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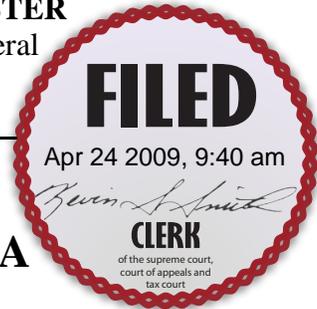
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**IN THE
COURT OF APPEALS OF INDIANA**

MAURICE MCGEE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A03-0809-CR-440

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0703-FA-13

April 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Maurice McGee appeals his conviction for aiding in dealing in cocaine, a Class A felony. McGee raises one issue on appeal, which we restate as whether the trial court abused its discretion in denying his motion to withdraw guilty plea. Concluding that the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

In March 2007, McGee contacted an undercover police officer, identified as UC340, in an attempt to purchase marijuana and cocaine. McGee arranged a meeting with UC340 in order to complete the sale. At the meeting, UC340 handed McGee some orange plastic baggies containing cocaine and marijuana. McGee took possession of more than three ounces of cocaine and approximately one ounce of marijuana and inspected it. He did not, however, leave the car with it. Additional police officers arrived and arrested McGee.

McGee was charged with aiding in dealing in cocaine in the amount of three grams or more, a Class A felony;¹ conspiracy to commit trafficking with an inmate, a Class C felony; aiding in dealing in marijuana in the amount of thirty grams or more, a Class D felony; and official misconduct, a Class D felony. On June 21, 2007, McGee pled guilty to all four counts pursuant to a written plea agreement. In exchange, the State agreed to a thirty-year cap on the executed portion of his sentence. During the guilty plea hearing, McGee admitted to arranging the meeting with UC340, having the cocaine delivered to him and in his possession, inspecting it, and intending to distribute the

¹ Dealing in cocaine is normally a Class B felony. Ind. Code § 35-48-4-1(a). However, when the amount of cocaine exceeds three grams, the crime is elevated to a Class A felony. Ind. Code § 35-48-4-1(b).

cocaine to inmates at the Pendleton Correctional Facility. However, he did not actually complete the transaction or leave with the cocaine. The trial court found an adequate factual basis and conditionally accepted the plea.

On August 27, 2007, McGee filed a verified motion to withdraw his guilty plea to all four counts. In an order dated May 5, 2008, the trial court granted the motion as to the aiding in dealing in marijuana charge because the evidence did not support a finding that the marijuana was in an amount greater than thirty grams. The trial court denied the motion as to all remaining counts. McGee was subsequently sentenced to an aggregate term of thirty years imprisonment. He now appeals.

Decision and Discussion

I. Standard of Review

Indiana Code section 35-35-1-4(b) provides:

After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty . . . 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 . . . 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 . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

The moving party has the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Code § 35-35-1-4(e). The trial court is required to grant the request only if the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice. Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998).

Conversely, the trial court is required to deny the request if withdrawal of the plea would result in substantial prejudice to the State. Id. In all other circumstances, the grant or denial of the request is at the discretion of the trial court. Id.; Ind. Code § 35-35-1-4(b). “Manifest injustice” is a “necessarily imprecise standard[],” and a trial court’s ruling comes to us with a presumption that it is correct. Coomer v. State, 652 N.E.2d 60, 62 (Ind. 1995).

II. Withdraw of McGee’s Guilty Plea

McGee claims that there was an insufficient factual basis to support his guilty plea, and therefore the trial court should have granted his motion to withdraw to prevent a “manifest injustice.”² A sufficient factual basis to support a guilty plea exists when there is evidence about the elements of the crime from which a trial court reasonably could conclude that the defendant is guilty. Oliver v. State, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006), trans. denied. An adequate factual basis may be established in several ways: 1) by the State’s presentation of evidence on the elements of the charged offenses; 2) by the defendant’s sworn testimony regarding the events underlying the charges; 3) by the defendant’s admission of the truth of the allegations in the information read in court; or 4) by the defendant’s acknowledgement that he understands the nature of the offenses charged and that his plea is an admission of the charges. Id. Based on the charging information for the crime of aiding the dealing of cocaine, the factual basis must establish that McGee (1) knowingly or intentionally (2) aided, induced, or caused (3) another

² On appeal, McGee challenges the trial court’s denial of his motion to withdraw guilty plea generally, but only makes a specific argument with respect to the aiding in dealing in cocaine count. He has therefore waived appeal of the trial court’s denial with respect to the conspiracy and official misconduct counts and we do not address them herein.

person (4) to deliver cocaine (5) weighing three ounces or more. Ind. Code §§ 35-41-2-4, 35-48-4-1. McGee argues that delivery did not take place, thereby nullifying one of the elements of the crime and creating a manifest injustice if his guilty plea were to be accepted. We disagree.

In Cline v. State, 860 N.E.2d 647 (Ind. Ct. App. 2007), Cline and another passenger were stopped in Cline's car by a police officer for a traffic infraction. As the officer was approaching the car, Cline passed a bag of marijuana to the passenger. Id. The State charged Cline with dealing in marijuana, arguing that even if Cline did not mean to relinquish possession or control of the marijuana, all that was required by statute was a transfer from Cline to his passenger. Id. at 649-50. The jury found Cline guilty of dealing in marijuana. Id. at 649. On appeal, this court affirmed, holding that the "statutory definition of 'delivery' in section 35-48-1-11 does not require intent to relinquish control or possession of the controlled substance to another individual. It merely requires the actual or constructive transfer of the controlled substance." Id. at 650.

McGee contends that because he did not have money to purchase the cocaine, a "delivery" did not take place and he therefore could not have aided in the delivery of cocaine. This is directly contrary to our holding in Cline. Indiana Code section 35-48-1-11 defines "delivery" as "an actual or constructive transfer from one (1) person to another of a controlled substance" There is no statutory requirement of contemporaneous payment or ability to make such payment. At the guilty plea hearing on June 21, 2007, McGee acknowledged under oath that he understood the statutes under which he was

charged and that by pleading guilty, he was admitting that he violated those statutes. Transcript of Guilty Plea Hearing at 15. McGee also twice admitted, again under oath, that there was a delivery of cocaine. First, in response to questioning by his attorney:

Mr. Kern: And you were, at some point, handed some orange plastic baggies. Is that correct?

[McGee]: Yes.

...

Mr. Kern: Do you know the approximate weight of the cocaine and the approximate weight of the marijuana that you eventually had in the baggies at the car? Inside the car?

[McGee]: I guess it was like, an eight-ball of cocaine and maybe an ounce of weed.

Id. at 24-25. Then, in response to questioning by the State:

[State]: And you met with this person referred to as UC340? And at that point in time they delivered cocaine to you. Is that correct?

[McGee]: Yes.

Id. at 27. These exchanges unquestionably establish a sufficient factual basis. See Oliver, 843 N.E.2d at 588-89 (holding that post-conviction relief was properly denied on petitioner's claim that no factual basis supported his guilty plea to theft because he actually thought the items were abandoned; petitioner indicated he understood charging information and understood that by pleading guilty he was admitting the truth of the allegations, and petitioner testified that he was guilty of theft because he took items that were not his). Similar to Cline, the fact that there may have been no intent on the part of UC340 to relinquish possession or control of the cocaine, or the fact that there was no money exchanged, is of no matter. A transfer of cocaine from UC340 to McGee occurred, and that is all the statute requires. On this basis, there is no manifest injustice that would require the trial court to grant McGee's motion to withdraw his guilty plea.

Without a manifest injustice, the decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. Weatherford, 697 N.E.2d at 34. From the record, it is apparent that McGee's guilty plea was entered knowingly and voluntarily and was supported by a factual basis. Therefore, the trial court did not abuse its discretion in denying his motion.

Conclusion

We conclude that McGee has not met his burden in proving that withdrawal of his guilty plea is necessary to correct a manifest injustice. The trial court did not abuse its discretion in denying McGee's motion for withdrawal of his guilty plea.

Affirmed.

CRONE, J., and BROWN, J., concur.