STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1569
A11-2066

State of Minnesota,
Respondent,

vs.

Marlin Eric Espe,
Appellant,

Marlin Eric Espe, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 24, 2012
Affirmed
Kalitowski, Judge

Freeborn County District Court
File No. 24-CR-07-2947

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

Craig S. Nelson, Freeborn County Attorney, David J. Walker, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Cleary, Judge; and Muehlberg, Judge.*

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

KALITOWSKI, Judge

In this consolidated appeal, appellant Marlin Eric Espe challenges the denial of his motions to withdraw his plea of guilty to fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(c) (2006), and the revocation of his probation. Appellant argues that: (1) the district court abused its discretion in denying his presentence motion to withdraw his guilty plea; (2) the postconviction court erred in concluding that his guilty plea was voluntary and abused its discretion in denying his petition for postconviction relief; (3) the postconviction court erred by admitting testimony from the prosecutor at the postconviction hearing; and (4) the district court erred in finding that appellant intentionally violated the conditions of his probation and abused its discretion in revoking his probation. We affirm.

D E C I S I O N

I.

Appellant contends the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. A court may permit a defendant to withdraw his guilty plea before sentencing "'if it is fair and just to do so.'" *State v. Lopez*, 794 N.W.2d 379, 382 (Minn. App. 2011) (quoting Minn. R. Crim. P. 15.05, subd.

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

2). The court "must give due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution." Minn. R. Crim. P. 15.05, subd. 2. The defendant bears the burden of proving that there is a fair-and-just reason to allow him to withdraw his plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). The district court's decision "will be reversed only in the rare case in which the appellate court can fairly conclude that the court abused its discretion." *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

Prior to sentencing, appellant argued that at the time he pleaded guilty, he believed he would be permitted to travel outside the state to work as a truck driver after his release from custody. He argued that the Department of Corrections (DOC) was unwilling to issue him travel permits, which was "a collateral consequence that was completely unforeseen." The state opposed the motion, arguing that it would be prejudiced if appellant was permitted to withdraw his plea. The state indicated that two witnesses, appellant's four- and seven-year-old children, would be subjected to emotional turmoil if required to testify. The district court denied the motion.

Appellant argues that the district court abused its discretion because appellant misunderstood what his plea entailed, and this misunderstanding provided a fair-and-just reason for withdrawal. We disagree.

The record establishes that at the plea hearing the district court and the prosecutor indicated to appellant that his ability to travel outside the state after his release from custody could be limited by the DOC's rules. The plea agreement provided that appellant's executed sentence would be limited to time served as of the date he entered

the guilty plea. The parties discussed conditions of release, and the prosecutor mentioned appellant's request that he be permitted to leave the state in order to work as a truck driver. The prosecutor stated, "I assume [appellant] is . . . subject to the [DOC] rules, but I have no problem with him leaving the [s]tate . . . once this plea is offered." The court replied, "Yeah, I can do that, and just subject to the [c]ommissioner of [c]orrections rules." Appellant asked about the DOC rules, and the court permitted appellant to speak with his counsel off the record. Appellant raised no additional questions and the court accepted his plea. Therefore, appellant was properly informed at the time he entered his plea that he would be subject to DOC rules.

Moreover, unlike *State v. Benson*, on which appellant relies, appellant did not have a mistaken belief as to an element of his sentence. *See* 330 N.W.2d 879, 880 (Minn. 1983) (holding that a mistaken belief warranting withdrawal existed when defendant was told at the plea hearing that the presumptive sentence for his offense was 32 months and the district court would not depart upward, but the presumptive sentence was actually 41 months). Here, appellant was informed that the DOC's restrictions on the persons it supervises are discretionary and beyond the control of the district court. Nothing in the record establishes that the DOC limitations, which were unknown at the time of his plea, were an element of his sentence. We conclude that the district court did not abuse its discretion in concluding that appellant did not provide a fair-and-just reason to withdraw.

Appellant also argues that the plea agreement was the result of a mutual mistake because, at the time he entered his plea, both parties believed appellant would be permitted to work as an out-of-state truck driver. Appellant failed to raise this argument

to the district court, and it is therefore waived. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will generally not consider matters not argued to and considered by the district court).

Furthermore, the record fails to support appellant's assertion. The parties agreed that the district court would not restrict appellant's ability to travel for out-of-state trucking jobs, but appellant would be subject to DOC rules. Therefore, the record does not establish that both parties believed appellant's ability to travel would be unrestricted.

Finally, appellant argues that the DOC impermissibly infringed his constitutional right to interstate travel. But appellant also waived this argument by failing to raise it to the district court. *See id.* (stating arguments not made to district court are generally not considered on appeal). Moreover, appellant's argument lacks merit; the state may limit a probationer's right to travel if the restriction is reasonably related to the purposes to be served by probation. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000).

Because appellant failed to establish that a fair-and-just reason for plea withdrawal existed, and because the state asserted prejudice, we conclude that this is not the rare case in which the district court abused its discretion by denying appellant's presentence motion to withdraw his plea.

II.

Appellant argues that the postconviction court erred in concluding that his guilty plea was voluntary and denying his petition for postconviction relief. In reviewing a postconviction order, an appellate court determines whether there is sufficient evidence to

support the postconviction court's factual findings and will not disturb the decision absent an abuse of discretion. *Walen v. State*, 777 N.W.2d 213, 215 (Minn. 2010).

"At any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if the plea is invalid because it does not comply with constitutional requirements that the plea be accurate, voluntary, and intelligent. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The defendant bears the burden of demonstrating that his plea is invalid. *Id.* The validity of a plea is a question of law, which is reviewed de novo. *Id.*

"To determine whether a plea is voluntary, the court examines what the parties reasonably understood to be the terms of the plea agreement" by considering all relevant circumstances. *Id.* at 96. If a plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (quotation omitted). "When a guilty plea is induced by unfulfilled or unfulfillable promises, the voluntariness of the plea is drawn into question, and due process considerations require that the defendant be given the opportunity to withdraw his plea." *State v. Wukawitz*, 662 N.W.2d 517, 526 (Minn. 2003) (citation omitted). The determination of what the parties agreed to in a plea bargain is a question of fact. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004).

Appellant argues that his plea was involuntary because it was induced by the state's unfulfilled promise that he would be permitted to leave the state to work as a truck

driver. Appellant specifically argues that the postconviction court's finding that the plea agreement did not include a promise by the state that appellant would be permitted to work as an out-of-state truck driver is clearly erroneous. We disagree.

As the postconviction court reasoned, the plea petition did not reference out-of-state travel, and defense counsel testified that if appellant's ability to leave the state was part of the plea agreement, it would have been included in the plea petition. At the plea hearing, the prosecutor stated that he "ha[d] no problem with" appellant leaving the state after entering his plea, and appellant was informed that his ability to travel could be limited by DOC rules. The prosecutor's statement that he did not oppose appellant leaving the state was not a promise that the DOC would not limit appellant's ability to travel. The postconviction court reasoned that appellant acknowledged at the plea hearing that his plea was voluntarily made, he did not disagree with the plea agreement when it was read on the record, and he could not recall "where he got the specific terms of his plea agreement as it related to his ability to leave the state." Simply, there is nothing in the record to support a finding that the state made an unqualified promise as part of the plea agreement that appellant's ability to travel would be unrestricted.

Appellant also challenges the postconviction court's finding that the prosecutor testified that his statements about out-of-state travel referred only to conditions of presentence release. But regardless of whether the prosecutor's statements concerned presentence release or probation, the state made no unqualified promise as part of the plea agreement that appellant's ability to travel would be unrestricted.

At oral argument, appellant argued that the DOC's travel-permit requirements violated the district court's sentencing order. But because appellant failed to raise this argument to the postconviction court, it is waived. *See Roby*, 547 N.W.2d at 357 (stating issues not raised in district court are not considered on appeal). Moreover, a postconviction petition to withdraw a guilty plea is not the appropriate vehicle to challenge the DOC's compliance with the sentencing order.

In sum, we reject appellant's argument that his plea was involuntary because the postconviction court's finding that the plea agreement did not include an unqualified promise that appellant would be permitted to travel is not clearly erroneous. Therefore, appellant fails to establish a manifest injustice, and the postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief.

III.

Appellant argues that the postconviction court committed plain error by permitting the prosecutor to testify at the postconviction hearing without requiring the prosecutor to formally withdraw from representation. Appellant concedes that he failed to object to this alleged error at the postconviction hearing, and therefore we review for plain error. *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011).

> [B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Ramey, 721 N.W.2d 294, 298 (Minn. 2006) (quotation omitted).

Appellant argues that the postconviction proceedings violated the advocate-witness rule. Minn. R. Prof. Conduct 3.7(a) provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Generally, under rule 3.7(a), "if a prosecutor intends to testify for the state in a prosecution of a defendant, the prosecutor should withdraw from the case." *State v. Fratzke*, 325 N.W.2d 10-11, 12 (Minn. 1982) (emphasis omitted) (discussing Erwin S. Barbre, Annotation, *Prosecuting Attorney as a Witness in Criminal Case*, 54 A.L.R.3d 100, § 5 (1973)); *see* 23 Ronald I. Meshbesher, *Minnesota Practice* § 22:8 (2011 ed.) (stating that when an attorney has undertaken representation, and it becomes apparent that the attorney will be required to testify, "it is usually required that the attorney withdraw"). It is within the discretion of the district court to permit the testimony of an attorney-witness at trial. *Fratzke*, 325 N.W.2d at 13; *Hagerty v. Radle*, 228 Minn. 487, 488, 37 N.W.2d 819, 821 (1949) (stating that it is "clearly within the discretion of the [district] court to determine whether the testimony of the attorney should be admissible").

Here, the prosecutor initially appeared at the postconviction hearing on behalf of the state, but indicated that he might be needed to testify about appellant's plea agreement, and stated that an assistant county attorney was available to participate in the hearing. The postconviction court agreed that the prosecutor should not participate, and the assistant county attorney questioned the witnesses and argued on behalf of the state.

Appellant asserts that the postconviction court violated the advocate-witness rule by admitting the prosecutor's testimony about the plea agreement without requiring that the prosecutor formally withdraw from representation, and that the error affected his substantial rights. We disagree.

Appellant cites no authority establishing that Minn. R. Prof. Conduct 3.7(a) prohibits attorney-witness testimony in a postconviction proceeding. The plain language of rule 3.7(a) applies to advocacy and testimony "at a trial." Therefore, by implication, the plain language of the rule does not prohibit advocacy and testimony in postconviction proceedings.

Moreover, even if rule 3.7(a) is applicable, appellant has not established that formal withdrawal from representation was required. *See, e.g.*, *DiMartino v. Eighth Judicial Dist. Ct.*, 66 P.3d 945, 946-47 (Nev. 2003) (holding that a rule identical to rule 3.7 prohibits an attorney-witness from appearing as trial counsel but does not mandate complete disqualification); *People ex rel. S.G.*, 91 P.3d 443, 450 (Colo. App. 2004) (collecting cases in which courts have held that rules similar to rule 3.7 do not mandate disqualification from pretrial or posttrial proceedings). The prosecutor did not participate in the postconviction hearing as an advocate. Instead, the assistant county attorney questioned the witnesses and argued on behalf of the state. Appellant fails to establish that the postconviction court erred in resolving the advocate-witness issue by requiring that an assistant county attorney act as the state's advocate during the proceeding.

Furthermore, appellant fails to establish that his substantial rights were affected by the alleged error. Appellant's bare assertion that he was prejudiced by the prosecutor's

brief discussion with the assistant county attorney at the hearing and the prosecutor's participation in a post-hearing in-chambers discussion is insufficient.

