12-26-2012

State v. Steinemer Respondent's Brief Dckt. 39869

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39869
	)	
vs.	)	
	)	
DOUGLAS JAMES STEINEMER, aka STEINEMOR aka HOLSOPPLE,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature Of The Case

Douglas James Steinemer appeals from his judgment of conviction for kidnapping in the first degree and rape, contending the district court erred in denying his pre-sentencing motion to withdraw his guilty pleas.

Statement Of Facts And Course Of Proceedings

According to the presentence report (PSI), the facts underlying Steinemer's convictions for first degree kidnapping and rape of the nineteen year-old victim (referred to as "Ms. S.") are as follows:

> On June 28 2003 [Ms. S.] was kidnapped from Mountain Home, Idaho. Her assailants were two (2) unknown males. They were later identified as Douglas James Steinemer and his father, Hans Michael Holsopple.
>
> [Ms. S.] recalled being abducted from a store and bound with duct tape around her hands, eyes and mouth. She was transferred to a semi truck. She was repeatedly sexually assaulted and threatened with death until she was eventually released at Mile Post 13, Payette County, Idaho. Fearing the men would follow through with threats to kill her, [Ms. S.] did not immediately report events to police. A rape kit was collected from [Ms. S.] at St. Luke's Hospital, Boise, Idaho, on June 29 2003. On August 6, 2003, the DNA profiles from the unknown males were entered into the Combined DNA Index System CODIS to be periodically searched against the database.
>
> On July 7, 2009, Mountain Home Police were notified of a CODIS match for one (1) of the offender's DNA in [Ms. S.'s] sexual assault kit. The State of Florida advised a suspect with the CODIS match was Douglas James Steinemer. A warrant was issued August 12, 2009, to collect blood evidence from Mr. Steinemer. When shown a photo lineup on October 16, 2009, [Ms. S.] identified Mr. Steinemer as the man who abducted her from Mountain Home on June 28, 2003. The blood sample from Mr. Steinemer was a confirmed match as a contributor to the DNA mixture previously obtained from the sperm cell fraction of the vaginal swab contained in [Ms. S.'s] rape kit. Idaho State Police Forensic DNA Manager, Cynthia Cunnington, advised the second unknown offender was biologically related paternally to Mr. Steinemer.

On February 23, 2010, Idaho State Police Detectives Victoria Gooch and Robert Boone traveled to Daytona Beach, Florida, to interview Douglas Steinemer. After initially lying to Detectives about never having been in Idaho, Mr. Steinemer was informed he was on a video tape at the Walmart in Mountain Home, his DNA positively matched one of [Ms. S.'s] assailants, and his photo was picked out of a lineup. Mr. Steinemer exercised his rights not to talk and the interview was terminated. Approximately three (3) hours later Stori Kusak, Mr. Steinemer's biological mother, told officers her son wanted to talk to them.

Mr. Steinemer admitted to Detectives he participated in the kidnapping and rape of [Ms. S.]. He identified the second suspect as his biological father, Hans Michael Holsopple. According to Mr. Steinemer, Michael Holsopple gave him a knife and duct tape before dropping him off at the Walmart with instructions to take a girl.

Mr. Steinemer said he made eye contact with [Ms. S.] as she entered the store. When she exited he convinced her to give him a ride. At her car Mr. Steinemer pull a knife and told her to do what he said. He duct taped [Ms. S.'s] hands and eyes before driving her around for a while. He drove to the field across from K-Mart, where Mr. Holsopple had parked his semi truck. . . .

. . . .

