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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2082**

State of Minnesota,
Respondent,

vs.

Wilondae Daron Easter,
Appellant.

**Filed December 10, 2018
Affirmed
Smith, John, Judge***

Blue Earth County District Court
File No. 07-CR-17-1369

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County
Attorney, Mankato, Minnesota (for respondent)

Daniel P. Repka, Andrea L. Repka, Repka Law, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Schellhas, Judge; and
Smith, John, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant's conviction of attempted second-degree criminal sexual conduct and his sentence because the district court did not err by denying appellant's request for a continuance of his sentencing hearing and his motion to withdraw his *Alford* plea.

FACTS

Appellant Wilondae Daron Easter was charged with multiple counts of first- and second-degree criminal sexual conduct with a ten-year old child who was living with Easter and his wife. On the day before trial, Easter agreed to an *Alford* plea to attempted second-degree criminal sexual conduct. Easter filled out a plea petition and was questioned on the record, indicating that he had been informed of his rights and had enough time to consult with his attorney. By stipulation, the factual basis for the plea included the Cornerhouse interview of the child. The parties made a joint recommendation for a stayed 18-month sentence, half of the presumptive guidelines 36-month sentence, because Easter was pleading to an attempt crime. The parties agreed that Easter would be permitted to return home, but he was ordered to have no contact with the victim, who had returned to her mother's home. Easter agreed that "the state could offer—or the evidence that the state would likely offer at trial supports a jury finding [of guilt] with regard to [the charge]."

On the scheduled sentencing date, the presentence investigation (PSI) had not been completed because of questions about out-of-state offenses and because Easter had not completed the questionnaire. Easter's public defender told the court that Easter had not

completed the forms because he was seeking new counsel and wanted to withdraw his plea. Because the PSI was not completed, the district court agreed to reschedule the sentencing hearing for eight days later.

Easter's new attorney, Daniel Repka, filed a continuance motion. His partner, Adam Garber, appeared with Easter at the hearing, arguing that Easter had a right to choose his own counsel and new counsel had not seen the PSI or the psychosexual examination results. The district court refused to grant a continuance, but permitted Garber to argue for withdrawal of the plea. The district court denied the motion to withdraw. The district court gave substitute counsel time to review the PSI and psychosexual report before proceeding with the sentencing.

The probation officer recommended a stayed 24-month sentence and some jail time. Relying on this recommendation, the district court imposed a 24-month stayed sentence and ordered Easter to serve 180 days in jail. Easter appeals from his conviction and sentence, arguing that the district court did not vindicate his right to counsel and that the court erred by denying his motion to withdraw his plea because the sentence imposed was not in accordance with the plea agreement.

D E C I S I O N

I.

Easter argues that the district court abused its discretion by denying Repka's requests for a continuance. We review the district court's ruling on a defendant's motion for a continuance for an abuse of discretion. *State v. Courtney*, 696 N.W.2d 73, 81 (Minn.

2005). The district court's decision denying a continuance may be reversed if it results in prejudice to a defendant. *Id.*

A defendant has a right to assistance of counsel under the federal and state constitutions. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. This includes the right to secure counsel of the defendant's own choosing. *State v. Caldwell*, 639 N.W.2d 64, 69 (Minn. App. 2002), *review denied* (Minn. Mar. 27, 2002). But "[a] defendant cannot demand a continuance for the purpose of delay or for arbitrarily choosing to substitute counsel at the time of trial." *Id.* (quotation omitted). Generally, whether the district court's decision to deny a continuance is an abuse of discretion is based on "the facts and circumstances surrounding the request." *Courtney*, 696 N.W.2d at 82 (quotation omitted).

Easter argues that Repka was given only one business day following a long holiday weekend to acquaint himself with Easter's case. But Easter informed his previous attorney, a public defender, shortly after the plea hearing that he may hire a private attorney. Eight weeks later, Easter was still represented by appointed counsel. The record shows that Easter had not completed the (PSI) because he was considering withdrawing his plea and rejected the public defender's offer to draft a plea withdrawal motion, telling her that he intended to get private counsel. The district court nevertheless continued the sentencing hearing for another eight days, instructing Easter, "[I]f you are hiring a different attorney, he needs to be available [for the scheduled hearing] and he needs to file any motions that are requested well before that time."

Repka filed a certificate of representation and a motion for a continuance on Sunday, and the court received the documents on Monday, before the Tuesday hearing. Repka did

not appear, and the district court denied the continuance motion, saying that Easter “has been considering hiring Mr. Repka for a while and . . . the fault lies . . . with not doing so sooner. We can’t continue this matter indefinitely and have a plea out there with no motion, no sentencing . . . it’s just simply not appropriate.”

Based on the circumstances, the district court did not abuse its discretion by denying Easter’s motion for a continuance. Easter was given enough time to hire new counsel; the district court gave him an additional eight days, instructed Easter that new counsel must appear and must file a timely motion, and warned him of the consequences of failing to do so.

II.

At his sentencing hearing, Easter sought to withdraw his plea pursuant to Minn. R. Crim. P. 15.05, subd. 2, which allows a court in its discretion to permit a defendant to withdraw a guilty plea at any time before sentencing if it is “fair and just to do so.” In his withdrawal motion to the district court, Easter argued as the sole basis for plea withdrawal that he was innocent of the charges against him. On appeal, Easter argues that the district court imposed a sentence that was contrary to the negotiated plea agreement. A defendant can challenge the validity of a guilty plea in a direct appeal, provided the record is sufficient to address the claim. *See State v. Newcombe*, 412 N.W.2d 427, 430 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987).

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). There are two standards for plea withdrawal. A court must permit a defendant to withdraw a plea at any time if necessary to correct a

manifest injustice. See Minn. R. Crim. P. 15.05, subd. 1. *Id.* A manifest injustice exists if a guilty plea is not accurate, intelligent, and voluntary. See *State v. Ecker*, 524 N.W.2d 712, 715-16 (Minn. 1994). A court may permit a defendant to withdraw a guilty plea before sentence is imposed if it is fair and just to do so; although this is a less demanding 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). Because Easter argues on appeal that the court imposed a sentence contrary to the negotiated plea agreement, we consider whether a withdrawal of the plea is necessary to correct a manifest injustice.

We review the interpretation and enforcement of plea agreements de novo, as issues of law. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000).

“If a plea agreement includes an *unconditional* promise of a particular sentence or sentencing range and the sentencing court considers the defendant’s post-plea acts and imposes a more severe sentence, the defendant retains his right to withdraw his guilty plea and stand trial.” *State v. Montez*, 899 N.W.2d 200, 203 (Minn. App. 2017) (emphasis in the original) (quotation omitted). But there is a difference between a plea based on an unconditional promise of an agreed-upon sentence and a plea based on a recommendation for a certain sentence. *Perkins v. State*, 559 N.W.2d 678, 687 (Minn. 1997).

Here, defense counsel and the prosecutor jointly recommended the following terms: (1) a guilty plea to attempted second-degree criminal sexual conduct; (2) imposition of a stayed sentence based on the sentencing guidelines, “anticipate[d]” to be 18 months; and (3) permission for Easter to return to the family home. The district court asked Easter if he understood “the recommendations made for sentencing . . . by the attorneys.” Then the

court stated, “I’ll take those [recommendations] into account along with what the sentencing guidelines are and the pre-sentence investigation in making the ultimate . . . determination of what sentencing will be.” Easter agreed that he understood this.

At the sentencing hearing, the probation officer explained that the presumptive guidelines sentence would be 24 months, stayed, and recommended that Easter serve 180 days in jail as a condition of the stay and complete sex offender treatment. She also stated that Easter should not be allowed to return home because the risk of reoffending was too high based on the psychosexual examination.

Easter’s plea was like that in *Perkins*, based on a joint recommendation by the attorneys to the court, but not binding on the court. *Id.* at 687-88. In *Perkins*, the district court asked the defendant if he understood the difference between a plea recommendation and a plea agreement. *Id.* at 688-89. The district court did not ask Easter this question; but the district court’s remarks to him indicated that the court would consider the joint recommendations along with other matters in sentencing Easter. Easter was not given an unconditional promise of a particular sentence that would support withdrawal of his plea. Because the record indicates that there was no agreement as to the sentence, Easter has not established that he is entitled to plea withdrawal under the manifest injustice standard. *See Perkins*, 559 N.W.2d at 688.

Affirmed.