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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-081

JANUARY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
	}	
Thomas Pushee	}	DOCKET NO. 524-4-06 WrCr
		Trial Judge: M. Kathleen Manley

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

Defendant appeals his conviction for disturbing the peace by telephone, in violation of 13 V.S.A. § 1027(a), arguing that the district court abused its discretion in denying his motion to withdraw his guilty plea. We affirm.

Defendant was charged with a violation of § 1027(a) on April 14, 2006. The case was delayed over the next eighteen months because defendant changed attorneys at least twice and obtained several continuances. An arrest warrant was issued in December 2006 based on defendant's failure to appear for a hearing, but the warrant was struck when defendant appeared before the court a day or two later saying that he had forgotten about the hearing. When defendant appeared at the district court on October 3, 2007, the court placed him in a holding cell and imposed $500 bail based on his having failed to appear for a scheduled status conference the previous day. While defendant was in the holding cell, his attorney told him that he would remain in jail unless he either paid the $500 or signed a plea agreement. Defendant told the court that he had not been notified of the hearing the previous day, but the court did not find this excuse credible, stating that the history of the case, including defendant's previous failure to appear, suggested otherwise. The court informed defendant that he would remain incarcerated until he paid the bail amount.

Later that same day, the court was advised that defendant wanted to change his plea based upon an agreement that the State had previously offered. When the court recited the terms of the agreement and asked defendant if he was certain that he wanted to accept those terms, defendant made statements suggesting that he wanted to proceed to trial. But when the court then indicated that the case would proceed to trial as he wished, defendant objected, noting that he was just saying he felt forced by the circumstances to accept the plea. At that point, the court declined to accept a plea that was not voluntary. Defendant then asked if he could talk to his attorney more about the proposed agreement. After talking to his attorney, defendant returned to

the courtroom, and the attorneys discussed the recommended conditions for domestic violence counseling. Following this conversation, defendant spoke again privately with his attorney and returned a short time later saying that he wanted to go forward with the plea agreement. Based on this request, the court entered into a lengthy change-of-plea colloquy pursuant to Vermont Rule of Criminal Procedure 11 to assure itself that defendant acknowledged a factual basis for the charge and understood the rights he was giving up. The court read the information, which alleged that defendant's telephone call had been intended to terrify, intimidate, threaten, or harass the victim. Defendant agreed that the State could prove such intent. Throughout the colloquy, defendant reiterated his understanding of the agreement and his desire to enter into it and plead guilty. The court then accepted the agreement, imposed the recommended sentence, and placed defendant on probation.

The following day, defendant filed a motion to withdraw his plea, stating that he did not realize until after he had left the courtroom and gone to the probation office that the agreement compelled him to admit that he had threatened harm to the complainant. Defendant asked the court to grant his motion and to assign him a new attorney. At a January 4, 2008 hearing on his motion to withdraw, at which time he was represented by a new attorney, defendant testified that he had not received notice of the October 2 hearing date, and his former attorney testified that she gave defendant notice of a hearing for October 1, rather than for the actual October 2 hearing date. Defendant testified further that he had felt pressured into accepting the plea agreement because he did not want to miss time at work or a memorial service for his father, who had recently passed away, and that he had not understood that he was acknowledging having threatened the complainant. About one month later, the court issued findings from the bench and denied defendant's motion.

The court first noted that defendant's claimed lack of notice of the October 2 hearing was not central to its decision. The court explained that, even if defendant was correct that his attorney mistakenly informed him that the hearing was on October 1, defendant did not appear on October 1, and if he had he would have been informed of the hearing set for the next day. As to the voluntariness of defendant's plea, the court found that defendant made a conscious, tactical choice, based on his circumstances, to enter into the plea agreement, and that he did so knowing the terms of the agreement and the consequences of his entering into the agreement. According to the court, the fact that defendant decided to enter into the agreement to get out of jail did not mean that the agreement was involuntary.

On appeal, defendant argues that, given the circumstances, the court abused its discretion in denying his motion to withdraw. We disagree. Under Vermont Rule of Criminal Procedure 32(d), if a motion to withdraw a guilty plea is made after sentence, as it was here, "the court may set aside the judgment of conviction and permit withdrawal of the plea only to correct manifest injustice." This rigorous standard is essentially the same as that applied to collateral attacks in petitions for post-conviction relief. See 3 C. Wright, N. King & S. Klein, Federal Practice and Procedure § 539, at 396 (3d ed. 2004). In this case, there is no showing of manifest injustice. Defendant concedes that the district court engaged him in a thorough Rule 11 colloquy, which is designed to assure that defendants make voluntary and knowing waivers of the right to proceed to trial. The essence of defendant's claim is that he accepted the plea agreement only because he was given the choice of either accepting it or remaining in jail. As the trial court concluded, defendant's predicament does not demonstrate that his plea was involuntary. To the contrary, the record demonstrates that defendant made a voluntary and knowing choice after weighing the circumstances, consulting with his attorney on a number of occasions, and responding to the

court's inquiries as to whether he understood the rights he was waiving. Defendant's attorney did not put undue pressure on him to accept the plea agreement, but rather correctly apprised him of the difficult choice he faced. Cf. In re Quinn, 174 Vt. 562, 564 (2002) (holding that guilty plea is not voluntary and must be stricken if defendant's free will is overborne by his attorney's pressure to enter plea).

Whenever a plea agreement is considered, a defendant must weigh the circumstances and the risks involved. As for defendant's suggestion that he was not responsible for the circumstances leading to his plea, the district court found otherwise. At the change-of-plea hearing, the court did not find persuasive defendant's lack-of-notice claim, noting that it was the second time defendant failed to appear. The court also pointed out that even if the notice from his attorney was mistaken, there was no injustice under the circumstance where defendant failed to appear on that date when he would have been apprised of the correct hearing date. In short, the lack-of-notice claim was determined to be a red herring.

Ultimately, defendant was given an accurate assessment of his predicament on October 3, and based on those circumstances, he made a voluntary decision to enter into an agreement requiring him to plead guilty. There is no showing of manifest injustice. The district court's denial of the motion to withdraw plea was no abuse of discretion. See State v. Hamlin, 143 Vt. 477, 480 (1983) (stating that on appeal from denial of motion to withdraw plea, defendant must show that trial court abused its discretion).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice