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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2032**

Oscar Lee Haynes, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 7, 2010
Affirmed
Worke, Judge**

Anoka County District Court
File No. 02-CR-07-2334

Oscar Lee Haynes, Jr., Lino Lakes, Minnesota (pro se appellant)

Lori Swanson, Attorney General; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's denial of his postconviction-relief petition, arguing that the district court abused its discretion by (1) miscalculating his

sentence, (2) refusing to grant a downward departure, and (3) refusing to permit him to withdraw his guilty plea. We affirm.

D E C I S I O N

Appellant Oscar Lee Haynes, Jr. pleaded guilty to first-degree burglary and the district court sentenced him to 67 months in prison. Appellant petitioned for postconviction relief, challenging his sentence and the validity of his guilty plea. The district court denied appellant's petition. In reviewing a district court's denial of postconviction relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). This court will reverse a postconviction court's decision if the court abused its discretion. *Id.*

Sentence Calculation

Appellant first argues that the district court miscalculated his sentence. Interpretation of the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Minn. Stat. § 609.582, subd. 1 (2006) provides:

Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, *either directly or as an accomplice*, commits burglary in the first degree . . . if:

(a) the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building;

(b) the burglar possesses, when entering or at any time while in the building, any of the following: a dangerous weapon, any article . . . reasonably believe[d] [by the victim] to be a dangerous weapon, or an explosive; or

(c) the burglar assaults a person within the building or on the building's appurtenant property.

(Emphasis added.) Under the Minnesota Sentencing Guidelines, violations of subdivisions 1(b) and 1(c) are considered severity level VIII offenses, and a violation of subdivision 1(a) is considered a severity level VII offense. *See* Minn. Sent. Guidelines V (2006).

Appellant asserts that the district court improperly categorized his first-degree burglary conviction as a severity level VIII offense, arguing that because “the dwelling [was] unoccupied the crime is burglary in the second degree.” Appellant’s argument seems to derive from the language of Minn. Stat. § 609.582, subd. 1(a). But appellant was charged under Minn. Stat. § 609.582, subd. 1(b) because one of the items stolen during the burglary was a firearm. Because appellant pleaded guilty to violating Minn. Stat. § 609.583, subd. 1(b) based on possession of a dangerous weapon, his argument is unavailing.

Appellant also argues that he was improperly charged under Minn. Stat. § 609.582, subd. 1(b) because he never actually handled the firearm that was stolen from the house. Because Minn. Stat. § 609.582, subd. 1 applies to those who participate “either directly or as an accomplice” in a burglary, appellant’s distinction is without merit. As the district court properly concluded, the determinative inquiries are whether “the burglar possesses a dangerous weapon[] at any time” and whether “the alleged

accomplice assist[ed] in the commission of th[e] crime.” Appellant does not deny that the firearm was stolen from the house, or that the firearm would be considered a dangerous weapon. Accordingly, appellant was properly charged under Minn. Stat. § 609.582, subd. 1(b).

Appellant next argues that first-degree burglary is not a crime against a person, and does not fit within the severity level VIII classification. But appellant advances no authority to support the proposition that a crime must be against a person to be classified as a severity level VIII crime. Appellant’s argument is unconvincing; thus, the district court did not err by refusing to reduce the severity level of appellant’s offense.

Appellant finally argues that the district court erred by refusing to reduce his criminal-history score. A felony is an offense for which sentence of more than one year may be imposed. Minn. Stat. § 609.02 subd. 2 (2006). Consistent with the sentencing guidelines, a criminal-history point is appropriately assigned for a felony conviction for which the imposition of sentence is stayed. *State v. Clipper*, 429 N.W.2d 698, 701 (Minn. App. 1988). Appellant asserts that his felony conviction for financial transaction card fraud should not have been factored into his criminal-history score for sentencing purposes because he only served 60 days in jail and five years probation. But appellant was unquestionably convicted of a felony and sentenced accordingly. Regardless of whether his sentence was stayed, this conviction was properly calculated into his criminal-history score. The district court did not abuse its discretion by refusing to reduce appellant’s criminal-history score.

Downward Departure

Appellant also challenges the district court's denial of his request for a downward departure. The state argues that appellant did not properly raise the issue below because the downward departure was not listed as one of the specific claims for relief in appellant's postconviction petition. But appellant argued at length during the postconviction hearing that the district court should have departed from the presumptive sentence. Given the leniency afforded to pro se litigants on appeal, we consider this issue to have been properly raised below. *See, e.g., Dale v. State*, 535 N.W.2d 619, 621, 624 (Minn. 1995) (reviewing issues raised for the first time in a pro se brief to the court of appeals).

A district court may depart from the presumptive guideline sentence when "substantial and compelling circumstances" are present. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). But the presence of a mitigating factor does not require departure from the guideline sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Whether to depart from the guidelines rests within the district court's discretion, and this court will not reverse the decision "absent a clear abuse of that discretion." *Id.* Only in a "rare" case will a reviewing court reverse a district court's refusal to depart. *Kindem*, 313 N.W.2d at 7.

At sentencing, appellant argued for a downward departure based largely on his recent life changes, including attaining employment and attending church. The court

acknowledged appellant's efforts by stating, "I am pleased that you have seen the light. I believe that your epiphany is true." But the court also noted the sophisticated planning of the crime, including "the purchasing of the equipment and the tools necessary to carry out the crime." The court considered appellant's "significant criminal history that . . . includes seven felonies," as well as "the resistance that [appellant] gave along the way from the moment [he] [was] apprehended up until the time [he] entered [his] plea." Consequently, the district court determined that a departure was not warranted after considering all of the factors presented by appellant and currently argued on appeal. The district court did not abuse its discretion in denying appellant's departure request.

Withdrawal of Guilty Plea

Appellant also argues that the district court erred in denying his motion to withdraw his guilty plea. A postconviction court may allow a defendant to withdraw a guilty plea after sentencing if the petition is timely and withdrawal is "necessary to correct a manifest injustice." *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). But a petitioner does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). And a petitioner's belief that he would receive a probationary sentence is not grounds for withdrawal of a guilty plea unless the record establishes that the petitioner was legitimately misled. *State v. Ferraro*, 403 N.W.2d 845, 847-48 (Minn. App. 1987). The petitioner bears the burden to demonstrate that a plea withdrawal is warranted by a preponderance of the evidence. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). A district court's application of the manifest-injustice standard is reviewed for an abuse of discretion. *Perkins*, 559 N.W.2d at 685.

Appellant claims that he should be allowed to withdraw his plea because he agreed to enter the plea only on the understanding that he would be granted a dispositional departure in sentencing. There is little evidence in the record to support appellant's contention that he believed that he was promised a downward departure. To the contrary, at the plea hearing, the state informed the court that appellant was "pleading guilty to . . . burglary in the first degree. The remaining counts would be dismissed. . . . [T]he [s]tate would agree to cap the time it's requesting at [the] low end of 67 months. The defense is free to argue for a downward departure, although the [s]tate has not agreed to that." Appellant pleaded guilty immediately afterwards and indicated that he understood the rights he forfeited by pleading guilty.

In denying appellant's postconviction request to withdraw his guilty plea, the district court concluded "a departure was not, in any way, promised to [appellant]." Appellant fails to demonstrate by a preponderance of the evidence that the district court erred in this assessment. Accordingly, the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

Affirmed.