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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2314**

Ali Mohammed Hussein, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed August 13, 2012  
Affirmed  
Rodenberg, Judge**

Stearns County District Court  
File No. 73CR099468

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

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

Janelle Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County  
Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and  
Harten, Judge.\*

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

## UNPUBLISHED OPINION

**RODENBERG**, Judge

In this post-conviction appeal, appellant Ali Mohammed Hussein seeks relief from convictions of first-degree aggravated robbery, fleeing a peace officer, and receiving and/or concealing stolen property. He asserts that (1) the warrantless search of the cell phone discovered on his person at the time of arrest was unlawful, and the resulting evidence should have been suppressed; (2) his jury-trial waiver was not knowing, intelligent, and voluntary because the district court did not sufficiently inform him of his trial rights; and (3) the district court abused its discretion in denying his request for a downward durational sentencing departure without adequately considering the circumstances in support of departure. We affirm.

### FACTS

On the night of August 23, 2009, during St. Cloud State University's move-in weekend, appellant and his friends encountered T.S. and B.E. in downtown St. Cloud. Appellant, who did not know T.S. or B.E., invited them to a house party. While walking to the party, appellant boasted that he had recently beaten up a person and stolen a few cell phones. The group soon reached the driveway of the house where the party was supposed to take place, and T.S. became nervous about the situation. Appellant turned to T.S. and demanded that he empty his pockets. When B.E. asked if appellant was serious, appellant "sucker-punched" him in the face. B.E. briefly lost consciousness.

Appellant then turned and grabbed T.S. by the neck, shoving him up against a nearby vehicle. Appellant told T.S. to hand over all his money. After T.S. complied,

appellant directed him to “run as fast as you can.” T.S. turned around, “took a few punches [to the] back of the head,” and ran.

B.E. and T.S. fled to a busy street and called the police. Officer Stellmach of the St. Cloud Police Department was dispatched to the house where the robbery took place. From outside the house, he observed appellant through a window. When appellant exited through the back door of the house, Officer Stellmach directed him to stop. Appellant fled. Officer Stellmach gave chase and attempted to Taser him. Responding officers eventually caught up with and arrested appellant.

While conducting a pat-down of appellant incident to arrest, Officer Stellmach discovered two cell phones in appellant’s pockets. Appellant claimed that one of the cell phones belonged to his cousin. Officer Stellmach went through the contact list on the phone. He dialed one of the numbers and determined who owned the phone by speaking to the person who answered, a friend of the owner of the cell phone. At trial, the cell-phone owner testified that a group of “guys” had punched him and stolen his cell phone earlier that night. He identified the cell phone found on appellant as the one that was stolen from him.

Appellant was charged with first-degree aggravated robbery and fleeing a peace officer. Through counsel, appellant waived the omnibus hearing and all omnibus issues. The state later amended the complaint to add a charge of receiving and/or concealing stolen property. At a subsequent pretrial hearing, appellant waived his right to a jury trial and elected to proceed with a bench trial. The district court found him guilty on all charges.

At the sentencing hearing, appellant made an oral motion for a downward durational departure based on his claim of innocence and his lack of any substantial criminal history. The district court denied the motion, finding that “there aren’t any grounds to depart from what are the guidelines in this case.” It imposed the presumptive sentence of 68 months.

Appellant did not file a direct appeal. On August 11, 2011, he filed a petition for postconviction relief. The district court summarily denied appellant’s claims for relief, and this appeal from the denial of his petition follows.

## **D E C I S I O N**

As appellant did not file a direct appeal from the convictions, his appeal concerns the district 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 district court’s decision on a petition for postconviction relief absent an abuse of discretion. *Dukes*, 621 N.W.2d at 251.

### **I. Cell-phone search**

First, appellant argues that the evidence recovered from the cell phone (regarding its owner and the fact that it was stolen) should have been suppressed as the fruit of an unlawful search in violation of his Fourth Amendment rights. He maintains that Officer Stellmach conducted a search by looking through the contact list on the cell phone that was found in appellant’s pocket. The district court concluded that appellant had waived this issue by failing to bring a suppression motion before trial.

The relevant rules provide that a defendant's failure to bring a suppression motion before trial generally results in a waiver:

Defenses, objections, issues, or requests that can be determined without trial on the merits must be made before trial by a motion to dismiss or to grant appropriate relief. The motion must include all defenses, objections, issues, and requests then available. *Failure to include any of them in the motion constitutes waiver . . . .*

The court can grant relief from the waiver for good cause.

Minn. R. Crim. P. 10.01, subd. 2 (emphasis added). Thus, a defendant who fails to object *before trial* to the admission of evidence obtained in violation of his constitutional rights will generally be deemed to have waived the issue. *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 550–51, 141 N.W.2d 3, 11 (1965); *see also State v. Pederson-Maxwell*, 619 N.W.2d 777, 780 (Minn. App. 2000) (noting that “[i]n order for constitutional challenges to the admission of evidence to be timely, objections to such evidence must be raised at the omnibus hearing” in the form of a pretrial motion to suppress); *State v. Brunnes*, 373 N.W.2d 381, 386 (Minn. App. 1985) (holding that defendant waived his constitutional objection to admission of evidence by failing to raise the issue at the omnibus hearing), *review denied* (Minn. Oct. 11, 1985).

Here, appellant did not raise any objection to the cell-phone evidence until well after trial. Appellant waived the omnibus hearing; his attorney expressly stated that appellant wanted to “waive [his] omnibus issues.” Although the state subsequently amended the complaint to add the charge of receiving stolen property, appellant again had the opportunity to raise any constitutional objections at a pretrial hearing several days

later. Appellant failed to do so, and instead asserted the challenge to the evidence seized from the cell phone for the first time in his petition for postconviction relief. As a result, appellant has waived his right to challenge evidence derived from the cell phone.

Appellant argues that relief is warranted under the plain-error standard. When a defendant fails to object at trial to the admission of evidence, he bears the burden on appeal of establishing plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). To merit reversal, the error must be one that affected the defendant's substantial rights, and it must have seriously affected "the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Here, as a result of appellant's failure to timely raise the suppression issue, the record has not been developed with regard to the cell-phone search. The state did not have an opportunity to present evidence or arguments on the Fourth Amendment issue. The only evidence on the issue is Officer Stellmach's trial testimony that he retrieved the cell phone from appellant's pocket during the pat-down search, scrolled through its contact list, and dialed a random number from the list to determine the identity of the phone's owner. The record does not reflect how soon this occurred after the arrest, or other facts relevant to establishing a warrant exception. Nor does it establish that appellant's *own* rights were violated with regard to the search of a cell phone that did not belong to him. *See Rakas v. Illinois*, 439 U.S. 128, 138–40, 99 S. Ct. 421, 427–29 (1978) (explaining that to establish a Fourth Amendment infringement, the defendant must show that his own rights were violated); *cf. United States v. Caymen*, 404 F.3d 1196, 1200–01 (9th Cir. 2005) (holding that the defendant lacked standing to challenge a search of the

hard drive on a laptop he obtained by fraud); *United States v. Tropicano*, 50 F.3d 157, 161–62 (2d Cir. 1995) (holding that “a defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car” and therefore cannot assert a Fourth Amendment challenge against a search of the car). Without these crucial facts, appellant cannot meet his burden of establishing plain error.

The purpose of the waiver rule is to avoid precisely this situation, where the state is blindsided by suppression issues without sufficient opportunity to rebut them. *See State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992) (noting that pretrial motions should specify grounds for suppression “in order to give the state as much advance notice as possible as to the contentions it must be prepared to meet at the [pretrial] hearing”); *Brunes*, 373 N.W.2d at 386 (recognizing that constitutional objections must be raised at omnibus hearing “to give the State the opportunity to present evidence to refute appellant’s claims”). Here, as a result of appellant’s failure to timely raise the cell-phone search issue, the record is not sufficiently developed for appellate review.

Although the rules permit granting relief from a waiver of suppression issues, appellant did not request any such relief, and he has not cited any good cause in support of it. *See* Minn. R. Crim. P. 10.01, subd. 2 (permitting relief from waiver “for good cause”). This is not a case where failure to grant relief from the waiver would “perpetuate a substantial and essential injustice in the sense that as a result an innocent man may have been convicted.” *Tahash*, 272 Minn. at 551, 141 N.W.2d at 11 (describing circumstances under which defendant should be granted relief from a waiver of constitutional objections). The state adduced substantial evidence of appellant’s guilt

on the charge of receiving/concealing stolen property. Both of the robbery victims testified that appellant boasted about how he had recently beaten up a person and had stolen a few cell phones. The owner of the cell phone testified that a group of “guys” had stolen his phone earlier that night, and he identified it as the one found in appellant’s pocket. Although appellant denied any involvement in the cell-phone theft, the district court as factfinder was entitled to disbelieve him. *See In re A.A.M.*, 684 N.W.2d 925, 927 (Minn. App. 2004) (“It is the exclusive role of the factfinder to determine the weight and credibility of witness testimony.”), *review denied* (Minn. Oct. 27, 2004). Thus, there is no basis for granting appellant relief from the waiver of his right to challenge the cell-phone evidence. The district court did not abuse its discretion in denying his petition for postconviction relief on this ground.

