

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1967**

Jennifer Diane Anderson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 15, 2009
Affirmed
Peterson, Judge**

Sherburne County District Court
File No. 71-K9-04-2314

Stephen P. Doyle, Stephen W. Hance, Doyle Hance, L.L.C., 2 Carlson Parkway, Suite 230, Minnetonka, MN 55447 (for appellant)

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

Kathleen A. Heaney, Sherburne County Attorney, Leah Emmans, Assistant County Attorney, 13880 Highway 10, Elk River, MN 55330 (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of third-degree criminal sexual conduct based on a guilty plea, appellant argues that she misunderstood the outcome of her plea and, therefore, the district court abused its discretion in denying her motion to withdraw her plea. We affirm.

FACTS

Appellant Jennifer Anderson was charged with two counts of first-degree criminal sexual conduct, two counts of third-degree criminal sexual conduct, and one count of depriving another of custodial or parental rights. The charges were based on alleged conduct that involved appellant and a 15-year-old boy for whom appellant had provided foster care. On the third day of trial, during jury selection, appellant pleaded guilty to one count of third-degree criminal sexual conduct. In exchange, the state dismissed the remaining charges. The district court sentenced appellant to 41 months in prison.

Appellant then moved to withdraw her guilty plea. In support of her motion, appellant filed affidavits by herself and her mother, father, stepmother, husband, minister, and a close friend. The affidavits stated that defense counsel had indicated that appellant was unlikely to prevail at trial and that appellant entered her plea on the understanding that she would be sentenced to four months on work release. At the evidentiary hearing, appellant's mother and stepmother testified that they were present at a meeting when defense counsel advised appellant that she would be sentenced to four months on work release if she pleaded guilty. Appellant's father testified about a family meeting during

which appellant made several telephone calls to defense counsel, and defense counsel represented that appellant would be sentenced to four months on work release. But appellant was the only person who actually spoke to defense counsel during the family meeting.

The district court applied the manifest-injustice standard and denied the motion. In appellant's appeal from her conviction, this court determined that appellant's trial counsel provided ineffective assistance by advising appellant to wait until after sentencing to move to withdraw her guilty plea without informing her that a more stringent standard applies to motions to withdraw made after sentencing. *Anderson v. State*, 746 N.W.2d 901, 910-11 (Minn. App. 2008). Because the record showed a likelihood that appellant would have moved to withdraw her plea before sentencing had she been advised that the more lenient, fair-and-just standard would have applied, this court remanded to allow appellant to file a motion to withdraw with instructions that the district court consider the motion under the fair-and-just standard. *Id.* at 911-12.

The district court held an evidentiary hearing on remand. Appellant's husband testified that, on the day of the plea, he heard defense counsel state that appellant would be sentenced to four months on work release if she pleaded guilty. Appellant's mother again testified about the meeting when defense counsel represented that appellant would be sentenced to four months on work release. The district court denied appellant's motion to withdraw her guilty plea, and this appeal followed.

DECISION

A criminal defendant does not have an absolute right to withdraw a plea of guilty once entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). The district court has discretion to allow a

defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving 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. "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 (quotation omitted). The decision whether to allow withdrawal under the fair-and-just standard is committed to the district court's discretion and will not be reversed absent an abuse of that discretion. *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991).

A valid plea of guilty "must be accurate, voluntary, and intelligent." *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). For a plea to be accurate, it must be supported by an adequate factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "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). "To be intelligently made, a guilty plea must be entered after a defendant has been informed of and understands the charges and direct consequences of a plea." *State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

The district court stated:

[Appellant's] family members (Mother, Father, Husband) testified at the hearing that [defense counsel] made promises regarding [appellant's] sentence. They allege that [defense counsel] stated that [appellant] would receive four months in the local jail with work release. None of the witnesses presented at the hearing were present at all of the meetings between [defense counsel] and [appellant] or privy to all of their conversations. Each was only aware of what [defense counsel] told [appellant] on the night before the plea based upon what information [appellant] relayed. That conversation was a telephone conversation between [appellant] and [defense counsel]. [Appellant] would not submit to cross-examination nor facilitate [defense counsel's] testimony at the hearing. The Court does not find that the affidavits of [appellant's] witnesses are credible. These witnesses claim to have previously supported [appellant's] decision to lie under oath.^[1] Each is strongly motivated to see that [appellant] is permitted to withdraw her plea.

The Court finds that the State's offer of a plea to Count Four of the complaint rather than Count One [a potential twelve year prison sentence] is a sufficient inducement to explain why [appellant] chose to plead guilty on the third day of jury selection rather than [appellant's] proffered reason that she lied under oath and only plead[ed] guilty because she was told to lie, was promised a particular sentence and was apparently told her answers to the questions asked at the plea would not really matter.

The Court finds that [appellant] did not prove by a preponderance of the evidence that a withdrawal of her plea is fair and just.

¹ In seeking to withdraw her guilty plea, appellant claimed in the district court that even though she had always maintained that she was innocent, after a meeting with her family members, her best friend, and her minister, she decided to plead guilty to take advantage of the favorable plea offer that had been communicated to her by her attorney. Appellant acknowledges that she understood that she would have to lie to enter a guilty plea and contends that, at the meeting with her family and friends, the focus was on the moral dilemma of an innocent person pleading guilty.

Appellant argues that the district court erred in denying her motion to withdraw her plea when she presented undisputed evidence that defense counsel had convinced her that she would receive a four-month work-release sentence if she pleaded guilty. *See Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979) (stating that when an unqualified promise is part of a plea arrangement, the promise must be honored or the guilty plea may be withdrawn).

Appellant's argument assumes the credibility of the evidence that she submitted. But it was the district court's role to determine the credibility of the witnesses who submitted affidavits and testified for appellant. *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997) (stating that when credibility determinations are crucial in deciding whether to permit plea withdrawal, we defer "to the primary observations and trustworthiness assessments made by the district court"), *review denied* (Minn. June 11, 1997); *State v. Lopez*, 379 N.W.2d 633, 638 (Minn. App. 1986) (stating that the district court is in the best position to judge credibility when deciding if a defendant should be allowed to withdraw a guilty plea), *review denied* (Minn. Feb. 14, 1986). The district court stated valid reasons for finding that the affidavits and testimony of appellant's witnesses were not credible, and we defer to that assessment.

Appellant relies on *State v. Loyd*, 291 Minn. 528, 531, 190 N.W.2d 123, 125 (Minn. 1971), in which the supreme court held that a defendant must be allowed to withdraw a plea when defense counsel had represented that if the district court did not impose the recommended sentence, the defendant would be allowed to withdraw the plea. There is no evidence that defense counsel made such a representation in this case.

Appellant also relies on *State v. Benson*, 330 N.W.2d 879 (Minn. 1983). *Benson* is distinguishable in that the reason for allowing plea withdrawal was a misunderstanding about the defendant's criminal-history score, which resulted in an incorrect determination of the presumptive sentence. 330 N.W.2d at 880.

Citing the district court's reference to appellant's decision to exercise her Fifth Amendment right to not testify and her decision to not waive the attorney-client privilege and permit defense counsel to testify, appellant argues that the district court was biased against her. The district court's comments do not indicate a bias against appellant but rather address appellant's failure to meet her burden of proof.

Appellant incorrectly argues that this court determined the credibility of her witnesses in the previous appeal. This court accepted only the unchallenged evidence that defense counsel advised her to wait until after sentencing to move to withdraw her plea. *Anderson*, 746 N.W.2d at 909-10. The evidence presented by appellant that she was promised a four-month workhouse sentence was contradicted by her testimony at the plea hearing that she understood that the state would be asking for a prison sentence, that there were no sentencing guarantees, that she would not have the right to withdraw her plea if the district court sentenced her to prison, and that the possibility existed that she could be sentenced to 48 months in prison.

The district court did not abuse its discretion in denying appellant's motion to withdraw her plea under the fair-and-just standard.

Affirmed.