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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1514**

State of Minnesota,
Respondent,

vs.

Kenneth Edward Dean,
Appellant.

**Filed February 24, 2020
Affirmed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-17-29962

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this reinstated direct appeal from his conviction for failing to register as a predatory offender, following denial of his postconviction petition seeking plea

withdrawal, appellant argues that his plea was not voluntary or intelligent because he was not informed that his sentence could include a conditional-release term. We affirm.

FACTS

Ten years after being convicted of first-degree criminal-sexual conduct, appellant Kenneth Edward Dean was charged with violating his predatory-offender registration requirements. The complaint alleged that appellant was a risk-level-III predatory offender. The complaint stated that the maximum sentence was five years plus a conditional-release term if appellant was a risk-level-III offender on the date of his registration offense.

Appellant appeared with counsel and pleaded guilty to the charge. He tendered a plea petition to the court indicating that he was entering a “straight plea.” The petition stated that the maximum penalty was five years in prison. Though the petition indicated that “most sex offenses” require a “mandatory period of conditional release,” the petition stated that conditional release was not applicable. The district court accepted appellant’s plea and, that day, sentenced him to 24 months’ imprisonment, with execution of his sentence stayed for three years. The sentence was a dispositional departure. The sentencing order did not reference a conditional-release term, and conditional release was not discussed at the combined plea and sentencing hearing.

Appellant directly appealed his conviction, but later moved to stay the appeal pending postconviction proceedings. We stayed the direct appeal, and appellant then filed a postconviction petition seeking either plea withdrawal or assurances from the state that it would not seek a conditional-release term in the future. Appellant argued that if he was a risk-level-III offender at the time of his registration offense, and the state were able to

prove that to a jury, he would be subject to a ten-year conditional-release term. He asserted that he was not informed of this potentiality prior to pleading guilty, and therefore his plea was involuntary and unintelligent.

The state argued that appellant's claim was not ripe. The state acknowledged that a ten-year conditional-release term could not be imposed "on the record established," and stated that it was "highly unlikely" that it had "a legal basis" to modify appellant's sentence to include the term. The state indicated that it was "not seeking to do so at this time."

The postconviction court summarily denied appellant's petition. The court concluded that appellant's argument, that his plea was unintelligent, was "not ripe" because it was too "far attenuated." The court noted that the state had made no attempt to elicit a jury determination or waiver to establish appellant's offender level at the time of his registration offense. The court also noted that if appellant completed his probation he would never face incarceration or the possibility of conditional release. The court stated that because appellant "did not actually face a consequence of conditional release" his "guilty plea was intelligent." Likewise, the court concluded that appellant's plea was voluntary because, although his plea petition indicated that a conditional-release term was inapplicable and the maximum penalty was five years, those statements were "correct." The court found that, therefore, appellant's plea was not the result of "improper pressure or coercion."

On appellant's motion, we dissolved the stay and reinstated this appeal.

DECISION

“When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court’s decisions using the same standard that we apply on direct appeal.” *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). We review findings of fact for clear error and legal issues de novo. *State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007); *State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994).

We review de novo the validity of a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). “A defendant does not have an absolute right to withdraw a valid guilty plea.” *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). After sentencing, a defendant may withdraw a guilty plea only by establishing that “withdrawal is necessary to correct a manifest injustice.” *Id.* (quoting Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice exists when a guilty plea is not valid. *Id.* A valid 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). “A defendant bears the burden of showing his plea was invalid.” *Raleigh*, 778 N.W.2d at 94.

We begin our analysis with an overview of the ten-year conditional-release term relevant to this appeal. In Minnesota, predatory offenders are assigned a risk level upon release from prison. See Minn. Stat. § 244.052 (2018). A district court *must* impose a ten-year conditional-release term for any *risk-level-III* offender who commits a registration offense. Minn. Stat. § 243.166, subd. 5a (2018); see also *State v. Franson*, 921 N.W.2d 783, 786 (Minn. App. 2018) (indicating that if a risk-level-III offender commits a

registration offense, a ten-year conditional-release term is mandatory), *review denied* (Minn. Feb. 27, 2019). The conditional-release term must be imposed when the court commits the offender “to the custody of the commissioner of corrections.” Minn. Stat. § 243.166, subd. 5a. A district court may not impose the conditional-release term unless the defendant admits that he was a risk-level-III offender at the time of the offense or a jury makes that finding. *State v. Her*, 862 N.W.2d 692, 695-96 (Minn. 2015).

Appellant argues that he was not sufficiently informed of his sentencing exposure. He contends that he is entitled to plea withdrawal because of “the real risk that the [s]tate could ask to convene a sentencing jury to prove his risk level and add ten years of conditional release if [his] probationary sentence was ever executed.” The state argues that the district court properly denied the postconviction petition because appellant’s claim is not ripe for review.

To the degree appellant argues his plea *will be* invalidated by the imposition of a conditional-release term, we agree that appellant’s claim is not ripe. Justiciability is a question of law, which we review de novo. *Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). It is well settled that “there must be a substantial and real controversy between the parties before a case will be considered” by an appellate court. *State v. Brown*, 12 N.W.2d 180, 181 (Minn. 1943).

In *State v. Murphy*, a defendant was sentenced to 96 months in prison and 450 months of probation, and as a condition of probation he was ordered to serve his probation outside of Minnesota and Wisconsin, or in the alternative, outside of a specified area surrounding Minneapolis and St. Paul. 545 N.W.2d 909, 912 (Minn. 1996). He appealed

the probationary condition, which the supreme court refused to consider, deeming it “speculative and not ripe for review.” *Id.* at 918. The supreme court stated that, in order to establish a justiciable controversy, the defendant was required to show a “direct and imminent injury which results from the alleged unconstitutional probationary provision.” *Id.* at 917. The supreme court concluded that the defendant’s claim was too speculative because, by statute, the defendant could be placed on out-of-state probation in only two instances, and the existence of those instances would not be apparent until the defendant was released from prison, which would not occur “for several years.” *Id.* at 918.

Like *Murphy*, appellant’s claim, as it relates to a hypothetical future harm, is not ripe. We do not know whether appellant was a risk-level-III offender when he committed his registration offense; whether appellant will violate probation and be committed to the custody of the commissioner of corrections, necessitating imposition of a conditional-release term; or whether the state will seek to prove that appellant was a risk-level-III offender. Appellant does not face a direct and imminent injury, and his claim is not justiciable.¹ This is not a case of when, it is a case of “if.” *Cf. State ex. rel. Ford v. Schnell*, 933 N.W.2d 393, 403 (Minn. 2019) (concluding that issue was justiciable because

¹ Appellant argues that if he is forced to wait until a ten-year conditional-release term is imposed, he may be unable to seek a remedy because postconviction relief may be time barred. We disagree. When a direct appeal is filed, as is the case here, a petition for postconviction relief must be filed within two years of “an appellate court’s disposition of petitioner’s direct appeal.” Minn. Stat. § 590.01, subd. 4(a) (2018). Appellant was given a stayed three-year sentence on June 18, 2018. We will know if appellant has successfully completed his probationary sentence by June 18, 2021, which is within two years of our disposition of this appeal.

defendant's return to prison was "imminent and almost inevitable," even though it had not yet occurred).

To the degree that appellant argues that his plea was invalid *when entered* because he was not told of the potential for a conditional-release term, appellant's claim is ripe. Such a claim presents a tangible controversy and injury. *See Murphy*, 545 N.W.2d at 917 (discussing ripeness). But any failure to inform appellant of the potential for a conditional-release term does not render his plea involuntary or unintelligent.

"The intelligence requirement ensures that a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea." *Raleigh*, 778 N.W.2d at 96. Consequences are "a plea's direct consequences, namely the maximum sentence and fine." *Id.* "The voluntariness requirement ensures a defendant is not pleading guilty due to improper pressure or coercion." *Id.* "To determine whether a plea is voluntary, the court examines what the parties reasonably understood to be the terms of the plea agreement." *Id.*

Regarding the intelligence of the plea, a defendant need not be advised of every consequence of a plea, and need only be advised of "direct consequences." *Kaiser v. State*, 641 N.W.2d 900, 903-04 (Minn. 2002). Direct consequences are those that have "a definite, immediate and automatic effect on the range of a defendant's punishment." *Id.* at 904 n.6. A conditional-release term is generally a direct consequence of a plea "because it affects the maximum amount of prison time a defendant may serve." *Kobrom v. State*, 863 N.W.2d 88, 92 (Minn. App. 2015). Here, a conditional-release term is not a direct consequence because there is no certainty that a term is applicable. Appellant does not

claim, and the state has not proved, that he was a risk-level-III offender at the time of his registration offense. *See Her*, 862 N.W.2d at 695-96.

Regarding voluntariness, we agree with the district court that appellant was not improperly pressured or coerced to enter his plea. Appellant's plea petition indicated that a term of conditional release was not applicable, and indeed no term is applicable because appellant does not admit that he was a risk-level-III predatory offender at the time of his registration offense, and the state has not proven that fact. *See id.*

Appellant's claim that his plea *will be* rendered invalid by the imposition of a conditional-release term is not ripe for review, and the district court therefore did not err by summarily denying such a claim. *See State v. Lindsey*, 632 N.W.2d 652, 665 (Minn. 2001) (affirming summary denial of postconviction ineffective-assistance-of-counsel claim because the claim was not ripe). Appellant's claim that his plea was invalid *when entered* is ripe. But any failure to inform appellant of the potential for a conditional-release term did not invalidate his plea.

Affirmed.