STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1838

Joshua David Rutgers, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 13, 2011
Affirmed
Schellhas, Judge

Nobles County District Court
File No. 53-CR-10-147

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

Gordon L. Moore III, Nobles County Attorney, Travis J. Smith, Assistant County Attorney, Worthington, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's summary denial of his postconviction petition to withdraw his guilty plea, arguing that the plea was involuntary due to

ineffective assistance of counsel. Because appellant failed to allege a reasonable probability that he would not have pleaded guilty but for the alleged ineffective assistance, we affirm.

FACTS

Respondent State of Minnesota charged appellant Joshua Rutgers with one count of fourth-degree assault in violation of Minn. Stat. § 609.2231, subd. 3(2) (2008), for spitting at a Nobles County Jail corrections officer on January 30, 2010. Appellant pleaded guilty pursuant to a plea agreement that provided that (1) the district court would sentence appellant to 12 months and one day in prison consecutive to his two prior concurrent 26-month sentences for terroristic threats and (2) the sentencing would occur the same day as the plea.

Following the plea, the district court and the attorneys discussed the sentence contemplated pursuant to the plea agreement:

> THE COURT: Is that—what's that sentencing guidelines or is that a statute on that consecutive deal?
> DEFENSE COUNSEL: It is in the guidelines, Your Honor.
> THE COURT: Do you know the section of it so that I can cite it?
> THE PROSECUTOR: It is in II, like Roman number II, F.
> . . . .
> DEFENSE COUNSEL: And I think a lower case "g" actually is more specific as well.
> THE PROSECUTOR: Yes.
> DEFENSE COUNSEL: And I think the first comment is pretty specific too.
> THE COURT: Is this a permissive consecutive?
> THE PROSECUTOR: Yes, Your Honor.
> THE COURT: And there is no mandatory minimum on this?
> THE PROSECUTOR: No, Your Honor.

> THE COURT: All right, thank you. The Court will accept the Defendant's guilty plea; find him guilty as charged in Count 1 of the complaint.

After appellant waived his right of allocution on the record, the district court sentenced him pursuant to the terms of the plea agreement. The court explained that the consecutive sentence was authorized under Minn. Sent. Guidelines II.F.2.g (2008),[1] and that although appellant's criminal-history score was seven, the court used a score of zero to compute the duration of appellant's consecutive sentence in accordance with Minn. Sent. Guidelines cmt. II.F.201 (2008).

Two months later, appellant filed a postconviction petition with the district court to withdraw his guilty plea,[2] arguing that his plea was not voluntary due to ineffective assistance of counsel. Appellant alleged in his petition that his counsel had incorrectly informed him that a consecutive sentence was mandatory, when in fact it was permissive. Appellant submitted no affidavit or other evidence to the court.

In response, the state submitted an affidavit from appellant's counsel in which he stated that he had told appellant that the charge "was a permissible offense for a consecutive sentence" and that he and appellant had "discussed the weight of the evidence and . . . the probability that the judge would give a consecutive sentence," if appellant were convicted at trial. Appellant's counsel also stated, "At some point I

[1] Minn. Sent. Guidelines II.F.2.g provides, "A current conviction for a felony assault committed while in a local jail or workhouse may be sentenced consecutively to any other executed prison sentence if the presumptive disposition for the other offense was commitment to the Commissioner of Corrections." The parties appear to agree that the presumptive disposition of appellant's terroristic-threats sentences was commitment to the Commissioner of Corrections.

[2] The parties agree that appellant's petition was a petition for postconviction relief.

indicated to the defendant that a consecutive sentence might be mandated, in light of section 609.2232.[3] I do not recall ever telling the defendant that a consecutive sentence was mandatory, and I do not believe I ever instructed him as such." Counsel explained that at the time of the plea, appellant's "most important concern seemed to be to get his case concluded and [get] transported to prison as soon as possible" because appellant was not getting along with the Nobles County Jail staff. That is why appellant requested to be sentenced at the same time as his plea.

The district court summarily denied appellant's postconviction petition, reasoning that it was clear from the conversation at the plea hearing that appellant's counsel knew the consecutive sentencing was permissive, appellant was present for that conversation and could have said something if he had been told that consecutive sentencing was mandatory, and appellant "failed to present any evidence that his attorney did, in fact, advise him that the consecutive sentence was mandatory." This appeal follows.

D E C I S I O N

A person who is convicted of a crime and who claims that the conviction violated his or her rights may file a petition for postconviction relief. Minn. Stat. § 590.01, subd. 1(1) (2008). The district court must set an evidentiary hearing on the petition unless "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). A hearing is required if the petitioner

[3] Minn. Stat. § 609.2232 (2008) mandates consecutive sentences for "inmate[s] of a state correctional facility" who are convicted of assault "while confined in the facility." Here, it is undisputed that at the time of the charged conduct, appellant was confined in the Nobles County Jail, not in state prison.

alleges facts that, if proved, would entitle him or her to the requested relief. *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). But the allegations in the petition "must be more than argumentative assertions without factual support." *Laine v. State*, 786 N.W.2d 635, 637 (Minn. 2010) (quotation omitted). This court reviews the district court's denial of a postconviction petition without a hearing for an abuse of discretion, but "[a]ny issues of law are reviewed de novo." *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009).

Appellant's petition requested that the district court permit him to withdraw his guilty plea. A defendant is entitled to withdraw his or her guilty plea after sentencing if he or she can prove "that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice has occurred if a plea was not accurate, voluntary, and intelligent. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998).

Appellant argues that his plea was involuntary because he received ineffective assistance of counsel at the time he pleaded guilty. "[T]he voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985)) (quotation marks omitted). Appellate courts apply a two-prong test to determine whether a plea was involuntary due to ineffective assistance of counsel. *Id.* The petitioner must show (1) the representation fell below an objective standard of reasonableness and (2) there is a "reasonable probability" that, but for the inadequate representation, he would not have pleaded guilty. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)).

The state concedes that appellant's petition alleges facts sufficient to meet the first prong—if appellant's counsel did, in fact, advise him that he was facing a mandatory consecutive sentence, the state agrees that the representation fell below an objective standard of reasonableness. The state argues that the postconviction petition was nevertheless insufficient on this prong because appellant did not present "factual support" for his allegations. The state is correct that mere "*argumentative assertions* without factual support" are insufficient to support a postconviction petition. *Laine*, 786 N.W.2d at 637 (emphasis added). But appellant's petition contains more than "argumentative assertions"—it contains a specific allegation that appellant's counsel materially misstated the applicable law. And alleging facts that, if proved, would entitle the petitioner to the requested relief is sufficient to require an evidentiary hearing. *Fratzke*, 450 N.W.2d at 102. The state concedes that the allegation here, if proved, would constitute ineffective assistance of counsel. Under *Ecker*, appellant alleged sufficient facts on the first prong to entitle him to at least an evidentiary hearing.

But appellant's petition alleged no facts to support the second prong—that there is a reasonable probability that he would not have pleaded guilty but for the alleged misstatement by his counsel. Although appellant alleged that he "has found people in prison where their time was ran concurrent to the time they are serving now," he did not allege that he would not have accepted the prosecution's plea offer or would have insisted on going to trial had he known that the consecutive sentence he was agreeing to was not

mandatory as he was allegedly told, but only permissive. Because appellant failed to allege facts in his petition sufficient to entitle him to relief under this prong, the district court did not abuse its discretion by denying his petition without an evidentiary hearing. We affirm.

Affirmed.