STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0620

State of Minnesota,
Respondent,

vs.

Lendale Thomas,
Appellant.

Filed July 15, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 05067466

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Justin L. Seurer, Seurer Law, 2116 Second Avenue South, Minneapolis, MN 55404 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Harten, 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

PETERSON, Judge

In this appeal from a judgment of conviction of second-degree controlled-substance offense, appellant argues that he should have been allowed to withdraw his guilty plea because the plea agreement called for a 45-month sentence but appellant was sentenced to 67 months after he failed to appear for the first sentencing hearing. Appellant argues that a manifest injustice justifies withdrawal of his plea because he was not given an opportunity to understand the consequences of his plea. We affirm.

FACTS

In three separate criminal cases, appellant Lendale Thomas was charged with terroristic threats, second-degree controlled-substance crime, and first-degree controlled-substance crime, respectively. There was also a potential charge for failure to register as a predatory offender. A plea petition indicates that appellant understood that he had been charged with attempted second-degree controlled-substance crime and would plead guilty to that offense. The plea petition states that the prosecutor agreed to the following:

> Remainder of the charges to be dismissed
> 45 months executed prison sentence, dismiss case #06-021725
> Will not file charge of failure to register as predatory offender

The following discussion took place at the plea hearing:

> THE CLERK: [Appellant], to the felony charge of a controlled substance crime second degree possession . . . , how do you plead?
> [Defense counsel]: It will be an attempt, correct?
> [Prosecutor]: Well, Judge, it's actually upon sentencing, we have agreed to sentence [appellant] as an attempt, second

> degree attempt, for an agreed sentence within the guidelines of 45 months.
>
> For the time being, we're going to enter a plea to the second degree possession case and set his sentencing out a couple of weeks. If [appellant] does not return for sentencing, the agreement is that he'll serve – he will be sentenced on second degree possession case, and not as an attempt, and receive a guidelines sentence, bottom of the box, of 67 months.
>
> If he comes back for his sentencing like he's promising to, he will be sentenced as an attempt for the 45 months that we have agreed upon.
>
> [Defense counsel]: That's correct.
>
> [Appellant]: Guilty.

Appellant also pleaded guilty to terroristic threats. Sentencing was scheduled for May 30, 2006.

Appellant did not appear for sentencing on May 30, 2006. On July 18, 2006, appellant moved to withdraw his guilty plea. The district court denied the motion[1] and sentenced appellant to 67 months in prison. This appeal followed.

D E C I S I O N

We review the district court's decision to deny withdrawal of a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). The standard employed to determine whether to permit a guilty plea to be withdrawn depends on the stage in the proceedings when the motion is made. Before sentencing, the defendant has the burden of showing that fair and just reasons for guilty-plea withdrawal exist, with consideration of whether granting the motion would prejudice the state. Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). After

[1] Appellant did not provide a transcript of the hearing on his motion to withdraw, but the record indicates that the district court orally denied the motion.

sentencing, the defendant has the burden of establishing that guilty-plea withdrawal is necessary to correct a manifest injustice, Minn. R. Crim. P. 15.05, subd. 1, which occurs if the guilty plea is not accurate, voluntary, and intelligent, *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). The fair-and-just standard for withdrawing a guilty plea before sentencing requires a lesser showing than is necessary to establish manifest injustice. *State v. Williams*, 373 N.W.2d 851, 853 (Minn. App. 1985).

Appellant moved before sentencing to withdraw his guilty plea. The district court denied appellant's motion and imposed sentence. On appeal, appellant does not identify any reason why it was fair and just to allow him to withdraw his plea before sentencing. Instead, he contends that a manifest injustice occurs if a plea is not accurate, voluntary, and intelligent and that the only issue is whether his guilty plea was intelligently made. *See Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002) ("[T]he purpose of the requirement that the plea be intelligent is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea." (quotation omitted)). Appellant argues that a manifest injustice justifies withdrawal of his guilty plea because he "was not given any opportunity to understand the consequences of his plea," there was an unqualified promise that he would be sentenced to 45 months, and he did not receive the benefits contemplated by the plea agreement.

There is caselaw that a defendant must be allowed to withdraw a guilty plea when the district court departs from the agreed-on sentence based on events that occur after the plea. *See, e.g.*, *State v. Kealy*, 319 N.W.2d. 25, 26 (Minn. 1982); *State v. Kortkamp*, 560

N.W.2d 93, 95 (Minn. App. 1997); *State v. Kunshier*, 410 N.W.2d 377, 379 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). In *Kunshier*, after the plea hearing, the defendant escaped from custody and committed new offenses. 410 N.W.2d at 378. As a result, the prosecutor recommended consecutive sentences rather than the concurrent sentences agreed to in the plea agreement. *Id.* at 378-79. This court held that the later events allowed the district court and prosecutor to reject the previous agreement, but the defendant had the right to withdraw his guilty plea. *Id.* at 380.

In *Kortkamp*, the district court accepted the sentencing agreement between the defendant and the prosecutor, but stated that if the defendant got "into any trouble between today and the time I sentence you . . . all bets are off about any disposition I make." 560 N.W.2d at 94. The district court allowed the prosecutor to seek a greater sentence after the defendant was charged with another crime. *Id.* This court reversed, holding that the defendant had to be allowed to withdraw his guilty plea and stand trial because the state did not keep its promise. *Id.* at 95.

In *Kealy*, the defendant admitted at the plea hearing that he knew that the court could reject the sentencing recommendation, and, without allowing the defendant to withdraw his guilty plea, the district court decided not to stay the imposition of a sentence as stated in the plea agreement. 319 N.W.2d at 26. The supreme court stated that because the defendant's admission was not inconsistent with his right in the plea petition to withdraw his guilty plea if the court rejected the recommendation, the defendant had a right to withdraw the plea when the district court did not adhere to the recommendation. *Id.*

In this case, although the district court sentenced appellant based on an event that occurred after the plea, the record does not show that the court departed from the plea agreement. Instead, the plea-hearing transcript indicates that the parties anticipated that appellant might fail to appear for sentencing and agreed that in that event, he would be sentenced to 67 months. We find no support in the record for appellant's statements in his brief that "it does not appear that [appellant] was ever aware of the conversation regarding the alleged 67 months" and that the discussion about the consequence for appellant's failure to appear for sentencing occurred at sentencing, rather than at the plea hearing. The transcript shows that the discussion took place at the plea hearing in appellant's presence. Appellant has not shown that he was not aware of the conversation regarding the 67-month sentence or that he did not receive the benefits contemplated by the plea agreement. Therefore, we conclude that no manifest injustice supports withdrawal of his guilty plea, and appellant has not shown that the district court abused its discretion by denying his motion to withdraw his guilty plea.

Affirmed.