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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1929**

State of Minnesota,
Respondent,

vs.

Zachary Fitzgerald,
Appellant.

**Filed October 20, 2009
Affirmed
Lansing, Judge**

Sherburne County District Court
File No. 71-CR-07-3617

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Kathleen A. Heaney, Sherburne County Attorney, Arden Fritz, Assistant County Attorney, Government Center, 13880 Business Center Drive, Elk River, MN 55330 (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

LANSING, Judge

The district court denied Zachary Fitzgerald's presentence motion to withdraw his guilty plea. On appeal, Fitzgerald argues that the district court abused its discretion by failing to make sufficient findings of its reasons for denying the motion and by failing to conduct a full evidentiary hearing with substitute counsel to explore whether Fitzgerald received ineffective assistance of counsel when he pleaded guilty. Because the district court made sufficient findings and Fitzgerald did not, in the district court, raise a claim of dissatisfaction with his counsel that would trigger a hearing, we affirm.

F A C T S

Zachary Fitzgerald was charged with two counts of terroristic threats and one count of fourth-degree criminal damage to property. Minn. Stat. §§ 609.713, subd. 1, .595, subd. 3 (2006). Fitzgerald pleaded guilty to one count of terroristic threats on April 1, 2008. In return, the state agreed to drop the remaining charges and to request the lowest sentence within the applicable guidelines range.

In the course of the plea hearing, Fitzgerald's attorney addressed on the record the terms of the agreement and the strategic considerations in accepting it. Fitzgerald asked the district court whether it could guarantee a sentence without prison time. The district court told Fitzgerald that it could only promise to keep an open mind in reviewing a downward-departure motion and the information supporting it. The district court then provided a recess for Fitzgerald to further discuss the plea agreement with his attorney. Following the recess, Fitzgerald asked the district court about the possibility of an

upward departure if he went to trial. The district court listed the general circumstances in which the state could request an upward departure and again provided a recess for Fitzgerald to discuss this risk with his attorney. Following the second recess, Fitzgerald accepted the plea agreement and entered a plea consistent with the procedures set out in Minn. R. Crim. P. 15.01. Fitzgerald testified to the facts forming the basis for his guilty plea.

At Fitzgerald's sentencing hearing on June 10, 2008, Fitzgerald's attorney told the district court that Fitzgerald wanted to withdraw his plea. On August 6, 2008, after two continuances, Fitzgerald formally moved to withdraw his plea. Fitzgerald's attorney argued that it would be fair and just to allow withdrawal because Fitzgerald was at times "unhappy" with his current attorney and was "equivocal" in pleading guilty. The attorney also argued that the state would not be prejudiced by withdrawal. Fitzgerald addressed the court directly, stating that he was heavily intoxicated on April 1, 2008, and would not have pleaded guilty had he been sober.

After discussing the claims, the district court found that Fitzgerald's plea was knowing, intelligent, and voluntary and denied the plea-withdrawal motion. Consistent with the plea agreement, the state requested a sentence of twenty-six months in prison, the minimum sentence in the presumptive range for the offense of terroristic threats based on Fitzgerald's criminal-history score of six. The court imposed the requested sentence, and Fitzgerald appeals the district court's denial of his motion to withdraw his guilty plea.

DECISION

I

A defendant who enters a valid guilty plea does not have an absolute right to withdraw it. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). Before sentencing, a district court may allow plea withdrawal if, on due consideration of the reasons advanced for the withdrawal and any prejudice to the state, the court determines that withdrawal of the plea is fair and just. Minn. R. Crim. P. 15.05, subd. 2. This determination is committed to the sound discretion of the court. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). We review a district court's decision on whether plea withdrawal is fair and just under an abuse-of-discretion standard. *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007).

When credibility determinations are crucial to a district court's decision, we defer to that court's primary observations and trustworthiness assessments. *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). Whether a plea was intelligent and voluntary is a question of fact, which will be sustained unless it is clearly erroneous. *See State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994) (discussing standard of review for voluntariness of guilty plea). "Findings of fact are not clearly erroneous if there is reasonable evidence to support them." *Id.*

Fitzgerald does not argue on appeal that he proved withdrawal of his plea was fair and just. Instead, he argues that the district court did not make sufficient findings on the record to support its denial. No explicit rule requires district courts to state reasons for granting or denying a plea-withdrawal motion. But the record must contain sufficient

findings to permit appellate review. *See State v. Morgan*, 296 N.W.2d 397, 401 (Minn. 1980) (stating that district court must make factual findings adequate for appellate court to ascertain basis for ruling).

In presenting Fitzgerald's argument for plea withdrawal, his attorney stated that Fitzgerald was equivocal about pleading guilty. This argument challenges the validity of his guilty plea, and we address that challenge as part of Fitzgerald's contention that the district court's findings are insufficient to support the denial of his plea-withdrawal motion. The record of the plea hearing shows that the prosecutor asked and Fitzgerald answered all of the questions set forth in Minn. R. Crim. P. 15.01. This series of questions seeks to ensure that the defendant is entering an accurate, intelligent, and voluntary plea. Fitzgerald's answers to these questions do not reflect equivocation. Although Fitzgerald did not want to go to prison, the answers are not equivocal on the questions relating to his guilt or waiver of rights. In addition, Fitzgerald signed a plea petition and testified to his actions that formed the basis for his guilty plea. The district court also answered questions asked by Fitzgerald and twice permitted a recess for Fitzgerald to discuss issues more fully with his attorney. Referring to the plea hearing, the district court stated that it "previously found [Fitzgerald] made a knowing, intelligent and voluntary waiver of his rights, and a knowing, intelligent, and voluntary plea of guilty. And so I will deny [the plea-withdrawal] motion."

The other two reasons advanced as a basis for a plea withdrawal are directly addressed in the record. Specifically, the attorney's statement that Fitzgerald was at times unhappy with the attorney's representation is countered by Fitzgerald's own

statement under oath at the plea hearing and in his plea petition that he believed that his attorney had represented his interests and fully advised him of his rights. Similarly, Fitzgerald stated under oath that he was not under the influence of alcohol or any controlled substance at the time he entered his plea. Fitzgerald's intoxication argument was also directly addressed when Fitzgerald presented his plea-withdrawal motion. Fitzgerald claimed he had been so intoxicated that he had "blacked out completely." The district court noted that Fitzgerald had been in continuous custody for 118 days at the time of the plea hearing. The district court also stated that Fitzgerald's claim of intoxication was "inconsistent with [its] recollection of that day." These statements represent the district court's assessment of Fitzgerald's credibility. After lengthy exchanges with Fitzgerald at the plea hearing and presiding over the rule 15.01 questions, the district court had an ample basis on which to make the assessment. *See Aviles-Alvarez*, 561 N.W.2d at 527 (stating that reviewing courts defer to district court's credibility determination); *see also Butala v. State*, 664 N.W.2d 333, 340-41 (Minn. 2003) (affirming district court's determination that plea withdrawal would not be fair and just based on its recollection of rule 15.01 inquiry and Butala's demeanor at plea hearing).

The district court also considered the state's argument that withdrawal of the plea would result in prejudice because it would be unable to locate two witnesses whose whereabouts were no longer known. The state had subpoenaed both witnesses for trial and held one in custody pending trial to ensure that he would be present to testify. Although a more specific finding on whether and how the state would be prejudiced by

Fitzgerald's plea withdrawal would have been preferable, the lack of such a finding does not preclude review and affirmance of the district court's decision.

The record demonstrates that the district court considered each of Fitzgerald's arguments for plea withdrawal. In light of the fully developed record and the district court's direct responses to Fitzgerald's most specific claim, additional findings are not necessary to permit appellate review or to support the district court's decision. The district court did not abuse its discretion by denying Fitzgerald's motion to withdraw his guilty plea.

II

The second issue that Fitzgerald raises on appeal is a claim that the district court abused its discretion by not holding an evidentiary hearing and not appointing substitute counsel to represent him on his claim of ineffective assistance of counsel. Fitzgerald's counsel stated only that Fitzgerald was, at times, unhappy with his attorney's representation. When Fitzgerald addressed the district court directly to argue for plea withdrawal, he raised only his intoxication claim and did not make any statements indicating that his counsel was deficient in any aspect of Fitzgerald's representation.

"A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation marks omitted). Based on Fitzgerald's arguments to the district court, both directly and through counsel, the district court would not reasonably have understood that Fitzgerald was claiming ineffective assistance of counsel as the basis for plea withdrawal. *Compare State v.*

Paige, 765 N.W.2d 134, 136-37, 140-42 (Minn. App. 2009) (holding defendant should have been afforded substitute counsel to argue for plea withdrawal after making request to discharge counsel) and *Butala*, 664 N.W.2d at 341 (stating substitute counsel should have been provided to support plea-withdrawal motion by defendant expressly asserting ineffective assistance of counsel). Although a defendant may not be able to state an ineffective-assistance-of-counsel claim precisely while being represented by that attorney, Fitzgerald made no claims of a problem with his attorney and argued that the basis for his plea-withdrawal motion was his alleged intoxication. Because an ineffective-assistance-of-counsel claim was not before the district court, we do not address Fitzgerald's abuse-of-discretion argument.

Related to his claim that the district court ignored his assertion of ineffective assistance of counsel, Fitzgerald reasserts his attorney's reference to the fact he was equivocal about pleading guilty. Fitzgerald links this equivocation to reluctance, which he then links to the coercion argument in *State v. Kaiser*, 469 N.W.2d 316 (Minn. 1991). In that case, Kaiser alleged that his counsel coerced his plea, and the Minnesota Supreme Court remanded for a full evidentiary hearing to determine whether appellant's plea was involuntary and must be withdrawn. *Kaiser*, 469 N.W.2d at 319. The supreme court also questioned whether Kaiser could be adequately represented by his counsel at the evidentiary hearing. *Id.* at 320.

Fitzgerald's attempt to equate reluctance with coercion is not persuasive on this record. At the plea hearing, Fitzgerald stated under oath that he was not pleading guilty in response to threats or promises. See *State v. Abdisalan*, 661 N.W.2d 691, 694-95

(Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003) (affirming denial of motion for plea withdrawal when rule 15.01 inquiry evidenced voluntariness). Unlike the defendant in *Kaiser*, Fitzgerald has submitted no evidence or affidavits to the district court to support a coercion claim. 469 N.W.2d at 318-19. The district court did not abuse its discretion by failing to hold an evidentiary hearing when Fitzgerald provided no indicia of coercion.

Affirmed.