STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1305

State of Minnesota,
Respondent,

vs.

Gerald Leonard Roy,
Appellant.

Filed May 20, 2008
Affirmed
Connolly, Judge

Scott County District Court
File No. 70-CR-05-21668

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, Government Center JC340, 200 Fourth Avenue West, Shakopee, MN 55379 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant asserts that he should have been allowed to withdraw his guilty pleas at his original sentencing when the prosecutor's plea offer was rescinded. In the alternative, he argues that the plea agreement should have been specifically enforced. Respondent argues that it was within the district court's discretion to deny specific performance of the plea agreement. Because the district court provided appellant with an opportunity to withdraw his guilty pleas and it was not an abuse of discretion to deny appellant's request for specific performance, we affirm.

FACTS

Over the course of six months, appellant Gerald Leonard Roy was arrested and charged with gross-misdemeanor second-degree DWI test refusal, gross-misdemeanor giving a false name to a peace officer, felony fifth-degree possession of a controlled substance, felony possession of drug paraphernalia, felony fleeing a police officer in a motor vehicle, misdemeanor careless driving, misdemeanor fleeing other than in a motor vehicle, and two counts of misdemeanor driving after revocation. On March 9, 2006, the prosecutor sent a letter to appellant's counsel offering to resolve all of these charges. Under the terms of this offer, appellant would plead guilty to second-degree DWI, fifth-degree drug possession, and fleeing a police officer in a motor vehicle. In exchange, the prosecutor would drop all other charges. Appellant would receive an executed 365-day sentence on the DWI charge with credit for time served. On the fifth-degree drug-possession charge, appellant would receive a stay of execution of 24 months and would

serve 12 months in jail concurrent with the DWI sentence while being work-release eligible. Lastly, on the fleeing charge, appellant would be given a stay of execution of 22 months to run concurrent with the other offenses.

On April 13, 2006, appellant pleaded guilty to second-degree DWI test refusal, fifth-degree drug possession, and fleeing in a motor vehicle.[1] At that time, the prosecutor informed the district court that appellant had not accepted the offer in the letter but that "[appellant] is going to get a PSI because he is either going to execute or he is going to accept my offer that I have put in writing, and he will make that decision at the time of Sentencing . . . ." The matters were then set for sentencing on June 30, 2006.[2]

The sentencing hearing was held on September 25, 2006. Appellant was first sentenced to 365 days, with credit for time served on the second-degree DWI test refusal. This was the sentence contemplated by the prosecutor's plea-agreement offer. Appellant had enough jail credit to offset the fully executed sentence. The district court next addressed appellant's sentence for fifth-degree drug possession. At that time, the prosecutor requested the PSI's recommended executed sentence of 24 months for

[1] Appellant filled out two petitions to enter plea of guilty in felony or gross misdemeanor case pursuant to rule 15 for the fleeing in a motor vehicle and fifth-degree drug-possession charges. The plea agreement section of the forms, which laid out the prosecutor's sentence recommendation, was filled in and then crossed out. There is no indication in the record as to why this was done.

[2] Respondent appeared on June 30, 2006 for the sentencing hearing. However, appellant had absconded from the Hennepin County Work Release Center, and the PSI could not be completed. Therefore, sentencing was rescheduled for August 28, 2006, and then again for September 25, 2006.

appellant on that charge.[3] Appellant was upset by this recommendation, stating that he only pleaded guilty because he had been promised work release or county jail. In response, the district court acknowledged that appellant would have an opportunity to bring a motion to withdraw his pleas, but that the court would not rule on that issue at the sentencing hearing.

The district court then sentenced appellant for the fifth-degree drug-possession conviction to prison for 24 months with credit for time served. On the fleeing conviction, appellant was sentenced to 22 months in prison. This sentence was to run concurrently with the other sentences imposed. Thereafter, appellant was taken into custody.

On December 7, 2006, over two months after the sentencing, appellant filed a motion to withdraw his guilty pleas or, in the alternative, for specific performance of the contemplated plea agreement. A hearing was set for December 29, 2006. A hearing was held on that date and continued to February 23, 2007.

At the February 23, 2007 hearing, the district court indicated that it would review the plea and sentencing transcripts before making a decision on appellant's motion. On February 26, 2007, the motion hearing was reconvened. Appellant withdrew his motion to withdraw his guilty pleas. The prosecutor then addressed her understanding of the plea agreement and what occurred at sentencing:

> THE PROSECUTOR: But I would just state for the record that the day of sentencing Mr. Patrin and I had some

[3] It is not clear from the record why the prosecutor requested an executed sentence rather than the sentence contemplated by the plea-agreement offer. In its brief, respondent argues that it was due to appellant's lengthy criminal history articulated in the PSI, as well as the fact that he had recently absconded from work release in Hennepin County.

> discussions. And there was ambiguity of whether or not the offer was still open. My file had conflicting notes due to a couple of offers being made. And Mr. Patrin and I both recalled that he rejected the offer. We ordered the sentencing and at that time apparently was still open.
>
> But I made it clear on the sentencing day, and lengthy discussions in chambers, that even if, because of that ambiguity, even if the offer had been left open at that time on the day of sentencing prior to him being sentenced the state was withdrawing the offer and going to allow him to withdraw his plea. Then there was some concern or confusion as to whether or not he was going to abscond because he has absconded from his work release on a Hennepin County offense, and because of information we received from a tipster, that we could still locate and contact, that said he was gonna flee. So there was some discussion that day.
>
> It's still the state's position that he's not entitled to any dispositional departure, that the PSI makes it very clear that he's not amenable to probation. The sentence that he was given is appropriate. And so the state would ask that his sentence not be altered.

The district court then announced that it was denying appellant's motion for specific performance but would allow him to withdraw his pleas. Appellant declined to withdraw his pleas. This appeal follows.

D E C I S I O N

Appellant argues that plea withdrawal is not an adequate remedy where the prosecution rescinded the plea offer at the sentencing hearing, the district court did not allow appellant to argue for plea withdrawal prior to sentencing, and appellant had served a substantial portion of his prison sentence before the motion hearing occurred. Therefore, appellant asks this court to fashion a remedy that recognizes these unique

circumstances. Respondent asserts that it was within the district court's discretion to deny specific performance of the plea agreement. We agree.

"The district court's decision on whether to allow withdrawal of a guilty plea is reviewed under an abuse of discretion standard." *State v. Hamacher*, 511 N.W.2d 458, 460 (Minn. App. 1994). Specific performance is an equitable remedy within the sound discretion of the district court. *Lilyerd v. Carlson*, 499 N.W.2d 803, 811 (Minn. 1993).

When a plea-agreement offer is rescinded, plea withdrawal is the typical remedy. *See Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979) ("It is well settled that an unqualified promise which is part of a plea arrangement must be honored or else the guilty plea may be withdrawn."). Alternatively, the district court may order specific performance of the breached plea agreement. *James v. State*, 699 N.W.2d 723, 728-29 (Minn. 2005). However, the Minnesota Supreme Court has stated that "there is no constitutional right to specific performance of a plea agreement." *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998) (citing *Santobello v. New York*, 404 U.S. 257, 262-63, 92 S. Ct. 495, 499 (1971)). The Minnesota Supreme Court has also declared that "[o]n demonstration that a plea agreement has been breached, the court may allow withdrawal of the plea, order specific performance, *or* alter the sentence if appropriate." *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (emphasis added). Thus, plea withdrawal, specific performance, or even alternative remedies may be appropriate depending on the circumstances. As discussed above, however, the decision to grant these remedies is within the district court's discretion.

The district court did not make a decision on appellant's motion on February 23, 2007. Quite understandably, based on the length of time between the original sentencing in September and this hearing, the district court wanted to check the transcript to confirm that a definite agreement as to the sentence had influenced appellant's decision to plead guilty before allowing appellant to withdraw his pleas. After review of the plea and sentencing transcripts, the district court acknowledged that it would have allowed appellant to withdraw his plea on the day of sentencing. However, nothing in the case law or rules requires that result. *See State v. Wolske*, 280 Minn. 465, 468, 160 N.W.2d 146, 149 (1968) (concluding that because the district court was not aware of prosecution's violation of the plea agreement until after sentencing, withdrawal should have been allowed when defendant filed a timely motion to withdraw his guilty plea).

Appellant cites Minn. R. Crim. P. 15.04, subd. 3(1), to support his position that he should have been allowed to withdraw his pleas at sentencing. His reliance is misplaced. The rule states that "[i]f the court rejects the plea agreement, it shall so advise the parties in open court and then call upon the defendant to either affirm or withdraw the plea." Minn. R. Crim. P. 15.04, subd. 3(1). In this case, however, the district court itself was not rejecting the plea agreement. In fact, it appears that at sentencing, the district court was not even certain that such an agreement as to sentence existed.

The district court advised appellant on the day of sentencing that if he wished to withdraw his pleas, he could bring a motion to do so. Appellant did bring a motion to withdraw his pleas, or in the alternative for specific performance, but not until more than two months after the sentencing hearing. Therefore, although appellant asserts that this

situation requires a unique remedy, his having served a substantial portion of his sentence before his motion was heard appears to be the result of his own doing. Furthermore, although it was nearly five months after the original sentencing, the district court did provide appellant the opportunity to withdraw his guilty pleas. Appellant chose not to utilize this remedy out of fear of consecutive sentences or upward departures. He decided to complete his original sentence rather than risk extended time in prison. This was his decision.

Appellant further argues that the plea agreement should be specifically enforced because the agreement was a valid contract. As articulated by the district court, however, the prosecutor made an offer that was never accepted by appellant. Therefore, no valid contract was formed, and plea withdrawal was the proper remedy. *Kochevar*, 281 N.W.2d at 687. It is of no consequence that appellant was sentenced on the DWI charge as contemplated in the plea offer. There is no evidence that appellant accepted the offer in its entirety, and it was implicitly withdrawn by the prosecutor at sentencing when she recommended the executed sentences for the drug possession and the fleeing charges based on the PSI. Finally, there is no evidence in the record to indicate that the prosecutor acted improperly by withdrawing this offer since it had not been accepted.

Generally, the district court should permit a defendant to withdraw any guilty pleas as soon as it becomes apparent that the defendant is not going to be sentenced in accordance with a plea agreement to avoid circumstances such as are presented in this case. The facts here, however, are unique in that the district court was unsure that a plea agreement existed at sentencing and appellant waited several months to file a motion to

withdraw his pleas. Appellant cannot now argue that he should be given exceptional relief because he served a substantial portion of his sentence without the opportunity to withdraw his pleas, when his failure to file a motion was, at least in part, the basis for that lack of opportunity. Moreover, the district court found that a plea offer had been made, but was withdrawn before appellant accepted. There is substantial evidence in the record to support this finding. Therefore, no actual plea agreement existed to specifically enforce. The district court did not abuse its discretion when it denied specific performance after providing appellant an opportunity to withdraw his guilty pleas.[4]

Affirmed.

[4] This court recently discussed the standards of proof applicable to motions to withdraw guilty pleas in *Anderson v. State*, 746 N.W.2d 901 (Minn. App. 2008). That case dealt with ineffective assistance of counsel and the higher standard of proof that is required when attempting to withdraw guilty pleas after sentencing, as opposed to before sentencing. *Id.* It is not necessary to apply the reasoned *Anderson* analysis here because the district court did allow appellant to withdraw his guilty pleas on a motion brought after sentencing.