Victim [Ms. S.] recalled that after she was driven around and the car finally stopped, a second man led her to the semi truck and put her into the sleeper compartment. He reportedly told her if she did everything he said she would not get hurt. When he left the compartment [Ms. S.] said the younger man reassured her if she did everything they wanted she would not get hurt. [Ms. S.] said the men used the names Steve (younger man) and Reggie (older man. [sic])[.] She believed the first one of the two (2) men to have sexual intercourse with her was the one named Steve. When Reggie came to the sleeper he told [Ms. S.] she had a nice body. Reggie undressed her and performed oral sex on [Ms. S.]. He had her move to various positions so he could perform sexual intercourse with her. [Ms. S.] recalled Reggie asking her about her sexual experience and if she had sex recently. He made [Ms. S.] perform oral sex on him. [Ms. S.] recalled him saying, "You got me a good one, Steve." Steve supposedly told [Ms. S.] he never did anything like this before and was being made to do this by the other man. [Ms. S.] recalled being made to have sex with both men at the same time. She was forced to perform oral sex on Reggie and sexual intercourse with Steve. She said Reggie did not ejaculate in her mouth but on her belly. [Ms. S.] reported feeling Reggie had a hairy chest. She could see beneath the duct tape on her eyes that he had a goatee that was silver or white and black, and a mustache. Toward the end of the

> incident Reggie came to the sleeper and had sex with [Ms. S.] again. He told her Steve convinced him that she was a good girl and stated they would let her out earlier than the anticipated drop off point in Oregon. [Ms. S.] reported Reggie had Steve come back to the sleeper and have sex with her. Reggie told [Ms. S.] to say sexual things to Steve during the intercourse.
>
> [Ms. S.] was told the men would drop her off in five (5) minutes and to keep her blindfold on for another two (2) minutes before walking to the gas station. Steve cut the duct tape off [Ms. S.'s] wrists while she was in the semi. Steve walked [Ms. S.] out of the truck, put her behind the truck and gave her back her cell phone. [Ms. S.] took the duct tape off her eyes after she was released and threw it off to the side of the road. She saw the truck drive away and noted it had a white trailer.
>
> [Ms. S.] called her boyfriend and walked to a nearby Stinker Station to ask where she was located. She said she did not tell people at the station what occurred because Reggie told her if she told anyone Steve would get in a lot of trouble and so would she. [Ms. S.] reported feeling scared and threatened.

(PSI, pp.2-4.)

Steinemer was indicted by an Ada County Grand Jury for kidnapping in the first degree and three counts of rape. (R., pp.13-15.) On July 12, 2011, pursuant to a plea agreement, Steinemer pled guilty to kidnapping in the first degree and one count of rape, and the two remaining rape charges were dismissed. (R., pp.149-157; Tr., p.9, L.10 – p.26, L.9.) On August 26, 2011, Steinemer filed a handwritten motion to withdraw his guilty pleas (R., pp.160-61), and that same day his attorney (John DeFranco) filed a separate motion to withdraw Steinemer's pleas (R., pp.162-63). A month later, Steinemer filed a motion (with a supporting affidavit) to "disqualify" his counsel, which was granted. (R., pp.170-78, 182-83.) After the court appointed new counsel (Robert Chastain) to represent Steinemer, the state filed an objection to Steinemer's motion to withdraw his guilty pleas (R., pp.194-201), and Steinemer's counsel responded by filing a Memorandum in Support of Defendant's Motion to

Withdraw Guilty Plea (R., pp.215-220). After a hearing (Tr., p.30, L.2 – p.82, L.15), the district court entered a Memorandum Decision and Order denying Steinemer's motion to withdraw his guilty pleas (R., pp.223-38).

The district court sentenced Steinemer, on each count, to concurrent sentences of 30 years with 13 years fixed. (R., pp.233-36.) Steinemer timely appealed. (R., pp.238-41.)

ISSUE

Steinemer states the issue on appeal as:

> Was it an abuse of discretion for the court to deny the motion to withdraw the guilty plea when it was made prior to sentencing and after a just cause was established?

(Appellant's Brief, p.8.)

The state rephrases the issue on appeal as:

Has Steinemer failed to establish an abuse of discretion in the denial of his pre-sentencing motion for withdrawal of his guilty pleas?

ARGUMENT

Steinemer Has Failed To Establish The District Court Abused Its Discretion In Denying His Pre-Sentencing Motion For Withdrawal Of His Guilty Pleas

A. Introduction

Steinemer contends the district court abused its discretion in denying his pre-sentencing motion to withdraw his guilty plea. (Appellant's Brief, pp.8-12.) He alleges that prior to his guilty pleas he was not provided an opportunity by his attorney to review the video and audio recordings of the victim's interview with law enforcement, and after he reviewed them before sentencing, he realized how much they supported a potential claim that his father coerced him into kidnapping and raping the victim. (Id.) The record, however, supports the district court's determination that Steinemer failed to demonstrate a just reason entitling him to withdraw his guilty plea. Steinemer has failed to establish an abuse of discretion.

B. Standard Of Review

"Appellate review of the denial of a motion to withdraw a plea is limited to whether the district court exercised sound judicial discretion as distinguished from arbitrary action." State v. Hanslovan, 147 Idaho 530, 535-536, 211 P.3d 775, 780-781 (Ct. App. 2008) (citing State v. McFarland, 130 Idaho 358, 362, 941 P.2d 330, 334 (Ct. App. 1997)). An appellate court will defer to the trial court's factual findings if they are supported by substantial competent evidence. State v. Holland, 135 Idaho 159, 15 P.3d 1167 (2000); Gabourie v. State, 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994).

C. Standards Applicable To A Motion To Withdraw A Guilty Plea

A motion to withdraw a guilty plea is governed by I.C.R. 33(c), which provides:

> (c) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

Although a district court's discretion should be "liberally exercised" when ruling on a motion to withdraw a guilty plea made prior to the pronouncement of sentence, withdrawal of a guilty plea is not an automatic right. Hanslovan, 147 Idaho at 535, 211 P.3d at 780. See also State v. Carrasco, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990). Rather, "the defendant has the burden of showing a 'just reason' exists to withdraw the plea." Hanslovan, 147 Idaho at 535, 211 P.3d at 780 (citations omitted). Failure to present and support a just or plausible reason, even absent prejudice to the prosecution, will weigh against granting withdrawal. State v. Mayer, 139 Idaho 643, 647, 84 P.3d 579, 583 (Ct. App. 2004). "[T]he good faith, credibility, and weight of the defendant's assertions in support of his motion to withdraw his plea are matters for the trial court to decide." Hanslovan, 147 Idaho at 537, 211 P.3d at 782 (citations omitted).

"The first step in analyzing a motion to withdraw a guilty plea is to determine whether the plea was knowingly, intelligently, and voluntarily made." Hanslovan, 147 Idaho at 536, 211 P.3d at 781 (citing State v. Rodriguez, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990)). "If the plea is constitutionally valid, the court must then determine whether there are any other just reasons for withdrawal of the plea." Id.

D. Steinemer Has Failed To Show An Abuse Of Discretion In The Denial Of His Motion To Withdraw His Guilty Plea

Steinemer does not dispute the district court's finding that his plea was knowingly, intelligently, and voluntarily made. (See Appellant's Brief, pp.8-12.)

Steinemer claims, however, that he established "just cause" for withdrawal of his guilty pleas because, prior to entering them, he was not provided an opportunity to review the video and audio recordings of Ms. S.'s interview with law enforcement, and when he reviewed them before sentencing, he realized more fully that they supported a claim that his father coerced him to commit his crimes. (Id.)

To the extent Steinemer's argument is predicated on the notion that he was legally entitled to personally review the audio and/or taped recordings of Ms. S.'s police interview, he has provided no authority to support such a claim, and therefore, he has waived the issue on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking") (citations omitted); see I.A.R. 35; Carrasquillo v. State, 742 S.W.2d 104, 112-113 (Tex. App. 1987) (Defendant was not entitled to personally review videotapes and listen to audio tapes before they were presented to jury in a capital murder trial).

In denying Steinemer's motion to withdraw his guilty pleas, the district court recognized its decision was discretionary and applied the correct legal standards. (R., pp.224-225.) The court's Memorandum Decision and Order (R., pp.223-228) outlined four reasons for denying Steinemer's motion, which will be discussed in turn.

1. The Evidence Establishes That Steinemer Was Fully Aware Of The Victim's Statements To Investigators Before He Entered His Guilty Pleas

The district court concluded that the evidence presented at the hearing on Steinemer's motion to withdraw his guilty pleas showed he "was fully aware before he entered his guilty plea of statements by [Ms. S.] to the investigators that Defendant was

acting under the direction of his father and that this was a defense to the charges against him." (R., p.226.) That conclusion is borne out by the record.

The district court explained that Steinemer's trial attorney, Mr. DeFranco, "testified that he had reviewed the audio and video recordings of the police interviews with [Ms. S.] well before Defendant entered his guilty plea on July 12, 2011. He stated that he and Defendant discussed on many occasions at the jail the potential defense that Defendant was acting at the direction of his father." (R., p.225; see Tr., p.52, L.9 – p.55, L.9.) The court summarized the testimony of Phillip Tuttle, an Investigator with the Ada County Prosecuting Attorney's Office, who listened to a phone call made by Steinemer from the Ada County Jail to an adult woman on March 5, 2011, several months before Steinemer entered his guilty pleas:

> During that phone call, Defendant stated, "When I go to court I'll have them (documents of victim's statements to investigators) submitted so that way the jury can hear her saying that you know she knows I was in fear of my father, she knows I was not . . . or I was in control of my father and all that other good gossip stuff so that way the jury like understands I had nothing to do with it. That I didn't plan it."

(R., pp.225-226; see Tr., p.35, L.8 – p.37, L.6; p.41, L.24 -.42, L.17.) The court stated that "Mr. DeFranco added that this defense was clear from the original interviews with [Ms. S.] and that he shared the substance of those interviews with Defendant. . . . Mr. DeFranco added that he felt this information was very important and that he had attempted to get the State to reduce its plea offer in light of its 'mitigational benefit.'" (R., p.226; see Tr., p.55, L.17 – p.58, L.1.)

Steinemer now acknowledges[1] that although, at the time of his guilty pleas, "he was aware of [Ms. S.'s] statements, he was not 'fully aware' of the complete value of that evidence" as the "audio and video recordings provide a fuller and more persuasive representation of a witness's believability and persuasiveness because they capture a witness's actual statements including the witness's voice inflection and, in the case of a video, demeanor." (Appellant's Brief, pp.9-10.) Steinemer's argument not well-taken.

Steinemer knew whether he had been coerced by his father into kidnapping and raping Ms. S. He was also made fully aware by his trial attorney that a "coercion" defense was possible, and he knew such defense could have been supported by Ms. S.'s taped statements about the control his father appeared to have over him. Despite Steinemer's assertion that "he was not 'fully aware' of the complete value of that evidence" (Appellant's Brief, pp.9-10), as his jail phone call demonstrates,[2] he knew

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[1] Steinemer's own handwritten motion to withdraw his guilty pleas appears to have only asserted he was unaware Ms. S.'s interview statements supported a claim of "coercion," stating:

> . . . I have not seen all the video and adio [sic] regarding the said case above. I feel that my aatorney [sic] should have not let me ple [sic] when there was adio [sic] and video that could soport [sic] my case and defense . . . .

(R., p.160.) The state filed an Objection to Motion to Withdraw Guilty Plea (R., pp.194-201) pointing out that, by receiving a copy of the Grand Jury transcript, Steinemer knew about Ms. S.'s testimony that his father appeared in control (R., p.199; see G.J. Tr., p.65, L.22 – p.66, L.8; p.68, Ls.1-3). Steinemer's third appointed counsel filed a memorandum in support of Steinemer's motion, and countered that the "audio and video recordings provide a fuller and more persuasive representation" and "it is not reasonable to equate a cold grand jury transcript with that of a witness's recorded statements." (R., p.217.)

[2] Investigator Tuttle testified that, when he listened to Steinemer's jail phone call, he "made a quoted comment" of it (Tr., p.41, L.24 – p.42, L.1), as follows:

enough about Ms. S.'s interview statements that he planned on presenting them to the jury to show he was in fear of his father, or was under the control of his father, so the jury would understand he "had nothing to do with it[,]" and "didn't plan it." (Tr., p.42, Ls.4-17.) That Steinemer did not personally review the audio or video recordings of Ms. S.'s police interview in order to gauge her demeanor and voice inflection does not change the fact that he was very much aware of his potential "coercion" defense and held such a firm belief that her statements would have supported it that he divulged in detail how he planned to use them at trial for that purpose.

The district court correctly concluded that Steinemer "was fully aware well before he entered his guilty plea of statements by Ms. S. to the investigators that Defendant was acting under the direction of his father and that this was a defense to the charges against him." (R., p.226.) Thus, there is no reason to believe that Steinemer's waiver of the defense of coercion was invalid. United States v. Ruiz, 536 U.S. 622, 630-31 (2002) (a defendant need not be presented with all exculpatory evidence to enter a proper guilty plea). The district court, therefore, properly viewed such a finding as a factor weighing against granting Steinemer's motion to withdraw his guilty pleas.

> [Steinemer] said, quote, "When I go to court I will have them" -- and I had in parentheses what he was referring to from the prior short conversation he was having with the woman in that the documents of the victim statements that she made to investigators -- and then out of the quotes, "submitted so that" -- "so that way the jury can hear her saying that, you know, she knows I was in fear of my father. She knows I was not. Or I was in control of my father and all that other good gossip stuff. So that way, the jury will, like, understand that I had nothing to do with it. That I didn't plan it. All that bullshit." End quote.

(Tr., p.42, Ls.4-17.)

2. Steinemer Decided To Withdraw His Guilty Pleas Before He Reviewed The Audio And Video Recordings Of The Victim's Police Interview

The second factor cited by the district court in support of its denial of Steinemer's motion to withdraw his guilty pleas is that he "had not seen the audio and video recordings before he decided to withdraw his guilty plea so his decision would not have been based on the actual review of that material." (R., p.226.) On appeal, Steinemer acknowledges that "while he told Mr. DeFranco he wanted to file the motion before having seen the video, he deferred doing so, on Mr. DeFranco's urging, until after he viewed it. So it cannot be concluded that the final decision to file the motion was not caused by viewing the video, as Mr. Steinemer alleged in his affidavit." (Appellant's Brief, p.10.)

Steinemer's argument, that because his motion was *filed* after he viewed the video of Ms. S.'s interview "it cannot be concluded that Steinemer's '*final* decision' to file a motion was not caused by viewing the video" is not compelling. The record shows that Steinemer contacted his attorney [Mr. DeFranco] and "said he wanted to withdraw his plea." (Tr., p.63, Ls.15-17.) DeFranco acknowledged that Steinemer was "very serious about his desire to withdraw his guilty plea[,]" but DeFranco wanted to "satisfy [him]self that it's in [Steinemer's] best interest to file the motion[,]" and "told him that it [was] in his best interest to wait." (Tr., p.63, Ls. 17-20; p.64, Ls. 6-10.) The district court's factual finding that Steinemer "decided" to withdraw his guilty pleas before he reviewed Ms. S.'s recorded interview is not undercut in any way by the fact that DeFranco persuaded Steinemer to delay the filing of such motion in order to satisfy him (DeFranco) that the motion was in Steinemer's best interest.

Inasmuch as Steinemer was very serious about wanting to withdraw his guilty pleas, and advised his attorney of that decision *before* he reviewed either the audio or video recordings of Ms. S.'s interview, the district court logically concluded Steinemer's decision to withdraw his guilty pleas could not have been motivated by such review. The district court reasonably deemed such finding a factor weighing against granting Steinemer's motion to withdraw his guilty pleas.

3. Trial Counsel Did Not Force Or Direct Steinemer To Change His Answer To The Guilty Plea Advisory Form Question Of Whether He Had The Chance To Review All Discovery In The Possession Of His Attorney Before Entering His Guilty Plea

Question 19 of the Guilty Plea Advisory form asked:

> Your attorney can get various items from the prosecutor relating to your case. These may include police reports, witness statements, tape recordings, photographs, reports of scientific testing, etc. This is called discovery. Have you reviewed the evidence provided to your attorney in discovery?

(R., p.155.) Question 19 of the Guilty Plea Advisory reveals that Steinemer apparently circled "no" to that question, but crossed that answer out, initialed the change, and then circled "yes." (Id.)

The district court rejected Steinemer's claim that his trial attorney, Mr. DeFranco, "told [Steinemer] to 'check yes' on the guilty plea advisory form with regard to whether he had reviewed the evidence provided to his attorney in discovery."[3] (R., p.225; see R., pp.155, 172.) The court stated:

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[3] Neither Steinemer's written motion to withdraw his guilty pleas (R., pp.160-61) nor the Motion to Withdraw Guilty Plea and supporting affidavit filed by his attorney (R., pp.162-66) make any mention of Question 19 of the Guilty Plea Advisory form. As explained by the district court, "Defendant provides more detail regarding this general assertion in his Affidavit in Support of Motion to Disqualify Counsel [R., pp.172-75]. . . . Defendant

> The Court also finds Mr. DeFranco did not force Defendant to change his answer to the question in the guilty plea advisory form that he had the chance to review all discovery in the possession of his attorney before entering his guilty plea. Rather, this was a decision Defendant made so the Court would accept his plea.

(R., p.227.) The record supports the district court's determination that Steinemer was not forced to change his answer to Question 19, but did so on his own volition.

During the hearing on Steinemer's motion to withdraw his guilty pleas, Mr. DeFranco, was questioned about the change made to Steinemer's answer to Question 19 in the following colloquy:

> [PROSECUTOR]: On the affidavit in support of motion to disqualify counsel, allegation number four, it specifically states that on the guilty plea advisory form there is a question regarding the discovery in the case and my attorney told me to, quote, "check yes as having seen the video and listened to the audio."
>
> A. Right.
>
> Q. Is that something that you did with the defendant?
>
> A. I read that. And.
>
> [DEFENSE COUNSEL]: Mr. DeFranco read what, read the guilty plea form or something else?
>
> THE WITNESS: The guilty plea form. And also I read the affidavit where he said that his -- me, that I told him that he needed to check this.
>
> And to say I have an independent recollection of exactly what I said, I don't. But I knew what he was saying. *What he was saying was that I told him that he better check that. And if we discussed it in that context I would not have said that you better check that. I would have said that if you want to plead guilty and you want the*

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alleges . . . that Mr. DeFranco told Defendant to 'check yes' on the guilty plea advisory form with regard to whether he had reviewed the evidence provided to his attorney in discovery." (R., p.225.) Paragraph "4" of Steinemer's Affidavit in Support of Motion to Disqualify Counsel states, "On the guilty plea advisory form there was a question regarding the discovery in the case and my attorney told me to 'check yes as having seen the video and listened to the audio.'" (R., p.172.)

> *Court to accept your plea, you have to check this.* So I think I am explaining myself.
>
> *It was a matter of semantics, though, and I felt like when I read the affidavit or the suggestion that somehow I had forced him to check that and that is not true.*

(Tr., p.58, L.20 – p.59, L.25 (emphasis added).)

Mr. DeFranco's testimony supports the district court's ruling that Steinemer was neither forced nor directed to change his answer to Question 19. The attorney matter-of-factly explained that if Steinemer wanted to plead guilty and have the court accept the plea, he would have to check the yes answer. The district court correctly noted the distinction between Steinemer's claim that his attorney told him to check "yes" as the answer, and Mr. DeFranco's testimony that he informed Steinemer that if he wanted to plead guilty and have the court accept such plea, he would have to do so.

The district court reasonably rejected Steinemer's assertion that his attorney either forced or directed him to change his answer to Question 19 of the Guilty Plea Advisory form, and, in turn, that such assertion supported Steinemer's motion to withdraw his guilty pleas.

4. Steinemer Had The Chance To Review The Psychosexual Evaluation Prior To Deciding To Withdraw His Guilty Plea

The last factor the district court cited in support of its denial of Steinemer's motion to withdraw his guilty pleas was that he had the opportunity to review his psychosexual evaluation (PSE) before he decided to withdraw his pleas. The court explained:

> Finally, the Court finds Defendant had the chance to review the psychosexual evaluation prior to deciding to withdraw his guilty plea. The Court acknowledges this does not mean Defendant's motion to withdraw

> guilty plea is necessarily comparable to one made after sentencing. Nonetheless it is a factor the Court has considered in making its decision.

(R., p.227.)

On appeal, Steinemer argues that the district court's "finding does not support the court's ruling because there was no evidence that Mr. Steinemer was dissatisfied with the report after his review[,]" the PSE was largely neutral, and it concluded Steinemer was "a moderate risk to reoffend and moderately amendable [sic] to treatment." (Appellant's Brief, p.11.)

