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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1859**

State of Minnesota,
Respondent,

vs.

Reginald Dwayne Clark,
Appellant.

**Filed August 24, 2010
Affirmed
Wright, Judge**

Olmsted County District Court
File No. 55-CR-09-239

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

Mark A. Ostrem, Olmsted County Attorney, Julie L. Germann, Assistant Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chief Judge Toussaint, Presiding; Wright, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WRIGHT, Judge

In this appeal from his conviction of felony domestic assault by strangulation, appellant argues that the district court abused its discretion by (1) denying his presentence request to withdraw his guilty plea and (2) miscalculating his criminal-history score. We affirm.

FACTS

Appellant Reginald Dwayne Clark was charged with felony domestic assault by strangulation, Minn. Stat. § 609.2247, subd. 2 (2008), and two counts of gross-misdemeanor domestic assault, Minn. Stat. § 609.2242, subd. 2 (2008). In anticipation of a possible guilty plea, the district court and the parties received a preplea sentencing worksheet, which indicated that Clark had a criminal-history score of zero. Clark subsequently pleaded guilty to felony domestic assault by strangulation pursuant to an agreement with the state that the other charges would be dropped and that the state would “seek a guideline sentence.” The agreement, as memorialized in Clark’s guilty-plea petition, further provides: “If presumptive local sentence, state not to request any additional jail time. [sic] State agrees defendant can be released from jail upon plea. Defendant must cooperate with [presentence investigation] and abide by conditions of release.” The district court accepted Clark’s guilty plea but delayed sentencing pending the completion of a thorough presentence investigation.

The presentence investigation report (PSI) indicated that Clark has multiple Illinois convictions and that he has a criminal-history score of four. But the probation

officer who prepared the PSI explained that the information regarding the Illinois convictions was limited and, therefore, Clark was given “the minimum weight allowed for those convictions” until the specific nature of the convictions could be determined. After receiving additional information about the Illinois convictions, the probation officer amended the PSI to indicate that Clark has a criminal-history score of eight.

Clark moved to withdraw his guilty plea based on the significant change in his criminal-history score from the preplea sentencing worksheet to the final PSI, arguing that, had he known that his criminal-history score is eight, he would not have entered into the plea agreement. The district court denied Clark’s motion, found that Clark’s criminal-history score is eight, and sentenced Clark to 26 months’ imprisonment, the lowest sentence in the presumptive sentencing range for that criminal-history score. This appeal followed.

D E C I S I O N

I.

Clark first argues that the district court abused its discretion by denying his request to withdraw his guilty plea. We review the district court’s decision to deny a defendant’s request to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

A defendant does not have an absolute right to withdraw a guilty plea after it has been entered, but the district court may permit withdrawal of a guilty plea under certain circumstances. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). The standard employed to determine whether to permit the withdrawal of a guilty plea depends on the

stage in the proceedings at which the motion is made. *See* Minn. R. Crim. P. 15.05. If the motion seeks withdrawal of a guilty plea before sentencing, the defendant has the burden of establishing that fair and just reasons exist for the withdrawal, with consideration given to the potential prejudice to the state. Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). If the defendant seeks withdrawal of a guilty plea after sentencing, the defendant has the burden of establishing that it is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists if the guilty plea is not accurate, voluntary, and intelligently made. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). The fair-and-just standard for withdrawing a guilty plea before sentencing requires a lesser showing than is necessary to meet the manifest-injustice standard. *State v. Williams*, 373 N.W.2d 851, 853 (Minn. App. 1985).

Clark contends that his guilty plea was the product of a mutual mistake as to his criminal-history score. Mutual mistake as to a defendant's criminal-history score may justify permitting withdrawal of a guilty plea. *State v. DeZeler*, 427 N.W.2d 231, 234 (Minn. 1988). But the mistake must be genuinely mutual and must be the basis of the guilty plea. *See id.* at 234-35. "[W]hat the parties agreed to at the time of the plea agreement is an issue of fact to be resolved by the district court." *Oldenburg v. State*, 763 N.W.2d 655, 658 (Minn. App. 2009).

