VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 2020-272

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

SEPTEMBER TERM, 2021

State of Vermont v. Harry Williams* } APPEALED FROM:
} Superior Court, Caledonia Unit,
} Criminal Division
} CASE NO. 533-9-17 Cacr

Trial Judge: Robert R. Bent

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

Defendant pled guilty to numerous crimes pursuant to a plea agreement. Before sentencing, he moved to withdraw his guilty pleas. The court denied his request and defendant now appeals. We affirm the court's decision.

In September 2017, defendant was charged with sexual assault on a child under sixteen, aggravated human trafficking of a child under eighteen, human trafficking via a commercial sex act, and resisting arrest. The first count was later amended to aggravated sexual assault on a child under sixteen. The complainant, G.G., was born in February 2002. According to the charging affidavit, G.G. was overheard telling a friend that she was having sexual intercourse with two drug dealers for drugs, money, and clothing. G.G. then provided details of this alleged conduct to police. She was later deposed in connection with this case.

Defendant and his appointed attorney had a fraught relationship. Defendant repeatedly contacted the court about his attorney. In November 2018, defendant filed a pro se motion addressing alleged ineffective assistance of counsel. He withdrew the motion at a January 2019 hearing. The court addressed other issues concerning defendant's relationship with counsel at various status conferences.

In July 2019—on the first day of the long-scheduled trial—the parties reached a plea agreement. Defendant agreed to plead guilty to sexual assault on a minor with a seven-to-fifteen-year sentence; human trafficking with an eight-to-fifteen-year sentence consecutive to the first count; resisting arrest with an eleven-to-twelve-month concurrent sentence; and sale of

cocaine (in a companion case) with a one-to-three-year concurrent sentence. The sentences were all suspended but eight years. The State agreed to dismiss the aggravated human trafficking charge, which carried a potential sentence of a minimum of twenty years and a maximum of life; it also reduced the aggravated sexual assault of a minor charge, which carried a mandatory twenty-five-year minimum. The parties agreed to defer the determination of defendant's probation conditions until the pre-sentence investigation was completed. Defendant also waived his right to appeal.

The court conducted a change-of-plea colloquy and defendant agreed with the specific factual basis for each charge. He agreed that he had sex with G.G. who was underage and that he promised money and other things in exchange for her having sexual intercourse with another man.

Three weeks later and before sentencing, defendant moved pro se to withdraw from the plea agreement. He argued that he understood his release date to be fixed and not subject to change based on outside factors, such as a failure to complete programming. He maintained that his attorney either failed to discuss or misrepresented factors that could impact his release date. He also argued that his pleas were not knowingly or voluntarily made. The court appointed defendant a second attorney to represent him on the plea-withdrawal issue.

Following a hearing at which defendant's trial attorney testified, the court denied the motion. It found as follows. Defendant's trial attorney testified that she conveyed various pre-trial settlement offers to defendant. Defendant rejected these offers because they contained to-serve sentences. Before the scheduled trial date, the attorney had discussed probation only generally with defendant as the State had not indicated a willingness to entertain that option. Defendant wanted to settle the case. He was anxious about trial and concerned that he would be deprived of a just outcome because of his race. After the State made its offer on the morning of trial, the attorney participated in a call about the offer with defendant, his father, and a family friend. The lawyer testified that she did not have all of the possible sex-offender conditions, which she generally preferred to go over with her clients. She explained to defendant the concept of probation and the consequences of violating probation, including by failing to complete sex-offender programming. She told defendant it was possible that something could arise that might extend his eight-year minimum. The court found that during the change-of-plea colloquy, defendant did not appear to question the factual basis for each charge or hesitate before agreeing to it as set forth by the State. It further determined that, based on its review of G.G.'s deposition transcript, the State had a complete prima facie case with respect to the sexual assault, aggravated sexual assault, and trafficking cases.

Based on these and other findings, the court turned to the language of Vermont Rule of Criminal Procedure 32(d). Under that rule, the trial court may grant a defendant's pre-sentencing motion to withdraw a plea "if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result from the withdrawal of the plea." Id.; State v. Scelza, 134 Vt. 385, 385 (1976) (recognizing defendant bears burden of showing "fair and just reason" to support withdrawal). Such motions are "to be liberally granted 'where the reason is fair and just and the prosecution has not relied on the plea to its substantial prejudice.' " State v. Dove, 163 Vt. 429, 431 (1995) (quoting Reporter's Notes, V.R.Cr.P. 32(d)). In conducting its analysis, the court considered factors used by federal courts in applying the

analogous federal rule. See F.R.Cr.P. 11(d)(2)(B). Specifically, it cited the following relevant factors, many of which were also cited in Vermont case law: "(1) whether the defendant has asserted his innocence, (2) prejudice to the government, (3) delay in filing defendant's motion, (4) inconvenience to the court, (5) defendant's assistance of counsel, (6) whether the plea is knowing and voluntary, and (7) waste of judicial resources." United States v. Hamilton, 510 F.3d 1209, 1214 (10th Cir. 2007) (quotation omitted).

The court found it unclear if defendant was asserting his innocence; his current attorney did not argue innocence but instead asserted that the State could not prove its case. Even if defendant was claiming innocence, the court continued, it was not required to accept a bare assertion of innocence and it found that, given the transcripts of G.G.'s deposition, the State had a sufficient case to present to a jury. The court found that prejudice to the government was not a significant factor in this case. It acknowledged that defendant had not delayed filing his request, but it noted that this case was at the top of the trial list and specific trial dates had been assigned. The parties reached their agreement at the point of drawing a jury for a scheduled pick-and-go trial. The court indicated that, to manage its docket, it needed to be able to rely on plea changes when it discharged a jury. Turning to the remaining factors, the court found that defendant's trial attorney was a competent, experienced attorney who was thoroughly prepared for trial. Before defendant accepted the plea agreement, the attorney explained the agreement and the consequences of violating probation, including a failure to complete sex-offender programming. The court found that defendant accepted the plea agreement knowingly. Notwithstanding defendant's statement that he was anxious at the change-of-plea hearing, the court had been able to address defendant without concern about his understanding. Defendant's correspondence with the court also evinced his understanding of the case. The court determined that the voluntariness of the plea was not compromised by the fact that the State had not offered a probated sentence in prior negotiations. After the State presented its new offer, the court allowed defendant additional time to consult with his trial attorney, family, and friends before deciding to plead guilty.

While defendant expressed concern about potential probation violations, the court noted that the probation conditions were not yet even established. Assuming that sex-offender programming would be required, the court saw no reason why defendant would be unable to complete it and more pointedly, it found that defendant's attorney had fully advised him of the need to make admissions to successfully complete programing. The court refused to presume that defendant would violate his probation conditions in the future or that, even if he did, such a violation would result in the imposition of the underlying sentence.

The ultimate test, the court explained, was whether the reason advanced to withdraw the plea was "fair and just." V.R.Cr.P. 32(d). While courts must consider such motions with leniency in mind, it found that a defendant's changed mind, without more, did not suffice. See State v. Scarola, 2017 VT 116, ¶ 22, 206 Vt. 335 (concluding that trial court acted within its discretion in denying motion to withdraw plea where trial court found in part that "the [d]efendant has not offered a fair or just reason" but sought "to withdraw his plea simply because he has changed his mind"). The court found that defendant here simply changed his mind and sought to renegotiate his plea agreement. It found this conclusion supported by a letter defendant had submitted to the court in which he indicated his willingness to accept a different sentence and accept responsibility for different uncharged crimes. The court explained that "[a] defendant is not entitled to withdraw his plea merely because he discovers . . . that his calculus

misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." State v. Hamlin, 143 Vt. 477, 481 (1983) (quotation omitted). With respect to the sentence itself, the court noted that it was a split sentence with eight years to serve and the underlying conduct to which defendant pled guilty involved repeated sexual assault of a very vulnerable fifteen-year-old girl by two adult men, induced by money and drugs. The court did not consider the sentence as structured so harsh as to warrant the relief requested, especially given that it would be probated. The court added that the dismissed charge would have carried with it a mandatory minimum sentence of twenty-five years. The court found that defendant failed to meet his burden of showing a fair and just reason for allowing withdrawal and it thus denied his motion. This appeal followed.

Defendant argues that the court should have granted his request. He notes that he filed his motion three weeks after entering his plea, he had resisted prior offers to settle the case, and that the State would not suffer any prejudice if his request was granted. He contends that he lacked a complete understanding of the meaning and ramifications of the plea agreement and that this is reflected in unspecified portions of his trial counsel's testimony. He also cites to his allocution, which post-dates the decision in this case and which we therefore do not consider. According to defendant, he was scared, pressured, and overwhelmed and had only a few hours to consider the State's offer. He states that he came to realize that he had not entered his guilty pleas knowingly and voluntarily and argues that he should have been allowed to withdraw his pleas.

As set forth above, the court may grant a presentence motion to withdraw a guilty plea where 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). The trial court has discretion in ruling on such requests and its decision will stand absent an abuse of that discretion. Hamlin, 143 Vt. at 480. "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." Id. At the same time, we leave it to the trial court to assess the credibility of witnesses and weigh the evidence. See State v. Merchant, 173 Vt. 249, 257 (2001) (recognizing that trial court need not accept "defendant's characterization of his own state of mind" in evaluating motion to withdraw and reiterating that "[i]t is axiomatic in this state that the trier of fact is given the sole determination of the weight of the evidence, the credibility of witnesses, and the persuasive effect of the testimony" (quotation omitted)).

Defendant fails to show an abuse of discretion here. The court considered the points he raises on appeal and found them unpersuasive. It recognized that defendant did not delay in filing his request, that he had rejected prior settlement offers, and that the State would not be prejudiced if the motion was granted. At the same time, it found that defendant's pleas were knowingly and voluntarily entered. It explained that defendant had sufficient time to consider the State's offer and that his counsel was competent and prepared. Defendant's counsel explained the terms of the plea agreement and she also discussed the concepts of probation and violating probation, including by failing to complete sex-offender programming. She told defendant that something could occur that might extend his eight-year minimum. The court explained that it had no concerns during the plea colloquy as to defendant's understanding of the case and noted that defendant's correspondence with the court evidenced his understanding of

the case as well. The factual basis for the charges was reflected in the complainant's deposition and defendant agreed with the specific factual basis for each charge. Beyond arguing that we should weigh the evidence differently, defendant makes no specific challenge to the court's findings. We do not reweigh the evidence on appeal. The court did not err in concluding that defendant had simply changed his mind and that this was an insufficient basis on which to allow him to withdraw his pleas. See Scarola, 2017 VT 116, ¶ 22 (reaching similar conclusion).

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice