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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0071**

Jabar Pedro Morarend, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 18, 2008
Affirmed; motion granted
Bjorkman, Judge**

Rice County District Court
File No. 66K8-98-1074

Lawrence Hammerling, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

G. Paul Beaumaster, Rice County Attorney, Benjamin Bejar, Assistant County Attorney, 218 Northwest 3rd Street, Faribault, MN 55021 (for respondent)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's denial of his postconviction petition, arguing that the district court erred by not permitting him to withdraw his guilty plea or resentencing him. In a pro se supplemental brief, appellant also argues that (1) the district court abused its discretion by sentencing him under a statute applicable only to repeat sex offenders, (2) imposition of a conditional-release term violated his plea agreement, and (3) his counsel was ineffective for failing to object to these two errors. Appellant also moves to strike portions of the appendix to respondent's brief. We affirm and grant appellant's motion to strike.

FACTS

In December 1998, appellant Jabar Pedro Morarend pleaded guilty to one count of first-degree criminal sexual conduct, a violation of Minn. Stat. § 609.342 (1996), in exchange for the state's agreement to dismiss other charges and recommend a guideline sentence. The district court sentenced Morarend to 110 months in prison and imposed five years of conditional release.

After being released from prison, Morarend violated his conditional-release terms. As a result, his incarceration was extended for the balance of the conditional-release period, until December 2009.

Morarend subsequently filed a pro se petition for postconviction relief challenging the five-year conditional-release term. The district court denied his petition. This appeal follows.

DECISION

On review of a postconviction decision, we determine whether there is sufficient evidence to support the postconviction court's findings. *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006). The postconviction court's decision will not be overturned absent an abuse of discretion. *Id.* We review the postconviction court's legal determinations de novo, but factual findings will not be set aside unless they are clearly erroneous. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007).

I. Validity of guilty plea

Under Minnesota law, “[a] criminal defendant does not have an absolute right to withdraw a guilty plea once it is entered.” *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004), *cert. denied*, 543 U.S. 882 (2004). After imposition of a sentence, a defendant may withdraw a guilty plea only if “necessary to correct a manifest injustice,” Minn. R. Crim. P. 15.05, subd. 1, and the burden is on the defendant to prove manifest injustice. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). Manifest injustice exists if the guilty plea was not accurate, voluntary, and intelligent. *Id.*

Morarend contends his guilty plea was not knowingly and understandingly made because his plea agreement did not include the five-year conditional-release term. Due process requires that a defendant be fairly apprised of the consequences of a plea. *Mabry v. Johnson*, 467 U.S. 504, 509, 104 S. Ct. 2543, 2547 (1984). But failure to include a conditional-release term in a plea agreement does not invalidate a guilty plea when the defendant was or should have been aware that the conditional-release term was mandatory. *Rhodes*, 675 N.W.2d at 327.

Morarend was sentenced according to a statutory framework that has been in place since 1992. *Id.* The Minnesota Supreme Court confirmed the mandatory nature of the conditional-release term in two cases decided July 9, 1998, well before Morarend's December 1998 guilty plea. *Id.* Thus, Morarend was on notice at the time of his plea and sentencing that the conditional-release term for sex offenders was mandatory.

Moreover, Morarend had an opportunity at the sentencing hearing to object to the inclusion of the conditional-release term or seek to withdraw his guilty plea and did not do so. As in *Rhodes*, Morarend's failure to object at the time of sentencing supports an inference that the defendant understood "from the beginning" that the term would be "a mandatory addition to his plea bargain." *Id.* Indeed, Morarend's failure to object for nearly nine years credits such an inference and supports the district court's denial of Morarend's postconviction petition. *Cf. Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) ("Certainly, delay is one relevant factor against granting [postconviction] relief, and in extreme cases may justify denial of relief."). The district court did not abuse its discretion in determining Morarend's plea was intelligently made notwithstanding the fact that the plea agreement did not reference the conditional-release term.

II. Pro se arguments

In his pro se supplemental brief, Morarend argues that the district court abused its discretion by (1) sentencing him under a statute applicable only to repeat sex offenders when he had no prior sex offenses, and (2) imposing a sentence that violated the plea agreement. He also argues that he received ineffective assistance of counsel at sentencing because his attorney failed to object to these claimed errors.

A.

Morarend relies on the headnote to Minn. Stat. § 609.109 (1998), which reads: “Presumptive and mandatory sentences for repeat sex offenders,” for the proposition the district court erred in imposing the five-year conditional-release term,¹ because he is not a repeat sex offender. But “[t]he headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are *mere catchwords* to indicate the contents of the section or subdivision and are not part of the statute.” Minn. Stat. § 645.49 (2006) (emphasis added). Moreover, section 609.109 distinguished between first-time and repeat offenders, imposing different mandatory conditional-release terms with respect to each category of offender. Minn. Stat. § 609.109, subd. 7. The district court correctly determined that section 609.109 applied to Morarend as a first-time offender and imposed the mandatory five-year conditional-release term accordingly.

B.

Morarend also argues that the inclusion of the conditional-release term resulted in a sentence that violated his plea agreement. When determining whether a plea agreement was violated, courts look to what the parties to the agreement reasonably understood the terms of the agreement to be. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). When a defendant’s guilty plea is induced by the promise of a maximum sentence that the

¹ The legislature has since repealed section 609.109 and amended the conditional-release provisions applicable to sex offenders. 2005 Minn. Laws ch. 136, art. 2, §§ 21, 23, at 929-33 (repealing Minn. Stat. § 609.109, subd. 7, and enacting Minn. Stat. § 609.3455, applicable to crimes committed on or after August 1, 2005). If Morarend were sentenced under the current statutory scheme, a ten-year conditional-release term would be required. Minn. Stat. § 609.3455, subd. 6 (2006).

district court agreed to honor by its acceptance of the plea, due process requires that the promise be fulfilled. *State v. Wukawitz*, 662 N.W.2d 517, 522 (Minn. 2003). Due process is not violated by addition of a conditional-release term when a specific sentence was not part of the underlying plea agreement. *State v. Christopherson*, 644 N.W.2d 507, 511-12 (Minn. App. 2002), *review denied* (Minn. July 16, 2002).

Morarend's petition to enter a guilty plea expressly acknowledged that the maximum penalty for his crime was 30 years, that the state would recommend a guideline sentence, and that the district court had not agreed to impose a particular sentence:

[A]nything in the plea agreement as to sentence (or disposition) by the judge is not a condition of my entering my plea of guilty herein; it would be merely a recommendation not binding upon the judge who sentences me (or makes any disposition) upon my plea of guilty today. Therefore, I cannot withdraw my plea of guilty if the sentencing judge disregards the prosecuting attorney's recommendation on sentence.

At the plea hearing, the state confirmed the scope of its agreement was "to dismiss the other counts . . . and agree[d] that at the time of sentencing that we'll be looking at Minnesota state guidelines for penalty and . . . won't seek an upward departure."

The district court's determination that the state's dismissals of the pending charges induced Morarend to plead guilty has ample support in the record. Morarend's agreement to a sentence in accordance with the sentencing guidelines constitutes an agreement to the conditional-release term, because the guidelines specifically acknowledge the mandatory conditional-release term. Minn. Sent. Guidelines cmt. II.E.05 (1998). The district court's finding that Morarend's plea agreement was not

violated has ample support in the record, and the district court did not abuse its discretion by denying his postconviction petition on that ground.

C.

Morarend also argues that he received ineffective assistance of counsel at sentencing because his lawyer did not object to the district court's imposition of the five-year conditional-release term.

To succeed in a claim of ineffective assistance of counsel, Morarend "must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted). There is a strong presumption that an attorney's representation falls within the range of reasonable professional assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Because Morarend has not demonstrated that the district court erred in applying section 609.109 to him and imposing the conditional-release term, counsel was not deficient by failing to object. Morarend's claim of ineffective assistance of counsel fails.

III. Motion to strike

Morarend moves to strike the materials at pages 15-18 of the state's appendix because they are not part of the record. The record on appeal consists of the papers filed in the district court, the exhibits, and the transcript of the proceedings. Minn. R. Civ. App. P. 110.01. We "will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*,

504 N.W.2d 758 (Minn. 1993). We agree that the challenged documents are outside the record. Because the state has not identified an applicable exception to rule 110.01, we grant Morarend's motion to strike.

Affirmed; motion granted.