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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1564**

State of Minnesota,
Respondent,

vs.

Kevin Hall,
Appellant.

**Filed January 7, 2019
Affirmed in part, reversed in part, and remanded
Klaphake, Judge***

Stearns County District Court
File No. 73-CR-15-543

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and
Klaphake, 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

KLAPHAKE, Judge

Appellant Kevin Hall filed this appeal from a final judgment of conviction and sentence for first-degree burglary following a guilty plea. We stayed the appeal to allow Hall to pursue postconviction relief. After the district court denied postconviction relief, we reinstated the appeal. Hall argues that (1) he should be permitted to withdraw his guilty plea; (2) he was denied his right to counsel when the district court imposed sentence without counsel and without securing Hall's knowing, intelligent, and voluntary waiver of the right to counsel, and (3) the chief judge should have granted his motion to disqualify the postconviction judge for cause. Because the record supports the postconviction court's findings that the plea was valid under the manifest-injustice standard, and because the chief judge did not abuse its discretion in denying Hall's disqualification motion, we affirm in part. But because Hall did not forfeit his right to counsel at sentencing, we reverse and remand for resentencing and to give Hall an opportunity to renew his presentence plea-withdrawal request for consideration under the fair-and-just standard.

D E C I S I O N

I.

Hall argues that he was denied his constitutional right to counsel at sentencing. After Hall entered his guilty plea to first-degree burglary he had no further contact with counsel. Another attorney notified the district court and the prosecuting attorney by letter that counsel would be unavailable for approximately 30 days for medical reasons, but no one informed Hall. Hall's sentencing hearing was continued from March to April 2016

based on counsel's unavailability. After counsel failed to appear at the rescheduled sentencing hearing, Hall discharged counsel, and the district court further continued the sentencing hearing to June 16 and June 30, 2016, to give Hall an opportunity to retain counsel. Although Hall was unable to retain counsel, the district court proceeded with the sentencing hearing on June 30, 2016, and denied Hall's on-the-record motion to withdraw his guilty plea.

Hall's appellate counsel moved to stay the direct appeal to pursue postconviction relief. In the postconviction proceedings, Hall argued that sentencing him without counsel violated his constitutional rights, prevented him from advancing sentencing arguments, and deprived him of assistance in preparing his guilty-plea-withdrawal motion. The postconviction court denied relief, concluding that Hall "waived his right to counsel by appearing without counsel [at sentencing] after receiving multiple continuances to obtain counsel."

When a defendant files a direct appeal and then moves to stay the proceedings for postconviction relief, the standard of review is the same standard that applies on direct appeal. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). This court reviews the district court's finding of a valid waiver of counsel under the clearly erroneous standard. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). But when the facts are undisputed, this court reviews the question of whether a defendant validly waived the right to counsel de novo. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012) (stating that question of whether a waiver-of-counsel is knowing and intelligent "is a constitutional one").

The right to counsel is guaranteed by federal and state constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The denial of the right to counsel “is a structural error,” *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009), that “does not require a showing of prejudice to obtain reversal.” *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997). The right to counsel applies to all critical stages in a criminal proceeding, and sentencing is one of those stages. *State v. Maddox*, 825 N.W.2d 140, 144 (Minn. App. 2013). But that right can be relinquished in three ways: (1) affirmative waiver; (2) waiver by conduct; and (3) forfeiture. *Jones*, 772 N.W.2d at 504. An affirmative waiver of the right to counsel in a felony case must be knowing, voluntary, and intelligent. *Id.* In felony cases, a written waiver is required, unless the defendant refuses to sign the written waiver, in which case the waiver must be made on the record. *Id.* (citing Minn. R. Crim. P. 5.02, subd. 1(4)).¹ “Waiver by conduct is a separate concept” and applies to defendants who voluntarily engage in misconduct after having been warned that they will lose counsel if they persist in the misconduct. *Id.* at 505. But the “same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct.” *Id.*

¹ Minn. R. Crim. P. 5.02, subd. 1(4) has subsequently been renumbered and is now found at Minn. R. Crim. P. 5.04, subd. 1(4). The substance of the rule is unchanged and requires the district court to advise the defendant of the nature of the charges, the possible punishment, mitigating circumstances, and “all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.” Minn. R. Crim. P. 5.04, subd. 1(4).

The record in this case contains no written or on-the-record waiver or colloquy sufficient to satisfy the requirements of the rules. The question remaining is whether Hall forfeited his right to counsel. A defendant forfeits the right to counsel if the “defendant engages in extremely dilatory conduct.” *Id.* at 505 (quotations omitted). Forfeiture does not require a waiver colloquy and is “reserved for severe misconduct, when other efforts to remedy the situation have failed.” *Id.*

In *Jones*, the supreme court concluded that Jones forfeited his right to counsel based on the following circumstances:

Jones engaged in conduct that was extremely dilatory. Almost a full year passed between Jones’s first bail appearance and his trial. Jones appeared for court without counsel on eight separate occasions. On seven of those occasions, Jones was told to retain counsel. Jones applied for and was denied a public defender at least three times. He repeatedly told the district court that he was planning on retaining private counsel, and he was granted three continuances solely for the purpose of giving him time to do so. The district court also set Jones’s trial date four months after his omnibus hearing so that he could hire counsel. And the district court made it clear to Jones that he would get no more continuances as a pro se party after February 14, 2007.

Id. at 506.

The relevant facts are undisputed. Hall was represented by counsel until counsel entered chemical dependency treatment after Hall pleaded guilty but before sentencing. The sentencing hearing was rescheduled due to counsel’s unavailability and Hall discharged counsel in April 2016, after counsel failed to appear at the rescheduled sentencing hearing. Sentencing was further continued until June 16, 2016, to allow Hall time to obtain counsel. Before the June 16 sentencing hearing, Hall contacted an attorney,

who requested a continuance of the sentencing hearing because she was having difficulty obtaining discovery from Hall's discharged counsel. The district court granted another continuance until June 30, 2016. Hall did not pay the retainer fee and the attorney was not retained. Hall was in prison during the entire time he was attempting to obtain new counsel. Applying de novo review, we conclude that this is not the type of extremely dilatory conduct that occurred in *Jones*.

Because the record does not establish that Hall waived his right to counsel in writing, waived counsel by his conduct, or engaged in extremely dilatory tactics constituting forfeiture, we reverse his sentence and remand for a new sentencing hearing.²

II.

Next, Hall argues that he is entitled to withdraw his guilty plea. Hall was charged with burglary, terroristic threats, domestic assault, and violation of a domestic abuse no contact order (DANCO) involving his former girlfriend R.A.R. On the first day of trial, R.A.R. and her daughter testified, and the state played a recording of the 911 call. On the second day of trial, Hall pleaded guilty to first-degree burglary involving an assault with

² On remand, Hall should be permitted to renew his plea-withdrawal request under the fair-and-just standard with the assistance of counsel because he brought his plea-withdrawal request before sentencing. *See State v. Paige*, 765 N.W.2d 134, 142 (Minn. App. 2009) (remanding to district court with instructions to allow appellant to renew plea-withdrawal request after court resolves his request to discharge counsel based on ineffective assistance). Nothing in this opinion prohibits Hall, with the assistance of counsel, from renewing his motion to disqualify the district court judge and from bringing any other motions relating to sentencing that he and his counsel deem appropriate.

the agreement that he would be sentenced to 58 months in prison, the low end of the presumptive sentencing range, and the remaining counts of the complaint would be dismissed. On appeal, Hall advances several arguments for plea withdrawal under the fair-and-just and manifest injustice standards. “A defendant has no absolute right to withdraw a guilty plea after entering it.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). “Withdrawal is permitted in two circumstances.” *Id.* First, a district court must allow a defendant to withdraw a guilty plea “[a]t any time” if “withdrawal 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, i.e., accurate, voluntary, and intelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). The defendant bears the burden of showing that his plea was invalid. *Raleigh*, 778 N.W.2d at 94. This court reviews the validity of a plea de novo. *Id.*

Second, a district court may allow a defendant to withdraw a plea before sentencing “if it is fair and just to do so.” Minn. R. Crim. P. 15.05, subd. 2. Although the fair-and-just standard “is less demanding” than the manifest-injustice standard, “it does not allow a defendant to withdraw a guilty plea for simply any reason.” *Theis*, 742 N.W.2d at 646 (quotation omitted). The fair-and-just standard requires the district court to consider the defendant’s reasons supporting withdrawal and the prejudice withdrawal would cause the state. *Raleigh*, 778 N.W.2d at 97. This court reviews a district court’s denial of a plea-withdrawal motion under the fair-and-just standard for an abuse of discretion. *Id.* Because different standards of review apply to plea-withdrawal claims, we consider Hall’s arguments separately.

Manifest injustice standard

The postconviction petition Hall filed after this court stayed his direct appeal sought plea withdrawal under the manifest-injustice standard on the grounds that (1) his plea was not accurate because it did not establish the nonconsensual-entry element of burglary and (2) his counsel provided ineffective assistance in plea negotiations. After an evidentiary hearing at which Hall, the prosecuting attorney, and Hall's counsel testified, the postconviction court denied Hall's plea-withdrawal motion. Because plea withdrawal is required if a plea is invalid, we address these claims.

First, we consider whether Hall's plea was accurate. "The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial." *Raleigh*, 778 N.W.2d at 94. A plea is accurate if it has a proper factual basis, which is typically satisfied by having the defendant "express in his own words what happened." *Id.* Although establishing a factual basis through leading questions is disfavored, it does not necessarily render a plea inaccurate if defense counsel and the prosecuting attorney elicit sufficient testimony establishing the factual basis for the plea. *See id.* (citing *State v. Nelson*, 250 N.W.2d 816, 817 (Minn. 1976)).

Hall pleaded guilty to first-degree burglary involving an assault, which requires the nonconsensual entry of a building and the burglar assaults a person within the building. Minn. Stat. § 609.582, subd. 1(c) (2014).³ With respect to the accuracy claim, the

³ Hall does not challenge the assault element, which was established by Hall's admission that he intended to cause R.A.R. to fear imminent bodily harm by yelling at her.

postconviction court concluded that, despite the use of leading questions, Hall's answers established that he entered R.A.R.'s residence without consent based on his acknowledgement that there was an active DANCO prohibiting him from having contact with the residence, and R.A.R. did not want him to enter the residence because she was "not thrilled" with his behavior the preceding day. The plea-hearing transcript confirms that Hall acknowledged that a DANCO was in effect at the time of the offense and prohibited him from entering the residence, although he was on the lease. *Cf. State v. Colvin*, 645 N.W.2d 449, 454 (Minn. 2002) (concluding violation of no-entry provision of an order for protection establishes the illegal entry element of burglary but cannot satisfy the independent crime requirement). Because Hall admitted a DANCO existed, we are satisfied that the plea was accurate, "despite its disfavored format." *Raleigh*, 778 N.W.2d at 96.

Next, we consider whether Hall is entitled to withdraw his plea based on ineffective assistance of counsel. "A defendant's guilty plea may be constitutionally invalid if the defendant received ineffective assistance of counsel." *Sames v. State*, 805 N.W.2d 565, 567 (Minn. App. 2011). The two-prong *Strickland* standard applies to ineffective-assistance-of-counsel claims, which requires the defendant to (1) "show that counsel's representation fell below an objective standard of reasonableness" and that (2) "counsel's deficient performance prejudiced the defense." *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984)) (other quotation omitted).

[W]hen we review a postconviction court's denial of relief on a claim of ineffective assistance of counsel, we will consider the court's factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court's decision or conclude that the court abused its discretion because postconviction relief is warranted.

State v. Nicks, 831 N.W.2d 493, 503-04 (Minn. 2013).

The postconviction court did not find Hall's testimony that counsel failed to inform him of the state's offer of a 42-month sentence credible based on the testimony of the prosecuting attorney and Hall's counsel to the contrary. The postconviction court also considered prejudice, and found Hall's testimony that he would have accepted the 42-month sentence not credible in light of the prosecuting attorney's testimony that Hall was making counteroffers prior to trial that "were well short of 42 months." Finally, the postconviction court found that Hall's assertion that counsel misinformed him that he would receive a ten-year sentence if the jury found him guilty was not credible, and that Hall did not establish that he received "deficient representation concerning sentencing advice." Based on our review of the postconviction evidentiary-hearing testimony, we are satisfied that the postconviction court's findings are supported by the record and that Hall has not demonstrated that he received ineffective assistance of counsel under the manifest injustice standard.

Fair-and-just standard

Before sentencing while Hall was unrepresented by counsel, Hall attempted to submit a written motion to withdraw his guilty plea, but the district court did not consider it because he did not serve the prosecuting attorney. The district court allowed Hall to

make an oral motion. Hall argued that his plea was not knowing and voluntary because his attorney did not provide effective representation by failing to (1) contact his witnesses and (2) accurately advise him of the penalties he was facing if the state proved the presence-of-a-child aggravating factor under *Blakely*.⁴ The district court denied Hall's plea-withdrawal motion and sentenced Hall according to the plea agreement.

Based on our conclusion that Hall was denied counsel at sentencing, Hall will be permitted to renew his plea-withdrawal arguments for consideration under the fair-and-just standard and with the assistance of counsel.

III.

Hall's final claim is that the district court judge, who had already presided over the first day of trial, the plea, and the sentencing hearing, should not have presided over postconviction proceedings because she was disqualified under the Code of Judicial Conduct. Before the postconviction evidentiary hearing, Hall's counsel filed a "motion for recusal," based on the following letter written by another attorney on his counsel's behalf:

[T]he attorney of record in the above-mentioned case . . . has requested that I contact Your Honor to request that the sentencing date scheduled for this Thursday, March 3, 2016, at 10:00 a.m. be rescheduled, as [he] has entered a 30 day medical facility and is unavailable until next month. I am happy to explain in more detail should Your Honor require but [the] matter is sensitive which is why I am only sending this letter to Your Honor and . . . the County Attorney handling the case.

⁴ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) (holding Sixth Amendment requires defendant's admission or jury's determination beyond a reasonable doubt of facts that support an upward sentencing departure).

The letter was sent to the district court judge and the prosecuting attorney but not to Hall. In the motion, Hall argued that this letter demonstrates that his counsel abdicated his role as counsel and engaged in improper ex parte communication. He further argued that, by receiving the letter, the district court judge had personal knowledge of facts related to Hall's postconviction claims and should not preside over the postconviction evidentiary hearing. The chief judge denied the motion, concluding that the letter did not warrant the judge's disqualification because it was about scheduling matters. The chief judge acknowledged that the perception of bias can support disqualification, but concluded "that perception is not legitimate where [the judge] could reasonably believe that" the attorney acting on Hall's counsel's behalf had contacted Hall.

"A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3). The Code of Judicial Conduct requires a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct Rule 2.11(A). This standard is met when a "reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015) (quotation omitted). A "reasonable examiner" is "an objective, unbiased layperson with full knowledge of the facts and circumstances." *Id.* (quoting *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012)). Additionally, "[a] judge shall not . . . consider ex parte communications . . . concerning a pending . . . matter." Minn. Code Jud. Conduct Rule 2.9. This rule does not apply to communications for scheduling purposes, provided that neither party gains "a procedural, substantive, or

tactical advantage” and the judge notifies “all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.” *Id.* (1)(a). A decision on a motion to remove a judge for cause is within the district court’s discretion and will only be reversed on appeal if the district court abused its discretion. *Hooper v. State*, 838 N.W.2d 775, 790 (Minn. 2013).

On appeal, Hall argues that his motion to disqualify the judge should have been granted under rule 2.9 of the Minnesota Code of Judicial Conduct, because the letter regarding counsel’s unavailability was a “substantive” ex parte communication.⁵ The chief judge concluded that the letter was related to a scheduling matter. Based on our review, the letter appears to have involved more than scheduling matters because it included information that Hall’s counsel entered a medical facility and was unavailable for 30 days. In other words, it related to counsel’s ability to continue to effectively represent Hall, who was incarcerated while he was awaiting sentencing. Moreover, the chief judge did not consider that the rule also requires the district court judge to notify the other parties of the ex parte communication, and the district court judge did not inform Hall of the pertinent facts contained in the letter. Although it may have been reasonable for the district court judge to assume that Hall was aware of his counsel’s unavailability, the record reflects that Hall was not informed. Because the information in the letter was relevant to defense counsel’s ability to continue to effectively represent Hall at sentencing, it would have been

⁵ Hall’s brief references Minn. Code Jud. Conduct Rule 2.11, but he does not explicitly advance the argument that he made in district court regarding disqualification based on the judge’s knowledge of facts that are relevant to the ineffective assistance of counsel claim.

the better practice for the district court judge to ensure that Hall was informed of these circumstances. Nonetheless, we cannot conclude that the chief judge clearly abused its discretion in denying Hall’s motion to disqualify the judge from presiding over the postconviction proceeding because that decision was not “a clearly erroneous conclusion that is against logic and the facts on record.” *State v. Williams*, 842 N.W.2d 308, 313 (Minn. 2014) (quotations omitted).

Affirmed in part, reversed in part, and remanded.