

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1698**

State of Minnesota,
Respondent,

vs.

Marvin Donald Bale,
Appellant.

**Filed July 30, 2012
Affirmed
Halbrooks, Judge**

Olmsted County District Court
File No. 55-CR-11-40

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Karen A. Arthurs, Assistant County
Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion to withdraw his
guilty plea. Because the district court acted within its discretion, we affirm.

FACTS

On March 17, 2011, appellant Marvin Donald Bale pleaded guilty to stalking in violation of Minn. Stat. § 609.749, subd. 4(a) (2010). In exchange for his guilty plea, the state amended an original stalking charge and dismissed a second property-damage charge.

On March 25, 2011, appellant sent a letter (pro se) to the district court requesting to withdraw his plea. Appellant stated in his letter that he did not believe that his attorney “ever really looked at the evidence concerning the case . . . [because appellant’s attorney] had in his possession a letter from . . . the victim . . . when [appellant] entered the plea and [appellant’s attorney] did not bother to inform [appellant] of the change in the victim’s procedure of actions[.]” This letter was followed by appellant’s formal motion to withdraw his guilty plea, which was filed March 30, 2011. This motion listed two grounds for withdrawal: “1. Newly discovered evidence (see attached letter). 2. Misunderstandings that the defendant had at the time of this plea.” An additional motion on the same grounds was filed by appellant’s substitute counsel on April 20, 2011.

At a hearing on his motion, appellant testified that he had pleaded guilty based on a misunderstanding about his criminal-history score. Appellant also testified that he did not know about the contents of a letter from one of the victims until after his plea hearing, and, had he known, he would not have pleaded guilty. The district court denied appellant’s motion, concluding that it was not fair and just to allow appellant to withdraw his plea. This appeal follows.

DECISION

A criminal defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). A district court may grant a defendant's motion to withdraw a guilty plea before sentencing if the defendant establishes that "it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). In contrast, a criminal defendant may only withdraw a plea after sentencing if doing so will prevent a "manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. The supreme court has stated that although the "fair and just" standard "is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea for simply any reason." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quotation omitted).

In assessing whether it is fair and just to allow the withdrawal of a plea, the district court "must give due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea." Minn. R. Crim. P. 15.05, subd. 2; *Kim*, 434 N.W.2d at 266. A defendant bears the burden of advancing reasons to support withdrawal, *Kim*, 434 N.W.2d at 266, and it is the state's burden to prove prejudice if the defendant were permitted to withdraw his plea, *Raleigh*, 778 N.W.2d at 97.

But if the defendant does not convince the district court that it would be fair and just to allow withdrawal of the plea, the district court does not have to consider the

prejudice to the state. *Raleigh*, 778 N.W.2d at 98. The decision to allow a plea withdrawal before sentencing “is left to the sound discretion of the [district] court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the [district] court abused its discretion.” *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (quotation omitted).

Appellant advances two reasons why he believes that it is “fair and just” to allow his plea withdrawal: his mistaken assumption regarding his criminal-history score and the fact that he did not know the contents of a victim’s letter when he pleaded guilty.

Whether appellant should have been allowed to withdraw his plea based on his erroneous assumption that he had a lower criminal-history score is resolved by the transcript of the guilty-plea hearing. First, the following exchange regarding appellant’s criminal-history score occurred between appellant and his attorney:

[Appellant’s counsel]: And there’s an issue about your points, right?

A. Yes.

Q. And you believe—according to the information we have, you were convicted of first degree burglary in Olmsted County in October of 1993, right?

A. Correct.

Q. And you got a sentence of 50 months at that time?

A. Yes.

Q. And that would not have decayed ordinarily on the sentence, but you believe that you went into the boot camp program and you successfully completed that and got out earlier?

A. That’s correct.

Q. And we’re going to check that out, right?

A. Yep.

Q. But you understand that whether you did or not, your points are what they are and you’re going to be sentenced based on what your points are, correct?

A. Yes.

Q. And you're willing to accept that?

A. Yes.

In addition, appellant's counsel gave the following explanation of the plea bargain to the district court:

And Mr. Bale would be given a presumptive sentence according to the guidelines. He—we believe that he has five points. It seems that Mr. Bale believes that he has three, and there's an issue about a burglary-in-the-first-degree charge from 1993 that might have decayed or might not have decayed.

But Mr. Bale would bear the risk of whatever his points are, and we're going to do some checking on that. But if he has three—if the sentence would be local, which would be the case if he had three points, the State would recommend probation, no more than 60 days in jail plus 30 for each point. But if it's a presumptive prison sentence, the State would agree to assent to the bottom of the box, which we believe would be 23 months.

And, finally, the prosecutor clearly explained to appellant the impact that the different criminal-history scores would have on appellant's sentence:

[Prosecutor]: Now, as to the—as to the sentence, when you get to that point, you understand that if it's—that if you are below the line—that is, less than four points—the State will ask for no more than 60 days in jail plus 30 days per criminal history point?

