STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1588

David Randy Sabby, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

Filed May 19, 2014
Reversed and remanded
Randall, Judge[*]

Otter Tail County District Court
File No. 56-CR-09-654

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

David J. Hauser, Otter Tail County Attorney, Michelle M. Eldien, Assistant County Attorney, Fergus Falls, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Randall, 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

RANDALL, Judge

Appellant challenges the district court's denial of his third postconviction-relief petition, arguing that the district court erred by denying his request to withdraw his guilty plea. Appellant's guilty plea was based on the prosecution's promise that he would receive an 11-year sentence for crimes he committed in both Minnesota and Georgia. Later, Georgia rescinded its plea offer and sentenced appellant to 80 years in prison. Despite a record that indicates Georgia's change of mind was partly due to willful conduct on the part of appellant, the state's offer was unequivocal. We do not know what happened in Georgia, but the State of Minnesota keeps its word. Appellant's Minnesota guilty plea was induced by a promise that was later unfulfilled. We reverse and remand for further proceedings.

FACTS

On March 7, 2009, appellant David Randy Sabby abducted his 17-year-old step-daughter, A.G.H, drove her to a remote cabin outside of Fergus Falls, and proceeded to force sexual intercourse with A.G.H. over the next few hours. Appellant eventually allowed A.G.H. to leave the cabin, and the police were dispatched to the scene shortly thereafter. Upon arriving at the address, police found the cabin engulfed by a fire that was ignited by a kerosene heater. Appellant was apprehended at the scene.

Appellant was charged in Otter Tail County district court with two counts of kidnapping; two counts of criminal sexual conduct in the first degree; two counts of criminal sexual conduct in the second degree; two counts of criminal sexual conduct in

the third degree; one count of witness tampering; one count of violation of an order for protection (OFP); two counts of burglary in the first degree; and negligent fire with over $2,500 in damage. During the same time, appellant had charges pending in Douglas County, Georgia. In Georgia, appellant was charged with incest, statutory rape, aggravated child molestation, and child molestation all involving acts perpetrated against A.G.H.

On December 14, 2009, appellant entered an *Alford* plea. At the hearing, counsel explained that, under the terms of the plea agreement, appellant would receive a 144-month sentence, to run consecutively with a 41-month sentence he had previously received in Grant County, Minnesota. In exchange for pleading guilty to first-degree criminal sexual conduct, appellant's other charges would be dropped. In addition, the sentence that he would receive in Georgia would be "less than the time served in Minnesota." The Minnesota and Georgia sentences were to run concurrently so that appellant would not serve any additional time in Georgia once he served the time in Minnesota. Counsel for appellant stated

> If for some reason that falls apart, if Georgia doesn't concur, or if [the prosecutor] or I have a misunderstanding about it, then [appellant] would have the right to withdraw his plea and we would go back to square one. I believe that's the basic text of our agreement.

As a result of this *Alford* plea, appellant was found guilty of first-degree criminal sexual conduct. The remaining charges were dropped.

On December 28, 2009, the Georgia prosecutor responsible for appellant's case sent a letter to the Minnesota prosecutor. That letter confirmed appellant's 11-year

sentence, and stated that "[a]ssuming that sentence is imposed, our agreement would be to allow the defendant to plead to one count of incest. We would recommend a plea to count of thirty (30) years to serve eleven (11) years."[1] The Georgia prosecutor further stated that appellant's Georgia sentence would run concurrently with his Minnesota sentence, and that appellant could also receive credit for time served.

On January 19, 2010, appellant notified the district court of his intention to withdraw from his plea agreement because he believed that Georgia did not fulfill its end of the bargain as it sought to impose a 30-year sentence. The prosecution objected to the plea withdrawal. And on January 29, 2010, the Georgia prosecutor sent another letter, clarifying that Georgia would reduce appellant's sentence "to twenty (20) years to serve eleven (11) years."

On February 8, 2010, appellant's Minnesota sentencing hearing was held. At that hearing, appellant filed a formal motion to withdraw his guilty plea. Appellant argued that he did not knowingly enter into the plea agreement because Georgia was now seeking a 20-year sentence, which changed the terms of his plea agreement. The district court denied appellant's motion to withdraw his guilty plea, reasoning that at that time

[1] While it is unclear from the record, we believe that the prosecutors determined that an 11-year sentence was appropriate by adding the actual time appellant would spend in prison for first-degree criminal sexual conduct and his 41-month sentence in Grant County, Minnesota. The presumptive sentence for first-degree criminal sexual conduct is 144 months. Minn. Sent. Guidelines IV (2008) (sex offender grid). The executed portion of this sentence is 96 months, which is roughly eight years. *See* Minn. Stat. § 244.101, subd. 1 (2008) (stating that offenders will receive an executed sentence consisting of two-thirds of the total sentence). Appellant also had a 41-month sentence in Grant County, Minnesota. The executed portion of this sentence is approximately 27 months, which is roughly two and one-fourth years and two-thirds of the sentence. *Id.* We believe that this is how the prosecutors determined that an 11-year sentence was appropriate.

there was no evidence indicating that Georgia had changed the terms of the plea or that it would require appellant to serve more than 11 years in prison. According to the terms of his plea, the court sentenced appellant to 144 months. Appellant filed a direct appeal, challenging the district court's denial of his motion to withdraw his guilty plea.

While his appeal was pending, appellant personally sent a letter to the Georgia prosecutor. In that letter, appellant requested discovery because he was challenging his plea, stated that he was "fighting extradition to Georgia," and he believed that he would be successful at trial. On March 18, 2011, a new Georgia prosecutor sent an e-mail to appellant's Georgia public defender. That e-mail rescinded all prior plea offers, explaining that there was "no plea offer in this case" because appellant had sought to withdraw his plea and fought extradition to Georgia.

On April 12, 2011, this court affirmed the Minnesota district court's order denying appellant's motion to withdraw his guilty plea. *State v. Sabby*, Nos. A10-0825, A10-1397, 2011 WL 1364282, at *2 (Minn. App. Apr. 12, 2011). At the time this appeal was filed and considered, appellant had not provided any evidence to this court establishing that Georgia had already rescinded, or was planning to rescind, the terms of its agreement.[2]

Appellant filed his second and third appeals based on the denial of his first and second petitions for postconviction relief. In both instances, the district court denied his

[2] In this opinion, we also stated that "appellant received an identical sentence in the Georgia matter as the one he received in this case . . . [a]nd appellant is serving the Georgia sentence concurrent with his sentence in this matter." *Sabby*, 2011 WL 1364282, at *2. We now recognize that this statement was incorrect, as appellant was not sentenced in Georgia until June 27, 2012.

petition and this court affirmed. *Sabby v. State*, No. A11-1779, 2012 WL 1470235, at *7 (Minn. App. Apr. 30, 2012); *Sabby v. State*, No. A13-0350 (Minn. App. Sept. 25, 2013) (order op.). In his second appeal, appellant argued for the first time in his reply brief that his guilty plea was induced by unfulfilled promises. *Sabby*, 2012 WL 1470235, at *7. Because appellant's postconviction petition contained no allegation of such an agreement, and the record was void of any evidence that such a promise was made, this court refused to address his argument on the merits. *Id.* In his third appeal, this court issued an order opinion, determining that appellant's arguments were *Knaffla*-barred. *Sabby*, No. A13-0350, at 4-5 (order op.).

Meanwhile, appellant was extradited to Georgia. The Georgia district court denied appellant's motion to enforce the Minnesota-Georgia plea agreement, reasoning that appellant had only made counteroffers with the prosecutor, and in any event, he was the one who first sought to withdraw from the entire deal. Appellant proceeded to a jury trial in Georgia, where he was found guilty of all charges brought against him. On June 27, 2012, the Georgia court sentenced appellant to 80 years: 60 years to be served in prison; with the possibility of 20 years on supervised release.

On April 12, 2013, appellant filed his third petition for postconviction relief, the basis for this appeal. The district court determined that appellant's petition was not *Knaffla*-barred because the withdrawal of the Georgia plea offer created a novel legal issue as a basis for his petition for postconviction relief. But the district court still denied appellant's petition, reasoning that appellant's actions indicated that he did not intend to fulfill the terms of the plea agreement. The district court found that appellant never

intended to comply with the Minnesota plea agreement, so the Georgia plea offer could not have been a promise or inducement for his Minnesota plea. This appeal followed.

