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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1421

Thomas Edward Utter, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 7, 2014
Affirmed
Bjorkman, Judge

Stearns County District Court
File No. 73-CR-10-2324

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

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's denial of postconviction relief, arguing that the district court abused its discretion by determining that it is not fair and just to permit him to withdraw his guilty plea. We affirm.

FACTS

Based on conduct between March 2007 and August 2009, appellant Thomas Edward Utter Jr. was charged with engaging in a pattern of harassing conduct, five counts of violating a harassment restraining order, and three counts of harassment. Utter's jury trial commenced on January 31, 2011. On the second day of trial, after the complainant and four other witnesses had testified, Utter indicated that he wished to plead guilty to engaging in a pattern of harassing conduct in exchange for the state's dismissal of the remaining charges. Utter waived his right to conclude the trial and provided a factual basis for the plea. The district court reluctantly accepted Utter's guilty plea and set the matter for sentencing.

At his sentencing hearing on March 25, Utter asked to withdraw his guilty plea "due to attorney misrepresentation." Utter explained that he pleaded guilty because he believed his attorney was unprepared and had not adequately cross-examined the state's witnesses. The district court denied his request, imposed a 23-month stayed sentence, and placed Utter on probation.

Nearly two years later, Utter petitioned for postconviction relief, arguing that the district court erred by denying his presentence request to withdraw his guilty plea. The district court denied Utter's petition. This appeal follows.

D E C I S I O N

In reviewing a denial of postconviction relief, we determine whether the district court's factual findings are supported by sufficient evidence and review issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We will reverse a postconviction decision only if the district court abused its discretion. *Id.*

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). But a district court may, in its discretion, permit a defendant to withdraw a guilty plea before a sentence is imposed "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2.[1] Whether plea withdrawal is warranted under the fair-and-just 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." *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

[1] Utter's postconviction petition essentially asked the district court to review its denial of his presentence plea-withdrawal request, and the district court considered his petition under the fair-and-just standard. The state suggests that the post-sentence manifest-injustice standard may have been more appropriate, but it waived this argument by failing to raise it in the district court. We observe, however, that our determination that Utter is not entitled to plea withdrawal under the fair-and-just standard obviates the need for considering the manifest-injustice standard. *See Theis*, 742 N.W.2d at 646 (stating that the fair-and-just standard is "less demanding" than the manifest-injustice standard).

In determining whether it is fair and just to allow a defendant to withdraw a plea, a district court must consider (1) "the reasons advanced by the defendant in support of the motion" and (2) "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; *State v. Cubas*, 838 N.W.2d 220, 223 (Minn. App. 2013), *review denied* (Minn. Dec. 31, 2013). A district court may deny plea withdrawal even when there is no prejudice to the state, "if the defendant fails to advance valid reasons why withdrawal is fair and just." *Cubas*, 838 N.W.2d at 224 (citing *State v. Raleigh*, 778 N.W.2d 90, 97-98 (Minn. 2010)).

Utter argues that it was fair and just to permit him to withdraw his guilty plea because he felt he had little choice but to plead guilty after his counsel's "feeble" cross-examination of the complainant. He contends that his trial counsel abandoned "the entire theory of defense" by not questioning the complainant more thoroughly and demanding more definitive responses on the issue of whether Utter's conduct caused him fear. Utter asserts essentially identical "inadequate representation" arguments in his pro se brief.[2] We are not persuaded.

First, as the district court observed, Utter identifies no authority permitting withdrawal of a guilty plea based on defense counsel's trial strategy, such as "how cross-

[2] Utter's pro se brief focuses somewhat more extensively on alleged shortcomings in his attorney's cross-examinations of other witnesses and explains that he realized after trial that his attorney did not work harder for him because he was about to retire. None of these arguments states a claim for relief materially different from the assertions in his principal brief.

examination was conducted."[3] To the contrary, the great weight of authority indicates that courts will not interfere with counsel's discretionary tactical decisions. *See State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998) (recognizing that counsel must have the discretion and flexibility to devise a trial strategy that best serves the client); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (holding that counsel's performance does not warrant plea withdrawal under manifest-injustice standard when "counsel's advice was within the range of competence demanded of attorneys in criminal cases") (quotation omitted).

Second, our careful review of the record reveals ample support for the district court's determination that defense counsel's performance does not justify plea withdrawal. During the complainant's direct-examination, defense counsel used objections to limit his testimony on the issue of fear. Then on cross-examination, defense counsel confirmed the complainant's testimony that Utter's conduct caused him to experience anger, shame, rage, and sadness—but not fear. Defense counsel also established that the complainant could not recall any actual threats other than Utter saying he was going to "throw [the complainant] in jail." But defense counsel declined to pursue the issue further when the complainant quibbled about whether Utter made any other threats, stating, "He could have. Because he says it in English and I'm not sure I understand everything he says." Utter may have disliked that decision, but we agree with

[3] Notably, Utter does not claim that his attorney improperly advised him to plead guilty. *See Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (observing that a defendant has a fundamental right to decide whether to plead guilty and that advice on the exercise of that right may be subject to review).

the district court that defense counsel's overall line of questioning reflects a reasonable trial strategy and that pursuing a more aggressive line of questioning might have detrimentally impacted Utter's defense.

Moreover, the state would be prejudiced if Utter were permitted to withdraw his midtrial plea. The state dismissed its witnesses in reliance on Utter's plea and would have to recall them for a second trial. *See Kim*, 434 N.W.2d at 267 (recognizing prejudice to the state when the state dismisses witnesses in reliance on a guilty plea). Permitting Utter to withdraw his plea also would subject the complainant and four other witnesses to having to testify a second time. *See State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (stating that it would be "an extremely rare case where [an appellate court] would reverse the [district] court's . . . refusal to allow a withdrawal under the 'fair and just' standard" where defendant's guilty plea was entered in the middle of a jury trial after complainant had testified); *Kim*, 434 N.W.2d at 267 (permitting consideration of the "interests of the victim" in weighing prejudice).[4] These considerations weigh against plea withdrawal.

Overall, the record indicates that Utter pleaded guilty "of [his] own free will," rather than continuing his trial. Accordingly, we conclude the district court did not abuse its discretion by denying Utter's postconviction request to withdraw his guilty plea.

Affirmed.

[4] Utter complains that the district court improperly evaluated prejudice to the state as of the time of his postconviction petition, rather than as of the time he initially moved to withdraw his guilty plea. The concern that the complainant and four other witnesses would be forced to testify for a second time applies regardless of the point in time at which prejudice is evaluated.