STATE V. MARQUEZ

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MARIA LOURDES MARQUEZ,
Defendant-Appellant.

NO. 33,527

COURT OF APPEALS OF NEW MEXICO

December 9, 2015

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Darren M. Kugler, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, David Henderson, Assistant Appellate Defender, Santa Fe, NM, Sergio Viscoli, Appellate Defender, Albuquerque, NM, for Appellant

JUDGES

RODERICK T. KENNEDY, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, J. MILES HANISEE, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Judge.

{1} Maria Marquez, Defendant in this case, brings this appeal to contest the district court's denial of her motion to withdraw her guilty plea. Defendant contends that her plea was not given willingly, knowingly, or intelligently. Further, Defendant asserts that her counsel was ineffective because he did not adequately advise her regarding her case or the potential amount of incarceration to which she was subjecting herself by signing the plea agreement.

{2} The record in this case reveals that the district court complied with Rules 5-303 and 5-304 NMRA when accepting Defendant's guilty plea, and Defendant does not point to any essential information that the district court omitted. Regarding her ineffective assistance of counsel claim, Defendant does not present any evidence to corroborate her own self-serving testimony to support her assertion that she would not have pleaded guilty had defense counsel not provided ineffective assistance. As such, she has failed to satisfy her burden of proving prejudice. We conclude that the district court did not abuse its discretion in denying Defendant's motion to withdraw her guilty plea.

I. BACKGROUND

{3} On January 23, 2013, Defendant pleaded guilty to one count of possession of a controlled substance and one count of tampering with evidence. The district court orally sentenced Defendant, and she immediately made an oral motion to withdraw her plea. The district court denied the oral motion, but allowed counsel to file a written motion at a later date. Defendant got new counsel who then filed a written motion to withdraw the guilty plea.

The district court held a hearing on the motion to withdraw, during which Defendant testified as the only witness. The district court again denied Defendant's motion and issued an order reflecting that denial. Defendant appeals the district court's order denying her motion to withdraw her plea.

A. Change of Plea Hearing

1. Terms of the Plea Agreement

{4} According to the plea agreement, the basic sentence for count one was an eighteen-month sentence to be followed by one year of parole with a habitual offender enhancement of one year. The plea agreement also stated that the basic sentence for count two was eighteen months, to be followed by one year of parole. The State agreed not to bring additional habitual offender proceedings during the initial sentencing in exchange for Defendant's plea. The plea agreement also stated that there was no agreement as to sentencing.

2. Plea Colloquy and Sentencing Recommendations

{5} Prior to Defendant entering her guilty plea, the district court questioned Defendant as to whether she had the opportunity to consult defense counsel regarding the plea agreement. Defendant answered in the affirmative. The district court emphasized that the plea agreement contained no agreement as to sentencing, and explained to Defendant that although the State agreed not to oppose running counts one and two concurrently, it was ultimately up to the court to decide Defendant's sentence. Defendant stated that she understood. In response to the court's questioning, Defendant acknowledged that she understood that she was subjecting herself to a minimum mandatory sentence of one year, regardless of what sentence the district court imposed. The district court reviewed each count and the maximum sentence associated with each count with Defendant, and Defendant indicated that she understood the charges and associated penalties. The district court explained to Defendant that she was giving up her right to a jury trial and the rights associated therewith. In response to the district court's further questioning, Defendant confirmed that she was entering her plea voluntarily. The district court found that Defendant understood the charges as set forth in the indictment and the maximum possible sentence for the offenses charged. The district court accepted Defendant's guilty plea as to counts one and two, finding Defendant's plea to be knowingly and voluntarily given.

{6} Despite the absence of agreement as to sentence in the plea agreement, the State recommended to the court that Defendant serve the one year and thirty-day balance remaining for a prior conviction[1] concurrently with a two year sentence for counts one and two in the present case. The State also asked that counts one and two run consecutively, and that all but two years of the sentence be suspended. Defense counsel requested the same.

3. District Court's Sentence

{7} Contrary to the parties' recommended sentence, the district court orally sentenced Defendant to seven years and thirty days' incarceration. This, according to the court, reflected the one year and thirty-day balance of the sentence in the previous case, plus eighteen months with a one-year habitual offender enhancement for count one, and eighteen months with a one-year habitual offender enhancement for count two—all counts and enhancements to run consecutively.

4. Motion to Withdraw

{8} Defendant, through defense counsel, immediately made an oral request to withdraw the plea, acknowledging the district court's discretion in sentencing but stating that both counsel and Defendant believed the court would impose a two-year sentence pursuant to the recommendations of the parties. The district court denied Defendant's request, but invited defense counsel to file a written motion to withdraw or a motion for reconsideration. The written judgment that the district court issued listed the eighteen months plus one-year enhancement to be followed by one year on parole for count one and the eighteen months plus one year enhancement to be followed by one year on

parole for count two. Counts one and two were to run consecutively resulting in a total term of five years in custody and one year on parole. The district court then required that counts one and two be served consecutively to the sentence in the previous case.

{9} Defendant obtained new counsel who then filed a written motion to withdraw Defendant's plea. The written motion presented the same arguments that Defendant now makes on appeal: Defendant's plea was not voluntary, knowing, and intelligent, and Defendant received ineffective assistance of counsel.

B. Hearing on Motion to Withdraw Plea

{10} The district court held a hearing on Defendant's motion to withdraw the plea in November 2013. Defendant testified as the only witness in that hearing. During her testimony, Defendant gave short "yes" or "no" answers to counsel's leading questions, testifying that she did not discuss the merits of her case with counsel prior to pleading guilty and claiming that her prior attorney had insisted she take the plea regardless of her reluctance to do so. She also testified that because of defense counsel's representations, she had believed that she would receive two years' incarceration. According to Defendant's testimony, she did not know what the plea agreement was when she signed it. She also stated that she did not really understand some of the questions that the district court asked during the change of plea hearing. The State did not call any witnesses, but stated a desire to call Defendant's prior attorney as a witness at a later time if doing so would be helpful to the fact finder. Defendant's prior counsel never testified.

{11} Following Defendant's testimony, Defense counsel proffered three arguments to the court. First, defense counsel argued that Defendant's plea was not voluntary. Next, defense counsel asserted that the plea colloquy did not comply with Rules 5-303 and 5-304. Finally, defense counsel suggested that an agreement existed between Defendant and the State such that Defendant should have been permitted to withdraw her plea when the district court did not accept that agreement. In support of the assertion that an agreement existed that Defendant would receive a two-year sentence, defense counsel pointed to various portions of the change of plea hearing transcript, and suggested that if Defendant received incorrect advice from her attorney that led her to believe she would receive two years' incarceration and that belief was inducement for Defendant's plea, Defendant's plea could not be voluntary.

{12} The State countered Defendant's argument by also pointing to the transcript of the change of plea hearing and arguing that the two-year sentence was a recommendation or request, and not a binding agreement. While acknowledging that Defendant's motion to withdraw was timely, the State asserted that the criteria for withdrawing a plea were not met.

{13} The district court found that, according to the transcript of the change of plea hearing, Defendant's plea was knowing, voluntary, and intelligent. With regard to Defendant's assertion of ineffective assistance of counsel, the district court found that

Defendant was subject to a possible eleven-year total sentence, that there was an advantage to Defendant taking the plea, and that Defendant therefore could not demonstrate prejudice. The district court did acknowledge that its oral sentence incorrectly applied a habitual offender enhancement to both counts one and two and that, in the interest of justice, Defendant was to be resentenced in accordance with the plea agreement.

{14} Following the hearing on the motion, the district court issued an order denying Defendant's motion to withdraw her plea. The district court also issued an amended judgment that resentenced Defendant to four years of incarceration. The four-year incarceration represented eighteen months followed by one year of parole followed by a one-year habitual offender enhancement for count one, and eighteen months followed by one year of parole for count two. Counts one and two were to be served consecutively to one another as well as consecutively to the remaining incarceration period for a previous case. Defendant appealed the district court's order denying her motion to withdraw her guilty plea.

II. DISCUSSION

{15} A motion to withdraw a guilty plea is a matter within "the sound discretion of the trial court" and we review the denial of such motion for abuse of discretion. *State v. Hunter*, 2006-NMSC-043, ¶ 11, 140 N.M. 406, 143 P.3d 168 (internal quotation marks and citation omitted). A court abuses its discretion when it acts unfairly, arbitrarily, or commits manifest error. *State v. Garcia*, 1996-NMSC-013, ¶ 7, 121 N.M. 544, 915 P.2d 300. "A denial of a motion to withdraw a guilty plea constitutes manifest error when the undisputed facts establish that the plea was not knowingly and voluntarily given." *Id.*

{16} Withdrawal of a plea after sentencing has occurred is permitted when necessary to correct a manifest injustice. Rule 5-304 comm. cmt.; *Hunter*, 2006-NMSC-043, ¶ 11. "Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that . . . [she] was denied the effective assistance of counsel. . . [or] the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed[.]" Rule 5-304 comm. cmt.; *see also State v. Lucero*, 1981-NMCA-143, ¶ 21, 97 N.M. 346, 639 P.2d 1200 (acknowledging that if the defendant did not make voluntary or intelligent plea, because of his counsel's ineffective assistance, his guilty plea should be set aside). A defendant seeking to withdraw a guilty plea has the burden of demonstrating that the court's failure to conduct an adequate plea colloquy prejudiced his or her ability to knowingly and voluntarily enter the plea. *State v. Moore*, 2004-NMCA-035, ¶ 14, 135 N.M. 210, 86 P.3d 635.

{17} It is undisputed that the State in this case satisfied any agreement reached with defense counsel to make a sentence recommendation of two years. The question, therefore, is whether the district court, after rejecting the parties' sentencing recommendation, was obligated to allow Defendant to withdraw her plea. *See State v. Pieri*, 2009-NMSC-019, ¶ 33, 146 N.M. 155, 207 P.3d 1132 ("[I]f a court rejects a

sentencing recommendation . . ., the court need not afford the defendant an opportunity to withdraw the plea, *as long as the defendant as been made aware that such recommendations and requests are not binding on the court*." (Emphasis added.)).

{18} Defendant presents two arguments to support her assertion that the district court abused its discretion in denying her motion to withdraw her plea. First, Defendant asserts that her plea was not knowingly, intelligently, or voluntarily given. Second, Defendant asserts defense counsel was ineffective and her plea was therefore not voluntary. We address each argument in turn.

A. Defendant's Plea Was Given Knowingly, Voluntarily, and Intelligently

{19} According to Rule 5-303(F), a district court cannot accept a guilty plea without having first informed the defendant, in open court, of the nature of the charges, the mandatory minimum penalty, the maximum possible penalty, the right to plead not guilty, and the effect of pleading guilty, including loss of right to trial and implications on immigration status. *See* Rule 5-304(B); *see also Marquez v. Hatch*, 2009-NMSC-040, ¶ 8, 146 N.M. 556, 212 P.3d 1110 (acknowledging that the district court has a duty to inform the defendant of the direct consequences of a plea, such as "those that have a definite, immediate and largely automatic effect on the range of the defendant's punishment" (internal quotation marks and citation omitted)). The district court must also determine whether the defendant's plea is given voluntarily by inquiring as to whether the plea is the result of force, threats, promises other than the plea agreement, or other discussions. Rule 5-303(G). In accepting a plea, the district court is not required to adopt a recommended sentence. If the district court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court must inform the defendant "that such recommendations and requests are not binding on the court." Rule 5-304(B). Failure to accurately inform a defendant of his sentencing exposure may render a plea involuntary. *See Marquez*, 2009-NMSC-040, ¶ 6; *Moore*, 2004-NMCA-035, ¶ 16 (acknowledging that a failure to advise the defendant of potential penalties "renders the plea unknowing and involuntary" (internal quotation marks and citation omitted)).