A. Correct.

Q. But do you also understand that if you're over the line—that is, four points or more—as part of this plea agreement you're giving up the right to argue for a downward departure? In other words, if you're over the line, you're going for the number of months that is the bottom of whichever box you're in?

A. Correct.

Q. You understand that?

....

A. Correct, yes.

Despite these numerous instances when appellant agreed to bear the risk of whatever his criminal-history score turned out to be, appellant now claims on appeal that “[w]hat is most likely to have happened in this instance is that appellant did not become aware until the plea colloquy was actually underway that he was indeed taking such a risk, but by that point he likely felt powerless to change anything.” But again, this is belied by the record. The plea petition includes a hand-written notation that states: “I bear the risk of what my points are.” Appellant would have completed the plea petition before the colloquy at the hearing was underway.

Although it may be fair and just to allow the withdrawal of a guilty plea when there is a true misunderstanding about a defendant’s criminal-history score, there was no such misunderstanding here. *See State v. DeZeler*, 427 N.W.2d 231, 235 (Minn. 1988) (concluding that the district court “in fairness” should have allowed the defendant to withdraw his plea where the plea agreement was based on a mutual mistake regarding the defendant’s criminal-history score). Appellant was repeatedly informed that everyone had calculated his criminal-history score differently, and he repeatedly agreed to bear the risk of being mistaken. Thus, fairness does not mandate withdrawal of appellant’s plea on this basis.

Appellant also asserts that his counsel’s failure to disclose the contents of a victim’s letter to him before he pleaded guilty justifies a plea withdrawal. Appellant’s

withdrawal motion characterized this issue as one of “newly discovered evidence.” The district court stated, “in reviewing that letter, I find that it neither states nor implies that you are not guilty of the offense to which you’re charged. . . . So I don’t believe that that letter is newly discovered evidence that would have impacted the Court’s acceptance of your guilty plea.” We agree. The fact that one of the victims wanted to have a domestic abuse no contact order (DANCO) against appellant removed is in no way related to the stalking or property-damage charges other than the fact that the same victim was involved in both. We therefore conclude that the district court was acting within its discretion when it determined that the letter was not “newly discovered evidence” that would, in fairness, require allowing appellant to withdraw his guilty plea.

Neither of the two reasons proposed by appellant as to why he should have been allowed to withdraw his plea present a “fair and just” reason to allow withdrawal. This is not the “rare case” of an abuse of discretion by the district court. *See Kaiser*, 469 N.W.2d at 320. To the contrary, we conclude that the district court was acting well within its discretion when it denied appellant’s motion.

Because we conclude that the district court did not abuse its discretion by determining that there was no fair-and-just reason to allow appellant to withdraw his plea, there is no need to consider the prejudice, or lack thereof, to the state. *See Raleigh*, 778 N.W.2d at 98.

Appellant asserts that the fact that the victim wanted the charges against him dropped would have been “highly relevant” to his decision to plead guilty because “it tended to bear directly on either the cooperativeness or the credibility of a complaining witness in this case”

and that “it is reasonable to conclude based upon the contents of the letter that [he] would have insisted on a jury trial.” He argues, therefore, that his counsel’s failure to bring the contents of the letter to his attention prior to pleading guilty was ineffective assistance of counsel.¹ We disagree.

To succeed on his claim of ineffective assistance of counsel, appellant must “prove that his counsel’s representation ‘fell below an objective standard of reasonableness’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

The alleged failure of appellant’s counsel to disclose the contents of the letter to appellant does not fall below the objective standard of reasonableness for an attorney’s performance. There is a “wide range of professionally competent assistance.” *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003) (quotation omitted). The letter was unrelated to the Olmsted County charges, and appellant’s counsel did what the letter requested—at the guilty plea hearing, he asked for the DANCO in place against appellant in Wabasha County to be vacated. Even if this letter tended to show that one of the two

¹ Respondent State of Minnesota claims that appellant has waived this argument by failing to raise it to the district court. Although the two plea-withdrawal motions filed by appellant’s original and then substitute counsel did not include ineffective assistance of counsel as one of the grounds for withdrawal, appellant’s pro se request to withdraw his plea arguably did make this assertion. And the district court did consider whether appellant received ineffective assistance of counsel—albeit with respect to appellant’s criminal-history-score argument rather than with respect to his receipt (or lack thereof) of the letter. Because there is some evidence that appellant raised an ineffective-assistance-of-counsel claim with the district court, we will address the merits of his claim on appeal.

victims of the stalking charge might be uncooperative, it does not indicate a lack of sufficient evidence to convict appellant. The fact that appellant's attorney failed to more fully discuss the contents of a marginally relevant piece of evidence with appellant does not fall outside the scope of the "wide range" of acceptable performance. Because we conclude that appellant's ineffective-assistance-of-counsel claim fails on the first prong of the *Strickland* test, we need not discuss whether or not appellant was prejudiced by this alleged error. *See Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

Affirmed.