STATE OF MINNESOTA
IN COURT OF APPEALS
A10-732

Michael Erin Docken, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 5, 2011
Affirmed
Randall, Judge[*]

Ramsey County District Court
File No. 62-K6-07-3301

Michael Erin Docken, Moose Lake, Minnesota (pro se appellant)

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Minge, Judge; and Randall, Judge.

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

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

Pro se appellant Michael Erin Docken seeks review of the district court's summary denial of his second postconviction petition. Affirmed.

FACTS

In February 2008, appellant pleaded guilty to a first-degree controlled-substance offense after he was arrested during a traffic stop and police found three bags containing 28.8 grams of methamphetamine during an inventory search of his vehicle. At sentencing in July 2008, the district court denied appellant's motion for a dispositional departure, finding that appellant was not amenable to probation. Appellant moved to withdraw his guilty plea, claiming that the district court had agreed to allow him to do so if it denied his departure request. The district court denied his request, stating that it had no notes of any such agreement, and sentenced appellant to 94 months in prison, which is at the low end of the presumptive guidelines range. No direct appeal of the conviction and sentence was filed.

In November 2008, appellant filed a postconviction petition seeking to withdraw his guilty plea. In his petition, which was prepared and filed on appellant's behalf by the attorney who had represented him during his plea and sentencing hearings, appellant alleged that the district court had promised to allow him to withdraw his plea if it denied his request for a dispositional departure. The district court denied the petition without an evidentiary hearing, concluding that the issue raised by appellant had already been

addressed and rejected at sentencing. On appeal, this court affirmed. *Docken v. State*, No. A09-447, 2010 WL 87952 (Minn. App. Jan. 12, 2010) (*Docken I*).

In March 2010, appellant appeared pro se and filed this second postconviction petition. He claims that he was deprived of his right to a trial because his attorney was ineffective in the district court and on appeal in *Docken I*. Appellant asserts that he would not have pleaded guilty if his attorney had not misled him to believe that the district court would allow him to withdraw his plea if the court denied his request for a dispositional departure. The district court again denied the petition without an evidentiary hearing, concluding that the issue raised by appellant had already been rejected by this court in *Docken I*.

D E C I S I O N

A postconviction court must hold an evidentiary hearing on a petition "[u]nless 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). To be entitled to an evidentiary hearing, the allegations in a petition must be more than "argumentative assertions without factual support." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008).

In his first postconviction petition, appellant claimed that the district court agreed to allow him to withdraw his guilty plea if it denied his motion for a dispositional departure; this court affirmed the district court's finding that there was no such agreement and denial of postconviction relief. *See Docken I*, 2010 WL 87952, at *1-4. In this second petition, appellant rephrases the claim and now asserts that his attorney was

ineffective because he misled appellant into believing that the judge agreed to allow appellant to withdraw his guilty plea if she denied his motion for a dispositional departure.

The state argues that appellant's current claims should be rejected because they are a mere rephrasing of the claims already raised in the first postconviction petition.[1] *See Sutherlin v. State*, 574 N.W.2d 428, 435 (Minn. 1998) (rejecting ineffective-assistance-of-counsel claim that is "merely a recasting of [appellant's] evidentiary objections that he already made on his direct appeal"). Now appellant's legal claim has changed slightly from the plea-withdrawal request in *Docken I* to a claim of ineffective assistance of counsel in that he now claims his attorney misled him regarding the existence of an agreement with the judge, he trusted his attorney, and he pleaded guilty despite what was stated on the record at the plea hearing. Therefore, we reject the state's argument on that narrow issue.

Nonetheless, the underlying factual basis for the claim remains the same – that appellant believed there was an agreement with the judge that appellant could withdraw his plea if he was not granted a dispositional departure. This factual claim was litigated and rejected in *Docken I*, 2010 WL 87952, at *3-4. In that case, this court concluded that

[1] The state also argues that appellant's claims are barred by *Knaffla* because those claims were known and available at the time he filed his first postconviction petition. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (Minn. 1976). But when, as here, trial and appellate counsel are the same, *Knaffla* does not bar postconviction consideration of claims alleging ineffective assistance of counsel. *Jama v. State*, 756 N.W.2d 107, 112 (Minn. App. 2008).

the attorney's affidavit is contradicted by what the attorney stated at sentencing and that "no purpose would be served by an evidentiary hearing because the district court has independent knowledge" of what occurred and already found there was no agreement. *Id.* at *3.

In *Crisler v. State*, 520 N.W.2d 22 (Minn. App. 1994), this court faced a somewhat analogous situation – similar claims raised on appeal from denial of a second postconviction petition. While this court did address "several of [appellant's] claims which were at least partially litigated before," we did not remand for a hearing on any claims even though the appellant had submitted additional affidavits in support of his second petition. *Crisler*, 520 N.W.2d at 24-26. This court rejected a new factual twist on an older claim that seems similar to the claim raised here that there was no "agreement" to allow plea withdrawal but there was an "arrangement" to not accept the plea that was tantamount to an agreement. *See id.* at 25 (rejecting previously addressed argument that appellant's counsel did not have notice of document despite new allegation that counsel did not have "complete" document). We note a remand for an evidentiary hearing on appellant's factual claim was denied in *Docken I*. Appellant is not now entitled to an evidentiary hearing merely because he has changed the legal basis to ineffective assistance of counsel. The issue continues to stem from that previously decided, meaning the district court found no credible evidence on the record that there had been a plea agreement.

That record includes the written plea petition, which indicates that appellant's attorney and the prosecutor agreed to a "straight plea" and that appellant would "move for dispositional departure based [on] amenability to probation and treatment." The petition further states that no one, "including my attorney, any policeman, prosecutor or judge . . . has made any promises to me . . . in order to obtain a plea of guilty from me."

At the plea hearing, appellant answered in the affirmative when the district court judge questioned whether appellant understood that "there is no agreement with the court at this point" and that "if you plead straight up, I won't accept [your] plea, but I will wait until . . . the sentencing date to see how you have progressed and whether you've made some steps towards cleaning up yourself and changing your lifestyle." At the end of the plea hearing, the district court ordered a presentence investigation (PSI), set sentencing for April 2008, and told appellant that "[y]ou must cooperate [with probation so that it can prepare the PSI]; you must remain law abiding; you must reappear for sentencing; and you must come to court ready to serve some jail time."

At sentencing, the district court noted that appellant failed to appear for the April 2, 2008 hearing and, when he finally entered treatment in May, he tested positive for methamphetamine. The district court considered the information contained in the PSI, which indicated that appellant had seven prior felony convictions, had violated probation at least four times, and had never successfully completed treatment until just recently. Based on this information, the district court concluded that appellant was not amenable to probation and denied his request for a dispositional departure. When appellant objected and claimed that "I was under the impression that if I wasn't found amenable to probation

that I could withdraw my plea, because . . . [my attorney] told me that," the district court judge stated she was not going to let him withdraw his plea.

In his sworn, on-the-record statements at previous appearances, appellant affirmed his understanding that he was entering a straight guilty plea and that there was no agreement with either the state or the district court regarding his sentence. Appellant's prior statements and the district court record are difficult to reconcile with his current claim that he believed there was an agreement with the court. His claims contradict what the district court found and what the parties stated on the record.

This is a clear case of "he said . . . she said," a pure fact issue resting on the credibility determination of the district court. The district court's recollection is supported by the record. The district court thus did not abuse its discretion in denying appellant's second petition for postconviction relief.

Affirmed.