Although the PSE concluded Steinemer was a moderate risk to reoffend and moderately amenable to treatment, those findings are not as neutral as Steinemer presumes. First, a "moderate" risk to reoffend does not mean a "low" risk to reoffend. The PSE explained there are three possible categories -- low, moderate, and high -- and that Steinemer "presented as a moderate risk to re-offend within the next five to ten years with a future sexual offense when compared to other sexual offenders. This risk classification *was contingent on the examinee participating in sexual offender and substance abuse treatment* to address the issues and dynamic variables that contributed to the sexual offense." (PSI, pp.63, 82 (emphasis added).) Additionally, the PSE found that, assuming Steinemer would re-offend, he "appeared most likely to act in an opportunistic way, targeting individuals who were easily manipulated, intimidated, and overcome by force[,]" and "based on [his] history, if he were to have a future victim[,] he seemed capable of higher levels of harm than most sexual offenders." (PSI, p.64; see R., p.92 ("the examinee seemed most prone towards sexually offending against vulnerable adult females"); p.93 ("Lastly, if the examinee were to have another

sexual assault, his potential for use of future physical force, restraint, and manipulation seemed high as compared to other sexual offenders.").)

Moreover, the PSE recognized that the risk Steinemer posed if he was released into the community would require greater (i.e., high risk) supervision than that normally provided to "moderate risk" sexual offenders, explaining:

> However, even though the examinee was classified as a moderate risk to re-offend, if at this time he were released in the community, it would be advised he was [sic] supervised with the level of attention typically given to high-risk individuals, considering the severity of harm that he could potentially cause another individual based on his history. If the examinee responded to treatment, then reducing the level of supervisory attention to what was more typical for his risk classification of moderate would be advised.

(PSI, p.97.) Similarly, the STATIC-99 evaluation, conducted as part of the PSE, placed Steinemer "at the moderate-high risk category for recidivism." (PSI, p.83.) That evaluation determined that, based on Steinemer's score, "he was 2.42 times as likely as the typical sexual offender to re-offend." (Id.) Steinemer would not have wanted the district court to consider, in determining his sentence, either the heightened supervision recommendation or the STATIC-99 recidivism finding contained in the PSE.

The PSE found that, compared to the risk of other sexual offenders, *if* Steinemer participated in sexual offender and substance abuse treatment (presumably as requested) he would be a moderate risk to commit another sexual offense, likely against a vulnerable adult female, within the next five to ten years -- findings Steinemer would not have wanted the district court to know about when it sentenced him. Rather than being neutral, such findings serve as a warning that, at best, Steinemer would remain a palpable risk to commit another sexual offense on another vulnerable woman.

In regard to treatment, the PSE explained that Steinemer "was determined to be as amenable for sexual offender treatment as most sexual offenders." (PSI, p.64.) However, even this finding was altered by the predatory and violent nature of Steinemer's crimes against Ms. S., as it further stated, "Because of the potential harm he could cause another individual, it would be advised treatment took place in a structured environment that could significantly limit the examinee's access to potential victims and opportunity to commit a future sexual offense." (PSI, p.64.)

In sum, the PSE clearly contains damaging information and findings about the continued danger Steinemer poses as a sexual offender. The district court reasonably found that Steinemer's opportunity to review the PSE prior to deciding to withdraw his guilty pleas was a factor that weighed against granting his motion.

5. Conclusion

Based on its consideration of the four factors discussed above, the district court properly concluded that Steinemer's "guilty plea was neither coerced nor was it based upon a lack of information concerning a potential defense. Rather, . . . that plea was entered knowingly and voluntarily and with an understanding of the consequences." (R., p.227.) As the district court held, Steinemer failed to show any just reason for his motion to withdraw his pleas of guilty. (Id.) His pleas were voluntary and free from legal defect. The district court properly denied Steinemer's motion. That action was not an abuse of discretion and should be affirmed on appeal.

CONCLUSION

The state respectfully requests this Court to affirm Steinemer's judgment of conviction for kidnapping in the first degree and rape.

DATED this 26th day of December, 2012.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of December, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DENNIS BENJAMIN
Nevin, Benjamin, McKay & Bartlett, LLP
PO Box 2772
Boise, ID 83701

John C. McKinney
Deputy Attorney General

JCM/pm