**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2303**

State of Minnesota,
Respondent,

vs.

Kenneth Raymond Nordin,
Appellant.

**Filed January 20, 2009**
**Affirmed**
**Stoneburner, Judge**

Isanti County District Court
File No. 30CR07140

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Amy J. Reed-Hall, Chief Deputy Isanti County Attorney, 555 18th Avenue Southwest, Cambridge, MN 55008 (for respondent)

Jason C. Brown, Brown Law Offices, P.A., 2140 Fourth Avenue North, Anoka, MN 55303 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

**STONEBURNER,** Judge

Appellant challenges the district court's denial of his motion to withdraw his guilty pleas to four counts of first-degree criminal-sexual conduct and one count of

second-degree criminal-sexual conduct. Because we agree with the district court's finding that appellant's pleas were voluntary and intelligent, and appellant failed to show that ineffective assistance of counsel affected his pleas, we affirm.

## FACTS

In January 2007, appellant Kenneth Raymond Nordin was charged with four counts of first-degree criminal-sexual conduct and one count of second-degree criminal-sexual conduct for multiple acts of sexual penetration committed against one granddaughter and sexual contact with another granddaughter committed between January 1, 1999, and December 31, 2002. Nordin, represented by counsel, admitted the allegations in a statement to law enforcement.

In June 2007, Nordin, out of consideration for his family, entered a straight plea of guilty to all counts. At the plea hearing, Nordin acknowledged that the state was seeking an upward durational sentencing departure but waived his right to a sentencing jury and asked the district court to determine his sentence. The district court accepted Nordin's pleas.

A presentence investigation (PSI) was completed in mid-August 2007. Sentencing was set for August 24, 2007, but at that hearing Nordin appeared with an "additional" attorney who moved the court to allow Nordin to withdraw his guilty pleas. This attorney (attorney) was subsequently substituted for Nordin's original counsel (counsel).

On September 9, 2007, the district court held an evidentiary hearing on Nordin's motion to withdraw his pleas on the basis that the pleas were not intelligent or voluntary and that newly discovered evidence supported his request. The district court found

Nordin's testimony at the evidentiary hearing not credible, including his allegation that counsel had not advised him of the possible maximum sentence and his assertion that threats by the father of one victim influenced his pleas. Counsel testified that he had thoroughly reviewed the complaint, the evidence, and the possible sentences with Nordin and that it was Nordin's voluntary decision to plead guilty. The district court specifically credited counsel's testimony that, at the time of the plea hearing, counsel told Nordin that, if the state's motion for an upward departure was granted, Nordin would spend "the rest of his life" in prison. The district court also found that the state would be prejudiced by allowing plea withdrawal. The district court denied Nordin's motion to withdraw the pleas.

At sentencing, the district court denied Nordin's motion for a downward departure and denied the state's motion for an upward departure. The district court sentenced Nordin to executed, concurrent, presumptive sentences for counts I–IV, for a total of 158 months, a permissive, consecutive sentence of 21 months for Count V, and 10 years conditional release. The district court did not impose a fine. This appeal followed.

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

The district court has discretion to allow a defendant to withdraw a plea before sentence "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2 (2008). The rule requires that the district court consider the reasons advanced by the defendant supporting plea withdrawal and any prejudice that a plea withdrawal would cause to the prosecution. A defendant does not have an absolute right to withdraw a guilty plea. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). "The defendant bears the burden of proving

that there is a 'fair and just' reason for withdrawing his plea." *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007) (quoting *Kim*, 434 N.W.2d at 266). The decision to allow withdrawal of a guilty plea will only be reversed if the district court abused its discretion. *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991).

