

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070392-CA
v.)	
)	F I L E D
Eddie G. Kucharski,)	(October 16, 2009)
)	
Defendant and Appellant.)	2009 UT App 295

Second District, Farmington Department, 041701630
The Honorable Thomas L. Kay

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City,
for Appellee

Before Judges Greenwood, Bench, and Davis.

PER CURIAM:

Eddie G. Kucharski appeals his conviction for communications fraud arguing that (1) the district court erred in denying his motion to withdraw his guilty plea, (2) the district court erred by failing to resolve alleged inaccuracies in the presentence investigation report, and (3) trial counsel was ineffective for failing to insure that the district court resolved the alleged inaccuracies in the presentence investigation report.

Kucharski first asserts that the district court erred in denying his motion to withdraw his guilty plea. Under Utah Code section 77-13-6(2), a guilty plea can be withdrawn only if it was "not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2) (2008). In determining whether a plea is knowingly and voluntarily made, a trial court must apply a subjective standard that examines whether the particular defendant entered his plea knowingly and voluntarily, as opposed to an objective test that would look at what a reasonable person would have done. See generally State v. Humphrey, 2003 UT App 333, ¶ 12, 79 P.3d 960.

Kucharski alleges that the district court improperly applied an objective standard in determining whether his plea was knowingly and voluntarily made rather than a subjective standard.

After reviewing the district court's ruling, it is clear that when the district court indicated that it would be untenable to use a subjective standard, it was not referring to whether Kucharski's actions should be reviewed under a reasonable person standard as opposed to an analysis based solely upon Kucharski's impressions. Instead, the district court was discussing how to view Kucharski's testimony that his plea was not voluntarily made when he expressly stated at the time he entered his plea that his plea was knowingly and voluntarily made. Contrary to Kucharski's arguments, the record demonstrates that the district court did review Kucharski's claims under a subjective standard. Specifically, in making its ruling the district court stated that it did not find a basis "in the testimony[,] or in the videotape[,] or in the record to indicate" that the plea was not knowingly and voluntarily made. Thus, the district court reviewed all available evidence, including Kucharski's attitude and reactions during the plea, before denying the motion to withdraw the plea. Under these circumstances, it is clear that the district court applied the appropriate standard in reviewing Kucharski's claim that his plea was not knowingly and voluntarily made.

Kucharski next argues that the district court erred in failing to resolve alleged inaccuracies in the presentence investigation report. The State concedes that the district court failed to comply with Utah Code section 77-18-1(6)(a) by not resolving the alleged inaccuracies on the record. See id. § 77-18-1(6)(a) (2008).

In State v. Maroney, 2004 UT App 206, 94 P.3d 295, we held that the district court erred in failing to resolve Maroney's objections to the sentencing reports, and we remanded to allow the court to resolve the objections on the record. See id. ¶ 31. We went on to state that "[i]f resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly." Id. This disposition is appropriate in the present case because Kucharski alleges that he was prejudiced by the failure to resolve the alleged inaccuracies in the report. Allowing the district court to revisit the sentences after resolving the alleged inaccuracies in the presentence investigation report gives appropriate deference to the district court's sentencing function. Accordingly, we remand the case so "the sentencing judge can consider the objections to the presentence report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to sentencing." State v. Jaeger, 1999 UT 1, ¶ 44, 973 P.2d 404. After resolving the alleged inaccuracies in the presentence investigation report, the district court may revise the sentence as it deems appropriate. Our disposition makes it

unnecessary to consider alternative arguments alleging ineffective assistance of trial counsel.

Affirmed in part and remanded.

Pamela T. Greenwood,
Presiding Judge

Russell W. Bench, Judge

James Z. Davis, Judge