IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34071

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 567**
	)	
Plaintiff-Respondent,	)	**Filed: July 31, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JOHN H. COOPER,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Judgment of conviction and unified sentence of four years, with two years determinate, for possession of a controlled substance with intent to deliver, reversed and case remanded.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

John H. Cooper appeals from his judgment of conviction and sentence. Specifically, he challenges the district court's denial of his motion to withdraw his guilty plea and alleges that his sentence is excessive. We reverse and remand for further proceedings.

I.
BACKGROUND

In August of 2006, the car in which Cooper was riding was stopped for a traffic violation. Cooper was very nervous and repeatedly grabbed his pants pocket as though trying to manipulate the contents. An officer made contact with Cooper, and learned that there was a felony warrant for Cooper's arrest. Cooper was arrested on the warrant and methamphetamine was discovered on his person, along with $306 in cash. A search of the vehicle incident to the arrest of the driver revealed a brown planner with plastic bags containing methamphetamine. Cooper admitted to

officers that the planner was his. Cooper was charged with possession of a controlled substance, methamphetamine, with intent to deliver, I.C. § 37-2732(a)(1)(A). He was bound over to district court, where he entered a plea of not guilty.

Shortly before trial, Cooper informed his attorney that he wanted to accept the state's plea offer, but then changed his mind in court. Cooper again changed his mind, and agreed to plead guilty in exchange for the state's promise not to refile two delivery charges that were dismissed at the preliminary hearing and not to bring any enhancement charges. The state further agreed to concur with the recommendations of the presentence investigation report (PSI), leaving Cooper free to argue for a lesser sentence. When asked if he wanted to enter a guilty plea, Cooper informed the court that he felt like he was being forced to plead. Although the court indicated that that was the end of the hearing, Cooper was given a chance to clarify. Cooper indicated confusion over the constantly changing terms of the plea agreement, but put himself "at the mercy of the court." The court then explained its view on sentencing:

> **The Court:** Well, let me tell you something, okay? If you're convicted of this by a jury, your sentence is going to be worse than if you plead guilty, because I always feel if someone enters a plea of guilty, they're taking responsibility for their conduct and they deserve that recognition in sentencing.
>
> If someone, on the other hand, has a trial -- and I'm not saying this would be your case, okay -- but if someone has a trial and they don't have a defense but they just want the state to jump through the hoops and give him a trial, then I always figure, okay, you want to play hard ball, I can play hard ball too.
>
> **Cooper:** That's not my intention.
>
> **The Court:** But sir, what I'm telling you is I don't ever punish anybody for having a jury trial where somebody has a legitimate defense they can raise to the jury, and I certainly -- I have no problem with that. But I do have a problem -- and I'm not talking about your case, I'm talking generally -- I have a problem where if somebody doesn't have a defense and they just want to make the state go through the hoops, go through the expense, inconvenience the jury, and have a trial, just for the hell of it, when that happens, I figure, okay, you want to play hard ball? I can play hard ball with the best of them.
>
> And then at sentencing, if they're convicted, then I take that into account and they get a worse sentence than they would if they would have pled guilty and admitted their responsibility. You see what I mean?
>
> But I'm not talking specifically about your case, so I don't want you to get me wrong here. If you want to have a trial on this, sir, we can sure have a trial Thursday morning.

Thereafter Cooper stated that he wanted to plead guilty, and the court explained the process of obtaining a PSI and the type of recommendations that would be contained within the report. The court reviewed Cooper's conduct that led to the charge and Cooper admitted to being in

possession of a controlled substance and having reason to believe it was methamphetamine. However, he denied that he had any intent to deliver the methamphetamine to anyone else.

Cooper emphasized that the methamphetamine seized was his "own private stash," and that he had no intention to deliver it to anybody else. He denied "stocking up," and stated that the quantity would normally last him about two weeks. The state was unwilling to amend the charge to simple possession, and the court explained to Cooper that it could not accept a guilty plea from him if he denied having the intent to deliver. The court took a recess to allow the state to consider its options. Cooper then agreed to enter an *Alford*[1] plea to the intent portion of the charge, while fully pleading to the possession portion; however the court refused to accept the arrangement. Cooper expressed frustration with the entire process, and affirmed his determination to plead guilty. When asked if he possessed the methamphetamine with intent to deliver, Cooper responded that he was going to deliver it to "[w]hoever came over to the house and wanted to sit down and keep me company." The court then reviewed the rights Cooper was giving up by pleading guilty, identified the maximum possible sentence, and verified that Cooper was satisfied with his representation to that point. Cooper was informed that there would not be an opportunity to withdraw the guilty plea once it was accepted, that the court would not let him do it because the plea was "in cement." The court accepted the plea as knowing and voluntary and set a date for sentencing.

On the day of sentencing, Cooper made an oral motion to withdraw his guilty plea pursuant to Idaho Criminal Rule 33(c) and also moved for replacement of counsel. Cooper's attorney informed the court that "apparently Mr. Cooper is dissatisfied with my services." Cooper admitted that he had read his PSI and then explained his reasons for wanting his current counsel to withdraw and a new attorney to be appointed. Cooper felt that his current attorney's caseload was too high for him to be able to provide quality representation and expressed concern that his attorney was always too tired to focus on his case. The attorney interjected that there was a breakdown in the attorney-client relationship, which may have impacted the decision to plead guilty, and stated that the basis for withdrawing the plea related to a claim of ineffective assistance of counsel. The court re-stated the terms of the plea agreement, focusing on the state's concessions to Cooper, and then addressed "the problem" of allowing withdrawal.

---

[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

> [B]ut here is the problem the way I see it, Mr. Cooper. You entered a -- you entered a knowing plea of guilty to Possession of Controlled Substance with Intent to Deliver Methamphetamine.
>
> We ordered a presentence investigation report. The presentence investigator recommended you go to the Department of Corrections facility, and now you want to come in here and withdraw your plea.
>
> Well, it's too late, and I'm not going to let you do it. And we're going to proceed to sentencing.
>
> **Cooper:** Your Honor --
>
> **The Court:** You pled guilty, man, and that's how it is going to be.

The district court did allow Cooper's counsel of record to withdraw and appointed a new attorney to represent him at sentencing. Cooper was sentenced to serve a unified term of four years, with two years determinate. This appeal followed.

II.

DISCUSSION

Cooper contends that the district court applied an incorrect standard when ruling on his motion to withdraw his guilty plea. Idaho Criminal Rule 33(c) governs the withdrawal of guilty pleas.[2] The grant 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). However, when the defendant's motion is made after having read the PSI and the sentencing recommendations presented therein, then the court has the broad discretion to take into account the defendant's apparent motive in filing such a motion. *State v. Akin*, 139 Idaho 160, 162, 75 P.3d 214, 216 (Ct. App. 2003); *Johnson*, 120 Idaho at 411, 816 P.2d at 367; *State v. Howell*, 104 Idaho 393, 397, 659 P.2d 147, 151 (Ct. App. 1983). This judicial discretion allows the individualization of law and permits justice at times to be hand-made instead of mass-produced. *Howell*, 104 Idaho at 396, 659 P.2d at 150.

---

[2] 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.

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); *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.

The first step in analyzing a motion to withdraw a guilty plea is to determine whether the plea was knowingly, intelligently, and voluntarily made. *Rodriguez*, 118 Idaho at 959, 801 P.2d at 1310. If the plea is constitutionally valid, the court must then determine whether there are any other just reasons for withdrawal of the plea. *Id.*; *see also State v. Dopp*, 124 Idaho 481, 485, 861 P.2d 51, 55 (1993); *Ward*, 135 Idaho at 72, 14 P.3d at 392. This just reason standard does not require that the defendant establish a constitutional defect in the guilty plea. *Id.*; *State v. Henderson*, 113 Idaho 411, 413, 744 P.2d 795, 797 (Ct. App. 1987). Once the defendant has met this burden, the state may avoid withdrawal of the plea by demonstrating the existence of prejudice. *Dopp*, 124 Idaho at 485, 861 P.2d at 55; *Ward*, 135 Idaho at 72, 14 P.3d at 392.

Cooper made two oral motions to the court on the day originally scheduled for sentencing. Cooper briefly explained to the court that he wanted a new attorney because of his current counsel's overload of cases and lack of time to devote to this particular case. Cooper's attorney asserted that the basis for withdrawing the guilty pleas was ineffective assistance of counsel. This was a conclusory summation at best. No evidence was presented, no testimony was heard, and no explanation of how counsel was ineffective was offered. The district court did not ask for reasons or proof, or allow Cooper the opportunity to present his reasons and support them. Indeed, Cooper was effectively acting without representation during the hearing, as he

was seeking removal of his current counsel at the same time. The court then made clear that Cooper's prior review of the PSI was a critical factor in considering whether to allow withdrawal. However, the court concluded that since Cooper had viewed the sentencing recommendation of incarceration, it was "too late" to withdraw the plea. This is not the proper standard. A defendant's review of the PSI is a factor to be considered when reviewing all of the relevant circumstances surrounding the plea and the motion to withdraw the plea, but having reviewed the PSI is not a complete bar to withdrawal. *See Howell*, 104 Idaho at 397, 659 P.2d at 151. Therefore, the court abused its discretion when it denied Cooper's motion to withdraw his guilty plea. A wiser course of proceeding in this case would have been to consider the motion for new counsel first, and rule on the merits before addressing the motion to withdraw the guilty plea. As the district court did thereafter grant the attorney leave to withdraw, new counsel could have been appointed and allowed to represent Cooper on his motion to withdraw his guilty plea at a later date.

Cooper also asserts that the district court imposed an excessive sentence. However, due to our conclusion that the district court abused it's discretion by denying Cooper's motion to withdraw his guilty plea, that issue does not need to be addressed.

III.

CONCLUSION

The district court abused its discretion by denying Cooper's motion to withdraw his guilty plea based on an incorrect standard. We therefore reverse and remand for Cooper to be allowed to present his reasons for withdrawal of his guilty plea with the assistance of counsel.

Judge LANSING and Judge PERRY **CONCUR**.