

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1754**

State of Minnesota,
Respondent,

vs.

Tyrone Lavell Straub,
Appellant.

**Filed July 9, 2012
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27CR111481

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Brian Wambach, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal from his conviction of second-degree possession of a controlled
substance, in violation of Minn. Stat. § 152.022, subd. 2(1) (2010), appellant argues that

(1) his guilty plea is invalid by reason of the district court's having impermissibly interjected itself into plea negotiations and (2) the court abused its discretion by denying his motion to withdraw his guilty plea. We affirm.

FACTS

Appellant Tyrone Straub was charged by complaint on January 19, 2011, with one count of controlled-substance crime in the second degree pursuant to Minn. Stat. §§ 152.01, subd. 16a, .022, subds. 2(1), 3(b), .609.101, subd. 3 (2010).

At an omnibus hearing held on May 27, 2011, the prosecutor placed the following on the record:

There was some discussions [sic] back in chambers. Just to let Your Honor know, the defendant is looking at a presumptive sentence of 111 months with a criminal history score of 6 and a severity level 9 crime. The State did offer 75 months. After some discussion in chambers, the State understands Your Honor is entertaining the possibility of a durational departure, in which case it would perhaps be less than the State's—in which case the State would—uh, it would be a straight plea over the State's objection.

Appellant then entered a plea of guilty to the complaint and signed a petition to enter a plea of guilty. Item 27 of the plea petition contains the printed statement, "I am entering my plea of guilty based on the following plea agreement with the prosecutor:" after which the following hand-written entry is made: "None. Straight Plea to the Court."

Item 28 of the plea petition states: "No one, including my attorney, any police officer, prosecutor, judge or any other person, has made any promises to me, to any member of my family, to any of my friends or any other person, in order to obtain a plea of guilty from me." The word "promises" is underlined by hand.

Following the plea and some scheduling discussions, the district court provided the prosecution with an opportunity to make a record of any objections, stating:

Now, for the State, I don't know if you want to make a record now or not, understanding that I am going to be departing, and that if he behaves himself and does what he should do, that I'm considering a 60-month commit which is obviously less than a hundred and eleven months, and more than what would have been technically a mandatory minimum. So is there anything you want to put on the record now, or did you want to reserve that to the time of sentencing.

The state simply repeated that it would object to a durational departure. The district court then admonished appellant, stating:

I want to make sure that you do remain law abiding . . . , because I want you to understand if you don't appear for sentencing or if there are serious allegations or concerns between now and sentencing, you are looking at a hundred and eleven months. Now if you don't appear, it will be a hundred and eleven months when you're picked up. But in the meanwhile you understand that the benefit of all of this, uh, your incentive to remain law abiding, take care of your family, and your treatment obligations will result in a departure.

Prior to the sentencing hearing, appellant was again discovered in possession of cocaine, and arrested on new charges.

At the sentencing hearing, appellant moved to withdraw his guilty plea. However, the motion was not based on any allegation that the district court had impermissibly inserted itself into the plea negotiations. Appellant's counsel instead characterized appellant's prior guilty plea as "a straight plea rather than a negotiation for 75 months that was asked for by the State."

The district court denied the motion, stating:

I certainly very well remember the plea because of the fact that I took seriously a departure consideration, and I don't always do that, but under these circumstances and what was happening, I deemed it correct to give you an opportunity, and it's not anybody's fault except your own that you didn't succeed.

The district court told appellant, "You fully understood the conditions and what was going to happen and especially what would happen if you didn't reappear for sentencing or if you violated any of the conditions." The district court sentenced appellant to 111 months in prison, consistent with the Minnesota Sentencing Guidelines.

DECISION

I.

A criminal defendant must be allowed to withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quoting Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice exists when a guilty plea is invalid. *Id.*

A district court may not properly offer a criminal defendant "an anticipated sentencing result that is not part of an existing agreement between the defendant and the prosecutor." *Melde v. State*, 778 N.W.2d 376, 378 (Minn. App. 2010). A district court that makes such an offer "improperly injects itself into plea negotiations." *Id.* at 378–79 (quotation omitted). "Anytime a district court improperly injects itself into plea negotiations the guilty plea is per se invalid." *State v. Anyanwu*, 681 N.W.2d 411, 415 (Minn. App. 2004). Failure to object at the time the district court improperly inserts itself

into the negotiations does not preclude consideration of the issue for the first time on appeal. *Id.* at 413–14.

In *Anyanwu*, this court held that the district court should have permitted the appellant to withdraw his plea, noting that “the district court directly and unequivocally promised the defendant a particular sentence in advance, and forced the plea bargain on the prosecutor over the prosecutor’s objections.” *Id.* at 415. This particular language has been adopted by subsequent case law as the standard for cases involving an agreement between the district court and the defendant. *See State v. Hannibal*, 786 N.W.2d 314, 318 (Minn. App. 2010) (rejecting argument that the district court had improperly injected itself into plea negotiations because the record did not indicate that the district court had directly and unequivocally promised a particular sentence in exchange for a guilty plea).

In this case, as in *Hannibal*, the record does not disclose a direct and unequivocal promise by the district court of a particular sentence. Indeed, the plea petition signed by appellant expressly disclaims the existence of any such promises by the district court. The parties all referred to appellant’s guilty plea as a simple “straight plea” to the district court. *Cf. Anyanwu*, 681 N.W.2d at 412, 415 (reversing conviction where the plea had been characterized by defense counsel as “a straight plea . . . with [*an*] understanding” (emphasis added)). The district court here specifically noted that it was only “considering a 60-month commit,” and specifically indicated that appellant’s deportment between the plea and sentencing would be considered in the ultimate sentence to be imposed. Prior to sentencing, the district court did indeed consider appellant’s post-plea

arrest and admission to possession of cocaine (secondary to his chemical dependency).¹ Appellant did not, in fact, receive the 60-month sentence which the district court had earlier indicated it was willing to consider if appellant proved himself deserving of a mitigated dispositional departure.

Although the district court was involved in plea discussions, it did not improperly inject itself into plea negotiations so as to render appellant's plea invalid.

II.

Appellant next argues that the district court erred in not addressing his motion to withdraw his guilty plea under the discretionary fair-and-just standard, but instead arguably applied the more exacting manifest-injustice standard. The fact that the district court makes findings on the basis of the manifest-injustice standard when it should apply the fair-and-just standard does not, by itself, require remand to the district court for findings based on the fair-and-just standard. *State v. Lopez*, 794 N.W.2d 379, 382–83 (Minn. App. 2011). Instead, this court examines whether the facts and circumstances presented in the record satisfy the fair-and-just standard. *Id.*

A district court may allow a criminal defendant to withdraw his guilty plea before sentencing if “it is fair and just to do so.” *Id.* at 382 (quoting Minn. R. Crim. P. 15.05, subd. 2). The defendant bears the burden of proving that there is a fair-and-just reason to

¹ Although appellant contended that he wanted to enter a plea of not guilty and proceed to trial on the new charges, the district court had found probable cause on the new complaint, and appellant's counsel conceded at the sentencing hearing that appellant had experienced a relapse occasioned by stressors in his life. The state ultimately dismissed the new complaint, not as part of any plea negotiation, but in light of the sentence imposed by the district court in this case.

allow him to withdraw his plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). The district court’s decision to allow a plea to be withdrawn under the fair-and-just standard is left to its sound discretion, “and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion.” *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

Appellant argues that it was fair and just to permit him to withdraw his guilty plea because the new criminal charges against him had yet to be proven beyond a reasonable doubt and should not have been used as a basis for denying the durational departure he had been expecting.

However, appellant did not present this argument to the district court as a basis for permitting him to withdraw his plea. Appellant’s request to the district court was to “resolve the new case first,” and it was in that context that his counsel sought to withdraw the plea of guilty in this case. His attorney noted that this case “was a straight plea.”

Appellant’s argument below was that he wanted to withdraw his guilty plea and have a trial because it appeared likely that the district court was no longer considering a departure on account of his arrest for possession of drugs between the date of his plea and the sentencing hearing. This is not a basis for withdrawal of a guilty plea and does not satisfy the fair-and-just standard. *Cf. Lopez*, 794 N.W.2d at 382 (“[M]ore than a change of heart is needed to withdraw a guilty plea.”)

The district court did not abuse its discretion by denying appellant’s motion to withdraw his guilty plea.

III.

In his pro se supplemental brief, appellant argues that in addition to the reasons argued by his appellate counsel, reversal is required because (1) the agreement he had with the district court was for a 60-month sentence, and the court rejected or violated that agreement by imposing a 111-month sentence; (2) the district court judge was “interested” in the outcome of the case within the meaning of Minn. R. Juv. Prot. P. 7.07 because she requested to preside over the proceedings on the new charge; and (3) appellant had ineffective assistance of counsel because his attorney did not remove the district court judge on the basis of said “interest.”

Appellant’s first pro se argument fails because, as discussed above, the record does not support the existence of an agreement with the district court for a specific sentence. Appellant’s second and third arguments fail because they conflate the colloquial meaning of the word “interest” with its meaning in Minn. R. Juv. Prot. P. 7.07, which in any case does not apply to this criminal proceeding. *See generally* Minn. R. Juv. Prot. P. 7.07, subd. 2 (“No judge shall preside over any case if that judge is interested in its determination or if that judge might be excluded for bias from acting as a juror in the matter.”); Minn. Code Jud. Conduct 2.11 (laying out the types of circumstances in which a judge should recuse herself).

Affirmed.