STATE OF MINNESOTA
IN COURT OF APPEALS
A09-388

Felix Wemh,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 8, 2009
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CR-06-046609

David L. Wilson, Anna E. Scholl, Wilson Law Group, 3019 Minnehaha Avenue, Suite 200, Minneapolis, MN 55406 (for appellant)

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

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

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

KLAPHAKE, Judge

Appellant Felix Wemh challenges the district court's denial of his postconviction petition, in which he sought to withdraw his guilty plea to correct a manifest injustice and alleged that the district court abused its discretion by refusing to downwardly depart in sentencing him. Because appellant has not sustained his burden of showing that his guilty plea was not intelligently made and because the district court did not abuse its discretion by imposing the presumptive sentence, we affirm.

D E C I S I O N

In a request for postconviction relief, the petitioner bears the burden of establishing the facts alleged in the petition by a preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2008). When the district court has denied postconviction relief, we review issues of law de novo and issues of fact to determine if there is sufficient evidentiary support. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Withdrawal of Plea

A defendant may withdraw a guilty plea even after sentencing if the defendant can demonstrate that "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs when a plea is not accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A plea is voluntary if not "entered because of improper pressures or inducements." *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005) (quotation omitted). A plea is accurate if there is an adequate factual basis that supports the elements of the crime. *State v. Ecker*, 542

N.W.2d 712, 716 (Minn. 1994). A plea is intelligently made if the defendant "understands the charges, the rights being waived and the consequences of the guilty plea." *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). The real issue here is whether appellant's guilty plea was intelligently made, because of the substantial limitations in his mental capacity. Appellant has been diagnosed as mildly mentally retarded because of head injuries suffered as a child.

A person is not to be "tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense." Minn. Stat. § 611.026 (2008). Further,

> [a] defendant shall not be permitted to enter a plea or be tried or sentenced for any offense if the defendant (1) lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel; or (2) is mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in the defense.

Minn. R. Crim. P. 20.01, subd. 1.

A defendant may be mentally ill or mentally deficient but may still be competent to understand the proceedings, participate in the defense, and consult with defense counsel. *See State v. Ganpat*, 732 N.W.2d 232, 238 (Minn. 2007) (affirming district court's conclusion that defendant was able to consult meaningfully with defense counsel, despite mental retardation); *Bruestle v. State*, 719 N.W.2d 698, 703, 706 (Minn. 2006) (affirming postconviction court's denial of relief, when petitioner refused to disclose relevant medical records, despite subsequent evaluations showing "low intelligence and

mental disturbances"); *Schoen v. State*, 648 N.W.2d 228, 231-32 (Minn. 2002) (affirming postconviction court's competence finding).

The troubling aspect of this matter is that the district court and defense counsel made no inquiry on the record about mental illness or mental deficiency, despite appellant's statement on the plea petition that he had been "treated by a psychiatrist or other person for a nervous or mental condition." A court has some duty to inquire "in the face of uncontradicted testimony suggesting incompetence." *State v. Bauer*, 310 Minn. 103, 117, 245 N.W.2d 848, 856 (1976) (quotation omitted); *see also Burt v. State*, 256 N.W.2d 633, 635-36 (Minn. 1977) (concluding that district court must make detailed inquiry into defendant's competence before permitting waiver of right to counsel). But in both *Bauer* and *Burt*, the defendants were not represented by counsel, making the question of competence more critical; here, appellant was represented by experienced counsel.

A review of the transcript does not indicate that appellant had difficulty comprehending the proceedings. The district court explained in some detail the plea negotiation and sentence; appellant consulted with his attorney; and the attorney went over the plea petition with appellant. Appellant responded appropriately to the questions. Further, during the presentence investigation, appellant showed a remarkable understanding of his situation: he denied guilt, thought the sentence was too long, talked about expungement, and denied having any mental health issues. While not dispositive, a defendant's behavior during a court hearing can be considered when determining

competence, although, as noted earlier, the court must inquire into "uncontradicted testimony suggesting incompetence." *Bauer*, 310 Minn. at 117, 245 N.W.2d at 856.

The postconviction court concluded that appellant had not sustained his burden of showing that his plea was not intelligently made.[1] There is sufficient evidence in the record to sustain the district court's decision, which thus was not an abuse of discretion.

Sentencing Departure

Appellant argues that the district court abused its discretion when it failed to downwardly depart from the presumptive sentence because of his mental deficiency. We review the district court's decision to depart from the sentencing guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). "The sentence ranges provided in the Sentencing Guidelines Grids are presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines II.D. The district court may depart from the guidelines if "substantial and compelling circumstances are present." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court will reverse the district court's decision only in a "rare case." *Id.*

Here, appellant argues that his mental deficiency should be a basis for a downward departure. Mental impairment can be used as a mitigating factor if the offender "lacked substantial capacity for judgment when the offense was committed." Minn. Sent.

[1] Appellant has not directly argued that his plea was not intelligently made because he was unaware of the possibility of being deported after his conviction. In any event, deportation is a collateral consequence of the plea, and ignorance of a collateral consequence "does not entitle a criminal defendant to withdraw a guilty plea." *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998).

Guidelines II.D.2(a)(3). There is no evidence in this record that the charged assault offense occurred because appellant lacked judgment due to his mental deficiency.

In *Kindem*, the supreme court acknowledged that there were reasons to downwardly depart from the presumptive sentence, noting that the defendant played a passive role in the crime. 313 N.W.2d at 7. But the court noted that there were also valid reasons to adhere to the presumptive sentence. *Id.* While appellant's mental deficiency provides a mitigating factor of sorts, it must be weighed against the relatively brutal nature of the assault and the severity of the victim's injuries. This is not the rare case that demands reversal of the district court's denial of a downward departure.

Affirmed.