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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-2320**

State of Minnesota,  
Respondent,

vs.

James Ferguson,  
Appellant.

**Filed January 20, 2009  
Affirmed  
Huspeni, Judge<sup>\*</sup>**

Hennepin County District Court  
File No. 27-CR-07-028841

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

Mike Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (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 Kalitowski, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.

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<sup>\*</sup> Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**HUSPENI**, Judge

On appeal from his conviction and sentence of fifth-degree controlled substance crime, appellant James Ferguson argues that the district court erred in refusing to allow him to withdraw his guilty plea when he did not receive the sentence promised in the plea agreement and when the court failed to conduct a hearing to determine whether he violated the terms of his conditional release. Because appellant agreed to remain law-abiding between entry of his plea agreement and sentencing, but failed to do so, he received the sentence for which he bargained. We therefore affirm.

### FACTS

In May 2007, appellant was charged with a fifth-degree controlled substance offense after police observed him toss a pipe containing crack cocaine to the ground. The parties agreed that the presumptive sentence for this offense, based on appellant's criminal history score of 17, was 24 months.

At a hearing on July 27, 2007, the parties reached a plea agreement, which the prosecutor explained as follows:

I understand . . . the Defendant is prepared to enter a plea as charged to one count of Fifth Degree possession of a controlled substance, and the proposed plea negotiation is that the Defendant will be able to be released from custody for one month. And that if he returns for sentencing he would receive - - would be sentenced as an attempt to one year and one day in the custody of the Commissioner of Corrections, which would be the guideline sentence on an attempt. If he does not remain law abiding or fails to show up for sentencing on the chosen date, then he would receive the

guideline sentence which is 24 months in the custody of the Commissioner of Corrections.

The district court accepted appellant's guilty plea and set a date for sentencing. The district court reminded appellant to remain law-abiding and to appear for sentencing.

Four days later, on July 31, 2007, appellant was charged with possession of drug paraphernalia, with an offense date of July 30, 2007. On August 28, 2007, appellant pleaded guilty to this offense.

On August 31, 2007, appellant was charged with fifth-degree controlled substance crime and fleeing, with an offense date of August 29, 2007. On September 6, 2007, when appellant appeared for sentencing on the May 2007 drug offense, defense counsel informed the district court that appellant had a new charge; sentencing thus was continued until September 10, 2007, to provide defense counsel with an opportunity to discuss the new charges with the prosecutor.

At the sentencing hearing on September 10, the prosecutor stated:

It's my understanding the defendant pled guilty on July 27th, 2007[.] He put in a factual basis and there's a sentencing date set and if he were to return on that date without having committed or charged with committing that new crime, he would receive a year and a day. If he picked up a new case he would get 24 months.

. . . .

On August 31, 2007 my office charged the defendant with a new fifth degree felony possession case which is set on today.

It's our position that the defendant should be sentenced today to 24 months pursuant to the plea negotiation.

Defense counsel agreed that “[t]he deal was to stay out of trouble pending sentencing,” but that “[w]e intend to fight these new charges.” Defense counsel claimed that “[w]e understand the terms and conditions of the sentence and that we’d be able to set this on for an omnibus knowing the 24 month sentence is there.”

The district court sentenced appellant to 24 months on the May 2007 fifth-degree controlled substance offense. The court also dismissed the August 2007 drug and fleeing charges. This appeal followed.

## **D E C I S I O N**

“In determining whether a plea agreement was violated, courts look to what the parties to [the] plea bargain reasonably understood to be the terms of the agreement.” *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (quotation omitted). Appellant argues that he should be given an opportunity to withdraw his guilty plea because he did not receive the sentence he was promised and he was not given a hearing to determine whether he violated the terms of his conditional release. For several reasons, his argument fails.

First, appellant assumes that his plea was rejected at the sentencing hearing and that he should have been given the option to withdraw his plea under Minn. R. Crim. P. 15.04, subd. 3(1) (providing that “[i]f the court rejects the plea agreement, it shall so advise the parties in open court and then call upon the defendant to either affirm or withdraw the plea”). But the district court here did not reject the parties’ plea agreement; rather, the district court accepted the agreement and sentenced appellant according to its terms. Under those terms, the parties agreed that if appellant remained law-abiding

between his plea hearing and his sentencing date, he would receive a less severe sentence. Because appellant failed to remain law-abiding, he received the presumptive 24-month sentence.

Second, appellant assumes that he was entitled to a hearing on whether he violated the conditions of pre-trial release under Minn. R. Crim. P. 6.03. But appellant was not on pre-trial release when he subsequently committed these additional offenses. Appellant specifically agreed that his sentence would depend upon his post-plea conduct. Because appellant was released under the terms of his plea agreement, which required him to remain law-abiding until his sentencing hearing, a hearing was not required to determine whether appellant had failed to remain law-abiding.<sup>1</sup>

Finally, appellant cites several cases that generally stand for the principle that a district court may not add conditions at sentencing that have not been agreed to in the plea negotiations. *See In re Welfare of S.L.*, 663 N.W.2d 31, 34–36 (Minn. App. 2003) (allowing withdrawal of guilty plea when juvenile not sentenced in accordance with plea agreement); *State v. Kortkamp*, 560 N.W.2d 93, 95 (Minn. App. 1997) (allowing withdrawal when state breached its plea agreement); *State v. Kunshier*, 410 N.W.2d 377, 378–79 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987) (allowing withdrawal

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<sup>1</sup> At sentencing, appellant’s attorney appeared to argue that the “law abiding” requirement of the plea agreement only included convictions and that appellant should be able to challenge the new charges. Arguably, the requirement to remain “law abiding” likely assumed not only that appellant would receive no new convictions, but also that he would receive no new charges. Even if we were to construe the phrase “law abiding” to mean “no convictions,” the record here shows that appellant was not only charged with another fifth-degree controlled substance offense, but he was also charged with and pleaded guilty to the offense of possession of drug paraphernalia. Thus, under any reasoning, the district court could find that appellant failed to remain “law abiding.”

when court imposed consecutive sentences, despite plea agreement for concurrent sentences based on post-plea conduct). Because the district court here did not add or change any terms of the parties' plea agreement, but merely followed the parties' agreement that appellant would receive a 24-month sentence if he failed to remain law-abiding, these cases are inapposite.

We therefore reject appellant's arguments, and affirm his conviction and sentence.

**Affirmed.**