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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0088**

Marcus Aaron Smith, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 17, 2012
Affirmed
Rodenberg, Judge**

Washington County District Court
File Nos. 82CR09710; 82CR091144

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Peter Orput, Washington County Attorney, Karin L. McCarthy, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this postconviction appeal, appellant Marcus Smith argues that the postconviction court erred in (1) declining to hold an evidentiary hearing regarding

whether appellant's guilty plea was voluntary and (2) affirming that there were no substantial and compelling circumstances in support of a downward durational sentencing departure. We affirm.

FACTS

In late November and early December 2008, appellant was incarcerated for a domestic-assault conviction. J.H., the assault victim, had obtained an order for protection (OFP) against appellant. While incarcerated, appellant made numerous phone calls and third-party contacts with J.H.

On January 23, 2009, the state charged appellant with two counts of harassment and two counts of violating an OFP. A second complaint, filed on February 12, 2009, charged appellant with another count of violating an OFP. This second complaint stemmed from a third-party contact made in late January 2009, after the first complaint had been filed.

Appellant pleaded guilty to one count of harassment in the first complaint and one count of violating an OFP in the second complaint. As part of the plea agreement, the state agreed to dismiss the remaining charges, to refrain from charging any pending referrals, to forego pursuing its notice of intent to seek an upward sentencing departure, and to permit appellant to request a downward sentencing departure on both convictions. The parties agreed to leave all remaining sentencing terms up to the court.

During the plea hearing, the prosecutor reiterated that although appellant could argue for a downward durational departure at sentencing, the state intended to "adamantly oppose any request for a departure." When the court asked appellant if this

representation comported with his understanding of the agreement, he stated, “Partially, yes.” Appellant voiced his belief that the state had previously agreed *not* to oppose the downward durational departure.

Defense counsel then clarified that the state would be seeking the presumptive guidelines sentence. The court informed appellant, “You still have the right to request your departure. They’re simply going to ask for a guidelines sentence. They’re going to oppose what you’re asking for, basically. And then, as you know, I’ve got to make that call at sentencing.” Appellant affirmed his corrected understanding that the state would oppose his request for a durational departure. After consulting with his attorney, appellant entered his plea of guilty.

At sentencing, appellant moved for a downward durational departure. He argued that the departure was justified based on the benign and nonthreatening nature of the contacts, the extenuating circumstances motivating the contacts, the lack of physical or emotional harm to the victim, and the severity of the prison disciplinary sanctions previously imposed on him as punishment for the contacts. The state argued for the presumptive guidelines sentence.

After explaining its “finding that there are no substantial and compelling mitigating reasons to depart,” the district court imposed the presumptive sentence of 23 months for the harassment conviction and 15 months for the OFP violation.

Appellant filed a petition for postconviction relief on October 4, 2011. The petition alleged that appellant’s guilty plea was not voluntary because it was based on his understanding that the court would grant his request for a downward durational departure

over the state's objection. Appellant also argued that the sentencing court abused its discretion in denying his motion for a downward durational departure.

The postconviction court summarily denied appellant's claims for postconviction relief. It found that, although appellant initially believed the district court would grant him a durational departure, the state corrected this misunderstanding by repeatedly stating that it would oppose any such departure. The postconviction court found that appellant's guilty plea was voluntary. It also found that there were no substantial or compelling reasons to depart from the presumptive guidelines sentence.

This appeal followed.

D E C I S I O N

Appellant challenges the postconviction court's denial of his petition for postconviction relief. This court reviews a postconviction court's factual findings for clear error. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review questions of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We will not disturb the postconviction court's decision on a petition for postconviction relief absent an abuse of discretion. *Dukes*, 621 N.W.2d at 251.

I.

Appellant first argues that, because there is a factual dispute as to the voluntariness of his guilty plea, the postconviction court erred in rejecting his claim for relief without holding an evidentiary hearing.

Courts may deny petitions for postconviction relief without a hearing if "the petition and the files and records of the proceeding conclusively show that the petitioner

is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2010). The petitioner bears the burden of alleging facts which, if established by a preponderance of the evidence, would entitle him to relief. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002); *State v. Rainer*, 502 N.W.2d 784, 787 (Minn. 1993). In determining whether a postconviction court properly denied an evidentiary hearing, we review its decision for an abuse of discretion. *See Bruestle v. State*, 719 N.W.2d 698, 706 (Minn. 2006) (applying abuse-of-discretion standard in reviewing the denial of a postconviction evidentiary hearing).

There exists no absolute right to withdraw a guilty plea. *Williams v. State*, 760 N.W.2d 8, 11 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009). After sentencing, a guilty plea may be withdrawn only when necessary to correct a “manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice arises when a guilty plea is constitutionally invalid—that is, if it is not voluntary, accurate, and intelligent. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The defendant bears the burden of establishing that the plea was invalid. *Id.*

The voluntariness prong ensures that guilty pleas are not entered under “improper pressure or coercion.” *Id.* at 96. To determine whether a plea was voluntary, courts must examine the parties’ reasonable understandings of the plea agreement in light of all relevant circumstances. *Id.* Assessing the validity of the plea is a question of law, which this court reviews de novo. *Id.* at 94.

Appellant asserts that his plea was involuntary because it was based on a misunderstanding of the plea agreement. Specifically, he claims that the district court led him to believe it would grant his request for a downward sentencing departure over the

objection of the state. Appellant argues that the postconviction court should have granted him a postconviction evidentiary hearing on this issue because his petition alleged facts which, if proven, would entitle him to relief.

The transcript of the plea hearing conclusively refutes appellant's argument. Although appellant initially stated that he thought the state would agree to a downward departure, this misunderstanding was promptly rectified on the record. The district court, prosecutor, and defense counsel all clarified multiple times that the state would not agree to a downward departure. The district court informed appellant that although he was free to request a downward departure, the state would be objecting to the request, and the district court would make the final determination at sentencing. Finally, when the district court asked appellant if he understood that the state would oppose his request for a downward departure, appellant stated, "Yeah. Now I understand that." Appellant then consulted with his attorney and decided to go forward with the guilty plea. Appellant affirmed his understanding that if he did *not* plead guilty, the state would pursue an upward sentencing departure, but that the state had agreed not to seek the upward departure in exchange for the guilty plea. Thus, it is very clear from the transcript that appellant fully understood the terms of the plea agreement and proceeded with the plea voluntarily.

The plea petition itself, signed by appellant, also conclusively establishes that he was never guaranteed a particular sentencing outcome. The terms of the agreement as stated in the petition were that appellant would "be allowed *to argue for* a durational departure at sentencing." (Emphasis added.) All other sentencing terms were expressly

left up to the district court to decide. Appellant thus pleaded guilty with the full understanding that he would be allowed to request a downward departure, that the state would oppose the departure, and that the district court would make the final decision.

Appellant argues that the district court created a misunderstanding by suggesting at the plea hearing that it would grant appellant's request for a downward departure over the state's objection. The sole support appellant cites for this argument is the district court's comment, "I've got to make that call [regarding the departure request] at sentencing." Appellant argues that by stating it would "make [the] call," the district court implied that it would grant the departure. But the statement that the court would "make that call at sentencing" suggests nothing about the outcome. To the contrary, making a "call" commonly means "indicat[ing] a decision in regard to" something, as an umpire or referee would do in a sporting event. *The American Heritage Dictionary* 273 (3d ed. 1992). The court thus told appellant that it would make a decision regarding the departure request at sentencing. The court's statement was entirely consistent with the parties' agreement that the length of the sentence was to be left to the court. The challenged comment did not in any way convey that the court had already made a decision regarding the request.

Moreover, as appellant had been sentenced for thirteen convictions in the previous eight years, he was presumably familiar with the sentencing process and with the role of the judge in imposing sentence. The prosecutor had warned him that the judge might not grant the departure, and appellant was well aware that the state would oppose it. He

could not have reasonably interpreted the district court's statement as an agreement to grant the departure.

The record conclusively establishes that appellant's guilty plea was voluntary. As the same judge presided over both the plea hearing and the postconviction petition, the judge was already familiar with the facts of the case and knew what had transpired at the plea hearing. The postconviction court did not abuse its discretion in denying appellant's request for postconviction relief without holding an evidentiary hearing on the request for a plea withdrawal.

II.

Appellant also argues that the district court abused its discretion in finding that there were no substantial or compelling circumstances in support of a downward durational departure and that the postconviction court erred by denying his petition for postconviction relief on that basis.

Courts may depart from a presumptive sentence only if there are "identifiable, substantial, and compelling circumstances" in support of departure. Minn. Sent. Guidelines II.D (2008). Mitigating circumstances which may support a downward durational departure include the defendant's minor or passive role in the crime, the victim's role as an aggressor, and other substantial grounds tending to excuse or mitigate the defendant's culpability. Minn. Sent. Guidelines II.D.2.a (Supp. 2009). Thus, a downward departure may be justified if the defendant's role is "significantly . . . less serious than that typically involved in the commission of the crime." *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

Whether a ground for departure constitutes a substantial and compelling circumstance is a question of law reviewed de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). However, when a case involves substantial and compelling circumstances, the district court has broad discretion in deciding whether to grant a departure. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984). This court’s review of a decision to impose the presumptive sentence is “extremely deferential.” *Dillon*, 781 N.W.2d at 595–96. Only “rare case[s]” will merit reversal of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

At sentencing, appellant advanced various arguments in support of departure. He argued that the benign nature of the contacts mitigated the seriousness of the offenses.

However, the record demonstrates that appellant’s persistence in continually contacting J.H. was in and of itself threatening. Appellant perpetrated several acts of domestic abuse against J.H., and she had previously obtained nine OFPs against him. According to the complaint, J.H. was extremely fearful of appellant, and his continuing attempts at contact were extremely disruptive of her daily life. The state also highlighted the sheer number of appellant’s OFP violations; he persisted in making third-party contacts with J.H. as recently as seven days before sentencing. The district court properly took the extensive contacts into account, noting that “I have never seen anyone with more violations of orders for protection in the history that I’ve been involved in the criminal system.” Thus, even if the content of the phone calls could in some respects be characterized as non-threatening, the contacts themselves had an adverse effect on the

victim. The district court also properly considered that the offenses involved admittedly intentional violations of known directives from the court.

Appellant also argued that the circumstances surrounding the phone calls were extenuating. For example, he claimed that he was on one occasion seeking to verify the well-being of their children, when he learned that his daughter was missing. The district court expressly considered this argument and determined that it was not a substantial or compelling circumstance because emergency situations do not justify violating an OFP. Appellant, having been the subject of at least nine other OFPs, was aware that he could not contact the victim (including through third parties) for any reason. He admitted knowing that the contacts violated the OFP. Additionally, appellant admitted to other contacts that did not involve extenuating circumstances, such as when he called J.H. directly to wish her a happy birthday.

Finally, appellant argued that the severity of the prison disciplinary sanctions previously imposed upon him for the contacts merited a lesser sentence. But appellant failed to establish how the sanctions mitigated his culpability with regard to the underlying offenses. Additionally, the district court correctly observed that the authority for imposing prison disciplinary sanctions in this case was beyond its purview. *See* Minn. Stat. §§ 244.03, .035, .04 (2008) (providing commissioner of corrections with broad authority to impose disciplinary sanctions). That appellant's crimes also and simultaneously violated disciplinary rules at the facility in which he was then incarcerated does not substantially mitigate the seriousness of the offenses.

The record supports the district court's imposition of the presumptive sentence on both counts. The district court fully considered appellant's arguments and found that they did not mitigate the seriousness of the offenses. Although not required to do so, the district court thoroughly explained its reasons for denying the requested departure. The record establishes that the district court did not err in finding that there were no substantial and compelling reasons in support of departure and that the postconviction court did not err in denying relief on this ground.

Affirmed.