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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1792**

State of Minnesota,
Respondent,

vs.

Buster James Carson,
Appellant.

**Filed September 11, 2017
Affirmed
Randall, Judge***

Anoka County District Court
File No. 02-CR-15-6392

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

Anthony C. Palumbo, Anoka County Attorney, Blair Buccicone, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Randall,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court abused its discretion by failing to apply the fair-and-just standard when it denied his presentence motion to withdraw his plea. The district court did apply the wrong standard, but the totality of the record shows that appellant was treated fairly. We affirm.

FACTS

On June 28, 2016, appellant Buster James Carson pleaded guilty to first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2014). Under the plea agreement, Carson would plead guilty to the single count in the complaint, and the state would withdraw its request to seek an aggravated sentence. The parties agreed that Carson would receive a guidelines sentence of 144 months.

At the plea hearing, Carson's attorney, the prosecutor, and the district court questioned Carson on the record to establish that Carson understood the nature of the charges against him, his rights to a jury trial, and the state's burden of proof. Carson also provided a factual basis that established his guilt under the statute. During the plea colloquy, Carson testified that he read the plea petition in its entirety, his attorney went over it with him and answered his questions, he made the decision to plead guilty with a clear mind, and he was making no claim of innocence. The district court accepted Carson's guilty plea and scheduled a sentencing hearing.

At the sentencing hearing on August 9, 2016, Carson, who was represented by the same attorney he retained for trial, requested the district court to allow him to withdraw his guilty plea. Due to the seriousness of the request, the district court set the matter for a hearing. The district court noted that a different attorney had contacted it the previous day to discuss Carson's potential plea withdrawal motion, but called the next day to state he would not be representing Carson.

The next day, on August 10, Carson filed a written motion to withdraw his plea, claiming that at the time the state offered the plea agreement, he was under "immense stress," he made the decision to accept the plea in haste because he had one day to consider it, and his attorney coerced him into accepting the plea.

On August 12, 2016, after hearing argument on the matter, the district court denied Carson's plea withdrawal motion, concluding that "no manifest injustice existed" that justified allowing Carson to withdraw his plea. The district court noted that Carson's plea was accurate, voluntary, and intelligent as evidenced by Carson's plea hearing testimony. The district court rejected Carson's claim that he felt pressured to take the plea agreement. The district court also rejected Carson's coercion argument, stating that it had "no doubt as to the quality of the representation" Carson received. The district court did not specifically address whether Carson provided sufficient reasons to make a withdrawal under the fair-and-just standard.

After considering and denying Carson's plea withdrawal motion, the district court proceeded to sentencing. Following the terms of the plea agreement, the district court

sentenced Carson to 144 months in prison and ten years of conditional release. This appeal follows.

DECISION

“A defendant has no absolute right to withdraw a guilty plea.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). “Withdrawal is permitted in two circumstances.” *Id.* First, a district court must allow a defendant to withdraw his or her plea “[a]t any time” if it is “necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, a district court has discretion to allow a defendant to “withdraw a plea [a]t any time before sentence if it is fair and just to do so.” *Id.*, subd. 2. Generally the rule is simple. “To correct the manifest injustice” that is the standard after sentence has been pronounced. Before a sentence has been pronounced, the “fair and just standard” should be used.

When deciding whether to grant a motion to withdraw a guilty plea under the fair and just standard, the district court “must give due consideration to” the defendant’s reasons supporting the motion and any prejudice granting the motion would cause to the state. Minn. R. Crim. P. 15.05, subd. 2. The defendant bears the burden to establish that fair and just reasons exist to support the plea withdrawal. *Raleigh*, 778 N.W.2d at 97. A district court errs if it fails to employ the correct analysis under the fair-and-just standard. *State v. Cubas*, 838 N.W.2d 220, 224 (Minn. App. 2013), *review denied* (Minn. Dec. 31, 2013).

We note that the district court considered the manifest injustice standard when it denied Carson’s plea withdrawal motion. That was the incorrect standard, as Carson had

not yet been sentenced. The district court did not consider Carson's motion under the fair-and-just standard. That was an error.

Next, we must determine if the circumstances advanced by Carson support his plea withdrawal motion. This court has discretion to review the record to determine whether an appellant offered sufficient reasons to support a plea withdrawal motion in the district court. *See State v. Lopez*, 794 N.W.2d 379, 383 (Minn. App. 2011) (reviewing record "to determine whether the facts and circumstances satisfy the fair-and-just standard"). Plea agreements must not be the product of coercion. *State v. Ecker*, 524 N.W.2d 712, 719 (Minn. 1994). "[A] defendant's motivation to avoid a more serious penalty . . . will not invalidate a guilty plea." *Id.*

Carson knew about the plea agreement the day before his trial. At the plea hearing, Carson testified that he read the entire plea petition, discussed it with his attorney, and understood its terms. Carson also agreed in the signed plea petition that he was satisfied with the representation his attorney provided. Moreover, Carson stated he had a clear mind and, other than the plea agreement, no one threatened or promised him anything to obtain the plea. Carson repeatedly stated that it was his decision to plead guilty. On these facts, Carson's argument that his plea was coerced and accepted in haste fails. *See State v. Abdisalan*, 661 N.W.2d 691, 695 (Minn. App. 2003) (rejecting defendant's argument that decision to accept plea was made in haste where defendant knew of a possible plea agreement two days before he decided to plead guilty), *reviewed denied* (Minn. June 3, 2003); *Id.* at 719 (rejecting defendant's argument that his attorneys pressured him to plead guilty when record showed that defendant "repeatedly stated he was making his own

decision”). We conclude Carson did not provide sufficient justification to establish that plea withdrawal was “fair and just” under that lower standard.

Alternatively, Carson asserts that remand is necessary so the district court can appoint substitute counsel and consider whether his trial attorney pressured him to take the plea deal.¹ The preferred procedure when considering a plea withdrawal motion that asserts inadequate counsel is to “afford substitute counsel for purposes of making the motion.” *Butala v. State*, 664 N.W.2d 333, 341 (Minn. 2003). When a district court thoroughly considers a plea withdrawal motion and the grounds asserted by the defendant, substitute counsel is not required. *Id.*

Carson relies on *State v. Kaiser* to support his claim. 469 N.W.2d 316 (Minn. 1991). In that case, the state charged the defendant with two counts of criminal sexual conduct. *Id.* at 316–17. On the third day of trial, the defendant pleaded guilty to the lesser count in the complaint, although he stated “he did not feel totally guilty.” *Id.* at 318. Two weeks later, the defendant moved to withdraw his plea, claiming that his attorney had coerced him into taking the plea. *Id.* The defendant’s attorney “repeatedly” asked the court to allow the defendant to testify in support of his motion and *he submitted an affidavit stating that the plea was coerced.* *Id.* at 318-19. The district court, without holding an evidentiary hearing, denied the defendant’s motion to withdraw. *Id.* On those facts, the supreme court reversed and remanded, reasoning that a hearing was required to determine whether the attorney coerced the defendant into taking the plea. *Id.* at 319-20.

¹ Carson does not raise the issue of ineffective assistance of counsel.

Carson's case is not *Kaiser*. At his plea hearing, Carson repeatedly testified that he had adequate time to review the plea petition with his attorney. He also agreed in the signed plea petition that his attorney had discussed possible defenses, and he was satisfied with his attorney's representation. Additionally, Carson did consult an independent attorney, but chose not to hire him and to retain his trial counsel at the motion hearing. Carson never requested substitute counsel, nor did he request to testify at the motion hearing. Even applying the proper and lower standard of "fair and just," on this record, the district court did not abuse its discretion when it denied the motion to withdraw the plea.

Affirmed.