STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1467

State of Minnesota,
Respondent,

vs.

Edward John Olson,
Appellant.

Filed August 26, 2008
Affirmed
Shumaker, Judge

Chisago County District Court
File Nos. CR-06-612; CR-06-974

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

Janet Reiter, Chisago County Attorney, Beth Ann Beaman, Assistant County Attorney, 313 North Main Street, Room 373, Center City, MN 55012 (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 Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

SHUMAKER, Judge

On appeal from his sentencing order, appellant argues that the district court erred when it sentenced him to consecutive sentences for a gross misdemeanor offense and a felony offense; that it abused its discretion in denying his motion to withdraw his pleas of guilty without an evidentiary hearing; and that it abused its discretion when it denied his request to withdraw his pleas of guilty because the court did not honor the plea agreement. Finding no error or abuse of discretion, we affirm.

FACTS

Appellant Edward John Olson's former girlfriend, K.H., called the police in Chisago County on March 8, 2006, alleging that she had just been assaulted by Olson. K.H. claimed that Olson had appeared at her house, twisted her arm, and hit her in the face. Later that evening, K.H. called police to report that Olson had returned. He was arrested. The next day Olson posted bail and was released from jail. He then returned to K.H.'s house, screamed at her, and attempted to strangle her.

Olson was charged for the March 8 incident with two counts of gross misdemeanor domestic assault in violation of Minn. Stat. § 609.2242, subd. 2 (2004). In a separate complaint, Olson was charged for the March 9 incident with one count of tampering with a witness in the first degree in violation of Minn. Stat. § 609.498, subd. 1b(a)(6) (2004); one count of pattern of harassing conduct in violation of Minn. Stat. § 609.749, subd. 5(a) (2004); one count of domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (Supp. 2005); two counts of gross misdemeanor domestic assault in

violation of Minn. Stat. § 609.2242, subd. 2 (2004); and one count of violation of a no contact order in violation of Minn. Stat. § 518B.01, subd. 22(b) (Supp. 2005).

Olson pleaded guilty, in accordance with a plea agreement, to one count of gross misdemeanor domestic assault relating to the first incident and to the felony of pattern of harassing conduct relating to the March 9 incident. A plea agreement provided that there would be a stay of imposition of the felony sentence and that the sentences for the offenses would be concurrent. The plea agreement also required Olson to appear for his presentence investigation and for sentencing. He was informed that if he failed to comply with those requirements, his plea would be considered a straight plea.

Olson inexcusably failed to attend the presentence investigation interview or the sentencing. For a rescheduled sentencing on May 2, 2007, Olson had retained a new attorney. Newly retained counsel informed the district court that Olson wanted to withdraw his pleas of guilty. The attorney told the court that, because he was new to the case, he was not prepared to make a plea-withdrawal motion. Olson then told the court, "I would like to vacate my Guilty Pleas." The state's attorney was allowed to make an offer of proof regarding the pleas of guilty. The state claimed prejudice, particularly because the victim lived out of state and because Olson fired his former attorney, who was familiar with the case, at noon on the day of the sentencing. The court denied the motion and imposed a sentence of 365 days on the gross misdemeanor assault offense and a consecutive 18-month sentence with a stay of execution on the felony offense. This appeal followed.

D E C I S I O N

I.

Olson asserts that the district court erred by sentencing him to consecutive sentences for his gross misdemeanor offense and his felony offense, arguing that the imposition of consecutive sentences was a departure from the sentencing guidelines and that the district court failed to state reasons supporting a departure.

"Th[is] court may review the sentence . . . to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2004). We review a sentence imposed by a district court under the abuse of discretion standard. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). A district court abuses its discretion when a sentence unfairly exaggerates the criminality of the defendant's conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007).

