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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1272**

State of Minnesota,  
Respondent,

vs.

Danny Leo Levercom,  
Appellant.

**Filed July 21, 2009  
Affirmed  
Minge, Judge**

Anoka County District Court  
File No. 02-K6-03-008571

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

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

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, 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.

## **UNPUBLISHED OPINION**

**MINGE**, Judge

Appellant challenges the district court's denial of his motion to withdraw his guilty plea after sentencing and its revocation of his probation. We affirm.

### **FACTS**

In May 2003, appellant Danny Leo Levercom, whose date of birth is October 20, 1984, began a sexual relationship with N.R.J., whose date of birth is April 26, 1988. In June 2003, appellant forceably initiated sexual intercourse with her, despite her objection. Appellant was charged with two counts of criminal sexual conduct; one count alleging intercourse through force or coercion, the second alleging intercourse with a 15-year-old when appellant was more than two years older than her. Appellant pled guilty to the second count, admitting that he knew the victim was under age. In July 2004, appellant was sentenced to a stay of imposition, five years of probation, and 120 days of probationary jail. The first count was dismissed.

In January 2008, a probation-violation arrest warrant was issued for appellant's failure to complete sex-offender treatment, failure to obey the rules of probation, failure to reside at an approved residence, unsupervised contact with female minors, and use of intoxicants. Appellant was later arrested.

Prior to the probation-violation hearing, appellant moved to withdraw his three-and-a-half-year-old plea. At a hearing on that motion, appellant claimed that, at his plea hearing, his attorney told him that he needed to tell the district court that he was aware of the victim's age at the time of their relationship, even though appellant denied he knew

her age and thought she was 18. Other evidence was presented at the hearing on the plea-withdrawal motion. A psychologist who evaluated appellant reported that he admitted that he knew the victim's age. The psychologist explained that

[Appellant] resisted speaking directly about his relationship with or attraction to [the victim]. He said she initially claimed to be 18 years old and he found out she was 15 when a 17 year old sister visited and heard her discussing her true age. He said he continued to engage in a sexual relationship with [her] with knowledge of her true age because, ["I got along with everybody there. I talked to her about it on the phone and it felt okay.["]]

The corrections officer who conducted appellant's presentence investigation testified that

[Appellant] maintained that initially he did not know the victim's true age. He assumed she was older than she actually was. He stated that one day the victim, quote, slipped up in front of his sister and admitted that she was only 15 years old. After learning this, the defendant's sister contacted him immediately and warned him that the victim was only 15. He admitted to having sexual intercourse with the victim at least once after learning she was only 15 years old.

After hearing additional testimony from appellant's father and mother, the district court denied appellant's motion to withdraw his plea.

In May 2008, the district court held a probation-violation hearing. The district court found that appellant violated probation when he (1) failed to complete treatment; (2) had contact with minor females without proper supervision; and (3) used controlled substances. The district court determined that these violations were willful, intentional, and inexcusable; that appellant did not take probation seriously; that he was unamenable to probation because of his failures in sex-offender treatment and his contact with minors;

and that the public policy favoring probation was greatly outweighed by the need to protect public safety. The district court then revoked appellant's probation and imposed and executed an 18-month sentence with five years of conditional release. This appeal follows.

## DECISION

### I.

The first issue is whether the district court abused its discretion when it denied appellant's motion to withdraw his guilty plea. After sentencing, a defendant may withdraw a guilty plea "upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when an appellant can show that his guilty plea was not "accurate, voluntary, and intelligent" (i.e., knowingly and understandingly made). *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). "The decision to allow a defendant to withdraw his or her guilty plea is left to the discretion of the district court," and this court will reverse that decision only if the district court abused its discretion. *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007). Appellant does not have an absolute right to withdraw a guilty plea; he has the burden of establishing facts warranting reopening his case. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998).

Appellant argues his plea was not accurate because he lied about an element of the offense. "The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he could properly be convicted of at trial." *Munger v. State*, 749 N.W.2d 335, 337 (Minn. 2008). "Accuracy requires an adequate factual basis to

support the charge. The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Id.* at 337-38 (quotation and citation omitted).

The district court denied appellant's motion for three reasons. First, it held that appellant was not entitled to withdraw his plea, citing *Anderson v. State*, 746 N.W.2d 901 (Minn. App. 2008). In *Anderson*, the defendant argued that her lawyer advised her to lie when she pled guilty, but this court denied her claim on appeal, determining (1) the district court's instructions to the defendant and its administration of the oath to tell the truth superseded any advice given by her lawyer; (2) the defendant suffered no prejudice because the confession served her purpose of receiving the benefit of the plea agreement; and (3) the district court did not find that the defendant's attorney actually instructed her to lie. *Id.* at 907-08. In appellant's case, he also was under oath when pleading guilty, he received the benefit of a probationary sentence and dismissal of a second criminal sexual conduct charge, and the district court never found that appellant's lawyer actually told him to lie. *Anderson* is directly on point and supports the district court's decision.

Second, the district court held that appellant's motion was untimely. Factors relevant to timeliness include "(1) the district court's interest in preserving the finality of convictions, (2) the defendant's diligence in seeking withdrawal, and (3) whether the delay causes undue prejudice to the state's prosecution of the case." *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007) (citations omitted). Appellant waited over three years to assert this claim and only after a threat of probation revocation. With the risks to

the state's case incident to locating witnesses and their recollection of events for a new trial, the timeliness factor favors denial of the motion to withdraw the guilty plea.

Third, the district court held that appellant's claim was contradicted by his admissions in the 2004 proceedings that he knew the victim was underage. Furthermore, we note that, at the plea-withdrawal hearings, his attorney was never called as a witness to admit or deny his claim. Thus, the credibility of appellant's claim is weak, and there is no finding that appellant lied during his plea hearing.

As outlined previously, there was testimony from the psychologist and corrections officer that appellant admitted to the psychologist and in the course of the presentence investigation that he had sex with the victim after he knew she was under 16.

Because we agree with the district court's well-reasoned bases for denying appellant's motion, we hold that the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

## **II.**

The second issue is whether the district court abused its discretion when it determined that the need for confinement outweighed the policies favoring probation. Probation may be revoked if there is clear and convincing evidence that probation has been violated. Minn. R. Crim. P. 27.04, subd. 3(3). "A district court has broad discretion in determining when there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quotation omitted). Findings of fact are accorded great weight and should not be set aside unless clearly erroneous. *See State v. Critt*, 554 N.W.2d 93,

95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996). The district court must complete a three-step analysis before revoking probation, making findings that “1) designate the specific condition or conditions [of probation] that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that the need for confinement outweighs the policies favoring probation.” *State v. Modtland*, 695 N.W.2d 602, 606 (Minn. 2005) (quoting *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)).

Appellant does not challenge on appeal the finding that he violated his probation but argues that the evidence is insufficient to support finding that the need for confinement outweighed the policies favoring probation. The third *Austin* factor is satisfied if “confinement is necessary to protect the public from further criminal activity by the offender; or . . . it would unduly depreciate the seriousness of the violation if probation were not revoked.” *Austin*, 295 N.W.2d at 251. “The decision to revoke cannot be a reflexive reaction to an accumulation of technical violations but requires a showing that the offender’s behavior demonstrates that he or she cannot be counted on to avoid antisocial activity.” *Id.* (quotations omitted).

Appellant argues that he did not have a prior probation violation and that the district court never considered his alternative proposal for reinstatement on probation. However, it is undisputed that appellant failed to complete sex offender treatment during this time and had impermissible contact with minor females without proper supervision. The purpose of probation is rehabilitation. *Modtland*, 695 N.W.2d at 606. Appellant’s sex offender treatment program director cited a number of reasons for his discharge from treatment, including his denial of his conduct, lying to his therapist about “behaviors that

violate both his probation agreement and the rules of treatment,” and reports that appellant lacked motivation for treatment and desire to participate openly and honestly. Appellant’s attitude toward probation also was revealed when, after he was found to be staying periodically with a woman who had two minor children, which was a violation of his probation, appellant told his probation officer that he did not believe the violation or his probation was a “big deal.” The district court found that his violations and his dismissive attitude toward probation were evidence that it was difficult to monitor his conduct on probation, that he did not take probation seriously, and, as a result, he was not amenable to probation.

Based on the record, we conclude that the district court’s decision to revoke probation was not an abuse of discretion.

**Affirmed.**

Dated: