STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0906

State of Minnesota,
Respondent,

vs.

Marvin Wayne Head,
Appellant.

Filed December 16, 2008
Affirmed
Schellhas, Judge

Beltrami County District Court
File No. K2-06-287

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Timothy R. Faver, Beltrami County Attorney, Judicial Center Annex, 619 Beltrami Avenue Northwest, Bemidji, MN 56601 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, 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

SCHELLHAS, Judge

Appellant challenged the district court's acceptance of his guilty pleas to four counts of possession and sale of drugs, arguing that (1) the district court accepted his guilty pleas for aiding and abetting possession and sale of drugs without adequate factual bases, and therefore the entire plea hearing was illegitimate; and (2) that his guilty pleas were not entered on a voluntary or knowing basis. We reversed appellant's convictions of aiding and abetting, but affirmed his convictions of first-degree possession of controlled substance and first-degree sale of a controlled substance. The supreme court remanded to this court for the limited purpose of considering whether the district court abused its discretion in denying appellant's motion to withdraw his guilty pleas because they were not voluntary.

FACTS

The relevant facts are set forth in our opinion, *State v. Head*, No. A07-0906, 2008 WL 3896764 (Minn. App. Aug. 26, 2008). Appellant was charged with four counts of possession and sale of drugs, two of which were for aiding and abetting his codefendant, Craig Cook. With the advice of counsel, appellant pleaded guilty to all counts at his plea hearing. But, in providing factual bases for his pleas, appellant offered sworn testimony that Cook was not involved in appellant's possession and sale of drugs. The district court accepted appellant's pleas to all four counts, and before sentencing, denied appellant's motion to withdraw his pleas. We reversed the district court's denial of appellant's motion to withdraw his pleas to the two aiding-and-abetting counts and affirmed the

district court as to the other two counts. Appellant argues that it would have been fair and just for the district court to allow him to withdraw his guilty pleas. In our decision, we failed to address appellant's claim that all of his convictions should be reversed because none of them was voluntary. We now address whether the district court abused its discretion in denying appellant's motion to withdraw his guilty pleas on the basis that they were not voluntary. We have already reversed appellant's aiding-and-abetting convictions for lack of the required factual bases. Appellant argues that where the court has reversed appellant's convictions and vacated his pleas as to two of the four counts, the only just remedy is "to vacate all four pleas on all four counts," and "return to the *status quo* before the pleas were entered." We reject that argument and therefore address the voluntariness of appellant's guilty pleas only as to the remaining counts.

D E C I S I O N

A criminal defendant does not have an absolute right to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007); *see also Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989) ("[G]iving a defendant an absolute right to withdraw a plea before sentence would undermine the integrity of the plea-taking process.") If a defendant moves to withdraw a guilty plea before sentencing, the district court may, in its discretion, allow a defendant to withdraw the plea "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." Minn. R. Crim. P. 15.05, subd. 2. The district court has broad discretion in determining whether to allow the withdrawal of a guilty plea, and this court reviews a district court's decision to deny a

motion to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). The defendant bears the burden of establishing that there is a "fair and just" reason for withdrawing his plea, and the district court's denial "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.

A valid guilty plea must be "accurate, voluntary, and intelligent (that is, knowing and understanding)." *Farnsworth*, 738 N.W.2d at 372. The voluntariness requirement insures that the guilty plea is not in response to improper pressures or inducements. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983).

Appellant argues that the district court abused its discretion in denying his motion to withdraw his guilty pleas before sentencing because: (1) appellant denied his co-defendant's involvement yet the court accepted his pleas to the aiding-and-abetting counts, and "it would be manifestly unjust to permit the remaining two pleas to stand in light of the infirmities that eroded the validity of the pleas to the aiding/abetting offenses"; (2) appellant denied any involvement in the crime during the presentencing investigation and asserted that his co-defendant was responsible, but stated that he would not testify against him; (3) no written petition for appellant's pleas was prepared prior to making them orally on the record; (4) "appellant had lost faith in his counsel's ability to represent him and believed that it was futile to attempt to proceed with trial, thus deciding to simply give up and plead guilty to all counts of the complaint," i.e. appellant claims ineffective assistance of counsel; (5) "when being questioned during the Pre-sentence Investigation process, appellant denied any involvement in the offense"; (6) appellant

believes he was acting irrationally at the time of his guilty pleas; (7) "appellant's decision to plead guilty came out of the blue at a time when trial seemed imminent," and "was not made pursuant to any final settlement offer from the state and was not made pursuant to any promise that would have conferred a benefit of any kind to appellant"; (8) "appellant's demeanor during the plea hearing was concerning in that he appeared to be in a rush to get the proceedings over with—continually interrupting questions with his answers before the speaker had an opportunity to finish," and was admonished several times to allow the speaker to finish; and (9) the version of the events provided by appellant during the presentence investigation contradicted his testimony. Appellant argues that these factors indicate that he was "acting irrationally" during his plea hearing and that his guilty pleas were involuntary because he received ineffective assistance of counsel.

