STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2230

State of Minnesota,
Respondent,

vs.

Xavier Buckhanan,
Appellant.

Filed March 3, 2009
Affirmed
Johnson, Judge

Ramsey County District Court
File No. K6-06-3319

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Minge, Judge; and Schellhas, Judge.

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

JOHNSON, Judge

Xavier Buckhanan pleaded guilty to a charge of third-degree sale of a controlled substance pursuant to an agreement with the state that provided for a sentence of no more than 44 months of imprisonment. After Buckhanan twice failed to appear for sentencing, the state asked the district court to impose a longer sentence, and the district court did so, imposing a sentence of 51 months. On appeal, Buckhanan argues primarily that the district court erred by imposing a sentence longer than the agreed-upon sentence. We conclude that the district court did not err in rejecting the agreed-upon sentence because Buckhanan's written plea agreement provided that the district court could impose a longer sentence if he failed to appear for sentencing. Therefore, we affirm.

FACTS

In August 2006, officers from the St. Paul Police Department stopped a vehicle driven by Buckhanan after observing traffic violations. As Buckhanan was pulling his vehicle into a parking lot, the officers saw him lean toward his passenger, whom officers later identified as Buckhanan's 10-year-old nephew. During the investigatory stop, the officers learned that the nephew was in possession of marijuana, a white substance that later was determined to be crack cocaine, and a digital scale. The nephew told the officers that Buckhanan gave him those items while Buckhanan was pulling over and instructed him to put the items in his pockets.

The state charged Buckhanan with second-degree sale of a controlled substance to a minor, in violation of Minn. Stat. § 152.022, subd. 1(5) (2006). In June 2007, Buckhanan signed a plea petition, which provided that, in exchange for a guilty plea, the charge against him would be amended to third-degree sale and his sentence would be limited to 44 months. The language used in Buckhanan's plea petition is substantially the same as the form in Appendix A to Minn. R. Crim. P. 15 except that paragraph 20 reads, in part, as follows:

> I have been told by my attorney and understand:
>
> . . . .
>
> b. That if the court does not approve this agreement:
>
> i. I have an absolute right to then withdraw my plea of guilty and have a trial, *except* if I fail to comply with any of the following:
>
> □ I fail to cooperate with probation in the preparation of the pre-sentence investigation
>
> □ I have any new criminal charges or fail to remain law abiding
>
> □ I fail to abide by the No Contact Order
>
> □ I fail to abide by the terms of the Conditional Release to Project Remand
>
> □ I fail to reappear for sentencing as ordered on _____.
>
> □ Other _____
>
> The court will *not* accept the plea agreement and the court will likely sentence me to a more

> severe sentence than outlined in the plea agreement.

A vertical line was drawn through the first five boxes in paragraph 20.b.i.

At the June 4, 2007, plea hearing, the district court engaged in a colloquy with Buckhanan to confirm his understanding of the plea agreement:

> COURT: Do you understand that [the plea agreement] also depends on your remaining law abiding and cooperating between now and the time of sentencing?
>
> BUCKHANAN: Yes.
>
> . . . .
>
> COURT: And I'm sure [your attorney has] told you that I am not committed to any kind of sentence at all other than that I would go along with the plea agreement if you remained law abiding and made all of your court appearances and cooperate, right?
>
> BUCKHANAN: Yes.

The district court then accepted Buckhanan's guilty plea. The amended complaint was filed on June 25, 2007.

Sentencing was scheduled for August 17, 2007, but Buckhanan did not appear. On that date, Buckhanan's counsel informed the district court that Buckhanan was in Chicago to attend a funeral. Counsel provided the district court with a program from the funeral service. The district court continued the sentencing hearing to August 22, 2007, but Buckhanan again failed to appear, this time based on the assertion that he was ill and in a hospital emergency room. The prosecutor investigated Buckhanan's excuse for his absence from the August 17 hearing and learned that there had been no funeral on that date. The funeral program provided by Buckhanan was not authentic; it appears that the

program initially was created for a funeral in St. Paul in June but that Buckhanan altered the dates and location. Buckhanan later admitted that he fabricated the story about the funeral to delay serving his sentence.

