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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0792**

Kevin David Jones, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 25, 2013
Affirmed
Worke, Judge**

Sibley County District Court
File No. 72-CR-08-177

Gary R. Wolf, Minneapolis, Minnesota (for appellant)

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

David E. Schauer, Sibley County Attorney, Donald E. Lannoye, Assistant County
Attorney, Winthrop, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

In this postconviction appeal, appellant challenges the sentence imposed after his guilty plea to first-degree criminal sexual conduct, arguing that his trial counsel was ineffective because he failed to communicate a plea offer to appellant that would have resulted in a shorter sentence. Because appellant has not shown that he was prejudiced by trial counsel's ineffective assistance, we affirm.

DECISION

We review the postconviction court's decision to determine whether the findings are supported by sufficient evidence and whether the district court abused its discretion. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012). The postconviction petitioner has the burden of establishing by a fair preponderance of the evidence facts that warrant relief. *Erickson v. State*, 725 N.W.2d 532, 534 (Minn. 2007). Postconviction appeals involving claims of ineffective assistance of counsel present mixed questions of fact and law, which we review de novo. *Id.* at 534-35.

In April 2009, appellant Kevin David Jones pleaded guilty to first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(b) (2008), admitting to sexually penetrating the fifteen-year old victim. The district court sentenced appellant to the presumptive sentence of 144 months, denying his request for a downward durational departure. This court affirmed the district court's decision and further review was denied. In 2011, appellant learned that before he pleaded guilty, trial counsel received a

plea offer from the county attorney that would have limited appellant's prison time to 48 months; trial counsel did not disclose this offer to appellant.

In the context of a guilty plea, a defendant alleging ineffective assistance of counsel must show that "counsel's representation fell below an objective standard of reasonableness" and that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012) (quotations omitted). "An attorney's performance is substandard when the attorney does not exercise the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted). Failure to inform a defendant of a plea offer may provide a basis for an ineffective-assistance-of-counsel claim. *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (holding that defendant is entitled to competent counsel at critical phases of trial, including plea bargaining, and counsel's failure to communicate plea offer can be inadequate representation). Here, the postconviction court concluded that because trial counsel had not communicated the plea offer to appellant, his representation fell "below the objective standard of reasonableness." This satisfies the first requirement of an ineffective-assistance-of-counsel claim.

But a defendant who has pleaded guilty and who is alleging ineffective assistance of counsel must also show that he was prejudiced by counsel's actions and that he would not have pleaded guilty had he been fully informed about the plea offer. *Campos*, 816 N.W.2d at 486; *see also Frye*, 132 S. Ct. at 1409 (stating that in order to show prejudice

because of counsel's failure to communicate a plea offer, a defendant must show reasonable probability that he would have accepted offer). In *State v. Powell*, the supreme court observed that trial counsel had no obligation to engage in further discussion of a plea offer when the defendant's "insistence of his innocence, belief that the witnesses would change their testimony at trial, and rejection of the first plea offer" permitted trial counsel to reasonably conclude that "additional discussion [about the plea offer] would have served no purpose." 578 N.W.2d 727, 732 (Minn. 1998).

After hearing both appellant's and trial counsel's testimony, the postconviction court found that trial counsel reasonably concluded that appellant would not have accepted the state's offer at the time it was available, because appellant was adamant in insisting that he serve no prison or jail time, and believed that he should receive a probationary sentence. The postconviction court also found trial counsel's testimony that appellant was unwilling to accept any type of incarceration more credible than appellant's bald statement, made after he began serving a prison sentence, that he would have accepted the offer. Further, the postconviction court recognized that on the date the plea offer expired, appellant was in court for arraignment on a felony charge of violating an order for protection by contacting the victim; the postconviction court opined that this may have caused appellant to be more inclined to accept the offer, which was no longer available. The court focused instead on appellant's statements made prior to this day and concluded that "when the offer was actually available [appellant] would not have agreed to a prison sentence." The postconviction court noted that appellant had the burden of

showing that he was prejudiced, that is, that he would have accepted the plea offer, and that he had not sustained that burden of proof.

The postconviction court “is in a unique position to assess witness credibility.” *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006). As a reviewing court, we defer to the postconviction court’s credibility determinations. *Id.* The question before us, whether appellant would have accepted the county attorney’s offer, requires a credibility determination. Nothing in this record suggests that the postconviction court erred by finding trial counsel more credible than appellant.

Because appellant has not sustained his burden of establishing facts that would warrant postconviction relief, we affirm.

Affirmed.