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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0736**

Saeed Abdulkader, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 24, 2009
Affirmed
Shumaker, Judge**

Hennepin County District Court
File No. 27-CR-05-068267

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. F. Axelson, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant challenges the postconviction court's denial of his petition to withdraw his plea of guilty, arguing the court impermissibly injected itself into plea negotiations. Because there was no clear involvement by the district court in the plea negotiations and because appellant's motion for withdrawal was untimely, we affirm.

FACTS

In July 2006, appellant Saeed Abdulkader was in the middle of jury selection when his defense counsel had an in-chambers discussion with the district court judge and the prosecutor. After this discussion, Abdulkader pleaded guilty to a second-degree controlled-substance crime and terroristic threats. At the plea hearing, the prosecutor noted that the court was "entertaining the idea of a dispositional departure in this case," and objected to such a departure. The defense countered that departure would be appropriate because of Abdulkader's mental illness and in-court emotional breakdowns. At sentencing, the prosecutor again objected to any sentencing departure, and Abdulkader's counsel asked "the Court to sentence according to our understanding, and that there would be a dispositional departure." The court departed dispositionally from the sentencing guidelines and stayed execution of Abdulkader's sentence. After two probation violations, the court revoked Abdulkader's probation and executed his sentence.

In February of 2008, Abdulkader petitioned for postconviction relief seeking to withdraw his plea, arguing that the district court injected itself into plea negotiations.

The postconviction court denied his motion to withdraw, finding that the district court did not improperly participate in plea negotiations and that Abdulkader's motion was untimely.

DECISION

Abdulkader argues that the postconviction court erred in denying his motion for plea withdrawal, claiming the district court impermissibly injected itself into his plea negotiations. The postconviction court found that "it is not clear that the district court improperly injected itself into the plea negotiations . . . the judge made no explicit promise as to the sentence and conditions he would impose." Furthermore, it found that even if the district court had overstepped its bounds, Abdulkader's motion was untimely. We review decisions of the postconviction court for a clear abuse of discretion, limiting our review to the question of whether there is sufficient evidence to sustain its findings. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994); *Doughman v. State*, 351 N.W.2d 671, 674 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984) (stating a postconviction court's decision whether to allow a defendant to withdraw his or her guilty plea is reviewed for an abuse of discretion).

Injection into Plea Negotiations

A criminal defendant does not have an absolute right to withdraw his plea of guilty, but may do so if he shows that withdrawal "is necessary to correct a manifest injustice." *Ecker*, 524 N.W.2d at 715-16 (quoting Minn. R. Crim. P. 15.05, subd. 1). "A manifest injustice occurs when a guilty plea is not accurate, voluntary, and intelligent." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A defendant's plea of guilty is "per

se invalid” if the district court impermissibly participates in plea negotiations. *State v. Anyanwu*, 681 N.W.2d 411, 414-15 (Minn. App. 2004); *State v. Vahabi*, 529 N.W.2d 359, 360-61 (Minn. App. 1995). “Impermissible participation includes such things as the court’s direct involvement in the negotiations, its imposition of a plea agreement, or its promise to impose a particular sentence.” *Anderson v. State*, 746 N.W.2d 901, 905 (Minn. App. 2008). The proper role of the district court is to determine whether a proffered plea bargain is appropriate and to ensure that a defendant has not been improperly induced to plead guilty to a crime or permitted to bargain for a plea that is excessively lenient. *Vahabi*, 529 N.W.2d at 360-61; *State v. Johnson*, 279 Minn. 209, 215-16, 156 N.W.2d 218, 223 (1968).

Abdulkader argues that the postconviction court erred in refusing to allow him to withdraw his plea because the district court and his defense counsel had an “agreement” or “understanding” as to the sentence he would receive, even if the promise was not explicitly made a part of the record. In support of this contention, he offered his defense counsel’s sworn affidavit, which states that defense counsel had discussed his intention to seek a downward departure at sentencing with the district court judge and prosecutor in the event the jury convicted Abdulkader. According to the affidavit, “[t]he Court responded that it would be inclined to grant that request.” Then, counsel “inquired whether we could accomplish this in a plea without a trial.” Notably, the affidavit and the record as a whole fail to reveal the court’s response to this question.

“It is improper for a district court to promise a particular sentence in advance.” *Anyanwu*, 681 N.W.2d at 414. “[I]rrespective of any demonstrated prejudice, the law is

clear that a guilty plea is per se invalid when the district court impermissibly injects itself into plea negotiations.” *Id.* However, not all involvement by the district court is impermissible. *Id.* at 415. Rather, the “district court judge has a delicate role in a plea negotiation and necessarily plays a part in any negotiated guilty plea.” *Id.*

The record does not show that the district court actually became involved in plea negotiations, or assured that a particular sentence would be appropriate, or promised to impose a specific sentence in return for a plea of guilty. The context within which the issue arose was not that of plea negotiations. Rather, a jury trial was underway and defense counsel indicated that, if there were a conviction, he would seek a dispositional departure. The court merely said in response that it would be “inclined” to grant a departure. Although such a statement perhaps was inadvisable because it apparently engendered defense counsel’s hope and subjective expectation that the court would depart, this simple statement falls far short of the impermissible “excessive” involvement in plea discussions that virtually transforms the court into “one of the parties to the negotiation.” *Johnson*, 279 Minn. at 216, 156 N.W.2d at 223 n.11 (cautioning against the court’s “excessive involvement” in plea negotiations).

We do not understand the law to require a judge to remain mute regarding the possible disposition of a case or to refrain from giving any guidance whatsoever on the matter of the disposition. The judge necessarily enjoys at least an informational role that can help counsel for the defense and the state make rational decisions about plea discussions and offers. But statements cast in absolute terms or that might be deemed irrevocable promises in advance of a plea exceed the court’s proper role regarding plea

negotiations because they likely will have the effect of inducing a plea of guilty. Similarly impermissible is the court's active engagement in the bargaining process such as suggesting details to be included in a plea offer, or conditions of a plea, or ways in which a compromise might be achieved.

A plea of guilty must be voluntary, recognizing that "voluntary" nearly always means a choice of the lesser of two onerous outcomes. A plea is not entirely voluntary if the judge, through what is said or the extent of involvement, in effect induces the plea. If a judge merely states what he or she is inclined to consider as to a disposition, without encouraging the acceptance of an offer and without promising or guaranteeing a particular outcome, the judge performs a permissible function.

The statement by the court here that it would be "inclined" to grant a departure was more in the informational nature of what the court would consider than in the nature of a promised outcome. Because the record gives us no more than this, we agree with the postconviction court that there was no clear evidence that the district court impermissibly participated in plea negotiations. Thus, the postconviction court properly exercised its discretion in denying Abdulkader's petition on this ground.

Timeliness

We also agree that Abdulkader's motion was untimely. The postconviction court held that "[e]ven assuming the sentencing judge undertook a greater role in the plea negotiations than is permissible by case law, Petitioner's current request to withdraw his plea is untimely and unwarranted." We also review this decision under an abuse of discretion standard. *Ecker*, 524 N.W.2d at 715-16.

A motion for plea withdrawal may be made after sentencing and will be heard “upon a timely motion.” Minn. R. Crim. P. 15.05, subd. 1. “While there is no established time limit barring motions for withdrawal of a guilty plea, such motions should be made ‘with due diligence, considering the nature of the allegations therein.’” *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007) (quoting *Chapman v. State*, 282 Minn. 13, 17, 162 N.W.2d 698, 701 (1968)). Timeliness is a relevant factor to be considered in determining whether plea withdrawal is permissible. *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005).

There are three factors to consider in deciding whether a motion for plea withdrawal is timely: (1) the district court’s interest in preserving the finality of convictions; (2) the defendant’s diligence in seeking withdrawal; and (3) whether the delay causes undue prejudice to the state’s prosecution of the case. *Black*, 725 N.W.2d at 776 (citations omitted) (finding motion to withdraw untimely when more than two years had elapsed from the time of sentencing, drug evidence had been destroyed and witnesses’ memories of the event had “likely faded”). It is the state’s burden to show prejudice. *Hoagland v. State*, 518 N.W.2d 531, 536 (Minn. 1994).

In finding Abdulkader’s motion untimely, the postconviction court reasoned that (1) more than a year and a half had passed before he brought a motion for postconviction relief; (2) Abdulkader had several opportunities to bring the motion before the court prior to that time; and (3) “[i]t was not until [Abdulkader] failed to comply with probation and began serving his prison sentence that he contended the original plea was unjust.” Courts have found a delay of as little as three months to be untimely, *see State v. Andren*, 358

N.W.2d 428, 431 (Minn. App. 1984), but as long as 33 years to be timely. *Riggers v. State*, 284 Minn. 543, 543-44, 169 N.W.2d 58, 59 (1969).

Abdulkader had several opportunities to discover the basis for his motion and bring it before the court. Indeed, Abdulkader was warned that his sentence would be executed if he failed to comply with probation, and yet he never indicated that this would be an improper outcome because the judge had “promised” him probation. The timing and circumstances of his motion indicate that Abdulkader’s delay is inexcusable, and was not caused by any problem with the discovery of the grounds for his motion. *See James*, 699 N.W.2d at 728 (stating that denial of relief is permissible where delay is “deliberate and inexcusable constituting an abuse of the judicial process”); *State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004) (finding delay excusable where defendant sought withdrawal shortly after unknown consequences of plea arose), *review denied* (Minn. Sept. 29, 2004). Furthermore, the prosecution reasonably maintained that the delay in prosecution “may [make it] difficult to locate witnesses, elicit accurate testimony, and successfully prosecute the case.” The postconviction court properly found Abdulkader’s petition untimely, and therefore did not abuse its discretion in denying postconviction relief.

Affirmed.