When the sentencing hearing eventually was conducted on August 28, 2007, the state asked the district court to impose a prison sentence of 61 months, which is at the top of the applicable guidelines range. Buckhanan asked the district court to follow the terms of the plea agreement by imposing a 44-month prison sentence, which is at the bottom of the applicable guidelines range. Buckhanan's counsel noted that Buckhanan was abandoning his plan to request a downward durational departure. The district court imposed a sentence of 51 months of imprisonment, which is the presumptive guidelines sentence. Buckhanan appeals.[1]

D E C I S I O N

I. Evidence Supporting Conviction

We first consider an argument in Buckhanan's pro se supplemental brief in which he challenges his conviction. Buckhanan argues that the evidence is insufficient to convict him of a third-degree controlled substance crime because the total weight of the cocaine that he possessed was less than three grams.

[1]Three days after appointed counsel filed a notice of appeal, Buckhanan filed a pro se motion to correct sentence, which the district court treated as a petition for postconviction relief. The district court denied Buckhanan's petition because of the pending appeal. *See* Minn. Stat. § 590.01, subd. 1 (2006) (providing that criminal offender may not pursue postconviction relief "at a time when direct appellate relief is available"). Our review is confined to Buckhanan's direct appeal from his conviction.

Buckhanan may not challenge the sufficiency of the evidence supporting his conviction because a valid guilty plea "'removes the issue of factual guilt from the case.'" *State v. Jenson*, 312 N.W.2d 673, 675 (Minn. 1981) (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2, 96 S. Ct. 241, 242 n.2 (1975)). We will interpret Buckhanan's pro se argument liberally to have raised a challenge to the validity of his guilty plea. To be valid, a guilty plea "must be accurate, voluntary, and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he or she could be properly convicted of at trial." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998).

Buckhanan's argument assumes that his conviction is based on Minn. Stat. § 152.023, subd. 2(1) (2006), which prohibits possession of "one or more mixtures of a total weight of three grams or more containing cocaine." The district court record indicates that the original charge was amended to allege a violation of Minn. Stat. § 152.023, subd. 1 (2006), third-degree sale of a controlled substance. During the plea proceedings, Buckhanan admitted that on August 30, 2006, he gave cocaine to his nephew before he was stopped by police. The statute defines "sell" to include "give away, . . . , deliver, . . . , or dispose of to another." Minn. Stat. § 152.01, subd. 15a(1) (2006). Thus, the facts to which Buckhanan admitted are sufficient to prove the offense of third-degree sale of a controlled substance.

It is immaterial that the amended complaint, which was executed and filed three weeks later, referred to subdivision 1(3), which prohibits the sale of "one or more

mixtures containing a controlled substance classified in schedule I, II, or III, except a schedule I or II narcotic drug, to a person under the age of 18." Minn. Stat. § 152.023, subd. 1(3). Cocaine is classified as a controlled substance in schedule II, Minn. Stat. § 152.02, subd. 3(d) (2006), but, as a "narcotic drug," Minn. Stat. § 152.01, subd. 10(1) (2006), cocaine is excepted from subdivision 1(3). But the reference to subdivision 1(3) is not reversible error because the evidence satisfies subdivision 1(1), because there is no argument that Buckhanan did not understand the charge against him, and because Buckhanan did not request a substitute complaint. *See State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985); *see also* Minn. R. Crim. P. 15.07 (permitting guilty plea to lesser offense); Minn. R. Crim. P. 15.08 (permitting guilty plea to different offense); Minn. R. Crim. P. 17.05 (allowing amended complaint "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced"); Minn. R. Crim. P. 17.06, subd. 1 (providing that judgment based on criminal complaint shall not be "affected by reason of a defect or imperfection in matters of form which does not tend to prejudice the substantial rights of the defendant"). Therefore, Buckhanan's guilty plea is accurate.

II. Agreement Concerning Sentence

Buckhanan's primary argument is that the district court erred by imposing a sentence that exceeds the sentence contemplated by the plea agreement and by not giving him an opportunity to withdraw his plea on that ground. Buckhanan asks this court to reverse and remand with instructions to the district court to either impose the agreed-

upon 44-month prison term or, in the alternative, allow Buckhanan to withdraw his guilty plea.[2]

Minnesota courts have applied principles of contract law to plea agreements. *In re Ashman*, 608 N.W.2d 853, 858 (Minn. 2000); *State v. Spaeth*, 552 N.W.2d 187, 194 (Minn. 1996). Those principles imply that "'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (alteration omitted) (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971)). Accordingly, the voluntariness of a guilty plea may be called into question if it was "entered because of any 'improper pressures or inducements.'" *Id.* (quoting *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989)). Therefore, if an inducement in a plea arrangement is not honored, the guilty plea may be withdrawn. *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998) (quoting *Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979)). To determine whether a plea agreement has

[2]In the district court, Buckhanan did not request an opportunity to withdraw his guilty plea. *See, e.g.*, *State v. Wukawitz*, 662 N.W.2d 517, 520 (Minn. 2003) (noting defendant's motion to withdraw guilty plea following district court's imposition of conditional release term). Similarly, his attorney did not make any statement from which we may infer a request for plea withdrawal. *See State v. Kortkamp*, 560 N.W.2d 93, 95 n.1 (Minn. App. 1997) (inferring alternative request for plea withdrawal based on attorney's statement that defendant would not have pleaded guilty if he had been aware of sentence imposed). A defendant conceivably may be permitted to pursue such a remedy in this court despite the absence of a request in the district court in light of the district court's obligation, upon rejecting a plea agreement, to "then call upon the defendant to either affirm or withdraw the plea." Minn. R. Crim. P. 15.04, subd. 3(1). The state has not argued that Buckhanan is not permitted to pursue the remedy of plea withdrawal on appeal. In light of our conclusion that there was no breach of the plea agreement, we need not determine whether Buckhanan properly preserved that part of his argument.

been honored, courts look to "what the parties to [the] plea bargain reasonably understood to be the terms of the agreement." *Brown*, 606 N.W.2d at 674 (quotation omitted). The interpretation of a plea agreement is an issue of law that we review de novo. *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005); *Brown*, 606 N.W.2d at 674.

A. Length of Sentence

Buckhanan argues that the district court erred by imposing a sentence of 51 months despite his agreement with the state that a 44-month sentence was appropriate. Buckhanan's argument is in conflict with his written plea agreement. In paragraph 20.b.i., Buckhanan agreed that he would have a right to withdraw his guilty plea *unless* he failed to comply with any of five specified conditions, including the condition that he "reappear for sentencing as ordered." Paragraph 20.b.i. of the plea agreement continues by stating that, in the event Buckhanan fails to comply with the conditions of that paragraph, "[t]he court will *not* accept the plea agreement and the court will likely sentence me to a more severe sentence than outlined in the plea agreement." Buckhanan's agreement with the state expressly provided that he would forfeit his right to a 44-month sentence if he failed to appear for sentencing. Buckhanan confirmed this understanding at the plea hearing when he acknowledged that the district court would follow the plea agreement only if he appeared for all required court appearances. In light of this record, the district court's imposition of a 51-month sentence is consistent with

what Buckhanan "reasonably understood to be the terms of the agreement." *Brown*, 606 N.W.2d at 674 (quotation omitted).[3]

Both parties have cited and discussed *State v. Kunshier*, 410 N.W.2d 377 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987), in which the defendant pleaded guilty in exchange for a reduced sentence but, before sentencing, escaped from custody and committed a new offense. *Id.* at 378. At sentencing, the state recommended that the district court impose a sentence greater than was stated in the plea agreement, and the district court did so. *Id.* at 378-79. On appeal, this court reversed, holding that once a district court accepts a plea agreement, the district court cannot impose a sentence different from the one agreed upon by the parties without first giving the defendant an opportunity to withdraw his plea. *Id.* at 379; *see also* Minn. R. Crim. P. 15.04, subd. 3(1) ("the trial court judge shall reject or accept the plea of guilty on the terms of the plea agreement").

