

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. HUGGINS

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,
V.
KEITH HUGGINS, APPELLANT.

Filed July 24, 2012. No. A-11-570.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge.
Affirmed.

Thomas J. Garvey for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Keith Huggins appeals from his plea-based conviction for second degree murder, a Class IB felony. Huggins filed motions to withdraw his plea which were denied by the district court. Huggins was sentenced to 40 to 40 years' imprisonment. On appeal, Huggins challenges the district court's acceptance of his plea, the district court's failure to allow him to withdraw his no contest plea, the sentence imposed by the district court, and the alleged ineffectiveness of trial counsel. Finding no abuse of discretion in the district court's acceptance of the plea, the district court's denial of the motions to withdraw the plea, or the sentence imposed, we affirm. We do not reach the claim of ineffective assistance of counsel in this direct appeal.

BACKGROUND

On June 16, 2009, the State filed an information in the district court for Douglas County, charging Huggins with first degree murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 2008), a Class I felony; use of a deadly weapon to commit a felony in violation of Neb. Rev.

Stat. § 28-1205(1) (Reissue 2008), a Class II felony; and being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 2008), a Class III felony.

On March 17, 2011, the State filed an amended information charging Huggins with one count of second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 2008), a Class IB felony. Huggins withdrew his previous plea of not guilty and entered a plea of no contest. The State also agreed to recommend a sentence of not less than nor more than 40 years' imprisonment.

At the plea hearing, Huggins was informed that he had a right to 24 hours' notice of the amended information. When the court asked whether Huggins wanted to waive the waiting period, Huggins responded, "If I chose to wait the 24 hours, can it change?" The judge responded, "I can't tell you that, sir. You have the right to have - wait 24 hours before you enter a plea to an Amended Information so" A discussion was had off the record between Huggins and his attorney, and then a short recess was taken. When the proceedings resumed, Huggins agreed to waive the 24-hour service period.

The court then informed Huggins that in order to accept his plea, it had to make sure that he fully understood his constitutional rights; that the plea was made freely, knowingly, intelligently, and voluntarily; and that there was a factual basis for the plea. The court also told Huggins that if he was "at all unsure about this plea we will reinstate the original charge filed against you and proceed with a trial that's scheduled to begin Monday."

Huggins told the court that he had received his diploma through the GED program and could read, write, and understand English. He indicated that he was not under the treatment of a doctor or taking medication for any mental problems at that time. Huggins stated that he understood the charges and the roles of the various people in the courtroom. Huggins affirmed that he understood the possible pleas that he could enter and that, for purposes of sentencing, a plea of no contest is the same as a plea of guilty. The court then read through the various constitutional rights that Huggins would waive by pleading no contest, which rights Huggins indicated that he understood. Throughout the question and answer period, Huggins frequently conferred with his attorney.

The court also informed Huggins that the penalty for the charge is a minimum of 20 years' imprisonment and a maximum of life imprisonment. Huggins indicated that he understood that although the State was recommending a sentence of not less than nor more than 40 years' imprisonment, the court was not bound by the recommendation.

Finally, Huggins told the court that he had had enough time to talk with his attorney prior to coming to court and that there were no defenses that he might have that he had not discussed with his attorney. Huggins told the court that the plea was his own free and voluntary act.

The State set forth the factual basis for the charge as follows: On September 27, 2008, George Marsh was found dead in an alley with apparent gunshot wounds. Subsequent investigation identified a palmprint belonging to Huggins on the side of Marsh's vehicle parked in the alley. Additional investigation through witnesses, telephone records, and Huggins' mail confirmed that he was the shooter. When Huggins was arrested in October 2008, he was in possession of a .357 Magnum revolver which the State had evidence showing was used in the shooting. The State believed the evidence showed that this was a drug transaction that turned into a robbery and that Marsh was killed during the perpetration of that robbery.

Huggins' attorney had nothing to add to the factual basis set forth by the State. He had full access to the State's evidence, did not see any advantage to Huggins were he to have a trial, and believed the facts were sufficient to support a guilty verdict if the case were tried. Counsel believed that Huggins' plea was consistent with the law and the facts and was in Huggins' best interests.

Initially, Huggins had no questions for the court, but then he had a discussion with his attorney apparently about whether his brother would be allowed to visit. When the proceedings resumed, the court found that Huggins' plea was made freely, knowingly, intelligently, and voluntarily and that there was a factual basis for the plea. The court accepted Huggins' plea and ordered a presentence investigation (PSI).

On April 12, 2011, Huggins filed a motion to withdraw his plea. Huggins alleged that after entering his plea of no contest, he discussed the matter in greater detail with his family and decided that he wished to proceed to trial under the original allegations. Huggins decided that the State's witnesses were either not credible or that they might not appear to testify against him.

On May 4, 2011, a hearing was had on Huggins' motion to withdraw his plea. Huggins' attorney stated that he had no evidence to offer but would argue the motion. The following consists of comments by counsel and is not evidence. Counsel noted that Huggins entered his plea with "some hesitancy" and that the court accommodated Huggins' desire to speak to family members prior to entering his plea. Huggins apparently wanted to speak to his mother and attempted to reach her by telephone, but she was at work. He was able to speak with his brother who provided him some advice. Counsel described the deal as an "eleventh-hour offer" and stated that Huggins has since had the opportunity to speak with his mother and review the evidence. Counsel recited that Huggins felt he could challenge one of the State's witnesses who allegedly observed the shooting as well as the credibility of a jailhouse informant. Counsel also indicated that Huggins identified additional witnesses who would provide exculpatory evidence. Finally, Huggins told counsel that he was not aware whether the plea agreement would still be available the following day if he waited the 24 hours after service of the amended information. Huggins then addressed the court, noting that his first attorney was fired due to a conflict of interest, and Huggins thought his present counsel also had a conflict of interest because he had represented the jailhouse informant.

The State responded and noted that all of the witnesses identified by Huggins had been subpoenaed by the State and were prepared to testify if they had gone to trial. The State argued that all of the witness information identified by Huggins and the relevant reports were available to Huggins prior to his plea. The State noted that Huggins' present counsel did represent the jailhouse informant briefly, but that case was dismissed and no reports or discovery were ever given to counsel. Finally, the State argued that Huggins failed to show that the State would not be prejudiced if his plea were withdrawn. The State argued that prejudice would result because the State had been prepared to go to trial, had the witnesses subpoenaed, and had prisoners transported. If the plea were withdrawn, the State would have to try to recover all of those witnesses and prepare them again for trial.

At the conclusion of the hearing, Huggins' attorney requested leave to offer copies of the statements of the witnesses whose testimony Huggins thought were relevant to his case. On

May 5, 2011, counsel offered exhibits consisting of police reports detailing interviews between the Omaha Police Department and four witnesses.

On May 17, 2011, the district court entered an order denying Huggins' motion to withdraw his guilty plea. The court found that Huggins failed to establish that fair and just reasons exist for allowing him to withdraw his plea or that any fraud, mistake, or improper means were used in the procurement of the plea. The court again found that Huggins' no contest plea had been made freely, knowingly, intelligently, and voluntarily and that a factual basis existed for the plea.

On May 26, 2011, Huggins filed a pro se motion to withdraw his plea. Huggins alleged that he pled no contest based on the advice of his attorney that the plea was in his best interests. Huggins stated that although the court advised him that he had certain rights, he "did not realize the full consequences" of his no contest plea. Huggins alleged that his attorney continuously told him that he was prepared to go to trial and that he was confident that they had a good chance to win the case. However, on March 17, his attorney told him, "I just can't beat the case and you need to really consider this deal." Huggins claimed he was "shocked, scared, and confused" when he entered his plea, and he was influenced to make the wrong choice.

A sentencing hearing was held before the district court on June 7, 2011. At that time, the court considered the motion filed by Huggins. Huggins indicated that he did not receive the order ruling on the first motion, so he filed the second pleading. The court again found that Huggins failed to present evidence that he should be allowed to withdraw his plea and denied Huggins' motion.

