STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0447

Milton Thomas, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 26, 2008
Affirmed
Shumaker, Judge

Dakota County District Court
File Nos. KX-94-1675, KX-94-629

Milton Thomas, OID No. 145643, Minnesota Correctional Facility – Lino Lakes, 7525 Fourth Avenue, Lino Lakes, MN 55014 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, , St. Paul, MN 55155-2134; and

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant challenges the postconviction court's summary denial of postconviction relief, arguing that his guilty plea was not knowing and intelligent, and the district court's consideration of a prior crime to enhance his sentence was an ex post facto violation. We affirm.

FACTS

In 1994, appellant Milton Thomas pleaded guilty to two counts of third-degree criminal sexual conduct involving victims under the age of sixteen. He was sentenced on both charges concurrently to 36 months in prison, with ten years of conditional release, which the district court referred to at sentencing as "supervised release" or parole. The court determined that ten years of conditional release was appropriate after considering a prior conviction of criminal sexual conduct.

In April 2000, the district court amended its sentencing order and specifically referred to the release term as "conditional release." In September 2004, Thomas filed a petition for postconviction relief under the theory that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), applied to the conditional release term of his sentence; his petition was denied. On October 5, 2004, Thomas filed a motion for reconsideration, suggesting that *Blakely* was in fact controlling and that the conditional release term of his sentence violated his plea agreement; his motion was denied. He did not directly appeal either the denial of his petition or the denial of his motion for reconsideration.

Thomas then filed a second petition for postconviction relief in October 2006, similarly arguing that the ten-year conditional release term violated his plea agreement, that the court did not inform him of the meaning of conditional release, and that the sentence also infringed his rights to equal protection, a jury trial, and against double jeopardy. Thomas proceeded pro se in this matter. In January 2007, the district court summarily denied Thomas's petition, stating that Thomas, at the time of sentencing, was informed of the terms of his sentence and indicated that he understood those terms. The court further stated: "Petitioner has already filed two postconviction petitions with the court. The October 5, 2004, petition specifically argued that the 10 year conditional release term was unlawfully imposed as part of Petitioner's sentence. The October 5, 2004, petition was denied." It is this January 2007 denial that Thomas challenges on appeal.

D E C I S I O N

Thomas contends that the district court erred by denying his petition for postconviction relief. He frames his argument under two theories: first, that his guilty plea was not valid because it was not knowing and intelligent; and next, that the judge's consideration of a prior conviction for criminal sexual conduct amounts to a violation of the prohibition against ex post facto laws.

On a postconviction petition, the petitioner has the burden of establishing, by a fair preponderance of the evidence, facts which warrant relief. *State v. Warren*, 592 N.W.2d 440, 449 (Minn. 1999). We review the record to determine whether there are sufficient facts to sustain the postconviction court's findings and will not disturb these findings

absent an abuse of discretion. *Id.* at 449-50. A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). "The [district] court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner . . . ." Minn. Stat. § 590.04, subd. 3 (2006). An evidentiary hearing is not required if the petition and record "conclusively show that the petitioner is entitled to no relief." *Id.*, subd. 1 (2006).

Guilty Plea

Thomas argues that his guilty plea did not comply with due process requirements that it be knowing and intelligent because he was unaware that he would be required to serve ten years of conditional release. Once a plea of guilty has been entered, "a defendant does not have an absolute right to withdraw [that] plea." *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002). But a court must allow the withdrawal of a guilty plea if the request for withdrawal is timely and necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1; *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). A guilty plea is valid if it is accurate, voluntary, and intelligent. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). "The purpose of the requirement that the plea be intelligent is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea." *Id.* If these requirements are met, no manifest injustice has occurred. *Perkins*, 559 N.W.2d at 688.

At the sentencing hearing, the district court explained the terms of the plea agreement to Thomas. But Thomas asserts that because the term "conditional release" was not used, his guilty plea may not be considered knowing and intelligent. The

transcript reveals the following exchange between defense counsel and Thomas regarding one charge:

> THE ATTORNEY: You understand that once you're released from prison, you will be on parole?
> THE DEFENDANT: Yes.
> THE ATTORNEY: And you will be on parole—when I last spoke to you I said it would be either five years or ten years, and it will be ten years; you understand that?
> THE DEFENDANT: Yes.
> THE ATTORNEY: And do you understand that would be ten years including the time you are on unsupervised release from the prison sentence?
> THE ATTORNEY: Yes.
> THE DEFENDANT: Which is 12 months?
> THE ATTORNEY: Yes.

The court sentenced Thomas to 36 months, with 24 months in prison and 12 months supervised release, saying,

> In addition to that you will have ten years supervised release by the Department of Corrections . . . , but that would include the one year where you are on supervised release from jail. And, again, the 12 months of supervised release, you will receive that if you have no infractions in prison . . . .

The court asked Thomas if he had any questions about his sentence; Thomas said he did not. At no point did the district court use or explain the term "conditional release." And the district court spoke of conditional release as similar to parole or supervised release, which was potentially unclear.

However, we have dealt with such an issue before in *Stone v. State*, in which a district court, at sentencing, mistakenly referred to conditional release as supervised release, and we found that this error did not render the guilty plea unintelligent. 675 N.W.2d 631, 633-34 (Minn. App. 2004). As we explained in *Stone*, the term "supervised

release" was changed to "conditional release" in 1993. *Id.* at 633 n. 1; *see* Minn. Stat. § 609.346, subd. 5 (1992) (containing the term "supervised release" regarding period of supervision for sex offenders); 1993 Minn. Laws ch. 326, art. 9, § 9, at 2089 (changing "supervised release" to "conditional release"). We held that the plea in *Stone* was intelligent because the transcript revealed that the supervised release the district court imposed, which was discussed multiple times at sentencing, was actually the conditional-release period, and because appellant's attorney did not object when the supervised release was imposed, nor did appellant question the court about it, the plea was intelligent. *Stone*, 675 N.W.2d at 634; *see State ex rel. Rankin v. Tahash*, 276 Minn. 97, 101, 149 N.W.2d 12, 15 (1967) (presuming a defendant who pleads guilty with assistance of counsel has been advised of both his rights and the consequences of the plea).

Similarly, this district court discussed the terms and conditions of the plea; Thomas was represented by counsel at sentencing; and neither he nor his attorney questioned the terms imposed, although they had an opportunity to do so since the court directly asked Thomas if he understood the release period.

The sentencing order included ten years of parole, specifically taking into account the time period of "supervised release." For purposes of Thomas entering an intelligent plea, the exact term the district court used to explain this to Thomas was not critical. Thomas understood the district court was adding ten years of release time to his sentence when the court explained the parole period to him, whether it was referred to as supervised release, parole, or conditional release. Furthermore, in 2000, the court amended the sentencing order, clarifying any ambiguity that remained by specifically

stating that the release was ten years of conditional release. Despite the district court's failure to expressly use the term "conditional release" at the time of the guilty plea, Thomas's plea was intelligent, and we hold that the postconviction court did not abuse its discretion by summarily denying Thomas's petition for postconviction relief.

Ex Post Facto Claim

Thomas also asserts that the district court violated the prohibition against ex post facto laws by considering his 1987 sexual offense conviction to increase the term of his conditional release from five years to ten. He suggests that because conditional release did not exist under state law in 1987, that offense could not be used later to enhance his term of conditional release.

The Ex Post Facto Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10; *see also* Minn. Const. art I, § 11 (prohibiting ex post facto laws). Typically, "[t]o fall within the *ex post facto* prohibition, a law must be [1] retrospective—that is, 'it must apply to events occurring before its enactment'—and [2] it 'must disadvantage the offender affected by it.'" *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 896 (1997) (quotations omitted). To establish whether a particular statute violates the prohibition against ex post facto laws, "the court must find that the statute punishes, or increases the punishment for, the original act." *State v. Dumas*, 587 N.W.2d 299, 304 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999). And even where a retrospective law disadvantages a defendant, it does not violate the ex post facto prohibition if it is procedural. *Dobbert v. Florida*, 432 U.S. 282, 293, 97 S. Ct. 2290, 2298 (1977).

The district court's consideration of the 1987 conviction neither punished nor increased the punishment for that crime. And in fact, both the United States Supreme Court and the Minnesota Supreme Court have determined that consideration of a prior crime in a current sentencing is appropriate. Under the federal constitution, a law that allows enhanced penalties for a repeat offender does not punish the old crime, but instead stiffens the penalty for the latest crime. *Gryger v. Burke*, 334 U.S. 728, 732, 68 S. Ct. 1256, 1258 (1948); *see also Nichols v. United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 1927 (1994) (determining that enhancement statutes do not change the punishment for an earlier conviction). And in Minnesota, the supreme court has held that the increased punishment for the subsequent offense is not an added punishment for the first offense, but a harsher punishment for a second offense. *State v. Findling*, 123 Minn. 413, 415, 144 N.W. 142, 143 (1913); *see also State v. Willis*, 332 N.W.2d 180, 185 (Minn. 1983) (holding an amendment to a DWI law, which allowed past convictions to increase present punishments, did not punish the past crime, but "increased the possible penalty for the latest crime").

Thomas correctly points out that there was not a statute regarding conditional release time for repeat sex offenders in Minnesota in 1987. *See* Minn. Stat. § 609.346 (1986) (determining prison terms for repeat sex offenders previously convicted of qualifying crimes). But the statutorily prescribed term of release for sex offenders did exist under Minnesota law at the time of his convictions for both charges of third-degree criminal sexual conduct. Minn. Stat. § 609.346, subd. 5 (Supp. 1993). That statute enhanced the term of release for offenders who had committed prior qualifying crimes.

Id. Thus, this statute properly allows the consideration of a prior crime under its enhancement provision. We hold the district court's consideration of the prior crime was not an ex post facto violation, nor was the postconviction court's refusal to revisit this case yet again an abuse of its discretion.

Affirmed.