

Buyer's Remorse: Withdrawing from a Plea Agreement

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Sometimes a party to a plea agreement has buyer's remorse and wants to get out of the deal. The standard for evaluating such a request varies, depending on when the motion is made.

Consider first a motion to withdraw from a plea agreement made before the agreement is accepted by the court. The rule is that the State may withdraw from a plea agreement any time before entry of the plea or before there's an act of detrimental reliance by the defendant. *State v. Collins*, 300 N.C. 142, 148-49 (1980); *State v. Hudson*, 331 N.C. 122, 146-49 (1992) (rejecting the defendant's argument that suspending trial preparation constituted detrimental reliance); *State v. Marlow*, 334 N.C. 273, 279-81 (1993) (rejecting the defendant's argument that submitting to a polygraph constituted detrimental reliance); *State v. Johnson*, 126 N.C. App. 271 (1997) (following *Collins* and *Marlow*). The defendant, however, may withdraw from a plea agreement before entry of the plea regardless of any prejudice to the prosecution. *Collins*, 300 N.C. at 149.

What about when the buyer's remorse doesn't kick in until after plea has been accepted by the court? Typically such a withdrawal request comes from the defendant. If the motion is made before sentencing, the trial court may allow the defendant to withdraw a guilty plea for any "fair and just" reason. *State v. Handy*, 326 N.C. 532, 539 (1990); *see also State v. Meyer*, 330 N.C. 738, 742 (1992); *Ager*, 152 N.C. App. at 579. Motions to withdraw made before sentencing, and "especially at a very early stage of the proceedings, should be granted with liberality." *Handy*, 326 N.C. at 537; *Meyer*, 330 N.C. at 742-43. Some of the factors to be considered in determining whether a fair and just reason exists include:

- whether the defendant has asserted legal innocence;
- the strength of the state's proffer of evidence;
- the length of time between entry of the guilty plea and the desire to change it;
- whether the defendant had competent counsel at all relevant times;
- whether the defendant understood the consequences of the plea; and
- whether the plea was entered in haste, under coercion or at the time when the defendant was confused.

Handy, 326 N.C. at 539; *see also Meyer*, 330 N.C. at 743; *Ager*, 152 N.C. App. at 579; *State v. Marshburn*, 109 N.C. App. 105, 108 (1993).

Once the defendant makes the required showing, the State may refute it with "evidence of concrete prejudice" by reason of the withdrawal. *Handy*, 326 N.C. at 539; *see also Meyer*, 330 N.C. at 743; *Marshburn*, 109 N.C. App. at 108. Lack of prejudice to the State does not, in and of itself constitute a fair and just reason for withdrawal. *Ager*, 152 N.C. App. at 584. Examples of concrete prejudice include:

- destruction of important physical evidence;
- death of an important witness; and
- that the defendant's codefendant has already been tried in a lengthy trial.

After sentencing a stricter standard applies: the defendant has to show manifest injustice. *State v. Shropshire*, 210 N.C. App. 478, 481 (2011); *Russell*, 153 N.C. App. at 509; *State v. Suites*, 109 N.C. App. 373, 375 (1993). Several reasons explain the stricter standard for post-sentencing motions to withdraw. First, once the sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and wish to have it set aside. *Handy*, 326 N.C. at 537. Second, by the time of sentencing, the prosecutor likely will have followed through on his or her promises, such as dismissing other charges, and it may be difficult to undo these actions. *Id.* And finally, the higher standard is supported by the policy of giving finality to criminal sentences which result from voluntary and properly counseled guilty pleas. *Id.*

Only a few published North Carolina appellate cases apply this standard. *Compare Suites*, 109 N.C. App. at 376-79 (manifest injustice existed to allow withdrawal of guilty plea to accessory before the fact to second-degree murder when named principal was later acquitted of first-degree murder), *with Shropshire*, 210 N.C. App. at 481 (trial court did not err by denying the defendant's motion to withdraw his guilty plea; the defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement); *State v. Salvetti*, 202 N.C. App. 18, 34-35 (2010) (trial court did not err in denying the defendant's motion to withdraw; among other things, the trial court had determined that counsel was not ineffective and that the State's evidence was sufficient to support the conviction); *Russell*, 153 N.C. App. at 510 (rejecting the defendant's argument that manifest injustice existed because he was not fully informed of the sentencing consequences; the trial court was not required to inform the defendant that the sentence could be made to run at the expiration of sentences he was serving for unrelated convictions). Most of those cases indicate that the factors considered in connection with a motion to withdraw made prior to sentencing apply equally to a motion to withdraw made after sentencing. *Shropshire*, 210 N.C. App. at 481; *Russell*, 153 N.C. App. at 509; *State v. Salvetti*, 202 N.C. App. 18, 34 (2010).

Although there is variation among jurisdictions, it is generally thought that the following types of fact patterns rise to the level of a manifest injustice:

- when the defendant was denied effective assistance of counsel
- when the plea was not entered or ratified by the defendant or a person authorized to act in his or her behalf;
and
- when the plea was involuntary.

See 5 LaFare Criminal Procedure § 21.5(a), at 872 (3d ed.) (listing other fact patterns).