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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2425**

State of Minnesota,
Respondent,

vs.

John Andrew Babey,
Appellant.

**Filed July 15, 2008
Affirmed
Shumaker, Judge**

Dakota County District Court
File No. K9-05-3415

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lisa Lodin Peralta, Joseph S. Friedberg, Joseph S. Friedberg, Chartered, Suite 320, Fifth Street Towers, 150 South Fifth Street, Minneapolis, MN 55402; and

Bruce Rivers, Rivers & Associates, P.A., 100 North Sixth Street, Suite 280B, Minneapolis, MN 55403 (for appellant)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant pleaded guilty to first-degree criminal sexual conduct. Before the district court accepted his plea, appellant moved to withdraw it for various reasons. The court denied the motion, and appellant argues on appeal that the court thereby abused its discretion and committed reversible error. We find no abuse of discretion, and we affirm.

FACTS

In Apple Valley, 11-year-old C.M. conducted a neighborhood dog-walking business. One of her customers was appellant John Andrew Babey. C.M. walked his dog.

When the police learned of an allegation that Babey had sexual contact with C.M. in his home, two Apple Valley police investigators went to his home to interview him. They did not arrest him, and they told him that he was not under arrest. He agreed to a recorded interview.

During the interview, Babey stated that he knew C.M. from the neighborhood and that, for a time, she walked his dog “like everyday.” He indicated that C.M. came into his house from time to time, sometimes alone, sometimes with a brother, and sometimes with another girl. He described C.M.’s conduct when she was alone with him. She hugged him, “lap danced . . . , started moving and gyrating,” and “started French kissing” with her tongue. He did not stop her or push her off, even though he was shocked at such aggressive behavior from an 11-year-old. One time C.M. “damn near just tore her own

clothes right off” right in front of [him],” and he placed his mouth on her chest and left a mark by her breast.

On one occasion, C.M. “took her own clothes off” and laid on Babey’s bed. He admitted that he licked her vagina, saying, “Basically I just licked it a couple times and then she kinda pushed me away and that was it.” “But,” he qualified, “there was never any penetration or anything. It was on the surface.” He also acknowledged that he rubbed the outside of her vagina “a few times and that was about it,” and that C.M. touched his penis “[o]nce or twice maybe.”

After discussing these sexual contacts, one of the investigators asked: “Of all the things we talked about, is there anything else you think we should know about that maybe I haven’t asked the question or you avoided answering specifically?” Babey responded, “I’ve tried to be as honest as possible.”

The state later charged Babey with one count of first-degree and one count of second-degree criminal sexual conduct. At a contested omnibus hearing, Babey moved to suppress the police interview. The district court denied the motion and set the case for trial.

On the day trial was to begin, Babey’s defense attorney, Anthony Ho, told the court that Babey would plead guilty to criminal sexual conduct in the first degree and that the state would dismiss the other charge and not seek an aggravated sentence. Babey acknowledged the contents of his petition to plead guilty and was questioned by the court, Ho, and the prosecutor about his understanding of his rights and the essential facts of the charge to which he pleaded guilty. At the conclusion of the proceeding, the court

ordered a presentence investigation and deferred acceptance of Babey's plea until sentencing.

Before the sentencing, Babey fired Ho; hired new counsel, Bruce Rivers; and moved to withdraw his plea. The court held an evidentiary hearing on the motion. Babey testified that he felt pressured into pleading guilty, that Ho was not prepared to go to trial and was hostile toward him, and that Ho failed to adequately investigate the case and failed to spend sufficient time with him.

The court denied Babey's motion, and this appeal followed.

D E C I S I O N

Babey moved to withdraw his plea of guilty after he entered it but before the district court imposed sentence. He urges that it would be fair and just to permit the withdrawal because he established ineffective assistance of counsel, his plea was coerced, and the state failed to show prejudice if his motion were granted.

Although Babey concedes that the standard for determining whether the court abused its discretion in denying his motion is that of fairness and justice as provided in Minn. R. Crim. P. 15.05, subd. 2, he also asserts that, because the court had not accepted his plea, Minn. R. Crim. P. 15.04, subd. 3(2)(b), must be considered as well.

Rule 15.04, subdivision 3(2), provides that the district court may accept a plea agreement "when the interest of the public in the effective administration of justice would thereby be served." One of the factors the court is to consider in deciding whether to accept a plea agreement is "[t]hat the defendant has acknowledged guilt and shown a willingness to assume responsibility for the criminal conduct." Minn. R. Crim. P. 15.04,

subd. 3(2)(b). Babey contends that the evidence adduced at the hearing on the motion to withdraw the plea showed that he had not acknowledged his guilt and had not shown a willingness to assume responsibility for the crime.

Considering the entire record, as discussed more fully below, Babey's argument ignores the full context of the plea proceedings. At the time he entered his plea, he clearly acknowledged the criminal conduct underlying the charge of which he was convicted. However, he later denied that he touched C.M. in any sexual or otherwise inappropriate way, and he stated that his admissions to the police and during the plea interrogation were simply not true. Thus, the situation here is one in which a defendant, under oath, fully and clearly acknowledges his guilt and later retracts that acknowledgement. Although it is appropriate that the court consider the retraction and the reasons for it, the controlling rule is Minn. R. Crim. P. 15.05, subd. 2.

A criminal defendant does not have an "absolute right to withdraw a plea of guilty" once it has been entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). But before sentencing, the court in its discretion may allow a defendant to withdraw his plea "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2.¹ In exercising its discretion, the court must give "due consideration" to (1) the reasons the defendant gives for the withdrawal, and (2) any prejudice the prosecution would experience if the motion were granted. *Id.*

¹ In addition, a defendant may withdraw a guilty plea before or after sentencing upon a showing of manifest injustice. Minn. R. Crim. P. 15.05, subd. 1.

“The defendant bears the burden of proving that there is a ‘fair and just reason for withdrawing his plea.’” *Farnsworth*, 738 N.W.2d at 371 (citation omitted). “Although [the fair and just] standard is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea ‘for simply any reason.’” *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quoting *Farnsworth*, 738 N.W.2d at 372). Even though the court’s ruling on a motion to withdraw a plea of guilty is discretionary, the court does not have leeway to grant the motion “without good reason,” otherwise the plea process “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.” *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989) (quotation omitted).

If a plea of guilty were truly the product of ineffective assistance of defense counsel, or if the plea was truly coerced, or if reliable facts indicated that the defendant was not guilty of the crime, there would be good reason for the withdrawal of the plea, and it would be fair and just for the court to allow the withdrawal. Doing so, the court would not thereby abuse its discretion. But, recognizing that a defendant must prove a good reason for withdrawal of the plea and that the defendant fails to carry his burden merely by alleging an ostensibly good reason, the district court must make credibility assessments and must weigh the evidence, in light of the fair-and-just standard, to determine whether a good reason truly exists. The court here engaged in the requisite process by holding an evidentiary hearing on the motion.

Ineffective Assistance of Counsel

A plea of guilty is considered involuntary and, therefore, invalid if it is the product of the ineffective assistance of defense counsel. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). Ineffective assistance is that which falls below an objective standard of reasonableness and which produces an outcome that, but for the errors, would have been different. *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). Babey contends that, had he received effective assistance from Ho, he would have opted for a trial. Ho's alleged ineffectiveness lay in his lack of adequate preparation for trial and his failure to investigate a neighbor who had information about C.M. and was allegedly aware of C.M.'s reputation for untruthfulness.

At the evidentiary hearing on Babey's motion to withdraw his plea, Ho testified. He indicated that, since 1995, 70% of his practice has been devoted to criminal defense and that, over the years, he has handled hundreds of felony cases, including many cases involving charges of criminal sexual conduct. As to this matter, he testified that he conducted only a minimal investigation into C.M.'s background and that he did not believe a neighbor, whom Babey mentioned, had any relevant evidence for the case. He related to Babey the difficulty of dealing with Babey's detailed confession that would be presented at trial. By the day of trial, Ho was prepared to try the case, but Babey had gone back and forth as to whether to go to trial or plead guilty. Ho and Babey spoke at length on the day set for the trial and again Babey alternated between wanting to resolve the matter and going to trial. Twice Ho allowed Babey and his wife to talk outside Ho's

presence and to review Babey's options. Ho testified that he also explained the plea agreement, the nature of the presentence investigation, and the sentencing if Babey decided to plead guilty.

Babey testified that he met with Ho "only about three times" in Ho's office but that Ho did send the case file to him. He stated that for court appearances Ho did not prepare him ahead of time and that he wanted Ho to send an investigator to talk to the neighbors but Ho did not do so. Babey claimed that one neighbor in particular knew C.M. and knew her reputation for untruthfulness, more specifically, that C.M. "was a game player." When Ho said he never contacted the neighbor, Babey fired him.

Babey also testified that, in spite of his confession, he wanted a trial but Ho was hostile and wanted only a plea bargain. He said he pleaded guilty, waived his rights, and admitted the crime because he felt pressure from Ho, was anxious, and had high blood pressure. Babey stated that he told Ho dozens of times that he wanted a trial. In his testimony, Babey also noted that there were inconsistencies in the way in which C.M. described the interior of his house and he thought an investigator should look into that.

On cross-examination, the prosecutor asked Babey about a part of his confession:

PROSECUTOR: I believe that even now during your plea you agreed you only licked the vaginal area once; but when you talked to the police officer you told them there were more incidents than that, isn't that right?

BABEY: Yes. I said what they wanted me to or else.

At the conclusion of the hearing the court denied the motion to withdraw, citing the evidence presented at the hearing and Babey's testimony during his plea.

Babey's plea testimony is in stark contrast to that which he gave in the motion hearing. Babey's answers to questions and his own statements during the plea proceeding were clear and unequivocal. He testified that he had "a number of opportunities" to discuss with Ho the charges against him and his rights; he reviewed the complaint, all police reports and the court's pretrial orders, and he had opportunities to "go over them completely"; he acknowledged each of his trial rights and that, by pleading guilty, he was giving them up; he understood that there would be a presentence investigation and a psychosexual evaluation, and that he could argue for a probationary sentence; and he stated that no one forced him or threatened him to get him to plead guilty. Babey then admitted that he engaged in oral sex with C.M., specifically using his "tongue to lick her vaginal area" and that the act took place in his bedroom. He also stated that he had been fully advised as to the case by Ho and that he was satisfied with Ho's representation. In response to the inquiry of whether he was "making any claim of innocence regarding this offense," Babey said, "No."

From Babey's own plea testimony, it appears that Ho thoroughly discussed the case with him, adequately advised him of his rights, and put no pressure on him to plead guilty. Babey has not shown how the representation respecting those matters was ineffective.

Ordinarily, competent defense preparation would involve locating and talking to persons with relevant information. Babey claims that a neighbor knew that C.M. was a "game player" and that the neighbor's testimony would be relevant to the defense. Ho did not talk to the neighbor because he found no relevance in what she might say.

Considering that the prosecution would present at trial Babey's confession that he had oral sex with C.M., a reasonable defense lawyer could conclude that the victim's reputation is irrelevant, for the mere fact that the victim is a "game player" does not mean she cannot also be a crime victim. Ho's decision not to talk to a person who apparently could say only that C.M. was a "game player" was a judgment call of the type defense attorneys must repeatedly make. Babey has not shown that Ho's representation in this regard was ineffective.

Babey also notes that there was an inconsistency in C.M.'s description of his home and that Ho should have had his investigator come to his home to verify it. But the record reveals no inconsistencies in Babey's confession or apparently in C.M.'s report of the crime. An inexact description of the location of the crime would likely carry little weight in an attempt to impeach C.M.'s credibility. We find no ineffective assistance as to this issue.

