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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0489**

State of Minnesota,
Respondent,

vs.

David Anthony Carter,
Appellant.

**Filed June 25, 2012
Affirmed
Connolly, Judge**

Wilkin County District Court
File No. 84-CR-10-68

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Timothy E. J. Fox, Wilkin County Attorney, Breckenridge, Minnesota (for respondent)

Samuel S. Johnson, Johnson Law Office, Wahpeton, North Dakota; and

Erica Chisholm Jaehning, (pro hac vice) Chisholm Law Firm, Wahpeton, North Dakota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

On appeal from his conviction of second-degree criminal sexual conduct, appellant argues that the district court abused its discretion in denying his motion to withdraw his guilty plea because the plea was not voluntary, resulting in manifest injustice. We affirm.

FACTS

Appellant was charged with two counts of felony criminal sexual conduct in the first degree, two counts of felony soliciting a child to engage in sexual conduct-prohibited act, and four counts of felony communication of sexually explicit material to a child for acts that allegedly occurred between appellant and his three step-granddaughters. The state made appellant a plea offer, under which appellant would plead guilty to one charge of criminal sexual conduct in the first degree with an executed sentence of 144 months. The state's offer was to expire at noon on October 28, 2010. Appellant met with his attorney and declined the state's plea offer.

A jury trial was scheduled for November 1, 2010. The morning of the trial, appellant's attorney approached the state to inquire whether the plea agreement was still available. During the discussion, the state told the attorney that appellant's wife would be testifying to an act of sexual conduct she witnessed between appellant and one of her granddaughters. At some point between the time that appellant declined the state's original plea offer and the date of trial, appellant's wife had told him that she would appear as a witness, she would tell the truth, and she would not lie for him as he may

have anticipated. The state discussed returning to the expired plea offer with the victims' mother. She supported the offer in order to spare her young daughters from testifying, reliving the experience, and having to face their abuser while on the witness stand. After a discussion with his attorney, appellant pleaded guilty. The plea agreement called for appellant to plead guilty to an amended charge of criminal sexual conduct in the second degree, for the court to execute a prison sentence of 90 months, and for the state to dismiss the remaining counts.

Appellant filed a presentencing motion to withdraw his guilty plea, asserting that he did not understand the charge to which he pleaded guilty, that he felt pressured into entering a plea agreement he did not understand, and that it would be fair and just to permit him to withdraw his plea. In the accompanying affidavit, appellant stated: "I did not understand that I was pleading guilty to Sexual Conduct in the Second Degree, but that the overriding charge was still Criminal Sexual Conduct in the First Degree, therefore looking like I had plead[ed] to a lesser charge." Appellant also claimed that his attorney had not fully explained to him that the overriding charge would be criminal sexual conduct in the first degree. Appellant stated that, faced with new evidence and "threatened with facing a life sentence," he decided to plead guilty, without "an ample opportunity to digest or understand the consequences of [his] guilty plea." Finally, appellant asserted his innocence.

The district court denied appellant's motion to withdraw his plea. The district court found that the plea was accurate because appellant indicated that he understood the terms and ramifications of the plea agreement. The district court found that "[t]he plea

was voluntary because the [appellant] stated that he was not being coerced or bribed into making the plea. He was making the plea of his own volition.” Finally, the district court found that the plea was intelligent because appellant admitted that he had sufficient time to consult with his attorney regarding the terms of the plea agreement and that he was satisfied that his attorney had advised him fully.

The court sentenced appellant to 90 months in prison on the amended charge of criminal sexual conduct in the second degree and dismissed the other charges in accordance with the plea agreement. Appellant appeals the district court’s denial of his motion to withdraw his plea.

D E C I S I O N

Appellant argues that the district court abused its discretion in denying his motion to withdraw his guilty plea because manifest injustice occurred because the plea was not voluntary. A criminal defendant does not have an absolute right to withdraw his guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). This court reviews a district court’s denial of a motion to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

A court may consider a withdrawal of a guilty plea in two situations. First, a district court has discretion to allow a defendant to withdraw his guilty plea at any time in order to correct a “manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, a district court may also, in its discretion, grant a defendant’s presentence motion to withdraw a guilty plea if the district court determines that it would be “fair and just” to allow withdrawal. *Id.*, subd. 2. “The ‘fair and just’ standard requires district courts to

give ‘due consideration’ to two factors: (1) the reasons a defendant advances to support withdrawal and (2) prejudice granting the motion would cause the State given reliance on the plea.” *Raleigh*, 778 N.W.2d at 97 (quoting Minn. R. Crim. P. 15.05, subd. 2).

Appellant filed his motion to withdraw his plea before sentencing, arguing that his plea was not valid. The district court denied the motion, finding that withdrawal was not required under the “fair and just” standard. A guilty plea is not valid if it is not accurate, voluntary, and intelligent. *Id.* at 94. The defendant has the burden of establishing that his guilty plea is invalid. *Id.* The validity of a guilty plea is a question of law, which is reviewed de novo. *Id.* It is a “manifest injustice” if the defendant’s guilty plea is not valid, and, by implication, an invalid guilty plea is a “fair and just” reason for withdrawing a plea. *See id.*; *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (declining to consider a plea withdrawal under the “discretionary fair-and-just standard because the manifest injustice standard of subdivision 1 requires withdrawal where a plea is invalid”).

On appeal, appellant’s only argument is that the district court should have allowed him to withdraw his guilty plea because the plea was not voluntary. “To determine whether a plea is voluntary, the court examines what the parties reasonably understood to be the terms of the plea agreement.” *Raleigh*, 778 N.W.2d at 96. The voluntariness requirement ensures that a guilty plea is not in response to improper pressures or coercion. *Id.* In determining whether a guilty plea is voluntary, courts employ a totality-of-the-circumstances approach. *Id.*

Appellant argues that it would be fair and just to allow him to withdraw his plea because his “guilty plea was not voluntary because it was made under improper pressure induced by the State concerning alleged ‘new evidence’ brought to light during plea negotiations the morning of the jury trial.” Appellant alleges that he was unaware until the morning of trial that his wife would testify that she had witnessed appellant sexually abuse one of her granddaughters. In light of this new information, and facing a life sentence if found guilty by a jury, appellant argues that he was improperly pressured at the last minute into making an involuntary guilty plea.

The district court did not abuse its discretion in finding that appellant’s plea was voluntary. At the plea hearing, appellant acknowledged that he was 53 years of age, did not have any communication disabilities, and that his highest level of education was one year of college.¹ Appellant acknowledged that he understood the charges and the plea agreement, had sufficient time to discuss the case with his attorney, and felt that his attorney had fully informed and advised him. Appellant stated that neither he nor any persons close to him were given any promises or received any threats in order to obtain his guilty plea. The following exchange occurred between appellant and his counsel:

Q: And you understand that you are charged here, today, with criminal sexual conduct in the second degree?

A: Yes.

Q: Actually, you’re charged right now with several first degree criminal sexual conduct counts, but you understand that you’re pleading to an amended charge of criminal sexual conduct in the second degree.

¹ Appellant also has an extensive criminal record and experience with the criminal-justice system, admitting to a police investigator that he had convictions for “burglary, theft, grand theft auto, um, aggravated battery, sexual battery”

A: Yeah, I understand that.

Q: And it's specifically a violation of Minnesota Statute 609.342, subdivision 1(h)(iii). Now do you feel, [appellant], that you've had sufficient time to discuss this case with me?

A: Yes, I have.

Q: Are you satisfied that I'm fully informed as to the facts of that case, and that I have represented your interests fully and advised you fully?

A: Yes, I feel that way, yes.

Q: Now, [appellant], would you agree that neither you nor any other persons close to you have been given any promises other than those in this plea petition or have been threatened by anyone to attain your guilty plea today.

A: That is correct.

Appellant then acknowledged that he was giving up his trial rights by pleading guilty and indicated that he understood he would be receiving a prison sentence of 90 months instead of a possible maximum sentence of 25 years if he were found guilty at trial. Finally, he admitted that he had had sexual contact with one of his step-granddaughters on two or more occasions and then signed a plea petition, which was filed with the court.

While appellant argues that he was unaware until the morning of the trial that his wife would testify to witnessing an act of sexual abuse between appellant and one of his step-granddaughters, the district court found that appellant's wife had told him before the date of trial that she would testify. A police officer submitted an affidavit stating that appellant's wife had told the police officers that she told appellant before trial that she would be testifying against him. If appellant thought his wife's testimony would have been untruthful, he was entitled to proceed to trial and have her cross-examined on the witness stand. Moreover, the plea agreement was very favorable to appellant, both in

reducing the number and severity of the charges and in significantly reducing appellant's prison sentence. In fact, the plea agreement was more favorable to appellant than the original offer and was based on an offer that was made after the state's likelihood of success had increased dramatically with the revelation that appellant's wife would be testifying against him.

Finally, there was potential prejudice to the state if the district court had allowed appellant to withdraw his plea. The three young victims had already been taken out of school once and faced the trauma of coming to the courtroom to testify against their abuser. If appellant were allowed to withdraw his guilty plea, the victims would be forced to face this trauma a second time.

This case is not the rare case requiring reversal. *See id.* at 97 (holding that a defendant's bare assertion that he felt pressured to plead guilty without further evidentiary support did not provide a "fair and just" reason for withdrawal). The district court did not abuse its discretion in finding that appellant's guilty plea was voluntary and determining that withdrawal of the guilty plea would not be fair and just.

Affirmed.