## **II. Jury-trial waiver**

Appellant argues that the district court failed to adequately inform him of his right to a jury trial and, as a result, his waiver was invalid. In denying the petition for postconviction relief, the district court found that the waiver colloquy was adequate. It implicitly found that appellant had voluntarily, knowingly, and intelligently waived his right to a jury trial.

An accused is guaranteed the right to a jury trial under both the state and federal constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A waiver of one’s right to a jury trial must be voluntary, knowing, and intelligent. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). In accepting such a waiver, the district court must be satisfied that the defendant was informed of his rights, and that he “understands the basic elements of a

jury trial.” *Id.* at 654. Similarly, the rules provide that a defendant may waive his right to a jury trial provided he “does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.” Minn. R. Crim. P. 26.01, subd. 1(2)(a).

Here, the district court engaged in the following colloquy regarding appellant’s waiver of his right to a jury trial:

[APPELLANT’S COUNSEL]: Your honor, after several conferences with my client he’s advised me that it would be his request that he simply waive jury and go to trial before you.

THE COURT: Sir, is it your intention at this time to give up your right to a jury trial?

THE DEFENDANT: Yes, ma’am.

THE COURT: You understand that if you had a jury that would be a jury of twelve persons and those twelve persons would all have to agree before you could be found guilty?

THE DEFENDANT: Yes, ma’am.

THE COURT: And you’re giving up that right and deciding just to have the trial heard to the court or myself?

THE DEFENDANT: Yes, ma’am.

The district court thus complied with Rule 26.01: it ensured that appellant was aware of his right to a jury trial, that he had an opportunity to consult with counsel, and that he was personally waiving his right. Although perhaps not ideal in its comprehensiveness, this colloquy was more thorough than the one in *State v. Pietraszewski*, cited by appellant. *See generally* 283 N.W.2d 887, 889–90 (Minn. 1979). There, the district court merely confirmed that appellant personally wished to waive his right to a jury trial; it did not advise him of the nature of that right. *Id.* at 890. But the supreme court held that the colloquy, while not ideal, did not warrant reversal. *Id.* Here, the district court went

beyond the limited colloquy in *Pietraszewski* by informing appellant of the key aspects of his right to a jury trial.

Appellant argues that the district court should have engaged in a more detailed discussion of his trial rights, as required in *United States v. Delgado*, a federal court of appeals case. *See generally* 635 F.2d 889, 890 (7th Cir. 1981). There, the Seventh Circuit advised trial courts to explain “that a jury is composed of twelve members of the community, that the defendant may participate in the selection of jurors, and that the verdict of the jury is unanimous.” *Id.* The Minnesota Supreme Court has commended these inquiries as “helpful guidelines,” but declined to mandate them in every case. *Ross*, 472 N.W.2d at 654 (discussing *Delgado* and noting that “[t]he nature and extent of the inquiry may vary with the circumstances of a particular case”). In any event, the Seventh Circuit itself has clarified that reversal is not required when a trial court fails to implement the advisories of *Delgado*. *See United States v. Rodriguez*, 888 F.2d 519, 527 (7th Cir. 1989). It characterized the *Delgado* warnings as “a matter of prudence.” *Id.* Their absence does not undermine the constitutional sufficiency of the waiver, since a valid waiver requires “an intentional relinquishment of a known right.” *Id.* at 528. Thus, appellant’s argument is without merit, as the district court was not required to follow *Delgado*.

Appellant also argues that the district court should have apprised him of the right to a unanimous verdict, the right to confront and subpoena witnesses, and the right to present a defense. As to the first, the district court did inform appellant of his right to a unanimous verdict by stating that “those twelve persons [in the jury] would all have to

agree before you could be found guilty.” As to appellant’s rights to call and confront witnesses and to present a defense, those rights were unaffected by his jury-trial waiver. He could still assert those rights in a bench trial, and did so. Thus, there was no need for the court to inform him of those rights, as he was not waiving them. The district court therefore did not abuse its discretion in denying appellant’s petition for postconviction relief on the ground of inadequate waiver of appellant’s right to a jury trial.

### **III. Sentencing**

Appellant argues that the district court abused its discretion by denying his request for a downward durational departure at sentencing. He contends that the court failed to properly consider the circumstances in support of departure. In denying appellant’s postconviction petition, the district court concluded that appellant did not present any substantial or compelling factors to support a downward departure.

