MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Thomas Wayne McKenzie,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 4, 2022

Court of Appeals Case No. 21A-CR-2214

Appeal from the Vanderburgh Superior Court

The Honorable Robert J. Pigman, Judge

Trial Court Cause No. 82D03-2010-F1-5762

May, Judge.

[1] Thomas Wayne McKenzie appeals his sentence for three counts of Class A felony child molestation.[1] McKenzie raises one issue on appeal, which we revise and restate as whether the trial court abused its discretion when it denied his motion to withdraw his guilty plea. We affirm.

Facts and Procedural History

[2] On October 20, 2020, McKenzie's fourteen-year-old grandson reported to his mother that McKenzie repeatedly molested him from the time he was five years old until he was seven years old. When the victim's father confronted McKenzie, McKenzie admitted molesting the victim. On October 28, 2020, the State charged McKenzie with three counts of Class A felony child molestation and three counts of Level 1 felony child molestation.[2] On November 23, 2020, the State e-mailed McKenzie's counsel: "My offer for Mr. McKenzie is PGAC 20 years X DOC.[3] I know that's likely a life sentence for him, but that's what I've got." (App. Vol. II at 52 (footnote added).) On December 18, 2020, McKenzie's counsel e-mailed the State: "I shared your offer with the D. He asked for time to consider his options." (*Id*. at 53.)

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[1] Ind. Code § 35-42-4-3 (2007).

[2] Ind. Code § 35-42-4-3 (2014).

[3] The acronym "PGAC" appears to stand for "plead guilty as charged," and "X DOC" appears to indicate the sentence will be fully executed in the Indiana Department of Correction.

[3] At a review hearing on March 2, 2021, the trial court set McKenzie's case for jury trial to begin on August 2, 2021. The parties reaffirmed the trial date during a pretrial conference on July 14, 2021, and the trial court held another review hearing on July 26, 2021.

[4] McKenzie appeared at the July 26 review hearing by video from the Vanderburgh County Jail. A colloquy occurred between McKenzie and his counsel, John Warrum, at the beginning of the hearing:

> MR. WARRUM: Thomas, are you able to hear me?
>
> THE DEFENDANT: Yes.
>
> MR. WARRUM: Thomas, today is our final appearance prior to our trial date next Monday. The last time we spoke I walked you through the three options you have. You can reject everything that has been tendered, we can proceed to trial on Monday; you can plead guilty without a Plea Agreement; or I have sent Officer Zehner a Plea Agreement that the State has tendered. Which would you like to do this morning please?
>
> THE DEFENDANT: I'll just go ahead and plead.
>
> MR. WARRUM: Are you pleading consistent with that Plea Agreement or without a recommendation?
>
> THE DEFENDANT: Uh, consistent I guess.

(Tr. Vol. II at 4.) The plea agreement provided McKenzie would plead guilty to the three counts of Class A felony child molesting and the State would

dismiss the remaining charges. The agreement also stipulated McKenzie would receive an aggregate sentence of twenty years in the Indiana Department of Correction.

[5] The trial court asked McKenzie if he wished to plead guilty pursuant to the plea agreement, and McKenzie confirmed he desired to do so. The colloquy continued:

> THE COURT: And you now withdraw your plea of not guilty and enter a plea of guilty as charged in Counts 1, 2 and 3, those being Child Molesting as Class A Felonies?
>
> THE DEFENDANT: Yes.
>
> * * * * *
>
> THE COURT: Okay. I'll read it—I'll read it again. Do you understand that by your plea of guilty you are admitting to the truth of all the facts alleged in the charging Information and upon entry of such a plea the Court will proceed with judgment and sentence?
>
> THE DEFENDANT: Yes.

(*Id*. at 5-6.) The trial court then listed all the rights McKenzie would forfeit by pleading guilty, and McKenzie acknowledged he understood those rights. The trial court established a factual basis for each of the three Class A felony charges with McKenzie agreeing the State's allegations were true. Then the following dialogue occurred:

THE COURT: Sir, have you read the Plea Agreement and does it contain all the conditions reached between yourself and the State of Indiana and do you understand the Court is not a party to this agreement, that the Court has neither accepted or [sic] rejected the agreement?

