STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1602

State of Minnesota,
Respondent,

vs.

Melie Ike Ilogu,
Appellant.

Filed September 17, 2018
Affirmed
Smith, John, Judge[*]

Hennepin County District Court
File No. 27-CR-15-25044

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Kirk, Judge; and Smith, John, Judge.

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

U N P U B L I S H E D O P I N I O N

SMITH, JOHN, Judge

We affirm appellant Melie Ike Ilogu's conviction for third-degree criminal sexual conduct because the district court did not err in refusing to permit appellant to withdraw his guilty plea and did not err in its imposition of the fine amount.

FACTS

Appellant was charged with third-degree criminal sexual conduct based on an incident that occurred on July 19, 2015. On February 15, 2017, just before closing arguments in a jury trial on the charge, Ilogu asked his attorney to determine whether the state's proffered plea agreement was still available. The state indicated it was not but made a new offer and Ilogu decided to plead guilty. Although Ilogu expressed some hesitation about the guilty plea—he told the district court, "I am ready to plead guilty. I am only hesitant because I would like to be able to wrap up some affairs and at least see my daughter before I go to prison." Ilogu pleaded guilty to third-degree criminal sexual conduct with a promise of a bottom-of-the-box sentence of 41 months.

The next day, Ilogu sought to withdraw his guilty plea, arguing that he was under duress from defense counsel. On March 10, 2017, Ilogu, through newly hired counsel, filed an amended motion to withdraw his guilty plea, citing ineffective assistance of counsel for failing to explain the terms of the sentence, health concerns arising out of an infection, improper pressure from defense counsel, confusion following six months in segregation while awaiting trial, and immigration concerns. The district court considered

the motion under both the manifest-injustice and the fair-and-just standards, and concluded that Ilogu had not demonstrated that he should be permitted to withdraw his guilty plea.

On July 14, 2017, the district court denied Ilogu's second amended motion to withdraw his plea and sentenced Ilogu to an executed 41-month sentence and a $30,000 fine. Ilogu appeals from both his conviction and the sentence.

D E C I S I O N

1. Ilogu is not entitled to withdraw his plea on grounds of manifest injustice.

A defendant does not have an absolute right to withdraw a guilty plea after entry. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). But a court must permit a defendant to withdraw a guilty plea if it "is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if a guilty plea is invalid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Id.* In addition, this court has stated that "a guilty plea based on ineffective assistance of counsel creates a manifest injustice as a matter of law." *State v. Ellis-Strong*, 899 N.W.2d 531, 541 (Minn. App. 2017). We review the validity of a guilty plea and a defendant's claim of ineffective assistance of counsel de novo. *Taylor*, 887 N.W.2d at 823. A defendant has the "burden of showing his plea was invalid." *State v. Boecker*, 893 N.W.2d 348, 350 (Minn. 2017) (quotation omitted).

a. Voluntariness of plea

Ilogu argues that his plea was not voluntary. A plea is not voluntary if a defendant is pleading guilty because of improper pressure or coercion. *Raleigh*, 778 N.W.2d at 96. Ilogu cites three circumstances that made his plea involuntary: (1) his attorney discussed

the plea in a "non-private" setting and pressured him to plead guilty; (2) he was not given enough time to consider whether to plead guilty; and (3) he was physically ill and mentally unstable after spending time in solitary confinement in jail.

The record does not support Ilogu's claims. A review of the transcript shows that Ilogu asked defense counsel if the state's plea offer was still available. *See id.* (rejecting argument that plea was not voluntary when defendant suggested pleading guilty). Defense counsel stated that he had reviewed the plea petition with Ilogu in the holding cell, not the courtroom. The state offered Ilogu a similar plea agreement before trial and the case itself had taken over a year to resolve. According to email and court records, Ilogu was given almost two hours to consider the plea offer, and the plea colloquy shows that Ilogu had sufficient time to consult with his attorney and he had not been pressured into pleading guilty. The district court questioned Ilogu about whether he was impaired by drugs or alcohol, and he denied this. In its order denying the withdrawal petition, the judge noted that she had observed no signs of physical or mental impairment during the plea hearing. The district court's order indicates that the court found Ilogu's allegations not credible.

The district court also carefully reviewed the transcripts of jailhouse calls Ilogu made following the guilty plea and found that the calls showed that Ilogu "was thinking clearly and decided to plead guilty solely because he thought he would be convicted and spend more time in prison." The district court concluded that Ilogu had not "sustained his burden of showing his plea [was] not voluntarily made." The record supports the district court's determination that Ilogu's plea was voluntary.

b. Ineffective assistance of counsel

Ilogu argues that his guilty plea was invalid because his defense counsel was ineffective. We review a claim of ineffective assistance of counsel de novo. *Taylor*, 887 N.W.2d at 823.

Ilogu argues that defense counsel assured him he would not have to participate in sex-offender treatment, which the Minnesota Department of Corrections (DOC) requires for all incarcerated persons convicted of sexual crimes. But Ilogu did not raise this as a basis for plea withdrawal before the district court. An appellate court does not decide issues that were not raised before the district court. *State v. Ali*, 855 N.W.2d 235, 261 (Minn. 2014).

Even if we were to consider his ineffective-assistance-of-counsel claim, Ilogu has failed to sustain his burden of showing "that counsel's representation fell below an objective standard of reasonableness," and that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012) (first quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984); then quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)).

Ilogu offers no evidence that he would not have pleaded guilty had he known he would have to participate in sex-offender treatment and, therefore, has failed to show that he was prejudiced by the claimed affirmative misadvice. *See Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (determining that a defendant satisfied prejudice prong of ineffective-assistance claim based on affirmative misadvice when the defendant adequately

demonstrated a reasonable probability that he would have rejected a guilty plea had he been properly advised). The district court's conclusion that Ilogu did not show he should be allowed to withdraw his plea due to a manifest injustice is not erroneous.

2. Ilogu has not demonstrated that it would be fair and just to permit him to withdraw his presentence guilty plea.

Before sentencing, a court may permit a defendant to withdraw a guilty plea "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2; *see also State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). The fair-and-just "standard is less demanding than the manifest injustice standard," but "it does not allow a defendant to withdraw a guilty plea for simply any reason." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quotation omitted). The district court considers two factors: (1) defendant's proffered reasons supporting withdrawal, and (2) prejudice to the state. *Raleigh*, 778 N.W.2d at 97. The defendant has the burden of advancing reasons for withdrawal. *Id.* We review the district court's decision for an abuse of discretion. *Farnsworth*, 738 N.W.2d at 372.

Before the district court, Ilogu offered three reasons in support of withdrawal: he did not understand his conditional release term or the registration requirements, and he did not have an opportunity to talk to an immigration attorney. On appeal, Ilogu argues that he was not advised he would have to participate in sex-offender treatment. Again, an appellate court does not decide issues that were not raised before the district court. *Ali*, 855 N.W.2d at 261. And Ilogu not only did not raise the issue below, he also failed to articulate any reason why mandatory DOC-ordered sex-offender treatment raises issues of fairness and justice. He alleges briefly that any time a defendant is deprived of effective

assistance of counsel, it is fair and just as a matter of law to permit withdrawal of a guilty plea, citing *State v. Lopez*, 794 N.W.2d 379, 383-84 (Minn. App. 2011). But Ilogu's proffered reasons are not supported by the record.

In *Raleigh*, the supreme court rejected the state's arguments that it was prejudiced by an almost 16-month delay between the offense and the motion to withdraw. 778 N.W.2d at 98. Here, the time between the offense date and motion to withdraw is similar—about 20 months. But the state had completed a six-day jury trial and the attorneys were about to give closing arguments when Ilogu chose to plead guilty rather than wait for the verdict. This is a greater showing of prejudice than that advanced in *Raleigh*. The district court's denial of Ilogu's motion under the fair-and-just standard was supported by the record and not an abuse of discretion.

3. The fine imposed on Ilogu is not unconstitutionally excessive.

Ilogu argues that the $30,000 fine imposed by the district court was unconstitutionally excessive as applied to him. A district court is required to "impose a fine of not less than 30 percent of the maximum fine authorized by law" for certain offenses, including third-degree criminal sexual conduct. Minn. Stat. § 609.101, subd. 2 (2014). The district court may not waive the minimum fine but

> [i]f the defendant qualifies for the services of a public defender or the court finds on the record that the convicted person is indigent or that immediate payment of the fine would create undue hardship for the convicted person or that person's immediate family, the court may reduce the amount of the minimum fine to not less than $50.

Id., subd. 5 (a)-(b) (2014). We review a claim of the constitutional protection against excessive fines as a question of law. *State v. Rewitzer*, 617 N.W.2d 407, 412 (Minn. 2000).

Both the United States and the Minnesota Constitutions prohibit imposition of excessive fines. U.S. Const. amend. VIII; Minn. Const. art. I, § 5. A fine is not considered to be excessive if it is proportional to the gravity of the offense. *Rewitzer*, 617 N.W.2d at 413. A court considers three factors to determine whether a fine is proportional: "(1) the gravity of the offense and the harshness of the penalty, (2) comparison of the contested fine with fines imposed for the commission of other crimes in the same jurisdiction, and (3) comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions." *Id*. (citing *Solem v. Helm*, 463 U.S. 277, 290-92, 103 S. Ct. 3001, 3010 (1983)).

This court recently applied this standard in a case involving third-degree criminal sexual conduct, concluding that that the $9,000 fine was not disproportionate to the gravity of the crime of third-degree criminal sexual conduct, despite the fact that no force, coercion, or physical injury was involved and it was an isolated incident. *State v. Madden*, 910 N.W.2d 744, 748 (Minn. App. 2018), *review denied* (Minn. June 19, 2018). This court rejected defendant's argument that third-degree criminal sexual conduct was not the most serious of the sexual offenses, an argument also made by Ilogu. *Id.* This court then compared the $9,000 fine with fines for sexual offenses ranked at the same level under the Minnesota Sentencing Guidelines, which ranged between $20,000 and $35,000. *Id.* at 749. Finally, this court compared fines for similar offenses in the states surrounding Minnesota, including Iowa, North Dakota, South Dakota, and Wisconsin, where the maximum fines

for similar offenses ranged between $10,000 and $100,000. *Id.* at 750. We concluded that the fine was not disproportionate. *Id*.

Based on this reasoning, the $30,000 fine imposed is not unconstitutional as applied to Ilogu. But Ilogu also asserts that the district court abused its discretion by refusing to reduce the fine to $50, as permitted by Minn. Stat. § 609.101, subd. 5(b), for defendants represented by the public defender.

A public defender was appointed for Ilogu at his first appearance, but he was represented by private counsel at trial and during his plea withdrawal motions. Fine reduction is permissive and not mandatory under the statute. *See* Minn. Stat. § 609.101, subd. 5 (stating that court "may reduce" fine if defendant qualifies for a public defender).

The district court did not fully explain the reason for imposition of the maximum fine, but commented on Ilogu's lack of remorse and failure to take responsibility for his crime, while noting that this was not the first time he had victimized a woman in the same manner. Ilogu has not demonstrated that the district court's refusal to reduce the fine was an abuse of discretion.

4. Ilogu's five pro se issues are without merit.

a. Conditional release

Ilogu argues that he was misinformed about the term of conditional release imposed as part of his sentence. The explanation of the conditional release term included in the guilty plea transcript was not clear or perfectly accurate. But the ten-year conditional release term is mandatory and cannot be waived by the district court. Minn. Stat. § 609.3455, subds. 6, 8(a) (2014). "[A]ny sentence that omits the conditional-release

period is unauthorized." *Kubrom v. State*, 863 N.W.2d 88, 92 (Minn. App. 2015). If a defendant is aware of the conditional-release term, a defendant will not be permitted to withdraw his plea even if the court did not explicitly instruct the defendant about the requirement. *See State v. Rhodes*, 675 N.W.2d 323, 327 (Minn. 2004). If a defendant is led to believe there is no requirement, plea withdrawal is permitted. *Uselman v. State*, 831 N.W.2d 690, 693-94 (Minn. App. 2013). Ilogu's situation falls somewhere in between. Like *Uselman*, Ilogu's plea petition contains the notation "N/A" next to the conditional-release clause. But Ilogu was informed, however imperfectly, about the requirement during the plea hearing. If a defendant pleads guilty "in exchange for a specific and definite sentence that would be extended by the addition of the conditional-release term," the plea agreement is violated if the conditional-release term is added after sentencing. *Kubrom*, 863 N.W.2d at 93-94. Ilogu was informed before sentencing, imperfectly by the court and by probation, of the conditional-release requirement.

b. Restitution

Ilogu challenges the restitution award because he did not receive an affidavit setting forth the basis for restitution. During his sentencing hearing, the prosecutor and defense counsel agreed that there had been a restitution request in the amount of $1,443.07. A victim must submit either an affidavit or "other competent evidence" to the court or a designated agency. Minn. Stat. § 611A.04, subd. 1(a) (2014). The information must be provided to defense counsel at least 24 hours before sentencing. *Id.* A defendant may challenge restitution at the sentencing hearing by following the procedures set forth in Minn. Stat. § 611A.045, subd. 3 (2014). *Id*. Under this section, a defendant must provide

a detailed sworn affidavit setting forth challenges to the requested restitution. Minn. Stat. § 611A.045, subd. 3(a). If the offender intends to challenge restitution, he must request a hearing within 30 days of either the written notification of the amount requested or the sentencing hearing. *Id.*, subd. 3(b). An offender may not challenge a restitution order once the 30-day limit has passed. *Evans v. State*, 880 N.W.2d 357, 361 (Minn. 2016). More than 30 days passed without a challenge to the restitution award.

c. Imposition of fine

Ilogu argues that he should be permitted to withdraw his guilty plea because the plea agreement did not provide for payment of a fine. The penalty for third-degree criminal sexual conduct is no more than 15 years imprisonment or a fine of not more than $30,000, or both. Minn. Stat. § 609.344, subd. 2(1) (2014). Ilogu and the state agreed to a term of 41 months, but no mention was made of a fine. A plea is not voluntary, and, therefore, invalid, if a promise made within the plea agreement is not or cannot be fulfilled. *Carey v. State*, 765 N.W.2d 396, 400 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). But under Minn. Stat. § 609.101, subds. 2, 5(a)-(b), a court is required to impose a fine equal to no less than 30 percent of the maximum fine authorized by law, and may not waive payment of the minimum fine.

A defendant who enters into a plea agreement based upon a promise that cannot be fulfilled but which was essential to the agreement may be permitted to withdraw his guilty plea. *Carey* 765 N.W.2d at 400. This raises the question of which term in the bargained-for plea agreement was the essential inducement for the plea agreement. *State v. Brown*, 606 N.W.2d 670, 674-75 (Minn. 2000). Here, Ilogu focused on the length of the prison

sentence and agreed to plead guilty because of the recommendation for a bottom-of-the-box sentence of 41 months. This was confirmed by discussions in the plea hearing and by Ilogu's jailhouse telephone calls. The fine, a mandatory part of the sentence, was not discussed and, thus, was not an essential element of the plea agreement.

d. Mental illness

Ilogu argues he should be permitted to withdraw his plea based on ineffective assistance of counsel because his trial attorney failed to raise a mental-illness defense. But an appellate court does not review an ineffective-assistance-of-counsel claim based on defense counsel's trial strategy. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Trial strategy includes counsel's selection of evidence to present to the jury. *Id.* The decision not to raise a mental-illness defense is strategic. And the record here does not support a mental-illness defense. A person cannot be convicted of a crime if he is mentally ill to such a degree that he does not know the nature of the act he is committing or that it was wrong. Minn. Stat. § 611.026 (2014). Mental illness alone is an insufficient basis; a mental-illness defense can be rejected based on evidence that the defendant engaged in "planning and concealment, flight from authorities, disposal of evidence, and expressing awareness of consequences," such as apologizing or acknowledging that his actions were wrong. *State v. Roberts*, 876 N.W.2d 863, 869-70 (Minn. 2016).

e. Vienna Convention

Ilogu argues that he was deprived of effective assistance of counsel because his attorney did not inform him of his right under the Vienna Convention on Consular Relations, art. 36, paragraph 1(b), April 24, 1963, 21 U.S.T. 77, 100-01, to contact his

consular official. Article 36 provides that a foreign national who has been arrested, imprisoned, or taken into custody may ask that his consular authority be contacted, and the arresting authorities "shall inform" the person in custody of his right to do so. *Id.* But Article 36 provides no sanctions for a violation. *State v. Miranda*, 622 N.W.2d 353, 356 (Minn. App. 2001). A defendant has the burden of showing that he was prejudiced by a violation of Article 36. *Id.* This court rejected an argument that a defendant was prejudiced by violation of the convention because he would have "heeded advice from the consulate" about speaking to police. *State v. Morales-Mulato*, 744 N.W.2d 679, 686 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). Ilogu argues that the Nigerian consulate could have given more information about deportation and advised him on plea negotiations or whether to "take his chances with the jury." But Ilogu was advised of the immigration consequences of his plea and was represented by counsel, who advised him during the trial and plea negotiations. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350, 126 S. Ct. 2669, 2681-82 (2006) ("A foreign national detained on suspicion of crime . . . enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination. Article 36 [of the Vienna Convention] adds little to these 'legal options.'" (citation omitted)).

Affirmed.