FILED

05/29/2018

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 17-0307

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 131N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL MAROZZO,

Defendant and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DC-2015-92
Honorable Matthew Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Daniel Marozzo, self-represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Madison L. Mattioli, Assistant Attorney General, Helena, Montana

Marcia Jean Boris, Lincoln County Attorney, Libby, Montana

Submitted on Briefs: May 16, 2018

Decided: May 29, 2018

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Daniel Marozzo (Marozzo) appeals from the April 6, 2017 order from the Nineteenth Judicial District Court, Lincoln County, denying his motion to withdraw his guilty pleas. We affirm.

¶3 On November 17, 2015, Marozzo was charged with felony DUI (fourth offense), and misdemeanor driving while license suspended or revoked in DC 15-92. On March 3, 2016, Marozzo was charged with felony criminal endangerment, felony DUI (fifth offense), misdemeanor driving while license suspended or revoked, misdemeanor failure to show proof of liability insurance, and fleeing from peace officer in DC 16-22. During this time, charges were pending in Butte-Silver Bow County, against Marozzo for felony DUI, misdemeanor habitual traffic offender, and misdemeanor driving while license is suspended or revoked. Marozzo was sentenced in the Silver Bow County matter on April 21, 2016.

¶4 On May 2, 2016, Marozzo entered into an Acknowledgment and Waiver of Rights and Plea Agreement in both DC 15-92 and DC 16-22. The Plea Agreement provided Marozzo will plead guilty to felony DUI in DC 15-92 and felony criminal endangerment

in DC 16-22. Upon entry of a guilty plea, the State would dismiss with prejudice all remaining charges and withdraw designation as a persistent felony offender (PFO). The Plea Agreement further provided Marozzo and the State would jointly recommend imposition of a five-year commitment to the Department of Corrections on each offense to run concurrently with Marozzo's sentence from Silver Bow County, and recommended Marozzo receiving credit for the 140 days of time he had already served on these offenses. Pursuant to the Plea Agreement, Marozzo appeared with his counsel and entered guilty pleas to felony DUI in DC 15-92 and felony criminal endangerment in DC 16-22. At sentencing on May 9, 2016, the District Court followed the joint recommendation.

¶5 On November 3, 2016, Marozzo, appearing pro se, filed a motion to withdraw his guilty pleas asserting his sentence in DC 15-92 and DC 16-22 would run concurrent with the Silver Bow County sentence of thirteen months with five years suspended and his attorney advised him if he rejected the plea agreement, the State was going to pursue PFO designation. Based on Marozzo's representations at the change of plea hearing, the District Court denied the motion in regard to the PFO assertion. The District Court indicated Marozzo had not provided any basis that his sentence violated the Plea Agreement. Marozzo amended his motion to withdraw his guilty pleas. The District Court denied the amended motion on the basis Marozzo failed to present anything new in support of his motion. It is from this order Marozzo appeals.

¶6 We review a district court's denial of a motion to withdraw a guilty plea de novo, reviewing the district court's underlying factual findings to determine if they were clearly

erroneous and its interpretation of the law and application of facts thereto for correctness. *State v. Swensen*, 2009 MT 42, ¶ 9, 349 Mont. 268, 203 P.3d 786 (citations omitted).

¶7 Pursuant to § 46-16-105(2), MCA, a court may, within one year after judgment becomes final, permit a defendant to withdraw a guilty or nolo contendere plea upon a showing of good cause. Upon a review of the record herein, Marozzo has failed to establish good cause. We reject Marozzo's argument that he did not understand or receive the sentence as set forth in the Plea Agreement. The District Court engaged in a thorough colloquy with Marozzo at the change of plea hearing and Marozzo fully understood the sentence for which he bargained:

> THE COURT: All right. The agreement is that you will get five years commitment to the Department to be served concurrently with each other and Defendant's sentence out of Silver Bowe [sic] County. You get credit for time served, fined $5,000 in DC 15-92, is that your understanding?
>
> MR. MAROZZO: Yes, Your Honor.

Marozzo received the exact sentence for which he bargained including withdrawal of PFO designation, dismissal with prejudice of the remaining charges, credit for time served, and concurrence with the Silver Bow County matter. Furthermore, based on the record, the State did not impermissibly threaten Marozzo with PFO designation. If Marozzo rejected the Plea Agreement, it was within the State's discretion to seek PFO designation. We conclude the District Court's factual findings were not clearly erroneous and its interpretation of the law and application of the facts thereto were correct.

Marozzo, for the first time on appeal, raises that he was suffering from a mental disease or defect when he entered into the Plea Agreement. It is "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Whalen*, 2013 MT 26, ¶ 37, 368 Mont. 354, 295 P.3d 1055. We conclude Marozzo has waived this argument as he raises this issue for the first time on appeal. Nevertheless, Marozzo's assertion he is suffering from mental disease or defect is in direct contradiction to the representations he made during the colloquy that he was not under the effect of any kind of illness and was changing his plea willingly, voluntarily, and intelligently.

¶8 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶9 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER