STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1090

State of Minnesota,
Respondent,

vs.

Scott David Hardy,
Appellant.

Filed July 25, 2011
Affirmed
Bjorkman, Judge

Washington County District Court
File No. 82-CR-08-7344

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

Pete Orput, Washington County Attorney, Jennifer S. Bovitz, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of first-degree assault, arguing that the district court erred by (1) denying his request for a public defender and requiring him to proceed

pro se without a valid waiver of his right to counsel, (2) denying his presentence request to withdraw his guilty plea, and (3) denying his request for a downward dispositional departure. We affirm.

FACTS

In the early morning hours of September 10, 2008, S.B. and J.L. were sitting under a tree across the street from S.B.'s family's residence when they heard footsteps and saw feet underneath the tree. S.B. approached the person to ask what he or she was doing and observed a man in a black hooded sweatshirt with the hood pulled over his head. The man, later identified as appellant Scott Hardy, hit S.B. on the head with an unknown object. While S.B. was contacting the police on his cell phone, J.L. grabbed Hardy's sweatshirt. Hardy punched her in the face, saying, "I don't like to hit girls." Then he fled.

Hardy was charged with first-, second-, and third-degree assault and the district court appointed a public defender to represent him. Hardy had numerous court appearances during which he was represented by counsel, and his trial was continued twice on scheduled trial dates; first because he fired his public defender and second when he fired his private attorney. When Hardy appeared for trial on January 19, 2010, he did not have an attorney, and the district court denied his request for another continuance to retain a new attorney. After considering the state's offer to recommend a 48-month prison sentence, a downward durational departure, Hardy decided to plead guilty to first-degree assault and argue for a downward dispositional departure at sentencing. He submitted a written plea petition and asked the district court to accept his guilty plea.

At his sentencing hearing on March 25, Hardy asked for a public defender and permission to withdraw his guilty plea. The district court denied both requests. The district court also denied Hardy's request for a downward dispositional departure and sentenced Hardy to 74 months' imprisonment. This appeal follows.

D E C I S I O N

I. The district court did not err by denying Hardy's request for reappointment of a public defender and requiring him to proceed without counsel.

Hardy first argues that the district court erred by denying his request for a public defender and by requiring him to proceed pro se without a valid waiver of his right to counsel. Although he couches these as two separate arguments, they are two aspects of one decision by the district court—that Hardy relinquished his right to counsel and was not entitled to reappointment of a public defender after he fired his public defender, hired private counsel, and then fired private counsel.[1]

A defendant has the constitutional right to counsel and a statutory right to be represented by a public defender if he or she is financially unable to afford or obtain counsel. *State v. Jones*, 772 N.W.2d 496, 502 (Minn. 2009); *see also* Minn. Stat. § 611.15 (2010); Minn. R. Crim. P. 5.04, subd. 1(2). But a defendant may relinquish the right to counsel "in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *Jones*, 772 N.W.2d at 504. Waiver is "the voluntary relinquishment of a known right" and must be based on a full understanding of the rights being relinquished. *Id.*; *see also* Minn. R. Crim. P. 5.04, subd. 1(4) (detailing advisory necessary for waiver of counsel in

[1] The district court did not find that Hardy is financially ineligible for the public defender.

felony case). Waiver by conduct "occurs if a defendant engages in dilatory tactics after he has been warned that he will lose his right to counsel" and also requires an advisory of rights. *See Jones*, 772 N.W.2d at 505. But even in the absence of a full rights advisory, a defendant "may be said to have forfeited his right to counsel" if he "engages in extremely dilatory conduct." *Id.* (quotation omitted). "Forfeiture is usually reserved for severe misconduct, when other efforts to remedy the situation have failed." *Id.*

It is undisputed that Hardy never affirmatively asked to represent himself. And although the record indicates that Hardy was or should have been substantially aware of the risks he faced by repeatedly firing his attorneys, the record does not include an advisory of rights under rule 5.04 and, therefore, does not establish waiver by conduct. Accordingly, we consider whether Hardy forfeited the right to counsel, including his statutory right to a public defender.

Hardy was charged on September 15, 2008, and a public defender was appointed shortly thereafter. Hardy worked with several different public defenders and was actively represented by the public defender's office for pretrial and omnibus hearings and for multiple conditional-release violations hearings. On September 14, 2009, Hardy was scheduled for a jury trial but left the courthouse because he believed his public defender was unprepared and decided that he wanted to obtain private counsel. Hardy's private attorney, Barry McKee, Jr., appeared on October 2 for a bail review. McKee explained why Hardy had fired his public defender and obtained a continuance to prepare for trial. Then on November 30, the continued trial date, Hardy appeared with McKee and informed the district court that he wished to fire McKee and hire a different attorney.

