

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36536

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 526
	)	
Plaintiff-Respondent,	)	Filed: June 17, 2011
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
JOHN HENRY McELHINEY,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order denying motion to withdraw guilty plea, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

John Henry McElhiney appeals from the district court’s denial of his motion to withdraw his guilty plea. For the reasons set forth below, we affirm.

I.

BACKGROUND

On January 23, 2008, a grand jury indicted McElhiney for felony murder. Idaho Code § 18-4003. Prior to trial, McElhiney entered into a binding Idaho Criminal Rule 11 plea agreement with the state in which he agreed to plead guilty to first degree felony murder in exchange for a unified life sentence with a determinate term of twenty-two years. At the change of plea hearing, the district court engaged McElhiney with regard to the rights he was waiving pursuant to the plea agreement. The district court also informed McElhiney of the potential punishment for felony murder, and inquired as to whether McElhiney had adequate time to consult with his attorneys and review the evidence in the case, whether he understood the terms

of the plea agreement and the waivers within his plea, and whether he was entering the plea voluntarily. McElhiney responded in the affirmative to the court's inquiries.

Approximately one month after entering his guilty plea, but prior to sentencing, McElhiney filed a motion to withdraw his guilty plea. McElhiney asserted that his plea was not entered "knowingly, voluntarily and/or intelligently." McElhiney alleged that his trial counsel had lied to him about potential defense witnesses and evidence, that his trial counsel had placed all of her efforts in getting him to accept a guilty plea, and that he had entered his guilty plea "only under extreme duress." McElhiney requested and was granted appointment of conflict counsel for the remainder of the proceedings in the case. After an evidentiary hearing was conducted, the district court denied McElhiney's motion finding McElhiney's testimony in support of his motion to withdraw his plea was not credible. The district court entered a written order denying McElhiney's motion to withdraw his guilty plea and imposed the agreed upon sentence. McElhiney appeals.

## II. DISCUSSION

McElhiney asserts that the district court abused its discretion by denying his motion to withdraw his guilty plea. Idaho Criminal Rule 33(c) governs the withdrawal of guilty pleas.<sup>1</sup> The granting or denial of such a motion is within the discretion of the trial court. *State v. Rodriguez*, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). When the motion is made before the pronouncement of sentence, such discretion should be liberally exercised. *Id.* Before sentencing, the inconvenience to the court and prosecution resulting from a change of plea is ordinarily slight as compared to protecting the right of the accused to trial by jury. *State v. Johnson*, 120 Idaho 408, 415, 816 P.2d 364, 371 (Ct. App. 1991). Presentence withdrawal of a guilty plea is not an automatic right; the defendant has the burden of showing a "just reason" exists to withdraw the plea. *State v. Hawkins*, 117 Idaho 285, 289, 787 P.2d 271, 275 (1990);

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<sup>1</sup> Idaho Criminal Rule 33(c) states in full:

**Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

*State v. Ward*, 135 Idaho 68, 72, 14 P.3d 388, 392 (Ct. App. 2000); *State v. McFarland*, 130 Idaho 358, 362, 941 P.2d 330, 334 (Ct. App. 1997). We review the decision of the trial court for an abuse of discretion. *State v. Gardner*, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct. App. 1994); *Rodriguez*, 118 Idaho at 959, 801 P.2d at 1310. When a trial court’s discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). Appellate review of the denial of a motion to withdraw a plea is limited to whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *McFarland*, 130 Idaho at 361, 941 P.2d at 333.

When analyzing a motion to withdraw a guilty plea, the first step is to determine whether the plea was knowingly, intelligently, and voluntarily made. *State v. Hanslovan*, 147 Idaho 530, 536, 211 P.3d 775, 781 (Ct. App. 2008); *Rodriguez*, 118 Idaho at 959, 801 P.2d at 1310. Then, if the plea is constitutionally valid, the court must decide whether there are any other just reasons for withdrawal of the plea. *Rodriguez*, 118 Idaho at 959, 801 P.2d at 1310. If the defendant meets this burden, the state can avoid withdrawal of the plea by demonstrating the existence of prejudice. *Hanslovan*, 147 Idaho at 536, 211 P.3d at 781; *Ward*, 135 Idaho at 72, 14 P.3d at 392.

McElhiney asserts that the failure of his attorney to provide him with “adequate consultation” with regard to any potential defenses he may have had at trial under his “version of the facts” relating to the felony murder charge constituted a just reason for withdrawal of his guilty plea.<sup>2</sup> McElhiney further argues that his attorney’s actions had a material and highly coercive impact on his decision to plead guilty.

At the hearing on the motion to withdraw his guilty plea, both McElhiney and his counsel testified. The district court determined that McElhiney’s testimony that he was “lying” when he entered his guilty plea was not credible, that McElhiney’s plea was made knowingly, voluntarily, and intelligently, and that McElhiney failed to establish any other just reason for withdrawal.

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<sup>2</sup> McElhiney notes in his brief that he is not raising these issues as assertions of ineffective assistance of counsel at this time, and “expressly reserves the right to raise any and all issues of ineffective assistance of counsel through a post-conviction petition, should one be necessary.”

The district court also determined that McElhiney's counsel's testimony was more credible than McElhiney's testimony. McElhiney's counsel testified that she had many meetings with McElhiney with regard to discovery disclosure and that McElhiney had seen everything she had received in the course of representing him. McElhiney's counsel also testified that she never told him that he had no defense and testified that she went over the case with him "in great detail" and "heard many things about his story," but merely cautioned him to be careful that his story remain consistent. With regard to the decision to enter the guilty plea, McElhiney's counsel testified that she never approached the prosecutor's office regarding a plea agreement without McElhiney's express permission.

We defer to the district court's finding that McElhiney's counsel's testimony was credible and that McElhiney's own testimony was not credible, noting our agreement that his statements at the hearing on the motion to withdraw his guilty plea were in contradiction to his past statements at the change of plea hearing. When McElhiney entered his guilty plea, he stated under oath that there was nothing he wanted his attorney to do that had not been done, and that he was satisfied with the representation he received. McElhiney has failed to identify any of the potential defenses that he believes he was not apprised of by his attorney, and has failed to show that his attorney would not listen to his "personal version of the facts." Moreover, the record does not reflect any instances of coercion on his attorney's part with regard to McElhiney pleading guilty. Indeed, the district court specifically asked McElhiney at the change of plea hearing if he felt like he was under any kind of coercion from any source to fill out the guilty plea advisory form, and McElhiney answered in the negative. It appears that McElhiney is seeking to withdraw his guilty plea due to nothing more than a change of heart, which does not constitute a just reason. Therefore, McElhiney has failed to show that the district court abused its discretion in denying his motion to withdraw his guilty plea.

### **III.**

#### **CONCLUSION**

The district court did not abuse its discretion by denying McElhiney's motion to withdraw his guilty plea. Accordingly, we affirm his judgment of conviction and sentence for felony murder.

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