STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1238

State of Minnesota,
Respondent,

vs.

Calvin King,
Appellant.

Filed August 18, 2009
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. K7-06-199

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

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, St. Paul, MN 55101 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Andrea G. Barts, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

SCHELLHAS, Judge

Following his conviction of second-degree controlled-substance crime, appellant argues that the district court erred in denying his motions to withdraw his guilty plea and for a downward departure from the presumptive sentence. We affirm.

FACTS

The state charged appellant Calvin King with two counts of first-degree controlled-substance crime and one count of felon in possession of a firearm in violation of Minn. Stat. § 152.021, subd. 2(1) (2004) and Minn. Stat. § 624.713, subd. 1(b) (2004). On November 13, 2006, pursuant to a plea agreement, appellant pleaded guilty to an amended count of second-degree possession of a controlled substance. In exchange for appellant's guilty plea, the state agreed to dismiss the remaining charges. The plea agreement provided: "Sentence is capped at guideline sentence, high end of box. Agree to downward departure if change in circumstances." The parties did not specify what they intended by "change in circumstances."

At the plea hearing, when appellant's counsel informed the district court that appellant would plead guilty, the following exchange occurred:

> THE COURT: All right. And, [appellant], do you understand everything that's been said?
> APPELLANT: Yeah I guess. And at the – everything happened and then we come back; right?
> DEFENSE COUNSEL: That's correct.
> APPELLANT: Okay. Yeah.
> THE COURT: And have you had enough time to discuss this case with your attorney?
> APPELLANT: Yes.

> THE COURT: Do you have any questions for me or her at this time?
> APPELLANT: No. She – she said that it's agreed that if. . .
> THE COURT: You may want to be careful what you say on the record.
> APPELLANT: - probation do – it all depends on the – they agree or not, that it still remains open for me to do a downward departure.
> THE COURT: All right.
> DEFENSE COUNSEL: That's correct.
> THE COURT: All right. And if you don't have any further questions, are you prepared to plead at this time?
> APPELLANT: Yeah.

After entering his guilty plea to second-degree controlled-substance crime, defense counsel reviewed the plea petition with appellant as follows:

> DEFENSE COUNSEL: [Appellant], do you recognize this document entitled Petition to Enter a Plea of Guilty in a Felony Case?
> APPELLANT: Yes.
> DEFENSE COUNSEL: In fact, you and I sat down and went through this document; is that correct?
> APPELLANT: Yep.
> . . . .
> DEFENSE COUNSEL: You also understand and we've talked about that if the prosecutor were to proceed in this case and to have a trial, that the burden would be on them to prove these charges against you; is that correct?
> APPELLANT: Yes.
> DEFENSE COUNSEL: And you and I have had numerous discussions about how a trial would operate, who the witnesses would be, who our witnesses would be, and how all of that would occur; is that correct?
> APPELLANT: Uh-huh.
> DEFENSE COUNSEL: Is that a yes?
> APPELLANT: Yes.
> DEFENSE COUNSEL: And you've told me that you do not wish to have a trial, but instead wish to enter this plea of guilty to an amended charge; is that correct?
> APPELLANT: Right.

DEFENSE COUNSEL: And you understand and we've discussed, and it's in the plea petition also, there's a cap on the sentence at the high end of the guideline box; is that correct?
APPELLANT: Yes.
DEFENSE COUNSEL: And you and I have gone through those numbers and you are aware of what those numbers are; correct?
APPELLANT: Right.
DEFENSE COUNSEL: You also are aware that there may be a downward departure in the future, also?
APPELLANT: Yes.
DEFENSE COUNSEL: Okay. And there is some obligations on your part in order to get the benefit of this deal and we've talked about those also; is that correct?
APPELLANT: Yes.
DEFENSE COUNSEL: You must not get any new criminal charges, and to remain law abiding between today's date and the sentencing date?
APPELLANT: Yes.
DEFENSE COUNSEL: You must abide by a No Contact Order that will be issued by the Judge against [C. S.]?
APPELLANT: Yes.
DEFENSE COUNSEL: You must reappear for sentencing and go to any presentence-type court dates?
APPELLANT: Yes.
DEFENSE COUNSEL: In fact, we discussed there would be one on December 20th, a review hearing?
APPELLANT: Yes.
DEFENSE COUNSEL: And you also must appear for sentencing when that is scheduled?
APPELLANT: Yes.
DEFENSE COUNSEL: Do you have any questions for myself or the Court at this time?
APPELLANT: No.

The district court accepted the petition and asked appellant if he had any questions about anything in the petition or "anything that has been said so far" and appellant answered, "No." The district court then asked appellant if he understood all the rights he was giving up, and appellant asked if he could ask "one thing": "Is this plea actually being accepted

now or . . ." The court responded, "I'm not going to accept it," and then added, "But I will accept the plea petition; do you understand that?" Appellant answered, "Yes." The district court stated that it would order a Pre-Sentence Investigation (PSI) but then stopped and said, "maybe not." Defense counsel asked that the court wait to order a PSI. The court then said that there would be a review hearing on December 20 and "at that time, [appellant], we will review the conditions of your release."

According to a March 31, 2008 PSI, the planned review hearing never took place. The PSI reports that on April 23, 2007, a warrant was issued for appellant's arrest "for his failure to contact the Sheriff's Department." Appellant was arrested on the warrant on February 27, 2008, and, according to the PSI, a sentencing hearing was scheduled. In early March 2008, a probation officer attempted to interview appellant at the Ramsey County Law Enforcement Center "without success." Appellant told the officer that he understood that a PSI would not be completed until a review hearing was held, "during which time a plea agreement would be negotiated." Appellant refused to participate in the PSI because the review hearing had not taken place. The PSI reports that appellant represented that the plea agreement was to be determined "based on his assistance with the St. Paul Police Department's Narcotics Unit."

Based on the sentencing worksheet attached to the PSI, appellant had 7 criminal history points, the severity level of the offense was 8, and appellant's presumptive sentence was 108 months' imprisonment with a range of 92-129 months. The PSI states that appellant could qualify as a career offender because he had six or more prior felony

convictions, and probation recommended a top-of-the-box sentence because of "the previously cited aggravating factor."

On April 22, 2008, appellant filed a motion to withdraw his guilty plea, arguing that his plea did not meet the requirement that a plea be "knowingly and understandingly made," and in the conclusion section of his motion, that it was not "voluntary and intelligent." Appellant also filed a motion seeking a "durational sentencing departure."

On April 23, 2008, at the sentencing hearing, appellant argued that he did not understand the plea agreement or "the expectations of him in regards to any departure." He also argued that the state had represented that, depending on cooperation with the sheriff's department, it was "possible" that he could get probation. The prosecutor argued that "the plea agreement is as stated in the PSI" and that "there was an expectation of cooperation and that if the–if law enforcement felt it warranted, they would join the state's motion for the downward departure." The court denied appellant's motion to withdraw his guilty plea.

Regarding his motion for a departure, appellant argued that he "did do what [he] could do" and that he wished it would have been clearer under the agreement what he needed to do. Appellant asked for a departure "for me even participating" with the sheriff's department. He also asked the district court to consider that he spent time in treatment. The district court denied appellant's request for a downward departure and sentenced him to 92 months' imprisonment, the bottom-of-the-box sentence, because appellant gave information to authorities. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying appellant's motions to withdraw his guilty plea and for a downward departure. In his pro se brief, appellant also argues that: (1) appellant's plea was not intelligent because he never stated at the plea hearing that he understood his rights; (2) the district court did not accept the plea agreement at the plea hearing and, thus, the plea was "invalid"; and (3) the district court interjected itself into plea negotiations when it made findings at the sentencing hearing regarding the meaning of the plea agreement.

Withdrawal of Guilty Plea

A criminal defendant does not have an absolute right to withdraw a guilty plea once entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). A defendant may generally withdraw a guilty plea upon a timely motion and proof that withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. But when the defendant moves to withdraw a plea before sentencing, the district court may, in its discretion, allow withdrawal of a guilty plea "if it is fair and just to do so." *Id.*, subd. 2. A defendant has the burden of showing fair and just reasons for withdrawal, and the court must consider both the reasons advanced by the defendant and any prejudice to the prosecution. *Id.*; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

The fair-and-just standard is less demanding than the manifest-injustice standard. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). But the district court may not grant the motion "for any reason or without good reason" before a sentence is imposed because 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." *Kim*, 434 N.W.2d at 266 (quotations omitted). This court reviews denial of a motion to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Appellant argues that withdrawal was fair and just because the prosecutor breached an unqualified promise and because appellant was confused about the plea agreement.

