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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-272**

State of Minnesota,
Respondent,

vs.

Corlandras Shuntae Smith,
Appellant.

**Filed December 28, 2010
Affirmed
Wright, Judge**

Hennepin County District Court
File No. 27-CR-09-39524

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

Susan L. Segal, Minneapolis City Attorney, Zenaida Chico, Assistant City Attorney,
Minneapolis, Minnesota (for respondent)

Marcus Jarvis, Jarvis & Associates, LLC, Burnsville, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Stauber,
Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this challenge to the district court's denial of his motion to withdraw his guilty plea based on alleged ineffective assistance of counsel, appellant argues that the district court erred by finding that appellant waived the attorney-client privilege and by

permitting his former appointed counsel to testify against him. Appellant also argues that the district court erred when it concluded that his appointed counsel's assistance was not ineffective and that appellant's guilty plea was accurate, voluntary, and intelligently made. We affirm.

FACTS

Appellant Corlandras Shuntae Smith was charged with the following criminal offenses: gross misdemeanor interference with an emergency call, a violation of Minn. Stat. § 609.78, subd. 2 (2008); domestic assault with intent to cause fear, a violation of Minn. Stat. § 609.2242, subd. 1(1) (2008); domestic assault with intent to inflict bodily harm, a violation of Minn. Stat. § 609.2242, subd. 1(2) (2008); and disorderly conduct, a violation of Minn. Stat. § 609.72, subd. 1(3) (2008). At Smith's first appearance, the district court ordered him to have no contact with the alleged victim and appointed counsel to represent Smith.

Pursuant to a plea agreement reached on the scheduled trial date, Smith agreed to enter an *Alford* plea¹ of guilty to disorderly conduct in exchange for the state's agreement to dismiss the remaining charges. But before entering the guilty plea, Smith indicated that he was unaware of the charges against him. The state asserted that it had previously served a complaint on Smith. The district court gave Smith a copy of the complaint and an opportunity to review it and speak with appointed counsel. Following a recess,

¹ An *Alford* plea is entered when a defendant maintains his or her innocence while conceding that there is a substantial likelihood that the evidence would support a jury conviction of the charged offense. *State v. Goulette*, 258 N.W.2d 758, 760-61 (Minn. 1977) (adopting holding of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)).

appointed counsel reviewed Smith's rights on the record, during which Smith affirmed that he understood that he could proceed to trial represented by appointed counsel or pro se, appointed counsel had explained to him the probable outcome and potential consequences of a trial, and he understood that, by entering a guilty plea, he was voluntarily and knowingly waiving his trial rights. The district court accepted Smith's *Alford* plea and set the matter for sentencing.

At the sentencing hearing, appointed counsel advised the district court of Smith's desire to withdraw his guilty plea because Smith did not want to be on probation or attend domestic-abuse counseling. Speaking directly to the district court, Smith stated that he wanted to proceed to trial when he entered the guilty plea. But appointed counsel advised him that, if he did not plead guilty, Smith would have to represent himself at a trial that would begin the next day. In reply, appointed counsel told the district court that, because he recognized no legal basis for withdrawing the guilty plea, he planned to refer the case to a conflicts attorney. And appointed counsel requested to testify if the basis for Smith's motion was ineffective assistance of counsel.

With newly obtained counsel, Smith filed a written motion to withdraw his guilty plea and a supporting affidavit in which Smith claimed that appointed counsel had not fully explained the merits of the case and had not informed Smith of new charges brought by the state on the day of trial.

At the evidentiary hearing on Smith's motion, Smith objected when the state called appointed counsel as a witness. Concluding that, under Minnesota law, a client implicitly waives the attorney-client privilege when the client alleges that his attorney

breached a duty to him, the district court overruled Smith's objection and permitted appointed counsel to testify.

Appointed counsel testified that he received an amended complaint with additional charges at Smith's pretrial hearing. He reviewed the charges with Smith and explained that the factual basis remained the same. Appointed counsel testified that, on the trial date, he discussed with Smith what likely would occur during the trial and the probable outcome. Appointed counsel advised Smith that he was prepared to represent Smith at trial or to assist Smith in entering a guilty plea; it was Smith's decision whether to proceed to trial. Smith, who was displeased with appointed counsel, wanted a different attorney; but the district court declined to grant a continuance to permit Smith to prepare for trial with a new attorney. When appointed counsel advised Smith that the district court denied the continuance, he explained to Smith that the trial would begin within a day and Smith could choose to continue with appointed counsel as his lawyer, hire a new lawyer, or represent himself. Appointed counsel advised Smith that, if he accepted the state's guilty-plea offer, he would not go to jail. Rather, he would receive a probationary sentence and could be ordered to attend domestic-abuse counseling.

Appointed counsel also testified that Smith expressed confusion as to why the case would proceed to trial against the wishes of the alleged victim. Smith then placed a call on his cellular telephone, said to the person who answered, "[T]ell him what you told me," and handed the telephone to appointed counsel. Appointed counsel testified that, although the woman on the telephone identified herself as the alleged victim, he could not verify her identity.

The district court denied Smith's motion to withdraw his guilty plea, concluding that Smith's ineffective-assistance-of-counsel claim was without evidentiary support. The district court found that appointed counsel fully disclosed and explained the charges to Smith, reviewed the merits of the case and options for trial, sought a continuance to permit Smith to obtain a different lawyer, and fully explained Smith's options when a continuance was denied. The district court also rejected Smith's claims that he was not advised of his constitutional rights, did not waive those rights, and did not understand his rights. Because Smith failed to establish reasonable grounds to withdraw his guilty plea, the district court denied the motion. The district court subsequently imposed a sentence of 90 days, stayed the execution of the sentence for one year, and ordered Smith to complete a domestic-violence-prevention program. This appeal followed.

DECISION

I.

Smith first challenges the district court's decision to permit appointed counsel to testify as a witness for the state at the evidentiary hearing on Smith's motion to withdraw his guilty plea. Smith contends that the district court erroneously concluded that he waived the attorney-client privilege when he claimed ineffective assistance of counsel as the basis for the motion to withdraw his guilty plea.

Under Minnesota law, "[a]n attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty." Minn. Stat. § 595.02, subd. 1(b) (2008). In addition, the rules of professional conduct prohibit an attorney from

disclosing a client's confidences. Minn. R. Prof. Conduct 1.6(a). A client, however, may waive the attorney-client privilege either by express consent or by implication. *State v. Walen*, 563 N.W.2d 742, 752 (Minn. 1997); *see also*, Minn. R. Prof. Conduct 1.6(b)(8) (attorney-client privilege waived when client alleges attorney misconduct). Here, relying on *Walen*, the district court ruled that Smith waived the attorney-client privilege by alleging that appointed counsel provided ineffective assistance of counsel during the judicial proceedings. *See* 563 N.W.2d at 752-53.

In *Walen*, the defendant alleged that his former attorney failed to provide effective assistance and called the attorney to testify. *Id.* The district court permitted the state to cross-examine the attorney notwithstanding the defendant's objection on the grounds of attorney-client privilege. *Id.* The *Walen* court affirmed the ruling, holding that "a defendant who claims ineffective assistance of counsel necessarily waives the attorney-client privilege as to all communications relevant to that issue." *Id.* at 753.

Smith argues that *Walen* is distinguishable because his appointed counsel voluntarily testified for the state. This distinction, however, does not render *Walen* inapposite. The *Walen* court analyzed the Minnesota Rules of Professional Conduct, which permit an attorney to disclose client confidences when it becomes necessary to defend against a client's accusation of wrongful conduct. *See id.* at 752. The *Walen* court also favorably considered decisions of other jurisdictions that have concluded that a defendant who claims ineffective assistance of counsel necessarily waives the attorney-client privilege as to all communications relevant to that issue. *Id.* The waiver is not contingent on which party called the attorney as a witness. Rather, it is the nature of the

claim—ineffective assistance of counsel—that is dispositive of whether the attorney-client privilege has been waived.

Smith asserts that, because he had not filed a formal complaint against appointed counsel when the hearing was held on his motion to withdraw his guilty plea, the attorney-client privilege remained intact. This argument is unavailing. *Walen* does not require initiation of a formal ethics complaint against defense counsel to trigger a waiver of the attorney-client privilege. Rather, the assertion of ineffective assistance of counsel is sufficient. *See id.* at 753 (stating that a “defendant who claims ineffective assistance of counsel” waives attorney-client privilege). Indeed, the *Walen* court acknowledged that Minnesota’s rules of professional conduct contemplate that the attorney-client privilege will be waived when attorney misconduct is alleged. *Id.* at 752; Minn. R. Prof. Conduct 1.6(b)(8) (attorney permitted to reveal communications with client “to respond in any proceeding to allegations by the client concerning the lawyer’s representation of the client”).²

Smith argues alternatively that appointed counsel’s testimony exceeded the scope of the issue under consideration. By testifying about Smith’s telephone call to the woman who claimed to be the victim, Smith contends, appointed counsel disclosed that Smith violated the order for protection. This disclosure, he asserts, contravenes the Minnesota Rules of Professional Conduct. *See* Minn. R. Prof. Conduct 1.8(b) (prohibiting counsel from using “information relating to representation of a client to the

² Similarly, the rules of professional conduct defeat Smith’s argument that the district court should have quashed appointed counsel’s testimony to protect policy considerations encouraging clients to confide in their attorneys fully.

disadvantage of the client unless the client gives informed consent,” except as rules permit or require), 1.9(c) (prohibiting counsel from using or disclosing information relating to his or her representation of a former client to the disadvantage of the client, except as rules permit or require). Smith implies that the district court erred by failing to exclude testimony regarding Smith’s telephone call sua sponte. We disagree. A defendant who claims ineffective assistance of counsel waives the attorney-client privilege as to all communications relevant to the issue. *Walen*, 563 N.W.2d at 753. Appointed counsel testified about the telephone call to illustrate the context in which he explained that the case would proceed to trial against the victim’s wishes. Although we observe that the details of the telephone call were not necessary to convey the extent of the assistance appointed counsel provided, the incident was generally relevant to establish the nature of the assistance provided within the attorney-client relationship. Moreover, any error resulting from this disclosure was harmless in light of the ample body of evidence, independent of this telephone call, establishing that appointed counsel’s assistance was not ineffective.

II.

Smith next argues that the district court erred by denying his motion to withdraw his guilty plea. We review the 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 defendant does not have an absolute right to withdraw a valid guilty plea.” *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). 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). When considering whether withdrawal is “fair and just,” the district court must consider not only the reasons advanced by the defendant, but also any prejudice that granting the motion would cause the state because of its reliance on the guilty plea. Minn. R. Crim. P. 15.05, subd. 2; *Kim*, 434 N.W.2d at 266.

A valid guilty plea must be accurate, voluntary, and intelligently made. *Theis*, 742 N.W.2d at 646. A guilty plea is intelligently made if, when entered, a defendant has been advised of and understands the charges and the direct consequences of entering a guilty plea. *State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). A guilty plea may be involuntary as a result of the defendant receiving ineffective assistance of counsel. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994).

To succeed on a claim of ineffective assistance of counsel, a defendant must establish that the representation of defense counsel 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 proceedings would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). This objective standard of reasonableness requires defense counsel to exercise “the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.” *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). There is a strong presumption that counsel’s performance falls within a broad range of reasonable assistance. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Thus, a defendant who has entered a guilty plea must establish with reasonable probability that, but for counsel’s alleged errors, the

defendant would not have pleaded guilty. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004); *Ecker*, 524 N.W.2d at 718.

Smith asserts three bases to support his contention that appointed counsel provided ineffective assistance of counsel, justifying a withdrawal of the guilty plea: (1) his guilty plea was not intelligently made because he did not understand the charges, (2) his guilty plea was not voluntary because appointed counsel threatened that Smith would have to begin his trial the next day without counsel if he did not enter the guilty plea, and (3) appointed counsel committed attorney misconduct by threatening to testify against Smith if Smith withdrew the guilty plea and by actually testifying.³

As an initial matter, the relevant inquiry is the effectiveness of appointed counsel's representation of Smith before and during Smith's entry of the guilty plea. Appointed counsel's actions *after* the guilty plea was entered are not relevant to our consideration of whether the district court abused its discretion by denying Smith's motion to withdraw his guilty plea based on ineffective assistance of counsel. Appointed counsel advised Smith of his intent to testify at the sentencing hearing well after Smith entered his guilty plea. Thus, it had no bearing on Smith's decision to plead guilty to disorderly conduct.

The district court found no evidentiary support for Smith's other allegations that appointed counsel was so ineffective as to render Smith's plea involuntary. Appointed counsel's testimony and Smith's affirmative statements on the record amply support the

³ Smith claims that appointed counsel's testimony was motivated by the attorney's desire to "get[] back at" Smith for their earlier oral disagreements. But the record does not support this allegation and establishes that appointed counsel sought to testify only after it was evident that Smith intended to pursue a claim of ineffective assistance of counsel.

district court's finding. Indeed, the record establishes that appointed counsel fully advised and explained to Smith the nature of the charges as they were originally filed and subsequently amended. Before Smith entered his guilty plea, he met with appointed counsel and reviewed the amended complaint before agreeing to proceed. Smith acknowledged under oath that appointed counsel had explained the charges and consequences to him and that he was entering his guilty plea voluntarily, knowingly, and willingly. And the district court found credible appointed counsel's testimony that, after the district court denied Smith's continuance motion, appointed counsel explained to Smith that his options were to represent himself at the impending trial, permit appointed counsel to represent him, or accept the plea agreement. Accordingly, the district court did not err by finding that Smith's assertions of ineffective assistance of counsel were without factual support. And on this record, we reject Smith's argument that his guilty plea was not intelligently and voluntarily entered.

Finally, Smith argues that the district court erred by failing to consider that Smith's motion to withdraw his guilty plea was filed before sentencing. The Minnesota Rules of Criminal Procedure authorize the district court to grant a motion to withdraw a guilty plea either before or after sentencing and sets forth different legal standards depending on the procedural posture of the motion. Minn. R. Crim. P. 15.05, subds. 1 (mandating withdrawal of guilty plea at any time, even after sentencing, if it "is necessary to correct a manifest injustice"), 2 (authorizing withdrawal of guilty plea before sentencing if defendant proves that "it is fair and just to do so"). But our review of the record establishes that the district court clearly applied the proper legal standard for a

presentence motion to withdraw a guilty plea. Nothing in the record supports Smith's argument by implication that the district court erroneously applied the stricter standard for a postsentencing motion to withdraw a guilty plea.

Because there is a dearth of evidentiary support for Smith's ineffective-assistance-of-counsel claim and the district court applied the correct legal standard when it considered Smith's presentence motion to withdraw his guilty plea, the district court did not abuse its discretion by denying Smith's motion.

Affirmed.