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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0923**

State of Minnesota,
Respondent,

vs.

Jerome A. Johnson,
Appellant.

**Filed June 2, 2009
Affirmed
Crippen, Judge***

Mille Lacs County District Court
File No. 48-K3-04-001348

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

Janice S. Kolb, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Courthouse Square, 525 Second Street Southeast, Milaca, MN 56353 (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant Jerome Johnson disputes the denial of his motion to withdraw his plea, claiming that the plea record was inadequate and, in the alternative, that he satisfied the conditions of a stay of adjudication. Because appellant's challenge to the validity of his plea has been waived and the record sustains the revocation of the stay of adjudication, we affirm.

FACTS

In November 2004, the state charged appellant in Mille Lacs County with one count of issuing a dishonored check for more than \$250 in violation of Minn. Stat. § 609.535, subd. 2 (2004). The offense is classified as a gross misdemeanor. *See* Minn. Stat. § 609.02, subd. 4 (2004).

Appellant initially responded to the charges by filing an affidavit denying that he signed the check or had anyone sign it on his behalf. But on September 26, 2006, appellant entered an *Alford* plea to the complaint. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). Pursuant to the terms of the plea agreement, stated on the record, the district court stayed adjudication of the matter for one year, and the state promised to dismiss the charges on the condition that by December 1, 2006, appellant provide either (1) documentation that he was working in Duluth on the date of the alleged offense, or (2) that he provide restitution in the amount of \$432.50.

In September 2007, the prosecutor filed a motion to vacate the stay of adjudication and have appellant sentenced according to his plea. Four months later, appellant filed a

motion to withdraw his guilty plea or, in the alternative, to have the charge dismissed for lack of probable cause. He provided various documents to support his claim that he was working in Duluth on the date of the alleged offense. The state countered those documents with evidence tending to place appellant at the site in Mille Lacs County where the check was drawn.

At the hearing on the motion in February 2008, appellant argued that he sent the alibi affidavit to the court twice and that it was therefore fair and just to permit him to withdraw his plea. Appellant did not argue that the plea was invalid. The district court denied appellant's motion.

In May 2008, the district court sentenced appellant to one year in jail and a \$3,000 fine, but stayed the sentence and stated that upon payment of restitution, the court would close the case.

DECISION

1. Accuracy of Plea

Appellant argues on appeal that because his *Alford* plea was not accurate, the district court abused its discretion by denying his motion to withdraw his plea. The district court denied the motion solely on the ground that appellant had not met his burden of demonstrating that it was fair and just to permit him to withdraw his plea.

Generally, arguments not raised before the district court, including constitutional issues, are waived. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989) (holding that constitutional challenge to stop of vehicle waived where not raised in district court). A court may review a matter

that was not properly preserved “when the interests of justice require and doing so would not unfairly surprise a party to the appeal.” *Roby*, 547 N.W.2d at 357; *see also State v. Moen*, 752 N.W.2d 532, 537 n.4 (Minn. App. 2008) (considering issue even though not raised in district court because issue was “implied”); *State v. Kouba*, 709 N.W.2d 299, 306 n.1 (Minn. App. 2006) (stating constitutional issues not raised in district court may be addressed in interests of justice provided parties have had “adequate briefing time” and issues were “impliedly raised”).

The arguments raised in appellant’s motion to withdraw his plea and the hearing on that motion were focused entirely on the merits of his alibi defense. This was largely in the context of appellant’s claim that he documented the alibi after the plea; insofar as he otherwise asserts his innocence, he states no suggestion that the *Alford* plea was mistaken. Because appellant did not challenge the validity of his plea, this argument has been waived. *See Roby*, 547 N.W.2d at 357. The interests of justice are not served in this case by reaching appellant’s challenge to the validity of the plea because, as discussed below, the record demonstrates that appellant failed to document that he was not in Mille Lacs County when the offense occurred. (We examine the justice impact of his evidence even though it was offered in his attempt to show that he satisfied the stay-of-adjudication conditions.)

Finally, there is no indication in the record that a challenge to the validity of the plea was even “impliedly raised” below. *Kouba*, 709 N.W.2d at 306 n.1. Thus, we decline to analyze the validity of appellant’s plea.¹

2. Stay of Adjudication

Appellant argues that the district court abused its discretion in denying his motion to withdraw his plea because he produced evidence contradicting the state’s evidence against him—evidence that would indicate it would be fair to undo his plea because he satisfied the condition of proof attached to the original stay of adjudication. Appellant does not claim that he paid restitution, the second of the conditions of the stay.² The district court concluded that appellant had not satisfied the conditions of the stay of adjudication within the agreed-upon time frame. A decision under the fair and just standard will not be reversed except in the “rare case” where the district court abused its discretion. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

By rule, the district court “may, within its discretion,” permit withdrawal of a plea based on fairness and justice, after taking into account both the reasons advanced by the

¹ The complaint states a second gross misdemeanor count of driving without a valid license in violation of Minn. Stat. § 171.24, subd. 5 (2004). Likewise, the adjudication stay was in reference to both charges. As stated in the opinion, appellant’s entire district court presentation dealt with conviction and sentencing on the check charge. Just as appellant failed to address the validity of his plea when appearing before the district court, he wholly failed to address the license conviction. On appeal, appellant says nothing about the license conviction; insofar as he argues that his plea was invalid, which implicates both counts, the argument addresses a topic waived below. In sum, we have no occasion to disturb or even review the license conviction.

² The conditional criminal impact of the case is suggested by the district court’s final sentencing order, which provides that even after sentencing the case would be closed in the event appellant paid restitution.

defendant and any likely prejudice to the prosecution due to action it has taken upon the defendant's plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007) (citing Minn. R. Crim. P. 15.05, subd. 2.). A defendant bears the burden of proving that there is a "fair and just" reason for withdrawing his plea. *Id.* (quotation omitted).

Appellant contends that he sent notarized statements from his employer in Duluth in an attempt to comply with the documentation condition of the stay of adjudication. He asserts that he submitted a copy of a notarized statement from an employer dated November 5, 2007. But the evidence does not show that this submission occurred before his motion in January 2008, which was more than one year after the December 2006 deadline for his stay of adjudication. As the district court noted, there is no evidence that appellant sent the statement to the court before the December 2006 deadline or at any time during the year before the court revoked the stay of adjudication, and there is no explanation for why the statement was not in either the district court's file or the county attorney's file. In addition, the record does not compel a decision that the conflicting evidence furnished at the motion hearing compels a finding that appellant had a valid alibi defense. Finally, as the prosecutor noted at the hearing, permitting the plea to be withdrawn would have prejudiced the state because its difficulties of proof, existing already when the plea was taken, two years after the offense, are now further enlarged. *See State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994) (affirming refusal to permit withdrawal of plea under fair-and-just standard in light of prejudice to state).

The record adequately supports the district court's decision that appellant failed to carry his burden to show cause for permitting withdrawal of his plea. The court did not abuse its discretion in denying appellant's motion.

Affirmed.