## I. Nordin's pleas were intelligently made

Nordin first argues that his pleas were not intelligently made because he was not aware of the maximum sentence that could be imposed as a result of the pleas. To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). For a guilty plea to be intelligent, the defendant must be aware of the direct consequences of the plea, including the maximum sentence and any fine to be imposed. *Alanis v. State*, 583 N.W.2d 573, 578–79 (Minn. 1998) (holding that the district court did not abuse its discretion by denying a defendant's motion to withdraw a guilty plea because deportation is not a "direct" consequence of a guilty plea, and defendant's ignorance of possible deportation did not make his plea unintelligent).

Nordin's argument is supported by the absence of any information concerning the possible maximum sentence in either his Rule 15 petition or the transcript of the plea hearing. The supreme court has stated that a plea must be vacated if it does not appear on the record to have been voluntarily and intelligently made. *State v. Casarez*, 295 Minn. 534, 536, 203 N.W.2d 406, 408 (1973) (vacating a guilty plea because the district court erred by not permitting defendant to withdraw a plea where the transcript of the proceedings of the plea and sentencing was so incomplete that there was no way to

determine if defendant properly waived all of his rights or was informed of the consequences of the plea). In this case, we conclude that the district court erred by failing to advise Nordin of the maximum possible sentence on the record at the plea hearing. But the transcripts of the plea hearing and the evidentiary hearing on Nordin's motion, together with the district court's credibility determinations, plainly establish that Nordin was advised of the maximum possible sentence before the plea hearing and was specifically advised on the day of plea hearing that he could spend the "rest of his life" in prison. Therefore, we conclude that Nordin's pleas were intelligent, and the error does not mandate that Nordin's pleas be vacated.

At his first appearance on the charges in March 2007, Nordin acknowledged to the district court that he had received the five-count complaint. The complaint plainly states the maximum penalty for each of the counts against him: 30 years imprisonment and/or a $40,000 fine for each count of first-degree criminal-sexual conduct, and 25 years and/or a $35,000 fine for second-degree criminal-sexual conduct. In May 2007, the state filed notice that it was seeking an upward departure from the presumptive sentence, raising the possibility that Nordin could receive a longer sentence than recommended by the sentencing guidelines.

At the June 5 plea hearing, Nordin testified that he fully understood the serious charges against him and had sufficient time to discuss the case with counsel. Nordin acknowledged that the state was seeking an upward departure, but waived his right to a sentencing jury, stating that he wanted the district court to decide his fate. Nordin acknowledged that he had reviewed his Rule 15 petition "line by line" with counsel and

initialed every part of every page of the petition. Nordin's counsel went through the Rule 15 petition with Nordin on the record, establishing Nordin's understanding of the charges against him; the voluntariness of his pleas, his competence to enter the pleas, his understanding and waiver of all of his rights to trial on his guilt and trial on aggravating sentencing factors; and his understanding that the state had moved for an upward departure. In response to questioning by the prosecutor, Nordin admitted that there were "multiple victims and multiple occurrences." Nordin assured the district court that he had reviewed the plea petition with counsel, understood everything in the petition and had no questions about the petition to plead guilty. Nordin testified about the factual basis for his plea to each charge, and the district court accepted his pleas.

At the September 2007 evidentiary hearing on Nordin's motion to withdraw his pleas, counsel testified that, prior to the June 2007 plea hearing, he had reviewed the minimum and maximum penalties with Nordin and discussed all possible options with him. Counsel testified that, on the day of the plea hearing, he told Nordin that he would spend the rest of his life in prison if the motion for an upward departure was granted. The district court found Nordin's testimony to the contrary not credible and found "very credible" that counsel told Nordin that he could go to prison for the rest of his life. The district court found counsel's description of the possible maximum sentence to be "an incredibly illustrative statement" that was actually "more compelling . . . than having the record show what the maximum penalty was, even though I would prefer that the record had had the maximum penalty."

We defer to the credibility determinations of the district court. *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997) (stating that appellate courts defer to the observations and assessment of trustworthiness made by the district court in determining whether a guilty plea was valid), *review denied* (Minn. June 11, 1997). Case law does not require that a defendant be questioned at a plea hearing to ensure that he understands the presumptive sentence. *See Trott*, 338 N.W.2d at 252–53 (noting that in a substantial number of cases the district court cannot accurately determine the presumptive sentence until a PSI report has been prepared). On this record, we conclude that Nordin has failed to meet his burden to show that his plea was not intelligently made, despite the omission of sentencing information from the record at the plea hearing.

## II. Nordin's pleas were voluntary

The district court found that Nordin's assertion that his pleas were not voluntary because he was under duress due to an alleged threat by one victim's father, made approximately three months before he was charged, is not credible. Nordin acknowledged that he had no contact with either the victims or their families in the eight months between the alleged threat and the plea hearing. At the plea hearing, Nordin denied that his pleas were coerced in any way. The record fully supports the district court's credibility determination on this issue.

## III. Nordin failed to establish that ineffective assistance of counsel affected his pleas

For the first time on appeal, Nordin argues that he should be allowed to withdraw his pleas because he received ineffective assistance of counsel. This issue was

specifically excluded from consideration at the hearing on Nordin's motion to withdraw his pleas, but there was significant testimony at that hearing concerning counsel's representation of Nordin. Generally, we do not consider issues first raised on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). And, generally, a claim of ineffective assistance of trial counsel is best addressed in a petition for postconviction relief rather than on direct appeal. *Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995). Nevertheless, in the interest of judicial economy, because the record is sufficiently developed, we address Nordin's ineffective-assistance-of-counsel argument here. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that appellate courts may review matters as the interest of justice may require).

A plea of guilty is involuntary if it is the result of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To establish ineffective assistance of counsel, Nordin "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). This court may address the prongs of the *Strickland* test in any order and may dispose of the claim of ineffective assistance of counsel without analyzing both. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

With respect to representation, (the "performance" prong of the *Strickland* test), whether a guilty plea is voluntary depends on whether counsel's advice fell "within the range of competence demanded of attorneys in criminal cases." *Ecker*, 524 N.W.2d at 718 (quotation and citation omitted). An attorney's actions are "within the objective standard of reasonableness when [the attorney] provides [the] client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation and citation omitted). There is a strong presumption that counsel's performance was reasonable. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

With regard to the result (the "prejudice" prong of the *Strickland* test), in the context of a challenge to a guilty plea, the defendant must demonstrate "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.'" *State v. Wiley*, 420 N.W.2d 234, 237 (Minn. App. 1988) (quoting *Hill*, 474 U.S. at 59, 106 S. Ct. at 370), *review denied* (Minn. Apr. 26, 1988). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gates*, 398 N.W.2d at 561.

Nordin, in his brief on appeal, alleged 14 deficiencies in counsel's representation. But he conceded at oral argument on appeal that many of the alleged deficiencies are unrelated to his guilty pleas. The only allegations related to the pleas are (1) failure to include in the Rule 15 petition, or make a record of at the plea hearing, the maximum

sentence that could be imposed and (2) failure to terminate the plea hearing when counsel noticed that Nordin appeared to be confused.

But as discussed above, the district court credited counsel's testimony that he had reviewed the relevant documents in the case, discussed sentencing possibilities with Nordin, and told Nordin on the day of the plea hearing that he could be sentenced to spend the rest of his life in prison. And Nordin has failed to demonstrate that, if counsel had made a record of the maximum sentence, Nordin would not have pleaded guilty. Furthermore, despite counsel's statement that Nordin appeared confused at the plea hearing, the transcript of the hearing demonstrates that any confusion was addressed on the record, and Nordin assured the district court of his complete understanding of the proceedings. The transcript demonstrates that Nordin was not experiencing any difficulties hearing what transpired: he answered questions appropriately and had no questions. On this record, Nordin has failed to establish that counsel was ineffective by not seeking the termination of the plea hearing.

**Affirmed.**