STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1023

State of Minnesota,
Respondent,

vs.

Alberto Rivera,
Appellant.

Filed April 27, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-08-38132

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by denying his motion to withdraw his guilty plea under Minn. R. Crim. P. 15.05. We affirm.

FACTS

On July 31, 2008, respondent State of Minnesota charged appellant Alberto Rivera with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2006), alleging that appellant sexually abused his girlfriend's minor children. Appellant had two prior criminal-sexual-conduct convictions in 1994 and 1996. At a hearing on January 8, 2009, appellant pleaded guilty to one count of first-degree criminal sexual conduct pursuant to a plea agreement. Under the plea agreement, the other count of first-degree criminal sexual conduct was dismissed and appellant was sentenced to 270 months' imprisonment, a downward durational departure from the presumptive sentence of 360 months.

Prior to sentencing, appellant moved the court to allow him to withdraw his guilty plea. The district court denied the motion and sentenced appellant pursuant to the plea agreement. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying his motion to withdraw his guilty plea prior to sentencing. A defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). The

Minnesota Rules of Criminal Procedure provide that a guilty plea may be withdrawn in two situations. First, a district court must permit a defendant to withdraw a guilty plea upon a showing that withdrawal is necessary to correct "manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Second, a district court may, in its discretion, permit a defendant to withdraw a guilty plea before sentence is imposed "if it is fair and just to do so." *Id.*, subd. 2. This court reviews a district court's decision whether to allow a defendant to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Manifest Injustice

Appellant argues in his pro se supplemental brief that the district court abused its discretion by denying his motion because withdrawal was necessary to correct a manifest injustice. Under rule 15.05, subdivision 1, "[t]he court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." The defendant has the burden of proving manifest injustice. *State v. Christopherson*, 644 N.W.2d 507, 510 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). Manifest injustice exists when a guilty plea was not accurate, voluntary, and intelligent. *Alanis*, 583 N.W.2d at 577. "A reviewing court may weigh a defendant's experience with the criminal justice system when evaluating whether his plea was knowing and intelligent." *State v. Doughman*, 340 N.W.2d 348, 353 (Minn. App. 1983), *review denied* (Minn. Mar. 15, 1984).

Accuracy

"An accurate plea protects the defendant from pleading guilty to a charge more serious than he or she could be convicted of were the defendant to go to trial." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "A proper factual basis must be established for a guilty plea to be accurate." *Id.* "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." *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted). "In a typical plea, where the defendant admits his or her guilt, an adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *Ecker*, 524 N.W.2d at 716.

In this case, appellant pleaded guilty to first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a). This offense can be proved by showing that (1) the defendant engaged in sexual penetration or contact with a complainant under 13 years of age, and (2) the defendant was more than 36 months older than the complainant. *Id.* Sexual penetration includes fellatio. Minn. Stat. § 609.341, subd. 12(1) (2006).

At the plea hearing, appellant testified under questioning from his lawyer about each element of first-degree criminal sexual conduct. He testified that between September 2006 and September 2007, he put his penis in the complainant's[1] mouth, that

[1] Pursuant to the plea agreement, the prosecution dismissed one count which left only one complainant.

the complainant was born in September 1997, and that he is more than 36 months older than the complainant. These facts are sufficient to establish that appellant is guilty of first-degree criminal sexual conduct. Appellant did not plead guilty to a charge more serious than he could have been convicted of had he gone to trial. The accuracy requirement is therefore satisfied.

Voluntariness

Appellant argues that his plea was not voluntary because he told his lawyer a number of times that he was innocent and would like to go to trial and his lawyer acted on his own, and not in good faith. Appellant also claims that when he asked his lawyer after the plea hearing what the lawyer had done, his lawyer responded, "I took a deal for you so you do not get life in prison." Appellant says that he told the lawyer that he was not acting on his behalf and that the lawyer should not have done that because appellant did not agree to it.

"The voluntariness requirement insures that the guilty plea is not in response to improper pressures or inducements." *Alanis*, 583 N.W.2d at 577. Whether a plea was voluntary is a question of fact for the district court, and the district court's factual findings will not be disturbed unless they are clearly erroneous. *State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994). Findings of fact are not clearly erroneous if they are reasonably supported by the evidence. *Id.*

Here, the district court found that appellant's plea was voluntary. This finding is reasonably supported by the record. Appellant signed a written plea petition in which he indicated his agreement that "[n]o one, including my attorney, any peace officer,

prosecutor, judge or any other person, has made any promises to me, to any member of my family, to any friend or any other persons, in order to obtain a plea of guilty from me," and that "[n]o one, including my attorney, any peace officer, prosecutor, judge or any other person, has threatened me, any member of my family, and friend [sic] or any other person, in order to obtain a plea of guilty from me." The last line of the petition states, "That in view of all the above facts and conditions, I wish to enter a plea of guilty." At the plea hearing, appellant answered in the affirmative when asked if he recognized the petition and if it was his signature at the bottom of each page. He also answered in the affirmative when asked if he understood that by signing the petition, he was telling the court that he understood its contents. Appellant argues on appeal that his lawyer did not let him read the "waiver list" (presumably the plea petition) because he did not have his glasses. Even if true, at the plea hearing, appellant's lawyer asked, "And specifically, did I not read, word for word, this document to you?" Appellant responded, "Yeah." The contents of the plea petition and the questions at the hearing are sufficient to support the district court's finding that the plea was voluntary.

Intelligence

A plea is intelligent if "the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty" to the charged offense. *Alanis*, 583 N.W.2d at 577. Appellant argues that he did not understand the charge to which he was pleading because he was in a "small room" and could not hear what was being said in the courtroom. Appellant claims that when he told his lawyer he could not hear, his lawyer told him everything was okay. As found by the district court, when it denied

appellant's motion to withdraw his plea, the transcript of appellant's plea hearing does not support his argument that his plea was not intelligent:

> [Appellant] entered a knowing and voluntary plea of guilty. The facts were set out in detail. He understood the negotiation and it was set out by his attorney. The Court had discussions with him after his plea. He stated he understood what was happening, he understood the contents of the plea negotiation and that he would accept the consequences. He was asked if he had any questions regarding any of his rights. He did not. It was explained to him that by pleading guilty that he would stop the proceedings and any pretrial practices and motions that he had previously filed, that he was giving up his right to a jury trial.
>
> A specific question was asked, "Have you had enough time to talk to me about your case?" The answer was, "Yes." "Are you satisfied that your attorney had been acting in your best interests?" Again the answer was, "Yes."

The district court's summary accurately reflects what transpired at the plea hearing with the exception that the statement, "*the Court* had discussions with [appellant] after his plea," is not reflected in the hearing transcript. (emphasis added). Instead, appellant's counsel elicited testimony from appellant about his understanding of the proceeding. The record supports a finding that appellant understood the charges—two counts of first-degree criminal sexual conduct—understood his rights, and understood the consequences of pleading guilty to one of the charges. We note that, prior to pleading guilty, appellant made at least five court appearances[2] at which he had the opportunity to ask his lawyer or the district court questions about the charges he faced. Based on the record and

[2] Court records reflect that both appellant and his attorney were present for appearances on August 27, 2008, September 9, 2008, September 23, 2008, December 15, 2008, and January 6, 2009.

appellant's prior experience in the criminal justice system stemming from his two criminal-sexual-conduct convictions that preceded his guilty plea in this case, appellant's argument that he did not understand the charge to which he pleaded guilty lacks merit. We conclude that appellant's plea was intelligently made.

Because appellant's plea was accurate, voluntary, and intelligent, plea withdrawal is not required to correct a manifest injustice.

Fair and Just

Appellant's principal brief focuses on Minn. R. Crim. P. 15.05, subd. 2, which provides that the district court, in its discretion, "may . . . allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so." Although the fair-and-just standard "is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea for simply any reason." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quotation omitted). In applying the fair-and-just standard, the district court must give "due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea." Minn. R. Crim. P. 15.05, subd. 2. The defendant has the burden of proving that there is a "fair and just" reason for allowing the withdrawal of a plea. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). "[T]he ultimate decision of whether to allow withdrawal under the 'fair and just' standard is left to the sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the

trial court abused its discretion." *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (quotations omitted).

Citing *State v. Williams*, 373 N.W.2d 851, 853 (Minn. App. 1985), appellant argues that "trial courts should generally be lenient in allowing defendants to withdraw their pleas" before sentencing. But the supreme court discredited this notion in *Kim* when it said that

> giving a defendant an absolute right to withdraw a plea before sentence would undermine the integrity of the plea-taking process. If a guilty plea can be withdrawn for any reason or without good reason at any time before sentence is imposed, then the process of accepting guilty pleas would simply be a means of continuing the trial to some indefinite date in the future when the defendant might see fit to come in and make a motion to withdraw his plea.

434 N.W.2d at 266 (citations and quotations omitted). "*Kim* rejected the approach of the pre-*Kim* decisions of the court of appeals, which had been saying that the trial courts ought to be liberal and lenient in allowing defendants to withdraw guilty pleas before sentencing." *Kaiser*, 469 N.W.2d at 319–20. Appellant's assertion that the district court should have been lenient in allowing him to withdraw his plea is unsupported by current law.

Appellant next argues that the district court should have allowed him to withdraw his plea because he "took swift and prompt corrective action to inform the court that his guilty plea was not voluntary and that the pressures of his attorney acted as an inducement for the entry of the plea." Rule 15.05, subdivision 2, requires only that the district court give "due consideration" to a defendant's reasons for wanting to withdraw a

plea; it leaves the ultimate decision of whether to grant the defendant's request to the district court's discretion. Here, the record reflects that the district court considered defendant's claim but found that the plea was voluntary, and as discussed above, this finding is supported by the record. Because the district court's finding is supported by the record, there is no abuse of discretion.

Appellant also argues that the district court should have allowed him to withdraw his plea because he is actually innocent and pleaded guilty only because he was afraid of receiving a longer sentence. At the hearing on appellant's motion, the following colloquy ensued between appellant and the court:

> APPELLANT: So you just have me go to prison for something I didn't do?
> THE COURT: I have a factual basis on the record that you did do something, sir.
> APPELLANT: I didn't do nothing.
> THE COURT: Sir, I have a plea, I have a factual basis.

Contrary to appellant's argument, the record reflects that, as required by rule 15.05, subdivision 2, the district court considered both appellant's claim of innocence and the factual basis he previously gave the court to support his guilty plea. Moreover, a defendant's assertion of innocence after entering a guilty plea is not necessarily a reason to reverse the district court's decision under the fair-and-just standard. *Williams*, 373 N.W.2d at 853; *see also State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (holding that guilty plea may be accepted although defendant maintains innocence as long as factual basis would support guilty verdict). We conclude that the district court did not

abuse its discretion by denying appellant's motion to withdraw his plea because his claims of innocence lack merit.

In deciding whether a defendant has presented a fair-and-just reason for allowing his or her plea withdrawal, a district court must consider any prejudice to the prosecution due to actions taken in reliance upon the defendant's plea. Minn. R. Crim. P. 15.05, subd. 2. In this case, the state told the district court that following appellant's plea of guilty, the prosecutor's office informed the two minor complainants that they would not have to testify. The state argued that telling the children that they would have to testify would cause "significant emotional harm" to them. The district court agreed with the state, stating, "I believe at this point in time after being told they would not have to testify, I believe it would be emotionally harmful for the children to be brought into court to do so."

Appellant argues that "[w]hile the children may not want to testify and may be upset about having to do so, the fact remains that they are available to do so. Thus, there is no prejudice to the state's case." But appellant cites no authority for the proposition that the state is prejudiced only if the witnesses have become unavailable. On the contrary, in *Kim*, in concluding that the district court did not abuse its discretion by denying the defendant's motion to withdraw his plea under the fair-and-just standard, the supreme court noted that the state had released the witnesses that it had summoned by subpoena. 434 N.W.2d at 267. The court also stated that the district court "was not unjustified in considering the interests of the victim." *Id.* Similarly, here, the district court did not abuse its discretion by determining that to require two young complainants

to testify, after they had been told they would not have to testify because appellant had pleaded guilty, constituted prejudice to the state.

Affirmed.