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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 44749
Plaintiff-Respondent,	)	
	)	Madison Co. Case No.
vs.	)	CR-2015-2493
	)	
JASON BRAD HJELM,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jason Brad Hjelm appeals from the judgment entered upon his guilty plea to possession of methamphetamine. On appeal, he challenges the district court's denial of his motion for a continuance and his motion to withdraw his guilty plea.

Statement Of The Facts And Course Of The Proceedings

Hjelm was a passenger in a vehicle that was pulled over because the driver was driving without a license. (R., p. 14.) While the officer spoke to the driver he smelled marijuana. (R., p. 14.) Consequently, the officer searched the vehicle, finding suspected methamphetamine and a pipe under the passenger seat. (R., p. 15.) Hjelm was arrested and searched, and more methamphetamine and paraphernalia were found on his person. (R., p. 15.)

The state charged Hjelm with possession of methamphetamine and possession of paraphernalia. (R., pp. 42-43.) Hjelm initially filed a motion to suppress (R., p. 50); however, by the next pretrial hearing the parties had reached a settlement agreement, and Hjelm pleaded guilty to the possession charge. (R., pp. 58-59.)

Hjelm thereafter moved to withdraw his plea. (R., pp. 60-61.) He asserted that "he believe[d] his plea was made involuntarily and without being properly advised and without full knowledge of the facts of this matter." (R., p. 60.) The district granted the motion to withdraw the plea. (R., p. 64.) Thereafter, new counsel substituted in to represent Hjelm. (R., p. 67.)

Hjelm filed a Combined Motion Supplementing Motion to Suppress and Motion to Dismiss and Brief in Support. (R., pp. 90-106.) The district court ruled on the motion,

suppressing pre-Miranda statements made to law enforcement, but denying suppression of the drugs and paraphernalia. (See R., p. 133.)

The case was set for trial. (R., p. 134.) On the morning of trial, Hjelm again changed course and entered into a plea agreement with the state, and the jurors were sent home. (R., p. 137; Tr., p. 110, L. 10 – p. 112, L. 9.) Pursuant to the plea agreement Hjelm pleaded guilty to the possession charge. (R., p. 138.) The district court accepted his plea and set the matter for sentencing. (R., p. 138.)

A PSI was ordered and completed. (R., p. 139; see PSI.) Thereafter, Hjelm filed several *pro se* motions prior to sentencing—a Motion to Execute Stay of Proceedings and Abate Further Proceedings, a Motion to Withdraw Attorney on Record, and a Motion for Continuance. (R., pp. 140-146.) At the hearing set for sentencing, the district court "inferr[ed] from the documents" that Hjelm filed that he wished to "fire [his] attorney and withdraw [his] plea of guilty," which Hjelm confirmed. (Tr., p. 135, Ls. 15-20.) The district court denied the motion to withdraw the guilty plea without prejudice. (Tr. p. 153, Ls. 3-5.) But the court continued the sentencing, allowing Hjelm to find counsel "to readdress" withdrawal of the plea. (Tr., p. 153, Ls. 4-6.)

Hjelm made additional *pro se* filings: he filed a Motion to Change Venue Due to Violation of Civil Rights and A Fair Hearing, a Petition for All Discovery of All Witness Statements, Audio and Video in this Matter, and a petition for rehearing. (R., pp. 149-156.) The public defender was appointed as counsel. (R., pp. 157-58.)

At the sentencing hearing Hjelm's counsel moved for a continuance. (R., p. 160.) He did so based on 1) Hjelm's belief that the district court had made assurances regarding a withdrawal of the guilty plea (Tr., p. 157, L. 22 – p. 159, L. 10); and 2) counsel's

representation that Hjelm thought there were existing dispatch and 911 records that had not been disclosed, and that would undermine the officer's credibility (Tr., p. 160, L. 9 – p. 162, L. 21). The district court denied the motion. (Tr., p. 176, L. 19 – p. 178, L. 19.)

Hjelm's counsel then renewed the motion to withdraw the plea, arguing Hjelm had only pleaded guilty because he felt intimidated by a statement the prosecutor made at trial regarding the sentence he would seek.[1] (Tr., p. 178, L. 20 – p. 180, L. 8.) Counsel also represented more generally that Hjelm did not knowingly and voluntarily enter the plea due to a lack of understanding of the proceedings: "I don't think [Hjelm] understands the legal jargon and whatnot, and I don't think that it was explained to him in such a way that he was able to understand it by [sic] his other attorneys." (Tr., p. 187, Ls. 3-20.)

The district court disagreed:

> So I believe that the Defendant went into his second guilty plea with his eyes completely wide open. I found then—and I again affirm my prior finding just after listening to this testimony again—that the Defendant made a knowing, intelligent, and voluntary waiver of his right to a jury trial, that he was competent to do so, and that he established a factual basis for his plea.

(Tr., p. 190, Ls. 10-16.)

The district court accordingly denied Hjelm's motion to withdraw his guilty plea. (Tr., p. 191, Ls. 7-10.) The court sentenced Hjelm to five years prison with two years fixed, but suspended the sentence and placed him on probation. (R., p. 164.) Hjelm timely appealed. (R., pp. 163-65, 171-73.)

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[1] As Hjelm points out on appeal, "trial counsel specifically conceded that the prosecutor had not committed misconduct in his discussions with Mr. Hjelm." (Appellant's brief, p. 9; <u>see</u> Tr., p. 183, Ls. 6-15.)

<u>ISSUES</u>

Hjelm states the issues on appeal as:

I. Did the district court abuse its discretion by denying Mr. Hjelm's motion to continue the hearing on his motion to withdraw his guilty plea?

II. Did the district court abuse its discretion by denying Mr. Hjelm's motion to withdraw his guilty plea?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

I. Has Hjelm failed to show district court abused its discretion by denying the motion for a continuance?

II. Has Hjelm failed to show the district court abused its discretion by denying Hjelm's motion to withdraw his guilty plea?

ARGUMENT

I.
Hjelm Has Failed To Show The District Court Abused Its Discretion By Denying His Motion For A Continuance

A. Introduction

Hjelm argues there was undisclosed discovery, that was not presented below, that "could possibly have given Mr. Hjelm the ability to impeach the officer's credibility at trial and good cause to withdraw his plea." (Appellant's brief, p. 7.) Hjelm argues the district court therefore failed to reach its decision to deny his motion for a continuance "through an exercise of reason," and abused its discretion. (Appellant's brief, p. 7.)

But this argument fails, because there is no evidence in the record below showing that there was undisclosed discovery, or that it would have affected the officer's credibility. Moreover, an application of the applicable standards shows the district court arrived at its decision through an exercise of reason, and correctly denied Hjelm's motion for a continuance. Hjelm therefore fails to show any abuse of discretion.

B. Standard Of Review

A decision whether to grant a party's motion for a continuance is in the district court's discretion. State v. Ward, 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). Appellate review of a discretionary decision looks to "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable; and (3) whether the trial court reached its decision by an exercise of reason." State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011). "Unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for

continuance, appellate courts can only conclude that there was no abuse of discretion." Id. (citing State v. Cagle, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995)).

C. Hjelm Fails To Show The District Court Abused Its Discretion In Denying His Request For A Continuance

The district court did not abuse its discretion by denying Hjelm's request for a continuance. Hjelm requested a continuance for two reasons: 1) because he "[felt] that the Court stated something [during the original sentencing hearing] along the lines that once he was appointed a public defender and a motion to withdraw was made, that that motion would be granted" (Tr., p. 158, L. 16 – p. 159, L. 10); and 2) because "he [didn't] feel like he was able to receive all the discovery he requested in the case"—namely, "dispatch calls, dispatch logs, and 911 records" that would show that the traffic stop actually stemmed from a prior incident involving Hjelm fishing and trespassing on a neighbor's land. (Tr., p. 160, L. 12 – p. 161, L. 13.) Hjelm's roundabout theory was that the traffic stop was not based on the driver's license violation but "due to the fact that there was a relationship between the landowner and the cops," and that somehow *those* cops "[let] another department know what was going on," leading to the traffic stop. (Tr., p. 161, Ls. 7-13.) Hjelm concluded that evidence showing that the fishing-trespassing vendetta actually led to the stop would therefore "impeach the cop's credibility." (Tr., p. 161, L. 23 – p. 162, L. 4.)

The district court correctly denied the motion. (Tr., p. 176, L. 19 – p. 178, L. 19.) Hjelm's first basis for a continuance—the court's purported promise to grant a motion to withdraw—was directly contradicted by the audio recording of the original sentencing hearing. (Tr., p. 164, L. 22 – p. 165, L. 6; p. 172, Ls. 2-25.)

Hjelm's other argument for a continuance—based on the purported dispatch logs and the fishing-trespassing theory—was equally unavailing. After noting its abundant patience with the defendant up until that point, the district court explained its reasoning for a denial:

> But ignoring all that, ignoring all that, just going off of the merits of the motion that was brought up before the Court, the Court notes that back on July 20th of 2016, that there was a suppression hearing, that Officer Brodie Riding testified. He was under oath. Mr. Hjelm was present with his attorney, Mr. Bunitsky, had a full opportunity to cross-examine the officer about these issues. The evidence that was supplied to the Court at that hearing, which was not opposed by any testimony offered by Mr. Hjelm, so the unopposed testimony from the officer was that he had reasonable suspicion for the stop based upon the fact that he identified and recognized the driver of the vehicle and that he understood that the driver of the vehicle shouldn't have been driving because he didn't have a driver's license.
>
> So regardless of whether or not there may have been some ulterior motive, he was able to articulate reasonable suspicion without anything contrary being supplied by the Defense. Certainly they had full opportunity at that time to cross-examine him about motives and intents and—if somehow that was even relevant to his credibility, as it turned out, the driver of the vehicle, as the Court understands, didn't have a license and was on probation at the time.
>
> So I just don't think this is an argument that has any merit and would certainly justify a continuance. If the Defendant wants to continue researching this issue, he has a right to access those logs; and apparently he's made his own request for those. And if the evidence showed something to the contrary, I guess the Court would be willing to reconsider. But at this point in time this—you know, you've been talking about going fishing. This just seems like a fishing expedition that's being used to once again postpone this matter that has been set for so many different—on so many different occasions.
>
> It was set for sentencing on November 17th. At the October 31st—I continued that until October 31st. On October 31st I continued it again so that he could get court-appointed attorney, and the matter was set for sentencing on November 7th. We continued it again on November 7th. I'm not sure if there was a subsequent continuance or not, but here we are at the end of November. And again, there comes a time when the Defendant,

> who's pled guilty twice, has to face his day of reckoning. So the Court's of the opinion that this shouldn't be a basis for a continuance. So the Court is going to deny the request at this time.

(Tr., p. 177, L. 2 – p. 178, L. 19.)

This was plainly not an abuse of discretion. Numerous continuances and delays preceded this particular request for a continuance (see R., pp. 28-30, 33-35, 69, 81-84, 111-12), a fact that the court appropriately considered. See State v. Daly, 161 Idaho 925, 929, 393 P.3d 585, 589 (2017) (finding no abuse of discretion where the record "strongly suggest[ed] that Daly's request for substitute counsel evinced a desire to delay sentencing," and concluding "[t]he court acted well within its discretion in deciding the motion, including appropriate consideration of the needs of fairness and the demands of its calendar."). The district court here correctly found that, even assuming evidence showing an ulterior motive existed, it would have no bearing on the outcome of the suppression motion. (Tr., p. 177, Ls. 2-23.) With respect to officer credibility, Hjelm had a "full opportunity" to cross-examine the officer's story, but did not. (See Tr., p. 177, Ls. 4-23; see R., pp. 133-34.) All told, evidence that was only speculated to exist, that would not have affected suppression, regarding subjects that Hjelm had previously declined to explore, did not justify yet another continuance at the eleventh hour of the case. The district court did not abuse its discretion by denying the motion.

On appeal, Hjelm agrees the officer's purported ulterior motive is "irrelevant" for the purposes of the suppression hearing, but nevertheless argues that "evidence of an ulterior motive … could be used to impeach the officer's credibility generally; this could be done at trial and would be good cause for Mr. Hjelm to withdraw his plea." (Appellant's brief, p. 7.) Hjelm contends a continuance would have been justified in light

of this, and therefore the court "failed to reach its decision through an exercise of reason and abused its discretion." (Appellant's brief, p. 7.)

This argument fails. First, Hjelm's guilty plea waived "all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." Clark v. State, 92 Idaho 827, 832, 452 P.2d 54, 59 (1969). Consequently, a post-plea continuance motion could not be predicated on a failure to investigate issues affecting a hypothetical *trial*, in light of the guilty plea.

Even assuming a post-guilty plea motion for a continuance can be justified purely on trial-level claims, Hjelm's argument fails because it begs the question. It depends on a premature conclusion that there *were* officer credibility issues, because it assumes 1) that "dispatch calls, dispatch logs, and 911 records" existed; and 2) if they were produced, such records would support Hjelm's fishing-trespassing vendetta theory of the case. However, there is no evidence in the record supporting either assumption. Hjelm's counsel simply made unsworn arguments, based on hearsay, about how Hjelm "felt" additional records existed, and unsworn arguments, again based on hearsay, about the fishing-trespassing story, and its assumed effects on the officer's motives. (See Tr., p. 160, L. 11 – p. 162, L. 21.)

But arguments are not evidence. See State v. Griffith, 97 Idaho 52, 56, 539 P.2d 604, 608 (1975); State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). And unsworn representations, even made by counsel, are not evidence. C.f. State v. Cunningham, 161 Idaho 698, 701, 390 P.3d 424, 428 (2017) (holding that "unsworn representations, even by an officer of the court, do not constitute 'substantial evidence'" upon which a restitution award could be predicated). All told, there is no evidence in the

record that "dispatch calls, dispatch logs, and 911 records" existed or that, if they did, they would verify the fishing-trespassing story and therefore impugn the officer's credibility.[2] (See generally, R.) Because Hjelm's continuance motion was predicated on assumed facts and speculative conclusions, but was unsupported by actual testimony, affidavits, or other evidence, it fails.

Furthermore, Hjelm could have raised these issues prior to the sentencing hearing, but he did not. (See R., pp. 90-106, 119-31, 140-146, 149-56.) He could have specifically raised credibility issues during the suppression hearing, but he did not. (See Tr., p. 177, Ls. 2-15.) The record does not show that Hjelm questioned the officer about any telltale dispatch logs or 911 records, or about fishing-trespassing vendettas or inter-departmental conspiracies, or about his credibility generally. (See R., pp. 132-33.[3]) To the extent Hjelm had many months, motions, and opportunities to develop these issues as he saw fit—including the ability to directly address them with the officer on the stand—waiting until the penultimate moments before sentencing to bring them up was too little, too late.

There was no evidence supporting Hjelm's motion for a continuance. And even assuming that "dispatch calls, dispatch logs, and 911 records" existed Hjelm fails to show

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[2] In particular, one wonders why "911 records" would exist here, given that the officer encounter happened during a routine traffic stop.

[3] Admittedly, the review of the record on this point is limited to the record Hjelm has supplied on appeal, which includes minutes of the suppression hearing, but not a transcript of it. (See R., pp. 132-33.) But it is the "responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal," and "[i]n the absence of an adequate record on appeal to support the appellant's claims, [this Court] will not presume error." State v. Tregeagle, 161 Idaho 763, 768, 391 P.3d 21, 26 (Ct. App. 2017).

the district court exercised its discretion in an unreasonable way given the posture of the motion for a continuance.[4] Because Hjelm fails to show any prejudice to his substantial rights the district court did not abuse its discretion in denying the motion.

II.
Hjelm Has Failed To Show The District Court Abused Its Discretion By Denying His Motion To Withdraw His Guilty Plea

A. Introduction

Hjelm argues "that he was intimidated by the threat of prison time and only pleaded guilty to avoid prison time." (Appellant's brief, p. 10.) He therefore contends the court failed to reach its decision to deny his motion to withdraw his plea "through an exercise of reason," and abused its discretion. (Appellant's brief, p. 10.)

This argument fails because there was no evidence below showing that Hjelm was intimidated by the threat of prison time and only pleaded guilty to avoid prison time. To the contrary, Hjelm's own testimony unambiguously shows that he knowingly, intelligently, and voluntarily pleaded guilty because he was in fact guilty. Accordingly, the district court arrived at its decision through an exercise of reason and correctly denied

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[4] To the extent Hjelm takes issue with what his trial attorneys did or did not do to obtain the purported "dispatch calls, dispatch logs, and 911 records," ferret out other evidence supporting the fishing-trespassing vendetta theories, or otherwise investigate or develop these issues prior to Hjelm's eleventh-hour motion for a continuance, those claims are more appropriately presented in a collateral proceeding reviewing counsel's assistance. State v. Saxton, 133 Idaho 546, 549, 989 P.2d 288, 291 (Ct. App. 1999) ("The question of competency of counsel is an extremely complex factual determination which, in all but the most unusual cases, requires an evidentiary hearing before determination . . . . The resolution of those factual issues for the first time on appeal, based upon a trial record in which competence of counsel was not at issue, is at best conjectural.") (quoting Carter v. State, 108 Idaho 788, 791, 702 P.2d 826, 829 (1985) (Bakes, J., specially concurring).)

Hjelm's motion to withdraw his plea. Hjelm therefore fails to show any abuse of discretion.

B. Standard Of Review

The granting or denial of a motion to withdraw a guilty plea is within the discretion of the trial court. State v. Hanslovan, 147 Idaho 530, 535, 211 P.3d 775, 780 (Ct. App. 2008).

C. Hjelm Fails To Show The District Court Abused Its Discretion In Denying His Motion To Withdraw His Guilty Plea

Defendants may move to withdraw a guilty plea prior to sentencing. I.C.R. 33(c). But the presentence withdrawal of a guilty plea is not an automatic right. State v. Carrasco, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990); Hanslovan, 147 Idaho at 535, 211 P.3d at 780. The defendant bears the burden of proving, in district court, that the plea should be withdrawn. Id.; Griffith v. State, 121 Idaho 371, 374-75, 825 P.2d 94, 97-98 (Ct. App. 1992).

In ruling on a motion to withdraw a guilty plea, the district court must determine, as a threshold matter, whether the plea was entered knowingly, intelligently and voluntarily. State v. Mauro, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991); Hanslovan, 147 Idaho at 536, 211 P.3d at 781; State v. Rodriguez, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). If the plea was voluntary, in the constitutional sense, then the court must determine whether other reasons exist to allow the defendant to withdraw the plea. Hanslovan, 147 Idaho at 536, 211 P.3d at 781. The decision to grant or deny a motion to withdraw a guilty plea lies in the discretion of the district court. Id. at 535, 211 P.3d at 780. "[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." Id. at 537, 211 P.3d at 782.

The district court did not abuse its discretion in denying Hjelm's second motion to withdraw his guilty plea. When the court denied the motion it began by revisiting Hjelm's second entry of plea:

> After the Court has considered this yet again, I've undertaken to listen to the recording of the Court's sentencing—excuse me, the Court's second change of plea colloquy. I've also seen the transcript—or listened to the transcript of the first one. So the Court is confident in finding that the Court has twice engaged in very thorough discussions under oath with the Defendant. It was typically thorough the first time I did it. The second time I believe I was painstakingly thorough.
>
> And the reason I did that is because he had once withdrawn his guilty plea before. We had just had a jury of 50 or so Madison County residents summoned to be here, and I had to tell them it was time to go home because the Defendant was going to be changing his plea. Perhaps if I had been wiser, I would have kept them around just in case he changed his mind. But he didn't change his mind. He went ahead and pled guilty, and he did that only after extremely careful and cautious and painstaking questioning by the Court in which the Court specifically addressed the fact that this was his second time pleading guilty. And I expressly told him that if he pled guilty a second time and then tried to withdraw it, it was highly unlikely that the Court would grant that.

(Tr., p. 189, L. 13 – p. 190, L. 9.) A review of Hjelm's guilty plea colloquy shows the district court's recollection was entirely correct; the court was painstakingly thorough in determining Hjelm's state of mind and knowledge of the proceedings. (Tr., p. 112, L. 10 – p. 132, L. 2.) And Hjelm unambiguously indicated he understood what was taking place, and was knowingly, intelligently and voluntarily pleading guilty. (See, e.g., Tr., p. 122, L. 24 – p. 126, L. 24; p. 128, L. 23 – p. 131, L. 12.) The court therefore correctly concluded:

> … I believe that the Defendant went into his second guilty plea with his eyes completely wide open. I found then—and I again affirm my prior finding just after listening to this testimony again—that the Defendant made a knowing, intelligent, and voluntary waiver of his right to a jury trial, that he was competent to do so, and that he established a factual basis for his plea.
>
> While the Court, I think, is properly lenient in allowing a Defendant prior to sentencing to withdraw a guilty plea later, I think out of caution and, frankly, out of judicial economy, it typically makes sense to allow that 'a [sic] second time. It just does make a mockery of justice. And the Court, based upon what's been presented, cannot conclude there's been sufficient evidence established that there's any reason to withdraw the plea. Certainly even after a sentencing the Court has discretion to withdraw a plea if I find that there's been a manifest injustice. In this case I haven't seen or heard anything suggesting there would be a manifest injustice.
>
> Although certainly that high of a level isn't required under these circumstances, the Court believes that the Defendant just, after the fact, gets scared and changes his mind. I cut him some slack the first time, but the second time I don't think it would be proper. And so the Court, even recognizing it has some discretion in this matter, does believe it would be far more proper that we go ahead with the sentencing. So the motion is denied. We'll now begin the sentencing hearing.

(Tr., p. 190, L. 10 – p. 191, L. 10.) A review of the record shows that the guilty plea was knowing, intelligent, and voluntary, and that the district court was well within its discretion to deny Hjelm's request to withdraw the plea.

On appeal Hjelm "asserts that he was intimidated by the threat of prison time and only pleaded guilty to avoid prison time," and that he "did not have the opportunity to fully review the dispatch information" and the potentially impeaching information that is purportedly therein. (Appellant's brief, p. 10.)

But these arguments fail. Again, Hjelm is relying on assertions that have no support in the record. Hjelm did not testify about, submit affidavits showing, or produce any other evidence that "he was intimidated by the threat of prison time and only pleaded

guilty to avoid prison time." (See generally Tr., pp. 109-34; see also R.) The prosecutor's recollection of the incident is not evidence of Hjelm's mental state or motivations (see Tr., p. 150, Ls. 1-11), nor is Hjelm's counsel's unsworn representations evidence of anything. C.f. Cunningham, 161 Idaho at 701, 390 P.3d at 428.

As a result, the only evidence in the record regarding Hjelm's state of mind during the entry of plea is his own testimony about it. And Hjelm's testimony establishes that the plea was knowing, voluntary, and intelligent: Hjelm testified that he was pleading guilty because he was guilty (Tr., p. 131, Ls. 7-12); that he was not coerced or pressured by the prosecutor or anyone else (Tr., p. 126, Ls. 6-24); and that he understood what he was doing (Tr., p. 121, L. 6 – p. 130, L. 12). Hjelm also informed the court in no uncertain terms that he was fully aware of the potential consequence should he develop buyer's remorse—for the second time—and seek to withdraw the plea. (Tr., p. 114, Ls. 12-25.) Weighing the plethora of evidence showing Hjelm knowingly, intelligently, and voluntarily pleaded guilty, against the unadorned, unsupported assertions to the contrary, the district court was well within its discretion to deny the motion.

Finally, even assuming that the prosecutor's statement about prison time intimidated Hjelm, and he in fact pleaded "guilty to avoid prison time" (see Appellant's brief, p. 10), this alone would fail to show a coerced plea—because the same could be said about *every* plea bargain in which the state offers a sentencing concession—such as avoiding prison time—as consideration. If a defendant could challenge the voluntariness of their plea simply because there was a worse outcome in the offing if they did *not* take the deal, and they entered into the plea agreement to avoid that worse outcome, then every plea bargain that gave some benefit to the defendant would automatically be suspect.

Here, the state agreed to dismiss the paraphernalia charge and seek no more than 30 days of local jail (in addition to any suspended sentence), and to not oppose a request for a withheld judgment. (See Tr., p. 119, L. 5 – p. 120, L. 12.) Moreover, Hjelm conceded below the prosecutor did not commit misconduct, and does not challenge that concession on appeal. (Appellant's brief, p. 9; see Tr., p. 183, Ls. 6-15.) Thus, even assuming Hjelm was intimidated by prison time, and pleaded guilty to avoid going to prison, he fails to show he acted out of coercion, rather than a desire to take advantage of the plea deal.

The district court was exacting, patient, and thorough throughout this case. It granted Hjelm's first motion to withdraw his plea. (R., p. 64.) It granted request after request for a continuance. (See R., pp. 28-30, 33-35, 69, 81-84, 111-12.) Before accepting Hjelm's second guilty plea, the court conducted a searching colloquy to ensure Hjelm's plea was knowing, intelligent, and voluntary. (Tr., p. 112, L. 10 – p. 132, L. 10.) A review of the transcript shows that it was.

Hjelm indicated he was fully aware of one potential consequence of pleading guilty: the district court could exercise its discretion and deny a motion to withdraw the plea. (Tr., p. 114, Ls. 12-25.) He nevertheless chose to plead guilty. Because Hjelm fails to show the district court abused its discretion by denying his motions, this court should affirm.

CONCLUSION

The state respectfully requests this Court affirm the district court's denial of Hjelm's motions.

DATED this 28th day of November, 2017.

/s/ Kale D. Gans__________
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of November, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kale D. Gans_____________
KALE D. GANS
Deputy Attorney General