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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1286**

State of Minnesota,
Respondent,

vs.

Edward Leroy Milner,
Appellant.

**Filed September 8, 2009
Affirmed
Ross, Judge**

Olmsted County District Court
File No. 55-CR-06-9756

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

Mark A. Ostrem, Olmsted County Attorney, Richard W. Jackson, Jr., Special Prosecution Unit, Government Center, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Edward Milner challenges his conviction and sentence for first-degree burglary. He contends that the district court abused its discretion when it refused to permit him to withdraw his guilty plea and when it sentenced him according to the Minnesota Sentencing Guidelines. Because the district court acted within its discretion by assigning Milner a presumptive sentence, we affirm.

FACTS

In November 2006, Rochester police responded to a reported apartment burglary in progress. They arrived and spoke with the tenant and with V.L.T. The tenant and V.L.T. reported that Milner, V.L.T.'s boyfriend, had broken a panel from a back door, reached inside, unlocked the door, entered, and assaulted V.L.T by holding her against the wall and hitting her head. Milner called the apartment while police were there, and admitted to breaking in. He also threatened that "he would do more than just break the door down." V.L.T. told police that Milner was abusive, and they escorted her to a women's shelter.

Less than an hour later, police were again dispatched to the apartment to investigate a report that Milner had returned and attempted to break in. Milner fled on foot, and police located and arrested him two blocks away.

The state charged Milner with two counts of first-degree burglary. He entered an agreement in which he would plead guilty to the second count of burglary and to an amended misdemeanor assault charge, and the state would dismiss one burglary count

and recommend a presumptive sentence under the Minnesota Sentencing Guidelines with a “jail cap” of 180 days.

Milner pleaded guilty according to the terms of the plea agreement. At the time of his guilty plea, Milner’s criminal history score was two. The district court scheduled Milner’s sentencing hearing for April 12, 2007. Milner was released on his own recognizance and ordered to remain in the state without court approval to leave, to remain law-abiding, and to make all scheduled court appearances.

But Milner absconded. He failed to appear for his sentencing and decided to start a new life in Wisconsin. Police eventually arrested him in La Crosse, Wisconsin on an unrelated charge. Police returned Milner to Minnesota in March 2008. By then, Milner had been convicted of six additional misdemeanors since his guilty plea. This new criminal activity increased his criminal history score to three. As a consequence, the presumptive guidelines sentence for his burglary conviction changed from 33 months stayed to 39 months executed.

Fifteen months after he pleaded guilty, and almost one year after his originally scheduled sentencing, Milner filed motions to withdraw his guilty plea and for a downward sentencing departure. Milner argued, in part, that a downward departure would “even things out” because Milner had pleaded guilty when his criminal history score was lower and expected that his sentence would be more favorable to him.

The district court denied Milner’s motion to withdraw his guilty plea and sentenced him to the presumptive sentence for Milner’s criminal history score of three,

consistent with Milner's post-plea conduct, with no downward departure. Milner appeals.

DECISION

I

Milner challenges the validity of his guilty plea. He asserts that the district court erred when it denied his motion to withdraw the plea, based on two independent grounds: permitting him to withdraw his guilty plea would correct a manifest injustice and permitting withdrawal would have been "fair and just." A district court's refusal to permit withdrawal of a guilty plea will be reversed only if the district court abused its discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). Withdrawal must be permitted if it would correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1.

Manifest Injustice

Milner argues that withdrawal was necessary to correct a manifest injustice. A manifest injustice occurs when a defendant's guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). The invalidity of a guilty plea is a threshold issue to be considered before determining whether fairness and justice warrants discretionary withdrawal. *Id.* A guilty plea is invalid if it is not accurate, voluntary, and intelligent. *Id.* Issues of interpretation and enforcement of plea agreements are reviewed de novo. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). Milner specifically argues that his plea was not intelligently and voluntarily entered because he relied on a promise by the prosecutor that was not fulfilled and because his sentence was contrary to his plea agreement.

When a plea agreement is reached based on a prosecutor's unfulfilled promise, the voluntariness of the plea "is drawn into question." *Brown*, 606 N.W.2d at 674. A guilty plea is involuntary if it is entered because of "improper pressures or inducements." *Id.* (quotation omitted). Milner's prosecutor promised to dismiss one burglary count and to recommend a presumptive sentence under the sentencing guidelines and a "jail cap" of 180 days. Because Milner's criminal history score changed after he pleaded guilty but before he was sentenced, the presumptive sentence for his crimes changed. The sentence for Milner's burglary conviction increased to presumptively include prison time, interfering with the prosecutor's promise to recommend no more than 180 days in jail.

As promised, the state dismissed Milner's second burglary charge, and, also as promised, at the sentencing hearing the prosecutor recommended the presumptive sentence. It was no longer required for the prosecutor to recommend that Milner's sentence be limited to the mandatory minimum of 180 days in jail because Milner's post-plea criminal behavior brought him into a new guidelines penalty of a presumptively executed term of imprisonment.

We are not persuaded by Milner's argument that the prosecutor's failure to make the promised recommendation of 180 days in jail renders his guilty plea involuntary. The state more persuasively argues that it did not make an unqualified promise concerning how Milner would be sentenced. *See State v. DeZeler*, 427 N.W.2d 231, 234 (Minn. 1988) (distinguishing between agreement as to sentence and agreement for recommendation). It asserts that the state only promised to recommend a presumptive sentence, and that the promise to recommend a 180-day jail sentence was qualified within

that context. The promise was implicitly contingent on Milner complying with the court's instructions for him to remain law-abiding until sentencing. Because the state's promise was made subject to the expectation that Milner would not commit additional criminal acts before sentencing, we conclude that the state's failure to recommend a jail cap at sentencing does not render Milner's plea involuntary. We add that the recommendation, if made by the prosecutor, would have been futile in light of Milner's changed criminal history at the time of sentencing. So even if the prosecutor had an unqualified duty to make the recommendation, the failure to follow through on these facts was inconsequential; the agreement regarded only a recommendation, not an agreement to any particular sentence. The new criminal history score distinguishes this case from *State v. Kunshier*, 410 N.W.2d 377 (Minn. App. 1987).

Milner also argues that his plea was not intelligently made because he was not aware of the maximum sentence to be imposed. A plea is intelligent when a defendant "understands the charges, his or her rights under the law, and the consequences of pleading guilty." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998) (footnote omitted). A plea is not intelligent if a defendant does not understand the maximum sentence to be imposed. *Id.* at 578. At the time he entered his plea, Milner expected that he would be sentenced in accord with a criminal history score of two, but he was told that the maximum sentence for burglary was 20 years in prison. Milner's contention on appeal that he was not aware of his maximum sentence is contradicted by the record. Milner understood that the district court could impose a sentence up to the maximum on the basis of other criminal convictions. Milner's plea was made intelligently.

Fair and Just

Milner argues that his request to withdraw should have been granted because it would have been fair and just to do so. A district court may permit a guilty-plea withdrawal before sentencing if, after considering the reasons given by the defendant and the prejudice to the state, it concludes it would be fair and just to do so. Minn. R. Crim. P. 15.05, subd. 2; *State v. Williams*, 373 N.W.2d 851, 853 (Minn. App. 1985). The district court denied Milner's plea-withdrawal request because it was untimely and prejudicial to the prosecution. Motions to withdraw guilty pleas must be made with "due diligence" in light of the allegations. *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007) (quotation omitted). When evaluating a motion's timeliness, the district court is expected to consider (1) the interest in the finality of convictions; (2) the defendant's diligence in seeking withdrawal; and (3) whether withdrawal following the delay would unduly prejudice the state's ability to prosecute. *Id.*

Because fifteen months had passed since it had accepted Milner's guilty plea, the district court concluded that Milner had not acted with the requisite diligence and that withdrawal would prejudice the prosecution. The district court's conclusion is supported by the evidence and the law. The fifteen-month delay alone justifies the district court's refusal to permit withdrawal. *See State v. Lopez*, 379 N.W.2d 633, 636 (Minn. App. 1986) (affirming a district court's refusal to permit withdrawal after eleven months), *review denied* (Minn. Feb. 14, 1986). The record also illustrates that the delay prejudiced the state. The state tried but was no longer able to locate the two witnesses to the burglary and assault. Because all of the relevant considerations weigh against granting

the request, the district court did not abuse its discretion by concluding that fairness and justice did not justify withdrawal.

II

Milner argues that the district court abused its discretion when it sentenced him to the presumptive sentence. Even when reasons for downward departure exist, a district court's refusal to depart from a presumptive sentence will be reversed only rarely. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). But where reasons for downward departure exist, they must be considered. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). When the district court does not depart, it need not issue a written explanation for the decision. *Id.* at 263.

Milner contends that the district court did not consider two grounds that would justify a downward departure. He asserts that he is amenable to probation and that he pleaded guilty expecting to be sentenced in accord with a criminal history score of two. The district court heard the defense's and the state's arguments justifying departure and non-departure and imposed the presumptive sentence, stating, "I do not find a substantial and compelling reason to depart from the sentencing guidelines."

We conclude that the district court considered the reasons argued by Milner's attorney and rejected them. The district court's sentencing decision followed close on the heels of the parties' arguments concerning reasons for departure. At Milner's sentencing hearing, Milner's attorney argued for a downward departure based on Milner's changed outlook on life, his willingness to participate in chemical dependency treatment, and because Milner's guilty plea was entered when he had a more favorable criminal history

score. The state pointed out that Milner's disregard of the court's instructions to remain in Minnesota, to remain law abiding, and to appear for scheduled court dates illustrated that Milner was not amenable to probation. Milner's own conduct created the disparity between the sentence he anticipated when he entered his guilty plea and the one the guidelines recommended when he finally appeared for sentencing. This is not the rare case that justifies reversing the district court's decision to assign a guidelines sentence.

Affirmed.