{20} The district court satisfied the requirements of Rules 5-303 and 5-304 in this case. Prior to entering her plea and in response to the district court's inquiries, Defendant confirmed that she understood that she was subject to a mandatory one-year minimum sentence. The district court emphasized that it was not bound by the State's recommendation, and Defendant acknowledged that she understood that. It also questioned whether Defendant understood each charge in the plea agreement, the maximum penalty for each charge, and the potential habitual offender enhancement for each charge. *See Marquez*, 2009-NMSC-040, ¶ 12 (acknowledging that when the plea will result in immediate sentence enhancement because of prior convictions, the district court must advise the defendant of such likelihood before accepting the plea). The district court then informed Defendant of the rights that she was forfeiting by pleading guilty; it also informed her that she had a right not to plead guilty. Defendant confirmed that she had an opportunity to discuss her case with defense counsel and had not been

threatened, forced, or coerced to plead guilty, nor had she been promised anything in exchange for her plea.

{21} Although "it is incumbent on the court to clarify the understanding of a defendant *who demonstrates misunderstanding* regarding the charges and sentencing set forth in a plea agreement[,]" *State v. Ramirez*, 2011-NMSC-025, ¶ 19, 149 N.M. 698, 254 P.3d 649 (emphasis added), Defendant has made no such demonstration so as to require clarification. During the change of plea hearing, Defendant never demonstrated or even hinted at a misunderstanding of the plea agreement.

{22} Defendant testified during the hearing on the motion to withdraw the plea that when she signed the plea, she did not know why she was in court, what the charges against her were, or what the plea agreement said. Notably, however, she did not assert that she did not understand that the district court's questions to her regarding its sentencing discretion. Instead, her testimony focused on her belief, based on defense counsel's representations, that she would definitely receive a two-year sentence. We also note that although Defendant testified to her understanding of what an enhancement was presumably in order to demonstrate a misunderstanding of that term, her definition of an enhancement was accurate for her own case. She described her understanding of an enhancement as an additional year of incarceration for having gone to prison before. Under the terms of the plea agreement, Defendant was subject to just that: a one-year enhancement to an eighteen month sentence for count one. Such an understanding was sufficient. Rather than require defendants to have a comprehensive technical understanding of all relevant legal terms, we require that a defendant understand the direct sentencing consequences of the plea. *Marquez*, 2009-NMSC-040, ¶ 12 (requiring that the district court ensure a defendant understands direct sentencing consequences for plea to be voluntary, knowing, and intelligent).

{23} "[A]bsent a showing of prejudice to the defendant's right to understand [her] guilty plea and its consequences, substantial compliance with Rule 5-303[(F)] is sufficient." *State v. Garcia*, 1996-NMSC-013, ¶ 12, 121 N.M. 544, 915 P.2d 300. Defendant neither points to any necessary information that the court failed to mention during its plea colloquy, nor suggests how the district court should have elicited more convincing evidence of knowledge, intelligence, and voluntariness. Instead, Defendant's argument is limited to cursory assertions that the court failed to adequately ascertain whether Defendant, with a seventh-grade education, understood the court's remarks. Defendant has therefore failed to meet her burden to show that the district court's plea colloquy was inadequate to demonstrate her ability to knowingly and voluntarily enter the plea.

{24} Additionally, we note that the only evidence that supports Defendant's assertion that her plea was not knowingly or voluntarily given was Defendant's self-serving testimony regarding her understanding of the plea agreement. It appears from the record that the district court concluded that Defendant's self-serving testimony, claiming that she did not understand her plea, was not credible. We defer to the district court on matters of witness credibility. *State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482. Given that it is for the district court to weigh evidence and assess credibility,

we cannot conclude that the district court abused its discretion in denying Defendant's motion to withdraw her plea.

{25} We dealt with a similar case in *State v. Ramos*, in which both defense counsel and the prosecution requested a deferred sentence as a part of a plea bargain. 1973-NMCA-103, ¶ 4, 85 N.M. 438, 512 P.2d 1274. The district court did not follow the recommendation; it gave the defendant a higher sentence than the parties requested. *Id.* ¶ 5. The defendant moved to withdraw his guilty plea immediately after hearing the sentence "because there had been plea bargaining and because of the assumption that the trial court would follow the recommendations for a deferred sentence." *Id.* ¶ 6. This Court held that it is not "fundamentally unfair to hold [a] defendant to his guilty plea when the only basis asserted for withdrawal of the plea is that the [district] court refused to follow the sentencing recommendation of the district attorney[.]" *Id.* ¶ 10. Although Defendant in this case based her written motion to withdraw her guilty plea on a more legally sound basis than surprise and dissatisfaction, the record indicates that this is little more than "a case of [D]efendant being fully aware of [her] rights and the consequences of [her] acts and not getting the desired result." *Id.* ¶ 14 (internal quotation marks and citation omitted). We therefore conclude that the district court did not abuse its discretion in denying Defendant's motion to withdraw her plea. *See Pieri*, 2009-NMSC-019, ¶ 25 (acknowledging that where the defendant "has bargained for a sentence recommendation and the prosecution in fact made the recommendation, [the defendant has] received what was bargained for. Therefore, the plea agreement was voluntarily made and the opportunity to withdraw it is no longer required.").

B. Ineffective Assistance of Counsel

{26} "If, by reason of ineffective assistance of counsel [Defendant] did not make a voluntary or intelligent plea, [her] guilty plea should be set aside." *State v. Lucero*, 1981-NMCA-143, ¶ 21, 97 N.M. 346, 639 P.2d 1200. An otherwise valid plea can be undermined by ineffective assistance from counsel. *State v. Tejeiro*, 2015-NMCA-029, ¶ 5, 345 P.3d 1074. In fact, when a defendant enters a plea based on the advice of his attorney, "the voluntariness and intelligence of the defendant's plea generally depends on whether the attorney rendered ineffective assistance in counseling the plea." *Id.* (emphasis, internal quotation marks, and citation omitted). We apply a de novo standard of review to claims of ineffective assistance of counsel, which are mixed questions of law and fact. *State v. Barnett*, 1998-NMCA-105, ¶ 13, 125 N.M. 739, 965 P.2d 323.

{27} We assess ineffective assistance of counsel claims using the two-part standard delineated in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that "defense counsel's performance fell below the standard of a reasonably competent attorney and, due to the deficient performance, the defense was prejudiced." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. "We afford a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Garcia v. State*, 2010-NMSC-023, ¶ 30, 148

N.M. 414, 237 P.3d 716 (internal quotation marks and citation omitted). According to the transcript of the plea hearing, both defense counsel and Defendant were aware of the district court's sentencing discretion. During her testimony at the motion to withdraw hearing, however, Defendant made a general assertion that defense counsel did not explain the plea to her and did not discuss the merits of taking her case to trial. In her brief, Defendant makes the assertion that defense counsel failed to adequately advise her regarding her plea.

{28} Had we decided that defense counsel was ineffective, Defendant's assertion of ineffective assistance would still fail because she cannot demonstrate that counsel's performance was prejudicial to her defense. *See State v. Allen*, 2014-NMCA-047, ¶ 19, 323 P.3d 925 (stating that even if the defendant were able to demonstrate that trial counsel's performance was deficient, the defendant's failure to demonstrate prejudice was fatal to the defendant's ineffective assistance argument), *cert. denied*, 2014-NMCERT-002, 322 P.3d 1062. The prejudice prong of the *Strickland* test, when applied to a defendant whose conviction rests on a plea, requires a defendant to establish that "but for counsel's error, he would not have pleaded guilty and instead gone to trial." *Patterson*, 2001-NMSC-013, ¶ 18 (internal quotation marks and citation omitted). Thus, we must determine whether there exists a " 'reasonable probability' that [D]efendant would have gone to trial instead of pleading guilty . . . had counsel not acted unreasonably." *Id.* (citation omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks and citation omitted).