On two occasions, one of which involved testimony under oath, Babey admitted that he had oral sex with C.M. Later, also under oath, he changed his mind and said he never had any sexual contact with C.M. This contradiction presented the court with the need to make a credibility assessment. It did so and believed Babey's admissions.

On one occasion under oath, Babey said his lawyer competently represented him. Later, also under oath, he changed his mind and contended that his lawyer did not effectively represent him. Again, the court had to determine which was credible, Babey's original testimony or his recanted testimony. The court believed the former.

The record amply and unequivocally supports the court's credibility determinations. We defer to a court's credibility assessments when they are supported by the record. *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006).

Coercion

“The voluntariness requirement insures that the guilty plea is not in response to improper inducements or pressures.” *State v. Wukawitz*, 662 N.W.2d 517, 522 (Minn. 2003).

Babey at first testified that he was not coerced in any way to enter a plea. Then he said he was coerced. When credibility determinations are crucial to the issue of the propriety of a plea withdrawal, we defer “to the primary observations and trustworthiness assessments made by the district court.” *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997), *review denied* (Minn. June 11, 1997); *see also State v. Lopez*, 379 N.W.2d 633, 638 (Minn. App. 1986) (holding that the district court is in the best position to judge credibility when deciding if a defendant should be allowed to withdraw a plea of guilty), *review denied* (Minn. Feb. 14, 1986).

The court here concluded that Babey failed to show that his plea was coerced in any way. The record supports that determination.

Acknowledgement of Guilt

Babey contends that the court abused its discretion by accepting his plea of guilty because he never acknowledged that he was guilty. *See* Minn. R. Crim. P. 15.04, subd. 3(2)(b) (indicating that the court can consider the defendant's acknowledgment of guilt when accepting a plea agreement).

Before Babey pleaded guilty, the court was aware of his confession in which he admitted licking C.M.'s vagina. Then, at the plea hearing, this exchange occurred between the prosecutor and Babey:

PROSECUTOR: Mr. Babey, did you use your tongue to lick C.M.'s vaginal area?

BABEY: Yes.

PROSECUTOR: Did that occur in the bedroom of your residence in Apple Valley?

BABEY: Yes.

PROSECUTOR: Did that happen once or more than once?

BABEY: I only recall once.

And prior to that exchange, at the plea hearing, Ho asked Babey questions about the charge:

HO: Did you have sexual penetration or contact with her in her private areas?

BABEY: Yes.

HO: Would you agree that you had what the complaint refers to as oral sex with this girl?

BABEY: Yes.

HO: You understand that that essentially is what the crime of criminal sexual conduct in the first degree would entail?

BABEY: Yes.

Babey was charged with violating Minn. Stat. § 609.342, subd. 1(a) (2004), making it criminal sexual conduct in the first degree for a person to engage in “sexual penetration” with someone under the age of 13. Minn. Stat. § 609.341, subd. 12(1) (2004), defines “sexual penetration” as “sexual intercourse, cunnilingus, fellatio, or anal intercourse.”

When Babey admitted that he licked C.M.'s vagina, he admitted that he performed cunnilingus on her. He acknowledged his guilt of the charge to which he entered his plea.

Prejudice to the Prosecution

Babey argues that the prosecution failed to show that it would be prejudiced by a plea withdrawal and that the court made no findings in that regard.

Rule 15.05, subdivision 2, requires the court to assess the reasons given by the defendant for withdrawing his plea and any prejudice that would result to the prosecution by such withdrawal. As noted above, a proper exercise of discretion requires a showing of "good reason" for allowing the plea to be withdrawn. *Kim*, 434 N.W.2d at 266. Because Babey failed to show any good reason for a plea withdrawal, it was not necessary that the court reach the issue of possible prejudice to the prosecution.

Affirmed.