

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 12, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP1391-CR**

**Cir. Ct. No. 2005CF986**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEON TART,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Leon Tart appeals a judgment, entered upon a jury's verdicts, convicting him of three offenses: false imprisonment, first-degree sexual assault with use of a dangerous weapon, and first-degree recklessly endangering safety. Tart also appeals an order denying his motion for

postconviction relief. He argues the trial court erred by denying his requests to allow him to enter a plea of not guilty by reason of mental disease or defect, and to adjourn the trial. We reject these arguments and affirm the judgment and order.

### BACKGROUND

¶2 An Amended Information charged Tart with false imprisonment, first-degree sexual assault with use of a dangerous weapon and attempted first-degree intentional homicide. Following his arrest, Tart was represented by four different trial attorneys. The first attorney withdrew due to a conflict of interest. Tart requested replacement of the second attorney, resulting in adjournment of the scheduled trial. The third appointed attorney's subsequent motion to withdraw was granted a few days before the rescheduled trial. That trial was therefore continued. Approximately one day before trial, Tart's fourth appointed defense attorney learned Tart had "an extensive mental health history" and consequently telephoned the trial court to inform it of his discovery and the possibility that Tart may desire to enter an NGI plea.<sup>1</sup>

¶3 On the morning of trial, Tart moved to enter an NGI plea and adjourn the trial to allow an examination of his mental status. The motions were denied and the trial proceeded. Tart was convicted upon a jury's verdicts finding him guilty of false imprisonment, first-degree sexual assault with use of a dangerous weapon and the lesser-included offense of first-degree recklessly

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<sup>1</sup> The insanity defense provides that a person is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." WIS. STAT. § 971.15. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

endangering safety. The court imposed consecutive sentences totaling fifty and one-half years' initial confinement and twenty-eight years' extended supervision.

¶4 Tart filed a postconviction motion seeking to “vacate” the judgment on grounds of ineffective assistance of trial counsel. After a *Machner*<sup>2</sup> hearing, Tart’s motion for postconviction relief was denied. This appeal follows.

### DISCUSSION

¶5 On appeal, Tart has abandoned his claim of ineffective assistance of counsel but nevertheless argues the trial court erred by refusing his requests to enter an NGI plea and to adjourn the trial for a mental evaluation. The decision to grant or deny a defendant’s request to change his or her plea to not guilty by reason of mental disease or defect is within the trial court’s discretion. *State v. Oswald*, 2000 WI App 3, ¶49, 232 Wis. 2d 103, 606 N.W.2d 238. The decision to grant or deny a continuance is likewise committed to the trial court’s discretion. A trial court’s discretionary determination will be upheld on appeal if it is “consistent with the facts of record and established legal principles.” *Lievrouw v. Roth*, 157 Wis. 2d 332, 358-59, 459 N.W.2d 850 (Ct. App. 1990).

¶6 Tart argues the trial court’s denial of his motions to enter an NGI plea and adjourn the trial violated his Fourteenth Amendment due process right “to be heard in defense.” Specifically, Tart claims that because there is an “intent” element in the criminal violations for which he was found guilty, he should have been allowed to enter an NGI plea and adjourn the trial in order to negate that intent. We are not persuaded. There is no federal or state constitutional right to

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<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

enter an NGI plea—it is purely a statutory right. *State v. Francis*, 2005 WI App 161, ¶¶19-21, 285 Wis. 2d 451, 701 N.W.2d 632; WIS. STAT. § 971.06. Because there is no constitutional right to enter an NGI, it follows that there is no constitutional violation where a trial court denies a request to enter an NGI plea.

¶7 When, as here, a defendant makes an eleventh-hour request to change a plea, the defendant has the burden of showing why the plea change is appropriate. *Oswald*, 232 Wis. 2d 103, ¶49. In other words, the defendant must make an offer of proof as to why he or she should be allowed to enter such a plea. Additionally, the defendant must show why the plea was not entered earlier. *Id.* “Ultimately, when dealing with a request to change a plea at a late stage of the proceedings, the trial court must balance the interests of the defendant with the institutional need to resolve cases in a timely fashion.” *Id.* Although no statutory provision sets a date by which a plea of not guilty by reason of mental disease or defect must be made, “the plea must be entered sufficiently in advance of the trial so as to permit not only suitable notice to the prosecutor but also adequate time for implementation of the procedures mandated by WIS. STAT. § 971.16,” which governs examination of the defendant. *State v. Kazee*, 192 Wis. 2d 213, 222, 531 N.W.2d 332 (Ct. App. 1995) (trial court properly denied motion to enter NGI plea made four days before trial where defendant gave no adequate reason for failing to change plea earlier).

¶8 In the present case, the motions to enter an NGI plea and adjourn the trial were made on the morning of Tart’s scheduled trial. The trial had already been postponed at least twice and Tart had contributed to one of those delays by seeking substitution of counsel. By the time of the scheduled trial, the case had been pending for more than a year and there was a jury pool waiting. Moreover, Tart contributed to the delay in requesting to enter an NGI plea by failing to

mention any prior mental problems until the day before trial. Defense counsel explained that the issue of Tart's mental health had not surfaced in Tart's interactions with his previous three defense attorneys. Trial counsel learned of Tart's mental health history only after asking Tart "about how he responded to questioning." Counsel stated that when prodded, Tart told him about an episode in Minnesota where Tart had been found incompetent to stand trial.

¶19 In denying Tart's motions, the court noted the motions were being presented at the "eleventh hour and 59<sup>th</sup> minute prior to the commencement of the trial." Although the court acknowledged there are provisions for a late plea change to occur, it concluded the information presented did not adequately support that request. Defense counsel offered no evidence to corroborate Tart's claim about the Minnesota case. Further, there was no evidence or testimony offered with respect to a particular diagnosis or medications that would support an NGI plea. In the absence of a sufficient offer of proof or information to support Tart's requests, the trial court made a reasonable discretionary decision to deny Tart's motions and proceed with the trial.

*By the Court.*—Judgment and order affirmed.

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

