STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0019

State of Minnesota,
Respondent,

vs.

Wayne Joseph Bosto,
Appellant.

Filed September 4, 2018
Affirmed
Cleary, Chief Judge

Carlton County District Court
File No. 09-CR-16-2533

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

Thomas Pertler, Carlton County Attorney, Jeffrey LH Boucher, Assistant County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Tracy M., Judge.

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

CLEARY, Chief Judge

In this direct appeal from a judgment of conviction, appellant argues that the district court: (1) abused its discretion in denying his presentence motion to withdraw his guilty plea; and (2) failed to address his counsel's potential conflict of interest. We affirm.

FACTS

In December 2016, appellant Wayne Joseph Bosto was charged with second-degree intentional murder and felon in possession of a firearm arising out of an incident that occurred earlier that month. Per a plea agreement, appellant pleaded guilty to second-degree intentional murder and the state dismissed the firearm-possession charge. Before sentencing, appellant moved to withdraw his guilty plea, arguing that he felt "extreme emotional distress" at the time of his plea because he was facing a potential life sentence in prison. The district court denied the motion, concluding: "Defendant's guilty plea was voluntary. . . . [He] has failed to satisfy his burden of proving that it is fair and just to allow him to withdraw his guilty plea."

After the district court ruled on the motion but before sentencing, the district court received a letter from appellant asking it to consider additionally a "conflict of interest" in which appellant's attorney "pushed for [him] to take the plea." The district court sentenced appellant a few days after receiving his letter. The district court did not address appellant's letter at the sentencing hearing and sentenced him to the guidelines sentence of 426 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying appellant's presentence motion to withdraw his guilty plea.

Appellant argues that the district court applied the incorrect standard in ruling on his withdrawal motion. We disagree.

A district court has discretion to allow a defendant to withdraw a guilty plea before sentencing and its decision will only be reversed if an appellate court "can fairly conclude that the [district] court abused its discretion." *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). We consider "the entire context in which [a defendant]'s plea of guilty occurred, as demonstrated by the record" to determine whether sufficient reasons exist to support the motion. *State v. Abdisalan*, 661 N.W.2d 691, 695 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003).

"A defendant has no absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). A guilty plea "may be withdrawn only if one of two standards is met. First a plea may be withdrawn if 'withdrawal is necessary to correct a manifest injustice.'" *State v. Lopez*, 794 N.W.2d 379, 382 (Minn. App. 2011) (quoting Minn. R. Crim. P. 15.05, subd. 1). "Second, before a defendant is sentenced, a plea can be withdrawn 'if it is fair and just to do so.'" *Id.* (quoting Minn. R. Crim. P. 15.05, subd. 2). "The fair-and-just standard is less demanding than the manifest-injustice standard." *Id.*

"The 'fair and just' standard requires district courts to give 'due consideration' to two factors: (1) the reasons a defendant advances to support withdrawal and (2) prejudice

granting the motion would cause the State given reliance on the plea." *Raleigh*, 778 N.W.2d at 97 (quoting Minn. R. Crim. P. 15.05, subd. 2). "Even when there is no prejudice to the state, a district court may deny plea withdrawal . . . if the defendant fails to advance valid reasons why withdrawal is fair and just." *State v. Cubas*, 838 N.W.2d 220, 224 (Minn. App. 2013), *review denied* (Minn. Dec. 31, 2013).

"Although a decision to allow plea withdrawal is discretionary . . . , a district court must apply the standard mandated by the rule when exercising its discretion." *Id.* Accordingly, a district court abuses its discretion if it applies the incorrect standard for plea withdrawal. *See id.* at 225. But a district court does not abuse its discretion in denying a presentence motion to withdraw a guilty plea if "[n]othing objectively in the record suggests that [a defendant] failed to comprehend the nature, purpose, and consequences of [the] plea." *Abdisalan*, 661 N.W.2d at 694.

Appellant claims that the district court analyzed his motion under the manifest-injustice standard, but the district court's order does not support this assertion. The district court analyzed appellant's claim under the voluntary-plea standard articulated in *Raleigh*, which in that case was analyzed under both the manifest-injustice and fair-and-just standards. 778 N.W.2d at 96-97. The district court reviewed the facts of appellant's case and the circumstances surrounding his plea, and cited the fair-and-just standard in concluding that appellant failed to satisfy his burden. The district court also noted that appellant did not provide any further explanation of how extreme emotional distress affected his decision to plead guilty.

The record supports the district court's conclusion that appellant did not have a fair-and-just reason to withdraw his guilty plea: after completing a plea petition, appellant acknowledged his plea at the plea hearing, did not ask any questions, and stated that he was of sound mind and ready to proceed. Appellant then admitted to each element of the crime and stated that he was making no claim of innocence. Nothing else in the record suggests that appellant's plea was not voluntary, or that he had any other fair-and-just reason to withdraw his guilty plea. The district court applied the correct standard and did not abuse its discretion in denying appellant's motion.

II. There was no conflict of interest between appellant and his counsel at the time of appellant's motion.

Appellant next argues that this court must remand his case for a renewed motion hearing because his counsel had a conflict of interest at the time of the original hearing. Due to the timing of the letter in relation to the hearing and the order, it is unclear whether the district court considered this claim when it ruled on appellant's motion. Regardless, appellant's claim is without merit.

Appellant appears to argue that the conflict at the center of his claim is his attorney's advice regarding the potential consequences of his plea, which he characterizes as coercion. However, appellant likely conflates a conflict-of-interest claim with an ineffective-assistance-of-counsel claim. An appellant may bring an ineffective-assistance-of-counsel claim if his attorney coerced him to plead guilty. *State v. Ecker*, 524 N.W.2d 712, 718-19 (Minn. 1994). Plea agreements must not be the product of coercion, but a pleading

defendant's "motivation to avoid a more serious penalty . . . will not invalidate a guilty plea." *Id.* at 719.

Appellate courts apply a two-part test to claims of ineffective assistance of counsel arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 369-70 (1985). An appellant must first show that "counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). To meet this standard, the appellant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066.

Second, the appellant must show that counsel's deficient performance prejudiced him. *Id.* at 687, 104 S. Ct. at 2064. We need not address both prongs of the *Strickland* test if one is dispositive. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

The record shows that appellant's counsel informed him of the potential consequences of not pleading guilty. Indeed, appellant acknowledges receipt of this information in his letter. Appellant does not provide any additional arguments or citations to legal authority showing that his attorney coerced him to plead guilty. Because counsel properly advised appellant of his options, counsel's performance was not deficient.

Appellant argues in his reply brief that his counsel also had a conflict of interest because he was the subject of an ineffective-assistance-of-counsel claim. A lawyer cannot represent a client if the representation involves a conflict of interest. Minn. R. Prof. Conduct 1.7(a). A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer. *Id.* (a)(2).

If an appellant claims that he received ineffective assistance of counsel arising out of a perceived conflict of interest, the appellant must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). "[T]he *possibility* of conflict is insufficient to impugn a criminal conviction." *Id.* at 350, 100 S. Ct. at 1719 (emphasis added). "Prejudice is presumed only if the [appellant] demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 350, 100 S. Ct. at 1719). "But until a[n appellant] shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 466 U.S. at 350, 100 S. Ct. at 1719.

To the extent appellant's counsel had a conflict because he was the subject of appellant's ineffective-assistance-of-counsel claim, such a claim did not exist at the time of the original motion hearing. The hearing occurred on September 22, and appellant's letter arguing his claim is dated September 26 and was stamped by the district court with a date of October 3. At the time of the hearing, appellant was not claiming ineffective assistance of counsel, so appellant's counsel did not have a conflict of interest.

For these same reasons, appellant was not entitled to substitute counsel at the original motion hearing. Appellant relies on *State v. Paige*, 765 N.W.2d 134 (Minn. App. 2009), to support his argument that the district court erred by failing to appoint substitute

counsel. In *Paige*, this court held that a district court was required to "take adequate steps to ascertain whether an impermissible conflict existed" where sufficient information brought such a conflict to the district court's attention at the time of the motion hearing. 765 N.W.2d at 141. But here, because the district court did not receive appellant's letter until several days after the motion hearing, the district court was not aware of any potential conflict. *Paige* therefore does not require us to remand for reconsideration of appellant's motion.

Affirmed.