**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0924**
**A09-0759**

State of Minnesota,
Respondent,

vs.

Donnell Ellis,
Appellant.

**Filed January 19, 2010**
**Affirmed**
**Connolly, Judge**

Freeborn County District Court
File No. 24-CR-07-2801

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Craig S. Nelson, Freeborn County Attorney, David J. Walker, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Shumaker, Judge; and Connolly, Judge.

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

**CONNOLLY**, Judge

Appellant challenges the district court's denial of his petition for postconviction relief seeking withdrawal of his plea, and claims that his plea was (1) not voluntary, because his public defender allegedly pressured him into entering a guilty plea and the district court refused to assign appellant substitute counsel, and (2) not intelligent, because appellant was misinformed about his criminal history score, his mandatory-minimum sentence, and his eligibility for a downward dispositional departure. We affirm.

## FACTS

In October 2007, police officers executed a search warrant on a residence in Freeborn County, where they found appellant Donnell Ellis and two other individuals. The officers instructed all three individuals to get onto the floor, searched the residence, and found drug paraphernalia containing drug residue. The officers also searched appellant's person and found 10 grams of crack cocaine and 49 pills that contained methamphetamine. Appellant was charged with one count of second-degree methamphetamine possession and one count of second-degree conspiracy to possess cocaine.

Appellant was represented by a public defender in the proceedings leading up to his conviction. At appellant's omnibus hearing his attorney stated that appellant was prepared to plead not guilty to the charges and request a speedy jury trial; appellant did not object to those statements. But appellant subsequently sent a letter to the district

court stating that he could not get in touch with his attorney until he went to court, that he therefore did not know much about his case, and that while his attorney wanted to take his case to trial, appellant preferred to plead guilty to one of the charges in return for having the other charge dropped.

At appellant's pretrial hearing, his public defender again stated that he and appellant were still anticipating a trial. Appellant then requested that replacement counsel be appointed, but the district court refused. Appellant added that although three months had passed, he had not received any statements from the other two people who were in the residence when he was searched. His attorney stated that he had submitted a discovery request to the prosecution. The district court told the county attorney, who was present in the courtroom, to ensure that appellant's attorney obtained copies of those statements if they existed and if they were in the prosecution's possession.

Four days later, appellant and his attorney again appeared before the district court, this time stating that appellant would plead guilty to the second-degree methamphetamine-possession charge. In return, the prosecution agreed to dismiss the second-degree conspiracy-to-possess-cocaine charge. A presentence investigation had not yet been conducted, but the prosecutor stated that "if we are correct about [appellant's] criminal history score being three," appellant's presumptive sentence would be 78 months. The prosecutor also stated that appellant would be subject to a three-year mandatory-minimum sentence. The district court added that the question of whether appellant would be eligible for a treatment program was a decision for the department of corrections. Prior to this hearing, appellant signed a plea petition in which he indicated

that he was satisfied that his counsel had represented his interests and had fully advised him. The plea petition also indicated that the second-degree conspiracy-to-possess-cocaine charge would be dropped, but did not include any agreement as to appellant's sentence.

The next day, the district court received another letter from appellant complaining about his public defender's representation. In this letter, appellant stated that he did not want the case to go to trial and that he wished to fire his attorney for taking it to trial.

At appellant's sentencing hearing, it was revealed that appellant's criminal history score was two rather than three, and the prosecutor asked the district court to impose the presumptive sentence of 68 months. His public defender argued that appellant should be sentenced to a bottom-of-the-box sentence of 58 months. The court asked appellant if there was anything he would like to say; appellant answered that there was not. The district court sentenced appellant to 68 months.

Appellant filed an appeal from his conviction, which this court stayed pending postconviction proceedings. Appellant then submitted a petition for postconviction relief in which he alleged that his public defender told him that he "was not going to win at trial and that [he] should just plead guilty." Appellant alleged that he could not afford a private attorney and believed he was "in danger of receiving a sentence of 78 months," which induced him to enter his plea. Appellant claimed that he was entitled to withdraw his plea because (1) he should have been appointed a new public defender due to "a complete breakdown in the attorney/client relationship," and (2) his plea was not

intelligently made because he was wrongly told that his criminal history score was three and that he was therefore subject to a presumptive 78-month sentence.

The district court held a hearing on appellant's petition. His public defender was called as a witness, and testified that he did not pressure appellant to enter a plea and that there was no disagreement about wanting to try the case. The district court found that testimony to be credible. The district court subsequently issued detailed findings of fact, conclusions of law, and an order denying appellant's postconviction petition. This appeal, which has been consolidated with appellant's prior appeal, follows.

## D E C I S I O N

"The petitioner seeking postconviction relief has the burden of establishing the facts alleged in the petition by a fair preponderance of the evidence." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). Appellate courts review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record, but afford "great deference" to these findings and will not reverse them absent a showing of clear error. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001) (citation omitted). Appellate courts review a postconviction court's decisions for abuse of discretion except for legal determinations, which are reviewed de novo. *Schleicher v. State*, 718 N.W.2d 440, 444-45 (Minn. 2006).

### I. Appellant is not entitled to withdraw his plea on the ground that the district court refused to appoint substitute counsel.

A defendant does not have an absolute right to withdraw a guilty plea, *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997), but a district court shall allow withdrawal of a

plea if it is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a defendant can show that a plea was not "accurate, voluntary, and intelligent (i.e., knowingly and understandingly made)." *Perkins*, 559 N.W.2d at 688. A plea is voluntary if it is not made "in response to improper pressures or inducements." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). When, as here, a defendant is represented by counsel, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Ecker*, 524 N.W.2d at 718 (quotation omitted).

Appellant argues that his plea was not voluntary because the district court refused his request for a new public defender. An indigent defendant's right to counsel is not an "unbridled right to be represented by counsel of his own choosing." *State v. Fagerstrom*, 286 Minn. 295, 299, 176 N.W.2d 261, 264 (1970). Rather, an indigent defendant must accept the defender that the court appoints and, while the defendant may ask for substitute counsel, his request will be granted only if exceptional circumstances exist and the demand is timely and reasonably made. *Id.*; *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). "[E]xceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). General dissatisfaction with court-appointed counsel's representation or differences of opinion as to strategy does not constitute "exceptional circumstances." *Id.* at 449-50. In addition, "personal tension" does not entitle a defendant to new counsel. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). The

decision to grant or deny a request for substitute counsel lies within the district court's discretion. *State v. Worthy*, 583 N.W.2d 270, 278-79 (Minn. 1998).

Appellant first argues that the district court abused its discretion by failing to make a more thorough inquiry after receiving appellant's complaints about his counsel's representation. When a defendant voices serious allegations of inadequate representation before his trial has commenced, the district court should conduct a "searching inquiry" before ruling on the request. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). Here, appellant's communications to the district court pertaining to the adequacy of his attorney's representation consist of the two letters that appellant sent to the district court and appellant's verbal request at his pretrial hearing to receive substitute counsel.

In his first letter appellant alleged that (1) he had not been able to get in touch with his public defender about his case, and (2) he disagreed with his attorney's strategy of taking his case to trial. But appellant did not state in this letter that he was dissatisfied with that representation or that he wanted substitute counsel, and we discern no serious allegations of inadequate representation in this letter. Moreover, the attorney's testimony, which the district court found credible, established that he communicated directly with appellant several times during the proceedings and had communications with other parties on appellant's behalf during this time. In addition, appellant's allegation in this letter that he wanted to plead guilty is inconsistent with the allegation appellant sets forth in his postconviction petition and his brief, that his attorney pressured him into entering a guilty plea, and appears to reflect a mere disagreement between appellant and his lawyer rather than any ineffective representation. And we observe that

appellant ultimately did enter a guilty plea in exchange for getting one of the charges dropped, just as appellant stated in his letter that he desired to do.

Appellant's verbal request to the district court for substitute counsel came just four days before his trial was scheduled. At that time, appellant merely asked whether he could have someone else represent him; appellant made no allegations of inadequate representation. Appellant did inquire about potential statements from the other people who were present during his arrest, but the record does not indicate, nor does appellant allege on appeal, that these statements existed or that his public defender did not act diligently in trying to obtain them.

In appellant's second letter to the district court, appellant stated his desire to fire his attorney on the ground that he was uncommunicative and did not tell appellant that he was taking appellant's case to trial. But by the time the district court received this letter, appellant had already pleaded guilty. And the allegation that his public defender was uncommunicative and handled appellant's case against his wishes is contradicted by that attorney's testimony, which the district court found credible. The allegation that his attorney handled appellant's case against his wishes is also inconsistent with the claim appellant set forth in his postconviction petition that he was pressured into entering a plea. We conclude that none of appellant's communications to the district court contained "serious allegations of inadequate representation," and that the district court did not err in refusing appellant's request for substitute counsel without making a "searching inquiry" as recommended by *Clark*.

Next, appellant argues that the district court misrepresented the law when it told appellant that it did not have the authority to remove a public defender. At appellant's omnibus hearing, the district court told appellant that it could not substitute appellant's counsel at appellant's request, and that only the chief public defender's office could do so. Appellant argues that, because he believed the district court when it told him that it could not appoint substitute counsel for appellant, he chose to keep his public defender as his counsel. As appellant correctly notes, the decision to appoint a substitute attorney is within the discretion of the district court. *Fagerstrom*, 286 Minn. at 299, 176 N.W.2d at 264. But an indigent defendant is entitled to substitute counsel only if exceptional circumstances exist and his demand was reasonable and timely. *Vance*, 254 N.W.2d at 358. A district court's failure to appoint substitute counsel is subject to harmless-error analysis. *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991).

Appellant does not identify, either in his brief or his postconviction petition, how his public defender was unable or incompetent to represent him. His attorney's credible testimony establishes that, although his relationship with appellant was strained, it had not "broken down." Moreover, appellant's request for substitute counsel came only days before appellant's trial was scheduled. Therefore, appellant's request was properly denied as both inadequate and untimely. *See Fagerstrom*, 286 Minn. at 299-300, 176 N.W.2d at 264-65 (requiring an indigent defendant to show exceptional circumstances before receiving substitute counsel, and affirming the denial of a request for substitute counsel on the ground that the defendant fired his counsel on the day of trial). To the

extent that the district court erred when it told appellant that it could not appoint substitute counsel, we conclude that such error was harmless because appellant has not shown that he was entitled to substitute counsel.

