STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1440

State of Minnesota,
Respondent,

vs.

Nathan Jon McKeehan,
Appellant.

Filed June 3, 2013
Affirmed
Larkin, Judge

Anoka County District Court
File No. 02-CR-11-4444

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

Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's denial of his plea-withdrawal motion. He contends that a manifest injustice requires withdrawal and that the district court abused its discretion by concluding that it is not fair and just to allow withdrawal. We affirm.

FACTS

Respondent State of Minnesota charged appellant Nathan Jon McKeehan with one count of first-degree controlled-substance sale and one count of conspiracy to commit first-degree controlled-substance sale, stemming from a controlled buy of methamphetamine. On the third day of his jury trial, McKeehan pleaded guilty to first-degree controlled-substance sale in exchange for the state's agreement to dismiss the conspiracy charge and a downward durational sentencing departure. The prosecutor noted that the state's departure recommendation was conditioned on McKeehan remaining law abiding pending sentencing.

The district court clarified that to "remain law abiding means no use of any mood-altering chemicals" and ordered McKeehan to submit to random drug testing. McKeehan asked when he would be required to take the first drug test. In response, the district court asked McKeehan if he was under the influence. After McKeehan and his attorney had an opportunity to confer outside of the courtroom, McKeehan's attorney assured the court that McKeehan was "not under the influence of drugs this morning," that McKeehan was "clear-minded," and that McKeehan understood what was going on. But counsel also advised the district court that if McKeehan "were to take a UA today, it would probably

[be] dirty." The district court stated that a drug test would be given that day to establish a "baseline," after which, "it needs to go down. If it doesn't go down, then that's a violation." McKeehan told the district court that he understood.

Next, McKeehan and his attorney reviewed a petition to plead guilty on the record, and the district court accepted the petition. The prosecutor then stated that the terms of the plea agreement "between the state and the defendant," included the condition that "there must be no use, and the defendant must appear for any UAs on demand." McKeehan stated that he understood. Finally, the prosecutor and the court questioned McKeehan to establish a factual basis.

At the end of the hearing, the district court asked McKeehan's attorney if he planned to accompany his client to provide a urine sample. McKeehan asked: "It's just downstairs, right?" The court confirmed the testing location, and McKeehan responded: "I know where it is." The hearing ended shortly after 10:00 a.m. At approximately 4:40 p.m., McKeehan provided his baseline urine sample.

On December 19, 2011, four days after his guilty plea, McKeehan failed a drug test, and on January 3, 2012, he failed to report for testing. After learning that the state would not recommend the sentence contemplated by his plea agreement because he violated the conditions of release, McKeehan moved to withdraw his guilty plea. His initial motion stated that "at the time of the plea he was under the influence of drugs, did not understand the proceeding and vaguely remembers being there." In addition to filing the plea-withdrawal motion on McKeehan's behalf, McKeehan's attorney moved to withdraw as counsel. The district court allowed McKeehan's attorney to withdraw and

appointed a public defender to represent McKeehan. The public defender filed an amended plea-withdrawal motion that added an additional ground for withdrawal: "the court improperly injected itself into plea negotiations/agreement by adding the term of 'no use of any mood altering chemicals' as a condition of the plea agreement." McKeehan also moved for a downward durational sentencing departure.

The district court held a contested evidentiary hearing on McKeehan's plea-withdrawal motion. At that hearing, the state presented testimony from Joseph Morris, the corrections-department employee who collected McKeehan's baseline urine sample. Morris testified that McKeehan was nervous and shaky when he arrived to give his sample. Morris asked McKeehan if he was okay, and McKeehan responded that he was "high as hell." McKeehan told Morris that after his morning court appearance, he and his friends had driven around getting high because he knew he needed to provide a baseline urine sample. Morris testified that he was so concerned about McKeehan's condition that he followed McKeehan out of the courthouse to make sure he was not driving. The district court denied McKeehan's plea-withdrawal motion and sentenced him to a presumptive executed sentence of 134 months in prison. This appeal follows.

D E C I S I O N

I.

We begin by identifying the arguments that are properly before this court for review. McKeehan argues that plea withdrawal is appropriate for three reasons: he was under the influence of methamphetamine when he pleaded guilty, the district court inappropriately interjected itself into the plea agreement, and his plea was the result of

coercion. The state notes that McKeehan did not raise the coercion argument as a basis for plea withdrawal in district court, correctly observing that the district court was not asked "to make findings about whether or not [McKeehan] was coerced into accepting the . . . plea deal."

McKeehan's initial plea-withdrawal motion requested withdrawal "because at the time of the plea he was under the influence of drugs, did not understand the proceeding and vaguely remembers being there." In his amended motion, McKeehan additionally asserted that "the court improperly injected itself into plea negotiations/agreement by adding the term of 'no use of any mood altering chemicals' as a condition of the plea agreement." Thus, those two grounds were the only issues litigated and determined at the evidentiary hearing on McKeehan's plea-withdrawal motion. The district court did not consider McKeehan's appellate argument that his "plea was the product of improper coercion."

This court generally does not consider issues that were not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Moreover, an adequate factual record is necessary to resolve McKeehan's coercion argument. *Compare State v. Kaiser*, 469 N.W.2d 316, 319 (Minn. 1991) (stating that "whether or not defendant was coerced cannot be decided without the [district] court first making factual findings relating to the alleged coercion."), *with State v. Newcombe*, 412 N.W.2d 427, 430 (Minn. App. 1987) (allowing appellant to raise a plea-withdrawal argument for the first time on appeal because the relevant facts "were thoroughly aired at the guilty plea hearing"), *review denied* (Minn. Nov. 13, 1987). Here, the record is

inadequate regarding coercion. Even though the district court held an evidentiary hearing on McKeehan's plea-withdrawal motion, because McKeehan did not assert that he was coerced into pleading guilty, the district court did not make factual findings on that issue, and this court cannot make the necessary factual findings on appeal. *See Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) ("It is not within the province of [appellate courts] to determine issues of fact on appeal." (quotation omitted)).

Nor will we allow McKeehan to change his legal theory on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("Nor may a party obtain review by raising the same general issue litigated below but under a different theory."). Doing so would deprive the state of its ability to refute McKeehan's coercion claim by presenting evidence that McKeehan was not coerced. And because the record does not suggest that McKeehan was prevented from raising and fully litigating the coercion issue in district court, remand is unwarranted. *Cf. Kaiser*, 469 N.W.2d at 319 (stating that because the district court denied appellant's request to testify at the evidentiary hearing in support of his coercion claim, the court of appeals should have remanded to the district court "for an evidentiary hearing (at which defendant could testify)").

In sum, McKeehan's coercion argument is not properly before this court. We therefore limit our review to the plea-withdrawal arguments that were raised and determined in district court: McKeehan was under the influence of methamphetamine during the plea hearing and the district court improperly interjected itself into the plea negotiations.

II.

The district court must allow plea withdrawal at any time "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 a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be valid, a guilty plea must be "accurate, voluntary and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

> 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. The voluntariness requirement insures that the guilty plea is not in response to improper pressures or inducements; and the intelligent requirement insures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.

Carey v. State, 765 N.W.2d 396, 400 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Aug. 11, 2009). "A defendant bears the burden of showing his plea was invalid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The validity of a plea is a question of law that we review de novo. *Id.*

McKeehan argues that because he was under the influence of methamphetamine when he agreed to the plea negotiation, he did not have "an intelligent understanding of the consequences of his plea." "A defendant pleads guilty intelligently if he does so knowing and understanding the charges against him, the rights he waives by pleading guilty, and the consequences of his plea." *State v. Aviles-Alvarez*, 561 N.W.2d 523, 526 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). McKeehan did not testify at

the plea-withdrawal hearing, but he submitted an affidavit in support of his motion, attesting that he was under the influence of methamphetamine when he pleaded guilty, that he remembers very little of the plea hearing other than telling his attorney during a recess that he was under the influence of drugs, and that he has "no recollection of the court ordering no use of controlled substances as a requirement of the plea agreement with the State or as conditions of release." The district court found McKeehan's affidavit to be self-serving and lacking credibility. We defer to this credibility determination. *See id.* at 527 (stating that where credibility determinations "are crucial, a reviewing court will give deference to the primary observations and trustworthiness assessments made by the district court").

Moreover, the district court provided detailed, extensive findings to support its determination that McKeehan was not under the influence of methamphetamine when he pleaded guilty. First, the district court described McKeehan's appearance and demeanor during his plea, and compared it to McKeehan's condition when he provided his baseline urine sample later that day. The district court noted that McKeehan was described as nervous, fidgety, tapping his foot, and shaky when he provided his sample. The district court stated:

> Those are behaviors that I did not notice on December 15th during the plea hearing at all. In fact, Mr. McKeehan appeared to me that day as he had on Monday and Tuesday on that trial calendar. There was nothing physically about Mr. McKeehan's behavior or mannerisms or appearance that would indicate to me that [he] was under the influence of any drugs.

Second, the district court discussed McKeehan's assertion that he did not recall what happened during the plea hearing. The court stated:

> What undermines that argument to me is the factual basis that we took on the day of the plea. And specifically when I asked you, Mr. McKeehan, to tell me what happened, you were able to, with some great detail, tell me what happened on the night when you sold the drugs. You identified the person to whom you sold the drugs. Didn't know her name, but you identified her as the person that had been in court. You were able to tell me how much you sold. You were able to tell me that you yourself had tested the meth, so you knew that it was real, I think was the word you used, or that it was—"I knew it was real." Quote, I tested it. I knew it was real, when I asked you if you knew it was meth. I asked you if you had been paid for the drugs, and your response was, "You guys showed the money to the jury yesterday," indicating to me that you had the ability to recall the details of the trial from the day before. Same—you made the same kind of comment about the meth being shown—we had it on the table—the day before; again, indicating to me that you were clear-minded enough to recall details that had happened the day before at trial.

Third, the court pointed out that while the prosecutor described the plea agreement on the record, the microphone picked up McKeehan saying to his attorney, "Did you hear that? If I don't show up . . . ." McKeehan's attorney then asked, "What was that? He didn't hear it." The prosecutor repeated the plea agreement in response. The district court cited this incident to show that McKeehan was attentive during the plea hearing.

Fourth, the court observed that the transcript of the plea hearing made it "abundantly clear" that McKeehan understood the no-use condition. The court explained:

> That particular issue was discussed with Mr. McKeehan on a number of occasions, and he was very well aware of what that

> condition meant, very well aware of it such that he stepped outside, talked to [his attorney] about it, because as soon as it was brought up, he was concerned what it meant, talked to [his attorney] about it, came in, at which time [his attorney] offered to me his opinion of his client's mental state at the time which was that, "He's not under the influence today. That's my opinion. He's clear-minded, but his [drug test] might be positive." [McKeehan's attorney] was probably in the best position to offer that opinion because he had clearly met with Mr. McKeehan on more occasions than I had. But based on that representation, and based on the behaviors that we witnessed from Mr. McKeehan on the previous days, I agreed with that comment that he was clear-minded. That is why I asked Mr. McKeehan to tell me what happened during the drug transaction. Because if he wasn't able to do that, that would have led me to believe there might have been an issue. That's why I asked those types of questions, so I can have Mr. McKeehan speak and tell me. He was able to clearly speak. He was able to clearly recall not only the transaction itself, the people that were involved in the transaction, the amount of meth, the amount of money. He told me how much the money was—how much money was there, and he was able to recall the facts of the trial from the previous day.

And fifth, the district court noted that when it instructed McKeehan to provide his baseline drug test at the end of the hearing, McKeehan told the court that he knew where the testing location was and how to get there.

In conclusion, the district court did not clearly err in finding that McKeehan was not under the influence of methamphetamine during the plea hearing. *See State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996) ("The [district] court's factual findings are subject to a clearly erroneous standard of review[.]"), *review denied* (Minn. Nov. 20, 1996). Because McKeehan was not under the influence of methamphetamine when he accepted

the state's plea offer and pleaded guilty, there is not a manifest injustice requiring plea withdrawal.

III.

The district court has discretion to allow plea withdrawal before sentencing "if it is fair and just to do so. 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 by reason of actions taken in reliance upon the defendant's plea." Minn. R. Crim. P. 15.05, subd. 2. A defendant bears the burden of advancing reasons to support withdrawal. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). The state bears the burden of showing prejudice caused by withdrawal. *State v. Wukawitz*, 662 N.W.2d 517, 527 (Minn. 2003). Although it is a lower burden, the fair-and-just standard "does not allow a defendant to withdraw a guilty plea for simply any reason." *Theis*, 742 N.W.2d at 646 (quotation omitted). Allowing a defendant to withdraw a guilty plea "for any reason or without good reason" would "undermine the integrity of the plea-taking process." *Kim*, 434 N.W.2d at 266. We review a district court's decision to deny a motion to withdraw a guilty plea under the fair-and-just standard for an abuse of discretion, reversing only in the "rare case." *Id.*

McKeehan argues that it is fair and just to allow plea withdrawal because "courts have no legitimate interest in obtaining guilty pleas . . . from defendants who are high on illegal drugs." But as discussed in section II of this opinion, the record refutes McKeehan's argument that he was under the influence of methamphetamine when he pleaded guilty. Thus, McKeehan fails to establish a reason for plea withdrawal.

Moreover, the district court correctly reasoned that the state will be prejudiced if McKeehan is allowed to withdraw his plea. McKeehan pleaded guilty on the third day of his jury trial, during which two confidential witnesses for the state moved the district court to prohibit their testimony. The district court soundly reasoned that the state could be substantially prejudiced depending on its ability to locate and subpoena the reluctant witnesses for a new trial. *See Kaiser*, 469 N.W.2d at 320 (stating that it would be "an extremely rare case where [an appellate court] would reverse the [district] court's . . . refusal to allow a withdrawal under the 'fair and just' standard" where defendant's guilty plea was entered in the middle of a jury trial after complainant had testified and the state had nearly completed its case). McKeehan argues that because "the state had already completed trial preparation . . . resuming another trial would not have been overly burdensome." That argument trivializes the time and expense associated with jury trials and is precisely why defendants are not allowed to withdraw guilty pleas for any reason. *See Kim*, 434 N.W.2d at 266 ("If a guilty plea can be withdrawn for any reason or without good reason at any time before sentence is imposed, then the process of accepting guilty pleas would simply be a means of continuing the trial to some indefinite date in the future when the defendant might see fit to come in and make a motion to withdraw his plea." (quotations omitted)).

In sum, the district court did not abuse its discretion by denying McKeehan's motion to withdraw his guilty plea under the fair-and-just standard.

IV.

In his pro se supplemental brief, McKeehan argues that "[t]he court erred by interjecting [itself into] plea negotiations."

"The role of the district court during plea negotiations is to determine whether a proffered plea bargain is appropriate and to ensure that the defendant has not been improperly induced to plead guilty." *Anderson v. State*, 746 N.W.2d 901, 905 (Minn. App. 2008). "It is . . . reversible error for the district court to accept a guilty plea that results from the court's impermissible participation in plea negotiations." *Id*. "It is improper for a district court to offer the defendant an anticipated sentencing result that is not part of an existing agreement between the defendant and the prosecutor." *Melde v. State*, 778 N.W.2d 376, 378 (Minn. App. 2010). But the supreme court has recognized that "[i]nevitably the judge plays a part in the negotiated guilty plea. His role is a delicate one, for it is important that he carefully examine the agreed disposition, and it is equally important that he not undermine his judicial role by becoming excessively involved in the negotiations themselves." *State v. Johnson*, 279 Minn. 209, 216 n.11, 156 N.W.2d 218, 223 n.11 (1968) (quotation omitted).

McKeehan argues that the district court became "excessively involved in the negotiations themselves" by imposing the conditions of no use of mood altering chemicals and random drug testing. We have reversed district courts that directly promise a defendant a particular sentence in exchange for a guilty plea. *See, e.g.*, *Melde*, 778 N.W.2d at 379 (holding that the district court impermissibly injected itself into the plea negotiations when it told the defendant that it would impose a 46-month executed

sentence if he affirmed his guilty plea after the court rejected the plea agreement); *State v. Anyanwu*, 681 N.W.2d 411, 415 (Minn. App. 2004) (holding that the district court acted impermissibly when it promised and gave the defendant a 210-month sentence); *State v. Vahabi*, 529 N.W.2d 359, 360-61 (Minn. App. 1995) (holding that the district court impermissibly injected itself into the plea negotiations when it promised a noncriminal disposition in return for a guilty plea and restitution paid in full within a year); *State v. Moe*, 479 N.W.2d 427, 429 (Minn. App. 1992) (holding that the district court impermissibly injected itself into the plea negotiations when it offered the defendant a more lenient sentence in exchange for cooperation with the police), *review denied* (Minn. Feb. 10, 1992).

But in this case the district court did not promise a particular sentence. At most, the court imposed additional conditions on which the agreed-upon sentence was contingent. McKeehan offers no authority or argument for the proposition that imposing a condition of release pending sentencing amounts to excessive involvement in the plea negotiations under the law. We therefore discern no reversible error. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) ("An assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." (quotation omitted)), *aff'd*, 728 N.W.2d 243 (Minn. 2007).

Affirmed.