STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0182

Kenneth Ray Torkelson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 13, 2009
Affirmed
Bjorkman, Judge

Murray County District Court
File No. 51-K1-05-51

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

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

Paul Malone, Murray County Attorney, Murray County Courthouse, 2500 28th Street, Slayton, MN 56172 (for respondent)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the postconviction court's denial of his request to withdraw his guilty plea. Because the postconviction court did not abuse its discretion in finding that appellant's guilty plea was knowing, voluntary, and intelligent, we affirm.

FACTS

On February 16, 2005, appellant Kenneth Ray Torkelson was charged with three first-degree controlled-substance crimes relating to the manufacture of methamphetamine. The parties reached an agreement to resolve these and other pending charges. In connection with the plea negotiations, the parties discussed appellant's potential participation in the Minnesota Department of Correction's Challenge Incarceration Program (the program). The state sent a letter to appellant's counsel on July 14, 2005, indicating that the state would not oppose appellant's entry into the program. But the letter advised that the state was uncertain of appellant's current criminal history, and that appellant's conviction of a pending fifth-degree controlled-substance charge "may preclude his entrance into [the program]."

On August 1, 2005, appellant filed a petition to plead guilty to one first-degree controlled-substance offense. As set forth in the plea petition, appellant agreed:

> I will plead guilty to the charge of a 1st Degree Controlled Substance Crime—Manufacturing Methamphetamine and all of the remaining counts would be dismissed and the Pipestone County Attorney would dismiss the 5th Degree Controlled Substance charges pending in Pipestone County.

> The State would agree to sentencing at the low end of the sentencing guidelines.
>
> a) That sentencing be left up to the court—cap of 105 months—[appellant] will argue for [a] Downward Departure of 86 [months].

The four-page petition also stated, "That except for the agreement between my attorney and the prosecuting attorney[,] no one . . . has . . . made any promises to me . . . in order to obtain a plea of guilty from me."

The district court reviewed the key terms of the plea with appellant and confirmed, "Other than that plea agreement, has [anyone] made any promises to you . . . in order to get you to plead guilty?" Appellant responded, "No." The district court accepted appellant's guilty plea. There was no discussion of appellant's participation in the program at the guilty plea hearing.

At the September 19 sentencing hearing, the district court imposed a 105-month prison sentence, stating, "You are advised that you shall be required to serve 70 months of that time in prison, 35 months on supervised release." The district court then asked if it had omitted anything, and both attorneys responded in the negative. The sentencing order contains the same terms and does not mention appellant's potential participation in the program.

The department of corrections denied appellant's application to participate in the program. The department acknowledged that appellant meets the statutory eligibility requirements, but indicated that it was not required to accept all eligible offenders.

On September 13, 2007, appellant filed a petition for postconviction relief arguing that his guilty plea was not knowing, intelligent, and voluntary. The postconviction court

denied the petition, finding (1) the denial of admission to the program was a "collateral consequence" and (2) appellant's "unmet hope" of entering the program was not based on any promise made by the state. This appeal follows.

D E C I S I O N

In an appeal from a postconviction court's denial of relief, we review issues of law de novo and issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We will not disturb the postconviction court's findings of fact unless they are clearly erroneous and we will reverse its decision only if there has been an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001).

"[A] defendant does not have an absolute right to withdraw a guilty plea" once it has been entered. *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002). A district court may permit a defendant to withdraw a guilty plea after sentencing when it "is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a defendant can show that his guilty plea was "not accurate, voluntary, and intelligent." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). We will reverse the district court's determination of whether to permit withdrawal of a guilty plea only if the district court abused its discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Appellant argues that his plea was not intelligent because he understood he would serve his sentence in the program. A plea is intelligent when the defendant understands the charges, his rights, and the direct consequences of entering a guilty plea. *Alanis*, 583 N.W.2d at 577. He also argues that the denial of his application to participate in the

program is a direct consequence of his guilty plea. "[D]irect consequences are those which flow definitely, immediately, and automatically from the guilty plea—the maximum sentence and any fine to be imposed." *Id.* at 578.

As in *Alanis*, the record here belies appellant's claim that he understood that he would be allowed to participate in the program. The plea petition does not mention the program and appellant agreed, when he entered his plea, that he was not promised anything beyond the plea agreement. The district court imposed the agreed-to 105-month prison sentence without any reference to the program. As in *Alanis*, the record indicates appellant "knew and understood" his sentence. *Id.* at 579.

The record is devoid of any evidence that the state made an unqualified promise that appellant would be able to participate in the program or that participation in the program was part of, or "flow[ed] definitely, immediately, and automatically," from the plea. *Id.* at 578. Accordingly, the postconviction court did not err in determining appellant's inability to participate in the program was a collateral consequence of his guilty plea and that the state did not breach an unqualified promise to appellant.

In his pro se supplemental brief, appellant argues his guilty plea is invalid because (1) the state did not honor its agreement; (2) he wanted to plead guilty to an attempt charge, rather than a manufacturing offense; and (3) the evidence was insufficient to support his conviction. These arguments fail. The record demonstrates the state dismissed the other charges and appellant was sentenced to the agreed-to cap of 105 months in prison. As it had promised, the state did not oppose appellant's application to participate in the program. Appellant's assertions that there was not sufficient evidence

to convict him and that he wanted to plead to an attempt crime are unavailing. The plea petition clearly indicates appellant understood he was waiving his right to have a jury decide if the state had proved guilt of the first-degree controlled-substance offense beyond a reasonable doubt.

Because there is no manifest injustice, the postconviction court did not abuse its discretion in denying appellant's petition to withdraw his guilty plea.

Affirmed.