D E C I S I O N

I.

Respondent argues that appellant's claim is *Knaffla*-barred as he has repeatedly attempted to withdraw his guilty plea and this court has repeatedly dismissed his claim.

Once a direct appeal has been taken, all claims raised in that appeal, all claims known at the time of that appeal, and all claims that should have been known at the time of appeal "will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). But an exception to the "*Knaffla* rule" includes instances where the claim's novelty was so great that its legal basis was not reasonably available when direct appeal was taken. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995).

In his third appeal, this court determined that appellant's claim regarding the withdrawal of his guilty plea was *Knaffla*-barred. However, critical events have unfolded and appellant has provided this court with evidence that Georgia has not complied with the terms of the "claimed" plea agreement. We now have letters from the Georgia prosecutor rescinding its plea offer. We also have the sentencing order proving that appellant did not receive an 11-year sentence in Georgia. The withdrawal of the Georgia plea offer was not known to appellant at the time of his direct appeal. Due to the timing in which events occurred, we conclude that appellant's claim does present a novel legal issue and is not *Knaffla*-barred.

II.

Now we address appellant's argument that the district court erred by denying his postconviction petition to withdraw his guilty plea.

A district court may allow a defendant to withdraw a guilty plea if it is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). To be valid, a guilty plea must be "accurate, voluntary and intelligent (i.e., knowingly and understandingly made)." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The intelligence requirement ensures that a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). "'Consequences' refers to a plea's direct consequences, namely the maximum sentence and fine." *Raleigh*, 778 N.W.2d at 96.

We agree with the district court that appellant was the one responsible for the plea agreement falling through. Had he not challenged his guilty plea shortly after entering it and challenged extradition to Georgia, it is likely that the Georgia prosecutor and Georgia court would have followed through with the Minnesota-Georgia combined plea agreement. From the beginning, the Georgia prosecutor went out of his way to confirm that he would conform the Georgia sentence to the Minnesota sentence on the all-important issue of how much time appellant would actually serve in prison.

The supreme court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *State v. Brown*, 606 N.W.2d 670, 674

(Minn. 2000) (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971)). The plea transcript establishes that appellant's guilty plea was based on Minnesota's promises that he would serve 11 years in Minnesota and receive no additional time in Georgia. He had been assured by the prosecutor and his attorney that the Georgia agreement was in place and would be enforced. At the plea hearing, appellant was told: "If for some reason that falls apart, if Georgia doesn't concur, or if [the prosecutor] or I have a misunderstanding about it, then [appellant] would have the right to withdraw his plea and we would go back to square one." Appellant provided this court with correspondence proving that the deal was later revoked. He also submitted the Georgia sentencing order proving that Georgia sentenced him to 80 years.

Reviewing this record, appellant had a reasonable multi-state plea agreement considering the convictions and pending charges in both states. In effect, he chose to unilaterally withdraw from the agreement with both states and start over. He took his chances in Georgia and received the imposition of an 80-year sentence. We have no jurisdiction over the state of Georgia and its sentencing policies. However, going back to the terms of the plea agreement, the operative words are: "if for some reason it falls apart." Well, it fell apart. We are not going to nit-pick and decide that somehow, because of appellant's actions, his plea of guilty in Minnesota is still valid. The state of Minnesota keeps its word. If appellant wants to withdraw his guilty plea in Minnesota and stand trial on all charges, including those that were previously dismissed as part of the plea agreement that appellant wants rescinded, that is his right.

We will require the state to honor its agreement. The state promised appellant that if he pleaded guilty he would receive an 11-year sentence in Minnesota and Georgia, and it promised him that these sentences could run concurrently. Appellant is currently serving an 80-year sentence in Georgia after serving a portion of his sentence in Minnesota. This court has no authority to change the result in Georgia, but we can give him his day in court in Minnesota. We reverse and remand. Appellant must understand that, regardless of his success in Minnesota, we have no control over his present 80-year sentence in Georgia.

Reversed and remanded.