

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-008

DECEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
	}	
Jeremy Amidon	}	DOCKET NO. 738/739-6-02 BnCr

Trial Judge: David Suntag  
David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction, following a guilty plea, of sexual assault on a minor, arguing that the district court abused its discretion by denying his motion to withdraw the plea and relying on a summary of his juvenile records at the sentencing hearing. We affirm.

In June 2002, defendant was charged with two counts of sexual assault on a minor and driving with a suspended license. On February 14, 2005, he pled guilty to one of the sexual assault counts, conditioned upon dismissal of the other charges. At the change-of-plea hearing, the district court accepted the plea, finding it to be voluntarily made based on an understanding of its consequences. A sentencing hearing was scheduled, continued, and rescheduled. On August 1, 2005, the day before the rescheduled sentencing hearing, the district court granted a motion to withdraw filed by defendant's attorney, who noted in his motion that defendant was under the influence of prescribed medication at the change-of-plea hearing. At the hearing on his attorney's motion to withdraw, defendant told the court that he wanted to withdraw his plea, stating that he would not have entered into the plea agreement if he had not been on medication. In October 2005, defendant's new attorney filed a motion to withdraw the guilty plea. The State opposed the motion. The hearing on the motion was delayed after the court ordered a competency evaluation. In May 2006, following a hearing, the court found defendant to be competent. In October 2006, following another hearing, the court denied defendant's motion to withdraw his guilty plea, concluding that defendant had failed to demonstrate a fair and just reason to withdraw the plea.

Before the sentencing hearing, defendant filed written objections to the pre-sentence investigation (PSI) report and moved to strike and seal the report because it was biased, incomplete, and based on information not properly before the court. At the hearing, in response

to defendant's objections, the court found some of the information pertaining to his juvenile record reliable by a preponderance of the evidence. Following the hearing, the court sentenced defendant to a term of two-to-ten years to serve.

Defendant first argues on appeal that the district court abused its discretion by denying his motion to withdraw his plea the day before his sentencing hearing. Under Vermont Rule of Criminal Procedure 32(d), when a defendant moves for withdrawal of a guilty plea before sentencing, "the court may permit withdrawal of the plea if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the state from the withdrawal of the plea." "Implicit in the rule is a balancing between important State interests in expediting criminal proceedings and the harm suffered by the defendant in foregoing a trial on the merits." State v. Hamlin, 143 Vt. 477, 480 (1983). The trial court has the discretion to weigh these factors, and on appeal from the denial of a motion to withdraw a plea, the defendant must show that the trial court abused that discretion. Id.; State v. Scelza, 134 Vt. 385, 386 (1976) ("The withdrawal of a guilty plea is not a matter of right but is within the sound discretion of the court, and the burden is upon the defendant to show that the court abused its discretion in denying the motion to withdraw."). In determining whether the trial court abused its discretion, this Court must "inquire into the circumstances surrounding the taking of a guilty plea to ensure that it was knowingly and voluntarily given." Id. A motion to withdraw a plea before sentencing is to be liberally granted when the defendant presents a fair and just reason and the State will not suffer prejudice, State v. Dove, 163 Vt. 429, 431 (1995); however, because "[a] guilty plea is a solemn undertaking," it "will not be set aside lightly" when it is knowingly and voluntarily made. Hamlin, 143 Vt. at 480-81.

Here, defendant contends that he should have been permitted to withdraw his guilty plea based upon his claim that, because of medication he was taking at the time of the change-of-plea hearing, he did not voluntarily and knowingly enter the plea. According to defendant, the district court abused its discretion by denying his motion to withdraw the plea, in light of his testimony that he could not remember things when he was on the medication and the testimony of the expert that a person taking the amount and types of medication that defendant was taking at the time might be unable to follow court proceedings and make rational decisions. As the court noted, however, after listening to the audiotape of the change-of-plea hearing, the expert did not detect any indication that defendant was unable to follow and rationally participate in the change-of-plea proceeding. The court also reviewed the transcript and audiotape of the proceeding and determined that defendant appeared awake, lucid, and comprehending when he informed the court that he understood the agreement, wanted to enter the guilty plea, and was satisfied with the help of his attorney.

As the court pointed out, (1) defendant's testimony indicated only that he had trouble later remembering what happened at the change-of-plea hearing, and (2) at best from defendant's perspective, the expert testified that the medication defendant was taking might have affected his ability to stay alert and follow the proceedings, but the transcript and audiotape demonstrated otherwise. The court found that, after informing the court at the change-of-plea hearing of the medication he was taking, defendant was appropriately responsive to all of the court's questions and did not appear to be hesitant or fatigued. The court expressly concluded that it did not find credible defendant's claim that he would not have known what he was doing at the hearing; rather, in the court's view, the facts and circumstances supported the expert's diagnosis of

possible “malingering” on the part of defendant so that he could further delay proceedings that had already been pending for over four years at the time. Finally, the court concluded that although the victim testified that she was still able and willing to testify at a trial, there was no fair or just reason to grant defendant’s motion and delay the criminal prosecution further. Upon review of the record, which indicates that defendant entered his plea knowingly and voluntarily, we conclude that defendant has failed to meet his burden of demonstrating that the court abused its discretion in denying his motion to withdraw his guilty plea.

Next, defendant argues that the State’s summary of his juvenile record in the PSI report was not the best evidence of that record and thus violated Vermont Rule of Evidence 1002. Putting aside the issue of whether a PSI report submitted for sentencing has to conform to the rules of evidence in general or the best-evidence rule in particular, see State v. Chambers, 144 Vt. 377, 383 (1984) (stating that range of information contained in PSI report is “not restricted by the rules of evidence”), we need not consider whether the summation of defendant’s juvenile record in the PSI report violated Rule 1002, insofar as defendant failed to raise this issue before the sentencing court. See State v. Lee, 2005 VT 99, ¶ 14, 178 Vt. 420 (noting that arguments raised for the first time on appeal are not preserved for review). In his written motion challenging the PSI report, defendant’s principal argument was that Rule 32 does not authorize release of juvenile records—an argument that he does not raise on appeal. At the sentencing hearing, defendant shifted the focus of his argument to contend that the summation of his juvenile record in the PSI report did not provide the court with the opportunity to determine what portions of the record were admissible or defendant the opportunity to understand what the State was referring to in the report. The sentencing court rejected this general objection, stating that defendant had the ability to present specific evidence refuting or contradicting the information contained in the report. In the end, following the presentation of evidence, the court found certain incidents in defendant’s juvenile history set forth in the report to be reliable by a preponderance of the evidence, but found much of the other history unreliable. On appeal, defendant fails to demonstrate that the information relied upon by the court was inaccurate or otherwise inappropriate for consideration at sentencing. See Chambers, 144 Vt. at 383 (stating that information included in a PSI report must be accurate and not based on hearsay allegations concerning uncharged conduct). Accordingly, we find no basis to disturb the sentence.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice