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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0863**

State of Minnesota,
Respondent,

vs.

Herman Lavar Wade,
Appellant.

**Filed June 23, 2009
Remanded
Collins, Judge***

Hennepin County District Court
File No. 27-CR-01-042162

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

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

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant asserts that the district court (1) abused its discretion by denying appellant's motion to withdraw his guilty plea, and by failing to show support for the ruling on the record; and (2) erred in sentencing by assigning appellant a custody-status point for his placement in a pretrial-diversion program. Appellant makes additional pro se arguments. We remand the case to the district court.

FACTS

Appellant Herman Wade shot and killed C.M. in the aftermath of a drug deal. Wade confronted C.M. after discovering that C.M. had paid for crack cocaine with counterfeit money. After the two exchanged words, Wade withdrew a gun from his waistband and in the course of events C.M. was shot and killed. Wade was initially charged with one count of first-degree murder and one-count of second-degree (intentional) murder.

Wade was convicted upon his negotiated plea of guilty of second-degree (unintentional) murder. At the plea hearing, Wade stated that he had reviewed the plea petition with his attorney for over an hour, read each line of the document, and understood that by pleading guilty he was waiving his constitutional right to a jury trial. Wade acknowledged that he had had enough time to consult with his attorney and that he was satisfied with his attorney's representation.

But at the sentencing hearing, Wade moved to withdraw his guilty plea and exercise his right to trial. Following arguments, the district court denied Wade's motion,

stating, “I find no manifest injustice in not allowing Mr. Wade to withdraw his plea[].” Because Wade had not yet been sentenced, the prosecutor correctly stated that the fair-and-just standard (not the manifest-injustice standard) applied, to which the district court immediately replied: “Withdrawal of the plea at this point is inappropriate, irrespective of what the standard is and what I understand [the prosecutor’s] statement as to the presentencing standard and that is the standard that I have applied.” Wade was then sentenced, and he appeals.

DECISION

I.

Wade asserts that the district court abused its discretion both by denying his motion to withdraw his guilty plea on the merits and by failing to adequately state on the record the reason for its denial.

A defendant does not have an absolute right to withdraw a guilty plea once it has been entered. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). The standard employed to determine whether to permit a guilty plea to be withdrawn depends on the stage in the proceedings when the motion is made. After being sentenced, the defendant has the burden of establishing that withdrawal of the plea is necessary to correct a manifest injustice, Minn. R. Crim. P. 15.05, subd. 1, because the guilty plea is not accurate, voluntary, or intelligent, *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). But prior to sentencing, the defendant need only show the existence of some fair and just reason for withdrawal of the plea. Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). The fair-and-just standard for withdrawing a guilty plea

requires a lesser showing than is necessary to establish a manifest injustice. *State v. Williams*, 373 N.W.2d 851, 853 (Minn. App. 1985). Under the fair-and-just standard, a district court may allow a criminal defendant to withdraw a guilty plea if it would be fair and just to do so, provided that the district court gives “due consideration to the reasons advanced by the defendant” and to “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; *Kim*, 434 N.W.2d at 266. The ultimate determination of whether to allow a defendant to withdraw a guilty plea under the fair-and-just standard is left to the district court’s discretion. *Kim*, 434 N.W.2d at 266. And we review the district court’s decision to deny withdrawal of a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

There is no explicit rule directing district courts to articulate on the record the basis for granting or denying a motion to withdraw a guilty plea. However, in the absence of particular findings, the record must be otherwise sufficiently developed for us to review the district court’s exercise of discretion in order to determine whether the district court abused that discretion. *See, e.g., Sperle v. Orth*, 763 N.W.2d 670, 672 (Minn. App. 2009) (reversing district court’s dismissal of petition for an order for protection “because [when] the record does not reflect the district court’s consideration of the factors that must be analyzed when determining whether a former relationship qualifies [as a significant romantic or sexual relationship under the Domestic Abuse Act], appellate review is not possible”); *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (stating conducting effective appellate review of a district court’s exercise of the

discretion given it in the determination of spousal maintenance “is possible only when the [district] court has issued sufficiently detailed findings of fact to demonstrate its consideration of all factors relevant to an award of permanent spousal maintenance”). It is not the province of this court to determine de novo whether it would be fair and just to allow an appellant to withdraw a guilty plea.

In denying Wade leave to withdraw his guilty plea, the district court stated, “Withdrawal of the plea at this point is inappropriate, irrespective of what the standard is and what I understand [the prosecutor’s] statement as to the presentencing standard and that is the standard that I have applied.” But the district court’s allusion to the application of the fair-and-just standard is confused by the preceding phrase (“irrespective of what the standard is”) as well as the district court’s initial ruling (“I find no manifest injustice in not allowing Mr. Wade to withdraw his plea[]”). Because the district court initially denied Wade’s request based on the more burdensome manifest-injustice standard and, after being prompted by the prosecutor, stated that withdrawal was inappropriate “irrespective of what the standard is,” the state of this record leaves us uncertain as to what standard the district court actually considered and applied in denying Wade’s motion. Other than what we have recited, the district court provided no insight into the basis of its denial of the motion. The record before us is inadequate to permit review for an abuse of discretion. Therefore, without imputing merit to the motion, we remand to the district court for full consideration of Wade’s presentencing motion to withdraw his guilty plea.

II.

Wade also argues that the district court erred in sentencing by assigning him a custody-status point attributed to his placement in a pretrial-diversion program. The state concedes that the proper calculation of Wade’s criminal history should not include a custody-status point. We agree.

“[B]ecause a sentence based on an incorrect criminal history score is an illegal sentence—and therefore, under Minn. R. Crim. P. 27.03, subd. 9, correctable ‘at any time’—a defendant may not waive review of his criminal history score calculation.” *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). When scoring criminal history for purposes of sentencing guidelines, a custody-status point is given if, at the time of the offense to be sentenced, the offender was on probation, or on a bail release, or under some type of justice-system supervision. Minn. Sent. Guidelines II.B.2. A custody-status point is not given in the case of “a person who commits a new felony while on pre-trial diversion.” Minn. Sent. Guidelines cmt. II.B.201. Because Wade’s criminal-history score was miscalculated due to the inclusion of a custody-status point, Wade must be resentenced in the event he is denied leave to withdraw his plea on remand.

III.

Wade raises several additional issues by way of his pro se supplemental brief, among them the assertion that he was unduly denied access to a public defender. “The Sixth Amendment guarantees that an accused in a criminal prosecution has the right to have the assistance of counsel for his defense.” *Hanson v. Passer*, 13 F.3d 275, 278 (8th Cir. 1994). The requirements of the Sixth Amendment extend to criminal defendants in

state court proceedings through the Fourteenth Amendment to the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335, 342-44, 83 S. Ct. 792, 795-96, (1963) (stating that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”). Concomitant with the right to counsel is the right of indigent criminal defendants to have counsel appointed for them. In Minnesota, criminal defendants who are financially unable to obtain adequate representation are entitled to the appointment of counsel. Minn. R. Crim. P. 5.02, subds. 1(2), 3, 5. The burden of proof is on the defendant seeking a public defender to show that he is financially unable to provide his own counsel. *In re Stuart*, 646 N.W.2d 520, 526 (Minn. 2002).

Appellate courts review the district court’s decision to appoint a public defender for an abuse of discretion. *Stuart*, 646 N.W.2d at 523. Here, the record contains neither an application for a public defender nor a transcript from any hearing at which Wade sought and was denied access to a public defender. Thus Wade has failed to provide an adequate record for meaningful review on this issue. Likewise, the record is not sufficiently developed for review of Wade’s other pro se assistance-of-counsel issues.

We remand the case to the district court for full consideration of Wade’s presentencing motion to withdraw his guilty plea. In the event the motion is denied, Wade must be resentenced and the scoring of Wade’s criminal history shall not include a custody-status point for his placement in a pretrial-diversion program.

Remanded.