**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0874**

State of Minnesota,
Respondent,

vs.

Daniel S. Schlienz,
Appellant.

**Filed July 22, 2008**
**Affirmed**
**Kalitowski, Judge**

Cook County District Court
File Nos. 16-CR-06-115, 16-CR-06-551, 16-CR-06-568

Timothy C. Scannell, Cook County Attorney, Cook County Courthouse, 411 West Second Street, Grand Marais, MN 55604 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

**U N P U B L I S H E D  O P I N I O N**

**KALITOWSKI,** Judge

Appellant Daniel S. Schlienz pleaded guilty to several counts of criminal sexual conduct and violation of a harassment restraining order involving three different victims. Prior to the date scheduled for sentencing, the prosecutor and district court judge had an

ex parte meeting to discuss the district court's concerns regarding the possibility that appellant would file a motion to withdraw his guilty plea. On appeal from the district court's decision to stay imposition and order a year of probationary jail at North East Regional Correctional Center (NERCC), appellant argues that (1) the district court abandoned its impartial and neutral role and should have recused itself from ruling on appellant's motion to withdraw; (2) appellant should be allowed to withdraw his plea; and (3) the district court erred by not allowing appellant an opportunity to retain alternative counsel when his withdrawal motion was based on ineffective assistance of counsel. We affirm.

## D E C I S I O N

### I.

Appellant argues that the district court abandoned its impartial and neutral role by notifying the prosecutor, in an ex parte conversation, that he should be prepared to discuss the prejudice to the state or to appellant's victims if appellant made a motion to withdraw his guilty plea. We conclude that because the conversation did not prejudice appellant, he is not entitled to a new hearing on his plea-withdrawal motion.

Initially, respondent argues that appellant waived this argument by failing to object to the communication during the sentencing hearing. *See State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007). But because the record does not indicate whether appellant even knew about the communication at the time of sentencing, we will address appellant's argument.

A judge is prohibited from considering communications made outside the presence of both parties regarding an ongoing proceeding. Minn. Code Jud. Conduct Canon 3A(7). But ex parte communications are permissible for scheduling and administrative purposes that do not deal with substantive issues on the merits when "the judge reasonably believes that no party will gain a procedural or tactical advantage" and notifies all the parties of the communication. Minn. Code Jud. Conduct Canon 3A(7)(a)(i), (ii). If an ex parte communication constitutes error, an appellant bears the burden of demonstrating that he was prejudiced by the error. *See State v. Sessions*, 621 N.W.2d 751, 756 (Minn. 2001).

Here, although the judge may have intended simply to ensure that the court's time not be wasted, the ex parte exchange addressed substantive matters regarding the case – the district court alerted the prosecutor that he may be asked to address the prejudice to the state and to the victims. And although the judge stated that he would notify defense counsel about the substance of the conversation, there is no evidence in the record that he did. Accordingly, this conversation was an inappropriate ex parte communication. *See* Minn. Code Jud. Conduct Canon 3A(7)(a)(i), (ii).

But appellant has not shown that he was prejudiced by the improper communication. The record does not support appellant's contention that the district court "took a position on the plea-withdrawal motion before it was argued." And there is no indication from either the judge's conversation with the prosecutor or the remainder of the proceedings that the district court abandoned its impartial and neutral role. Rather, the transcript of the ex parte conversation indicates that the district court was concerned

that the case would be delayed if the prosecutor was not prepared to address certain issues. Further, the transcript indicates that the court was not taking a position on the merits of a possible motion. Therefore, we conclude that appellant has not established prejudice and is not entitled to a new hearing on his plea-withdrawal motion.

**II.**

Appellant argues that the district court erred by denying his motion to withdraw his guilty plea because he was sentenced to confinement for a year and the plea agreement indicated that his jail time would be capped at 120 days. We disagree.

We review the district court's determination of whether to permit the withdrawal of a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). But the interpretation and enforcement of a plea agreement presents issues of law subject to de novo review. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004); *State v. Jumping Eagle*, 620 N.W.2d 42, 43 (Minn. 2000).

"In Minnesota, plea agreements have been analogized to contracts and principles of contract law are applied to determine their terms." *In re Ashman*, 608 N.W.2d 853, 858 (Minn. 2000). Although civil contract principles must be balanced with criminal procedural safeguards that protect defendants, civil contract principles are a useful means for analyzing the enforceability of a plea agreement. *Id.* And even though district courts may consider the appropriateness of a sentence that deviates from the sentencing range contained in a plea agreement, the district court's authority to impose such a sentence in a plea context is circumscribed. "[I]f an unqualified promise is made on the sentence to be imposed, a defendant should be allowed to withdraw his guilty plea if that promise is not

fulfilled." *State v. Kunshier*, 410 N.W.2d 377, 379 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987).

Appellant contends that "the plea agreement called for a stay of imposition, a 120-day jail cap, and a sex offender evaluation." But the plea agreement did not make an absolute promise that jail time would be capped at 120 days. In fact, defense counsel acknowledged that he understood that "the [c]ourt's not making promises, but will take into consideration the [PSI] as well as the sex offender assessment in determining what . . . jail time is appropriate." And the written plea agreement does not refer to a cap on jail time. Even at appellant's sentencing hearing, appellant's attorney understood that "if there was a recommendation for inpatient treatment . . . the [c]ourt could sentence [appellant] at up to a year. If there wasn't, there would be 120 day cap [sic]."

The plea agreement provided that if the PSI recommended inpatient commitment to sex-offender treatment, the defense would be allowed to provide a secondary assessment. The PSI found appellant unamenable to outpatient treatment and recommended one year of inpatient treatment at NERCC. Because the defense did not provide a second evaluation, the district court's sentence was consistent with the plea agreement. And because there was no "unqualified promise" left unfulfilled, we conclude that the district court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea.

**III.**

Appellant argues that because his attorney characterized appellant's plea-withdrawal motion as "in essence" an ineffective-assistance-of-counsel claim, the district

court abused its discretion by not appointing alternate counsel to argue the motion. We disagree.

We review a district court's decision not to appoint substitute counsel for an abuse of discretion. *State v. Worthy*, 583 N.W.2d 270, 278-79 (Minn. 1998); *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). A district court's failure to appoint substitute counsel is subject to harmless-error analysis. *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991).

A defendant in criminal proceedings is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "This right includes a fair opportunity to secure counsel of [one's] own choice." *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). A defendant's request for a substitution of counsel will be granted only when exceptional circumstances exist, the demand is reasonable, and the request is timely. *Vance*, 254 N.W.2d at 358. "[E]xceptional circumstances are those that affect a[n] . . . attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). In *State v. Gillam*, the Minnesota Supreme Court held that a defendant's disagreement with appointed counsel about trial strategy and general dissatisfaction with the representation did not constitute exceptional circumstances. *Id.* at 449-50. A defendant has the burden of showing the existence of exceptional circumstances. *See Worthy*, 583 N.W.2d at 279.

Here, appellant's attorney characterized appellant's plea-withdrawal motion as an ineffective-assistance-of-counsel claim based on appellant's general statement that at the time of his plea, his attorney was not familiar with all the facts of his case. But the record

indicates that appellant did not request another attorney, did not express any dissatisfaction with his attorney, and did not claim that he was coerced into pleading guilty. And during the plea hearing, appellant confirmed that he had "asked [his] lawyer whatever questions [he] needed to ask to understand [his] rights and options." Appellant also verified that he had not been threatened "that if [he] didn't plead guilty . . . it was somehow gonna be worse for" him. When the judge asked if appellant had any questions for the court or for his attorney, appellant said no. And the district court made the following finding: "Based on everything you've told me and you've told your attorney, I'm satisfied you understand . . . what you're doing here . . . today." At the hearing on appellant's motion to withdraw his plea, the district court asked him if he wanted to say anything on his behalf, and appellant responded:

> I would really just wish that the Court would . . . allow me to defend myself in front of a jury and the Court, and I really do feel sorry for the way that these girls feel about this whole situation, and I wish that we could go to court, go to trial and bring the whole truth out for . . . the world to see.

Appellant made no other statements, at any time, regarding dissatisfaction with his attorney or a request for alternate counsel. Therefore, appellant cannot show that he made a reasonable and timely demand for substitute counsel.

Moreover, even if the district court erred by not inquiring about appellant's desire to have another attorney, appellant is not entitled to a remand if the error was harmless. *See Lamar*, 474 N.W.2d at 3. Here, there is no evidence that "exceptional circumstances" existed to justify appointment of substitute counsel. The district court considered appellant's argument that his attorney "was not properly informed of the facts

of the case at the time that [he] advised [appellant] with regard to the . . . plea agreement that [was] reached," and found nothing to "suggest that [appellant's attorney], in any sense, ineffectively or inappropriately misrepresented [appellant] . . . or was less than effective in his representations. In fact, just the opposite." Appellant's failure to request another attorney and his oral acknowledgement that he understood the plea agreement support the district court's conclusion. Accordingly, we conclude that the district court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea.

**Affirmed.**