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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0741**

Jason Bradley Bartlette,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 20, 2008
Affirmed
Klaphake, Judge**

Polk County District Court
File No. K5-05-402

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Lan Nguyen, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Gregory A. Widseth, Polk County Attorney, 223 East Seventh Street, Suite 101, Crookston, MN 56716 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this postconviction challenge to a 2005 conviction and sentence for first-degree burglary, Minn. Stat. § 609.582, subd. 1(a) (2004), and solicitation of juveniles, Minn. Stat. § 609.494, subds. 1, 2(b) (2004), appellant Jason Bartlette argues that the postconviction court abused its discretion by denying his request to withdraw his guilty plea. He claims that the court improperly imposed executed, rather than stayed, prison sentences after he failed to appear for sentencing, even though his plea agreement allowed the court to do so if he failed to appear for sentencing. Appellant also argues that before imposing executed sentences, the court should have been required to make findings consistent with *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980), which requires a district court to make certain findings before revoking probation. We conclude that the postconviction court did not abuse its discretion by denying appellant's requests because appellant has not shown that his plea was not voluntary or intelligent for purposes of demonstrating manifest injustice in the entry of the plea and because *Austin* does not apply to sentencing determinations. We therefore affirm.

DECISION

A petitioner seeking a postconviction remedy must establish facts that show, by a fair preponderance of evidence, entitlement to relief. Minn. Stat. § 590.04, subd. 3 (2006). This court reviews the denial of a postconviction petition under an abuse-of-discretion standard. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

A defendant does not have an absolute right to withdraw a guilty plea, *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998), and may do so post-sentencing only if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a defendant can show that a guilty plea was not accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A guilty plea is intelligent only if the criminal defendant is aware of the direct consequences of the plea. *Alanis*, 583 N.W.2d at 577.

Appellant claims that the district court violated his plea agreement by imposing executed sentences, rather than stayed sentences, because he failed to appear for sentencing after he was detained in another state for probation violations on a separate offense. By its language, appellant's plea agreement provided for a probationary sentence but "reserved the right to ask the Court to . . . execute the defendant's sentences . . . [i]f the defendant fails to appear for sentencing[.]" Under normal circumstances, a defendant's post-plea but presentencing conduct may not be used as a basis for departing from an agreed-upon sentence without giving the defendant the right to withdraw the guilty plea. *State v. Kunshier*, 410 N.W.2d 377, 379-80 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987); *see State v. Kortkamp*, 560 N.W.2d 93, 95 (Minn. App. 1997) (allowing withdrawal of plea where state failed to keep promise to recommend a certain sentence because of defendant's post-plea behavior); *see also Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979) ("It is well settled that an unqualified promise which is a part of a plea arrangement must be honored or else the guilty plea may be withdrawn."). Where the plea agreement is based on a qualified or conditional promise,

however, the plea is voluntarily and intelligently made. *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007). In *Black*, this court affirmed a postconviction court's denial of an offender's motion to withdraw his guilty plea when the plea was based on a qualified promise to sentence concurrently if no aggravating circumstance occurred between the date of the plea agreement and sentencing. *Id.*

While appellant claims that he did not anticipate a request from the state for an executed sentence at his sentencing hearing, he explicitly agreed to this provision in his plea agreement and at his plea hearing. He points out that the difference between a probationary sentence and an executed prison sentence is "drastic." However, the district court reviewed the plea agreement at the plea hearing; appellant confirmed the details of the plea; and the district court found at sentencing that the plea was "clear" with regard to imposition of an executed sentence under the circumstances present here. We observe no factual basis for diverging from the ruling in *Black*, which upheld a similarly conditional plea agreement. We conclude that the postconviction court did not abuse its discretion in denying appellant's petition seeking to withdraw his plea.

Appellant further argues that before the district court could impose an executed sentence rather than a stayed sentence, the court should have been required to make the findings that are required before revocation of probation. *See State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980) (requiring that before probation revocation, the district court must designate the conditions that were violated, find that the violation was intentional or inexcusable, and find that the need for confinement outweighs the policies favoring probation). Appellant claims that if the state is allowed to negotiate conditional

plea agreements that allow the district court to execute a sentence on a plea agreement that otherwise would call for a probationary sentence, the court should be allowed to execute the sentence only after making *Austin*-like findings.

Appellant's claim ignores that the sentence he received was the result of an agreement and that he received other favorable provisions in exchange for the agreed-upon terms, including dismissal of charges and imposition of a presumptive sentence when there were facts that would have supported an upward durational departure. "The tender of a guilty plea, once accepted by a court, is and must be a most solemn commitment." *State v. Wukawitz*, 662 N.W.2d 517, 526 (Minn. 2003) (quotation omitted). Although the occurrence of a condition allowed the district court to execute, rather than stay, the presumptive sentence, appellant agreed to bear the risk of that occurrence by negotiating the plea that he did. Further, as respondent points out, this issue was not raised to the postconviction court, and appellant may not raise it for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Affirmed.