Buckhanan also relies on *State v. Kortkamp*, 560 N.W.2d 93 (Minn. App. 1997), in which the defendant entered into a plea agreement with the state in exchange for a reduced sentence. Before sentencing, however, Kortkamp pleaded guilty to additional offenses. *Id.* at 94. On the basis of the additional offenses, the state asked the district court to impose a sentence greater than specified in the plea agreement. *Id.* The district

[3]Buckhanan's plea agreement appears to be based on a two-page form agreement that was prepared in July 2005. Information particular to Buckhanan's case was inserted by hand at the time of his plea. We note that the organization and syntax of paragraph 20.b.i. of the form agreement are less than ideal. Future disputes concerning the form agreement are likely to be avoided and likely to be resolved more easily if the document is revised to provide greater clarity.

court warned Kortkamp at the plea proceeding, "If you get into any trouble between today and the time I sentence you, all bets are off about any disposition I make." *Id.* (alterations omitted). But the court of appeals reversed, concluding that the case was "indistinguishable from *Kunshier*" because the state's promise to recommend a reduced sentence was "unqualified." *Id.* at 95.

This case is unlike both *Kunshier* and *Kortkamp*. Buckhanan did not receive an "unqualified promise" regarding his sentence. *Kortkamp*, 560 N.W.2d at 95; *Kunshier*, 410 N.W.2d at 379. Buckhanan's right to a reduced sentence was qualified by the express terms of his plea agreement. Unlike *Kortkamp*, where the district court provided a vague, oral warning in open court, *see* 560 N.W.2d at 94, the qualification on Buckhanan's right to a reduced sentence was part of a written agreement. Paragraph 20.b.i. of the plea agreement states that Buckhanan does not have a right to a reduced sentence if he fails to comply with any of five specified conditions, including the condition that he "reappear for sentencing as ordered." Buckhanan retained the right to withdraw his plea if there was a breach of his plea agreement. But there was no breach of the plea agreement because, by its terms, it did not require a reduced sentence if Buckhanan failed to appear for sentencing.

The plea agreement signed by Buckhanan is not prohibited by Minn. R. Crim. P. 15.09, which provides, in part, "If a written petition to enter a plea of guilty is submitted to the court, it shall be in the appropriate form as set forth in the Appendices to this rule." The rule does not require that a plea petition be a verbatim recitation of a form

contained in the appendices to the rule. In fact, Appendix A is merely a "suggested form." Minn. R. Crim. P. 15.01, subd. 1. The modifications reflected in Buckhanan's plea agreement imposed only limited conditions on his right to a reduced sentence, which would be triggered only if he failed to abide by certain obligations that already had been imposed on him. The modifications reflected in Buckhanan's plea agreement are substantially different from the modifications at issue in *Perkins v. State*, 559 N.W.2d 678 (Minn. 1997), where the district court's plea petition form provided for a complete waiver of the defendant's right to withdraw his guilty plea if the district court did not adopt the agreed-upon sentence, even if the defendant was not at fault in any way. *Id.* at 686-87 & n.6.

Thus, the district court did not err by imposing a sentence of 51 months without giving Buckhanan an opportunity to withdraw his guilty plea.

B. Fine

Buckhanan also argues, in his pro se supplemental brief, that the district court erred by imposing a $500 fine that was not mentioned in the plea petition. Buckhanan is correct that the fine was not mentioned in the plea petition or at the plea hearing. But his argument is foreclosed by *Blondheim v. State*, 573 N.W.2d 368 (Minn. 1998), in which the supreme court held that an objection to a fine that was not included in a plea agreement was waived when it was not raised at sentencing. *Id.* at 369. The supreme court explained:

> The agreement did not speak to the matter of the mandatory minimum fine. At sentencing defense counsel did

> not claim that the trial court was barred from imposing a fine. Rather, defense counsel stated that the agreement did not speak to that issue and asked the court to waive a substantial part of the mandatory minimum fine. If a fine was somehow counter to the plea agreement, then defense counsel or defendant should have, and presumably would have, objected at that time. By entering into an agreement that did not speak to the matter of a mandatory minimum fine and by not actually objecting to the imposition of a fine at the time of sentencing, defendant is deemed to have waived his right to complain about it.

Id. at 368-69.

In this case, Buckhanan did not object at sentencing to imposition of the $500 fine. Thus, Buckhanan has waived any objection to the fine.

Affirmed.