The district court afforded Hardy another continuance to do so but noted Hardy's habit of seeking new counsel whenever a trial was scheduled. The district court advised Hardy that there would be "no further continuances" and that he would be proceeding on his own if he failed to obtain counsel.

After some shifting trial dates, partially related to Hardy's continued violations of his release terms, Hardy's jury trial was scheduled for January 19, 2010. When Hardy appeared for trial without an attorney, the district court asked him whether he understood that he would "be [his] own counsel." Hardy responded affirmatively, but then requested a continuance, explaining that he had found a new attorney and intended to "sign a retainer" but "just [had] not had the time to do it." The district court reviewed the history of Hardy's representation over the preceding 16 months, reminded Hardy that he had been warned in November that "there would be no further continuances," and denied the continuance. Hardy subsequently pleaded guilty.

At his sentencing hearing, Hardy requested reappointment of a public defender, and the district court again considered Hardy's past representation and the continuances he had received for purposes of obtaining new counsel. The district court told Hardy, "[Y]ou've created a lot of the trouble that you find yourself in and I am denying your request to have counsel present on the basis of the entire past history of this case." The district court also observed that Hardy's delays appeared to be his way of postponing the consequences of the serious charges against him.

This record of Hardy's extremely dilatory conduct amply establishes forfeiture of the right to counsel. The district court sought to vindicate Hardy's right to counsel by

appointing a public defender, then affording Hardy numerous hearing and trial continuances to retain private counsel. But there must be a balance between "a defendant's right to counsel of his choice" and "the public interest of maintaining an efficient and effective judicial system." *See Jones*, 772 N.W.2d at 505-06 (quotation omitted). Hardy upset that balance through his ongoing dilatory conduct, from his pattern of changing counsel each time a trial was scheduled to his failure to secure replacement counsel for himself in time for the third trial date, despite ample time and numerous warnings that he would not be afforded further continuances. On this record, we conclude that the district court did not err in determining that Hardy forfeited his right to counsel, including any right he had to representation by a public defender.

II. The district court did not err by denying Hardy's request to withdraw his plea.

Hardy next argues that the district court erred by denying his presentence request to withdraw his guilty plea. A defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). Guilty pleas may be withdrawn only if one of two standards is met. First, a plea may be withdrawn at any time if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists if a guilty plea is invalid. *Williams v. State*, 760 N.W.2d 8, 11 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009). A guilty plea is valid only if it is accurate, voluntary, and intelligent. *Id.* Second, a plea can be withdrawn before sentencing "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. The fair-and-just standard is less demanding than the manifest-injustice

standard. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). We consider Hardy's arguments for withdrawal under each standard in turn.

Manifest injustice

Hardy first argues that his guilty plea is invalid and, therefore, subject to withdrawal because it does not satisfy the accuracy requirement. We review de novo the validity of a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

"The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he or she could be properly convicted of at trial." *Alanis*, 583 N.W.2d at 577. To meet the accuracy requirement, a plea must have adequate factual support. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The factual basis is adequate if there are "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted). The factual basis is inadequate when the defendant makes statements that negate an essential element of the charged crime. *Id.* at 350.

A conviction of first-degree assault requires proof or an admission that the defendant intentionally inflicted or attempted to inflict bodily harm on another person. Minn. Stat. § 609.02, subd. 10 (2008); *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). Intent requires a showing that the defendant "has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2008). Intent can be established by evidence of

threatening statements. *State v. Kastner*, 429 N.W.2d 274, 275 (Minn. App. 1988), *review denied* (Minn. Nov. 16, 1988).

Hardy asserts that the facts he admitted in support of his plea are insufficient to establish first-degree assault because he claimed that he acted in self-defense, thereby negating the intent element of the offense. We disagree. At his plea hearing, Hardy testified that "[w]hat it says in the police report is what happened." He also specifically admitted that he told J.L., "I don't like to hit girls," and then hit her in the face. Hardy's statement, in context, supports a finding that he purposefully struck J.L. with knowledge that she likely would be injured. Hardy's subjective belief that he needed to hit J.L. because she was holding onto his sweatshirt does not preclude a determination that Hardy committed first-degree assault by intentionally hitting J.L. in the face so hard that he shattered her orbital bone. *See* Minn. Stat. § 609.06, subd. 1(3) (2008) (permitting use of "reasonable force" against another "to resist an offense against the person"). Moreover, Hardy expressly indicated in his plea petition that he was not making the claim that he was acting in self-defense at the time of the crime, and the district court reiterated during the plea hearing that Hardy could not be pleading guilty while "contending that self-defense is how [J.L.] got herself so very injured." We conclude that the facts Hardy admitted, together with his plea petition and the complaint to which he agreed, establish an adequate factual basis for Hardy's guilty plea. Accordingly, withdrawal of the plea is not necessary to correct a manifest injustice.

