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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0904**

State of Minnesota,
Respondent,

vs.

Blaine Eldon Raincloud,
Appellant.

**Filed April 10, 2017
Affirmed
Connolly, Judge**

Beltrami County District Court
File No. 04-CR-14-3984

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

Annie P. Claesson-Huseby, Beltrami County Attorney, Kristal Kadrie, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Blair W. Nelson, Blair W. Nelson, Ltd., Bemidji, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the denial of his motion to withdraw his guilty plea to one count of gross-misdemeanor criminal vehicular operation, arguing that newly acquired expert testimony regarding the central issue of the case made it fair and just to permit him to withdraw his guilty plea and that withdrawal was necessary to correct a manifest injustice because appellant had received ineffective assistance of counsel prior to his plea. Because the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea and because appellant did not receive ineffective assistance of counsel, we affirm.

FACTS

On December 23, 2014, Beltrami County Sheriff's deputies were told of a one-vehicle rollover in which three individuals were involved. When the deputies arrived, they found appellant Blaine Raincloud and two females, C.K. and L.P. The deputies noted that appellant had an odor of alcohol, bloodshot watery eyes, and thick speech; he was unable to perform field sobriety tests, and he failed a preliminary breath test. Appellant indicated to the deputies that he had been the driver of the vehicle; C.K. and L.P. also indicated that appellant had been the driver. Appellant was missing a black tennis shoe, and a black tennis shoe was found on the floor in front of the driver's seat.

Appellant was given a *Miranda* warning while being transported to a hospital. The deputies, with a signed search warrant, took a blood sample from appellant; it indicated an alcohol concentration (AC) of 0.254.

Appellant was charged with two counts of felony criminal vehicular operation and two counts of gross-misdemeanor criminal vehicular operation. Trial was scheduled for October 20, 2015, and, on that date, the state was prepared with 11 witnesses, and a jury was available. Before the trial began, appellant decided to accept the state's offer and pleaded guilty to one count of gross-misdemeanor criminal vehicular operation.

In response to the district court's questions, appellant said he understood that: (1) he could have a jury trial that day; (2) the state's offer was to let him plead guilty to one gross misdemeanor charge in exchange for dismissal of two felony charges and another gross misdemeanor charge; (3) he would return to the court for sentencing; and (4) the sentence could be up to a year in jail, up to a \$3,000 fine, and probation for three years. Appellant told the district court he had no questions concerning his plea.

Appellant also answered "Yes" when asked if (1) he wanted to plead guilty with a *Norgaard* plea "which means that you either can't remember any of it [i.e. the incident] or you can't remember substantial portions"; (2) he had read the police reports; (3) he remembered some of what was in the reports; and (4) he had been "pretty intoxicated" at the time of the events referred to in the reports. He said that, at the hospital, a test indicated that his AC was "a 0.255 or something."

The prosecutor then told appellant the state's witnesses at trial would include: (1) C.K. and L.P., who would testify that appellant was the driver; (2) a medical person, who would testify that C.K.'s and L.P.'s injuries were consistent with their being passengers in the vehicle, not the driver; (3) a deputy, who would testify that (a) he was first to arrive at the scene, (b) appellant admitted being the driver, (c) he observed multiple

indicia of alcohol when speaking with appellant, and (d) appellant admitted consuming some alcohol; (4) an officer who would testify that, at the hospital, C.K. and L.P. stated they were not the driver of the vehicle, and one of them identified appellant as the driver; (5) another deputy, who would testify that appellant's wallet and a shoe were found near the driver's side door of the vehicle; and (6) another medical person, who would testify that, at the hospital, appellant's AC was 0.254.

The district court asked appellant whether he thought that, if all this evidence were presented to the jury and the jury believed it, there was a substantial likelihood that the jury would find him guilty of one of the four charges or of all four (a *Norgaard* plea). After being told three times that he had to answer this question "yes" or "no," appellant answered "Yes."

The district court asked if they should go ahead with the trial. Appellant, who had agreed with the district court that it was "far too risky" to have a felony on his record because he would lose his job, said, "I will take the [state's] deal." Before accepting the guilty plea, the district court asked appellant, "Are you making any claim that you are innocent of this charge?" and appellant answered, "No."

On November 20, 2015, appellant appeared in court pro se to move to withdraw his guilty plea. He also indicated that he wanted to retain new counsel. Appellant's initial trial counsel, D.C., withdrew, and appellant obtained new counsel, B.N.

On December 31, at a hearing with B.N. on his motion to withdraw his guilty plea, appellant testified that he repeatedly asked D.C. to obtain an accident reconstruction expert to testify that appellant was not the driver of the vehicle. D.C. had not been called as a

witness or subpoenaed by appellant's new counsel and he did not testify. The district court noted that, without D.C., there was no way to investigate the accuracy of appellant's testimony.

The district court denied appellant's motion to withdraw his guilty plea and sentenced him on one count of gross-misdemeanor criminal vehicular operation. Appellant challenges the denial, arguing that it was an abuse of the district court's discretion and that he was deprived of effective assistance of counsel when he made his guilty plea.

D E C I S I O N

1. Withdrawal of guilty plea

A district court's decision to permit withdrawal under the fair-and-just standard, which is applied when the motion is made prior to sentencing, is discretionary. *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010). The district court must consider the reasons for withdrawal and any prejudice withdrawal could cause the state,¹ and this court reviews the decision to deny a withdrawal motion for an abuse of discretion, reversing only in a rare case. *Id.*

The district court found that:

On the day of the trial, all parties and the jury were present and prepared to go forward with trial. [Appellant] indicated he understood his guilty plea and knew the consequences of making such [a] plea. [Appellant] was advised of his rights and the penalties of his plea. The Court

¹ Appellant argues the state did not make the requisite showing of prejudice. But, at the December 7, 2015, hearing on the motion to withdraw, the state's attorney noted that, on the day trial was scheduled to begin, the state "had 11 witnesses prepared" and would be prejudiced if the plea were withdrawn because it had "released all those witnesses."

discussed a *Norgaard* basis for a plea, its requirements, and [appellant] indicated he had gone over everything in the police reports. [Appellant] was advised of the witnesses that would be called at trial and the requirement for a factual basis for a plea. [Appellant] admitted the risk [of a felony conviction] was too high and he wanted to take advantage of a plea deal. [Appellant] was not coerced and agreed there was a substantial likelihood that he would be found guilty of one or all the charges against him.

The transcript of the plea hearing supports the district court's findings. The district court did not abuse its discretion in finding that appellant's plea was knowing, voluntary, and intelligent, or in concluding that it would not be fair and just to withdraw the plea.

2. Ineffective Assistance of Counsel

The denial of postconviction relief based on a claim of ineffective assistance of counsel is a mixed question of law and fact and is reviewed de novo. *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013).

The defendant must affirmatively prove 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted), *quoted in Saliterman v. State*, 443 N.W.2d 841, 843-44 (Minn. App. 1989). "The evidence supports a finding of effective representation" when the record contains testimony that the defendant's counsel was prepared for trial, the defendant was fully informed of the plea bargain and the constitutional rights he would waive by pleading guilty, and the attorney obtained a dismissal of three of the five charges against the defendant. *Id.*

Appellant argues that D.C. was ineffective because he did not locate an accident-reconstruction expert who would have testified that appellant was not the driver of the vehicle and claims that D.C. “ignored [appellant’s] assertion that he was not the driver of the vehicle.” But D.C. was aware of that assertion: at the hearing, he told the district court: “[Appellant] believes he wasn’t driving. . . . In all sincerity and honesty, he believes that he . . . was [not] driving. That’s why we are here. And because of the impairment and because of the intoxication, he can’t say I’m guilty because he doesn’t believe he is guilty.”

At the hearing on the motion to withdraw, B.N. told the district court that he was not calling D.C. as a witness, and D.C. was not present. The district court, after hearing testimony about D.C.’s representation from appellant, observed that:

[Appellant] is saying one thing but we don’t have [D.C.] saying he did or didn’t say that or he did or didn’t do that. We have nothing.

. . . .

I’ve got nothing on the other side and anybody can make any allegations that they want to make.

. . . .

I’m not looking for anything other than . . . what evidence is presented to the Court. I expected [D.C.] to be here because, again, if somebody is going to claim that somebody did or said something then the only way – clearly, you could have subpoenaed him for him to say I didn’t do that or I did do that, somebody is lying or somebody is not lying. I would prefer to have [D.C.] here. But I have to take the evidence as it’s presented and weigh it as I weigh any other evidence.

B.N., without giving the state prior notice, called a North Dakota attorney to testify that D.C.’s alleged failure to hire an accident-reconstruction expert “fell below an objective standard of reasonableness.” The district court permitted the North Dakota attorney to testify but said to appellant’s attorney,

I don't know how you are going to deem him an expert and you haven't given notice to the other side so they are not prepared for any expert testimony he may be giving. . . . I will make my ruling on whether I will accept any of the information [he presents]. . . . I may not consider anything he says because, one: he is not an expert and two: . . . [the state hasn't] been noticed about what he is going to testify to. . . .

Whether or not to call an accident-reconstruction expert clearly falls under trial strategy. *State v. Lahue*, 585 N.W.2d 785, 789-90 (Minn. 1998). Trial strategy is not a basis for arguing ineffective assistance of counsel. *Anderson v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

The district court's conclusion that "[appellant] did not show that [D.C.'s] assistance fell below an objective standard of reasonableness, nor that there was a strong probability that, but for [D.C.'s] errors, the result of the proceeding would have been different" is supported by the law and the facts.

Affirmed.