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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2135**

State of Minnesota,
Respondent,

vs.

Herman Lavar Wade,
Appellant.

**Filed September 21, 2010
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-01-42162

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, 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; Stoneburner, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion to withdraw his guilty plea following remand. In a pro se supplemental brief, appellant raises additional

arguments related to his guilty plea. Because we conclude that the district court did not abuse its discretion in refusing to allow appellant to withdraw his plea, we affirm.

FACTS

On May 22, 2001, appellant Herman Lavar Wade was indicted on one count of first-degree murder and one count of second-degree murder. On January 28, 2008, appellant signed a petition to plead guilty to the charge of second-degree unintentional murder. As part of the agreement, the parties agreed that “the court may award a prison sentence between 0-15 years. Other outstanding cases to run concurrent. All other issues determined by the court (fines, restitution, etc.).”

At the guilty-plea hearing, appellant acknowledged that he had discussed the plea petition with his attorney for one and one-half hours that day, that they read each line together, that his attorney answered all of his questions, and that appellant would agree to waive his rights and plead guilty. Appellant also agreed that he had had enough time to talk to his attorney about the case and was satisfied with his representation. Appellant’s attorney then went through the factual basis for the plea, and appellant responded to leading questions regarding the essential elements of the crime. Specifically, appellant admitted that he had received counterfeit money from the victim in exchange for crack cocaine. Appellant admitted that he later confronted the victim and brandished a firearm that he fired once. Appellant remarked, “I just believe that it ricocheted off it, off the wall and hit him. I didn’t aim to kill him.” He also agreed that he assaulted the victim with the gun, that he had no legal reason to do so, and that his actions caused the victim’s death. Importantly, the transcript shows that at various times during the factual basis,

appellant made clarifying statements after his counsel's questions and each time those volunteered statements were further examined by his counsel.

At the sentencing hearing in February 2008, after reviewing the state's evidence, appellant moved for a short continuance to determine whether it would be in his interest to move to withdraw his guilty plea. Appellant's counsel remarked that the state had demonstrated that its seven primary witnesses were available, but appellant wanted more time to review the evidence. The state agreed that its witnesses had been served or were available for testimony. The district court denied appellant's motion for a continuance. Appellant then moved to withdraw his plea and proceed to trial on the grounds that "he didn't have enough time . . . to discuss this case with [his attorney] prior to entering the plea." In response, the state argued that two of its witnesses were homeless, one lived out of state, and that it would be prejudiced by trying to locate these witnesses from a 2001 case. The prosecutor also remarked that appellant signed the petition and that his counsel was very thorough. Appellant's counsel responded that he had met with appellant more than a dozen times but characterized appellant as withdrawn, stating that "[i]t's hard to figure out if he is understanding me or where he's at."

The district court denied appellant's motion, stating that it found "no manifest injustice in not allowing [appellant] to withdraw his [plea]." The prosecutor later clarified that the standard for plea withdrawal before sentencing is the fair-and-just standard. The district court responded that "[w]ithdrawal of the plea at this point is inappropriate, irrespective of what the standard is." Appellant was sentenced to 171 months, and he appealed.

On review, we concluded that “the state of this record leaves us uncertain as to what standard the district court actually considered and applied in denying [appellant]’s motion” and “the district court provided no insight into the basis of its denial of the motion.” *State v. Wade*, No. A08-863, 2009 WL 1750949, at *2 (Minn. App. June 23, 2009). This court also held that the district court erred by assigning appellant a custody-status point. *Id.* at *3. Thus, we remanded for full consideration of appellant’s withdrawal motion and for resentencing. *Id.*

On remand, the district court held a resentencing hearing where it again heard arguments regarding appellant’s motion to withdraw his plea. The prosecutor argued that appellant’s claim that he hadn’t had enough time to talk to his counsel was not an adequate reason for plea withdrawal. According to the prosecutor, appellant’s former counsel referred to multiple meetings with appellant, and the proceedings involved a number of appearances and quite a bit of discussion. Furthermore, the prosecutor argued that the state it would be prejudiced if appellant’s motion to withdraw his plea was granted because the state released its witnesses from its subpoenas after the plea. Appellant, with new counsel, argued that “considering the seriousness of the offense and the fact that the state’s case was based almost entirely on witnesses who had criminal backgrounds and various possible motivations to be less than honest with police,” appellant had not had an adequate opportunity to “discuss each of these witnesses, the potential impeachability, . . . [and] the likelihood they would appear for trial.” Appellant also argued that he felt pressured to plead guilty.

The district court denied the motion “based on the extreme prejudice to the state in proceeding with the plea and then the delay during the PSI and the ability of the state thereafter to proceed.” Appellant spoke on the record, stating that he felt he had an inadequate former attorney, and he felt pressured to plead guilty the morning of the plea. The district court resentenced appellant to 156 months. This appeal follows.

DECISION

I.

A defendant does not have an absolute right to withdraw a guilty plea once it has been entered, but a district court may permit withdrawal of a guilty plea under certain circumstances. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). Before sentencing, a district court may allow a defendant to withdraw a guilty plea if it is fair and just to do so. Minn. R. Crim. P. 15.05, subd. 2. The fair-and-just standard requires the district court to give “due consideration” to two factors: (1) the reasons advanced to support withdrawal and (2) the prejudice to the state given reliance on the plea if the motion were granted. *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010) (citing Minn. R. Crim. P. 15.05, subd. 2). “The [s]tate bears the burden of showing prejudice caused by withdrawal.” *Id.* 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). The decision whether to allow a defendant to withdraw his plea under this standard is “left to the sound discretion of the [district] court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the [district] court

abused its discretion.” *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (quotation omitted).

The district court denied appellant’s motion to withdraw his plea on the ground that the state would suffer extreme prejudice by proceeding with trial. Appellant first argues that because the district court did not address his asserted grounds for withdrawing his guilty plea, the district court abused its discretion. Rule 15.05, subdivision 2, requires the district court to give due consideration to the stated grounds for plea withdrawal; but the rule does not require the district court to expressly analyze those grounds or articulate its reasons for concluding that the stated grounds are insufficient. Instead, in order to satisfy the rule, the record must indicate only that the district court gave due consideration to the stated grounds and the asserted prejudice. After reviewing the record, we conclude that the district court satisfied the requirements of the rule.

Second, appellant argues that the state’s assertion of prejudice is insufficient to support the district court’s conclusion. The prosecutor argued that it would be prejudiced by a plea withdrawal because the state released its witnesses after appellant pleaded guilty. According to the prosecutor, it took until one week before trial to locate all of its eyewitnesses, and even one month after appellant pleaded guilty, the state would suffer significant prejudice in having to find those witnesses because it had not kept track of them. The district court found that the prejudice to the state would be severe if appellant were permitted to withdraw his plea. We find nothing in the record to suggest that the district court’s assessment of the state’s prejudice was an abuse of discretion. The record demonstrates that the state had difficulty locating all of its witnesses, as some lived out of

state, some were homeless, and some were incarcerated. It was not until one week before trial that the state was able to subpoena or convince its witnesses to appear for trial. On this record, we conclude that the district court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea on the ground that the state would suffer significant prejudice if it had to locate and re-subpoena witnesses more than seven years after the incident.

II.

Appellant also raises a number of issues in his pro se supplemental brief. In particular, appellant argues that (1) he received ineffective assistance of counsel, (2) his guilty plea was invalid, (3) the district court used an erroneous criminal-history score when sentencing him, and (4) he was denied assistance of counsel at a pretrial hearing. We address each issue below.

A. Ineffective Assistance of Counsel

To prevail on an ineffective-assistance-of-counsel claim, an appellant must demonstrate that his counsel's "representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). An appellant asserting a claim of ineffective assistance of counsel bears the burden of proof on that claim. *Id.*

Appellant contends that his former trial counsel was ineffective based on the following: his counsel failed to investigate a witness who, according to appellant, knew

who committed the crime; his counsel did not move to suppress evidence; his counsel did not investigate the state's witnesses; and his counsel allegedly pressured him to plead guilty. But generally, this court will not review ineffective-assistance-of-counsel claims based on trial strategy, which includes the extent of an attorney's investigation. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Therefore, appellant's claims related to his counsel's trial strategy and investigation are without merit.

Furthermore, appellant does not support his claims with anything other than assertions. And appellant's assertion that he was coerced into pleading guilty is contradicted by the record, which shows that appellant pleaded guilty voluntarily. Overall, we find no merit to appellant's argument that he suffered from ineffective assistance of trial counsel.

B. Invalid Guilty Plea

Appellant raises a number of additional issues related to his guilty plea, contending that he was coerced into pleading guilty, the district court failed to conduct his plea colloquy correctly, there was an inadequate factual basis, and his competency was never determined. We conclude that appellant's argument that he was coerced into pleading guilty is without merit for the same reasons discussed above; specifically, the record reflects that appellant voluntarily pleaded guilty, and appellant cites no evidence to contradict the record. Second, appellant argues that the district court violated Minn. R.

Crim. P. 15.01 when conducting the plea hearing.¹ But the record demonstrates that rule 15 was complied with in this case. Third, appellant argues that the factual basis for the plea was improper because he responded to leading questions as opposed to stating the facts on the record himself. But while the Minnesota Supreme Court has expressed disapproval of this approach, it has never held that a plea is invalid for lack of accuracy when the factual basis is established by leading questions. *See Raleigh*, 778 N.W.2d at 95. Because appellant did not plead guilty to a more serious crime “than that of which he could be convicted if he elected to go to trial,” we find no reversible error with respect to the factual basis of his plea. *Id.*

Finally, appellant argues that his plea should be withdrawn because the district court did not inquire as to his competency or level of understanding at the time of the plea. We see no basis for this argument. The record reflects that appellant expressed his understanding of the proceedings and had a clear mind at the time of the plea.

C. Criminal-History Score/Assistance of Counsel

Appellant argues that the district court erred by using an incorrect criminal-history score and that he was denied assistance of counsel because he was not provided with a public defender at a preliminary hearing. Both of these issues were addressed in appellant’s previous appeal. On remand, the district court sentenced appellant using the

¹ Appellant also argues that the district court violated rule 11 of the Federal Rules of Criminal Procedure. But these rules do not apply to appellant’s plea hearing, and we therefore find this argument to be without merit.

accurate criminal-history score. And we determined in his previous appeal that appellant's argument regarding his right to assistance of counsel was without merit.

Affirmed.