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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1061**

State of Minnesota,
Respondent,

vs.

Bret Thomas Ninfeldt,
Appellant.

**Filed June 4, 2012
Affirmed
Johnson, Chief Judge**

Kanabec County District Court
File No. 33-CR-10-10

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

Amy R. Brosnahan, Kanabec County Attorney, Barbara McFadden, Assistant County
Attorney, Mora, Minnesota (for respondent)

Rodd Tschida, Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Johnson, Chief Judge; and
Crippen, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment
pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Bret Thomas Ninefeldt pleaded guilty to first-degree criminal sexual conduct pursuant to a plea agreement. Before sentencing, he moved to withdraw his guilty plea on the ground that he was not adequately informed of the consequences of pleading guilty. The district court denied the motion and, pursuant to the plea agreement, imposed a stayed prison sentence, which is a downward dispositional departure from the presumptive guidelines sentencing range. On appeal, he challenges the denial of his motion to withdraw. We affirm.

FACTS

In January 2010, Kanabec County law enforcement officers received a report that Ninefeldt had engaged in criminal sexual conduct with a five-year-old girl. The investigation revealed that on or about January 3, 2010, Ninefeldt removed the girl's pants and underwear, put lotion on her body, and touched her vaginal area with his hand. The state charged Ninefeldt with one count of first-degree criminal sexual conduct, a violation of Minn. Stat. § 609.342, subd. 1(a) (2008), and two counts of second-degree criminal sexual conduct, a violation of Minn. Stat. § 609.343, subds. 1(a), 1(e)(i) (2008).

In August 2010, just before the scheduled trial, Ninefeldt and the state entered into a plea agreement. Ninefeldt agreed to plead guilty to count 1, and the state agreed to dismiss counts 2 and 3. Ninefeldt's plea agreement also specified a stayed sentence of 173 months of imprisonment, which is a downward dispositional departure from the presumptive guidelines sentence of an executed 144-month prison sentence.

Before sentencing, Ninefeldt obtained a new attorney and moved to withdraw his guilty plea. The district court conducted an evidentiary hearing and denied the motion in a 17-page order. The district court later sentenced Ninefeldt in accordance with the plea agreement. With the assistance of his third attorney, Ninefeldt appeals the denial of his motion to withdraw his guilty plea.

D E C I S I O N

I. Motion to Withdraw Guilty Plea

Ninefeldt argues that the district court erred by denying his motion to withdraw his guilty plea. Ninefeldt argues that he is entitled to withdraw his guilty plea because the plea is invalid, for three reasons. First, Ninefeldt contends that his attorney misinformed him that he would be “required” to serve 144 months in prison if a jury found him guilty but failed to inform him of the possibility of a downward departure. Second, Ninefeldt contends that he was misinformed that, if convicted, he would be subject to conditional release for four years, not ten years, as provided by law. Third, Ninefeldt contends that he was not informed that, if convicted, he would be required to register as a sex offender.

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). The rules of criminal procedure allow for the withdrawal of a guilty plea in two circumstances. First, a district court may grant a defendant’s motion to withdraw a guilty plea if necessary to prevent “manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, a district court may, in its discretion, grant a defendant’s pre-sentence motion to withdraw a guilty plea if the district court determines that it would be “fair and just” to do so. Minn. R. Crim. P. 15.05, subd. 2. Because

Ninefeldt moved to withdraw his guilty plea before sentencing, the district court applied both standards.

A. Manifest Injustice Standard

Under the manifest-injustice standard, withdrawal of a guilty plea is required if a guilty plea is invalid. *Raleigh*, 778 N.W.2d at 94. To be valid, a guilty plea “must be accurate, voluntary, and intelligent.” *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007). As the supreme court has explained,

The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he or she could be properly convicted of at trial. The voluntariness requirement insures that the guilty plea is not in response to improper pressures or inducements; and the intelligent requirement insures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.

Alanis v. State, 583 N.W.2d 573, 577 (Minn. 1998) (footnotes omitted), *overruled on other grounds by Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010), *as recognized by Campos v. State*, 798 N.W.2d 565, 568 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). If a guilty plea fails to meet any of these three requirements, it is invalid. *See State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). Thus, if a person’s guilty plea was not accurate, voluntary, or intelligent, a district court must permit the person to withdraw his guilty plea. *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007).

1. Potential Sentence

Ninefeldt contends that he should be permitted to withdraw his guilty plea because his first attorney misinformed him that he would be “required” to serve 144 months in prison if a jury found him guilty, without informing him of the possibility of a downward departure. Ninefeldt contends that his attorney’s alleged misinformation caused his guilty plea to be involuntary. The voluntariness requirement, however, is intended to ensure that a guilty plea is not entered in response to improper pressures or coercion. *Raleigh*, 778 N.W.2d at 96. Ninefeldt has not alleged that his attorney intentionally misinformed him of a “required” sentence in an attempt to coerce him into pleading guilty. The gist of Ninefeldt’s allegation is, in essence, that he was not correctly informed of the parameters of his potential sentence. This allegation is more accurately framed as an argument that his guilty plea did not satisfy the intelligence requirement, which is intended to ensure that “the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.” *Alanis*, 583 N.W.2d at 577. We will analyze it accordingly.

Ninefeldt’s allegation concerning his attorney’s statements during the plea hearing is borne out by the district court record, but he nonetheless is not entitled to relief. At the plea hearing, Ninefeldt’s attorney stated: “[T]he guideline sentence for this kind of crime is 144 [months] in prison. You understood that the court would be required, if you were found guilty by a jury, that the court would be required to impose that kind of sentence[?]”

Ninefeldt's attorney correctly stated the general rule. As the supreme court has noted, a "district court is *required* to impose the presumptive sentence set out in the Sentencing Guidelines Grid absent additional findings." *State v. Shattuck*, 704 N.W.2d 131, 140-41 (Minn. 2005) (emphasis added). Ninefeldt does not dispute that an executed sentence of 144 months is the presumptive guidelines sentence. Ninefeldt's attorney's statement would be inaccurate with respect to Ninefeldt only if there was a basis for additional findings to support a downward departure. Ninefeldt's brief does not identify any such basis, and Ninefeldt's appellate counsel was unable to identify any such basis during oral argument. In the absence of mitigating circumstances to justify a downward departure from the presumptive guidelines sentence, it is not incorrect to say that a district court is required to impose the presumptive guidelines sentence. *See* Minn. Stat. § 609.342, subd. 2(b); *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002) (holding that sentencing departures must be "supported by substantial and compelling circumstances"). Thus, Ninefeldt cannot establish that his guilty plea was not intelligent on the ground that his attorney stated that an executed 144-month sentence would be "required."

2. *Duration of Conditional Release*

Ninefeldt also contends that he should be permitted to withdraw his guilty plea on the ground that he was misinformed regarding the duration of his term of conditional release. Specifically, he contends that his attorney incorrectly told him that the period of conditional release would be four years and that he did not learn that it would be ten years until after he had pleaded guilty.

Ninefeldt's contention is inconsistent with both the district court record and the law. The record reveals that Ninefeldt was properly informed of the ten-year term of conditional release before entering his guilty plea. During the plea hearing, his attorney explained that "there is such a thing known as a conditional release requirement [and] that upon discharge you could be on conditional release for four years." The district court questioned the attorney's statement. After an off-the-record discussion, Ninefeldt's attorney said that he was mistaken regarding the length of conditional release and that "the conditional release upon the completion of a prison sentence is ten years." His attorney further explained, "So it's just a difference in the amount of time. Instead of four years, it's ten years . . . ; do you understand?" Ninefeldt responded, "Yes." The attorney then modified the plea agreement to reflect a ten-year period of conditional release, and Ninefeldt initialed the modification. The plea hearing proceeded. The district court eventually asked Ninefeldt whether he wished to plead guilty. Ninefeldt stated that he wished to plead guilty, that it was his final decision, and that he understood all of the terms of pleading guilty, including the ten-year period of conditional release. Thus, the record reveals that Ninefeldt knew the correct period of conditional release prior to entering his guilty plea.