The court "generally will not interfere with sentences that are within the presumptive sentence range." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982). "Thus, although we have the authority, if the circumstances warrant, to modify a sentence that is within the presumptive sentence range, we generally will not exercise that authority absent compelling circumstances." *Id.* Interpretation of the sentencing guidelines is reviewed de novo. *State v. Rouland*, 685 N.W.2d 706, 708 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

The Minnesota Sentencing Guidelines are intended to produce consistent results while simultaneously preserving the tradition of judicial discretion in sentencing. *State v. Bendzula*, 675 N.W.2d 920, 923 (Minn. App. 2004). When the district court departs from the presumptive sentence, it must state departure reasons for each offense on which it departs. *State v. Richardson*, 670 N.W.2d 267, 285 (Minn. 2003). However, the sentencing guidelines do not apply to gross misdemeanor offenses. *State v. Kier*, 678 N.W.2d 672, 677 (Minn. App. 2004); *see also State v. Dulski*, 363 N.W.2d 307, 310 (Minn. 1985) (concluding that the sentencing guidelines do not technically apply to gross misdemeanors).

Olson argues that, because his first sentence related to a gross misdemeanor and the second to a felony offense, the district court erred in ordering consecutive sentences because only the felony offense is included under Section VI of the sentencing guidelines. *See* Minn. Sent. Guidelines II.F.2 (determining that a district court can permissively sentence a defendant to consecutive sentences if both crimes are felonies listed in Section VI). But Minn. Stat. § 609.15, subd. 1(b) (2004), provides:

> When a court imposes sentence for a misdemeanor or gross misdemeanor offense and specifies that the sentence shall run consecutively to any other sentence, the court may order the defendant to serve time in custody for the consecutive sentence in addition to any time in custody the defendant may be serving for any other offense, including probationary jail time or imprisonment for any felony offense.

The Minnesota Sentencing Guidelines do not apply to Olson's first sentence, a gross misdemeanor offense. The district court sentenced Olson to an appropriate gross misdemeanor sentence and then to the presumptive felony sentence. The district court

stated at sentencing that "in this particular case it is not appropriate, this Court cannot depart in an upward way. In other words, I cannot send him to prison." The district court was not bound by the sentencing guidelines as to the gross misdemeanor sentence, and, therefore, the court did not depart from the guidelines as to that sentence. Thus, the court was not required to give departure reasons. *See Richardson*, 670 N.W.2d at 285 (requiring a district court to specify reasons for a sentencing departure when the sentencing guidelines apply).

But our analysis does not end here. We would be remiss if we did not address an exception to Minn. Stat. § 609.15, subd. 1(b). The Minnesota Supreme Court has stated:

> [I]t would be unfair to hold, in effect, that a defendant who is convicted of a gross misdemeanor may, by virtue of the technical nonapplicability of the Sentencing Guidelines, have to serve more total time in confinement in a case . . . than he would have to serve if he were convicted of a felony.

Dulski, 363 N.W.2d at 310. Applying that rule to Olson's sentences, we find that he would not serve more time than he would had he been sentenced consecutively for two felony offenses.

The district court sentenced Olson to 365 days for the gross misdemeanor domestic assault charge, and it sentenced him to a consecutive 18-month sentence with a stay of execution on the felony charge. Under the sentencing guidelines, assuming that Olson would have been sentenced for two felonies, his sentence for a felony charge of domestic assault would have carried a presumptive sentence of 12 months, stayed. Minn. Sent. Guidelines IV. For a second felony charge, he would also face a presumptive sentence of 23 months, stayed. *Id.* That would equal a concurrent sentence of 23

months. Obviously, that is less than his current sentence, which potentially extends to 30 months. But the crucial component here is that if Olson had been sentenced for two felonies, the district court could properly order that each sentence be served consecutively, for a total of 35 months. *See* Minn. Sent. Guidelines II.F.2 (determining that "consecutive sentences are permissive" and "may be given without departure" if both crimes are felonies listed in Section VI of the guidelines). Olson's current sentences on the gross misdemeanor offense and felony offense are not longer than the potential sentences for two felonies and are not in violation of the rule set out in *Dulski*. The district court did not err its application of the sentencing guidelines or abuse its discretion in sentencing Olson to consecutive sentences.

II.

Olson also argues that the district court abused its discretion by failing to hold an evidentiary hearing before denying his motion to withdraw his pleas because he had a new attorney and received ineffective assistance of counsel from him. If we understand his argument, he is claiming that he hired a lawyer at the last minute and, because that lawyer had no time to prepare, the lawyer's assistance was ineffective.

A criminal defendant does not have an absolute right to withdraw a plea of guilty once entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). Minnesota rules provide that:

> In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving 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.

Minn. R. Crim. P. 15.05, subd. 2.[1] "The defendant bears the burden of proving that there is a 'fair and just' reason for withdrawing his plea." *Farnsworth*, 738 N.W.2d at 371. When determining if a defendant's reason is fair and just, the district court must duly consider the reasons advanced by the defendant and any prejudice the prosecution would suffer as a result of the plea withdrawal. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

"Although [the fair and just] standard is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea 'for simply any reason.'" *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quoting *Farnsworth*, 738 N.W.2d at 372). "The ultimate decision is left to the sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion." *Kim*, 434 N.W.2d at 266. In the instant case, Olson moved to withdraw his pleas of guilty before sentencing, so the district court appropriately applied the "fair and just" standard.

A plea of guilty is rendered involuntary—and thus invalid—if it is the result of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To establish ineffective assistance of counsel that violated his constitutional rights, Olson "must show that his attorney's representation fell below an objective standard of reasonableness, and that but

[1] In addition, a defendant may withdraw a guilty plea before or after sentencing upon a showing of manifest injustice. Minn. R. Crim. P. 15.05, subd. 1.

for the errors, the result would have been different." *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007) (quotation omitted). In the context of a challenge to a plea of guilty, the appellant must demonstrate "that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *State v. Wiley*, 420 N.W.2d 234, 237 (Minn. App. 1988) (quoting *Hill*, 474 U.S. at 59, 106 S. Ct. at 370), *review denied* (Minn. Apr. 26, 1988)).

There is scant evidence in the record to support Olson's contention. Even if Olson's new attorney was not well-prepared, Olson was apprised of his rights in his case, including those rights he would waive if he pleaded guilty. Olson fired his original attorney just before the hearing. His new attorney told the district court at sentencing:

> Mr. Olson has put me in a position where I don't feel that there is much I can do or say as his attorney here today . . . . Now, he has told me he wants to withdraw his Pleas of Guilty and in my opinion that's probably something that should be addressed with [his prior attorney].

He also told the court that he had shown Olson the presentence investigation and told him the recommendations. The district court then asked Olson to address the court if he wished. And Olson told the district court that his new attorney "doesn't know too much about the case and can't really represent me to his best capability, and I would like to vacate my Guilty Pleas. Further than that, I don't know what more I could say to you."

The district court denied his motion, stating:

> I was present when these Pleas were taken, you were represented by Counsel, you were fully represented, you understood all of the circumstances, you knowingly, willingly, and voluntarily waived all of your rights at that point in time. There was more than sufficient facts . . . to

> support that Admission . . . the Plea was accepted at that point in time, and you have absconded for the last nine months. Under those circumstances, Mr. Olson, any request on your part to withdraw your Plea is denied . . . .

Olson has not shown ineffective assistance of counsel, and the court did not abuse its discretion when it so held.

