STATE OF MINNESOTA
IN COURT OF APPEALS
A10-276

State of Minnesota,
Respondent,

vs.

Douglas Frederick Gratz,
Appellant.

Filed October 5, 2010
Affirmed
Lansing, Judge

Watonwan County District Court
File Nos. 83-CR-09-322, 83-CR-09-579

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

LaMar Piper, Watonwan County Attorney, St. James, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

LANSING, Judge

Douglas Gratz appeals the district court's denial of his motion to withdraw his guilty plea to a charge of terroristic threats against his mother and father. Gratz argues that he established a fair and just reason to withdraw his plea based on the state's failure to disclose an exculpatory and impeaching telephone conversation with Gratz's father. Because the content of the telephone conversation and the state's failure to disclose it do not amount to a *Brady* violation, we affirm.

F A C T S

The events leading to Douglas Gratz's arrest for terroristic threats occurred at his parents' home in May 2009 when Gratz went there to retrieve his medication. Gratz has had a troubled relationship with his mother over a period of years and, at times, a troubled relationship with his father. In the course of a discussion, Gratz became angry at his parents and threatened to injure them. Gratz's father called the police, and two officers arrested Gratz near his parents' home. One of the officers called his parents' house and spoke with Gratz's mother who told the officer that Gratz threatened to "snap their necks" and kill them. Gratz's mother also told the officer that Gratz's father would be upset that she was talking to the police. The state charged Gratz with felony terroristic threats.

While the charge was pending, Gratz repeatedly called a worker at human services and left threatening and insulting messages. As a result of these communications, Gratz was charged with making harassing phone calls and obscene phone calls.

Gratz reached an agreement with the prosecutor to resolve both criminal files in September 22, 2009. Gratz pleaded guilty to the terroristic-threats charge and the harassing-phone-calls charge. In accordance with the plea agreement, the district court withheld adjudication on the terroristic-threats charge and imposed supervised probation for three years. Gratz received no additional jail time for the harassing-phone-calls conviction, and the state dismissed the obscene-phone-calls charge. Gratz's personal testimony provided a factual basis for his guilty plea on both charges. He stated that he understood the rights he was foregoing and that he voluntarily made the choice to plead guilty.

At Gratz's sentencing hearing in October 2009, Gratz moved to withdraw his guilty plea. He argued that the state had failed to disclose the fact that his father called the prosecutor shortly after Gratz was charged and told him that his hearing aid wasn't turned up during the May 2009 confrontation, and he was not sure what Gratz said or to whom his comments were directed. Gratz argued that the state's failure to disclose this conversation to him constituted a disclosure violation and that it was "fair and just" to allow Gratz to withdraw his plea. The district court continued the sentencing hearing to allow both parties to submit additional argument on plea withdrawal.

The district court denied the motion in November 2009, concluding that the content of the phone call was not exculpatory and that it had not been suppressed. The district court noted that Gratz's mother was the primary victim and the complaining witness, that the plea withdrawal would adversely affect witness availability on the harassing-phone-calls charge, and that the prosecution of the charges had already been

delayed by Gratz's failure to appear for his initial trial date and for the continued-sentencing hearing. The district court sentenced Gratz according to the plea agreement. In this appeal, Gratz argues that the district court erred in not granting Gratz's plea-withdrawal motion based on the state's failure to disclose the contents of his father's telephone call.

D E C I S I O N

Once a guilty plea has been entered, a defendant does not have an absolute right to withdraw it. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). If the defendant has not been sentenced, the district court has the discretion to allow the defendant to withdraw his guilty plea only "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). The district court should consider the reasons advanced by the defendant and any prejudice to the prosecution. Minn. R. Crim. P. 15.05, subd. 2.

The fair-and-just standard is less demanding than the standard applied to plea-withdrawal motions once a sentence has been imposed, but it does not allow a defendant to withdraw a guilty plea for any reason. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To allow a defendant to withdraw his plea for any reason would "transform the process of accepting guilty pleas into 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." *State v. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007) (quotation omitted). The district court's decision to deny a defendant's motion to withdraw his plea

"will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion." *Kim*, 434 N.W.2d at 266.

The state and Gratz agree that a disclosure violation could constitute a fair and just reason for plea withdrawal. *Cf. Shorter v. State*, 511 N.W.2d 743, 745-46 (Minn. 1994) (reversing under "manifest injustice" standard to allow plea withdrawal because of numerous procedural irregularities including possible *Brady* violation). They disagree, however, on whether the content of the telephone conversation and the prosecutor's failure to disclose it violates Minn. R. Crim. P. 9.01 and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

To constitute a *Brady* violation, the evidence must be favorable to the defendant because it is exculpatory or impeaching; "the evidence must have been suppressed by the prosecution, intentionally or otherwise"; and "the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010). When analyzing a possible *Brady* violation, we review issues of materiality de novo. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005). "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) (quotation omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Pederson*, 692 N.W.2d at 460 (quotation omitted).

Gratz's lawyer submitted an affidavit stating that "Fred Gratz has indicated that there was a misunderstanding about the argument and who the comments made by

Douglas Gratz were directed to[]" and that Fred Gratz "communicated this to the prosecutor shortly after this incident occurred and at the time of charging Doug." At the hearing on the motion, Gratz's lawyer said that Fred Gratz's "hearing aid wasn't [turned] up and he misunderstood what his son was saying with regard to certain statements that he was making, or where certain statements were directed." The district court concluded that Gratz's father's statement was not exculpatory and was not suppressed.

The district court did not err in concluding that Gratz's father's statement was not exculpatory and therefore did not constitute a *Brady* violation. Gratz was only charged with one count of terroristic threats. His mother made the statement to the police officer and submitted a separate letter outlining Gratz's interactions with her and his father over the preceding few months. This letter was admitted into evidence at the omnibus hearing. Gratz's mother never retracted her statement, and she was included in the state's witness list. Gratz's father's statement does not contradict his mother's statement. It only indicates that he did not hear the substance of Gratz's comments. Because Gratz's father's statement does not call Gratz's mother's statement into question and Gratz faced only one charge of terroristic threats, the evidence is not exculpatory. Therefore, the evidence does not meet the first requirement for a *Brady* violation.

As the district court noted, the second *Brady* element is also unmet because the prosecution did not suppress any evidence. In his first court appearance on the charge, Gratz responded to the state's request for a no-contact order with his parents, stating, "They're not mad at me. My dad can't hear what the story is and he probably didn't understand whoever asked him any questions." Shortly before Gratz was scheduled to go

to trial on the charge, he sent the district court a letter asking for help and stated that his dad is "deaf [and] doesn't understand things right anymore." The no-contact order was removed for Gratz's father at his father's request, Gratz's father appeared with him at almost every hearing, and he was listed as a witness for the defense. Gratz was well aware of his father's hearing problem and had commented about it from the outset of the proceedings. Gratz could easily access evidence that his father did not hear his statements that formed the basis for the charge and would be unable to provide evidence at trial to substantiate the charge. *See United States v. Jones*, 34 F.3d 596, 600 (8th Cir. 1994) (stating "[w]hen information is readily available to the defendant, it is not *Brady* material, and the prosecution does not violate *Brady* by not discovering and disclosing the information").

The district court did not discuss the third *Brady* element—the materiality of the statement, but the statement falls short of this requirement too. It is disputed whether the prosecutor told Gratz's attorney that the state would not call Gratz's father as a witness. But Gratz's attorney agreed that he and the prosecutor "had conversations . . . with regard to the viability of the [father's] statements or what he might do on the stand." Gratz knew his father could not hear well and did not always understand what was going on around him. Gratz also knew that his father had been supportive in his defense of the charges. Gratz's mother was the critical witness and she did not indicate that she would testify inconsistently with her inculpatory statements to the police. Under these circumstances and in light of the favorable resolution on sentencing, it is unlikely that disclosure of Gratz's father's statement to Gratz's attorney would have affected Gratz's

decision to plead guilty to the charges. *Cf. Shorter*, 511 N.W.2d at 745-46 (reversing to allow plea withdrawal because of numerous procedural irregularities including possible *Brady* violation).

Finally, Gratz argues that this court can reverse the district court's decision even without a showing that the suppression of the evidence prejudiced the defendant if we apply the reasoning of *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992). But the supreme court in *Kaiser* was exercising its supervisory power to enforce its own rules when it vacated the defendant's conviction and remanded for a new trial because of suppressed evidence even though the prejudicial effect was unclear. *Id.* This court has declined to exercise supervisory powers in these circumstances, concluding that they are reserved for the supreme court in its administration of the rules it promulgates. *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995). This case does not present a reason to deviate from the conclusion we reached in *Gilmartin*.

Gratz failed to show that his father's statement was exculpatory, and it is unclear that the statement was suppressed or likely affected Gratz's decision to plead guilty. Consequently, the district court did not err in concluding that no *Brady* violation occurred. The record indicates that Gratz's actions in violating the conditions of his release and not showing up for his trial after moving for a speedy trial delayed the resolution of his case. The district court acted within its discretion when considering the delay, the interests of Gratz's mother as the complaining witness, and the potential prejudice to the state if Gratz were allowed to withdraw his plea in mid-November when

the state's key witness in the other charge was likely to become unavailable in December. *See Kim*, 434 N.W.2d at 266-67 (Minn. 1989) (evaluating potential for plea withdrawal to be used as delay tactic in light of victim's interests and witness availability). For these reasons we conclude that the district court did not abuse its discretion in determining that Gratz did not present a fair and just basis for plea withdrawal.

Affirmed.