Because appellant fails to establish that the postconviction court erred by admitting the prosecutor's testimony, and because appellant fails to establish that the alleged error affected his substantial rights, we conclude that the postconviction court did not commit plain error.

IV.

Finally, appellant argues that the district court abused its discretion in revoking his probation and executing his sentence. When a probation violation is challenged, the state must prove the violation by clear and convincing evidence. *State v. Cottew*, 746 N.W.2d 632, 636 (Minn. 2008). If this standard is met, the district court may revoke probation and execute a previously stayed sentence. Minn. Stat. § 609.14, subd. 3(l) (2010). The decision to do so rests within the district court's broad discretion and will not be disturbed absent a clear abuse of that discretion. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). When revoking a defendant's probation, the district "court must: (1) designate the specific condition . . . that [was] violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation." *Id*. at 250.

Appellant was sentenced to a 24-month stay of execution with the specific requirement that he complete sex-offender treatment and, in connection with treatment, submit to polygraph examinations. The district court found that appellant intentionally and inexcusably violated these conditions because: (1) appellant failed to enter treatment

for almost nine months and did not submit to a polygraph examination; (2) appellant was discharged fewer than 60 days after entering treatment; and (3) appellant "continually questioned the need for sex offender treatment and placed a higher priority on his chosen occupation of being a truck driver and his ability to leave the state."

Appellant argues that the district court's finding that he intentionally violated the probationary requirement that he complete sex-offender treatment is erroneous because he did not intentionally leave the program. Appellant argues that the primary reason for his discharge from the program was his inability to pay, which is unintentional. We disagree.

The record establishes that appellant was discharged for a number of reasons, including that he failed to complete any assignments, was resistant to treatment, acted defensive and disrespectful, and voluntarily left a treatment group. In a letter regarding his discharge, appellant's counselor at the sex-offender treatment program stated that appellant, "continue[d] to rationalize his abusive behavior and project blame onto the victim," failed to complete any of his treatment assignments, and failed to make any payments toward his treatment. The counselor stated that appellant "received feedback regarding his lack of assignments," lack of accountability, and resistance to treatment, and that, in response, he was defensive and acted in a disrespectful manner. The counselor stated that she told appellant he would be asked to leave the group if he continued to act aggressively or disrespectfully, and appellant "walked out of the group."

Moreover, the district court found that appellant's inability to pay was intentional, because he was given the opportunity to apply for medical assistance, which would have

partially or fully covered the program expenses, but failed to do so. This finding is supported by the probation agent's testimony that he discussed applying for medical assistance with appellant. Appellant testified that medical assistance refused to cover the program expense, but he also testified that he failed to timely submit documentation for medical assistance.

Appellant argues that, based on *Bearden v. Georgia*, 461 U.S. 660, 672, 103 S. Ct. 2064, 2073 (1983), it is unconstitutional to revoke probation because the probationer is unable to pay for services. But *Bearden* is not controlling because it addressed the payment of a fine or restitution as a sentence for an offense, rather than a payment required in connection with conditions of probation. 461 U.S. at 673-74, 103 S. Ct. at 2073-74. And moreover, under *Bearden*, the court may revoke probation if the probationer "failed to make sufficient bona fide efforts legally to acquire the resources to pay." *Id.* at 672, 103 S. Ct. at 2072.

Appellant argues that his failure to complete any of the written assignments is due to his illiteracy, and is also, therefore, unintentional. But the district court found that the treatment program was aware of appellant's illiteracy. Appellant testified that program staff refused to help him complete written assignments, but the court found this testimony not credible and instead found that appellant failed to ask for assistance. This finding is supported by the counselor's statement that she discussed appellant's failure to complete assignments with appellant, and the probation officer's testimony that program staff did not mention literacy concerns in their reports about appellant's progress.

Because the district court's finding that appellant intentionally violated the conditions of probation is supported by the record, we conclude that the district court did not abuse its discretion in revoking appellant's probation and executing his sentence.

Affirmed.