DA 19-0511

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 29N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEITH SCOTT STRECKER,

Defendant and Appellant.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Powell, Cause No. DC-18-01
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Trevor Carlson, Carlson Law, PLLC, Great Falls, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Patrick J. Moody, Assistant Attorney General, Helena, Montana

Kathryn McEnery, Powell County Attorney, Deer Lodge, Montana

Submitted on Briefs: December 30, 2020

Decided: February 9, 2021

Filed:

Clerk

Justice Laurie McKinnon 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 Keith Scott Strecker appeals a judgment from the Third Judicial District Court, Powell County, denying Strecker's motion to withdraw his nolo contendere plea and imposing a sentence of five years to the Montana Department of Corrections with two years suspended. We affirm.

¶3 On April 3, 2017, while serving as an inmate at Montana State Prison (MSP), Strecker assaulted Correctional Officer Scheett (Scheett). Scheett was distributing laundry items to Strecker's unit when Strecker threw a laundry loop at him. When Scheett entered Strecker's cell to handcuff him, Strecker hit Scheett twice in the face. Scheett instructed him to stop resisting, but Strecker grabbed Scheett by his shirt and the two struggled, falling to the floor. Additional guards arrived to help control the situation. Scheett was evaluated by medical staff, who reported he had long scratches on the back of his head and neck, and other minor abrasions.

¶4 On January 3, 2018, the State charged Strecker with Assault on a Peace Officer or Judicial Officer, a felony, in violation of § 45-5-210, MCA (2015). On June 8, 2018, after acknowledging he thoroughly reviewed the charge against him, Strecker pled nolo contendere pursuant to an agreement, which Strecker and his then counsel signed. The

agreement provided Strecker understood he could persist in his plea of not guilty and included an allocution section, which had the words "no contest" written in. Strecker entered his nolo contendere plea on June 12, 2018, and was found guilty of Assault on a Peace Officer or Judicial Officer. During the plea colloquy with the District Court, Strecker was reminded that in signing the agreement he was indicating he understood he was pleading nolo contendere and would be adjudicated as if he had pled guilty. Strecker indicated he understood his options; the rights he was waiving by pleading nolo contendere; and that he was not induced to enter his plea by use of force or threat. Strecker explained that he was taking some medication but confirmed he understood the charges and consequences of his plea. The District Court concluded Strecker had received the advice of counsel; he understood his rights; he was not suffering from a mental disability or under the influence of drugs; he was competent to aid in his defense; and that he had voluntarily entered his plea.

¶5 At the sentencing hearing on July 10, 2018, Strecker indicated he wished to withdraw his plea and asked for new counsel. The District Court ordered new counsel to be appointed by the Office of the Public Defender on September 4, 2018. On November 30, 2018, Strecker filed a motion to withdraw his nolo contendere plea alleging the District Court erred in failing to determine whether he was under the influence of drugs and whether he suffered from a mental disability. To support his motion to withdraw, Strecker submitted a psychological evaluation from 1991, which stated he was a slow learner, but nonetheless had graduated from high school. The evaluation also stated there was little indication his low skill level was the result of a

learning disability. In the motion to withdraw, Strecker alleged his previous counsel failed to advise him that a nolo contendere plea had the same effect as a guilty plea. On December 18, 2018, the District Court requested Strecker's previous counsel to respond within 30 days by affidavit or other sworn testimony to the allegations of ineffective assistance of counsel.

¶6 Strecker's previous counsel responded, by affidavit, stating he spent numerous hours ensuring Strecker understood the effect of the plea and the rights given up as a result. He indicated that Strecker was diligent in asking about issues he did not understand and was clear in his understanding of what was occurring during their meetings and at the hearing. During the evidentiary hearing held April 16, 2019, on Strecker's motion to withdraw, Strecker altered his position regarding his previous counsel when he denied having any memory of the colloquy with the District Court or discussing the evidence with his attorney. MSP provided evidence of Strecker's medications, including those Strecker was prescribed at the time he entered his plea, which indicated that these medications would not have affected Strecker's mental state when he entered his plea. Relying on the colloquy and Strecker's inconsistent statements at the evidentiary hearing, the District Court denied the motion to withdraw the plea. The District Court further held Strecker failed to meet his burden in showing his plea was involuntary. Strecker appeals.