Finally, the record does not support the claim at the root of appellant's argument – that he was pressured into entering a plea. The plea petition, which appellant signed, stated that appellant was satisfied with his attorney's representation. Furthermore, the plea-hearing transcript indicates that appellant was thoroughly questioned by his attorney, the prosecutor, and the district court about his plea. Appellant answered that he was satisfied that his lawyer had represented him fully and that he was not threatened or influenced by "any other kind of a deal" in entering his plea. Appellant was also asked if he wanted more time with his lawyer to discuss his plea, and appellant explicitly refused. We therefore reject appellant's claim that his plea was not voluntary.

## II. Appellant is not entitled to withdraw his plea on the ground that he was misinformed about his criminal history score and his mandatory-minimum sentence.

A plea is intelligent when the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). Appellant argues that he was not properly apprised of the consequences of his plea because when he entered his plea, he understood that his criminal history score was three and that his presumptive sentence was 78 months. In reality, his criminal history score was only two and his presumptive sentence was only 68 months. "[W]hen a defendant is not fairly apprised of the consequences of his plea, his due process rights are violated." *State v. Wukawitz*, 662 N.W.2d 517, 521 (Minn. 2003).

But appellant was not unequivocally told at his plea hearing that his criminal history score was three; the prosecutor merely stated that appellant would have a 78-month presumptive sentence "if we are correct about the criminal history score being three." At the time appellant entered his plea, the presentence investigation had not yet been conducted. *See State v. Trott*, 338 N.W.2d 248, 252-53 (Minn. 1983) ("In a substantial number of cases, the prosecution, the defense counsel and the court must wait until after a pre-sentence investigation report has been prepared before they can accurately determine the presumptive sentence."). Moreover, *Wukawitz* recognized that a defendant has a right to withdraw a plea if the sentence he receives exceeds the agreed-upon maximum sentence. 662 N.W.2d at 526. Appellant has not shown that a defendant has a right to withdraw a plea if the sentence he receives is less than the agreed-upon presumptive sentence. Appellant's plea petition, in any event, did not contain any agreement for a sentence. Here, even with a criminal history score of two, appellant could still have received a 78-month sentence, as the presumptive sentence range for his score was 58-81 months. *See* Minn. Sent. Guidelines IV (Supp. 2007). We conclude that appellant has failed to show that he was prejudiced by the prosecution's mistaken belief about his criminal history score, and therefore no manifest injustice arose from it. *See State v. Thomas*, 467 N.W.2d 324, 326-27 (Minn. App. 1991) (refusing to reverse conviction because of "technical" violation of rules of criminal procedure, when defendant failed to show that he was prejudiced by violation).

Appellant further argues that he was misadvised about his eligibility for a downward dispositional departure, and asserts that numerous references were made at his

plea hearing to the possibility of probation and treatment, which appellant argues were contradictory to the law that subjects appellant to a 36-month mandatory-minimum sentence. When a defendant's conviction of a second-degree controlled-substance crime is subsequent to another controlled-substance conviction, the conviction carries a mandatory-minimum sentence of three years. Minn. Stat. § 152.022, subd. 3(b) (2006). A defendant who receives a mandatory sentence under this section "is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law." Minn. Stat. § 152.026 (2006). A district court has no discretion to impose a sentence upon a defendant that is less than the mandatory-minimum sentence established by the legislature. *State v. Bluhm*, 676 N.W.2d 649, 653-54 (Minn. 2004).

But the plea-hearing transcript shows that appellant was specifically informed that he would be subject to a 36-month mandatory-minimum sentence, and does not indicate that anyone told appellant that he could serve less than his 36-month mandatory-minimum sentence. While the prosecutor did tell appellant that he might be able to get out of prison early if he participated in one of these programs, the prosecutor was presumably referring to appellant's 68-month sentence, two-thirds of which was to be served in prison. *See* Minn. Stat. § 244.01, subd. 8 (2006) (defining "term of imprisonment" as "the period of time equal to two-thirds of the inmate's executed sentence"). Appellant's participation in treatment programs could allow him to leave prison before serving 45 months, but only after his 36-month mandatory-minimum sentence was served. In addition, the prosecutor specifically informed appellant that

there was no agreement as to appellant's sentence and that it was merely his attorney's hope that the department of corrections would find appellant suitable for treatment programs. The prosecutor reiterated that appellant was subject to a three-year mandatory-minimum sentence. There is no contradiction between what appellant was informed of at his sentencing hearing and the fact that appellant was required under Minnesota law to serve a 36-month mandatory-minimum sentence.

Appellant has failed to show that his plea was not intelligently or voluntarily entered, and therefore has failed to show that withdrawal of his plea is necessary to correct a manifest injustice.

**Affirmed.**