**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-1088**

State of Minnesota,
Respondent,

vs.

Joshua William Dwyer,
Appellant.

**Filed June 12, 2023**
**Reversed and remanded**
**Cochran, Judge**

Rice County District Court
File No. 66-CR-18-2386

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

Brian Mortenson, Rice County Attorney, Sean R. McCarthy, Assistant County Attorney, Faribault, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Frisch, Judge; and Florey, Judge.*

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

## NONPRECEDENTIAL OPINION

**COCHRAN**, Judge

On appeal from his conviction of fourth-degree assault following a guilty plea, appellant argues that his guilty plea was unintelligent because he did not understand that, by pleading guilty, he would waive his right to appeal certain pretrial issues. Because appellant's plea was not entered intelligently, we reverse and remand to allow appellant to withdraw his plea.

## FACTS

In October 2018, appellant Joshua William Dwyer was charged by respondent State of Minnesota with two counts of fourth-degree assault after he allegedly spit on two police officers when they arrested him at his mother's home on other charges. In December 2018, Dwyer appeared for an omnibus hearing on the assault charges and another file. At the omnibus hearing, Dwyer's public defender stated that, "as it relates to any sort of omnibus issues or *Rasmussen* issues, we don't have any to raise at this time . . . we are going to waive those omnibus issues [and] enter not guilty pleas on both these files." The district court confirmed that all "omnibus issues [had] been waived."

In November 2021, the parties appeared before the district court for a jury trial, but the proceeding was later converted into a plea hearing. At the outset of the proceeding that day, the district court addressed Dwyer's request to present evidence showing that the police did not have permission to enter his mother's home at the time of the arrest. The district court noted that the question of permission to enter was "really not an issue in this case." And the district court ruled that it would "not allow any testimony, argument, or

implication that what Mr. Dwyer may or may not have done in regard to [spitting on] the officers [was] negated by any . . . lack of permission for entering into the home" where he was arrested. Dwyer himself objected, stating that "the whole reason I'm here is because of the Fourth Amendment violation." He further explained that "[i]f it weren't for the Fourth Amendment violation . . . I would have just taken the plea deal." Dwyer then made a motion to fire his public defender and represent himself. The district court denied the motion.

After further discussion, Dwyer made a second request to represent himself at trial, arguing that his representation was inadequate because, among other issues, the public defender had failed to raise the issue of a potential Fourth Amendment violation at the omnibus hearing. Dwyer reiterated that "the only reason I'm here today is because of the Fourth Amendment violation." The district court responded that "we're past the point for raising those issues at this time." The district court told Dwyer that if Dwyer wished to raise those issues, he "would only be able to do so in appeal at this point. The omnibus issues, including the Fourth Amendment issue, [were] waived."

The district court then continued to address Dwyer's second request to represent himself. During questioning by the district court, Dwyer returned to the Fourth Amendment issue. Dwyer specifically asked the district court if he could raise the Fourth Amendment issue on appeal. The district court responded that "[t]he only place that it would be able to be brought up would be in the . . . appellate process." Dwyer then stated: "I'm just trying to set myself up for an appeal, and my understanding is, you know, if the issue's not brought up at trial court it's not reviewed on appeals." The district court

replied: "you've brought the issue up." Dwyer next asked for clarification on "what constitutes the issue being brought up." The district court responded, "I'm not going to give you legal advice or a legal opinion in regard to that." Dwyer then asked if he could "just take the plea deal then and . . . preserve the issues for appeal?" The district court responded that Dwyer should speak to his attorney for "legal advice on that." Dwyer decided to have the public defender continue as his attorney.

After a short recess, Dwyer's attorney told the court that Dwyer agreed to a plea deal offered by the state. Under the terms of the plea deal, the state would dismiss one of the fourth-degree assault charges if Dwyer pleaded guilty to the other charge. When the district court asked Dwyer if he wished to accept the plea deal, Dwyer expressed hesitation and asked if he could consult a different lawyer. The district court told Dwyer that he could not consult a different lawyer. Dwyer then asked if there was "any way [he] could have like a mistrial and be able to argue the Fourth Amendment violation?" The district court again stated that "the Fourth Amendment issue is not an issue for trial," that "[w]e're past that stage in the proceedings," and that "raising that issue at this time can only occur at the appellate level." Dwyer clarified that this was "because I missed it in omnibus; right?" The district court said, "Right."

Dwyer agreed to accept the state's plea deal. The district court explained Dwyer's trial rights and asked Dwyer if he wanted to give up those rights and accept the state's plea offer. Before responding, Dwyer asked his public defender in open court if he should accept the plea offer, and the public defender said that he thought pleading guilty was "the best course of action" for Dwyer. Dwyer told the district court that he did not trust his

public defender's advice. The district court told Dwyer that he could raise concerns about his representation, along with other issues, on appeal. The district court did not mention that Dwyer would waive certain appeal rights by pleading guilty. Dwyer then pleaded guilty to one count of fourth-degree assault.

In March 2022, Dwyer filed a pro se motion to withdraw his guilty plea. In a supplemental letter and an accompanying affidavit, Dwyer asserted that police officers violated the Fourth Amendment when they arrested him at his mother's home in October 2018 and that he had received ineffective assistance of counsel because, in relevant part, his public defender did not raise a Fourth Amendment issue at Dwyer's omnibus hearing. Dwyer also stated in his letter that he pleaded guilty believing that his conviction "[would] be overturned [on] appeal."

In May 2022, the district court considered Dwyer's motion to withdraw his guilty plea at Dwyer's sentencing hearing. Dwyer, representing himself, reiterated at the hearing that he had expressed his Fourth Amendment concern to his public defender "since the beginning of this case" but that he had been inadequately represented because his public defender "missed the omnibus hearings." He also argued that he should be allowed to withdraw his guilty plea because he was unable to communicate effectively with his public defender on the fourth-degree assault charges while in prison for an unrelated conviction. The state argued that Dwyer's plea withdrawal request was not supported by the "appropriate factors," that Dwyer's waiver of any omnibus issues was addressed at his plea hearing, and that the issues that Dwyer wanted his public defender to raise were raised "throughout" and did not provide "a proper basis for relief."

The district court denied Dwyer's motion to withdraw his guilty plea. The district court explained that "[t]he reasons advanced by Mr. Dwyer in support of his motion to withdraw his plea are reasons that were discussed at the plea hearing" and that "no new information" supported Dwyer's motion to withdraw his plea. On that basis, the district court found that it was not "fair and just" to allow Dwyer to withdraw his plea. The district court then sentenced Dwyer to 13 months in prison with 465 days of credit for time served, noting that Dwyer had satisfied his sentence.

Dwyer appeals.

## DECISION

Dwyer challenges the district court's denial of his presentence motion to withdraw his guilty plea to fourth-degree assault.[1] "A defendant has no absolute right to withdraw a guilty plea," but "[w]ithdrawal is permitted in two circumstances." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). First, a district court "*must* allow a defendant to withdraw a guilty plea" at any time if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1 (emphasis added). Second, a district court *may* allow a defendant to withdraw a guilty plea before sentencing "if it is fair and just to do so." *Id.*, subd. 2. Dwyer contends that the district court erred by denying his presentence motion to withdraw his guilty plea because he met both standards for withdrawal under Minn. R. Crim. P. 15.05.

[1] In the alternative, Dwyer challenges his sentence, arguing that the district court erred by sentencing him with an incorrect criminal-history score. Because we conclude that Dwyer is entitled to withdraw his guilty plea and we reverse and remand on that basis, we do not address Dwyer's alternative argument.

We first consider whether Dwyer was entitled to withdraw his guilty plea under the manifest-injustice standard.[2] A defendant has the right to withdraw a guilty plea at any time if he can show that "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid." *Raleigh*, 778 N.W.2d at 94. "To be valid, a guilty plea must be accurate, voluntary, and intelligent." *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). The validity of a guilty plea is a question of law which we review de novo. *Raleigh*, 778 N.W.2d at 94.

Dwyer argues that his guilty plea was invalid because it was not intelligent. "To be intelligent, a guilty plea must represent a knowing and intelligent choice among the alternative courses of action available." *Dikken v. State*, 896 N.W.2d 873, 877 (Minn. 2017) (quotation omitted). And whether a defendant entered a plea intelligently depends on whether the defendant understood the charges against him, the rights he was waiving, and the direct consequences of the plea. *Raleigh*, 778 N.W.2d at 96. One of those rights is the right to appellate review. *See* Minn. R. Crim. P. 28.02, subd. 2 (providing that "[a] defendant may appeal as of right from any adverse final judgment," including a judgment of conviction); Minn. R. Crim. P. 15, Appendix C (providing a model plea petition form which includes the statement that "any appeal or other court action I may take claiming error in the proceedings probably would be useless and a waste of my time

[2] The state argues that Dwyer forfeited the right to request plea withdrawal under the manifest-injustice standard on appeal by not seeking to withdraw his plea under that standard in district court. This argument is unavailing. An appellant "does not waive the manifest-injustice argument by raising it for the first time on appeal." *State v. Bell*, 971 N.W.2d 92, 100 n.1 (Minn. App. 2022), *rev. denied* (Minn. Apr. 27, 2022).

and the court's time"). A defendant's right to appellate review of a conviction is limited when they plead guilty because a guilty plea operates "as a waiver of all nonjurisdictional defects arising prior to the entry of the plea," including Fourth Amendment claims. *State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986); *see also Dikken*, 896 N.W.2d at 878 (referencing this "longstanding rule"). Thus, a guilty plea may be unintelligent if a defendant does not understand that their plea acts as a waiver of the right to appeal any nonjurisdictional issues, including Fourth Amendment issues.

Dwyer argues that his guilty plea was not intelligent because he was affirmatively advised by the district court that he could pursue substantive nonjurisdictional issues on appeal, including his Fourth Amendment issue. Dwyer argues that he therefore did not understand the appeal rights he was waiving by pleading guilty and, consequently, his plea was not intelligent. We agree that Dwyer is entitled to withdraw his guilty plea because it was not intelligently entered.

Taken as a whole, the record shows that Dwyer intended to preserve his Fourth Amendment issue and that he thought he could raise that issue on appeal even if he pleaded guilty. Dwyer asked the district court directly if he could raise his Fourth Amendment issue on appeal, and the district court responded that "[t]he only place that it would be able to be brought up would be in the . . . appellate process." Dwyer then asked the district court to confirm that he had properly raised the issue, explaining: "I'm just trying to set myself up for an appeal, and my understanding is, you know, if the issue's not brought up at trial court it's not reviewed on appeals." The district court confirmed that Dwyer had "brought the issue up," though it declined to opine on whether Dwyer could "just take the

plea deal then and . . . preserve the issue[] for appeal." Later on, when discussing the details of the state's plea offer, Dwyer asked if there was any way he "could have like a mistrial and be able to argue the Fourth Amendment violation" before the district court. The district court again explained that "raising that issue at this time can only occur at the appellate level" because Dwyer had waived the issue at his omnibus hearing.

Based on these comments by the district court, Dwyer was left with the misimpression that he could continue to raise constitutional issues relating to the state's evidence on appeal even after pleading guilty. Significantly, the record does not show that Dwyer was ever informed otherwise. While the district court did explain the trial rights that Dwyer would waive by pleading guilty, there is no indication on the record that Dwyer was ever informed by the district court or by his public defender that he would also waive his right to appeal any nonjurisdictional issues, including those arising under the Fourth Amendment, by pleading guilty. And, given Dwyer's stated mistrust of his public defender and the breakdown in communication between them, we cannot assume that the public defender advised Dwyer off the record that he would waive his right to appeal Fourth Amendment evidentiary issues by pleading guilty. Moreover, Dwyer did not sign a Rule 15 plea petition explicitly waiving that right by acknowledging that any appeal "probably would be useless." Minn. R. Crim. P. 15, Appendix 15. The record therefore shows that Dwyer pleaded guilty without understanding that he was waiving his right to raise his Fourth Amendment issue (and all other nonjurisdictional issues) on appeal.

For the above reasons, we conclude that Dwyer did not understand the rights that he was waiving by pleading guilty. *See Raleigh*, 778 N.W.2d at 96. Dwyer's guilty plea was

therefore unintelligent, and its withdrawal is necessary to correct a manifest injustice.[3] *See* Minn. R. Crim. P. 15.05, subd. 1. Consequently, we reverse and remand with instructions to allow Dwyer to withdraw his guilty plea.

We are not persuaded otherwise by the state's argument that Dwyer's statements at the plea hearing regarding his desire to raise his Fourth Amendment issue and other issues "were at most an untimely motion to reopen omnibus." Based on this premise, the state argues that any error by the district court in denying Dwyer's motion to withdraw his guilty plea was harmless because Dwyer "was adequately informed on multiple occasions that his motion to reopen omnibus was untimely and not properly before the court." But while the record does show that Dwyer seemed to understand that he had waived his ability to raise a Fourth Amendment issue *at trial*, the record does not show, as discussed above, that Dwyer understood that he would also waive his ability to raise certain issues, including a Fourth Amendment issue, *on appeal* by pleading guilty.

**Reversed and remanded.**

[3] Given this conclusion, we do not consider Dwyer's argument that the district court abused its discretion by denying his request to withdraw his guilty plea under the "less demanding" fair-and-just standard. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007).