The district court may depart from a presumptive sentence only if there are “identifiable, substantial, and compelling circumstances” in support of departure. Minn. Sent. Guidelines II.D (2010). Mitigating circumstances which may support a downward 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 mitigate or excuse the defendant’s culpability. *Id.* at II.D.2.a(1)–(2), (5). Thus, a downward departure may be justified if the defendant’s conduct 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).

Here, appellant’s counsel requested a departure based on appellant’s “ongoing claim of innocence” and lack of a substantial criminal history. Appellant also addressed the court directly, requesting that it “give me a chance to be in the world again because I miss my freedom.”

These reasons do not present substantial and compelling circumstances, as they do not establish any mitigating factors relating to the offense. *See State v. Staten*, 390 N.W.2d 914, 916 (Minn. App. 1986) (“To be a basis for a downward departure, a factor must tend to excuse or mitigate the offender’s culpability for the offense.”). The district court, which acted as the factfinder at trial, had already rejected appellant’s claim of innocence. Additionally, appellant’s criminal history cannot be characterized as insubstantial. His presentence investigation reflects a felony conviction for third-degree assault and several misdemeanor convictions, including disorderly conduct, terroristic threats, and theft. Moreover, as the presumptive sentence already took into account appellant’s criminal history, that alone cannot provide a basis for departure. *See State v. Cizl*, 304 N.W.2d 632, 634 (Minn. 1981) (holding that the defendant’s clean record “was already taken into account by the guidelines in establishing the presumptive sentence”

and was therefore not a mitigating circumstance). Finally, a defendant's desire for freedom does not in any way reduce his culpability or otherwise constitute a mitigating circumstance. Thus, the district court did not abuse its discretion in declining to grant a downward durational departure.

Appellant argues that the district court should have further explained its reasons for rejecting his proffered grounds for departure. But when a court imposes the presumptive sentence, it is not required to give reasons for doing so. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Appellant relies on *Curtiss*, in which this court reversed the imposition of a presumptive sentence after the district court erroneously found that no compelling circumstances existed that could potentially justify a downward durational departure. 353 N.W.2d at 263–64 (noting the district court's lament that the presumptive sentence was "too much" under the circumstances). In that case, however, the record reflected that the benign nature of the offense, the severity of the presumptive sentence, and the defendant's young age all presented unique and compelling circumstances. *Id.* at 263–64. Here, by contrast, the record does not reflect any such circumstances. The record shows that the district court heard and fully considered appellant's arguments in support of a downward departure. The district court therefore did not abuse its discretion by declining to provide additional reasons for denying appellant's motion.

#### **IV. Pro se arguments**

Appellant raises two additional arguments in his pro se supplemental brief. First, he argues that his trial counsel was ineffective by discouraging him from exercising his

right to a jury trial. To establish ineffective assistance of counsel, a defendant “must demonstrate that (1) counsel’s performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for his counsel’s unprofessional error, the outcome would have been different.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). An objective standard of reasonableness is that of “an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). Courts apply a strong presumption that an attorney’s performance “falls within the wide range of reasonable professional assistance.” *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted).

Here, appellant alleges only that his attorney encouraged him to submit to a bench trial because his chances of winning an acquittal by a jury were slim. There is no evidence that such advice fell below an objective standard of reasonableness. Moreover, as discussed above, the record reflects that appellant was aware of his right to a jury trial, decided to waive it, and voluntarily elected to proceed with a bench trial. Thus, appellant’s argument is without merit.

Appellant also argues that the record contains insufficient evidence to support his conviction of aggravated robbery because there was no evidence that he used a weapon to effectuate the crime. This argument is premised on a mistaken interpretation of the aggravated robbery statute, which provides that “[w]hoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead

the victim to reasonably believe it to be a dangerous weapon, *or inflicts bodily harm upon another*, is guilty of aggravated robbery in the first degree.” Minn. Stat. § 609.245, subd. 1 (2008) (emphasis added). Thus, the statute provides two alternative bases for liability: either use of a dangerous weapon or infliction of bodily harm.

In this case, both victims testified that appellant inflicted bodily harm upon them during the course of the robbery. Appellant punched B.E. in the face, briefly knocking him out, and then grabbed T.S. by the neck and shoved him up against a vehicle. Appellant continued to punch T.S. when he turned to run away. Thus, the record contains sufficient evidence in support of the aggravated robbery conviction.

**Affirmed.**