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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1276**

State of Minnesota,
Respondent,

vs.

Julia Rene Zvorak,
Appellant.

**Filed June 30, 2009
Affirmed
Willis, Judge***

Steele County District Court
File No. 74-CR-07-1997

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

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Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and Willis, Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

On appeal from her conviction of a first-degree controlled-substance crime, appellant argues that the district court abused its discretion by denying her motion to withdraw her guilty plea before sentencing and by denying her motion to stay the execution of her sentence. Because the district court did not abuse its discretion, we affirm both rulings.

FACTS

Julia Rene Zvorak was charged with one count of first-degree possession of methamphetamine and one count of first-degree possession of cocaine, in violation of Minn. Stat. § 152.021, subd. 2(1) (2006), and with one count of first-degree sale of methamphetamine and one count of first-degree sale of cocaine, in violation of Minn. Stat. § 152.021, subd. 1(1) (2006). The case was set for a jury trial on February 25, 2008. Zvorak appeared on that day and made several unsuccessful requests for a continuance; later in the day, the state and Zvorak reached a plea agreement, whereby Zvorak agreed to plead guilty to the count of first-degree sale of cocaine and the state agreed to dismiss the remaining charges and to recommend a sentence of no more than 100 months. The district court accepted Zvorak's guilty plea, denied her request to be released pending sentencing, and set the matter for sentencing.

Before sentencing, Zvorak moved for withdrawal of her guilty plea, under Minn. R. Crim. P. 15.05, subd. 2, and moved for a stay of execution of her sentence, under

Minn. Stat. § 152.152 (2006). The district court denied both motions and imposed an executed sentence of 100 months.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying Zvorak’s motion to withdraw her guilty plea under Minn. R. Crim. P. 15.05, subd. 2.

A defendant who has entered a guilty plea does not have an absolute right to later withdraw it. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). A district court may permit a defendant to withdraw a guilty plea before sentence is imposed, “if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of the motion and 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. The defendant bears the burden of establishing that it is “fair and just” to allow withdrawal of a guilty plea. *State v. Kaiser*, 469 N.W.2d 316, 319 (Minn. 1991). We will reverse the district court’s decision to deny withdrawal of a plea “only in the rare case” when the district court abuses its discretion. *Kim*, 434 N.W.2d at 266.

Zvorak argues that it would have been fair and just to permit her to withdraw her plea because the plea agreement called for the same sentence that her codefendant received after a jury found him guilty of the same offenses with which Zvorak was charged and because she was given an insufficient opportunity to discuss the plea agreement with her counsel.

Same Sentence as Codefendant

Zvorak argues that her plea agreement was fundamentally unfair because she forfeited her right to a jury trial but yet received the same sentence as her codefendant, who chose to exercise that right and who was convicted of the same four offenses that she had been charged with. Zvorak contends that she should have been allowed to withdraw her guilty plea so that she could either have a jury trial or negotiate a more favorable plea agreement with the state. But Zvorak cites no authority for the proposition that a court abuses its discretion by denying a motion to withdraw a plea under these circumstances.

Because Zvorak's codefendant was sentenced several days before Zvorak pleaded guilty, Zvorak should have been aware at the time of her plea that the state's offer to recommend a sentence of no more than 100 months was consistent with her codefendant's sentence. Indeed, the state noted at the sentencing hearing that it had offered to recommend no more than 100 months because that was the sentence that Zvorak's codefendant had received and "there was some fairness in offering [Zvorak] the same type of time."

The fair-and-just standard for withdrawal of a guilty plea does not permit withdrawal "for simply any reason." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quotation omitted). Guilty pleas are intended to facilitate the efficient administration of justice, and therefore, more than a change of heart is needed to establish a basis to withdraw a guilty plea. *See Kim*, 434 N.W.2d at 266 (discussing need to protect plea integrity). Zvorak's postplea, presentence belief that she might have received a more

favorable sentence by going to trial or through more aggressive plea negotiations is not a basis for concluding that it would be fair and just to allow Zvorak to withdraw her plea.

Opportunity to Discuss Plea with Counsel

Zvorak next asserts that she should have been permitted to withdraw her plea because she did not have a sufficient opportunity to discuss the proposed plea agreement with her counsel. She claims that she was deprived of that opportunity because the state did not make its final offer until the day trial was to begin, the offer differed from the parties' original discussions, and Zvorak's requests for a continuance were denied. But Zvorak does not explain the differences between the state's final offer and any earlier discussions or how any differences denied her the opportunity to fully discuss the plea agreement with her counsel. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignments of error based on mere assertion and not supported by argument or authority are waived unless prejudicial error is obvious). And Zvorak does not argue that the district court abused its discretion by denying her requests for a continuance. In any event, a district court may deny such a request that is made on the day of trial, even if the defendant seeks the continuance to obtain substitute counsel. *See State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (acknowledging the right to counsel but stating that a defendant "may not . . . obtain a continuance by arbitrarily choosing to substitute counsel at the time of trial"); *State v. Reed*, 398 N.W.2d 614, 616 (Minn. App. 1986) (providing that a district court may properly deny last-minute requests for substitute counsel that inevitably delay the proceedings), *review denied* (Minn. Feb. 13, 1987).

The record does not support Zvorak's claim that she was denied an opportunity to fully discuss the plea agreement with her counsel. Indeed, during the plea colloquy, Zvorak told the court that she had had enough time to speak with her attorney about the plea and that she did not want any further time to speak with counsel before proceeding with the entry of her plea. Furthermore, Zvorak stated under oath that she understood that she had the right to be represented by an attorney and that she was comfortable with the representation that she had received.

The district court did not abuse its discretion by denying Zvorak's motion to withdraw her guilty plea.

II. The district court did not abuse its discretion by denying Zvorak's motion to stay her sentence under Minn. Stat. § 152.152.

Zvorak next argues that the district court abused its discretion by denying her motion for a downward dispositional departure in the form of a stay of execution of her sentence under Minn. Stat. § 152.152. Instead, the district court imposed an executed sentence of 100 months, which falls within the presumptive guidelines range.

A district court must impose a presumptive sentence unless a case involves "substantial and compelling circumstances" warranting a departure from the sentencing guidelines. Minn. Sent. Guidelines II.D.; *State v. Kindem*, 313 N.W.2d 6, 7-8 (Minn. 1981) (affirming district court's refusal to depart downwardly for lack of substantial and compelling circumstances). Whether to depart from the guidelines is within the district court's discretion, and this court will not reverse the decision "absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied*

(Minn. Aug. 22, 2001). Only in a “rare case” would a refusal to depart warrant reversal. *Kindem*, 313 N.W.2d at 7.

A defendant’s particular amenability to probation may be a substantial and compelling circumstance that justifies a downward dispositional departure. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). But in sentencing for a conviction of a first-degree controlled-substance crime, the district court’s discretion also is limited by Minn. Stat. § 152.152, which provides that a “sentence may be stayed based on amenability to probation only if the offender presents adequate evidence to the court that the offender has been accepted by, and can respond to, a treatment program that has been approved by the commissioner of human services.”

Zvorak was convicted of first-degree sale of a controlled substance; Zvorak presented evidence that she had been accepted into an appropriately licensed program, and she argued that she had demonstrated a capacity to respond to treatment because her discharge summary and progress reports indicated that she had done well in the primary phase of treatment and that she was actively participating in outpatient group treatment. She also told the court that she had been participating in dialectical behavioral therapy, which addresses borderline personality disorder.

Section 152.152 allows, but does not require, a district court to stay an offender’s sentence on the basis of amenability to probation. Thus, even if Zvorak had established that she had been accepted to and could respond to treatment in an approved program, the district court was not required to stay her sentence.

Here, the district court concluded that there was an insufficient showing that Zvorak was amenable to probation, particularly because the court knew that Zvorak had recently violated probation on another offense. *See Trog*, 323 N.W.2d at 31 (stating that a district court may consider a defendant's prior record when assessing amenability to probation). Moreover, as the state pointed out at sentencing, Zvorak has a long history of chemical abuse, has been through treatment programs before, and committed the current offense while she was on probation for a felony. Under these circumstances, the district court did not abuse its discretion by denying Zvorak's motion for a downward dispositional departure.

Affirmed.