

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2019-168

APRIL TERM, 2020

State of Vermont v. Scott Perky*	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 430-6-16 Cacr
		Trial Judge: Robert R. Bent

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

Defendant appeals the trial court's denial of his motion to withdraw his plea of guilty before sentencing. We affirm.

In July 2016, defendant was charged with one count of sexual assault on a child. Defendant and the State reached a plea agreement, and a change-of-plea hearing was set for April 19, 2017. Defendant decided he did not want to enter a plea and did not appear at the hearing. At a status conference two days later, defense counsel asked the court to set another change-of-plea hearing the following week. Defendant later moved to cancel that hearing.

The matter was eventually set for a two-day trial at the end of March 2018. Defendant then decided to accept the agreement originally offered by the State in April 2017. On March 7, 2018, defendant pleaded guilty to one count of lewd and lascivious conduct with a child in violation of 13 V.S.A. § 2602, in exchange for which he agreed to a sentence of three-to-fifteen years, all suspended with six months to serve. Defendant admitted to the court that between March and June of 2014, he inserted his penis into the vagina of the complainant, who was then fourteen years old. The court ordered a pre-sentence investigation and a psychosexual evaluation. During the psychosexual evaluation interview in June 2018, defendant denied that he engaged in sexual relations or did anything inappropriate with the complainant, and stated that he felt coerced by the harshness of the potential penalty if he were convicted of the original charge of sexual assault.

At the first sentencing hearing in late October 2018, defendant's attorney informed the court that defendant had denied engaging in the charged conduct and that he intended to move to withdraw his plea. Defendant's attorney subsequently filed a motion stating that defendant was innocent and wished to withdraw his plea. At a hearing in January 2019, defense counsel argued that defendant would be severely prejudiced if he was not allowed to withdraw his plea because he would end up serving his maximum sentence if he maintained his innocence.

The court denied the motion. It noted that defendant had admitted his guilt in his petition to enter a plea and at the change-of-plea hearing, even though he was later unwilling or unable to do so during the psychosexual evaluation interview. The court considered defendant's statement that he felt coerced to take the plea because he could potentially be sentenced to twenty years in prison for the original sexual assault charge. It reasoned that the potential maximum sentence for the amended charge of lewd and lascivious conduct was fifteen years. The court found that the five-year difference in potential penalties was not substantial enough to find unfair coercion in the nature of the sentence. The court found that defendant was aware that he would need to comply with sex-offender treatment programming because he signed the probation conditions attached to the plea agreement. The court found there was nothing new in the case that defendant was unaware of when he changed his plea. It therefore concluded that defendant's motion was unreasonable under the circumstances. At a subsequent sentencing hearing, the court imposed the agreed-upon sentence of three-to-fifteen years, all suspended with six months to serve. This appeal followed.

Vermont Rule of Criminal Procedure 32(d) provides that a presentence motion to withdraw a plea of guilty may be granted "if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the [S]tate from the withdrawal of the plea." If a motion to withdraw a plea meets this standard, it should be "liberally granted." See State v. Dove, 163 Vt. 429, 431 (1995). "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). We review the denial of a motion to withdraw a plea for abuse of discretion. State v. Merchant, 173 Vt. 249, 256 (2001). "In determining whether the court abused its discretion, it is the duty of this Court to inquire into the circumstances surrounding the taking of a guilty plea to ensure that it was knowingly and voluntarily given." Hamlin, 143 Vt. at 480. "A guilty plea is a solemn undertaking, and when knowingly and voluntarily made, will not be set aside lightly." Id. at 480-81 (citations omitted). "[I]f defendant's justification for withdrawal is unreasonable under the circumstances, the motion should be denied." State v. Fisk, 165 Vt. 260, 262 (1996).

Defendant argues that this case is like State v. Stewart, in which we reversed a trial court's denial of a defendant's motion to withdraw his guilty plea to assault and robbery with a deadly weapon. 2019 VT 89, ¶9. The transcript of the plea colloquy in Stewart showed that the defendant struggled with a lack of memory about the night of the incident, leading the court to question whether there was a factual basis for the plea. Two days after the court accepted the plea, the defendant moved to withdraw it, claiming that he and his attorney had not communicated about his lack of memory. We held that the trial court abused its discretion in denying the motion under the circumstances. Id.

Unlike Stewart, defendant in this case does not claim, and nothing in the record suggests, that defendant was impaired in any way or did not understand the terms or consequences of the plea agreement. Nor is there any evidence that defendant was coerced into pleading guilty. The transcript of the plea colloquy demonstrates that defendant knowingly and voluntarily pleaded guilty to the charge of lewd and lascivious conduct with a minor and admitted the factual basis for the charge. Defendant did not file his motion to withdraw until nearly eight months after he pleaded guilty, when he finally faced sentencing. Under these circumstances, the trial court did not abuse its discretion in finding that defendant's justification for the withdrawal—that he was in fact innocent—was unreasonable, even if the State did not claim it would be prejudiced by the

withdrawal. See id. (noting that denial of motion to withdraw may have been appropriate if there had been no concerns raised in plea colloquy or defendant's motion had come later in proceedings); Fisk, 165 Vt. at 263-64 (affirming denial of motion to withdraw nolo contendere plea where record showed defendant understood nature and consequences of plea and admitted State could prove elements of offense).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice