STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0548

Timothy Lowell Millhouse,
petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed April 29, 2008
Affirmed
Crippen, Judge*

Freeborn County District Court
File No. KX-05-1189

Mark D. Nyvold, Suite W-1610, 332 Minnesota Street, St. Paul, MN 55101 (for respondent)

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

David J. Walker, Assistant Freeborn County Attorney, 411 South Broadway, Albert Lea, MN 56007 (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.

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* 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

CRIPPEN, Judge

Respondent Timothy Millhouse pleaded guilty in December 2005 to a charge of fourth-degree controlled substance crime. Minn. Stat. § 152.024, subds. 1(1), 3(a) (2004). One year after he was sentenced, the district court permitted him to withdraw his plea. The State of Minnesota appealed, arguing that respondent failed to show a manifest injustice that would permit withdrawal of the plea.

Because respondent's plea was neither voluntary nor intelligent, we conclude that withdrawal of the plea was necessary to correct a manifest injustice and therefore affirm.

FACTS

While a December 2004 charge of fourth-degree controlled substance crime against him was pending, respondent's home was searched in September 2005, as permitted under the terms of his pre-trial conditional release. During this search, officers discovered drug paraphernalia and apparent drugs, including a water pipe (bong) that contained a liquid with suspected drug residue. Being charged with fifth-degree possession of methamphetamine and possession of drug paraphernalia, respondent demanded a jury trial.

In October, the prosecutor was contacted by a deputy sheriff, who reported that the BCA results showed enough methamphetamine residue in the bong discovered in September to support a first-degree drug possession charge. The prosecutor asked for, but did not receive confirmation of these test results. The prosecutor began plea discussions with respondent's public defender, offering to dismiss the September 2005

charges if respondent pleaded guilty to the December 2004 charge. The prosecutor told respondent that the BCA test results would provide a basis for first-degree possession charges and that he would amend the September 2005 charges if respondent did not plead guilty to the December 2004 charge.

On advice of his attorney, respondent agreed to plead to the December 2004 charge in return for dismissal of the September 2005 charges. On December 6, 2005, respondent pleaded guilty to the December 2004 charge, the September 2005 charges were dismissed, respondent was sentenced to time served, and he agreed to enter drug treatment at the VA Hospital. No mention of the anticipated test results was made during the plea, although the public defender stated, "[T]his morning I was given some additional information with regard to the 5th degree charge [the September 2005 charge] by [the prosecutor] that shed some light on our decision to enter the plea of guilty today." This is an apparent allusion to the anticipated BCA results.

Several weeks later, the county attorney's office received the BCA results; according to the report, the liquid was "not identified," implying that no drug was identified. The prosecutor forwarded the report to the public defender's office, but respondent's attorney had left that office and the report was simply filed away. Respondent was sentenced on March 1, 2006.

In April 2006, respondent obtained a copy of the BCA report and contacted his former attorney. On April 24, the attorney contacted the prosecutor's office and the attorneys confirmed the "not identified" BCA report. Nothing further happened at that point; respondent attempted to contact his former attorney two more times, in July and

November 2006. In November 2006, respondent was arrested for possession of methamphetamine and probation violations. Respondent's new attorney then brought a motion to withdraw the plea entered in December 2005.

After hearings in February 2007, the district court issued its order permitting withdrawal of the plea, concluding that the motion to withdraw the plea was timely, and that it would be manifestly unjust not to permit withdrawal of the plea. The state filed this appeal.

D E C I S I O N

A person convicted of a crime may challenge the conviction, sentence, or disposition by bringing a petition for postconviction relief. Minn. Stat. § 590.01 (2006). This court reviews a postconviction proceeding for an abuse of discretion. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006). The district court's findings are reviewed to determine if there is sufficient evidence to sustain them, but legal issues are reviewed de novo. *Id.* The petitioner has the burden of proving the facts alleged in the petition by a fair preponderance of the evidence. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997).

A defendant has no absolute right to withdraw a plea of guilty. *Id.* A defendant may withdraw a plea after sentencing only "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.

The question of timeliness depends on several factors, including (1) the district court's interest in preserving the finality of convictions; (2) the defendant's diligence in pursuing withdrawal of the plea; and (3) the possible prejudice to the state. *State v.*

Byron, 683 N.W.2d 317, 321 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). The state has the burden of proving undue prejudice. *Id.* The state did not raise the issue of prejudice here and respondent attempted to withdraw his plea immediately upon learning of the BCA report. There is no issue of timeliness here that would prevent the district court from permitting a plea withdrawal.

A plea may be withdrawn for manifest injustice if the plea is not accurate, voluntary, and intelligent. *Perkins*, 559 N.W.2d at 688. An accurate plea protects a defendant from pleading to an offense more serious than he or she could be convicted of at trial. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A voluntary plea is one made without improper pressure or inducement. *Id.* An intelligent plea is one made when the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty. *Id.*

Respondent's plea is faulty in two ways: it is not voluntary because respondent was improperly induced to plead guilty; the prosecutor represented that respondent would be charged with the far more serious offense of first-degree drug crime based on laboratory results that never materialized. The prosecutor acted without any evident intent to deceive, relying on representations from a deputy sheriff. But respondent was persuaded by his attorney to enter a plea to protect himself from a more serious charge. In essence, respondent was induced to act on a purported benefit that, as the parties later learned, had never existed.

Respondent's plea also was not intelligent. Although generally a guilty plea is intelligent if the defendant understands the charges, his or her rights, and the

consequences of the plea, misrepresentation of the evidence affects a defendant's ability to properly assess the charges or the consequences of pleading guilty. When he entered his plea, respondent understood that the negotiated plea would spare him from an 86-month sentence, not a sentence of a year and a day.

The district court's findings, which are supported by the record, show that respondent's plea was not voluntary or intelligent, was therefore manifestly unjust, and that respondent made a timely motion to withdraw his plea, hampered by a lack of assistance from counsel. Based on these findings, the district court did not abuse its discretion by permitting the plea withdrawal.

Affirmed.