

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37006

STATE OF IDAHO,)	2011 Unpublished Opinion No. 622
)	
Plaintiff-Respondent,)	Filed: September 16, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
DAVID ROY BAKKE,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Minidoka County. Hon. John M. Melanson, District Judge.

Orders denying motion to withdraw guilty plea for burglary and denying, in part, I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

David Roy Bakke appeals from the district court’s orders denying his second written motion to withdraw his guilty plea for burglary and denying, in part, his Idaho Criminal Rule 35 motion for a reduction in sentence. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Bakke was charged with burglary and petit theft. On the morning of trial, pursuant to a plea agreement, Bakke entered a guilty plea to burglary and the State dismissed the petit theft charge. At a status conference two months later, Bakke made an oral motion to withdraw his guilty plea. The district court denied it without prejudice because of a pending psychological evaluation. After receiving a report of that evaluation, the district court held another status conference and found Bakke competent to stand trial. Subsequently, Bakke filed a written motion to withdraw his guilty plea. The district court again denied the motion, finding that

Bakke was competent, his plea was entered voluntarily, and he offered no plausible reason as to why it should be withdrawn. Months later, Bakke filed a second written motion to withdraw his guilty plea after he was appointed new counsel. This new motion elaborated on and asserted grounds similar to the previous motion, supported by an affidavit and testimony only from Bakke himself. The district court denied this motion as well, noting issues of credibility and contradictions between Bakke's statements at the plea hearing and statements in Bakke's affidavit.

The case proceeded to sentencing where the district court imposed a unified sentence of eight years with two and one-half years fixed. Bakke filed a Rule 35 motion to reduce his sentence, which the court granted in part--giving more credit for time served--and denied in part by declining to further reduce the sentence. Bakke appeals both the denial of his motion to withdraw his guilty plea and the denial, in part, of his Rule 35 motion.

II.

DISCUSSION

A. Motion to Withdraw Guilty Plea

The core of Bakke's argument is that his perception of his attorney's unpreparedness for trial is a just reason for withdrawing a guilty plea and therefore, the court erred in denying it. Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* This is done by looking at whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

As the court's decision is discretionary, withdrawal of a guilty plea is not an automatic right; the burden rests on the defendant to demonstrate a justification for withdrawing his guilty plea. *State v. Acevedo*, 131 Idaho 513, 516, 960 P.2d 196, 199 (Ct. App. 1998). If made before sentencing, the defendant's burden is to show that there is a "just reason" for withdrawing the plea. *State v. Arthur*, 145 Idaho 219, 222, 177 P.3d 966, 969 (2008); *Freeman*, 110 Idaho at 121, 714 P.2d at 90. Even upon a showing of a just reason, a motion to withdraw may still be denied

if there is prejudice to the State. *State v. McFarland*, 130 Idaho 358, 362, 941 P.2d 330, 334 (Ct. App. 1997). To constitute a just reason, a defendant must demonstrate more than a mere assertion of innocence, which by itself is not adequate justification to withdraw a guilty plea. *State v. Rodriguez*, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990); *State v. Stone*, 147 Idaho 330, 333, 208 P.3d 734, 737 (Ct. App. 2009).

A perception of a defendant, at its extreme, may make a plea involuntary because it was not given knowingly or intelligently. However, where the plea is voluntary, a defendant's subjective impressions alone are generally not sufficient grounds on which to vacate a guilty plea. *See State v. Dye*, 124 Idaho 250, 256, 858 P.2d 789, 795 (Ct. App. 1993) (defendant's perception of a conflict of interest between counsel and an integral witness, along with perception of inadequate time to prepare for trial, did not support withdrawal of a guilty plea). Moreover, in considering a defendant's evidence to determine if it constitutes a just reason, the good faith, credibility and weight of the defendant's support of his motion to withdraw are matters for the trial court to decide. *State v. Knowlton*, 122 Idaho 548, 549, 835 P.2d 1359, 1360 (Ct. App. 1992). This Court will not substitute its view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *State v. Flowers*, 131 Idaho 205, 207, 953 P.2d 645, 647 (Ct. App. 1998).

Bakke argues he has a just reason for withdrawing his guilty plea in that he "felt pressured into pleading guilty on the day of trial because it was apparent to him that his counsel was not prepared for trial." In so arguing, Bakke accepts that his arguments are not enough to establish that the plea was unconstitutional for want of voluntariness: Bakke was found competent to stand trial and enter a plea notwithstanding the evaluation of his mental condition. Additionally, the evidence used to support the perception that defense counsel was unprepared for trial consists only of an affidavit by Bakke and his own testimony at the hearing on the motion.

In this case, the offer of proof was, in essence, an issue of credibility for the district court. The court found Bakke's testimony at the plea hearing more credible than the subsequent testimony and the affidavit. The district court relied on Bakke's testimony during the plea hearing that he was not under pressure or coerced to enter the plea:

[Court]: But is this plea of your own free will and volition?

[Bakke]: Yes, sir.
[Court]: Has anybody threatened you, pressured you or coerced you into entering the plea?
[Bakke]: No, sir.
[Court]: Has anyone told you what you have to say here today in order for this court to accept your plea?
[Bakke]: No, not specifically.
[Court]: Well, has anyone--I mean are your words your own words?
[Bakke]: Yes, sir.
[Court]: Has anyone prevented you from saying anything you want to say?
[Bakke]: Not so far, no sir.
[Court]: Okay, do you understand the whole idea here is that I'm telling you what you're charged with, what the maximum possible penalties and other consequences are, what your rights are, what it is you give up by pleading guilty so you can decide, make an informed decision about whether you want to plead guilty or go to a trial?
And it's your decision. Okay, that's what I'm trying to convey to you and be real clear about.
Do you understand that?
[Bakke]: Yes, sir, I do.
[Court]: This needs to be your decision. So do you want to go to trial, or do you want to plead guilty?
[Bakke]: No sir, I already under oath gave you my plea, and that's how I would like to proceed.
[Court]: We haven't asked you yet whether--to plead yet. I want to make sure at this point you want to go forward with the guilty plea or you want to go to trial.
[Bakke]: I want to go forward under the stipulations that we have and what we have already discussed.

Bakke also specifically testified as to the preparedness of his counsel, including discovery and investigation, as follows:

[Court]: All right, have you had adequate access to your lawyer to discuss the law and facts of this case?
[Bakke]: Yes, sir.
[Court]: Are you satisfied with his representation?
[Bakke]: Yes, sir.
[Court]: Was there discovery conducted?
[Bakke's Counsel]: Yes.
[Court]: Did you go over this discovery and investigation and whatnot with your client?
[Bakke's Counsel]: Yes.
[Court]: And did you, Mr. Bakke--
[Bakke]: Yes, sir, that's correct.
[Court]: --go thru this information with your lawyer?

[Bakke]: Yes, sir.
[Court]: Do you understand what was discussed?
[Bakke]: Yes, sir.
[Court]: Are you satisfied with his investigation of your case, the discovery completed?
[Bakke]: Yes, sir.
[Court]: Have you asked him to contact any particular witnesses on your behalf?
[Bakke's Counsel]: We have discussed a lot of witnesses. Some we have chosen to investigate further, and some we have decided not to.
[Court]: Are you satisfied with what he's done?
[Bakke]: Yes, sir, to proceed.

Finally, the district court verified Bakke also understood potential defenses and waiver of such defenses upon entering his plea:

[Court]: Okay, do you believe any of your rights have been violated in this case?
[Bakke]: Not that I'm aware of.
[Court]: Do you believe you may have a defense to this charge?
[Bakke's Counsel]: Again, we have discussed a lot of the defenses and options that are available to him; so at this point in time, by him choosing to enter a plea, he's choosing to give up or waive any other defenses that we may have.
[Court]: Do you understand that clearly?
[Bakke]: Even though you asked me if I believe I have a defense, yes, sir, I do.
[Court]: Correct. But do you understand if you plead guilty, that's gone, or those are gone? Water under the bridge, gone forever. Do you understand that?
[Bakke]: Yes, sir.
[Court]: Because that's what--one of the things a jury would do, would be hear the state's evidence, hear any evidence you might wish to present, including any kind of a defense; and let the jury decide in accordance with the legal instructions that the court would give the jury on what the law is.
Do you understand that?
[Bakke]: Yes, sir.
[Court]: And so by pleading guilty, you're making, again, a judicial admission that--to the burglary and, therefore, there's nothing for the jury to decide.
Do you understand that?
[Bakke]: Yes, sir.
[Court]: The jury is sent home?
[Bakke]: Yes, sir.
[Court]: Okay, do you want to--Again, do you understand you waive those? Is that what you want to do?

[Bakke]: That's correct, I understand my attorney's discussed--

[Court]: And do you want to waive any such defenses?

[Bakke's Counsel]: Give up defenses.

[Bakke]: Yes, sir.

In his affidavit, Bakke contradicted the above testimony stating "counsel . . . was not prepared for trial [Counsel] did not prepare me to go on the stand to enable me to provide a defense to the charges." Bakke also had complaints about the lack of discovery, including failures to subpoena phone and purchase records, videotapes, and expert witnesses. Ultimately, however, the district court concluded:

This transcript discloses a complete, under oath, voluntary, and knowing pleas of guilty, with no indication whatsoever of any coercion of any kind [T]he court believes that what Mr. Bakke said first, and that was what he said at the time of the change of plea hearing. The belated statements now that the plea was coerced, that he was under duress, that he thinks maybe [counsel] wasn't prepared for trial are, frankly, self serving, and the court believes they're entitled to little credibility, if any.

The record supports the district court's determination and we will not substitute our view of credibility or reliability of evidence for that of the district court. Consequently, we conclude the district court did not err in denying Bakke's motion to withdraw his guilty plea.

B. Motion for a Sentence Reduction

Bakke argues that his sentence is excessive due to his health conditions. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the otherwise lawful sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984). Though a health condition may be considered in determining the reasonableness of a sentence, it is not necessarily a determinative factor. *State v. James*, 112 Idaho 239, 243-44, 731 P.2d 234, 238-89 (Ct. App. 1986).

Upon review of the record, we conclude no abuse of discretion has been shown. Some of the health issues Bakke asserted to support the motion to reduce his sentence preexisted the original sentencing and were contained within the Presentence Investigation Report. Though the health issues were not explicitly discussed at the sentencing hearing, the court properly based the sentence on the primary objective of protecting society and the related goals of deterrence, rehabilitation, and retribution. Bakke has not demonstrated why his new health conditions should now be a determinative factor and make this otherwise reasonable sentence unduly harsh.

III.

CONCLUSION

The district court did not err in determining Bakke failed in his burden to show a “just reason” for withdrawal of his guilty plea. The district court did not err in determining Bakke’s health conditions did not merit a reduction of his sentence. Accordingly, we affirm the district court’s orders denying Bakke’s motion to withdraw his guilty plea and denying his Rule 35 motion, in part.

Chief Judge GRATTON and Judge LANSING **CONCUR.**