

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1569**

State of Minnesota,
Respondent,

vs.

Akpene Yaa Asempa,
Appellant.

**Filed June 27, 2022
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CR-18-7904

Keith Ellison, Attorney General, Jilian Frueh, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Natalie R. Paule, Paule Law P.L.L.C., St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant pleaded guilty to one count of theft by swindle. Before sentencing, appellant moved to withdraw her plea. The district court denied appellant's motion and convicted and sentenced her. On appeal, appellant argues that the district court erred by denying her motion to withdraw her guilty plea because she received ineffective assistance

of counsel. We determine appellant’s claim of ineffective assistance of counsel fails and appellant advanced insufficient reasons for withdrawal under the fair-and-just standard. Thus, we affirm.

FACTS

On November 1, 2018, the respondent State of Minnesota charged Akpene Yaa Asempa with one count of theft by swindle under Minn. Stat. § 609.52, subd. 2(a)(4) (2014), three counts of theft by false representation under Minn. Stat. § 609.52, subd. 2(a)(3)(iii) (2014), and one count of identity theft under Minn. Stat. § 609.527, subd. 2 (2014).

The complaint alleged Asempa had “defrauded the Medicaid program by submitting claims for personal care assistant (PCA) services that were either falsified or the product of falsified timesheets.” According to the complaint, Asempa was the owner, biller, and qualified professional for Lifespan Home Care Services, and Asempa “regularly submitted claims” to the Minnesota Department of Human Services (DHS) “for PCA services under the name of one PCA, when the timesheets listed another PCA as the treating provider.” The complaint also alleged Asempa fraudulently received reimbursement from DHS for “non-covered PCA services.” The complaint finally alleged DHS paid Asempa \$50,001.23 as a result of Asempa’s fraudulent submissions.¹

¹ The state amended the complaint two times. Besides the counts already described, the second amended complaint included one count of aiding and abetting identity theft under Minn. Stat. § 609.527, subd. 2 (2014), and four more counts of theft by false representation.

Over a year after the state filed charges, and on the first day scheduled for Asempa's jury trial, Asempa's attorney informed the district court that the parties had reached a plea agreement. Asempa indicated she wanted to plead guilty to one count of theft by swindle in exchange for the state's agreement to dismiss the remaining charges and to recommend a stay of imposition with supervision by probation and Asempa's payment of restitution. In response to questioning by the district court, Asempa stated she understood the plea agreement, wanted to plead guilty to theft by swindle, and understood she was agreeing to pay restitution.

After Asempa was sworn in and entered a guilty plea, she and her attorney discussed her written plea petition, which was filed with the court. Asempa agreed she had reviewed the written plea petition "line by line" with her attorney and had signed it. Asempa agreed that she had "had an adequate opportunity to talk to [her attorney] about [the petition]," that she understood the petition, that she had asked her attorney about the petition, and that she had discussed the plea agreement with her attorney. She also agreed she understood that she was giving up her trial rights, including the right to a trial by jury or court, the right to remain silent, and the right to be presumed innocent. Asempa testified she has a bachelor-of-science degree in nursing and was enrolled in a master's and doctoral program.

In response to questions from her attorney, Asempa testified to the facts underlying her plea. Asempa agreed that, between September 2014 and August 2016, she had "submit[ted] claims" to DHS that "didn't accurately reflect the identities of . . . personal care assistants who had provided services to certain clients" and that she did that "so [she] and [her] company could get paid money for those PCA services." When Asempa's

attorney asked whether she had “g[otten] paid for claims that [she] submitted with incorrect names on them, over \$5,000 of those claims,” Asempa stated, “Not to my intent, yeah.” Asempa also answered, “Not really,” when asked whether she knew “that some of those [PCA] claims had different names on them than the time sheets.” Asempa also stated she was “not sure” when asked whether she would “agree . . . that time sheets that supported [her] claims that [she] submitted to DHS had different names on them than the claims she submitted.”

The district court asked Asempa why she was pleading guilty. Asempa replied, “Well, it’s the best offer that they’ve offered me.” The district court then asked whether Asempa was guilty, and Asempa replied, “I guess, yes.” The district court inquired what Asempa had done to be guilty of theft by swindle, and Asempa responded that she had “billed for the clients that [she had] been servicing with [her] PCA employees” and that she had “not knowingly” billed for any work that had not been done. The district court again asked Asempa why she was pleading guilty, and she replied, “Because that’s what [was being] offered to me.”

The district court informed the parties it would not accept the plea. Asempa immediately responded, “I am guilty of it. That’s it. We need to take care of this today.” The district court stated, “[T]hat’s not the way things work.”

With the district court’s permission, Asempa’s attorney continued to inquire of Asempa. Asempa agreed that she had “submit[ted] billings that were incorrect,” that she “knew they were incorrect when [she] submitted them,” that she “intended then to be paid on those billings,” and that she “was paid” on those billings. Asempa acknowledged that

she had, among other things, “submit[ted] billings that contained the names of PCAs who were not yet certified as PCAs” despite this being “an illegal claim” because “[a] PCA not qualified and not certified is not able to be paid.” Asempa agreed she had “put a different name” on the uncertified PCAs’ time sheets and “changed the name to someone that had been enrolled” as a PCA before submitting the claim to DHS. When Asempa responded, “Yes to everything,” the district court reminded her she should respond truthfully so the court could determine whether she was guilty. The district court then asked whether Asempa had received “more than \$5,000” that she was “not entitled to” between September 2014 and August 2016. Asempa agreed she had.

The district court found the factual basis adequate for the guilty plea, deferred acceptance of the plea until sentencing, and ordered a presentence investigation.

Before the sentencing hearing, Asempa moved to withdraw her guilty plea. Asempa’s motion argued for “the Court’s discretionary allowance of withdrawal before sentence if it is fair and just to do so.” Asempa submitted two affidavits—her own and one from the attorney who had represented her at the plea hearing. Asempa’s attorney’s affidavit averred that Asempa had considered the plea agreement “for approximately one hour,” the attorney “believed that a factual basis existed for the entry of the plea . . . and [the attorney] advised [Asempa] to accept the plea offer and submit the plea.”

Asempa’s affidavit attested her attorney “did not explain each of the counts that [she] was charged with” and “failed to investigate or obtain . . . favorable evidence.” Asempa also averred that she agreed to plead guilty because she “was scared [she] would be taken to jail if [she] did not agree to the plea,” and she “entered the plea without

sufficient time to understand and consider it.” The state opposed Asempa’s motion, arguing that granting withdrawal would “significant[ly] prejudice” the state because they had released thirteen witnesses.

After a hearing was held in January 2021, the district court denied the motion to withdraw. In a written order, the district court found that Asempa “pleaded guilty, signed a petition to enter a guilty plea, and was informed of her rights on the record when she pleaded guilty.” The district court also determined that “[i]t would not be fair and just to allow [Asempa] to withdraw her plea,” reasoning that, while “the prejudice to the State would not be overwhelming,” granting the motion “would undermine the plea bargaining process.” The district court stated that Asempa “has buyer’s remorse about her plea, which is common and understandable, but is not a sufficient reason to allow her to withdraw her guilty plea.”

The district court later accepted Asempa’s plea and stayed imposition of sentence, placing Asempa on probation for three years.

Asempa appeals.

DECISION

Asempa argues her conviction should be reversed and she should be allowed to withdraw her guilty plea for two reasons: (1) she received ineffective assistance of counsel; and (2) it would have been “fair and just” to allow Asempa to withdraw her plea before sentencing because she received ineffective assistance of counsel.

“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). Rather, they may do so if one of two standards

is met. First, a defendant must be allowed to withdraw her guilty plea at any time if doing so “is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, the district court may, in its discretion, allow a defendant to withdraw a plea at any time before sentencing “if it is fair and just to do so.” Minn. R. Crim. P. 15.05, subd. 2.

Ineffective assistance of counsel can render a guilty plea constitutionally invalid, causing a manifest injustice. *Sames v. State*, 805 N.W.2d 565, 567 (Minn. App. 2011); *see also Raleigh*, 778 N.W.2d at 94 (acknowledging that a “manifest injustice exists if a guilty plea is not valid”). And because “the fair-and-just standard is less demanding than the manifest-injustice standard,” a showing of manifest injustice because of ineffective assistance of counsel would also satisfy the fair-and-just standard. *See State v. Ellis-Strong*, 899 N.W.2d 531, 541 (Minn. App. 2017) (“[I]f Ellis-Strong shows his plea is invalid, he has shown both a manifest injustice and a fair-and-just reason to withdraw his plea as a matter of law.”).

Asempa contends ineffective assistance of counsel supports plea withdrawal under both the manifest-injustice standard and the fair-and-just standard. We examine Asempa’s arguments in turn.

I. Asempa fails to meet her burden to prove ineffective assistance of counsel under the manifest-injustice standard.

Ineffective assistance of counsel renders a guilty plea invalid. *Id.* “Assessing the validity of a plea presents a question of law that we review de novo.” *Raleigh*, 778 N.W.2d at 94. Thus, if Asempa makes a successful showing of ineffective assistance of counsel,

she has shown a “manifest injustice” requiring plea withdrawal. *See Ellis-Strong*, 899 N.W.2d at 541.

A claim of ineffective assistance of counsel requires proof of two elements: (1) that trial counsel’s representation fell below an objective standard of reasonableness (performance element); and (2) that there is “a reasonable probability that, but for counsel’s errors, [Asempa] would not have pleaded guilty and would have insisted on going to trial” (prejudice element). *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This court, however, need not address both elements if it determines Asempa has failed to prove either one. *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014) (“We need not analyze both prongs if either one is determinative.”).

We first examine the performance element. “Whether an attorney’s performance is objectively unreasonable is ‘necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Ellis-Strong*, 899 N.W.2d at 539 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)). “There is a strong presumption that a counsel’s performance falls within the wide range of reasonable professional assistance.” *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted).

Asempa argues that her trial counsel’s performance was objectively unreasonable for several reasons:

Appellant stated under oath that despite telling [counsel] that she was innocent, [counsel] told her he feared for her life and that the judge was going to find her guilty. Appellant also stated that [counsel] told her that if she didn’t take the plea she would be sent to jail immediately.

Asempa also states she “only had 15-30 minutes to discuss the felony plea with her counsel.” Finally, Asempa points to her repeated “statements [during the plea hearing] asserting claims she had no intent and was innocent” as evidence that she was inadequately represented. Asempa concludes: “The record supports the argument that [Asempa] was not fully advised by her attorney of what she was pleading to, the consequences, or the rights she was giving up. The record also supports that [Asempa] did not have enough time to fully understand the plea agreement.”

Asempa’s argument boils down to three contentions: (1) her attorney failed to spend sufficient time with her and therefore did not inform her of her constitutional rights and the details of the plea agreement; (2) she felt pressured when she entered her plea because her attorney stated she would go to prison if she did not agree to the plea offer; and (3) her attorney failed to investigate “evidence that would corroborate her claim of innocence.” These allegations track Asempa’s affidavit in support of her motion to withdraw. We consider each contention in turn.

First, the record does not support Asempa’s contention that her counsel had insufficient time to advise her and failed to adequately inform her of her rights. Generally, a defendant cannot attack the validity of a guilty plea with an affidavit that contradicts sworn statements made by the defendant at the plea hearing. *Coolen v. State*, 179 N.W.2d 81, 86 (Minn. 1970); *State v. Hamilton*, 157 N.W.2d 528, 529 (Minn. 1968); *Anderson v. State*, 746 N.W.2d 901, 907 (Minn. App. 2008), *overruled on other grounds by Wheeler v. State*, 909 N.W.2d 558 (Minn. 2018).

Asempa's trial rights were explicitly addressed in her testimony during the plea hearing and in the signed plea petition that she filed with the district court. Asempa indicated that she understood that she had a right to a trial by jury, to be presumed innocent, to call and question witnesses, and to remain silent. Asempa also confirmed that she had reviewed the plea petition—which reflected these rights—with her attorney “line by line.” Asempa stated that she “had an adequate opportunity to talk to [her attorney] about th[at] document” and that she understood it. Asempa also confirmed that she had discussed the plea agreement with her attorney and that she wanted to plead guilty based on that agreement. Asempa's contentions in her affidavit and on appeal, which directly contradict her statements made under oath during the plea hearing, are insufficient to establish that her attorney failed to advise her of her trial rights. *See Coolen*, 179 N.W.2d at 86; *Hamilton*, 157 N.W.2d at 529; *Anderson*, 746 N.W.2d at 907.

Asempa also appears to argue that her attorney did not ensure her rights “were fulfilled” during the plea hearing. Specifically, Asempa contends that she “[t]hroughout the plea hearing . . . made statements asserting claims she . . . was innocent.” The transcript, however, reflects that Asempa—after being informed of and acknowledging her trial rights—provided an adequate factual basis for theft by swindle. Under Minn. Stat. § 609.52, subd. 2(a)(4), theft by swindle occurs when a person, “by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person.” Asempa's testimony that she intentionally submitted “illegal claim[s]” by “submit[ting] billings that contained the names of PCAs who were not yet certified as

PCAs” and that she received “more than \$5,000” that she was “not entitled to” because of these illegal claims satisfies the elements of this offense.

Second, we are not persuaded by Asempa’s argument that her attorney’s conduct pressured her into pleading guilty. Even if we accept that Asempa’s attorney told Asempa that pleading guilty would allow her to avoid a prison sentence, this conduct is not objectively unreasonable. The supreme court has recognized that “[a] defendant’s motivation to avoid a more serious penalty or set of charges will not invalidate a guilty plea.” *State v. Ecker*, 524 N.W.2d 712, 719 (Minn. 1994); *see also Saliterman v. State*, 443 N.W.2d 841, 843-44 (Minn. App. 1989) (rejecting ineffective-assistance-of-counsel claim where defendant was advised of and accepted a plea agreement to dismiss three of five charges), *rev. denied* (Minn. Oct. 13, 1989). The state charged Asempa with multiple felonies that, had she been convicted, would have led to a presumptive prison commitment under the sentencing guidelines. In contrast, under the plea agreement, the state dismissed all but one charge, and Asempa was placed on probation. Given that avoiding prison time is a valid incentive for a defendant to plead guilty, Asempa’s attorney’s conduct was not objectively unreasonable.

Finally, we reject Asempa’s argument that her attorney failed to investigate potentially relevant evidence. Asempa’s affidavit states that she directed her attorney to “investigate or obtain the favorable evidence that [she] directed him to” and that such evidence would have been “helpful.” Mere speculation about an attorney’s performance, however, is insufficient to establish objectively unreasonable representation under *Strickland*. *In re Civ. Commitment of Johnson*, 931 N.W.2d 649, 658 (Minn. App. 2019)

(rejecting ineffective-assistance-of-counsel claim where appellant lacked evidentiary support). Asempa’s affidavit does not describe what evidence should have been investigated, how that evidence would have been helpful, or why it was objectively unreasonable for her attorney not to investigate that evidence.

In sum, Asempa has failed to establish that her attorney’s performance was “objectively unreasonable.” *Ellis-Strong*, 899 N.W.2d at 539. Because Asempa fails to establish the first *Strickland* element—performance—we need not reach the prejudice element. Thus, the district court did not abuse its discretion by denying Asempa’s motion to withdraw under the manifest-injustice standard.

II. The district court did not abuse its discretion by denying Asempa’s motion to withdraw under the fair-and-just standard.

The fair-and-just standard is set forth in Minnesota Rule of Criminal Procedure 15.05, subdivision 2:

In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving due consideration to 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.

Thus, the fair-and-just standard requires district courts to give “due consideration” to two separate factors: (1) the “reasons advanced . . . in support of the motion” and (2) “any prejudice the granting of the motion would cause to the prosecution.” Minn. R. Crim. P. 15.05, subd. 2; *accord Raleigh*, 778 N.W.2d at 97. The defendant bears the burden of advancing reasons to support withdrawal, and the state bears the burden of showing prejudice. *Raleigh*, 778 N.W.2d at 97. The district court’s decision to deny a withdrawal

motion under the fair-and-just standard is reviewed for an abuse of discretion and is reversed only in the “rare case.” *Id.*

We first consider the reasons for withdrawal advanced by Asempa. Asempa points to the same facts cited to support her claim of ineffective assistance of counsel: her attorney’s failure to advise her of her rights and the nature of the charges against her. Thus, much of our above analysis applies here.

The district court denied Asempa’s motion after determining that “[a]llowing [Asempa] to withdraw her plea at this stage undermines the Court’s trial-setting powers and the plea-bargaining process. [Asempa] has buyer’s remorse about her plea, which is common and understandable, but is not a sufficient reason to allow her to withdraw her guilty plea.” The district court noted that Asempa’s case had been set for a jury trial three times and had been pending for over one year. The district court concluded that it would not be “fair and just” to allow withdrawal.

On this record, we find the district court acted well within its discretion when it denied appellant’s motion to withdraw under the fair-and-just standard. As discussed above, the record reflects that Asempa, with her attorney, went over her written plea petition and her various rights “line by line.” Asempa indicated that she had “had an adequate opportunity to talk to [her attorney] about th[at] document” and that she understood it. Asempa also testified that she wanted to move forward with her guilty plea based on that agreement. The district court repeatedly followed up with questioning to determine whether Asempa was pleading guilty because she was actually guilty, and Asempa responded that she was guilty. This record supports the district court’s finding that

Asempa's motion to withdraw stemmed from "buyer's remorse" and that Asempa did not furnish a fair-and-just reason to permit withdrawal of her guilty plea.

Because the district court's denial of Asempa's motion was not an abuse of discretion, we need not consider the district court's analysis of prejudice to the state's case.

Affirmed.