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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0176**

State of Minnesota,
Respondent,

vs.

Geovany Gonzalez Bernia,
Appellant.

**Filed December 17, 2018
Affirmed
Worke, Judge**

Polk County District Court
File Nos. 60-CR-17-1600, 60-CR-16-52, 60-CR-15-2133

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that he was denied his right to counsel when he sought to withdraw his guilty pleas before sentencing based on ineffective assistance but his attorney continued to represent him. Appellant also argues that his guilty plea to felony failure to appear was invalid. We affirm.

FACTS

In November 2015, appellant Geovany Gonzalez Bernia was charged with threats of violence and fifth-degree assault. In January 2016, Bernia was charged with two counts of second-degree assault, two counts of threats of violence, and violation of an order for protection (OFP). On January 12, 2016, Bernia appeared in both matters and was released on bail with several conditions, including that he “make all court appearances,” and not leave the state without the district court’s permission. The district court stated that any violation could result in new criminal charges.

In February 2016, Bernia was charged with violation of the OFP. Bernia requested a continuance in all three matters. The district court granted the request, instructing Bernia: “You need to appear in court on [March 22, 2016, at 9:00 a.m.] Failure to appear could result in new and separate charges” Bernia did not appear on March 22, 2016. Bernia’s attorney stated that he received a message that Bernia had a family emergency. Warrants were issued for Bernia’s arrest, which were not quashed until July 10, 2017. Bernia was charged with felony failure to appear for court.

On October 25, 2017, Bernia agreed to enter *Alford* pleas in two of the matters. On the charges from November 2015, Bernia agreed to plead guilty to threats of violence. On the charges from January 2016, Bernia agreed to plead guilty to two counts of threats of violence. The state agreed to dismiss the remaining charges and the violation-of-an-OFP charge from February 2016. Bernia separately pleaded guilty to failure to appear. Bernia acknowledged that if he had a trial and was convicted, his likely sentence would be 54 months in prison. The plea agreement contemplated a 21-month sentence.

The district court asked Bernia if he understood that he could have a trial. Bernia replied: “I understand it, but my attorney wants me to do something different and that’s the only deal that they are offering me.” The district court stated that it sounded like Bernia claimed to be innocent and did not want to plead guilty. Bernia, who is from Cuba, replied: “I am innocent, but I am pleading guilty because my mother’s about to die. So . . . I want to leave here.” Bernia indicated that he did not need more time to talk to his attorney, and agreed that he was not coerced into pleading guilty. He indicated that he understood that he waived any defense, and agreed that he was pleading guilty to lesser charges because the evidence supported a guilty verdict of more serious charges.

At sentencing on November 2, 2017, Bernia stated that he wanted a trial and a new attorney because he was innocent but his attorney told him to plead guilty. Bernia’s attorney, who was unaware that Bernia wanted to withdraw his guilty pleas, stated: “[I]f the [c]ourt does deem it appropriate to allow him to withdraw his guilty plea, it sounds like he’s making a request for alternative [c]ounsel.”

Bernia's attorney then cited the rule for plea withdrawal and restated Bernia's reasons: he is not guilty and his attorney was ineffective. He noted that Bernia entered *Alford* pleas, meaning Bernia maintained innocence when he pleaded guilty. Addressing possible prejudice to the prosecution, Bernia's attorney noted that the parties were ready for trial at the plea hearing and a witness had traveled from Virginia. Bernia's attorney stated that he would file a plea-withdrawal motion "immediately," but the prosecutor was prepared to contest the motion without a written submission.

The district court recessed to consider Bernia's motion. The district court noted that Bernia's cases were discussed in detail during numerous appearances and that a "lot of facts were placed on the record" to support his *Alford* pleas. The district court stated that Bernia's attorney was "diligent and deliberate in moving" the cases forward and "spent a great deal of time and effort with [Bernia]." The district court concluded:

[W]e had you set for trial . . . [and] the witnesses were here . . . in the courthouse. We had a witness . . . travel from a significant distance away. . . . We had two interpreters prepared to spend a number of days working with respect to your trial. And, frankly, we've been working on your cases for a very long period of time. We've got file dates that go back to November of 2015 [D]elaying these matters further will certainly have a significant prejudice against the [s]tate. . . . At the time you entered your plea, there were issues and concerns . . . about witness tampering and statements that you had made to potential witnesses in your case. And if we were to delay this any further, . . . I've got concerns about whether there would be further instances of witness tampering.

I do believe that at the time that you entered into your pleas that you knew what you were doing, that you understood the actions that you were taking and the consequences of those actions. . . . [Y]ou have not . . . met the burden of proving that

it would be fair and just to withdraw these pleas of guilty at this time.

The district court sentenced Bernia to 21 months in prison. This appeal followed.

DECISION

Plea withdrawal

Bernia argues that he was denied his right to counsel when he moved to withdraw his guilty pleas before sentencing. A defendant may bring a motion to withdraw a guilty plea before sentencing, which the district court has the discretion to allow “if it is fair and just to do so.” Minn. R. Crim. P. 15.05, subd. 2. The district court considers “the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant’s plea.” *Id.* The defendant has the burden to establish a fair and just reason for withdrawing his guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). A fair and just reason may be ineffective counsel at a plea-withdrawal proceeding due to a conflict of interest. *State v. Paige*, 765 N.W.2d 134, 140 (Minn. App. 2009). If the district court has sufficient notice of a potential conflict that could limit counsel’s representation, it must “ascertain whether an impermissible conflict existed.” *Id.* at 141.

Bernia claims that his case is similar to *Paige*. In *Paige*, the defendant, while represented by private counsel, pleaded guilty to second-degree murder. *Id.* at 136. Acting pro se, Paige requested to withdraw his plea and fire his attorney, alleging that his attorney did not assist him and coerced him into pleading guilty. *Id.* at 136-37. In response, Paige’s attorney moved to withdraw. *Id.* at 137. When the district court held a hearing on Paige’s

request to discharge his attorney and Paige did not have new representation, the district court declined to take action until Paige had substitute counsel. *Id.* Paige did not retain another attorney and was represented by the same attorney at his sentencing/plea-withdrawal hearing. *Id.* Paige's attorney made no argument for plea withdrawal; instead, he expressed uncertainty as to what he could do because the request was based on ineffective assistance. *Id.* The district court denied the plea-withdrawal request. *Id.*

On appeal, Paige argued that the district court improperly addressed his motion to discharge counsel, which resulted in inadequate representation at his plea-withdrawal hearing. *Id.* at 140. This court held that because Paige's attorney did not file a motion, made no argument on Paige's behalf, and stated only that his hands were tied, the district court was on notice of a potential conflict and was required to ascertain whether an impermissible conflict existed. *Id.* at 141. This court remanded to the district court to first address Paige's request to discharge his attorney and then for a plea-withdrawal hearing. *Id.* at 142.

Although Bernia aligns this matter with *Paige*, we observe several significant differences. First, Paige had a private attorney and Bernia was represented by the public defender's office. Bernia's attorney stated at the sentencing hearing that Bernia did not get to choose his attorney and that if he was going to be represented by the public defender's office, his current attorney would continue representing him unless he made a written request to the public defender's office for substitute counsel. Second, Paige's attorney moved to withdraw as counsel whereas Bernia's attorney made no such request.

Third, Paige requested to discharge his attorney *prior* to requesting to withdraw his guilty plea. Here, the sequence is different. Bernia's attorney stated: "The [c]ourt needs to make a determination whether [Bernia] would be allowed to [withdraw his guilty pleas] *Then, if* the [c]ourt does deem it appropriate to allow [Bernia] to withdraw his guilty plea[s], . . . he's making a request for alternative [c]ounsel." (Emphasis added.) Bernia agreed. He did not correct this statement by requesting different representation on his plea-withdrawal request. Moreover, while Paige's plea-withdrawal motion was based on ineffective assistance, Bernia's primary basis for plea withdrawal was his claim of innocence.

Fourth, Paige's attorney did not file a motion or argue in support of Paige's request. Here, Bernia's attorney told the district court that he would file a motion "immediately." The district court, instead, allowed the parties to present their arguments. Bernia's attorney summarized Bernia's reasons for requesting to withdraw his guilty pleas and the possible prejudice to the state. *See* Minn. R. Crim. P. 15.05, subd. 2 (stating that a district court must consider the reasons in support of the motion and any prejudice to the state). Bernia's attorney stated that Bernia claimed he was innocent and that his attorney was ineffective, pointing out that Bernia entered *Alford* pleas. Bernia's attorney suggested that the possible prejudice to the prosecution would be that the parties were ready for trial and one witness had traveled from Virginia. Bernia claims that these comments "undermined" his motion, but they are simply the facts. Additionally, Bernia argued that he only found out about the criminal charges at the last court hearing, his attorney was concerned with immigration and

did not discuss the criminal matters, and he pleaded guilty because his attorney told him to.