Fair and just

Hardy also argues that he is entitled to withdraw his guilty plea under the more lenient fair-and-just standard. We review the district court's application of the fair-and-just standard for an abuse of discretion. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

In determining whether a defendant's reason for withdrawal is fair and just, a district court must consider: (1) the reasons a defendant advances to support withdrawal and (2) any prejudice granting the motion would cause the state as a result of reliance on the plea. *Raleigh*, 778 N.W.2d at 97 (citing Minn. R. Crim. P. 15.05, subd. 2). The defendant has the burden to prove that a fair-and-just reason exists to withdraw his plea, and it is the state's burden to show any prejudice that withdrawal would cause. *Id.*

Hardy argues that it is fair and just to permit him to withdraw his plea because he did not have the benefit of counsel when deciding whether to plead guilty. We are not persuaded. Hardy was represented on these charges for more than one year and, therefore, presumably was aware of the charges against him, the consequences he faced, and the dangers of self-representation. *See State v. Jones*, 266 N.W.2d 706, 712 (Minn. 1978) (permitting presumption that defendant had been advised of the benefits of legal assistance after consulting with the public defender). And, as we concluded above, the absence of defense counsel at Hardy's guilty plea was directly attributable to his dilatory conduct, which does not warrant withdrawal of his guilty plea.

Moreover, our independent review of the record reveals that Hardy received a fair opportunity to decide whether to plead guilty and a thorough plea hearing. The

prosecutor presented Hardy three alternatives—a guilty plea in exchange for a downward durational departure, a straight guilty plea and the opportunity to argue for a downward dispositional departure, or trial. When Hardy opted to submit a straight plea, the district court and the prosecutor thoroughly questioned Hardy to ensure that he understood all three alternatives, their potential consequences, and the rights he was waiving by pleading guilty. Thus, although Hardy was not assisted by counsel when he elected to plead guilty, we conclude that the district court did not abuse its discretion in determining that this fact was insufficient to warrant withdrawal of Hardy's plea under the fair-and-just standard.[2]

III. The district court did not abuse its discretion by denying Hardy's request for a downward dispositional departure.

Hardy challenges the district court's imposition of the presumptive 74-month prison sentence. *See* Minn. Sent. Guidelines IV (2008) (presumptive prison commitment with sentencing range of 74 to 103 months for a level IX offense). The district court must impose the presumptive guidelines sentence unless "substantial and compelling circumstances" warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The decision to depart from the sentencing guidelines rests within the district court's sound discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001); *see also State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse-of-discretion standard when evaluating downward

[2] Because Hardy failed to establish a basis for withdrawal of his plea, we decline to consider the question of prejudice to the state. *See Raleigh*, 778 N.W.2d at 98 (stating that defendant's failure to "advance substantiated reasons for withdrawal of his plea" independently justified denial of withdrawal request).

departure), *review denied* (Minn. Jan. 14, 1991). Even if reasons for departing downward from the presumptive guidelines sentence exist, we ordinarily will not disturb the district court's sentencing decision. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Hardy argues that the district court abused its discretion by not granting him a downward dispositional departure because he is amenable to probation and there were mitigating circumstances. When considering a downward dispositional departure, a district court focuses "on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A relevant factor in determining whether to impose a downward dispositional departure is the defendant's amenability to probation. *Id.* Other relevant factors include the defendant's age, prior criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Hardy asserts that the district court failed to consider his amenability to probation because it focused instead on the Challenge Incarceration Program (CIP), a boot-camp program offered through the department of corrections for prisoners who show an interest in and inclination toward rehabilitation and self-improvement. We disagree. The record reflects that the district court did not believe Hardy was amenable to probation and recommended CIP because it offers rehabilitative programming. And the district court thoroughly explained that Hardy's record of numerous conditional-release violations demonstrated that he is not amenable to probation.

Hardy's argument that mitigating factors warranted a downward dispositional departure is also unavailing. The existence of mitigating factors does not compel the district court to impose a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). Hardy neither expounds on his argument nor explains why other mitigating factors warranted a dispositional departure despite his unamenability to probation. On this record, we conclude that the district court did not abuse its discretion by declining to depart from the presumptive prison commitment.

Finally, we observe that some of Hardy's departure arguments appear to also challenge the district court's denial of a downward durational departure. Our review of the record reveals that Hardy's argument at sentencing focused on disposition and did not expressly request a durational departure. Nonetheless, the district court considered and ultimately denied a durational departure. The district court's decision not to depart durationally was driven by a desire to improve Hardy's chances for admission to CIP, a disposition that the district court reasonably considered more appropriate than probation. But the district court also advised Hardy that his admission to the program was not guaranteed. That CIP denied Hardy admission because of his assault conviction does not make the district court's imposition of the presumptive sentence an abuse of discretion.

Affirmed.