STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1005

State of Minnesota,
Respondent,

vs.

Mario Patino,
Appellant.

Filed July 28, 2009
Affirmed in part, reversed in part, and remanded
Muehlberg, Judge*

Hennepin County District Court
File No. CR06074377

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

Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County Attorney, C-2000 Government Center, 300 S. 6th Street, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.

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

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

MUEHLBERG, Judge

On January 23, 2008, appellant, who was indicted on a charge of first-degree murder, pleaded guilty to aiding and abetting an offender after the fact for the benefit of a gang, Minn. Stat. §§ 609.495, subd. 3, .229, subd. 2 (2004). In this appeal, he argues that the district court abused its discretion by refusing to permit him to withdraw his guilty plea before sentencing and erred by imposing a 176-month sentence without first determining the appropriate severity level for this unranked offense.

Because the district court did not abuse its discretion by refusing to permit appellant to withdraw his guilty plea, we affirm appellant's conviction. But because the district court erred by failing to make a record of the factors that support assignment of a severity level X to this unranked offense, we reverse and remand the issue of appellant's sentence to the district court for findings or resentencing.

FACTS

On May 1, appellant Mario Patino, who was a high-ranking member of the gang Surenos 13, drove with his four co-defendants to Bloomington to threaten or harm Carlos Hernandez Perez, alleged to be a member of a rival gang, Vatos Locos. Pretending to be members of the Vatos Locos, the men lured Perez outside where either Noel Escarcega or Jose Miguel Chavarria-Cruz shot and killed him. Appellant was alleged to have been part of the plot, to have accompanied the two to the scene of the shooting on foot, and to have subsequently helped to protect them.

The five men were charged by indictment with first-degree murder, Minn. Stat. § 609.185(a)(1) (2004), and first-degree murder for the benefit of a gang, Minn. Stat. §§ 609.185(a)(1), .229, subd. 2 (2004). The driver of the car, Felipe Salvidar-Alvillar, eventually pleaded guilty and agreed to testify against the others.

On January 22, 2008, appellant's counsel requested a *Florence* hearing on the issue of whether there was sufficient probable cause for the indictment. The district court denied the motion for a *Florence* hearing but failed to address the motion to dismiss for lack of probable cause.

On the next day, appellant pleaded guilty to an amended charge of aiding an offender after the fact for the benefit of a gang. Minn. Stat. §§ 609.495, subd. 3, .229, subd. 2. The parties agreed that this offense, which is unranked in severity under the Minnesota Sentencing Guidelines, would be treated as a severity level X offense, but the court entered no reason on the record for that decision.

On February 28, 2008, the district court dismissed the indictment against co-defendant Jose Manuel Salvidor-Alvillar for lack of probable cause; Salvidor-Alvillar was a passenger in the car and did not go to the scene of the shooting. On March 13, 2008, appellant moved to withdraw his guilty plea and for dismissal of the indictment, at least partially based on the dismissal of the indictment against Salvidor-Alvillar. On March 20, the district court denied appellant's motion to withdraw his guilty plea but did not address the motion to dismiss the indictment. The district court imposed an executed sentence of 176 months, within the guidelines for a severity level X offense. This appeal followed.

D E C I S I O N

Withdrawal of Plea

The district court may allow a defendant to withdraw a guilty plea prior to sentencing "if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant" and to any prejudice withdrawal would cause to the state. Minn. R. Crim. P. 15.05, subd. 2. We review the district court's decision for an abuse of discretion. *State v. Abdisalan*, 661 N.W.2d 691, 693 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003). The defendant has the burden of proving that the district court abused its discretion. *State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994). A defendant has no absolute right to withdraw a guilty plea once entered. *Abdisalan*, 661 N.W.2d at 693.

Generally, a defendant waives nonjurisdictional defects by entering a guilty plea, *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980), but a guilty plea does not eliminate the defendant's right to withdraw his plea if it is fair and just to do so, *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007).

The "fair and just" standard involves a weighing of both the defendant's reasons asserted to support withdrawal and the potential prejudice to the state. *Danh*, 516 N.W.2d at 544. Appellant argues that it would be fair and just to permit withdrawal because the district court never issued an order on his motion to dismiss for lack of probable cause.

Unlike *Farnsworth*, in which the defendant asserted that he was not aware that his confession could have been suppressed, 738 N.W.2d at 369, appellant was aware of the

probable cause issue; his motion for a *Florence* hearing had twice been denied and this fact was acknowledged on the plea petition. Further, according to the record, appellant's counsel was allowed to present the issue in some detail to the district court and the district court's refusal to hold a *Florence* hearing leads us to conclude that the district court implicitly found probable cause.

Second, appellant argues that it would be fair and just to permit withdrawal of the plea because the indictment against one of his co-defendants was dismissed for lack of probable cause shortly after appellant pleaded guilty. The accusations against appellant differed significantly from those against this co-defendant, Jose Manuel Salvidar-Alvillar, who, unlike appellant, never left the car and did not accompany the others to the scene of the shooting. In any event, the district court need not permit plea withdrawal simply because "the defendant made what turned out, in retrospect, to be a poor deal." *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 125 S. Ct. 2398, 2407 (2005).

Finally, the district court denied appellant's motion to withdraw his plea because appellant pleaded guilty not to the indictment charge but to an amended and lesser charge. The district court reasoned that this "substantially different" charge reflected weaknesses in the state's case. Appellant contends that he would not have entered a guilty plea had the district court ruled in his favor on his probable cause motion. But appellant did not insist on a ruling before entering his plea.

Based on the record before us, appellant has not sustained his burden of proving that the district court abused its discretion by refusing to permit plea withdrawal. We therefore affirm appellant's conviction.

Sentencing

The state has conceded that the district court abused its discretion by assigning a severity level to the unranked charge of aiding an offender after the fact for the benefit of a gang without explaining the factors that it considered in making that determination, except that the parties had agreed to a 176-month sentence. *See* Minn. Sent. Guidelines II.A & cmt. II.A.04 (stating that a judge must specify on the record which of several factors support assignment of severity level to unranked offense); *State v. Kenard*, 606 N.W.2d 440, 442-43 (Minn. 2000) (requiring court to make a record of factors considered in setting severity level for unranked offenses); *see also State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002) (stating that plea agreement alone is not sufficient to support sentencing departure). We therefore remand this matter to the district court, either for re-sentencing or for findings supporting the district court's assignment of the severity level.

Appellant's Pro Se Issues

Appellant raises a number of issues in his pro se supplemental brief. First, appellant argues that the district court erred by refusing to sever the trials of the co-defendants and that he was deprived of a fair trial because of prosecutorial misconduct. Prosecutorial misconduct acts to deprive a defendant of a fair trial, *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000), or influences the jury to unfairly convict a defendant, *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). Appellant pleaded guilty before trial, and any prejudice related to joinder or severance is theoretical because there was no trial.

Second, appellant argues that the district court was biased against him. Much of this argument duplicates counsel's argument about the district court's failure to rule on the motion for dismissal or the district court's dismissal of co-defendant's indictment.

Finally, appellant lists a number of violations of his constitutional rights, including speedy trial, right to counsel, right to know the evidence against him, ineffective assistance of counsel, and a *Batson* allegation. Appellant has not provided legal support for any of his allegations. *See State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (stating that pro se claims must be supported by law and argument).

We have fully considered appellant's pro se arguments and find them to be without merit.

Affirmed in part, reversed in part, and remanded.