THE DEFENDANT: Yes.

* * * * *

THE COURT: Are you aware that the maximum possible sentence in this case for a Class A Felony, maximum of fifty years, minimum of twenty years, you could be fined up to Ten Thousand Dollars?

THE DEFENDANT: Oh wow.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

* * * * *

THE COURT: Will you assure the Court that no one has made any promises, force or threats to obtain your plea of guilty and it was voluntarily made by you?

THE DEFENDANT: Yes.

THE COURT: Do you fully understand this proceeding and have you discussed it with your attorney?

THE DEFENDANT: Yes.

(*Id*. at 7-9.) The trial court accepted McKenzie's guilty plea and set a sentencing hearing for September 8, 2021.

[6] On the morning of September 8, 2021, McKenzie filed a verified motion to withdraw his guilty plea that asserted his plea was not voluntarily given. Later that morning, the State filed an objection that asserted:

> On August 27, 2021, the Defendant made a phone call to his daughter during which he acknowledged that he did take a plea but that he wants to turn that plea down and go to trial if the offer is essentially a life sentence for him.

(App. Vol. II at 50.)

[7] The trial court then convened later that day for a hearing on McKenzie's verified motion and his sentencing. McKenzie explained he felt his defense counsel pressured him "a little bit" into pleading guilty and he desired to withdraw the plea. (Tr. Vol. II at 18.) The trial court then stated it had reviewed the recording of the July 26, 2021, hearing, and it "didn't find any evidence at all that there was any coercion or uncertainty or a sense of unsureness about your decision to plead guilty at that time." (*Id*. at 21.) The trial court denied McKenzie's motion to withdraw his guilty plea and sentenced him to twenty years in the DOC in accordance with the plea agreement.

Discussion and Decision

[8] Indiana Code section 35-35-1-4(b) allows a defendant to move to withdraw a guilty plea prior to the trial court's entry of sentence, and the trial court has discretion to grant the motion "for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea." Ind. Code § 35-35-1-4. However, the statute goes on to state that "the court shall allow the defendant to withdraw his plea of guilty . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice." *Id*. "'Manifest injustice' and 'substantial prejudice' are necessarily imprecise standards, and an appellant seeking to overturn a trial court's decision faces a high hurdle." *Gross v. State*, 22 N.E.3d 863, 868 (Ind. Ct. App. 2014), *trans. denied*. We presume a trial court's denial of a motion to withdraw a guilty plea is valid, and it is the burden of the appealing party to convince us the trial court abused its discretion. *Asher v. State*, 128 N.E.3d 526, 530 (Ind. Ct. App. 2019). In making this determination, "we examine the statements made by the defendant at the guilty plea hearing to decide whether the plea was offered 'freely and knowingly.'" *Jeffries v. State*, 966 N.E.2d 773, 777 (Ind. Ct. App. 2012) (quoting *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001)), *trans. denied*.

[9] McKenzie, who is seventy-eight years old, asserts "[t]he record is unclear whether McKenzie understood that he would receive a 20-year fixed term in prison if he pleaded guilty pursuant to the plea agreement." (Appellant's Br. at

9.) Based thereon, he argues the trial court's decision not to allow him to withdraw his guilty plea results in a manifest injustice.[4] We disagree.

[10] The record from the hearing in which McKenzie entered his guilty plea does not indicate his plea was anything other than a knowing and voluntary decision. Even though McKenzie was not physically in the courtroom during the hearing, he was present by videoconference. His attorney indicated the two had discussed the State's plea offer before the hearing, and when McKenzie's attorney reiterated his options, McKenzie said he wanted to plead guilty pursuant to the terms of the plea agreement. The written plea agreement stated:

> Pursuant to negotiations between the State of Indiana and the Defendant, the parties have agreed to the following sentencing recommendation:

[4] The State initially argues the proper forum for McKenzie's challenge is a post-conviction relief proceeding rather than a direct appeal. In support of its position, the State cites our Indiana Supreme Court's holding in *Tumulty v. State* that a defendant forfeits his right to challenge his conviction on direct appeal after entering a guilty plea. 666 N.E.2d 394, 396 (Ind. 1996). However, the State fails to acknowledge that five years after *Tumulty*, in *Brightman v. State*, our Indiana Supreme Court drew a distinction between a challenge to a trial court's decision on a defendant's motion to withdraw his guilty plea made before the trial court imposes sentence and a challenge to the voluntariness of the defendant's guilty plea made on direct appeal after the trial court sentenced the defendant. 758 N.E.2d 41, 44 (Ind. 2001) ("The present case differs from *Tumulty* in a significant way. Brightman sought to withdraw his guilty plea prior to sentencing. In response, the trial court heard evidence on the motion, reviewed the claim, and rejected it."). The Court thus allowed Brightman's challenge to the trial court's denial of his motion to withdraw his guilty plea to move forward on direct appeal. *Id*. McKenzie is in the same position as the defendant in *Brightman*, and his challenge is therefore properly before us. *See Milian v. State*, 994 N.E.2d 342, 344 (Ind. Ct. App. 2013) ("where a defendant has sought to withdraw his guilty plea prior to sentencing, and the trial court hears evidence on the motion, reviewed the claim, and rejected it, the defendant may present the challenge on direct appeal"), *trans. denied*.

> **Counts 1-3: the Court shall sentence the Defendant to the Indiana Department of Correction for a fixed-term of twenty (20) years executed at the Indiana Department of Correction.**
>
> **The sentence imposed in Count [sic] 1, 2, and 3 shall be served concurrently to one another.**
>
> **State of Indiana shall dismiss Counts 4-6 upon sentencing and final disposition.**

(App. Vol. II at 30 (emphases in original).) On the same day he entered his guilty plea, McKenzie signed the written agreement and initialed each numerical paragraph.

[11] McKenzie affirmatively answered the trial court's questions during the hearing regarding his desire to plead guilty, and he acknowledged committing the acts alleged. He also assured the court it was his voluntary decision to plead guilty and he did not do so as the result of force, threats, or promises not laid out in the plea agreement. When the trial court informed McKenzie of the maximum and minimum penalties for a Class A felony, he did say, "Oh wow." (Tr. Vol. II at 8.) However, he immediately acknowledged he understood the sentencing range. McKenzie was told multiple times and in multiple ways that by pleading guilty pursuant to the terms of the plea agreement, he was agreeing to receive a twenty-year executed sentence.

[12] While McKenzie now speculates that he will likely die in prison, McKenzie's age and the length of the term he was agreeing to receive were both known to him when he plead guilty. The trial court is not required to allow a defendant

to withdraw his guilty plea merely because the defendant has second thoughts. *See*, *e.g.*, *Asher*, 128 N.E.3d at 531 (holding trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea when the defendant repeatedly affirmed while entering his plea that he knowingly intended to kill the victims but later asserted, upon further reflection, he never possessed the requisite intent). Therefore, we hold the trial court did not abuse its discretion in denying McKenzie's motion to withdraw his guilty plea. *See Coomer v. State*, 652 N.E.2d 60, 63 (Ind. 1995) (holding trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea because the defendant's direct answers to the trial court's questions before entering the plea demonstrated it was knowing and voluntary).

Conclusion

[13] The trial court did not abuse its discretion when it denied McKenzie's motion to withdraw his guilty plea. The terms of the plea agreement were spelled out in the written plea agreement. McKenzie clearly stated he wished to plead guilty consistent with the terms of the plea agreement when he entered his guilty plea, and he reaffirmed this desire after being informed of his rights and the maximum and minimum penalties available for his class of offense. Therefore, we affirm the trial court's denial of McKenzie's motion to withdraw and the trial court's imposition of the twenty-year sentence to which the parties agreed.

[14] Affirmed.

Brown, J., and Pyle, J., concur.