**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-2005**

Micheal Delanie Harris, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 15, 2019**
**Affirmed**
**Klaphake, Judge**[*]

Dakota County District Court
File No. 19HA-CR-16-2491

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Evan W. Frazier, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Slieter, Judge; and Klaphake, 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

**KLAPHAKE**, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that he should have been permitted to withdraw his guilty plea to second-degree controlled-substance crime (sale) because, at the time he pleaded guilty, he was also facing a 60-month sentence on a conviction for a firearm offense that was subsequently vacated; he also argues that the vacation of that conviction entitled him to reconsideration of his sentence for second-degree controlled-substance crime (sale). Because the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea and did not err in deciding not to reconsider his sentence, we affirm.

## D E C I S I O N

In June 2016, when appellant Micheal Delanie Harris was charged with one count of second-degree controlled-substance crime (sale), his pending district court files included a guilty plea to the charge of possession of a firearm by an ineligible person resulting from his possession of a BB gun. In September 2016, he pleaded guilty to the charge of second-degree controlled-substance crime and to charges of third-degree assault, driving after revocation, and fifth-degree assault. His criminal-history score (CHS) was then nine; the presumptive range for second-degree controlled-substance crime was 95-132 months and the presumptive sentence was 111 months. Appellant's motion for a downward durational departure was granted, and he received a sentence of 60 months in prison, or 54% of the presumptive sentence.

In May 2017, appellant's conviction for possession of a firearm was vacated under *State v. Haywood*, 886 N.W.2d 485, 489 (Minn. 2016) (holding that an air-powered BB gun is not a firearm under the plain meaning of Minn. Stat. § 609.165). His CHS was reduced to six and one half, which changed the presumptive range for second-degree controlled-substance crime to 92-129 months in prison and the presumptive sentence to 109 months in prison. Appellant petitioned for postconviction relief, seeking to withdraw his guilty plea, and challenges the denial of the petition.

After sentencing, a guilty plea may be withdrawn only if withdrawal is necessary to correct a manifest injustice, which requires a showing that the plea was invalid, i.e., not accurate, voluntary, and intelligent. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Whether a plea was invalid is reviewed de novo. *Id.*

Appellant argues that his guilty plea was not voluntary because he wanted a different public defender (PD) to be appointed. But, when the district court told appellant the only PD available to handle either appellant's controlled-substance conviction or a recent conviction for an assault in jail was the PD appellant said he wanted to fire, appellant said in response, "I just got to stick with [him] then." The district court asked appellant, "You're okay staying with [this PD]?" and appellant answered, "I'll stay." The district court pointed out that the PD's failure to communicate with appellant since the assault was due to the fact that appellant "[hadn't] been able to get phone calls" in jail and was in segregation. The district court then asked appellant, "[A]t this point you're okay going forward with [this PD] . . . if possible, today?" and appellant answered "Yes." Thus, the

transcript reflects that appellant voluntarily proceeded on his plea agreement with his assigned PD.

To argue that his plea was not intelligent, appellant relies on *State v. Casarez*, 203 N.W.2d 406, 408 (Minn. 1973) (holding that, for a plea to be intelligent, a defendant must "have a full understanding of its consequences," and reversing a conviction because the record did not show "that the trial judge discussed the consequences of the plea so that [the] defendant would have a full understanding of [the] consequences"). But *Casarez* is distinguishable: here, the transcript clearly shows that appellant was aware of the consequences of his plea. The district court told appellant that, with a plea agreement, his sentences would be concurrent rather than consecutive; the PD said he would ask for a downward durational departure so appellant would receive "60 months concurrent on [the second-degree controlled-substance conviction] as well"; and appellant, when asked if this sounded accurate, said, "Yes. Yes. They'll be 60. And I said basically 60 altogether, everything ran concurrent . . . ."

Appellant told the prosecutor that he knew a guilty plea to a drug offense could be used in the future to make other drug offenses have more severe consequences. When the prosecutor asked if appellant understood that he could plead guilty on the assault and take the drug case to trial, or plead guilty on the drug case and take the assault to trial, or take both to trial, appellant answered that he wanted to enter guilty pleas on both cases. The transcript reflects that appellant understood the consequences of his plea.

There was no abuse of discretion in denying appellant's motion to withdraw his guilty plea.

Appellant also argues that the vacating of his firearm offense entitled him to reconsideration of his sentence, relying on *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017) (concerning a CHS reduced by the vacation of a conviction under *Haywood* and holding that "when a defendant is sentenced based on an incorrect criminal history score, a district court must resentence the defendant"). But *Provost* is distinguishable because, in that case, the defendant had received a guidelines sentence, not a significant downward departure from the presumptive sentence.

The district court denied appellant's petition after concluding that appellant "ha[d] failed to establish a reasonable probability of a different outcome absent the error in the criminal history score" because the difference between the presumptive sentence for second-degree controlled-substance crime with a CHS of nine (111 months) and a CHS of six and one half (109 months) was minimal and, in any event, appellant did not receive the presumptive sentence but rather a departure "more than forty percent (40%) less than the presumptive sentence." There was no error in the district court's decision not to reconsider appellant's sentence.

**Affirmed.**