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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1730**

State of Minnesota,
Respondent,

vs.

Jerome Deshawn Misters,
Appellant.

**Filed August 8, 2011
Reversed and remanded
Shumaker, Judge**

Washington County District Court
File Nos. 82-CR-09-3679, 82-CR-09-3350

Lori Swanson, Attorney General, St. Paul, Minnesota; and,

Peter Orput, Washington County Attorney, Michael C. Hutchinson, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Johnson, Chief Judge; and Worke, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal from convictions of predatory-offender-registration violation and aiding and abetting first-degree aggravated robbery, appellant argues, among other things, that

the district court abused its discretion when it denied his motion to withdraw his pleas entered under a plea agreement, which the court rejected because appellant failed to comply with presentencing release requirements. Because the district court abused its discretion when it denied appellant's presentence motion to withdraw his guilty pleas, we reverse and remand.

FACTS

The dispositive question on appeal is whether the district court abused its discretion when it denied appellant's motion to withdraw his pleas of guilty and sentenced him to terms contrary to the plea agreement because appellant had failed to satisfy presentencing release conditions that were included in the agreement.

Appellant Jerome Deshawn Misters pleaded guilty on October 30, 2009, to one count of failing to register as a predatory sex offender, and, as an *Alford* plea, to one count of aiding and abetting first-degree aggravated robbery. In return for Misters' pleas, the state agreed to dismiss a second count of violation of the sex-offender registration requirement and to recommend concurrent executed sentences of 36 and 84 months. These sentences were downward-durational departures from the presumptive sentences of 39 and 108 months. Misters signed plea petitions as to both charges, and the district court accepted the petitions.

Before Misters entered his *Alford* plea, the prosecutor stated in court: "Mr. Mister[s], one other thing you and I have discussed is, just so the Court knows, our settlement agreement was what we just talked about, your compliance with the presentence investigation, and coming back for sentencing?" Misters agreed, and the

prosecutor continued: “So, that means for whatever reason you blow off the PSI, or choose not to come back for sentencing, for whatever reason, neither the Court nor the prosecutor will be bound by these agreements.” Misters responded, “Yes, I understand.”

After Misters entered both pleas, the district court addressed him about his release pending sentencing, repeating the conditions set forth by the prosecutor that Misters remain law abiding, cooperate with the presentence investigation, return for sentencing, and, as stated in one of the plea petitions, that Misters comply with predatory offender registration. The district court then stated that if Misters failed to abide by any of the conditions, the court “would not be limited on, or bound by the agreement made today, and ... could sentence [Misters] to a more heavier sentence on either or both [charges].” Misters stated that he understood the release conditions. The court scheduled the sentencing for February 17, 2010.

On February 3, 2010, Misters was arrested and jailed in South Dakota on charges of possession of a forged instrument, forgery, and failure to register as a sex offender. Additionally, before the scheduled sentencing, the Minnesota probation agent assigned to the case informed the district court that Misters had failed to cooperate with the presentence investigation by missing meetings with the agent and not responding to her telephone message, and by missing three urinalysis tests. The agent also told the court that the United States Treasury Department was investigating Misters.

Because of his South Dakota incarceration, Misters did not appear for his February 17 sentencing, which then was rescheduled. When Misters appeared for the rescheduled sentencing, he moved to withdraw his pleas. The district court denied the motion, and, in

rejection of the plea agreement, imposed concurrent executed terms of 39 months, instead of 36 months, and 108 months, instead of 84 months. Contending that he was entitled to withdraw his pleas when the district court sentenced him contrary to the plea agreement, Mistery appealed.

D E C I S I O N

The district court has broad discretion as to whether to allow a criminal defendant to withdraw a plea of guilty. *State v. Ferraro*, 403 N.W.2d 845, 847 (Minn. App. 1987). The defendant does not enjoy an absolute right to do so. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). We review the district court's denial of a motion to withdraw a plea of guilty for an abuse of discretion, and we will reverse only when we are able to conclude that the court has abused its discretion. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

The rules of criminal procedure contemplate the withdrawal of a plea of guilty prior to sentencing when "it is fair and just" to allow a withdrawal, considering the reason for the defendant's request and any possible prejudice to the state. Minn. R. Crim. P. 15.05, subd. 2. The rules also provide that "[i]f the court rejects [a] plea agreement, it must advise the parties in open court and then call upon the defendant to either affirm or withdraw the plea." Minn. R. Crim. P. 15.04, subd. 3(1).

The state argues that Mistery was well aware of the presentencing conditions he had to satisfy in order to retain the advantage of the favorable plea agreement. It is true that both the prosecutor and the district court expressly warned Mistery that the plea agreement and the sentences contained in it were conditioned on his cooperating with the

presentence investigation, remaining law abiding, and returning for the scheduled sentencing. Misters acknowledged those warnings and expressly agreed to abide by the release conditions. He failed to abide by any of the conditions, and he does not contend otherwise. Furthermore, he does not argue that he is still entitled to the particulars of the plea agreement. Left unanswered in the case is whether, having forfeited his entitlement to the plea agreement, Misters is now subject to the imposition of the presumptive sentences without an opportunity to withdraw his pleas. The answer is found in *State v. Kunshier*, 410 N.W.2d 377 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987), which we deem to be controlling authority here.

In *Kunshier*, the prosecutor “promised” a concurrent 54-month sentence on five charges, but stated that, if the court did not approve, or if the defendant did not withdraw his plea, he would stand trial on all charges and “all terms of sentencing would be wide open.” *Id.* at 379. The district court apparently remained silent as to sentencing when the plea was entered and released the defendant into the custody of the state hospital for sex-offender evaluation. *Id.* at 378-79. The defendant escaped from custody and allegedly committed new offenses while free. *Id.* at 378. Ultimately, the court imposed consecutive, rather than concurrent, sentences, and denied the defendant’s motion to withdraw his pleas. *Id.* at 379.

On appeal, we reversed, noting that the defendant’s plea was “not unqualified” but was “based on a promise, which the trial court had no discretion to reject without tendering to [the defendant] his right to withdraw that plea and stand trial.” *Id.* at 379-80.

Kunshier fashioned this rule: Once a criminal defendant offers a qualified plea of guilty, he does not forfeit his right to withdraw that plea if, because of later events, the prosecutor or the district court properly reject the agreement upon which the plea is based. *Id.* at 380. Although we did not define the term “qualified plea” in *Kunshier*, its meaning is apparent from its application. If there are conditions of any sort that the criminal defendant must satisfy to become entitled to the benefit of the plea bargain, his plea is a “qualified” plea, or, as it is sometimes called, a “conditional” plea. This is in contrast to the so-called “straight plea” in which neither the prosecutor nor the court makes any promises or assurances of any sort. Although the defendant under a straight plea might hope for a favorable sentence, if his hope remains unrequited he may not withdraw his plea. Misters’ plea was a “qualified” one, and the *Kunshier* rule applies.

The record is clear that Misters’ guilty pleas were based on the state’s promise to recommend concurrent executed sentences of 36 and 84 months. The state did not keep its promise, and, therefore, the district court had no discretion to refuse Misters the right to withdraw his plea and stand trial on the original charges. When the state promises to recommend a particular sentence and does not keep that promise, a defendant should be allowed to withdraw his plea. *Id.* at 379; *see also State v. Kortkamp*, 560 N.W.2d 93, 95 (Minn. App. 1997). Furthermore, at the sentencing, the district court acknowledged that conditions were attached to the plea agreement and that, because Misters failed to adhere to them, “the agreement is not in place.” Without an agreement in place, Misters must be allowed to withdraw his guilty pleas and stand trial. Had the plea agreement included the provision that the court could impose the presumptive sentences if Misters failed to abide

by the presentence conditions, the court's sentences would have been proper. But without such a provision, the court unilaterally converted a qualified plea into a straight plea, a type of plea that Misters never entered.

Not only does *Kunshier* provide the answer to the question of Misters' right to withdraw his plea, but he also signed two standard-form rule 15 plea petitions that address the issue of plea withdrawal. In paragraph 21(i) of each petition, Misters states: "[t]hat if the court does not approve this agreement . . . I have an absolute right to then withdraw my plea of guilty and have a trial." No language added to either plea petition negated, modified, or otherwise qualified this statement, nor did the prosecutor or the district court state that Misters would also forfeit his right to withdraw his pleas if he did not comply with the release conditions. So, not only does the *Kunshier* rule dictate the conclusion that Misters is entitled to withdraw his pleas, the parties' express agreement, which the district court approved by accepting the terms of the plea petitions, compel the courts to honor the agreement. *See Perkins v. State*, 559 N.W.2d 678, 683, 686 (Minn. 1997) (affirming denial of motion to withdraw guilty plea where plea petition indicated that appellant could not withdraw guilty plea if court chose not to accept sentencing recommendation); *State v. Hamacher*, 511 N.W.2d 458, 459 (Minn. App. 1994) (holding that appellant could not withdraw plea where agreement said that if appellant did not meet conditions he would likely be prohibited from withdrawing guilty plea). Furthermore, because the rule 15 plea petition embodies significant rights and waivers, we do not treat it as merely perfunctory. The district court abused its discretion in denying Misters' motion to withdraw his pleas of guilty.

Because our holding on the question of plea withdrawal is dispositive, we do not reach the remaining issues Misters has raised on appeal.

Reversed and remanded.