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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1979**

Kelsey Anna Ballman, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed July 22, 2019  
Reversed and remanded  
Hooten, Judge**

Le Sueur County District Court  
File No. 40-CR-12-1347

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

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

Brent Christian, Le Sueur County Attorney, Jason L. Moran, Assistant County Attorney, Le Center, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Reilly, Judge.

**UNPUBLISHED OPINION**

**HOOTEN, Judge**

In this appeal from the denial of a postconviction petition, appellant claims that she should be allowed to withdraw her 2013 guilty plea in order to prevent a manifest injustice.

Because the district court erred when it modified the terms of appellant's guilty plea without calling on appellant in open court to either affirm or withdraw her plea, we reverse and remand with instructions to allow appellant to withdraw her guilty plea.

### FACTS

Appellant Kelsey Anna Ballman argues that she should be allowed to withdraw her March 5, 2013 guilty plea to felony theft under Minn. Stat. § 609.52, subd. 2 (2012). She claims that the district court erred when it modified her plea agreement without calling on her to either affirm or withdraw her plea and failed to grant her the benefit of her plea agreement with the state.

In October of 2012, appellant took her aunt's ring, valued at more than \$1,000, and gave it to her boyfriend to pawn. *State v. Ballman*, No. A18-0746, 2019 WL 178540, at \*1-2 (Minn. App. Jan. 14, 2019). The state charged her with felony theft as noted above. In March of 2013, appellant agreed to plead guilty to the charged offense in exchange for a stay of adjudication with probation of up to three years. The district court did not accept her plea and instead informed appellant that it was going to wait for the presentence-investigation report (PSI). The PSI acknowledged the agreement for three years, but recommended that if appellant received a stay of adjudication, she be placed on felony probation for five years. At the April 2013 sentencing hearing, appellant's attorney informed the court that both he and appellant had read the PSI and had "no factual additions or corrections."

The district court equivocated on whether to accept the plea granting the stay of adjudication, but eventually agreed to accept it after both the prosecutor and appellant

asked the district court to accept the plea and sentence appellant in accordance with the PSI. Appellant's attorney actually asked or moved the court three separate times to sentence appellant in accordance with the PSI. After both parties asked it to accept appellant's guilty plea and sentence in accordance with the PSI, the district court did so, sentencing appellant to a stay of adjudication and imposing a five-year probationary sentence. Appellant did not object to the imposition of the five-year probationary term at that time.

Now, over six years after appellant pleaded guilty, she appeals, asking this court to either allow her to withdraw her guilty plea or order specific performance of her initially agreed upon three-year probationary sentence. On January 30, 2017, after the expiration of three years of probation but before the five-year probationary period actually expired, a probation violation report was filed in district court. After appellant admitted to this violation and pleaded guilty to a new charge, and then violated her probation two more times, the district court revoked appellant's stay of adjudication and sentenced her to an executed sentence of one year and one day in prison for the 2013 conviction for felony theft.

Appellant initially challenged the district court's revocation of her probation, and in the same appeal, argued that her initial guilty plea was invalid because she did not receive the three-year probationary sentence that she bargained for. *Ballman*, 2019 WL 178540, at \*1. We rejected appellant's claim that the district court abused its discretion when it revoked her probation. *Id.* We also concluded that the issue of whether appellant's initial guilty plea was valid was not properly before the court because that appeal was from a

revocation of appellant's probation, and not from either a postconviction proceeding or from entry of the sentence itself. *Id.* at \*2-3.

While appellant's first appeal was pending, appellant filed a postconviction petition with the district court, arguing that her 2013 guilty plea was not valid. Also before appellant's appeal was resolved, the district court denied appellant's petition. This appeal follows from the denial of appellant's postconviction petition.

### **D E C I S I O N**

This case requires us to determine whether the postconviction court abused its discretion when it refused to allow appellant to withdraw her guilty plea. *Sanchez v. State*, 890 N.W.2d 716, 719–20 (Minn. 2017). “A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). “We review findings of fact for clear error and issues of law de novo.” *Sanchez*, 890 N.W.2d at 720. There is no absolute right to withdraw a guilty plea, but a guilty plea may be withdrawn “upon a timely motion and proof . . . that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs when a guilty plea is not accurate, voluntary, or intelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be intelligent, the guilty plea must be knowing and understanding to “insure that the defendant understands the charges, the rights being waived and the consequences of the guilty plea.” *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

Appellant claims that her guilty plea was unintelligent because her plea agreement required that the district court either sentence her to no more than three years of probation

or explicitly reject her plea and allow her the option to proceed to trial. Appellant also argues that her plea was involuntary because it was induced by an unfulfilled promise by the state that she would receive three years of probation, and that we should either allow her to withdraw her guilty plea or grant her specific performance by retroactively sentencing her to three years of probation. Respondent argues that we should reject appellant's argument because it is not timely.

The district court did not address the question of whether appellant's motion was timely in its order denying appellant's postconviction petition. Instead, it appears to have relied on the fact that appellant was represented by counsel at all times during the plea and sentencing process to conclude that appellant's plea was accurate, voluntary, and intelligent. However, the district court also made a factual finding that appellant's plea agreement was for a "stay of adjudication and up to three years of probation."

### *Timeliness*

Addressing first the issue of timeliness, respondent relies on the language in Minn. R. Crim. P. 15.05, subd. 1, which requires a "timely" motion to withdraw a guilty plea. Whether a motion for plea withdrawal is timely is a question of law subject to de novo review. *See Kubrom v. State*, 863 N.W.2d 88, 91 (Minn. App. 2015).

Respondent cites to cases where Minnesota courts have applied an independent meaning to this requirement. *See State v. Lopez*, 379 N.W.2d 633, 636 (Minn. App. 1986) (holding that an 11-month delay in moving to withdraw a guilty plea was not timely), *review denied* (Minn. Feb. 14, 1986); *Doughman v. State*, 351 N.W.2d 671, 674–75 (Minn. App. 1984) (holding that a 22-month delay in moving to withdraw a guilty plea raised a

question as to the legitimacy of appellant's claims that his guilty plea was not voluntary), *review denied* (Minn. Oct. 16, 1984). But these cases came before the codification of a statutory timeliness requirement in the form of the 2005 amendments to Minn. Stat. § 590.01, subd. 4 (2018). *See Lussier v. State*, 821 N.W.2d 581, 586 n.2 (Minn. 2012) (noting that after the 2005 amendments to Minn. Stat. § 590.01, delays in filing a motion to withdraw a guilty plea are treated no differently than delays in filing a petition for postconviction relief). And after those amendments took effect, it appears that the Minnesota Supreme Court abrogated the earlier caselaw cited by respondent. *See id.*; *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005) (“[W]e conclude that there is no reason to treat timeliness under Rule 15.05 differently from the manner in which delays in filing petitions for postconviction relief are treated.”).

Therefore, the cases cited by respondent are inapposite, and in evaluating whether appellant's postconviction petition was timely, we look exclusively to the requirements in Minn. Stat. § 590.01, subd. 4. That statute requires that petitions for postconviction relief be filed within two years of “the entry of judgment of conviction or sentence if no direct appeal is filed.” Minn. Stat. § 590.01, subd. 4(a)(1). Here, while appellant pleaded guilty in 2013 and received a stay of adjudication upon sentencing, she was not actually convicted of the offense until February 26, 2018, when her stay of adjudication was revoked and she was convicted and sentenced. And appellant filed the petition for postconviction relief on August 17, 2018, well within two years of actually being convicted and sentenced for the charge that is the subject of this appeal. Furthermore, respondent conceded at oral

argument that appellant met the two-year postconviction timeliness requirement. We therefore hold that appellant's postconviction petition was timely.<sup>1</sup>

*Plea agreement*

Appellant claims that her guilty plea was unintelligent because her plea agreement required that the district court either sentence her to no more than three years of probation or explicitly reject her plea and allow her the option to proceed to trial. *See* Minn. R. Crim. P. 15.04, subd. 3(1). Appellant also argues that she is entitled to plea withdrawal because the district court did not comply with Minn. R. Crim. P. 15.04, subd. 3(1).

When a plea is entered and the defendant questioned, the [district] court judge must reject or accept the plea of guilty on the terms of the plea agreement. . . . If the court rejects the plea agreement, it must advise the parties in open court and then call upon the defendant to either affirm or withdraw the plea.

Minn. R. Crim. P. 15.04, subd. 3(1). If a district court rejects an agreement as to sentence without complying with the requirement in Minn. R. Crim. P. 15.04, subd. 3(1), by calling on the defendant in open court to either affirm or withdraw the plea, the only remedy that the defendant is entitled to is plea withdrawal. *See State v. DeZeler*, 427 N.W.2d 231, 234 (Minn. 1988) (“[I]f the trial court rejects an agreement as to sentence, the defendant is entitled to withdraw his plea.”); *see also Melde v. State*, 778 N.W.2d 376, 379 (Minn. App. 2010); *In re Welfare of S.L.*, 663 N.W.2d 31, 34 (Minn. App. 2003); *State v. Hamacher*,

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<sup>1</sup> We note that respondent did not argue that the over five-year delay between the district court granting a stay of adjudication and appellant's postconviction petition constituted an abuse of the judicial process. *See McMaster v. State*, 551 N.W.2d 218, 218–19 (Minn. 1996).

511 N.W.2d 458, 460 (Minn. App. 1994); *State v. Tyska*, 448 N.W.2d 546, 549 (Minn. App. 1989).

The postconviction court made a factual finding that the plea agreement required that appellant receive a stay of adjudication and up to three years of probation.<sup>2</sup> But after granting the stay of adjudication, the district court sentenced appellant to up to five years of probation. Therefore, it rejected appellant’s “plea of guilty on the terms of the plea agreement,” but did not either “advise the parties in open court” or “call upon [appellant] to either affirm or withdraw the plea.” Minn. R. Crim. P. 15.04, subd. 3(1).<sup>3</sup>

We therefore reverse the denial of appellant’s postconviction petition and remand to the district court with instructions to allow appellant to withdraw her guilty plea if she so chooses.<sup>4</sup>

**Reversed and remanded.**

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<sup>2</sup> Respondent does not argue that appellant did not have a plea agreement for three years of probation, or that the district court’s finding that the agreement was for three years of probation was clearly erroneous.

<sup>3</sup> While respondent argues that appellant’s plea was accurate, intelligent, and voluntary because she was always represented by counsel, respondent cites to no authority which excuses the district court’s failure to comply with the requirements of Minn. R. Crim. P. 15.04, subd. 3(1). That rule of criminal procedure places an affirmative obligation on the district court. As above, the district court failed to comply with that obligation. Under this rule, whether appellant was represented by counsel is irrelevant.

<sup>4</sup> Because we conclude that the district court’s error in failing to call on appellant in open court to either affirm or withdraw her guilty plea requires reversal and the specific remedy of plea withdrawal, we do not reach appellant’s other argument that her guilty plea was involuntary because it was induced by an unfulfilled promise by the state.