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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1175**

Isauro Soto, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 23, 2012
Affirmed
Collins, Judge***

Polk County District Court
File No. 60-CR-08-1807

David W. Merchant, Chief Appellate Public Defender, Ngoc L. Nguyen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Gregory A. Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and
Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

In this postconviction appeal challenging his convictions on two counts of second-degree burglary, appellant contends that he is entitled to withdraw his guilty pleas because they were not voluntary, knowing, and intelligent, and because he was deprived of the constitutional right to an impartial judge. We affirm.

FACTS

Appellant Isauro Soto was charged with two counts of second-degree burglary, violations of Minn. Stat. § 609.582, subd. 2(b) (2006 & Supp. 2007), as well as misdemeanor theft and misdemeanor attempted theft. The complaint alleges that on May 5 and 6, 2008, Soto forcibly entered the Cathedral of the Immaculate Conception (Cathedral) and St. Paul's Lutheran Church (Lutheran Church) in Crookston, without consent, and stole money from the Cathedral. On September 2, 2008, Soto agreed to plead guilty to both counts of second-degree burglary in exchange for the dismissal of the misdemeanor charges, with no agreement as to the sentence.

During the plea hearing, District Court Judge Jeffrey S. Remick disclosed that he is a member of the Lutheran Church and asked the parties if they objected to him accepting Soto's guilty pleas. The parties responded that they had no objection, and Soto's guilty pleas were entered. Judge Remick then asked the parties if they objected to him presiding over Soto's sentencing hearing, and offered to arrange for a judge who is unaffiliated with either of the churches to conduct the sentencing hearing. Both Soto and his counsel stated that they had no objection to Judge Remick presiding.

At the sentencing hearing on October 6, 2008, the state sought sentences at the high end of the guidelines' presumptive-sentence range, citing Soto's history of burglary and theft offenses. The presentence investigation (PSI) report concludes that Soto poses a risk to the community and a risk of reoffending. The district court imposed and executed a sentence of 51 months' imprisonment for Soto's conviction of second-degree burglary of the Cathedral, and a concurrent sentence of 57 months' imprisonment for his conviction of second-degree burglary of the Lutheran Church. Both sentences are at the high end of the guidelines' presumptive-sentence range.

On November 1, 2010, Soto filed a petition for postconviction relief, seeking to withdraw his guilty pleas because they were not voluntary, knowing, and intelligent, and because he was deprived of the constitutional right to an impartial judge. The postconviction court, Judge Remick presiding, denied Soto's petition. The postconviction court found no factual support for Soto's claim that he is innocent of the offenses or that Soto's counsel coerced his guilty pleas, and found sufficient evidence in the record to confirm that Soto's guilty pleas were voluntary, knowing, and intelligent. The postconviction court also concluded that Soto was not deprived of the constitutional right to an impartial judge because (1) Soto waived any objection to Judge Remick's involvement in Soto's criminal proceedings, (2) the Minnesota Code of Judicial Conduct did not obligate Judge Remick to disqualify himself, and (3) the record contains no evidence of actual judicial bias. This appeal followed.

DECISION

We review the decision of a postconviction court for an abuse of discretion. *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010). Issues of fact are reviewed for sufficiency of the evidence, and we review issues of law de novo. *Id.* A defendant does not have an absolute right to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). A defendant may withdraw a guilty plea after sentencing only if it is “necessary to correct a manifest injustice.” Minn. R. Crim. P. 15 .05, subd. 1. There is a manifest injustice if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. *Id.* Soto argues that he is entitled to withdraw his guilty pleas because they were not voluntary, knowing, and intelligent, and because he was deprived of the constitutional right to an impartial judge.

I.

Soto initially contends that his guilty pleas were not voluntary, knowing, and intelligent, based on his bare assertion that the pleas were coerced by his counsel. But having failed to support this assertion by argument or authority, Soto has waived this issue. *See State v. Dahl*, 676 N.W.2d 305, 310-11 (Minn. App. 2004) (holding that issue unsupported by legal argument or authority is waived unless prejudicial error is obvious on mere inspection), *review denied* (Minn. June 15, 2004). Moreover, Soto’s assertion of coercion contradicts his guilty-plea colloquy, during which Soto testified under oath that he believed he was of fit mind to offer his guilty pleas, he was satisfied with his counsel’s work, his counsel understood the relevant facts and law, and no one had threatened him

or made him promises to induce him to plead guilty. Soto's assertion of coercion is also belied by the plea petition that Soto signed and testified to having read. Because the record contains no evidence that Soto's guilty pleas were coerced, this argument lacks merit.

Soto also contends that he is innocent of the offenses for which he was convicted. The requirement that a guilty plea be accurate "protects the defendant from pleading guilty to a more serious offense than he could properly be convicted of at trial." *Munger v. State*, 749 N.W.2d 335, 337 (Minn. 2008). Accuracy requires an adequate factual basis that establishes "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Id.* at 337-38 (quotation omitted). The burden is on the district court to ensure that an adequate factual basis is established on the record. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

A person is guilty of second-degree burglary if that person enters a "religious establishment" without consent and either has the intent to commit a crime or actually commits a crime while in the building. Minn. Stat. § 609.582, subd. 2(b). At the plea hearing, Soto testified under oath that he: (1) entered the Cathedral through a window, without consent, and stole approximately four dollars; and (2) entered the locked Lutheran Church, without consent, intending to steal money. Soto also testified to the accuracy of the facts of the incidents as set forth in the criminal complaint. Thus, an adequate factual basis supporting Soto's guilty pleas and convictions is shown on this record.

Accordingly, the postconviction court did not err by concluding that Soto's guilty pleas are valid because they were voluntarily, knowingly, and intelligently given.

II.

Soto next argues that he is entitled to withdraw his guilty pleas because he was deprived of the constitutional right to an impartial judge. Specifically, Soto contends that Judge Remick's affiliation with the Lutheran Church disqualified him from presiding over Soto's plea and sentencing hearings, and that the severity of the sentences evinces Judge Remick's judicial bias.

A criminal defendant has a constitutional right to a fair trial. *See* U.S. Const. amend. XIV § 1 (Due Process Clause); Minn. Const. art. I, § 7 (same). The right to a fair trial includes the right to an impartial judge and trial. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). We review *de novo* the constitutional question of whether a defendant has been deprived of the right to a fair trial before an impartial judge. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

A.

As a threshold matter, the state argues that Soto waived any claim that he was denied an impartial judge by expressly agreeing to permit Judge Remick to accept Soto's guilty pleas and to conduct the sentencing hearing.

A motion to remove a judge for cause is a procedural mechanism governed by the Minnesota Rules of Criminal Procedure and may be waived if it is untimely. *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004). Here, it is undisputed that Soto, being aware of Judge Remick's self-disclosed church membership, neither objected to Judge Remick

presiding over his plea and sentencing hearings nor acted to remove the judge. However, both the Minnesota Rules of Criminal Procedure and Minnesota Code of Judicial Conduct require a judge to disqualify himself or herself in certain circumstances, and the language of these disqualification requirements is not discretionary. *See* Minn. R. Crim. P. 26.03, subd. 14(3) (“A judge *must not* preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct.” (emphasis added)); Minnesota Code of Judicial Conduct, Canon 3D(1) (2008) (“A judge *shall disqualify* himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” (emphasis added)); *Powell v. Anderson*, 660 N.W.2d 107, 114-15 (Minn. 2003) (observing that “Canon 3D(1) is not purely aspirational in its terms, because it uses the operative verb ‘shall disqualify’”).

In addition, because the fundamental fairness and reliability of a criminal trial depend on the basic protection of the right to an impartial judge, a defendant cannot waive that right and agree to an unfair or unreliable trial. *See Dorsey*, 701 N.W.2d at 252-53 (acknowledging that “some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error,” and holding that automatic reversal is required when a defendant has been deprived of an impartial judge (quotation omitted)). Indeed, when a defendant submits to criminal proceedings before a judge without objecting on the basis of bias, this court may nonetheless reverse the defendant’s conviction if the defendant demonstrates actual bias in the proceedings. *State v. Moss*, 269 N.W.2d 732, 734-35 (Minn. 1978); *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Even though Soto did not object to Judge Remick's participation in Soto's criminal proceedings or move for Judge Remick's removal, we may not, as the state suggests, summarily deny Soto relief on this ground. Rather, we must determine whether reversal is warranted because either Judge Remick was obligated to disqualify himself under Minnesota's Code of Judicial Conduct or Soto has established that actual judicial bias adversely influenced his sentences.

B.

We first consider whether Judge Remick was obligated to disqualify himself under Canon 3D(1) of the 2008 Minnesota Code of Judicial Conduct.¹ Whether a judge has violated the Code of Judicial Conduct is a question of law, which an appellate court reviews de novo. *Dorsey*, 701 N.W.2d at 246.

“A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge . . . is a party to the proceeding, or an officer, director or trustee of a party” Minn. Code Jud. Conduct, Canon 3D(1)(d)(i). The term “impartiality” means the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.” *Id.*, Canon 3F (2008). Although Canon 3D(1) states the grounds for disqualification broadly and “does not provide a precise formula that can automatically be applied,” *Powell*, 660 N.W.2d at 115, the rule does not require a litigant to show

¹ The Minnesota Code of Judicial Conduct has subsequently been renumbered. *See* Minn. Code Jud. Conduct, Rule 2.11 (2011).

actual bias. *State v. Laughlin*, 508 N.W.2d 545, 548 (Minn. App. 1993) (citing earlier version of Minnesota Code of Judicial Conduct). When reviewing a judge’s decision not to disqualify himself or herself, an appellate court must objectively examine whether the judge’s impartiality could reasonably be questioned by an examiner with full knowledge of the facts and circumstances. *In re Jacobs*, 802 N.W.2d 748, 752-53 (Minn. 2011); *Dorsey*, 701 N.W.2d at 248. When doing so, we presume that a judge has the ability to make decisions based solely on the merits of the case and to “approach cases with a neutral and objective disposition.” *Dorsey*, 701 N.W.2d at 248-49 (quotation omitted).

Soto contends that Judge Remick’s impartiality is reasonably in question because his status as a member of the Lutheran Church made him “a victim and a party [to] these proceedings” because “[a] church is made up of a community of its members.” Minnesota courts have not directly addressed whether a judge’s church membership may call into question the judge’s impartiality when the church is the victim in a criminal proceeding. But in the civil context, the Minnesota Supreme Court has held that a judge’s membership in the State Bar Association did not disqualify the judge from hearing a civil action brought by the association to enjoin individuals from engaging in the unauthorized practice of law. *Minn. State Bar Ass’n v. Divorce Ed. Assocs.*, 300 Minn. 323, 326, 219 N.W.2d 920, 922 (1974). And the Supreme Court of Idaho has concluded that “[c]hurch affiliation alone is not a reasonable basis for questioning a judge’s impartiality” in a criminal proceeding. *State v. Wood*, 132 Idaho 88, 95, 967 P.2d 702, 709 (1998) (analyzing the disqualification provision of Idaho’s code of judicial conduct, which is substantially similar to the corresponding Minnesota provision).

Here, Judge Remick disclosed that he had been a member of the Lutheran Church in Crookston for 17 or 18 years. The Lutheran Church, while a victim, was not a party to the criminal proceeding and did not seek restitution; and the record does not show Judge Remick to be an officer, director, or trustee of the church. In addition, the record does not demonstrate that Judge Remick's church membership involves any tangible interest, pecuniary or otherwise, that would be affected by Soto's criminal proceedings. Indeed, nothing was stolen from the Lutheran Church and no property was damaged. Also, in this case Judge Remick was not required to assess the credibility of church members or officers.

On the record before us, we conclude that Judge Remick's impartiality cannot reasonably be questioned based solely on his affiliation with the Lutheran Church. Accordingly, Judge Remick was not obligated to disqualify himself under Canon 3D(1) of Minnesota's Code of Judicial Conduct.

C.

We next consider whether Soto was deprived of his constitutional right to proceedings properly conducted by an impartial judge, evidenced by actual judicial bias. An appellate court reviews this constitutional question de novo. *Dorsey*, 701 N.W.2d at 249. "An impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence, and prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court." *Id.* at 249-50 (citation omitted). We presume "that a judge has discharged his or her judicial duties properly," *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006), so a defendant must assert allegations

of impropriety sufficient to overcome this presumption, *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

Soto contends that the severity of his sentences evinces Judge Remick's partiality. Minnesota utilizes a sentencing matrix to establish "the presumptive sentence based on offense severity and the defendant's criminal history score." *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983). Within each cell of the sentencing-guidelines matrix there are three numbers: the lowest number is the minimum sentence permitted by the guidelines, the highest number is the maximum sentence permitted, and the middle number is the "presumptive fixed sentence." *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008); *see also* Minn. Sent. Guidelines IV (2010). "All three numbers in any given cell constitute an acceptable sentence . . . the lowest is not a downward departure, nor is the highest an upward departure." *Jackson*, 749 N.W.2d at 359 n.2.

Here, because Soto's criminal-history score was five, his presumptive-sentence range for the second-degree burglary of the Cathedral was from 37 months to 51 months. Minn. Sent. Guidelines IV. And because Soto's criminal-history score was six as applied to the second-degree burglary of the Lutheran Church,² his presumptive-sentence range for that conviction was from 41 months to 57 months. *Id.* Thus, Soto's sentences are within the guidelines presumptive-sentence range.

Although Soto's sentences are within the presumptive range and thus within the discretion of the district court, we next address whether the severity of Soto's sentences

² Because Soto's burglary of the Cathedral occurred before his burglary of the Lutheran Church, Soto's conviction of the earlier offense accounts for the additional criminal-history point in his criminal-history score applied to sentencing of the later offense.

was nonetheless influenced by judicial bias. The state argued for sentences at the high end of the guidelines presumptive-sentence range, citing Soto's history of burglary and theft offenses. The PSI revealed that Soto's criminal history includes 13 prior adult convictions arising from nine separate incidents between 1995 and 2006. These include four burglary convictions, two theft-related convictions, and three trespass convictions. The PSI report also notes that Soto expresses "hate for churches," he "shows no regard or remorse for what he has done," and he "does not take responsibility for his actions and does not realize the severity of his actions." The PSI report concludes that Soto "poses a serious risk to the community based on his criminal record" and his risk of reoffending. We are satisfied that the record before us contains abundant support for Soto's sentences, refuting Soto's assertion that the sentences were the product of judicial bias.

Accordingly, because the record does not demonstrate that Judge Remick was obligated to disqualify himself or that Judge Remick's sentencing decision reflects actual judicial bias, Soto is not entitled to relief on this asserted ground.

Affirmed.