IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KAVALILA SIMEON KAPOTAK JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11345 Trial Court No. 3DI-11-105 CR MEMORANDUM OPINION No. 6065 — June 25, 2014

Appeal from the Superior Court, Third Judicial District, Dillingham, Fred Torrisi, Judge.

Appearances: Nancy Driscoll Stroup, The Law Office of Nancy Driscoll Stroup, Palmer, for the Appellant. Terisia Chleborad, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

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[*] Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution and Administrative Rule 24(d).

In the middle of jury selection, Kavalila Simeon Kapotak Jr. pleaded guilty to one count of sexual abuse of a minor in the second degree. Three weeks later, prior to sentencing, Kapotak moved to withdraw his plea, alleging that his plea was involuntary and that there had been a breakdown in the attorney-client relationship. After concluding that these claims had no merit, the superior court denied the motion.

Kapotak now appeals. For the reasons explained below, we affirm the superior court's order.

Factual background and prior proceedings

Kapotak was indicted on two counts of sexual abuse of a minor in the second degree for engaging in sexual penetration with a fifteen-year-old girl.[1] At some point prior to trial, the State made an offer to resolve those charges, which Kapotak initially rejected. The plea offer required Kapotak to plead guilty to one count of second-degree sexual abuse of a minor. In exchange, the State would dismiss the other charge and agree to a sentence of 8 years with 3 years suspended (5 years to serve), the lowest sentence available within the applicable presumptive range.[2]

Kapotak filed notice that he intended to raise a mistake-of-age defense, and his case was scheduled for trial. However, on the morning of the second day of jury selection, Kapotak told his attorney that he had spoken with his son the night before and had decided to accept the State's plea offer.

Superior Court Judge Fred Torrisi held a change of plea hearing. Kapotak was visibly upset at the hearing. The judge gave Kapotak additional time to compose

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[1] AS 11.41.436(a)(1).

[2] AS 12.55.125(i)(3)(A); AS 12.55.125(o)(2).

himself and also offered him time to talk with his attorney, which he declined. After confirming that Kapotak had no questions or concerns about the plea agreement or his attorney's advice, the judge explained Kapotak's legal rights and the terms of the agreement. The judge verified that Kapotak understood his right to reject the plea agreement and to go to trial. After a lengthy colloquy about Kapotak's reasons for changing his plea, and about the ramifications of that decision, the judge found that Kapotak's plea was voluntary and that he had intelligently and voluntarily waived his right to trial.

Kapotak's motion to withdraw his plea

Approximately three weeks after he changed his plea, before he was sentenced, Kapotak filed a pro se motion to withdraw his guilty plea and to discharge his attorney. Kapotak asserted that he entered the plea "without understanding the nature of the charge, or the consequences of the plea, and against my best wishes, under poor legal advice of counsel and without any prior knowledge of the judicial system and the circumstances that the plea encompasses."

The State opposed the motion, asserting that Kapotak had failed to demonstrate that there was a breakdown in the attorney-client relationship *before* his change of plea. The prosecutor pointed out that Kapotak affirmatively denied any problems with his attorney at the plea colloquy, and she argued that Kapotak was simply suffering from "buyer's remorse." The prosecutor also asserted that the State would be unfairly prejudiced by having to expend additional time and resources on a trial it had been fully prepared to litigate when Kapotak changed his plea in the middle of jury selection.

Judge Torrisi held a hearing on Kapotak's motion and, following that hearing, issued a written memorandum. In that memorandum, the court recounted the colloquy at the change of plea hearing and observed that Kapotak had not complained about his attorney at the hearing, despite multiple opportunities to do so. The court found that there "was no hint of any discord between Mr. Kapotak and his attorney" at the hearing. The court also found that Kapotak's claims that he "did not understand the nature of the charge or the consequences" and that "he was without prior knowledge of the judicial system and the circumstances that the plea encompasses" were "wholly unpersuasive" in light of the lengthy and detailed plea colloquy, Kapotak's eight prior convictions, and the fact that he had previously been a defendant in a jury trial.[3] The court expressed skepticism about Kapotak's claim that he had not just "changed his mind" about the change of plea.

The court concluded, however, that in light of the general policy favoring liberal granting of pre-sentence motions to withdraw a plea for any "just and fair reason," Kapotak's allegations regarding his attorney's ineffectiveness — which included allegations that the attorney withheld discovery from Kapotak and lied to the court — needed to be investigated. The court appointed conflict counsel to investigate those claims and "supplement Kapotak's motion to withdraw his plea, if appropriate."

Two months later, Kapotak's new attorney filed a renewed motion to withdraw the plea. The motion requested that Kapotak be allowed to withdraw his plea on the ground that he was "overwhelmed and depressed at the time he made his decision to change his plea." The motion also asserted that Kapotak was "emotionally and mentally unprepared for trial" because "[he] believed ... that he did not have the

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[3] Three years previously, Kapotak had gone to trial on a misdemeanor charge with the same attorney and was acquitted.

necessary discovery and/or defense investigation." This claim was supported by an affidavit in which Kapotak repeated his previous allegations that he believed his attorney had withheld discovery from him, failed to subpoena the witnesses he had requested, and lied to the court about previously discussing the State's plea offer with him.

The court denied the renewed motion for the reasons stated in its earlier memorandum. This appeal followed.

Did the superior court err in denying Kapotak's request to withdraw his plea?

Under Alaska Criminal Rule 11(h)(2), a defendant may withdraw a previously entered plea prior to sentencing "for any fair and just reason" unless the State has been substantially prejudiced by reliance on the defendant's earlier plea.[4] Pre-sentence requests to withdraw a plea should be liberally granted.[5] But "liberality does not require ... that a plea be set aside for no reason at all."[6] A defendant must establish a "fair and just reason" that is supported by the record.[7]

Kapotak asserts that he had a "fair and just reason" to withdraw his plea because there had been a breakdown in the attorney-client relationship prior to his plea. A serious breakdown in the attorney-client relationship can justify a plea withdrawal, but the defendant must show that the relationship "had deteriorated to the point where [the

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[4] *Monroe v. State*, 752 P.2d 1017, 1019 (Alaska App. 1988) (citing *McClain v. State*, 742 P.2d 269, 271 (Alaska App. 1987)).

[5] *Wahl v. State*, 691 P.2d 1048, 1052 (Alaska App. 1984).

[6] *Shetters v. State*, 751 P.2d 31, 35 (Alaska App. 1988).

[7] *Id.*

attorney] was incapable of effective communication [with the client] or objective decision-making."[8]

Kapotak argues that this type of breakdown occurred here and that his case is "exactly the same as the situation in *Love v. State*," a case in which we reversed the trial court's denial of the defendant's motion to withdraw his plea.[9] But there are clear differences between the two cases. In *Love,* the defendant made a "substantial showing" that the attorney-client relationship had irreparably broken down *prior* to the change of plea, and the attorney corroborated that assertion.[10]

Here, in contrast, there was no such concession. Kapotak's public defender agreed that there had been a breakdown in the attorney-client relationship *following* the change of plea. But she did not support Kapotak's claim that the breakdown occurred prior to the change of plea, or assert that the breakdown was the reason Kapotak changed his plea. In addition, the trial court found that there was "no hint of discord" between Kapotak and his attorney at the change of plea hearing.

Kapotak's own affidavit provided only marginal support for the claim that he changed his plea because of a breakdown in the attorney-client relationship. Although the affidavit stated that he "felt that he was not going to have a fair trial" because he believed his attorney had not subpoenaed the witnesses he requested and that "not having the information I had requested and not having the witnesses I had requested to testify at my trial is a fact not in my favor," the affidavit never stated that these concerns (as

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[8] *Mute v. State*, 954 P.2d 1384, 1385 (Alaska App. 1998).

[9] *See Love v. State*, 630 P.2d 21 (Alaska App. 1981).

[10] *Id.* at 23, 25.

opposed to the "family" reasons Kapotak provided at the change of plea hearing) were the reasons he changed his plea.

Kapotak's affidavit also asserts that his attorney "lied" to the court at the change of plea hearing when she said she had discussed the State's offer with Kapotak "throughout the summer." But even if we assume, for the purpose of argument only, that the attorney lied to the court, Kapotak has not explained how he was prejudiced. He does not claim that he had inadequate time to consider the plea offer. And at the time of the alleged lie, Kapotak had already decided to take the State's plea offer, so it cannot have formed the basis for his decision to change his plea.

Moreover, Kapotak's affidavit contains only generalized allegations of his attorney's supposed ineffectiveness.[11] For example, Kapotak asserts that his attorney failed to subpoena the witnesses he requested, but he does not provide the identities of those witnesses, establish their availability to testify, or explain how their testimony would have benefitted him at trial.

In addition, the attorney appointed to litigate Kapotak's change of plea motion essentially abandoned these claims of ineffectiveness as grounds for withdrawing the plea. Although appointed specifically to investigate Kapotak's allegations of attorney ineffectiveness, the attorney did not offer any evidence to support them. Instead, the renewed motion to withdraw the guilty plea focused on the alleged involuntary nature of the plea, asserting that Kapotak was too emotional and depressed to enter a fully voluntary plea. The motion refers to Kapotak's affidavit and his

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[11] *See State v. Jones*, 759 P.2d 558, 570 (Alaska App. 1988) (to establish a *prima facie* case of ineffective assistance of counsel in the post-conviction context, the defendant must plead sufficiently detailed particulars of any claimed ineffectiveness such that those facts, if proven, would be sufficient to overcome the presumption of attorney competence).

ineffectiveness claims, but it does so primarily as additional proof of Kapotak's vulnerable emotional state — to establish that Kapotak felt unprepared for trial because he believed he "did not have the necessary discovery and/or defense investigation."

Having reviewed the change of plea hearing, we acknowledge that Kapotak was emotional during the hearing. But as we have previously recognized, this type of emotion is not uncommon during a change of plea hearing — particularly where, as here, the change of plea takes place on the morning of trial. As we noted in *McClain v. State*, "the pressures of trial are normal" and often lead to last-minute changes of plea on the eve or morning of trial.[12] But while those pressures might, under some circumstances, result in a defendant entering a guilty plea that the court should later allow the defendant to withdraw, we have cautioned courts against routinely allowing withdrawal of pleas entered on the day of trial, lest the practice become a means by which the trial calendar is manipulated and unnecessarily disrupted.[13]

Here, the trial court took particular care at the change of plea hearing to ensure that Kapotak understood the ramifications of what he was doing and had adequate time to reflect on his decision, consult with counsel, and express any misgivings to the court or his attorney. Kapotak had many opportunities to reconsider his decision, and the trial court accepted his plea only after ensuring that it was intelligently and voluntarily made. Given these circumstances, we conclude that the trial court's later rejection of Kapotak's claim that he was too emotional to have entered a voluntary plea is well supported by the record.

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[12] *McClain*, 742 P.2d at 271.

[13] *Id.*

We agree with Kapotak that, as a general matter, pre-sentence requests to withdraw a plea should be liberally granted.[14] But the record must still demonstrate that the defendant had a "fair and just reason" for the request: "[i]t is not sufficient that [the defendant] simply changed his mind, re-evaluated the evidence against him, or became more optimistic about his chances at trial than he was at the time of his plea."[15]

Here, the superior court concluded that Kapotak simply changed his mind and that he failed to show a "fair and just reason" to withdraw his plea. The trial court's findings are supported by the record, and we conclude that the court did not err in denying Kapotak's motion to withdraw his plea.

Conclusion

The judgment of the superior court is AFFIRMED.

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[14] *Wahl*, 691 P.2d at 1052.

[15] *Ortberg v. State*, 751 P.2d 1368, 1376 (Alaska App. 1988).