The district court determined that Clark's guilty plea was not the product of a mutual mistake because the criminal-history score included in the preplea sentencing worksheet was not part of the plea agreement. The plea agreement, as set forth in Clark's

guilty-plea petition, does not reference Clark's criminal-history score. Nor is there any other evidence in the record that the parties entered into the plea agreement in reliance on the preplea sentencing worksheet's indication of Clark's criminal-history score. The parties agreed only that (1) Clark would plead guilty to felony domestic assault by strangulation and (2) the state would dismiss the other charges and "seek a guideline sentence." Moreover, the parties acknowledged the possibility that the preplea sentencing worksheet did not indicate an accurate criminal-history score by providing that there would be a PSI prepared before sentencing and that the state would not request any additional jail time if the sentencing guidelines called for a "presumptive local sentence." By agreeing to plead guilty on these terms, Clark assumed the risk that his PSI would disclose a higher criminal-history score and, therefore, a greater presumptive sentence. *See State v. Hamacher*, 511 N.W.2d 458, 460 (Minn. App. 1994) (holding that denial of plea-withdrawal request was proper because defendant was aware "that he was taking a chance on going to prison"). The record supports the district court's determination that Clark's guilty plea was not the product of a mutual mistake as to his criminal-history score. The district court, therefore, did not abuse its discretion by rejecting Clark's request to withdraw his guilty plea.¹

Finally, Clark asserts that the state would not be prejudiced by withdrawal of his guilty plea. Although prejudice to the state is a proper consideration for the district court

¹ Clark also asserts that his guilty plea was not knowingly and intelligently made because he was under the false understanding that he would be receiving a presumptive sentence based on a criminal-history score of zero. But this argument essentially restates his mutual-mistake argument, which the district court rejected.

when faced with a request to withdraw a guilty plea, the district court need not find prejudice to the state to deny such a request. *See Butala v. State*, 664 N.W.2d 333, 340-41 (Minn. 2003) (concluding that district court’s refusal to allow guilty-plea withdrawal was valid without discussing prejudice to the state). Because the district court did not abuse its discretion when it determined that Clark failed to establish a basis for withdrawing his guilty plea, the absence of prejudice to the state does not undermine the district court’s decision to deny Clark’s request to withdraw his guilty plea.

II.

Clark next challenges the district court’s calculation of his criminal-history score based on the Illinois convictions. A district court’s determination of a defendant’s criminal-history score, including the equivalent Minnesota felony for an out-of-state felony offense, is an exercise of the district court’s discretion, which we will not disturb absent an abuse of that discretion. Minn. Sent. Guidelines II.B.5 (2008); *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). “The weighting of prior out-of-state felonies is governed by [Minn. Sent. Guidelines] II.B.1 . . . and shall be based on the severity level of the equivalent Minnesota felony offense[.]” Minn. Sent. Guidelines II.B.5; *see* Minn. Sent. Guidelines II.B.1 (2008) (allocating criminal-history points based on offense severity). The nature and definition of the offense, and the sentence received, are primary considerations in determining the weight to be assigned to an out-of-state offense. Minn. Sent. Guidelines II.B.5; *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001).

Clark was convicted of multiple controlled-substance offenses in Illinois, and the district court accepted the state's assignment of criminal-history points for each of those convictions. Clark does not dispute that he was convicted of these offenses or that they are felonies for which he was sentenced to multi-year prison terms. Rather, he contends that the district court improperly assigned weights of 1.5 criminal-history points to each of three convictions based on its determination that they are equivalent to the sale of a controlled substance, a third-degree controlled-substance crime under Minn. Stat. § 152.023, subd. 1 (2008). In doing so, the district court rejected Clark's argument that these convictions should receive .5 criminal-history points each because they are analogous to possession of a controlled substance, a fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 2 (2008). *See* Minn. Sent. Guidelines II.B.1.a, V (2008).

All three convictions at issue were obtained under an Illinois statute that makes it “unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled or counterfeit substance.” 720 Ill. Comp. Stat. Ann. 570/401 (West 1993). This statutory language is consistent with the record information from Illinois indicating that Clark was charged with manufacture or delivery of a controlled substance and possession of a controlled substance with intent to deliver. Thus, manufacture or delivery, not possession, of a controlled substance is the essence of the offenses at issue. *Cf.* 720 Ill. Comp. Stat. Ann. 570/402 (West 1993) (criminalizing possession of controlled substances). “Manufacture” is defined under Illinois law as “the production, preparation, propagation, compounding, conversion or processing of a

controlled substance”; and “delivery” is defined as “the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration.” 720 Ill. Comp. Stat. Ann. 570/102(h), (z) (West 1993). These concepts are very similar to the definition of “sell” under Minnesota law, which encompasses not only the actual sale of a controlled substance but also the giving away, bartering, delivering, exchanging, distributing, or disposing of a controlled substance to another; manufacturing a controlled substance; or possessing a controlled substance with intent to perform any of these acts. Minn. Stat. § 152.01, subd. 15a (2008); *see also* Minn. Sent. Guidelines cmt. II.B.502 (2008) (stating that out-of-state convictions should be factored into criminal-history scores by comparison to “current Minnesota offense definitions”).

Because the sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1, is assigned 1.5 criminal-history points, Minn. Sent. Guidelines II.B.1.a, V, the district court did not abuse its discretion by assigning 1.5 criminal-history points to Clark for each of the three offenses at issue and determining that Clark’s total criminal-history score is eight.

Affirmed.