"Although a plea of guilty may be set aside where an unqualified promise is made as a part of a plea bargain, thereafter dishonored, a solemn plea of guilty should not be set aside merely because the accused has not achieved an unwarranted hope." *Schwerm v. State*, 288 Minn. 488, 491, 181 N.W.2d 867, 868 (1970). "The disappointment of receiving a greater sentence than expected is not grounds for withdrawing a guilty plea." *State v. Robinson*, 388 N.W.2d 43, 45 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). An "unrealized impression of the likely sentence" is therefore "no justification for a motion to withdraw" a plea. *Id.* at 46. In *Schwerm*, the defendant argued that he had been induced to plead guilty "because of his belief that he would receive only a 7-year sentence to be served concurrently with another sentence." 288 Minn. at 489, 181 N.W.2d at 867. The supreme court noted that the defendant stated in a letter that he realized the judge "made no commitments" but felt "the prosecuting attorney would, in view of statements made, be willing to agree to, and support, a request for modification of sentence." *Id.* at 490, 181 N.W.2d at 868. The supreme court concluded that the evidence fell "short of showing that the prosecutor made any promissory inducement to

petitioner for a plea of guilty" and showed only that the prosecutor promised to "suggest" a shorter sentence to the judge. *Id.* at 491, 181 N.W.2d at 868. The supreme court noted that "[w]hatever the statements made by the prosecutor in the plea discussions," the record was clear that the defendant's counsel told him that the judge would not be bound, and then concluded that withdrawal was not warranted based on the failure to achieve an "unwarranted hope." *Id.*

In this case, appellant has failed to show any representations regarding a future agreement that rose to the level of an unqualified promise. Appellant argued only that the state represented that a probationary sentence was "possible" depending on cooperation with law enforcement. Like in *Schwerm,* the evidence falls short of showing the prosecutor "made any promissory inducement" for a guilty plea. Appellant's argument demonstrates only an "unrealized impression" of a possible sentence and does not justify withdrawal of a plea.

Appellant also argues that the agreement was vague and that the record demonstrates that he was confused. Authority allowing plea withdrawal where a plea was based on a mistaken understanding of circumstances reflects more concrete mistakes, such as a mutual mistake regarding the presumptive sentence. *See State v. DeZeler*, 427 N.W.2d 231, 234-35 (Minn. 1988) (discussing authority on mistakes and concluding withdrawal was warranted where plea agreement was based on incorrect assumption that presumptive sentence was a stayed sentence). Here, the parties were not mistaken about something concrete underlying the sentence; rather, they left the agreement regarding sentence "open" for changes based on later events. A review hearing was expected, but

the record does not demonstrate that the plea would be renegotiated at the review hearing and does not demonstrate why the review hearing did not take place. Moreover, the record contains no evidence that appellant requested a review hearing when one was not scheduled. The district court did not abuse its discretion in rejecting appellant's argument that withdrawal was warranted based on vagueness and confusion, particularly in light of appellant's criminal history. *See State v. Doughman*, 340 N.W.2d 348, 353 (Minn. App. 1983) ("A reviewing court may weigh a defendant's experience with the criminal justice system when evaluating whether his plea was knowing and intelligent."), *review denied* (Minn. Mar. 15, 1984).

Downward Departure

Appellant argues that the district court abused its discretion when it denied his motion for a downward durational departure. He argues that his cooperation with law enforcement and his participation in a treatment program supported a departure and that the district court abused its discretion in failing to consider these factors.

The district court must order the presumptive guidelines sentence unless "substantial and compelling circumstances" justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Refusal to depart is reviewed for an abuse of discretion and reversal will be warranted only in a "rare" case. *Id.*

The record demonstrates that the district court considered appellant's arguments for departure, and we conclude that the district court did not abuse its discretion in refusing to depart. The district court stated that it imposed a bottom-of-the-box guidelines sentence because appellant gave information to authorities. The district court

determined a departure based on cooperation was not warranted because the cooperation was not considered particularly valuable, noting that the PSI recommended a longer sentence than was imposed because appellant qualified as a career offender. We conclude that this is not the "rare" case that warrants reversal.

Pro Se Brief

Understanding of Rights

Appellant argues that, at the plea hearing, he did not understand his rights. A plea is not valid if it is not accurate, voluntary, or intelligent, and a plea is not intelligent unless the defendant is aware of his rights under the law. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). The rules of criminal procedure provide that a court assess the validity of a plea by asking, with the assistance of counsel, questions to assess the defendant's understanding of the charges and the rights given up by pleading guilty. A list of questions that serve this purpose is included in Minn. R. Crim. P. 15.01, subd. 1, but a court need not follow the list exactly. *See Doughman*, 340 N.W.2d at 351 (concluding that reversal is not warranted where the record "is adequate to establish that the plea was intelligently and voluntarily given").

Appellant argues that the record indicates a lack of understanding because he did not respond in the affirmative when the court asked if he understood his rights. Instead, appellant asked if he could ask "one thing" and then asked if the court was accepting the plea that day. Notably, appellant did not ask questions about his rights at this point or make any statement indicating that he did not understand the rights he was giving up by pleading guilty. Appellant admitted at the plea hearing that he went through the plea

petition with his counsel and signed the plea petition, and the petition addresses numerous rights appellant was waiving by pleading guilty. *See Saliterman v. State*, 443 N.W.2d 841, 844 (Minn. App. 1989) (examining plea petition and record of plea hearing to determine waiver of right to jury trial was accurate, voluntary, and intelligent), *review denied* (Minn. Oct. 13, 1989). The record therefore indicates that appellant understood his plea and the rights he was waiving, particularly given his experience in the criminal justice system. *See Doughman*, 340 N.W.2d at 353 ("A reviewing court may weigh a defendant's experience with the criminal justice system when evaluating whether his plea was knowing and intelligent.").

Acceptance of Agreement

Appellant argues that the district court's delay in accepting the plea supports withdrawal, apparently arguing either that the court determined the plea was invalid when it delayed acceptance or that he had a right to withdraw the plea because the court had not yet accepted the plea. We reject both arguments. The context makes clear that the district court was delaying acceptance of the plea, not rejecting the plea. Delaying acceptance of a plea until after a PSI is proper under Minn. R. Crim. P. 15.04, subd. 3(1), and such a delay does not give the defendant an "absolute right" to withdraw the plea. *State v. Tuttle*, 504 N.W.2d 252, 257 (Minn. App. 1993) (ruling that Minn. R. Crim. P. 15.04, subd. 3(1) gives the district court authority to delay acceptance of a plea and "does not give a defendant an absolute right to withdraw a plea pending acceptance by the court"); *contra State v. McElhaney*, 345 N.W.2d 800, 800-01 (Minn. App. 1984) ("We

believe that a defendant may withdraw his guilty plea prior to the judge's acceptance of the plea.").

Interjection into Negotiations

Appellant argues that the district court inserted itself into negotiations at sentencing. A district court should not participate in plea bargaining and it is "reversible error for the district court to accept a guilty plea that results from the court's impermissible participation in plea negotiations." *Anderson v. State*, 746 N.W.2d 901, 905 (Minn. App. 2008). "Impermissible participation includes such things as the court's direct involvement in the negotiations, its imposition of a plea agreement, or its promise to impose a particular sentence." *Id.* But at the sentencing hearing, the plea agreement was complete and no negotiation occurred. Because there was no negotiation at the sentencing hearing, the district court did not interject itself into negotiations when it made statements regarding the plea agreement. *See State v. Brown*, 709 N.W.2d 313, 319 (Minn. App. 2006) (concluding that state's argument about improper injection into negotiations was really an argument about improper enforcement of a plea agreement).

In sum, we reject appellant's arguments that the prosecutor made an unqualified promise regarding appellant's sentence and that the district court abused its discretion in refusing to depart. Additionally, the record does not support appellant's arguments that his plea was not intelligent, that the plea was invalid, and that the district court interjected itself into plea negotiations. Because the district court did not abuse its discretion, we affirm.

Affirmed.