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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0468**

State of Minnesota,
Respondent,

vs.

Johnson Nypea Yekeh,
Appellant.

**Filed September 1, 2009
Remanded
Johnson, Judge**

Pennington County District Court
File No. 57-CR-07-1511

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Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Johnson Nypea Yekeh pleaded guilty to fifth-degree criminal sexual conduct pursuant to a plea agreement that contemplated a 360-day sentence. But the district court

imposed a one-year sentence. On appeal, Yekeh argues -- for the first time -- that he should be permitted to withdraw his guilty plea. We remand to the district court to allow Yekeh to present his argument for plea withdrawal to the district court in the first instance.

FACTS

In late 2007, the state charged Yekeh with one count of criminal sexual conduct in the fifth degree, in violation of Minn. Stat. § 609.3451, subd. 1(1) (2006). In August 2008, Yekeh entered into a plea agreement providing, among other things, that he would be “sentenced to serve 360 days in the county jail.”

At a hearing in December 2008, the district court accepted Yekeh’s guilty plea and imposed sentence. Contrary to the plea agreement, the district court sentenced Yekeh to one year in jail. The one-year sentence is reflected both in the written criminal judgment and warrant of conviction and in the district court’s oral statement at the hearing that “[i]t will be the sentence and judgment of the court that you serve one year in the Pennington County jail.”

Yekeh is a resident alien. Under federal immigration law, the one-year sentence imposed by the district court is considered a felony, which is cause for deportation. *See* 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (2006). After Yekeh was sentenced, an immigration judge ordered him removed to Liberia, his country of origin. The following day, Yekeh filed a notice of appeal in this case. According to his appellate counsel, Yekeh presently is being held in the Carver County jail.

DECISION

Yekeh argues that he should be permitted to withdraw his guilty plea because the district court imposed a sentence longer than the sentence to which he agreed in the plea agreement. Yekeh does not argue that the district court abused its discretion by imposing a one-year sentence and does not argue that his sentence should be corrected to reflect the 360-day sentence to which he agreed. Rather, Yekeh seeks only one form of relief: withdrawal of his guilty plea. He does not seek any alternative forms of relief. In this situation, we will confine our analysis to the relief requested. *See Carey v. State*, 765 N.W.2d 396, 399 & n.1 (Minn. App. 2009) (considering only request for plea withdrawal because petitioner did not request modification of sentence), *review denied* (Minn. Aug. 11, 2009).¹

In response, the state argues that Yekeh did not properly preserve a request for plea withdrawal because he did not file a motion in the district court pursuant to rule 15.05 of the Minnesota Rules of Criminal Procedure. The state's argument is based on the fundamental rule that this court does not consider arguments that were not raised in the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). In this context, the supreme court has held that a criminal offender may not challenge a district court's

¹At oral argument, Yekeh argued that, if he is successful in establishing error, he would have a right to elect his remedy. But the caselaw states that, if a plea agreement has been breached, the district court should determine the appropriate form of relief. *See, e.g., State v. Jumping Eagle*, 620 N.W.2d 42, 44-45 (Minn. 2000) (reversing and remanding for determination whether to allow plea withdrawal or to modify sentence); *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (“On demonstration that a plea agreement has been breached, the court may allow withdrawal of the plea, order specific performance, or alter the sentence if appropriate”).

acceptance of a guilty plea if the challenge was not made in the district court so that the record is inadequate. *See State v. Coe*, 290 Minn. 537, 537-38, 188 N.W.2d 421, 422 (1971); *State v. Tamminen*, 282 Minn. 523, 524, 162 N.W.2d 369, 369 (1968). This court has, however, permitted a criminal offender to raise the issue of plea withdrawal on appeal if the relevant facts have been “thoroughly aired at the guilty plea hearing.” *State v. Newcombe*, 412 N.W.2d 427, 430 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). But that condition is not present in this case. There is no indication whether the district court intended to disregard the plea agreement, which contemplated a 360-day sentence, or intended to select a longer sentence despite the plea agreement. Furthermore, the parties did not present any evidence or argument to the district court as to whether withdrawal of Yekeh’s guilty plea would be “necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Thus, Yekeh may not seek withdrawal of his guilty plea for the first time on appeal. Rather, his request for plea withdrawal must be presented to the district court in the first instance.

In *State v. Witte*, 308 Minn. 214, 245 N.W.2d 438 (1976), an offender sought withdrawal of his guilty plea on direct appeal without having presented the argument to the district court. *Id.* at 214-15, 245 N.W.2d at 438. The supreme court remanded the case to allow the defendant to commence postconviction proceedings in which he could make the argument for plea withdrawal. *Id.* at 217, 245 N.W.2d at 440. The supreme court stated, “Without a hearing which focused on [the issue of plea withdrawal], and on the skimpy record before us, it would be difficult if not impossible to ascertain any meaningful answers” to the questions raised. *Id.* at 215, 245 N.W.2d at 438. Likewise,

the district court record in this case does not allow this court to analyze and resolve Yekeh's arguments.

Thus, we remand this case to the district court so that Yekeh may move to withdraw his guilty plea, either in the original criminal case or in postconviction proceedings.

Remanded.