¶7 Strecker first asserts his nolo contendere plea was involuntary. When accepting a plea, the court must ensure the defendant understands the nature of the offense he is pleading guilty to, the maximum and minimum penalties for that offense, as well as the

rights he is foregoing should he plead guilty. *See generally* § 46-12-210(1), MCA. This Court has held "it is well-settled legal principle that a guilty plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant." *State v. Radi*, 250 Mont. 155, 159, 818 P.2d 1203, 1206 (1991) (citing *North Carolina v. Alford*, 400 U.S. 23, 91 S. Ct. 160 (1970)). Upon a showing of good cause, a defendant may withdraw his plea of guilty or nolo contendere and substitute a plea of not guilty. Section 46-16-105(2), MCA. An involuntary guilty plea constitutes good cause supporting withdrawal of a plea. *State v. Peterson*, 2013 MT 329, ¶ 22, 372 Mont. 382, 314 P.3d 227. "While voluntariness is a legal conclusion not entitled to a presumption of correctness, the underlying facts that no threats, misrepresentations, or improper promises occurred are facts entitled to a presumption of correctness." *State v. Warclub*, 2005 MT 149, ¶ 32, 327 Mont. 352, 114 P.3d 254. To prove a plea was involuntary, the appellant must point to objective proof in the record. *State v. Hendrickson*, 2014 MT 132, ¶ 14, 375 Mont. 136, 325 P.3d 694. Any doubt that a plea is not voluntary should be resolved in the defendant's favor. *Hendrickson*, ¶ 14.

¶8 Strecker asserts he suffers from a mental disability and the District Court did not properly inquire into his cognitive functions prior to accepting his plea. This Court has held that a district court errs when it fails to follow up on potential issues raised by a defendant that would affect voluntariness. *See generally Warclub*, 2005 MT 149. Here, after some inquiry, and after Strecker indicated he was taking medication, there was no reasonable basis for the District Court to be concerned or follow up with additional inquiry. At the evidentiary hearing on Strecker's motion to withdraw, the District Court

relied upon interrogatories and testimony from medical professionals indicating that Strecker's medications would not have affected his understanding of the nature of the proceeding when he entered his plea. There was no indication in Strecker's medical evaluation that his lower cognitive level was the result of a mental disability. The record is replete with numerous instances in which Strecker demonstrated he comprehended the proceedings and knowingly and voluntarily participated. Additionally, the affidavit from Strecker's previous counsel established that Strecker was fully aware of the proceedings and understood the plea and its consequences. The District Court correctly concluded that Strecker voluntarily entered his plea.

¶9 Strecker also argues he received ineffective assistance of counsel. "Ineffective assistance of counsel can constitute good cause to withdraw a guilty plea." *State v. Terronez*, 2017 MT 296, ¶ 28, 389 Mont. 421, 406 P.3d 947 (citing *State v. Valdez-Mendoza*, 2011 MT 214, ¶ 14, 361 Mont. 503, 260 P.3d 151). The District Court relied upon the plea agreement, the affidavit from Strecker's previous counsel, its colloquy with Strecker, and Strecker's statements made during the evidentiary hearing, when it determined Strecker's plea was voluntary and there was not good cause to allow its withdrawal. Nothing in the record indicates that Strecker did not receive adequate advice from his previous counsel or that Strecker did not understand the plea agreement or the consequences that would result from it.

¶10 Strecker also asserts he received ineffective assistance of counsel from his new attorney when he failed to object to the State's introduction of his previous counsel's affidavit. Strecker argues the affidavit was heavily relied upon by the District Court in

denying his motion to withdraw, thus depriving him of a fair hearing. However, the record establishes the District Court relied upon the plea agreement, the affidavit from Strecker's previous counsel, its colloquy with Strecker, and Strecker's statements made during the evidentiary hearing, when it denied Strecker's motion to withdraw his nolo contendere plea. Strecker's ineffective assistance of counsel claims are, therefore, unsubstantiated. "A record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut" the strong presumption counsel's conduct falls within the wide range of reasonable professional conduct. *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032. If an ineffective assistance of counsel claim is "based on matters outside the record, [this Court] will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding" where a record may be developed. *State v. Ward*, 2020 MT 36, ¶¶ 20, 22, 399 Mont. 16, 457 P.3d 955. The record on appeal does not establish ineffective assistance of Strecker's new counsel.

¶11 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.

¶12 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE