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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-444**

State of Minnesota,
Respondent,

vs.

Charles Duane Elmlad,
Appellant.

**Filed January 4, 2011
Affirmed
Minge, Judge**

Anoka County District Court
File No. 02-CR-08-14291

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County
Attorney, Anoka, Minnesota (for respondent)

Paul P. Sarratori, Sarratori Law Office, P.A., Coon Rapids, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges the district court's denial of his motion to withdraw his
guilty plea prior to sentencing, arguing that (1) his withdrawal request met the fair and
just standard; (2) the record did not contain an adequate factual basis for a guilty plea;

and (3) there was not a basis for the district court's finding that the state would be prejudiced by the withdrawal. We affirm.

FACTS

Appellant Charles Duane Elmblad was charged with one count of criminal sexual conduct in the second degree under Minn. Stat. § 609.343, subds. 1(a), 2(a) (2008). On June 1, 2009, appellant pleaded guilty pursuant to a plea agreement. The district court deferred accepting the plea until sentencing. Following his plea, appellant was interviewed pursuant to a pre-sentence investigation. Appellant was informed that he would have to register as a sex offender in every state he enters. Because appellant is an over-the-road trucker, the registration requirement would now cause him to lose his job. Appellant indicated that he was unaware of this consequence when he pleaded guilty. Additionally, appellant denied wrongfully touching the victim.

Prior to sentencing, appellant moved the district court to allow him to withdraw his guilty plea. Appellant argued that his guilty plea was invalid because he did not understand the consequences of his plea and the record did not provide an adequate factual basis for his plea. The district court denied the motion to withdraw. In making this determination, the district court reasoned that: (1) the impact on appellant's employment was a collateral consequence not unique to appellant; (2) appellant provided an adequate factual basis for the plea through his sworn testimony; and (3) withdrawal would prejudice the state by delaying the matter and the state relied on the guilty plea in making its plea agreement. This appeal follows.

DECISION

The issue in this case is whether the district court abused its discretion by refusing to allow appellant to withdraw his guilty plea prior to sentencing. A district court may allow a defendant to withdraw a guilty plea prior to sentencing if it is “fair and just to do so.” Minn. R. Crim. P. 15.05, subd. 2. In making this determination, 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.” *Id.* In order for a guilty plea to be fair and just, it must be “accurate, voluntary, and intelligent.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

A defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). “Allowing withdrawal of a guilty plea is within the district court’s discretion and is reviewed under an abuse-of-discretion standard. Appellate review is generally limited to determining whether sufficient evidence exists to sustain the district court’s findings.” *Kaiser v. State*, 621 N.W.2d 49, 52 (Minn. App. 2001) (citing *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997)).

Fair and Just Standard

Appellant argues that the district court erred by denying his request to withdraw his guilty plea because it was fair and just to allow withdrawal. Appellant asserts that because he works as an over-the-road truck driver, driving in 48 states, he would have to register as a sex offender in all 48 states, that this effectively prevents him from engaging in his current work, and that in a depressed economy, he has poor prospects for alternate

employment. Appellant acknowledges that he was aware of the registration requirement prior to entering his plea, but argues that because he was not aware of the impact that registering would have on his employment, his guilty plea was not intelligent.

The accused in a criminal proceeding faces numerous consequences from litigation decisions. The district court often faces a difficult task in making sure the accused is advised of and understands his rights and the immediate consequences of a guilty plea. We do not expect the district court to anticipate, warn of and ascertain the accused's appreciation of all the indirect or collateral consequences. For this reason, the failure of the accused to understand the indirect or collateral consequences of a guilty plea generally does not mean that a plea is not intelligent, justifying its withdrawal prior to sentencing. *Kim v. State*, 434 N.W.2d 263, 266-67 (Minn. 1989).¹ Impact on employment is considered collateral consequences. *See id.*

Here, the record shows that the district court considered appellant's reasons for requesting withdrawal of the plea. Appellant concedes that he was aware of the registration requirement at the time he entered his plea. His main contention is that he did not understand the impact registering would have on his employment. The district court found this to be a collateral consequence that is not unique to the defendant. This conclusion is consistent with prior decisions reasoning that the impact of a guilty plea on

¹ We acknowledge that the United States Supreme Court declined to recognize the distinction between direct and collateral consequences in finding that the failure of an attorney to advise a defendant of deportation risks triggered by a guilty plea constituted ineffective assistance of counsel. *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473 (2010). This court has not had occasion to consider whether that Supreme Court decision undermines the direct-versus-collateral-consequences distinction in other areas. We do not sua sponte undertake a reconsideration of the distinction in this case.

employment is a collateral consequence that is insufficient to allow withdrawal of the plea. *See Kim*, 434 N.W.2d at 266–67.

We recognize that appellant attempts to distinguish his circumstances from caselaw on the basis that registration as a sex offender may cause him to lose his job in hard economic times. Appellant admits that such registration does not preclude him from driving a truck intrastate or regionally. But he asserts such work is not available to him. We recognize the seriousness of the economic impact on appellant. At the same time, the effective administration of the criminal-justice system imposes a limit on the ability of the accused to withdraw from properly-advised, critical decisions like guilty pleas, absent a clearly unforeseeable or unknown consequence that drastically affects the life of the accused and is disproportionate to the criminal sanction. Although the district court was not precluded from exercising its discretion to allow appellant to withdraw his plea in this circumstance, on this record, where appellant was represented by counsel, knew of the registration requirement, and can seek local and regional truck-driving work, we conclude that the district court did not abuse its discretion by denying appellant's request to withdraw his guilty plea on the basis that the plea was not intelligent.

Adequate, Accurate Factual Basis

Appellant argues that his plea is not valid because he did not provide an adequate factual basis for the district court to accept his plea, and that this meant his plea was not accurate. In order for a guilty plea to be accepted, it must have an adequate, accurate factual basis in the record. *Ecker*, 524 N.W.2d at 716. This accuracy requirement ensures that a defendant does not plead guilty to an offense more serious than one for

which he could be convicted if he went to trial. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010) (citing *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983)). “The district court typically satisfies the factual basis requirement by asking the defendant to express in his own words what happened.” *Id.* A defendant may not withdraw his plea “simply because the [district] court failed to elicit proper responses if the record contains sufficient evidence to support the conviction.” *Id.*

Leading Questions

Appellant argues that the factual basis for his plea was inadequate and did not meet the accuracy requirement for two reasons. First, he asserts that the prosecutor improperly used leading questions in eliciting the factual basis. In general, courts “discourage the use of leading questions to establish a factual basis.” *Ecker*, 524 N.W.2d at 717. The district court “must be particularly attentive to situations in which a defendant is pleading guilty and is asked only leading questions by counsel.” *Id.* at 716.

Appellant points to the following excerpt:

[PROSECUTOR]: Okay. At some point in time did you touch her breasts over her clothing?

[APPELLANT’S ATTORNEY]: Clothing over her breasts.

[APPELLANT]: I touched her clothing.

[PROSECUTOR]: That was over, covering her breasts?

[APPELLANT]: Yes.

[PROSECUTOR]: And you touched her—so, in essence, you touched her breasts through her clothing?

[APPELLANT]: No. I pulled her bra back down because she had lifted it up.

[PROSECUTOR]: And in doing that, did your hand rub against her breasts?

[APPELLANT]: The clothing was over the breast area at the time.

[PROSECUTOR]: And when you touched that area, do you agree that you did that with sexual or aggressive intent?
[APPELLANT]: With aggressive intent.

While the prosecutor used leading questions, appellant answered in his own words to explain why he was pleading guilty. For example, appellant admitted that he “pulled her bra back down because she had lifted it up,” that the “clothing was over the breast area at the time,” and that he did this with “aggressive intent.” *See* Minn. Stat. § 609.343, subd. 1(a) (providing that a person commits second-degree criminal sexual conduct when the person engages in sexual contact with a victim under the age of 13 and the person is more than 36 months older than the victim); § 609.341, subd. 11 (2008) (defining “sexual contact” as the “touching of the clothing covering the immediate area of the intimate parts” without the consent of the victim and with “aggressive intent”). Additionally, even if the state’s questioning was improper, it is not a basis to withdraw the guilty plea because the record supports the conviction. *See Raleigh*, 778 N.W.2d at 94.

Taking Responsibility

Appellant also argues that the factual basis is inadequate and inaccurate because he did not take responsibility for the conduct. Specifically, appellant asserts that at the pre-sentence investigation, he denied intentionally touching the victim’s breasts, and during a psychosexual evaluation, he denied acting with sexual intent or engaging in sexual activity with a young girl.

Here, the better reading of the June 1, 2009 hearing transcript shows appellant admitting guilt under oath. Appellant failed to allege any evidence or explanation indicating his innocence. Moreover, the statements made during the pre-sentence

investigation and the psychosexual evaluation do not necessarily contradict the statements made to establish the factual basis. For example, during the pre-sentence investigation, appellant denied “touching [the victim’s] breasts intentionally.” But Minn. Stat. § 609.341, subd. 11(iv), allows conviction when the actor intentionally touched “the clothing covering the immediate area of the intimate parts,” and appellant admitted at the plea hearing that he “pulled her bra back down because she had lifted it up.” With regard to the psychosexual evaluation, appellant stated that he did not touch the victim with any sexual intent. But Minn. Stat. § 609.341, subd. 11, allows conviction when the actor acted with “aggressive intent,” and appellant admitted at the plea hearing that he acted with “aggressive intent.” In sum, we conclude that the district court did not abuse its discretion in determining that there was a sufficiently accurate and adequate basis for the plea.

Prejudice to the State

Appellant argues that the state failed to present any evidence showing that the state would be prejudiced by withdrawal of the plea. But the rule does not require the state to establish prejudice. It is merely a “consideration” for the district court in determining whether it is fair and just to allow withdrawal. *See* Minn. R. Crim. P. 15.05, subd. 2.

Here, the record shows that the district court did not consider prejudice to the state in terms of its ability to present evidence and prove its charges against appellant. However, the district court did consider prejudice to the victim if appellant was allowed to withdraw his plea. In making this determination, the district court orally stated on the

record that the teenage victim “has been under the impression that the matter was resolved and she was not going to have to testify in court in this matter. Clearly, the Court and clearly the prosecution in this case considered the impact to the victim in making its plea offer. . . .” The district court may consider the impact on the victim in determining whether it is fair and just to allow withdrawal of the plea. *See Kim*, 434 N.W.2d at 267 (upholding the district court’s decision to deny withdrawal of a guilty plea, reasoning that “the trial court was not unjustified in considering the interests of the victim” as a factor).

Based on the foregoing analysis, we conclude that the district court did not abuse its discretion in denying appellant’s motion to withdraw his guilty plea.

Affirmed.

Dated: