STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1374

State of Minnesota,
Respondent,

vs.

Johnson Nypea Yekeh,
Appellant.

Filed June 25, 2012
Affirmed
Larkin, Judge

Pennington County District Court
File No. 57-CR-07-1511

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

Alan G. Rogalla, Pennington County Attorney, Kristin J. Hanson, Assistant County Attorney, Thief River Falls, Minnesota (for respondent)

P. Chinedu Nwaneri, Nwaneri Associates, PLLC, Eagan, Minnesota (for appellant)

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

* Retired judge of the Minnesota Court of Appeals, serving 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

LARKIN, Judge

Appellant challenges the district court's denial of his motions to withdraw his guilty plea, arguing that the district court deliberately disregarded his plea agreement and that he received ineffective assistance of counsel. Because the district court did not err in denying appellant's plea-withdrawal motions, we affirm.

FACTS

Appellant Johnson Nypea Yekeh was charged with fifth-degree criminal sexual conduct in 2007. In exchange for Yekeh's guilty plea, the state agreed to recommend a stayed sentence of 360 days and to dismiss of a separate misdemeanor dishonored-check charge. The plea agreement was stated on the record at Yekeh's plea hearing. At the plea hearing, Yekeh's counsel, Kip Fontaine, stated that Yekeh expected to be placed on probation, and that he would be required to make restitution payments, to remain law-abiding, and to complete a sex-offender assessment. Counsel also stated that Yekeh would be subject to a no-contact order.

During the plea hearing, Yekeh acknowledged that he understood the contents of his petition to plead guilty and that he and Fontaine had discussed the possible immigration consequences of the plea. Specifically, Yekeh acknowledged that "by pleading guilty to this crime, . . . it could result in [him] being deported or told to leave the United States" and that nobody could "predict what [would] happen to [him] if [he] plead[ed] guilty" as far as immigration consequences were concerned. Yekeh also acknowledged that Fontaine arranged the assistance of an immigration-law attorney,

Richard Breitman, that he and Fontaine talked to Breitman, and that Breitman provided advice regarding the potential immigration consequences of Yekeh's guilty plea. Yekeh indicated that he, Fontaine, and Breitman had discussed ways to minimize the potential ramifications of a guilty plea in this case. But Yekeh acknowledged that "there [were] no guarantees about the outcome of any immigration action against [him]." The district court noted Yekeh's guilty plea at the plea hearing, but it did not accept the plea at that time. The matter was scheduled for a sentencing hearing, and the district court ordered a presentence investigation.

At the sentencing hearing, the district court expressed concerns regarding the contents of Yekeh's presentence-investigation report. The report indicated that Yekeh had "recant[ed]" his plea of guilty and said that "he just made the confession in this case to law enforcement so he could go home." The district court stated that it wanted to know whether Yekeh wished to withdraw his guilty plea, and the court recessed the hearing for approximately one hour so that Yekeh could talk with his attorney. When the hearing resumed, Fontaine stated that "after some contemplation, [Yekeh] has determined that he wishes to proceed with sentencing here this afternoon." Fontaine acknowledged that at one point, Yekeh wanted to withdraw his plea, but that "after further contemplation, discussion, and visiting with [his] wife, [he wanted] the judge to accept [the] guilty plea."

The state requested that the court follow the plea agreement and "also order [Yekeh] to complete the booking process across the street." The district court accepted Yekeh's guilty plea and sentenced him to "one year in the Pennington County jail,"

stayed for two years, subject to standard probationary conditions. Yekeh did not object to the imposition of a 365-day sentence, which was inconsistent with the agreed-upon 360-day sentence. The state dismissed the misdemeanor dishonored-check charge. After the hearing, the Department of Homeland Security took Yekeh into federal custody and subsequently ordered his removal from the United States on the ground that he had committed an "aggravated felony."

Yekeh sought review in this court, arguing that he should be allowed to withdraw his guilty plea. *State v. Yekeh*, No. A09-468, 2009 WL 2747812, at *1 (Minn. App. Sept. 1, 2009). Because Yekeh had not moved to withdraw his plea in district court, we declined to address Yekeh's arguments and remanded the case for Yekeh to make an appropriate motion in district court. *Id.* at *2.

On remand, Yekeh moved to withdraw his plea, arguing that his plea of guilty was based on a plea agreement in which he and the state had agreed to a 360-day stayed sentence. Yekeh argued that he did not agree to a sentence of 365 days and because his plea agreement was breached, he should be allowed to withdraw his plea. The district court denied Yekeh's motion. The district court reasoned that Yekeh's sentence resulted from a mistake or a misstatement of the plea agreement by the court and that the appropriate remedy was for the district court to correct his sentence. The district court therefore amended Yekeh's sentence to conform to the plea agreement, reducing his stayed jail term to 360 days.

Yekeh also requested relief on the ground of ineffective assistance of counsel. The district court refused to address that claim, reasoning that it was beyond the scope of

this court's remand. The district court instructed Yekeh that he must raise his ineffective-assistance-of-counsel challenge in a separate motion or in a petition for postconviction relief. Yekeh appealed the district court's order denying his motion to withdraw his guilty plea, and this court stayed the appeal to allow Yekeh to pursue his ineffective-assistance-of-counsel claim in district court.

Yekeh filed a second motion to withdraw his plea, asserting ineffective assistance of counsel, and the district court held an evidentiary hearing on the motion. At the hearing, Yekeh testified that he talked with Fontaine and immigration attorney Breitman about the possible immigration consequences of a guilty plea. Yekeh testified that Breitman told Fontaine not to take a plea deal and that Fontaine became upset. Yekeh also testified that Breitman advised that the dishonored-check charge would have immigration consequences but that the criminal-sexual-conduct charge would not.

Fontaine also testified at the hearing. According to his testimony, Fontaine consulted with Breitman because he knew that Yekeh was not a United States citizen. Breitman informed Fontaine that a conviction for issuance of a dishonored check could have adverse immigration consequences and that he should try to obtain a sentence of less than one year. Regarding the criminal-sexual-conduct charge, Breitman advised Fontaine not to refer to the age of the victim during the plea. Breitman told Fontaine that "a colleague of his had successfully argued that such a plea was not an aggravated felony under federal immigration law." But Breitman did not say whether the victim was a minor in that case. According to Fontaine, because the victim's age was not an essential element of the fifth-degree criminal-sexual-conduct offense, it was not a part of the

factual basis for Yekeh's guilty plea.[1] Fontaine denied that Breitman said that Yekeh should not accept a plea agreement. Fontaine also testified that during the plea and sentencing hearings, he told Yekeh that Yekeh could rip up the plea petition and proceed to trial.

The district court denied Yekeh's second motion to withdraw his plea. This appeal follows.

D E C I S I O N

I.

"At any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970); *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). A defendant bears the burden of showing his plea was invalid. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). "Assessing the validity of a plea presents a question of law that we review de novo." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Yekeh argues that plea withdrawal is necessary to correct a manifest injustice, because the district court deliberately disregarded his plea agreement and sentenced him

[1] Although the victim in this case was 17 years old at the time of the offense, neither the victim's age nor the fact that she was a minor was mentioned at the plea hearing or in the petition to plead guilty.

to a stayed sentence of 365 days instead of 360 days. "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (quotation omitted). "If a promise within a plea agreement is not fulfilled, the defendant cannot be said to have voluntarily entered into the plea agreement." *Carey v. State*, 765 N.W.2d 396, 400 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). Therefore, "[w]hen a guilty plea is induced by unfulfilled or unfulfillable promises, the voluntariness of the plea is drawn into question, and due process considerations require that the defendant be given the opportunity to withdraw his plea." *State v. Wukawitz*, 662 N.W.2d 517, 526 (Minn. 2006) (citation omitted).

Although a plea is not valid if it is based on a promise that is subsequently breached, in this case, the promise of a 360-day sentence was not intentionally breached by the state or rejected by the district court. The state argued that Yekeh should be sentenced in accordance with the plea agreement and did not object to the district court's modification of Yekeh's sentence to 360 days. And the district court never indicated that it disapproved of the plea agreement. *See* Minn. R. Crim. P. 15.04, subd. 3 (stating that the district court "must advise the parties in open court" if it rejects a plea agreement and the district court must "then call upon the defendant to either affirm or withdraw the plea").

Yekeh argues that the district court had a "deliberate plan to dishonor or disregard the plea agreement." Yekeh relies on the fact that he was taken into federal custody immediately after his sentencing hearing, purportedly to complete the booking process

after sentencing. According to Yekeh, this evinces a "preconceived plan [to] deliberate[ly] . . . sentence [Yekeh] outside the terms of his plea agreement and hand him immediately after sentencing to the Department of Homeland Security for deportation." Nothing in the record supports Yekeh's assertion that the district court deliberately misstated Yekeh's sentence in order to have him deported. To the contrary, once the mistake was brought to the district court's attention in Yekeh's motion to withdraw his guilty plea, the district court corrected the error.

Moreover, even if the plea agreement was technically breached, the district court had discretion to modify the sentence in accordance with the plea agreement instead of allowing Yekeh to withdraw his plea. "On 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." *Brown*, 606 N.W.2d at 674; *see also* Minn. R. Crim. P. 27.03, subd. 9 (allowing for correction or reduction of a sentence not authorized by law at any time). In denying Yekeh's motion, the district court explained its pronouncement of Yekeh's sentence was simply a "mistake or a misstatement" and that it had no intention of disregarding the plea agreement. The district court's decision to modify Yekeh's sentence instead of allowing him to withdraw his plea was not an abuse of discretion.

Yekeh cites caselaw in support of his assertion that "a defendant is entitled to withdraw his plea if the terms of the plea agreement are breached." But two of the cases he cites merely indicate that a district court *may* permit a defendant to withdraw his or her plea if an underlying plea agreement is not honored. *See State v. Jumping Eagle*, 620 N.W.2d 42, 44-45 (Minn. 2000) (holding that when an imposed sentence violated a

defendant's plea agreement, the district court on remand had the discretion to either allow the defendant to withdraw his plea or to modify the sentence consistent with the plea agreement); *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998) ("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." (quotation omitted)). The third case that Yekeh cites is factually distinguishable. *See State v. Kunshier*, 410 N.W.2d 377, 379-80 (Minn. App. 1987) (stating that when a defendant's guilty plea is induced by a promise of a particular sentence, the district court has no discretion to expressly reject that promised sentence without allowing the defendant the right to withdraw his guilty plea), *review denied* (Minn. Oct. 21, 1987). Yekeh's reliance on language in his plea petition is similarly unpersuasive. The language indicates that Yekeh had a right to withdraw his guilty plea if the district court did not approve of the plea agreement. But as discussed above, the district court did not express its disapproval of the plea agreement and in fact modified the sentence to conform to the agreement. In sum, Yekeh's argument that he is "entitled" to withdraw his plea is unavailing.

Yekeh's arguments that the district court's sentence modification was not authorized under the rules of criminal procedure are also unavailing. He argues that Minn. R. Crim. P. 27.03, subd. 10, is inapplicable because there was no clerical mistake. *See* Minn. R. Crim. P. 27.03, subd. 10 (allowing for correction of clerical mistakes in a judgment or order at any time). He next argues that because the original sentence was within the "maximum sentence authorized by law for gross misdemeanors . . . there [was] nothing to correct under rule 27.03, subd. 9," and that a district court must first "impose a

sentence not authorized by law in order to trigger the provisions of Minn. R. Crim. P. 27.03, subd. 9." *See* Minn. R. Crim. P. 27.03, subd. 9 (allowing for correction or reduction of a sentence not authorized by law at any time). But the Minnesota Supreme Court has held that a district court may "alter the sentence if appropriate" where the sentence is inconsistent with the underlying plea agreement. *Brown*, 606 N.W.2d at 674. Because the sentence modification in this case is authorized under *Brown*, we need not determine whether the modification—which reduced Yekeh's sentence—is alternatively authorized under the rules of criminal procedure.

Lastly, Yekeh's argument that he is "innocent [and was] framed up by the alleged victim" is unpersuasive. *See State v. Robinson*, 388 N.W.2d 43, 46 (Minn. App. 1986) (refusing to disturb a district court's denial of a motion to withdraw a guilty plea based on the defendant's claims of innocence when there was "nothing in the record that would arouse any doubt concerning his guilt"), *review denied* (Minn. July 31, 1986). In sum, Yekeh fails to demonstrate a manifest injustice necessitating plea withdrawal. The district court therefore did not err in denying Yekeh's first motion to withdraw his plea.

II.

Yekeh also argues that he should be permitted to withdraw his plea because his attorney did not adequately advise him of the risk of deportation. Yekeh contends that he received ineffective assistance of counsel as a result. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by defense counsel's deficient performance. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn.

1994) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984)). The burden of proof rests with the defendant, who must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *accord Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (observing that judicial review should be "highly deferential" to counsel's performance). When a defendant fails to prove either deficient performance of counsel or resulting prejudice, the claim of ineffective assistance of counsel fails. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). A claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Yekeh argues that his attorney was ineffective because he failed to give Yekeh appropriate advice regarding the immigration consequences of Yekeh's plea. Yekeh relies on *Padilla v. Kentucky*, in which the United States Supreme Court held that, for purposes of the Sixth Amendment right to effective assistance of counsel, "counsel must inform her client whether [the guilty] plea carries a risk of deportation." 130 S. Ct. 1473, 1486 (2010); *see Campos v. State*, 798 N.W.2d 565 (Minn. App. 2011) (holding that *Padilla* applies retroactively to cases on collateral review), *review granted* (Minn. July 19, 2011). The Supreme Court stated that when the deportation consequence of a criminal conviction is "truly clear," defense counsel must provide accurate information regarding the adverse immigration consequence. *Padilla*, 130 S. Ct. at 1483. But in cases "in which the deportation consequences of a particular [guilty] plea are unclear or

uncertain" and "the law is not succinct and straightforward[,] . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

In *Padilla*, defense counsel incorrectly advised the defendant that his guilty plea would not result in his removal from the United States. *Id.* The *Padilla* court held that defense counsel "could have easily determined that [the defendant's guilty] plea would make him eligible for deportation simply from reading the text" of a single statutory provision that specifically commands removal for the offense to which the defendant pleaded guilty. *Id.* Because "the terms of the relevant immigration statute [were] succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction" and defense counsel's advice was incorrect, defense counsel's performance in *Padilla* fell below an objective standard of reasonableness. *Id.*

Yekeh argues that because he pleaded guilty to "sexual abuse of a minor," he was subject to automatic deportation under the relevant federal statutes regardless of the sentence imposed. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (providing that "[a]ny alien who is convicted of an aggravated felony any time after admission is deportable"); 8 U.S.C. § 1101(a)(43)(A) (2006) (defining an aggravated felony as including the sexual abuse of a minor). Yekeh contends that his attorney should have advised him that by pleading guilty to the charge of criminal sexual conduct, he would be subject to "automatic deportation."

The district court concluded that Fontaine was not obligated to advise Yekeh that a conviction of fifth-degree criminal sexual conduct would result in automatic deportation.

The district court reasoned that federal law did not clearly establish that a conviction of fifth-degree criminal sexual conduct results in automatic deportation because federal law is conflicting regarding the definition of "sexual abuse of a minor." The district court reviewed several federal cases and observed that "federal circuit courts differ on what constitutes 'sexual abuse of a minor'" under the relevant federal laws. The district court reasoned that because the risk of deportation was not clear, Fontaine acted effectively by informing Yekeh that there was a risk of deportation and that there were no guarantees regarding the immigration consequences. Thus, the district court concluded that Yekeh failed to show that he was denied effective assistance of counsel.

The district court's reasoning is sound. Yekeh was not charged with, nor did he plead guilty to, sexual abuse of a minor. Yekeh pleaded guilty to fifth-degree criminal sexual conduct, which does not include a victim-age element. *See* Minn. Stat. § 609.3451, subd. 1 (2010) (defining the crime of fifth-degree criminal sexual conduct). Moreover, as the district court reasoned, the consequences of Yekeh's plea were not clear because federal courts do not agree regarding what constitutes "sexual abuse of a minor" for deportation purposes. Thus, a federal court reviewing Yekeh's conviction could conclude that the offense does not constitute sexual abuse of a minor. *Compare Rivera-Cuartas v. Holder*, 605 F.3d 699, 701-02 (9th Cir. 2010) (comparing the Arizona statute at issue with the federal "generic definition" of sexual abuse of a minor and concluding that the defendant's conviction for engaging in oral sex with a 16-year-old child under the Arizona statute did not qualify as an aggravated felony), *with Gattem v. Gonzalez*, 412 F.3d 758, 764-65 (7th Cir. 2005) (approving a broader definition of "sexual abuse of a

minor" and concluding that the defendant's conviction for solicitation of sex from a minor in exchange for cigarettes under an Illinois statute qualified as an aggravated felony). Moreover, it was not clear what approach the 8th Circuit would take in examining Yekeh's conviction because at the time of Yekeh's guilty plea, it had not addressed this particular issue.

Contrary to Yekeh's assertions, the deportation consequences were not "succinct and straightforward." Thus, Yekeh's attorney adequately counseled Yekeh regarding the possible consequences of his guilty plea, including the risk of deportation, by advising him that "there [were] no guarantees about the outcome of any immigration action." *See Padilla*, 130 S. Ct. at 1483 (recognizing that in cases where the deportation consequences are not clear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences"). More importantly, Fontaine sought advice from an immigration attorney and, according to Yekeh's own affidavit in support of his motion, the immigration attorney advised Yekeh not to plead guilty. Yekeh rejected this advice, attempting to minimize the potential adverse immigration consequences of a guilty plea by following the immigration attorney's advice regarding the factual basis for the plea and the length of the negotiated sentence. Fontaine's performance was not objectively unreasonable, and Yekeh did not receive ineffective assistance of counsel under the general standard articulated in *Strickland* and applied in *Padilla*. Thus, the district court did not err in denying Yekeh's second motion to withdraw his guilty plea.

III.

In arguing that he should be allowed to withdraw his plea, Yekeh raises an issue related to the probationary conditions imposed by the district court. Yekeh argues that some of the court-ordered terms of probation were not included in the plea agreement, including conditions prohibiting his use or possession of alcohol and requiring him to submit to random chemical testing and searches. Yekeh argues that "these additional terms and conditions are not elements of the offense alleged against [him] or in any way connected or material to the alleged offense or supported by any law to be applicable to the offense [he] pled guilty to." He further argues that the conditions prejudice him "because they infringe on his liberty and make him vulnerable to easily violate his probation should he even engage in the legal act of consuming alcohol."

These arguments suggest a challenge to the validity of the probationary conditions. But Yekeh did not object to the conditions at the time of sentencing. In fact, the presentence-investigation report recommended the conditions that Yekeh now challenges, and Yekeh's attorney recommended that the district court adopt the conditions. Because Yekeh did not object to the conditions in district court, his challenge to the validity of the conditions is not properly before this court on appeal. *See State v. Anderson*, 733 N.W.2d 128, 138-39 (Minn. 2007) (refusing to consider a challenge to the validity of a probationary condition where the challenge was not raised and determined in district court).

Affirmed.