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**IN THE
COURT OF APPEALS OF INDIANA**

SHERI K. BUSTON,)
)
Appellant-Defendant,)
)
vs.) No. 48A04-0701-CR-65
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable David W. Hopper, Special Judge
Cause No. 48D03-0210-FC-350

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Sheri K. Buston appeals her conviction for Dealing in a Schedule IV Controlled Substance,¹ a class C felony, following her guilty plea to that offense. Buston claims that the conviction must be vacated because her guilty plea was not voluntary. Buston also contends that her plea cannot stand because the alleged plea agreement had not been reduced to writing. Concluding that Buston's conviction was proper, we affirm the judgment of the trial court.

FACTS

On October 31, 2002, Buston was charged with the above offense and with being a habitual offender. Thereafter, Buston entered into an oral plea agreement, whereby she would plead guilty to the dealing charge in exchange for the State's agreement to dismiss the habitual offender count and three unrelated charges.

At a dispositional hearing that commenced on October 5, 2004, the parties recited the terms of the plea agreement in open court. However, no written plea agreement was submitted. The trial court inquired about the terms of the agreement, and Buston acknowledged that her counsel had explained the agreement to her. Buston stated that she was satisfied with her counsel's representation and remarked that "she's a very good attorney." Tr. p. 10. The trial court addressed Buston's history of mental illness, and Buston explained that she is "fine as long as [she] stays[s] on [her] medication." Id. at 9. Thereafter, Buston acknowledged that she "knowingly or intentionally delivered" a Schedule IV substance. Id. at 13-14. The trial court accepted Buston's guilty plea and ordered the

¹ Ind. Code § 35-48-4-3(A)(1).

probation department to conduct a pre-sentence investigation.

At a status hearing that was conducted on May 4, 2006,² Buston's counsel orally moved to withdraw the plea agreement. Buston subsequently submitted a written motion to withdraw, claiming that her guilty plea was made under duress and that she did not understand the plea. During a hearing that commenced on June 19, 2006, Buston testified that her counsel and the prosecutor threatened her and coerced her into pleading guilty. Buston also claimed that she did not understand the guilty plea proceedings. Rachel Stewart, who was present at the dispositional hearing, testified that Buston's attorney was in the hallway yelling and telling Buston what she should say in the courtroom. Cheryl Franklin, another witness who was present at the dispositional hearing, testified that she observed Buston arguing with her counsel about the plea agreement. According to Franklin, Buston told her counsel that she did not want to plead guilty. Finally, Buston's husband testified that defense counsel told Buston that she should "plead guilty and she will do prison time." Tr. p. 123.

When Buston was asked about the responses she made at the guilty plea hearing, she claimed that she was simply repeating what her attorney had instructed her to say. At the conclusion of the hearing, the trial court denied Buston's request to have her guilty plea set aside, concluding that a transcript of the dispositional hearing indicated that Buston voluntarily waived her rights and understood that she was pleading guilty.

At the sentencing hearing, Buston again requested to withdraw her guilty plea, which

the trial court denied. Buston was sentenced to eight years with four years suspended, and she now appeals.

DISCUSSION AND DECISION

I. Voluntary Plea

In addressing Buston's contention that her plea agreement must be set aside because it was not voluntarily made, we initially observe that Indiana Code section 35-35-1-4(b) governs motions to withdraw guilty pleas:

Sec. 4. (a) A motion to withdraw a plea of not guilty for the purpose of entering a plea of guilty, or guilty but mentally ill at the time of the crime, may be made orally in open court and need not state any reason for the withdrawal of the plea.

(b) After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

(c) After being sentenced following a plea of guilty, or guilty but mentally ill at the time of the crime, the convicted person may not as a matter of right withdraw the plea. However, upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. A motion to vacate judgment and withdraw the plea made under this

² Subsequent to the dispositional hearing, the original judge disqualified himself and Special Judge David Hopper assumed jurisdiction on March 6, 2006. Appellant's App. p. 6.

subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:

- (1) the convicted person was denied the effective assistance of counsel;
 - (2) the plea was not entered or ratified by the convicted person;
 - (3) the plea was not knowingly and voluntarily made;
 - (4) the prosecuting attorney failed to abide by the terms of a plea agreement;
- or
- (5) the plea and judgment of conviction are void or voidable for any other reason.

The motion to vacate the judgment and withdraw the plea need not allege, and it need not be proved, that the convicted person is innocent of the crime charged or that he has a valid defense.

(d) A plea of guilty, or guilty but mentally ill at the time of the crime, which is not accepted by the court or is withdrawn shall not be admissible as evidence in any criminal, civil, or administrative proceeding.

(e) Upon any motion made under this section, the moving party has the burden of establishing his grounds for relief by a preponderance of the evidence. The order of the court upon a motion made under subsection (b) or (c) of this section shall constitute a final judgment from which the moving party or the state may appeal as otherwise provided by law. The order of the court upon a motion made under subsection (a) of this section is not a final judgment and is not appealable but is reviewable upon appeal from a final judgment subsequently entered.

In construing this statute, our Supreme Court has determined that after a defendant pleads guilty but before a sentence is imposed, a defendant may move to withdraw a plea of guilty. Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001). Indeed, the court must allow a defendant to withdraw a guilty plea if “necessary to correct a manifest injustice.” Id. In contrast, the court must deny the motion if withdrawal of the plea would “substantially prejudice” the State. Id. In all other cases, the court may grant the defendant’s motion to

withdraw a guilty plea “for any fair and just reason.” Id. A trial court’s ruling on a motion to withdraw a guilty plea “arrives in this Court with a presumption in favor of the ruling.” Id. This court will reverse only for an abuse of discretion. Id. In determining whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, this court examines the statements made by the defendant at the guilty plea hearing to decide whether her plea was offered “freely and knowingly.” Id.

In this case, the trial court recounted the terms of the plea agreement and Buston acknowledged that she understood the terms. As set forth above, Buston stated that her counsel had explained the agreement to her. Tr. p. 7-8. Buston also denied receiving any promises other than those that were agreed upon. Buston specifically stated that she was satisfied with her counsel’s representation. Id. at 10.

Although Buston presented evidence suggesting that her guilty plea was made under duress and claimed that she did not understand the terms of the agreement, her testimony at the guilty plea hearing wholly contradicted that notion. Id. at 7, 14. Moreover, it is apparent that the trial court reviewed the tape of the guilty plea hearing to determine if any other evidence or circumstance might have supported Buston’s claim of duress. Id. at 89-90. Thereafter, the trial court again denied Buston’s motion to withdraw her guilty plea.

Based on the evidence presented at the guilty plea hearing, we conclude that the trial court properly denied Buston’s motion to withdraw her plea, notwithstanding her claim that it was not made knowingly or voluntarily.

II. Written Plea Agreement

Alternatively, Buston claims that her conviction must be set aside because there was no written plea agreement. In support of this contention, Buston points out that Indiana Code section 35-35-3-3 requires a prosecutor to submit a plea agreement on a felony charge in writing to the trial court.

However, in Shepperson v. State, 800 N.E.2d 658, 659-60 (Ind. Ct. App. 2003), and Rogers v. State, 715 N.E.2d 428, 428-29 (Ind. Ct. App. 1999), this court determined that the parties and the trial court were bound by the terms of an oral plea agreement with regard to a felony conviction at the time of the plea because the trial court had accepted the plea and the terms of the agreement. Hence, the agreement became enforceable once the trial court accepted it. As were the circumstances in Shepperson and Rogers, the trial court had accepted Buston's plea. Thus, Buston's claim that the motion to withdraw her guilty plea should have been granted because the plea agreement was not in writing also fails.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.