

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-190

MAY TERM, 2021

State of Vermont v. Preston E. Foster*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 325-4-18 Bncr
		Trial Judge: John W. Valente

In the above-entitled cause, the Clerk will enter:

Defendant appeals the criminal division’s denial of his pre-sentence motion to withdraw his plea acknowledging guilt for violating an abuse-prevention order. We affirm.

Based on an alleged March 15, 2018 incident, defendant was charged on April 5, 2018 with one count of violating an abuse-prevention order that prohibited him from coming within 300 feet of a neighbor and the neighbor’s family. A jury was drawn on July 2, 2019, and the trial was scheduled to be held two weeks later, on July 16. On July 11, the parties entered into a plea agreement under which defendant would plead guilty to one count of violating the abuse-prevention order, and the State would dismiss four additional charges alleging the same offense. That same day, following a plea colloquy, the criminal division accepted the plea.

Five days later, on July 16, defendant filed a motion to withdraw his guilty plea, stating that, “[u]pon further contemplation of this decision [to plead guilty, he] has decided that he would like to withdraw his plea and have a trial in this matter.” The criminal division held a hearing on the motion on November 13, 2019. No evidence was presented at the hearing, but defense counsel explained that defendant made a very quick decision to accept the plea offer after defense counsel had informed him of the offer on July 11, and that the State was not prejudiced because it had not yet ordered a pre-sentence investigation report and the State’s witnesses had been informed of the plea in time to make other arrangements. The State responded that most pleas are done quickly, that the July 11 plea colloquy demonstrated that defendant had entered a knowing plea, that a change of heart was not a sufficient reason to withdraw the plea, and that the State was prejudiced because the scheduled jury trial was canceled, and the guilty plea impacted other criminal dockets involving defendant.

In considering whether defendant had a fair and just reason to withdraw his plea, the criminal division first found that defendant’s claim of innocence up until the time he entered his plea, and the brief period between when defendant entered and sought to withdraw the plea, weighed in his favor. The court found, however, that defendant had competent counsel representing him throughout the proceedings, including when he entered his plea at the change-of-plea hearing. Acknowledging defense counsel’s remarks concerning how quickly defendant made

the decision to enter the guilty plea, the court stated that it would need to listen to the July 11 plea colloquy, which had been conducted by a different judge, to determine whether defendant understood the nature and terms of the plea agreement. The court also indicated that it would have to consider any prejudice to the State.

Approximately five weeks later, the criminal division entered a written order denying defendant's motion to withdraw his guilty plea. The court first noted that it did not need to revisit the factors it had considered at the November 13 hearing. As for its review of the July 11 change-of-plea hearing, the court cited defendant's acknowledgment during the plea colloquy that he had voluntarily and freely entered the plea with an understanding of its terms and the rights he was giving up. The court stated that defendant had not presented any evidence from which it could conclude that he failed to understand what he was doing when he entered the plea. Hence, the court concluded that defendant had failed to present a fair and just reason for withdrawing the plea and could not show that his reason for seeking to withdraw his plea substantially outweighed the small prejudice to the State that would result if it had to prepare once again for trial on the instant charge and potentially on other charges that were dropped following the court's acceptance of the plea agreement.

On appeal, defendant argues that the criminal division abused its discretion by not applying the liberal standard set forth in Vermont Rule of Criminal Procedure 32(d) for reviewing a pre-sentence request to withdraw a plea. "We review the denial of a motion to withdraw a plea for abuse of discretion." State v. Stewart, 2019 VT 89, ¶ 8, 211 Vt. 297; see also State v. Scelza, 134 Vt. 385, 386 (1976) ("The withdrawal of a guilty plea is not a matter of right but is within the sound discretion of the court, and the burden is upon the defendant to show that the court abused its discretion in denying the motion to withdraw.").

For motions to withdraw a guilty plea made before a sentence is imposed or deferred, "the court may permit withdrawal of the plea if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the state from the withdrawal of the plea." V.R.Cr.P. 32(d). "A motion to withdraw a plea made before sentencing is to be liberally granted where the reason is fair and just and the prosecution has not relied on the plea to its substantial prejudice." Stewart, 2019 VT 89, ¶ 8 (quotation and alteration omitted). Implicit in Rule 32(d) "is a balancing between important State interests in expediting criminal proceedings and the harm suffered by the defendant in foregoing a trial on the merits." Id. (quotation omitted). "The weight given these factors in motions to withdraw guilty pleas under V.R.C.P. 32(d) is within the sound discretion of the court." State v. Hamlin, 143 Vt. 477, 480 (1983) (quotation omitted). "In determining whether the court abused its discretion, it is the duty of this Court to inquire into the circumstances surrounding the taking of a guilty plea to ensure that it was knowingly and voluntarily given." State v. Merchant, 173 Vt. 249, 256 (2001) (quotation omitted).

We find no abuse of discretion here. Boiled down to its essence, defendant's argument is that the criminal division abused its discretion by not granting his motion to withdraw based on the fact that he entered his plea within hours of first learning of the State's plea offer and then changed his mind a few days after entering the guilty plea. We conclude that this does not suffice as a basis to overturn the criminal division's discretionary decision to deny defendant's motion. The July 11 plea colloquy reveals that defendant acknowledged he was entering into the plea freely and voluntarily with a full understanding of the ramifications of doing so. There is no evidence in the record that defendant was pressured into accepting the plea, that he did not understand the terms or consequences of the plea, or that any other aspect of his state of mind or the circumstances of the plea gave rise to a fair and just reason to withdraw. See State v. Fisk, 165 Vt. 260, 263-64 (1996) ("It was reasonable for the trial court to deny withdrawal given that there was no objective

evidence indicating that defendant did not understand the nature or consequences of his plea.”); see also Scelza, 134 Vt. at 386 (“The burden was upon the defendant to establish the facts which she alleged entitled her to relief.”). Rather, the record indicates, at best from defendant’s perspective, that he made a quick decision to accept the plea voluntarily on his own accord with a full understanding of the plea, but that he had a change of heart a few days later after the jury had been released and the trial canceled. Cf. Stewart, 2019 VT 89, ¶ 9 (reversing denial of motion to withdraw guilty plea where “the trial court acknowledged during the plea colloquy that there were significant concerns regarding the factual basis for the plea”); Merchant, 173 Vt. at 257 (upholding denial of motion to withdraw guilty plea because “the court [was] not compelled to accept defendant’s characterization of his own state of mind” as being in state of shock). Accordingly, the criminal division did not abuse its discretion in concluding that defendant had failed to present a fair and just reason for withdrawing his plea that could substantially outweigh even minimal prejudice to the State resulting from the canceling of the jury trial.*

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

* According to defendant, the criminal division’s finding that he presented no evidence indicating he did not understand the terms or consequences of entering into the plea agreement is inconsistent with its finding that he entered his plea “due to the quickness with which things were rapidly moving at the time.” The court made no such finding. Rather, the court merely noted defendant’s argument that he entered his plea due to the quickness with which things were moving at the time. We find no inconsistency in the court’s findings.