Huggins' attorney asked the court to honor the plea agreement and enter a sentence of not less than nor more than 40 years' imprisonment. He also informed the court that immediately after Huggins' arrest on this matter, the federal government indicted him for possession of a weapon by a felon. Huggins had been given credit for the time he had served in Douglas County toward his federal sentence, but he requested the court to also credit Huggins in the present case. Finally, Huggins' attorney requested that the sentence imposed run concurrently with the time that Huggins had remaining on his federal sentence, which was approximately 2 years.

The State recommended a sentence of 40 to 40 years' imprisonment. The State had no agreement with Huggins regarding whether the present sentence should be concurrent or consecutive with his federal conviction, but saw "no reason why it should not be run consecutive."

The court sentenced Huggins to a period of 40 to 40 years' imprisonment with credit for 967 days of time served. The sentenced imposed would run consecutive to the federal sentence. The court indicated that it considered the following factors in determining Huggins' sentence: all of the evidence; the nature of the homicide and the present charges; the fact that Huggins' charges were reduced from first degree murder; his criminal history and gang affiliation; his history of violence, including gun charges, robbery, assaults, and prior felony conviction; the nature of the present offense; and the reasonableness of the plea agreement.

ASSIGNMENTS OF ERROR

Huggins asserts, restated, that (1) the district court abused its discretion in accepting Huggins' plea, (2) the district court abused its discretion in failing to allow Huggins to withdraw

his plea, (3) the district court abused its discretion in imposing an excessive sentence, and (4) trial counsel rendered ineffective assistance.

STANDARD OF REVIEW

A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010). The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012). A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The determining factor is whether the record is sufficient to adequately review the question. *Id.*

ANALYSIS

The issues on appeal are whether the trial court abused its discretion in accepting Huggins' plea, denying Huggins' motions to withdraw his no contest plea, and sentencing him to 40 to 40 years' imprisonment. Huggins also alleges that he received ineffective assistance of trial counsel.

Acceptance of Plea.

Generally, in order to support a finding that a plea of guilty has been entered freely, voluntarily, and intelligently, the court must, inter alia, inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

The record from the plea hearing shows the trial court properly advised Huggins of these rights, that he would be waiving these rights by entering a plea, and of the alternative outcomes he could expect at sentencing. Huggins responded affirmatively that he understood these rights and that he was voluntarily choosing to waive them.

Huggins argues that he was not asked whether he was satisfied with the services of his counsel and that Huggins did not have adequate time to think about the plea. Although the trial court must ascertain that a plea is made freely, knowingly, intelligently, and voluntarily, there is no requirement in Nebraska jurisprudence that a trial court must specifically ask if the defendant is satisfied with the services of his counsel. See *State v. Watkins*, *supra*. Further, Huggins specifically answered yes when asked whether he had enough time to talk to his attorney prior to coming to court on his plea and to discuss possible defenses to the charges.

Huggins' claim that the district court failed to make the proper inquiry prior to the time the plea was entered and accepted is without merit. The record shows that the plea was freely, knowingly, intelligently, and voluntarily made. Accordingly, the district court did not abuse its discretion in denying Huggins' motions to withdraw the plea.

Withdrawal of Plea.

Huggins argues that the district court erred in denying his motions to withdraw his plea. If a motion to withdraw a plea of guilty or no contest is made before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance on the plea. *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012). The right to withdraw a plea previously entered is not absolute. *Id.*

Huggins' reasons for motioning to withdraw his plea and proceeding to trial were that he had discussed the matter in greater detail with his family and had reconsidered the evidence of the State's witnesses. Huggins' pro se motion to withdraw his plea alleged he entered the plea based on the advice of counsel that he could no longer beat the case and that the plea was in Huggins' best interests. Huggins also alleged that he was "shocked, scared, and confused" when he entered the plea and that counsel influenced him to make the wrong choice.

After a hearing on Huggins' first motion, the district court denied Huggins' motion to withdraw his plea. The court found that Huggins failed to establish, by clear and convincing evidence, a fair and just reason for allowing him to withdraw his plea, or that any fraud, mistake, or improper means were used in the procurement of the plea. The court also addressed Huggins' pro se motion during the sentencing hearing. At that time, Huggins told the court he had not received the court's order on the first motion at the time he filed the second motion to withdraw his plea. The court again found that Huggins failed to present evidence that he should be allowed to withdraw his plea which was found to have been made freely, knowingly, intelligently, and voluntarily.

At the time of Huggins' plea, the court thoroughly outlined the constitutional rights that Huggins was waiving as a result of his plea. The court also allowed Huggins to consult with his attorney, including a recess in which Huggins apparently spoke with his brother on the telephone. Huggins indicated that he understood the rights that he was waiving, including the right to cross-examine all the witnesses that the prosecutors would call to testify. Huggins also told the court that he had had enough time to consult with his attorney and discuss the defenses to the charges he faced and that the plea was his own free and voluntary act.

Based upon this record, we cannot say that the district court abused its discretion in concluding that Huggins did not meet his burden of proving, by clear and convincing evidence, a fair and just reason for withdrawal of his plea.

Sentence.

Huggins asserts that the district court abused its discretion in imposing the sentence recommended by the State as part of the plea agreement without all of the information necessary to evaluate the appropriate sentence for the alleged crime.

Huggins was convicted of second degree murder, a Class IB felony, punishable by 20 years' to life imprisonment. See, § 28-304; Neb. Rev. Stat. § 28-105 (Reissue 2008). Huggins' sentence of 40 to 40 years' imprisonment is within the statutory guidelines.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

On the advice of his attorney, Huggins declined to participate or provide background information for the PSI. The PSI shows that Huggins was 23 years old at the time he was sentenced. In addition to a significant juvenile record, and misdemeanor and traffic charges, Huggins had been convicted of three felonies: felony assault while in confinement, felony theft by unlawful taking, and federal unlawful transport of a firearm. He also benefited from the plea agreement. In exchange for Huggins' plea, the State dismissed four of the felonies charged in the information, including first degree murder, and charged him with the single offense of second degree murder. Even without Huggins' participation in the PSI, there was ample evidence to support the sentence imposed. Given the violent nature and seriousness of the crimes for which Huggins was charged and his lengthy criminal history, we cannot find that the district court abused its discretion in sentencing Huggins. This assignment of error is without merit.

Ineffective Assistance of Counsel.

Huggins, represented on appeal by counsel different from trial counsel, alleges that his trial counsel provided ineffective assistance. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The determining factor is whether the record is sufficient to adequately review the question. *Id.*

We have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was “so egregious and resulted in such a high level of prejudice [that] no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial.”

State v. Sidzyik, 281 Neb. 305, 311, 795 N.W.2d 281, 287 (2011) (quoting *State v. Young, supra*).

In order to prevail on a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency. *State v. Howard, supra*. When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

Huggins alleges that he received ineffective assistance of counsel at both of the hearings to withdraw his plea. Huggins argues that counsel failed to properly expound upon the relevance of the witnesses' statements to the issue of allowing Huggins to withdraw his plea. Huggins also argues that counsel should have presented testimony from Huggins and his family to explain Huggins' state of mind and Huggins' family's contact, or lack thereof, with him. Finally, Huggins argues that counsel was ineffective at the sentencing hearing when the court addressed Huggins' handwritten motion to withdraw his plea. Counsel made no comments on the record as the court questioned Huggins and, ultimately, dismissed the matter.

Huggins further alleges that counsel was ineffective in recommending that Huggins enter a plea at all. Huggins' pro se motion to withdraw his plea indicates that counsel had previously told him that he was prepared to go to trial and that they had a good chance of winning the case. Huggins felt the plea was a last-minute decision based upon counsel's sudden decision that he could not beat the case.

We conclude that the record on direct appeal is not sufficient to adequately review Huggins' claims. We therefore do not reach Huggins' claim that he received ineffective assistance of trial counsel.

CONCLUSION

We conclude that the district court did not abuse its discretion in its acceptance of the plea, its denial of the motions to withdraw the plea, or the sentence imposed. We do not reach Huggins' claims that his trial counsel provided ineffective assistance because the record on direct appeal is insufficient for adequate review of these claims. Accordingly, we affirm the judgment of the district court.

AFFIRMED.