the prosecutor] read into the record?

A Yes, Sir.

Q Did you understand what he read into the record?

A Yes, Sir.

Q Is what he read into the record what happened?

A Yes, Sir.

Q And may the court rely on what he read into the record in finding a factual basis?

A Yes, Sir.

Q [Are] there any comments or anything that you need to say about the factual basis that he read into the record?

A No, Sir.

(*Id.* at 21.)

The trial court took the plea agreement under advisement and ordered a pre-sentence investigation report. When Gunnell was interviewed for the report, he said he wanted to withdraw his guilty plea. The interviewer stated in the report: “According to the defendant, he does not feel he is guilty of Murder because he claims he had ‘abandoned’ the cocaine deal. He also commented that the victim ran into him.”

(Appellant’s App. at 96.)³ Gunnell then moved to withdraw his guilty plea on the ground

³ A copy of the pre-sentence investigation report is included in the appendix on white paper. We remind counsel that the report is a confidential document that must be filed on light green paper. *See* Ind.

he was innocent. The trial court denied the motion, accepted the plea agreement, and accordingly entered a conviction of and sentence for felony murder.

DISCUSSION AND DECISION

Gunnell argues the trial court erred when it denied his motion to withdraw his plea prior to entry of conviction because Gunnell had asserted his innocence. Ind. Code § 35-35-1-4(b) provides:

After entry of a plea of guilty, . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

“One who appeals an adverse decision on a motion to withdraw must therefore prove the trial court abused its discretion by a preponderance of the evidence.” *Turner v. State*, 843 N.E.2d 937, 940 (Ind. Ct. App. 2006) (citations omitted).

Gunnell argues withdrawal of his guilty plea was necessary to correct a manifest injustice because he protested his innocence. A trial court may not accept a guilty plea from a defendant “who in the same breath protests his innocence.” *Ross v. State*, 456 N.E.2d 420, 422 (Ind. 1983) (quoting *Harshman v. State*, 115 N.E.2d 501, 502 (Ind. 1953)). The purpose of the *Harshman-Ross* rule is to increase the reliability of guilty pleas and to promote respect for the court system. *Carter v. State*, 739 N.E.2d 126, 129

Appellate Rule 9(J). We also remind counsel the appendix is to include a chronological case summary. App. R. 50(B)(1)(a).

(Ind. 2000). However, an admission of guilt that is later retracted may nonetheless be reliable:

The *Harshman-Ross* rule is explicitly contingent, however, upon the protestation of innocence occurring at the same time the defendant attempts to enter the plea.

* * * * *

There is a substantive difference between a defendant who maintains innocence but asks the court to impose punishment without trial, and one who concedes guilt in one proceeding but contradicts that admission by claiming innocence in a later proceeding. In the former case, the defendant has consistently denied culpability, and therefore never made the reliable admission of guilt that Indiana requires. In the latter case, a defendant under oath has told the court two opposing stories, both of which cannot be true.

Id. at 129-30.

The trial court did not violate *Harshman* and *Ross* when it accepted Gunnell's plea, and withdrawal of his plea was not necessary to correct a manifest injustice. Because Gunnell did not protest his innocence until after he submitted his guilty plea, the trial court had discretion to accept his guilty plea if the court found it reliable. Gunnell was advised of his rights and the implications of his plea. He indicated his plea was voluntary. He affirmed he understood the factual basis provided by the State, it was correct, and he had nothing to add. The trial court was able to observe Gunnell and was in the best position to determine whether his plea was reliable. Gunnell has not demonstrated his plea was not reliable, and the trial court did not abuse its discretion by declining to set aside the plea. *See Johnson v. State*, 734 N.E.2d 242 (Ind. 2000) (finding

no abuse of discretion in denial of motion to withdraw guilty plea to murder where Johnson did not protest his innocence until sentencing hearing).⁴

Affirmed.

RILEY, J., and KIRSCH, J., concur.

⁴ Gunnell's reliance on *Patton v. State*, 517 N.E.2d 374 (Ind. 1987) is misplaced. Patton pled guilty to murder, and the State sought the death penalty. At sentencing, Patton denied that he knowingly shot the victim. Our Supreme Court set aside the plea, recognizing extra caution should be exercised in accepting a guilty plea in a capital case. However, our Supreme Court has declined to extend *Patton* to non-capital cases. *Johnson*, 734 N.E.2d at 246 n.3.