Appellant's arguments are unconvincing. The record reflects that the following exchange occurred at the plea hearing:

> PROSECUTOR: Mr. Head, I have to ask you some questions about your understanding of the charges, your understanding of your rights, your willingness to plead guilty and some of the facts surrounding it. Okay?
> DEFENDANT: Sure.
> . . . .
> PROSECUTOR: Okay. Are you currently receiving any medical or psychiatric care?
> DEFENDANT: Both.
> PROSECUTOR: Okay. Why don't you explain.
> DEFENDANT: Just medication, antidepressants.
> . . . .
> PROSECUTOR: Got you. Anything about taking any of those medications make it difficult for you to understand what's going on today?

DEFENDANT: No.
PROSECUTOR: It's not affecting any decision[-]making on your part in any way?
DEFENDANT: No.
PROSECUTOR: Okay. Other than what you have just described, Mr. Head, do you have any mental disability or reading problem?
DEFENDANT: No, not at all.
PROSECUTOR: What I'm going to ask you to do is wait until I finish asking the question so we can get it down for the court reporter, so I'm going to ask that question again. Other than what you have already stated, do you have any mental disability or reading problem that Judge Schluchter should be made aware of?
DEFENDANT: No, not at all.
. . . .
PROSECUTOR: Do you understand that you've been charged with controlled substance crime in the first degree, an allegation that you either sold or manufactured cocaine here in Beltrami County on February 19 of this year?
DEFENDANT: Yes
. . . .
PROSECUTOR: Are you satisfied with [defense counsel's] services?
DEFENDANT: I wish she could have got me a bail reduction so I could have got out.
PROSECUTOR: Other than that, are you satisfied with her services?
DEFENDANT: Yeah.
PROSECUTOR: Do you feel that [defense counsel] is fully informed about the facts surrounding this case?
DEFENDANT: Yeah.
PROSECUTOR: Do you feel you've had enough time to discuss this case with [defense counsel]?
DEFENDANT: Sure.
PROSECUTOR: [Defense counsel] has reviewed your rights?
DEFENDANT: Sure.
PROSECUTOR: So you understand, Mr. Head, that you would have the right to maintain your not guilty plea and have this case tried for [sic] a jury of 12 citizens of Beltrami County?
DEFENDANT: Sure, I understand.

PROSECUTOR: I'm going to ask you to hold off answering until I finish my question. You understand that you have a right to maintain your not guilty plea and have this matter tried before a jury of 12 citizens of Beltrami County?
DEFENDANT: Yes.
PROSECUTOR: Okay. And you understand that if you exercised your right to a jury trial, Mr. Head, that all 12 of those jurors would have to agree upon your guilt, what we call the unanimous verdict, in order for you to be convicted?
DEFENDANT: Yeah, I understand that.
PROSECUTOR: And you understand that you would have the right to waive or give up your right to a jury trial and simply have this matter tried before court, a judge alone?
DEFENDANT: I understand.
PROSECUTOR: And you understand at a jury trial or a court trial that you are presumed to be innocent of these offenses and that presumption remains with you unless and until the State proves that you are guilty beyond a reasonable doubt?
DEFENDANT: Yes, I understand.
PROSECUTOR: Do you understand that you would have the right to testify at trial?
DEFENDANT: Yes.
PROSECUTOR: You also understand that you would have the right at trial to remain silent and not testify?
DEFENDANT: Yes, I understand.
PROSECUTOR: Do you understand that if you exercised your right to remain silent, Mr. Head, that neither the Court nor the State could comment on your silence and it could not be used against you in any way?
DEFENDANT: I understand.
PROSECUTOR: Do you understand at trial that the State of Minnesota would be required to have witnesses present and testify against you under oath in court in your presence?
DEFENDANT: Yeah, I understand.
PROSECUTOR: And you understand that you, with the assistance of [defense counsel], would have the right to cross-examination [sic] each of the State's witnesses?
DEFENDANT: Yes.
PROSECUTOR: Okay. And you understand that you would be entitled to have witnesses present on your behalf and provide testimony if necessary under a Court-order or subpoena, which would compel those persons to come into court and provide that testimony?

DEFENDANT: Yes.
PROSECUTOR: And you understand that by pleading guilty here today you'll be giving up all of these constitutional rights?
DEFENDANT: Yeah, I understand.
PROSECUTOR: You understand that by pleading guilty here today you'll be waiving or giving up any defenses that you and [defense counsel] may discuss?
DEFENDANT: Sure.
PROSECUTOR: Mr. Head, do you wish to give up your constitutional rights and any defense and plead guilty to the offenses that were described earlier?
DEFENDANT: Yeah.
PROSECUTOR: You're making this decision knowingly and voluntarily?
DEFENDANT: Sure.
PROSECUTOR: And it's because you believe yourself to be guilty—
DEFENDANT: Yes.
PROSECUTOR: —of acts of sale or manufacture of cocaine and possession?
DEFENDANT: Yeah, all of them.
PROSECUTOR: And again, just so we make it easier for the court reporter, I'm going to ask you to hold off on those answers until I finish my question. Anyone made any promises, threats to either you, your friends, or family members to get you to plead guilty to these offenses?
DEFENDANT: No, no.
. . . .
DEFENSE COUNSEL: Apparently, Mr. Head, I apologize, you still have a right to appeal any decision that were . . . pretrial decisions; do you understand that?
DEFENDANT: Yes.
DEFENSE COUNSEL: However, by entering your plea of guilty, it will become probably more difficult to prevail on that appeal; do you understand that?
DEFENDANT: Yes.
DEFENSE COUNSEL: And it is your decision to still go forward to plead guilty and give up your rights knowing that information?
DEFENDANT: Yeah.

While the transcript reveals that on several occasions, appellant interrupted questions put to him, the interruptions do not suggest that appellant's behavior during the hearing was irrational. Nor does the fact that appellant's plea was not made in response to a settlement offer suffice to show that his behavior was irrational. The district court found that appellant "was given adequate time to discuss his guilty plea with his counsel," and he "stated that he understood the charges before him, asserted that he was fully aware of his trial and appellate rights, and was satisfied with the services of his attorney." The court also found that appellant's decision to plead guilty occurred "after consultation with [his attorney and] was knowing and intelligent." Nothing in the record contradicts the district court's findings. As noted by the district court, appellant "admitted to the court that he was pleading guilty because he was, in fact, guilty."

The district court also observed that while appellant asserted during his pre-sentence investigation that he was innocent of the charges and that Cook was guilty, he did so at a point when his sentence was "imminently looming." That appellant also refused to testify against Cook suggests that, consistent with his statements at his plea hearing, he merely desired to avoid testifying against his co-defendant. Moreover, the record does not show that appellant alleged any evidence that would indicate his innocence. *See State v. Robinson*, 388 N.W.2d 43, 46 (Minn. App. 1986) (refusing to disturb a district court's denial of a motion to withdraw a plea based on the defendant's representation of innocence where there was "nothing in the record that would arouse any doubt concerning his guilt"), *review denied* (Minn. July 31, 1986). Appellant's denial of his co-defendant Cook's involvement in the offenses does not call into question

appellant's acknowledgment of his own participation, which would merely shift from that of an accomplice to that of a principal. Appellant has not shown that his guilty pleas to the two remaining counts of possession and sale of drugs were anything other than "accurate, voluntary, and intelligent." *Farnsworth,* 738 N.W.2d at 372.

A plea of guilty is invalid if it results from the ineffective assistance of defense counsel. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). Ineffective assistance is that which (1) falls below an objective standard of reasonableness and (2) produces an outcome that, but for counsel's errors, would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984). While the fact that the inconsistency of appellant's denial of his co-defendant's involvement with his guilty pleas to the aiding and abetting charges went unnoticed at appellant's plea hearing is unfortunate, appellant offers no convincing argument as to why this circumstance should render appellant's counsel's conduct objectively unreasonable. The record contains no evidence that appellant's original attorney had inaccurately counseled appellant regarding his rights or the implications of a guilty plea.

Appellant argues that the prosecution has not shown that it would be prejudiced by the withdrawal of his plea. "In determining prejudice, the burden is on the state to prove undue prejudice." *State v. Wukawitz*, 662 N.W.2d 517, 527 (Minn. 2003). The state notes that ten witnesses, including some expert witnesses, were released from appellant's trial date because of his plea, and that one of the expert witnesses now teaches in North Dakota. The state cites *Kim*, 434 N.W.2d at 267, in which the district court was held to have properly considered the fact that the state released 26 subpoenaed witnesses based

on the defendant's plea in denying withdrawal of the plea. Unlike *Kim*, nothing in the record suggests that in this case the state would have to subpoena any witnesses for a new trial. But although we are not convinced that the state has met its burden to prove prejudice, we conclude that appellant has failed to show a fair and just reason for the withdrawal of his plea and therefore conclude that the district court did not abuse its discretion in denying appellant's motion. *See* Minn. R. Crim. P. 15.05, subd. 2 (requiring a fair and just reason for the withdrawal of a plea); *Kim*, 434 N.W.2d at 266 (holding that allowing withdrawal of a plea without good reason compromises the integrity of the plea-taking process).

We have already reversed the district court's denial of appellant's motion to withdraw his guilty pleas to the aiding and abetting charges and vacated appellant's convictions based on those counts. We now conclude that as to the two remaining counts of possession and sale of controlled substance, the district court did not abuse its discretion in refusing to allow appellant to withdraw his guilty pleas.

Affirmed.