{29} "[C]ourts are reluctant to rely solely on the self-serving statements of defendants, which are often made after they have been convicted and sentenced[.]" *Id.* ¶ 29. As such, "a defendant is generally required to adduce additional evidence to prove that there is a reasonable probability that he or she would have gone to trial." *Id.*; *Tejeiro*, 2015-NMCA-029, ¶ 15 (stating that generally, a claim of prejudice from ineffective assistance "cannot rest solely on uncorroborated self-serving statements"). During her testimony, Defendant asserted that on the day she entered the plea, she did not know why she was in court, and that defense counsel pressured her to take the plea by representing to her that she would receive a two-year sentence. Defendant testified that she did not want to take the plea and that she informed defense counsel that she did not want to take the plea. According to Defendant, defense counsel spoke with her boyfriend and that as a result of that conversation, her boyfriend advised her to take the plea because she would receive a shorter sentence if she did.

{30} Based on Defendant's testimony, corroborating evidence existed to prove that, absent defense counsel's representations, she would not have taken the plea. The corroborating evidence that could have supported Defendant's assertion of prejudice includes testimony from her boyfriend, she asserted spoke with defense counsel and advised her to take the plea. Defendant's testimony also could have been corroborated by her former counsel. Defendant did not proffer any corroborating evidence from either of these individuals who, according to Defendant's testimony, had knowledge of her disinclination to plead guilty and of defense counsel's advice regarding the plea.

{31} Defendant points to her surprised reaction upon learning of the sentence imposed by the district court as corroborating evidence of the fact that she was not aware the district court could sentence her to more than two years. *See Tejeiro*, 2015-NMCA-029, ¶ 15 (acknowledging that a defendant's behavior after the plea may corroborate his self-serving statements). Defendant's surprise at receiving a higher sentence than expected does not corroborate her assertion that she did not knowingly enter into her plea agreement. Even a defendant who fully understands that a court has sentencing discretion can be surprised by a higher sentence than he or she was expecting. The evidence that Defendant points to is not sufficient to undermine our confidence in the validity of her guilty plea. This is particularly true in light of the completeness of the plea colloquy in which the district court engaged Defendant. As a result, Defendant has failed to demonstrate prejudice under *Strickland*.

{32} It comes to our attention, however, that the district court applied the incorrect standard for determining whether Defendant was prejudiced by defense counsel's actions. Rather than determining whether Defendant would have declined the plea and gone to trial, as it should have, the district court instead looked to the benefit Defendant received by getting a sentence shorter than the eleven-year sentence allowed by law to determine that Defendant could not demonstrate prejudice. While we acknowledge that the district court applied the incorrect standard for prejudice in ineffective assistance of counsel claims, its result—that Defendant did not demonstrate prejudice—was correct. As such, "[u]nder the 'right for any reason' doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 (internal quotation marks and citation omitted). Further, Defendant is in no way prejudiced by our application of this doctrine, because all parties had the opportunity to argue the correct application of the prejudice prong of ineffective assistance during the district court proceedings. *See State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828 (stating that the appellate court does not affirm the district court under the right for any reason doctrine if it would result in unfairness to the appellant).

III. CONCLUSION

{33} The record in this case reflects that Defendant entered a knowing and voluntary guilty plea. Further, there is an absence of any evidence corroborating Defendant's self-serving assertion of prejudice resulting from ineffective assistance of counsel. As such, Defendant has failed to meet her burden of proving that the district court abused its discretion in denying her motion to withdraw her guilty plea. We affirm the district court.

{34} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

1Case number D-307-CR-200900263.