Finally, and most importantly, in *Paige*, the district court did not consider Paige's requests. Here, the district court considered Bernia's ineffective-assistance and plea-withdrawal claims. The district court stated that it did not believe Bernia's claim that he just found out about the charges because there were multiple hearings at which the cases were discussed. The district court stated that Bernia's attorney was "diligent and deliberate" and "spent a great deal of time and effort" working with Bernia on his case. The district court also considered the prejudice to the state, noting that the cases were old, one witness had traveled a significant distance, and there were allegations of Bernia tampering with witnesses. Further, at his plea hearing, Bernia indicated that he was not coerced into pleading guilty. The district court thoroughly considered Bernia's claims under the fair-and-just standard; thus, the district court did not abuse its discretion by denying Bernia's request to withdraw his guilty pleas.

Failure-to-appear guilty plea

Bernia argues for the first time on appeal that his guilty plea to failure to appear in court had an insufficient factual basis. Generally, an appellate court does not decide an issue that was not first raised before the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But if the record provides a sufficient basis for meaningful review, a challenge to the validity of a guilty plea may be raised for the first time on appeal. See *State v. Anyanwu*, 681 N.W.2d 411, 413 & n.1 (Minn. App. 2004) (holding that defendant could challenge guilty plea for first time on appeal when challenge was based on matters

of record and no material-fact dispute existed), *overruled on other grounds by Wheeler v. State*, 909 N.W.2d 558 (Minn. 2018). The record here provides an adequate basis for meaningful appellate review.

A valid plea must be accurate, voluntary, and intelligent. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). To be accurate, a guilty plea must be supported by a proper factual basis. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012). A proper factual basis requires sufficient facts on the record supporting a conclusion that the defendant's conduct falls within the charge to which he is pleading guilty. *Kelsey v. State*, 214 N.W.2d 236, 237 (Minn. 1974).

Bernia pleaded guilty to felony failure to appear.

A person charged with . . . a felony and released from custody . . . who intentionally fails to appear when required after having been notified that a failure to appear for a court appearance is a criminal offense, or after having been released on an order or condition that the releasee personally appear when required with respect to the charge or conviction, is guilty of a crime for failure to appear.

Minn. Stat. § 609.49, subd. 1(a) (2016). Bernia argues that the crime “should be limited to cases of willful insubordination of judicial authority.” He asserts that the evidence was insufficient that he missed court to willfully disobey the district court's order because he went to Florida “just to prove that [he] didn't want to be here.”

Bernia seems to suggest that in order to be guilty of felony failure to appear, the reason for failing to appear is the act of sheer defiance of judicial authority. But the statute does not limit the offense to circumstances in which a defendant fails to appear merely in defiance of a court order. Under the statute, a person must be charged with a felony. Bernia

was charged with a felony. A person must be released from custody. Bernia was released from custody. A person must be notified that failure to appear is a crime or have a condition of release that he personally appear when required. Bernia was released with conditions requiring him to “make all court appearances,” and prohibiting him from leaving the state without the district court’s permission. In imposing the conditions of release, the district court stated that a violation could result in criminal charges. When Bernia later requested a continuance, the district court granted the request and told Bernia that his failure to appear at the continued hearing “could result in new and separate charges.”

Finally, a person must intentionally fail to appear. Bernia intentionally failed to appear. In establishing the factual basis for Bernia’s guilty plea, he admitted that he did not appear for the hearing scheduled for March 22. He stated: “Your Honor, I left. I went to Miami, just to prove that I didn’t want to be here.” He admitted that he was required to make that appearance and that “by not being there, even though [he] left the area, that that would constitute a failure to appear for court.”

Even under Bernia’s interpretation, he “willfully disobeyed” the district court’s order. He did not fail to appear because he forgot, was ill or hospitalized, or any other reason outside of his control. He went to Florida to “prove that [he] didn’t want to be here,” which was an intentional act of willful disobedience. The record contains sufficient evidence to conclude that Bernia’s conduct fell within the charge to which he pleaded guilty. As such, Bernia’s guilty plea was accurate and valid.

Affirmed.