Furthermore, in *State v. Rhodes*, 675 N.W.2d 323 (Minn. 2004), the supreme court rejected an argument that a guilty plea was invalid because a five-year term of conditional release was not mentioned in a plea agreement. *Id.* at 325-27. The supreme court reasoned that Rhodes had notice of the then-existing five-year term of conditional release because it had been enacted into law "years before Rhodes entered his plea" and

because the supreme court had “recognized the mandatory nature of conditional release terms” in two prior opinions. *Id.* at 327. The supreme court further reasoned that Rhodes did not object to the five-year term of conditional release even though it was mentioned in the pre-sentence investigation report, was mentioned by the prosecutor at sentencing, was mentioned by the district court at sentencing, and was included in the judgment. *Id.* at 325, 327.

In this case, the statute providing for a ten-year period of conditional release was enacted approximately five years before Ninefeldt entered into his plea. *See* 2005 Minn. Laws, ch. 136, art. 2, § 21, at 931 (establishing ten-year period of conditional release and repealing five-year period); *see also* Minn. Stat. §§ 609.3455, subd. 6 (2008), .109, subd. 7 (2004). In addition, Ninefeldt was informed of the ten-year term of conditional release during the plea hearing but did not object. Like the appellant in *Rhodes*, Ninefeldt had adequate notice of the ten-year period. Thus, Ninefeldt cannot establish that his guilty plea was not intelligent on the ground that he did not understand that he would be subject to a ten-year term of conditional release.

3. *Registration Requirement*

Ninefeldt contends that he should be permitted to withdraw his guilty plea on the ground that he was not informed that, if convicted, he would be required to register as a sex offender. This contention fails because the registration requirement is a collateral consequence of his guilty plea. *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002). As the supreme court has stated:

The duty to register as a predatory offender is a regulatory rather than punitive consequence and therefore is a collateral consequence of appellant's guilty plea. Failure to advise appellant of the registration requirement does not make the plea unintelligent, and does not constitute a manifest injustice that mandates the withdrawal of his plea.

Id.; see also *Raleigh*, 778 N.W.2d at 96 (concluding that guilty plea was intelligent because defendant understood direct consequences). Thus, Nenefeldt cannot establish that his guilty plea was not intelligent on the ground that he was not informed of the requirement to register as a predatory offender.

Having failed to establish that his guilty plea is invalid, Nenefeldt has failed to show that he is entitled to withdraw his guilty plea to avoid manifest injustice.

B. Fair and Just Standard

Because Nenefeldt moved to withdraw his guilty plea before sentencing, he may be allowed to withdraw his plea if it would be "fair and just" to do so. Minn. R. Crim. P. 15.05, subd. 2. But the fair-and-just standard does not allow a defendant to withdraw a plea "for simply any reason." *Theis*, 742 N.W.2d at 646 (quotation omitted). In applying the fair-and-just standard, 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." *State v. Kaiser*, 469 N.W.2d 316, 319 (Minn. 1991) (quotation omitted). The district court's application of the fair-and-just standard "is left to the sound discretion of the [district] court" and its decision "will be reversed only in

the rare case in which the appellate court can fairly conclude that the trial court abused its discretion.” *Id.* at 320 (quotation omitted).

Ninefeldt asserts the same grounds for plea withdrawal under the fair-and-just standard that he asserted under the manifest-injustice standard. Just as none of those grounds warrants withdrawal to avoid manifest injustice, none warrants withdrawal as fair and just. Ninefeldt was not misinformed about the parameters of his potential sentence following a jury’s guilty verdict. He was timely informed of the duration of his term of conditional release. And it is not unfair or unjust that he was not specifically informed of the collateral consequence that he is required to register as a predatory offender. This case is not the “rare” case in which we “can fairly conclude that the trial court abused its discretion” in denying a motion to withdraw under the fair-and-just standard. *Id.*

Accordingly, we affirm the district court’s denial of Ninefeldt’s motion to withdraw his guilty plea.

II. Lawfulness of Sentence

Ninefeldt also argues that his guilty plea is invalid because the district court imposed an unlawful sentence. Ninefeldt contends that the sentence imposed by the district court is unlawful because the district court imposed a stayed sentence, which is a downward dispositional departure from the sentencing guidelines’ presumption of an executed sentence, without making findings concerning mitigating circumstances to justify the departure. *See State v. Geller*, 665 N.W.2d 514, 516-17 (Minn. 2003); *Misquadace*, 644 N.W.2d at 71-72.

At sentencing, the district court adopted the state's reasons for a downward dispositional departure, namely, "to prevent the child from having to testify, and to insure conviction in the matter." Ninefeldt argues that these reasons are insufficient to justify the departure. Even though the downward dispositional departure was favorable to him because it allowed him to avoid prison, he asks this court to vacate his conviction and sentence and to remand the case for trial.

As an initial matter, we question whether Ninefeldt has preserved this argument for appeal. Ninefeldt did not make the argument as part of his motion to withdraw his guilty plea. Consequently, the district court did not address the issue in its thorough order denying the motion to withdraw the guilty plea. In this court, the state does not argue that Ninefeldt has forfeited the argument. Nonetheless, it is plain that Ninefeldt is presenting the argument for the first time on appeal. This is a sufficient reason to reject the argument. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *State v. Coe*, 290 Minn. 537, 537-38, 188 N.W.2d 421, 422 (1971); *State v. Tamminen*, 282 Minn. 523, 524, 162 N.W.2d 369, 369 (1968).

Even if we were to consider the argument for the first time on appeal, we would conclude that Ninefeldt is not entitled to the relief he seeks. Assuming without deciding that the district court imposed an unlawful sentence, we nonetheless would conclude that plea withdrawal is not a proper remedy in the present procedural posture. Notably, Ninefeldt has not filed a motion to correct his sentence, *see* Minn. R. Crim. P. 27.03, subd. 9, nor has he appealed directly from the sentence. Although he seeks the remedy of withdrawal of a guilty plea, he does not expressly invoke rule 15.05. Because the result

he seeks is withdrawal of his guilty plea, however, it is appropriate to analyze his argument according to rule 15.05 and the caselaw interpreting the rule.

This case is very similar to *Carey v. State*, 765 N.W.2d 396 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009), in which the defendant pleaded guilty pursuant to a plea agreement that called for “non-chronological sentencing,” which resulted in a prison sentence that was shorter than the presumptive guidelines sentence. *Id.* at 398-99. Three years later, he moved to withdraw his plea on the ground that the non-chronological nature of the sentence was unlawful. *Id.* at 399. He did not seek to correct his sentence but, rather, sought only the remedy of plea withdrawal. *Id.* We held that Carey failed to prove that his plea was invalid because all of the terms of his plea agreement were fulfilled, because he received “exactly what he bargained for,” and because it appeared that the defendant was merely trying “to take advantage of an allegedly unlawful term in the plea agreement of which he was well aware at the time of his guilty plea.” *Id.* at 401. Thus, we affirmed the district court’s denial of the motion to withdraw the guilty plea. *Id.*

In this case, the plea agreement called for a significant downward dispositional departure. By pleading guilty, Ninefeldt took advantage of that favorable term of the plea agreement. All of the terms of the plea agreement were fulfilled. Ninefeldt received exactly what he bargained for. Similar to the appellant in *Carey*, Ninefeldt has not shown that his guilty plea is invalid on the ground that it is not accurate, voluntary, and intelligent. *See Farnsworth*, 738 N.W.2d at 372. Thus, as in *Carey*, Ninefeldt’s plea is not invalid, even if it was entered in exchange for an unlawful sentence.

Ninefeldt cites a federal case in support of his argument that his guilty plea must be vacated. *See United States v. Greatwalker*, 285 F.3d 727, 729-30 (8th Cir. 2002) (holding that illegal sentence requires vacatur of guilty plea and sentence). Although *Greatwalker* may provide relief to a similarly situated person in federal court, we are bound by *Carey*.

Thus, Ninefeldt has failed to establish that there exists a manifest injustice requiring withdrawal of his guilty plea. For the same reasons, Ninefeldt has failed to establish that it would be fair and just to allow him to withdraw his guilty plea. Therefore, Ninefeldt is not entitled to withdraw his guilty plea on the ground that the district court did not abide by the sentencing guidelines when sentencing him to a downward dispositional departure.

Affirmed.