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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Petitioner, v. HON. RICHARD S. FIELDS and HON. JANE BUTLER, Judges of the Superior Court of the State of Arizona, in and for the County of Pima, Respondents, and MARTIN GUADALUPE MEDINA, Real Party in Interest.	2 CA-SA 2012-0039 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20112589001

JURISDICTION ACCEPTED; RELIEF GRANTED

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K E L L Y, Judge.

¶1 In this special action, petitioner State of Arizona challenges the May 15, 2012 order entered in the underlying criminal proceeding by respondent judge Richard S. Fields, vacating the guilty plea that real party in interest Martin Medina had entered and respondent had accepted on November 9, 2011, and transferring the case to the juvenile court for prosecution. Special action review of an order vacating a guilty plea is appropriate because there is no adequate remedy by appeal for such a ruling. *Coy v. Fields*, 200 Ariz. 442, ¶ 1, 27 P.3d 799, 800 (App. 2001); *see also* A.R.S. § 13-4032 (setting forth rulings in criminal proceedings from which state has right to appeal); Ariz. R. P. Spec. Actions 1(a) (providing special action jurisdiction appropriately accepted when remedy by appeal not equally plain, speedy or adequate).

¶2 Initially detained in juvenile court on July 12, 2011, then sixteen-year-old Medina was charged by an August 4, 2011 indictment with one count of continuous sexual abuse of a child under the age of fourteen by engaging in three or more acts of sexual conduct with a minor and child molestation, a class two, dangerous crime against children. At the November 9 change-of-plea hearing, respondent accepted a plea agreement pursuant to which Medina pled guilty to two amended counts of sexual conduct with a minor, class three felonies and preparatory, dangerous crimes against children. Sentencing initially was set for January 13, 2012, but it was continued several times while psychosexual evaluations were conducted. During this time, the possibility

of obtaining residential treatment for Medina pursuant to A.R.S. § 13-921 apparently was explored.

¶3 At the beginning of the scheduled sentencing hearing on May 15, 2012, the respondent stated he was considering whether to transfer the case to juvenile court pursuant to A.R.S. § 13-504. After arguments by both parties relating to the factors set forth in the statute, the respondent found clear and convincing evidence warranted the transfer of Medina to juvenile court for prosecution. The respondent stated he would "maintain, essentially, concurrent jurisdiction" with the juvenile court, resuming jurisdiction of Medina in the adult division in December—when Medina turned eighteen—and remaining intentionally vague about vacating the plea. But later that day, respondent reconvened the hearing and announced he had been informed by the juvenile court that in order to transfer the case, he had to vacate the plea, which he did over the state's various objections. Respondent found transfer was "necessary to prevent a manifest injustice" and remanded the case to the juvenile court "for prosecution relative to a count of sexual conduct with a minor in the second degree."[1] The respondent denied

[1]On May 16 we granted the state's request to stay respondent's May 15 transfer order and, consequently, stayed all further proceedings in juvenile court as well, pending the outcome of this special action. Medina apparently requested and respondent held a status conference the next day, on May 17, and at that conference, one of Medina's two attorneys pointed out to respondent that he had referred the case back to the juvenile court on one of the charges to which Medina had pled guilty. Counsel asked respondent to "send it back on the single charge" that had been alleged in the indictment. Respondent expressed concern that he lacked authority to enter any ruling in light of this court's May 16 stay order, but stated if he had the authority he would amend the transfer order so that the charge would be the same as alleged in the indictment. *See* Ariz. R. Crim. P. 17.5 ("Upon withdrawal, the charges against the defendant as they existed before any amendment, reduction or dismissal made as part of a plea agreement, shall be

the state's request to stay his order. A hearing before the juvenile court was set for the following day, but the state sought an order from this court staying the respondent's order and proceedings in the juvenile court, which we granted following a telephonic conference with counsel for both parties.

¶4 Rule 17.4(b), Ariz. R. Crim. P., permits a party to revoke a plea agreement any time before it is accepted. But once the court accepts a plea, Rule 17.5, Ariz. R. Crim. P., provides that "[t]he court, in its discretion, may allow withdrawal of a plea of guilty . . . when necessary to correct a manifest injustice." We review an order setting aside a plea for an abuse of discretion. *State v. Cramer*, 192 Ariz. 150, ¶ 8, 962 P.2d 224, 226 (App. 1988). The state contends, inter alia, the respondent abused his discretion when he found that setting aside the plea was necessary to prevent a manifest injustice. We agree.

¶5 At the outset, our supreme court stated in *State v. Djerf*, 191 Ariz. 583, n.7, 959 P.2d 1274, 1285 (1998), that even assuming manifest injustice has been established, "a trial court cannot, sua sponte, vacate the acceptance of a guilty plea." *See also State v. De Nistor*, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985). But even if we regard Medina's support of the transfer and failure to object when the respondent set aside the plea to effectuate the transfer as tantamount to a request to withdraw the plea, the respondent nevertheless abused his discretion.

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reinstated automatically."); *see also* Ariz. R. Crim. P. 40(k) (providing if prosecution is transferred to juvenile court, "the indictment or information shall serve as the juvenile petition for those charges subject to transfer by order of the court").

¶6 The comment to Rule 17.5 states that "[t]he term manifest injustice is intended to include denial of effective assistance of counsel, failure to follow the procedures prescribed by Rule 17, an incorrect factual determination made under Rule 17.3," and pleas based on or induced by mistake, misapprehension, duress or fraud. Ariz. R. Crim. P. 17.5 cmt. Case law similarly has defined manifest injustice to include circumstances in which a defendant lacked or was mistaken about crucial information going to the heart of the defendant's agreement to enter the plea and thus affected the defendant's ability to knowingly and intelligently evaluate the plea offer, the benefits of accepting it, and the sentencing possibilities. *See, e.g.*, *State v. Chavez*, 130 Ariz. 438, 439, 636 P.2d 1220, 1221 (1981) (stating grounds may exist to permit plea withdrawal when "parties to a plea bargain were mistaken as to the existence of a material factor which caused them to enter the agreement" and permitting withdrawal because defendant mistakenly believed sentence could be served in another state); *State v. Corvelo*, 91 Ariz. 52, 54-56, 369 P.2d 903, 904-06 (1962) (permitting withdrawal of plea given defendant's mistaken belief, based on class of felony, his immigration status would not be affected); *State v. Dockery*, 169 Ariz. 527, 527, 529, 821 P.2d 188, 188, 190 (App. 1991) (permitting defendant who learned he was infected with HIV[2] and had life expectancy between five and eight years to withdraw plea resulting in 7.5-year prison term, finding information affected "risk-benefit analysis" of plea and sentence); *State v. Stevens*, 154 Ariz. 510, 515, 744 P.2d 37, 42 (App. 1987) (permitting withdrawal of plea where parties

[2]Human immunodeficiency virus.

and court mistakenly believed defendant on parole at time of offense, permitting enhanced sentence). Manifest injustice does not exist simply because a defendant has "changed his mind," *State v. Ellison*, 111 Ariz. 167, 168, 526 P.2d 706, 707 (1974), or is disappointed with the sentence imposed, *State v. Gibbs*, 6 Ariz. App. 600, 602, 435 P.2d 729, 731 (1968).

¶7 Clearly motivated to ensure that Medina received appropriate treatment, the respondent stated it was necessary to set aside the plea to prevent manifest injustice because Medina should not have been charged as an adult in the first instance, he had been "sitting in Pima County Jail . . . for months" without receiving treatment, and obtaining treatment for him was "impossible without setting aside the plea." Although the record is unclear as to the reason, it appears that Medina was eligible for a particular treatment program if he were to be adjudicated delinquent, but not if he were to have a felony conviction. Even so, the mere fact that a certain treatment program was unavailable to Medina unless he was transferred back to the juvenile court does not constitute manifest injustice for purposes of Rule 17.5. Additionally, given the nature of the offense, the state properly charged Medina as an adult. *See* A.R.S. § 13-501(B)(2). It is axiomatic that the time for transferring a juvenile for prosecution in the juvenile court pursuant to § 13-504 is before the juvenile enters and the superior court accepts a plea agreement to the adult charge. Moreover, a motion to transfer a case for prosecution in the juvenile court must be filed within forty-five days of the arraignment, and the transfer hearing must be held within forty-five days of the filing of the motion or the court order setting the transfer hearing. Ariz. R. Crim. P. 40(d).

¶8 Despite certain factual distinctions, this court's decision in *State v. Denning*, 155 Ariz. 459, 747 P.2d 620 (App. 1987), provides guidance here. There, the defendant moved to withdraw his guilty plea, claiming he had entered the plea because law enforcement officers allegedly had promised "he would be sent to a mental institution for six to seven years instead of prison." *Denning*, 155 Ariz. at 463, 747 P.2d at 624. The defendant argued he had "pled guilty because he thought time in a mental institution would cure his gambling habit." *Id*. Affirming the trial court's denial of the motion, this court concluded the testimony presented at the evidentiary hearing on the motion did not establish any such promises had been made. *Id.* at 463-64, 465, 747 P.2d at 624-25, 626. The court added, "[a]part from the evidentiary hearing itself, the extended record contradicts the defendant's claim" because he did not discuss this purported agreement with anyone, never mentioning it to the probation officer who had prepared the presentence report, physicians who had evaluated him in connection with competency evaluations, or his attorney, until one week before sentencing. *Id*. at 464, 747 P.2d at 625. The court observed, "the plea agreement makes it clear that the defendant understood that he would receive 30 years in prison. It made no provision for mental institutionalization." *Id*. Finally, at the change-of-plea hearing the defendant had assured the court he had read the entire plea agreement, it had been explained to him, and no promises had been made to induce him to enter the plea. *Id*. at 464-65, 747 P.2d at 625-26.

¶9 Unlike the defendant in *Denning*, Medina does not assert he was promised treatment as part of his plea, much less a particular treatment program. Rather,

conceding "this case does not involve the regret of the defendant" for having entered the plea, he insists his need for a specific kind of treatment was a proper basis for vacating the plea. Medina asserts the respondent correctly set aside the plea based on discussions both on- and off-the-record with counsel for the parties, information in the presentence report, psychosexual evaluations, a letter confirming Medina qualified for a specific juvenile sex offender program, and Medina's "clear willingness and desire to become healthy." The authorities Medina relies on do not establish a trial judge can vacate a plea on the ground a particular treatment plan would be more beneficial to the defendant. And here, as in *Denning*, the record before us, which includes the minute entry from the change-of-plea hearing and the plea agreement, does not suggest treatment was part of the agreement. Consequently, nothing in the record establishes that Medina's plea was not knowing, voluntary and intelligent.

¶10 Medina suggests the respondent was justified in setting aside the plea because trial counsel had "a Sixth Amendment obligation to request a transfer hearing" pursuant to § 13-504(B) as soon as Medina was indicted and respondent "was required to set a transfer hearing" based on the statute and provisions of the state and federal constitutions. He also asserts "the experienced sex crimes prosecutor . . . had an obligation to request a hearing to ensure that justice was done." Medina has provided no persuasive authority for the proposition that the lack of a hearing under § 13-504 invalidated the plea, and we summarily reject these assertions. Moreover, even assuming arguendo a hearing was required by the mandatory language of § 13-504(A) and (B), such a nonjurisdictional defect was waived by Medina's entry of the plea. *See State v.*

Quick, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (by entering guilty plea, defendant waives all nonjurisdictional defects, including claims of ineffective assistance of counsel except those relating to validity of plea).

¶11 We conclude the respondent erred by setting aside Medina's guilty plea and transferring the case to the juvenile court for further prosecution. Consequently, we grant special action relief, *see* Ariz. R. P. Spec. Actions 3(c), and vacate the order, as well as this court's stay order, and remand this matter to the respondent for sentencing. In light of our decision, we need not address the state's remaining arguments that transfer was not warranted under § 13-504 and that respondent violated the rights of the victims by vacating the plea in their absence without prior notification.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge