STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1961

State of Minnesota,
Respondent,

vs.

Nicholas Scott Foley,
Appellant.

Filed August 29, 2011
Affirmed
Willis, Judge[*]

Carver County District Court
File No. 10-CR-08-105

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

Mark A. Metz, Carver County Attorney, Michael D. Wentzell, Assistant County Attorney, Chaska, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

WILLIS, Judge

Appellant challenges the district court's denial of his motion to withdraw a guilty plea, arguing that he was under pressure at the time of the plea. Because appellant presented no fair and just reason that he was entitled to withdraw his plea, the district court did not abuse its discretion by denying his motion.

FACTS

Appellant Nicholas Scott Foley was charged with criminal sexual conduct in the third degree for sexually penetrating a 14-year-old girl when he was 27. Foley's trial began in May 2009. Jury selection lasted three days, the parties gave opening statements, and then the state called the victim, K.W., as its first witness. K.W. testified for two to three hours. The district court called a recess for lunch, and Foley met with his attorney to discuss the case. The attorney opined that Foley likely would be convicted because K.W. had testified to all elements of the offense. Foley authorized his attorney to reinitiate settlement discussions with the prosecutor, and those discussions continued for approximately two hours.

Foley subsequently pleaded guilty to third-degree criminal sexual conduct with the agreement that he would receive a one-year jail sentence and a stay of imposition with a ten-year conditional-release period. At the plea hearing Foley agreed that his decision to plead guilty was completely voluntary. He signed a plea petition that stated, "No one – including my attorney . . . has threatened me . . . in order to obtain a plea of guilty from me." During the plea colloquy, Foley said that he felt under pressure and wished he had

more time to think about pleading guilty but recognized that pleading guilty was "definitely a better way." His attorney sensed Foley's hesitancy and so sought to make the record "very, very clear" that Foley's plea was voluntary:

> THE ATTORNEY: You understand on the record that I am not telling you to plead guilty, is that right?
> THE DEFENDANT: Yes.

The district court told Foley that "[u]nder no circumstances will I accept a plea of guilty if you're not telling me you're guilty." It stressed that the trial could resume at any time:

> THE COURT: It's totally your decision. We've got everybody here ready to go. In fact, we can start testimony in two more minutes, Mr. Foley. . . . If there is any hesitation in your mind, I'll call in the jury and we will continue testimony.
> THE DEFENDANT: Okay, well, I guess I signed it already, so.
> THE COURT: Well, your signature—it has been received by the Court but I'm happy to give it back to you. I do not have to accept a plea of guilty unless you feel confident that you want to go forward. The fact that you signed this document, I'm willing to rip it up right now, sir.
> . . . .
> THE DEFENDANT: I mean, I understand I'm not forced but I feel forced, I honestly do.
> THE COURT: Then I think I should rip up the plea petition. I think we should proceed to trial.

Minutes later, Foley admitted on the record that he sexually penetrated K.W. when she was 14 years old and he was 27 years old.

On July 13, 2009, Foley moved to withdraw his guilty plea, claiming that he was innocent, that he did not have enough time to make an intelligent choice, and that he lacked confidence in his attorney. After an evidentiary hearing, the district court denied

the motion, concluding that the plea was accurate, knowing, and voluntary, and that Foley did not show that there was a fair and just reason to withdraw his plea. Foley appeals.

D E C I S I O N

Foley argues that the district court abused its discretion by not allowing him to withdraw his guilty plea before sentencing. A criminal defendant does not have an absolute right to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). Plea withdrawal is permitted in two circumstances: if withdrawal is necessary to correct a "manifest injustice" or if a defendant moves to withdraw before sentencing and it is "fair and just" to allow withdrawal. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subds. 1, 2).

Foley claims that the district court abused its discretion by not allowing him to withdraw his plea under the "fair and just" standard. *See* Minn. R. Crim. P. 15.05, subd. 2 (stating that it is within the district court's discretion to "allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so"). To determine whether to allow withdrawal, the district court considers the defendant's reasons for moving to withdraw the plea as well as any prejudice that granting the motion would cause to the prosecution. *Id.* A defendant carries the burden of proving that there is a fair and just reason for allowing withdrawal of the plea, and the state bears the burden of proving prejudice. *Raleigh*, 778 N.W.2d at 97. We will reverse a district court's decision denying a motion to withdraw a guilty plea "only in the rare case" in which it abused its discretion. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

I. The district court did not abuse its discretion by concluding that Foley did not demonstrate a "fair and just" reason to support withdrawal of his plea.

Foley claims that he "was under a great deal of pressure at the time of the [guilty] plea," so the district court should have granted his motion to withdraw it. After a contested hearing, the district court thoroughly reviewed Foley's assertions of pressure and his attorney's testimony that he did not coerce Foley into entering the plea. It made an explicit finding that the attorney was more credible than Foley. This court defers to a district court's primary observations and credibility determinations. *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). The district court concluded that Foley merely felt internal pressure. This finding is supported by the evidence.

The district court also properly considered the record of the guilty-plea hearing. *See State v. Ecker*, 524 N.W.2d 712, 719 (Minn. 1994) (affirming a district court's refusal to permit a plea withdrawal when the plea-hearing record showed that the defendant repeatedly stated that he was making his own decision). Foley repeatedly stated at the hearing that it was his decision alone to plead guilty. The district court iterated that Foley's attorney and the plea-hearing court went to great measures to ensure "on the record, under oath" that the plea was voluntary.

The district court recognized that "[n]o doubt, a decision like this is a stressful decision." But Foley's feelings of circumstantial pressure and his desire to avoid a harsher penalty do not create a "fair and just" reason for plea withdrawal. *See Raleigh*, 778 N.W.2d at 97 (holding that a defendant's bare assertion that he felt pressured to plead

guilty without further evidentiary support did not provide a "fair and just" reason for withdrawal); *Ecker*, 524 N.W.2d at 719 (holding that "a defendant's motivation to avoid a more serious penalty or set of charges will not invalidate a guilty plea"). Foley failed to present to the district court a reason that it would be fair and just to allow him to withdraw his guilty plea. The district court did not abuse its discretion by denying Foley's motion.

II. The district court did not abuse its discretion by concluding that the state would be prejudiced by withdrawal of the plea.

It is unnecessary to review prejudice to the prosecution when a defendant has asserted no reason why it would be fair and just to allow withdrawal of his plea. *See Raleigh*, 778 N.W.2d at 98. We nevertheless choose to address the issue of prejudice, and we agree with the district court's conclusion that the state would be prejudiced if Foley were allowed to withdraw his plea because of the passage of time and the victim's documented eating disorder and self-injurious behaviors that might be exacerbated by testifying at another trial. The district court did not abuse its discretion by holding that the state would be prejudiced if Foley were allowed to withdraw his plea.

Affirmed.