Olson also makes vague references to coercion, reciting the facts of a case, *State v. Kaiser*, 469 N.W.2d 316 (Minn. 1991), which dealt with coercion in a plea. However, it unclear whether he is suggesting that he was coerced by one of his attorneys. He points to no facts in the record that would support such an argument. Further, the court noted on the record that Olson "knowingly, willingly, and voluntarily waived all of [his] rights" at the plea hearing. Olson did not disagree. The district court was in the position to judge Olson's demeanor when he entered his pleas. When credibility determinations are crucial in deciding whether to permit plea withdrawal, we defer "to the primary observations and trustworthiness assessments made by the district court." *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997), *review denied* (Minn. June 11, 1997); *State v. Lopez*, 379 N.W.2d 633, 638 (Minn. App. 1986) (stating that the district court is in the best position to judge credibility when deciding if a defendant should be allowed to withdraw a guilty plea), *review denied* (Minn. Feb. 14, 1986).

Olson contends that the district court should have conducted a full hearing on his plea-withdrawal motion. He relies on *Kaiser* to support his contention that the district court had a duty to conduct a plenary evidentiary hearing. In *Kaiser*, the supreme court determined that a criminal defendant had a right to a hearing to determine whether he was

in fact a victim of coercion by his attorney after he alleged coercion in his motion to withdraw his guilty plea. 469 N.W.2d at 319. But in *Kaiser*, the district court had sworn affidavits from both the attorney and the defendant confirming coercion. *Id.* at 318-19. Here, Olson did not mention any coercion at the sentencing hearing, although he had an opportunity to address the court. And at the plea hearing, the following exchange occurred:

> ATTORNEY: Now, has anyone coerced you or threatened you in any way to plead guilty to these matters?
> OLSON: No.
> ATTORNEY: You're pleading guilty, in fact, because you believe you feel that you are guilty?
> OLSON: Correct.

When there is not even a scintilla of evidence of coercion, there is no basis for holding an evidentiary hearing on the question of whether the plea was coerced. The court did not abuse its discretion in declining to hold an evidentiary hearing.

III.

Olson also argues that the district court abused its discretion in denying his request to withdraw his pleas of guilty because the court failed to honor the plea agreement.

The district court is given broad discretion to determine whether a defendant is allowed to withdraw his plea of guilty. *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007). But a defendant may withdraw his plea if an unqualified promise is made as to the sentence to be imposed and that promise is unfulfilled. *State v. Kunshier*, 410 N.W.2d 377, 379 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987).

In *Kunshier*, the plea agreement addressed appellant's sentence only as connected to the offense charged. *Id.* at 378-79. Then, on appeal, this court determined that the district court committed error when it declined to allow a plea withdrawal when the court imposed a different sentence because of appellant's post-plea conduct. *Id.* at 380. In stark contrast, Olson's plea specifically conditioned his sentence upon his post-plea behavior. There was an explicit agreement and understanding by all concerned that the plea would depend on Olson's post-plea conduct. As the district court explained:

> I want to make sure that you understand a number of things. One is that this whole agreement is conditioned upon your full cooperation with the presentence investigation and the domestic abuse assessment.
>
> As [Olson's attorney] has explained, if you fail to cooperate with the presentence investigation, if you fail to show up for sentencing, if you fail to get the domestic abuse assessment done, these will be straight pleas. You would be looking at whatever I decide to give you. Do you understand?

We have previously distinguished a situation such as Olson's, where the plea agreement was conditioned on post-plea behavior, from the situation in *Kunshier* where the agreement related only to the offense. In *Black*, we found that a district court's denial of a motion to withdraw a plea of guilty was appropriate when appellant had failed to cooperate with the presentence investigation, failed to appear for sentencing, and otherwise did not follow the plea-agreement conditions. 725 N.W.2d at 775-76. We explained that the situation was distinguishable from that presented in *Kunshier* because "appellant did not receive an unqualified promise regarding the sentence to be imposed." *Id.* at 776. We stated that "[a]ppellant acknowledged that he understood that the court

did not agree to follow the plea agreement and would not allow him to withdraw his plea if the plea agreement was not followed." *Id.* The district court did not abuse its discretion in denying Olson's motion to withdraw his pleas of guilty because Olson's own actions vitiated the plea agreement.

Affirmed.