STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2391
A08-351

State of Minnesota,
Respondent,

vs.

Daniel Arthur Southerling, petitioner,
Appellant.

Filed May 12, 2009
Affirmed
Schellhas, Judge

Washington County District Court
File No. K6-05-4377

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

Doug Johnson, Washington County Attorney, Karin L. McCarthy, Assistant County Attorney, 14949-62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, James R. Peterson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, 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 argues that the district court erred in denying his motions to withdraw his guilty plea and to depart from the presumptive sentence on his conviction of first-degree arson. Because we conclude that appellant's claims are not supported by the record and that the district court did not abuse its discretion in sentencing him, we affirm.

FACTS

Appellant Daniel Arthur Southerling was convicted of attempted first-degree arson after a stand-off at his house with Washington County police in July 2005. The stand-off began after police responded to a 911 call placed by an angry male from Southerling's address. The first responding officer was met at the door to the house by Southerling, who was "very belligerent and screaming obscenities." As more officers gathered at the scene, they heard Southerling shouting remarks that included: "bring it on coppers, let's step it up a notch." Officers then learned that Southerling had called local news media and told them that he had barricaded himself in his house with a two-year-old child and would not be coming out. Several relatives came to the scene including one of Southerling's nephews, who informed police that Southerling had been drinking all day. The Washington County SWAT team was called to the scene. After negotiations between the SWAT-team negotiator and Southerling failed, Southerling threw a liquid onto the roof of his house and ignited it. Soon after Southerling ignited the liquid on his roof, his 17-year-old-son exited the house and informed the police that Southerling had been intoxicated since early that afternoon. The officers then entered the house, found

Southerling in a closet, and, after a struggle, removed him from the house. Firefighters extinguished the fire, which had burned a hole in the roof and caused fire and smoke damage to the second floor of the house.

Southerling was charged with: (1) first-degree arson in violation of Minn. Stat. § 609.561, subd. 1 (2004); (2) making terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2004); (3) making terroristic threats in violation of Minn. Stat. § 609.713, subd. 2 (2004); (4) felony obstruction of legal process in violation of Minn. Stat. § 609.50, subds. 1(2), 2(1) (2004); and (5) obstructing legal process with force in violation of Minn. Stat. § 609.50, subds. 1(1), 2(2) (2004). Pursuant to a plea agreement, Southerling pleaded guilty to first-degree arson in exchange for the dismissal of the remaining charges. The state agreed to cap probation at ten years, and Southerling's counsel intended to move for a downward dispositional departure. Although the prosecutor felt that Southerling had "a very strong likelihood of getting [a dispositional departure]," departure was not a part of the plea agreement and counsel agreed on no other sentencing terms.

At the sentencing hearing, Southerling's counsel announced that Southerling wanted to withdraw his plea because he believed that he was innocent, but counsel also stated that there were no problems with the plea that pertained to the rules of criminal procedure or establishing a factual basis. Southerling's counsel also sought permission to withdraw from his representation, stating that his relationship with Southerling had broken down to the point that he did not believe that Southerling would be happy with his services. The district court then questioned Southerling, who stated that he would agree

to let his counsel withdraw but did not wish to "fire him" that day. Southerling then described the circumstances surrounding the entry of his guilty plea to first-degree arson. He claimed that his counsel told him that there was "a sweet deal on the table for you right now, four months but ten years probation, including intensive supervised release." Southerling's counsel stated that "it was understood and it was explained in detail that this—the particular plea agreement was open ended," that it was up to the court to determine whether there would be a downward departure, and that there would not necessarily be ten years' probation.

The district court denied counsel's motion to withdraw from legal representation of Southerling and denied Southerling's motion to withdraw his plea, concluding that Southerling had made no showing of error "in waiver of his rights or the factual basis that he placed on the record at the time of the plea." Southerling's counsel did not argue for a sentencing departure. The district court then sentenced Southerling to 58 months' imprisonment, to which Southerling protested, asserting that he had been promised a four-month sentence by his counsel and the prosecution. The prosecutor denied that Southerling was ever promised a four-month sentence and stated that while the court indicated at one time that it would consider a dispositional departure, Southerling had since "dropped out of contact with community services who was supposed to be monitoring him." And the district court stated that it had never promised Southerling any departure.

Southerling appealed his sentence in December 2006, but thereafter moved to stay his direct appeal pending postconviction proceedings, and this court granted a stay. The

district court[1] conducted a postconviction evidentiary hearing at which Southerling claimed that he had been drinking alcohol before entry of his plea and that his counsel had told him that he would receive a four-month sentence. Counsel who represented Southerling in connection with his plea and sentencing testified that he did not suspect that Southerling had been drinking alcohol or was under the influence when he entered his guilty plea. He also testified that he did not argue at sentencing for a dispositional departure because "[t]here was no argument to be made." He explained that Southerling had not complied with requests and had written letters to the district court and others reflecting that he accepted no responsibility for his crime. Southerling also testified.

The postconviction court found Southerling's testimony about the circumstances surrounding his guilty plea not credible and denied his motion to withdraw his plea. But the postconviction court concluded that Southerling had received ineffective assistance of counsel at sentencing because, based on the positive remarks in Southerling's presentence investigation and the prosecutor's remarks during the plea hearing, there was a reasonable possibility that the sentencing court would have granted at least some minimal durational departure had defense counsel made a proper argument. The postconviction court therefore vacated Southerling's sentence and scheduled a new sentencing hearing.

At Southerling's re-sentencing hearing, his defense counsel argued that the district court should depart downward dispositionally because Southerling's conduct was less serious than that for the typical offense of first-degree arson and that Southerling would

[1] The presiding judge was not the same judge who presided at the plea hearing and sentencing hearings.

not present a danger to the public if his chemical dependency and anger were addressed. At the end of the hearing, the district court explained that, while it had considered the possibility of departure when it vacated Southerling's sentence, Southerling's conduct since that time "wiped out that possibility." The court noted that Southerling had continued to send letters to the court and prosecutor in which he made veiled threats and that he showed no remorse. The court sentenced Southerling to 57 months' imprisonment.

Because this court previously stayed Southerling's direct appeal, we allowed Southerling to consolidate that appeal with his appeal from the postconviction judgment.

D E C I S I O N

Appellate courts "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record" and "afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review a postconviction court's decisions for abuse of discretion, but review legal determinations de novo. *Schleicher v. State*, 718 N.W.2d 440, 444-45 (Minn. 2006).

I

A defendant does not have an absolute right to withdraw a guilty plea, *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997), but a district court shall allow a defendant to withdraw a guilty plea if it is necessary to correct a manifest injustice, Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a guilty plea was not accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). The requirement

that a plea be intelligent ensures that "the defendant understands the charges, the rights being waived under the law, and the consequences of the guilty plea." *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

Southerling first argues, based on his affidavit and his sister's affidavit, that his plea was not intelligent because he was under the influence of alcohol when he entered it. But neither the district court, nor Southerling's plea counsel, nor the prosecutor suspected that Southerling had been drinking alcohol or was under the influence at the time of his plea. Moreover, as noted in the district court's sentencing order of November 20, 2007, Southerling admitted at the time of his plea that he had consumed two drinks at 8:00 a.m. on the morning of his plea hearing. He entered his plea at nearly 12:00 p.m. that day and neither Southerling nor his sister claims that he drank alcohol while at the courthouse. We conclude that the determination by the original sentencing court and the postconviction court that Southerling was not under the influence of alcohol when he entered his plea, such that his guilty plea was not intelligent, is supported by the record.

Southerling also argues that he did not understand (1) the rights he was waiving by pleading guilty, (2) the plea petition as it was being read to him, and (3) whether he could withdraw his plea if he was not given a four-month sentence. At the plea hearing, the following colloquy occurred:

> DISTRICT COURT: [D]o you understand the plea agreement made on your behalf?
> DEFENDANT: Yes.
> DISTRICT COURT: To the charge set forth in Count I, Arson in the First Degree in violation of Minnesota Statute 609.561, Subd. 1, how do you wish to plead?
> DEFENDANT: Guilty.

> . . . .
> DEFENSE COUNSEL: . . . I'm showing you a plea petition pursuant to Rule 15 of the Minnesota Rules of Criminal Procedure, do you recognize this form?
> DEFENDANT: Yes.
> DEFENSE COUNSEL: And did we go through each and every line on this form?
> DEFENDANT: Yes.
> DEFENSE COUNSEL: Okay. I want to make a note that on each of the pages that there is a signature, are these your signature?
> DEFENDANT: Yes.
> DEFENSE COUNSEL: And I do believe that there is one that we have missed. And we did go through each and every line, is that correct?
> DEFENDANT: Yes.
> DEFENSE COUNSEL: Okay. I need for you to sign the one on the bottom. In that petition we discussed certain rights that you would be giving up today by pleading guilty to this First Degree Arson. Did we go over each of those rights?
> DEFENDANT: Yes.
> DEFENSE COUNSEL: And you understood those rights?
> DEFENDANT: Yes.
> DEFENSE COUNSEL: Were there any unresolved questions as to the rights that you're waiving today?
> DEFENDANT: No.

Southerling's testimony at his plea hearing shows that he understood the terms of the plea petition and the rights he was waiving upon entering his plea. And Southerling admits in his affidavit that the written plea agreement contained no mention of a four-month sentence. In fact, other than stating that the maximum penalty under the law was 20 years' imprisonment, the plea petition contains no terms pertaining to the sentence Southerling would receive. Other than his own assertions and his sister's assertions, Southerling provides no evidence that his counsel promised him a four-month sentence. Moreover, both Southerling's previous counsel and the prosecutor testified that no such

agreement was made, and the record reflects that Southerling's counsel explained to him that there was no agreement as to a sentence and that he was entering a "straight plea." We conclude that the district court's finding that Southerling was not promised a four-month sentence is supported by sufficient evidence in the record and is not clearly erroneous. *See Dukes*, 621 N.W.2d at 251 (stating that a reviewing court will not reverse the findings of a postconviction court unless they are clearly erroneous).

Southerling also argues that his plea was not voluntary because he was induced to plead guilty with the promise of a reduced sentence and because he faced "intense pressure" from his counsel and his sister to plead guilty. A plea is not voluntary when the defendant pleads guilty because of improper pressures or inducements, *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). As stated above, we reject Southerling's assertion that he was promised a reduced sentence. Moreover, to the extent that Southerling claims that he was pressured to enter into the plea agreement, we note the district court's finding that over a month passed between when Southerling entered his plea and when he first contacted his counsel about withdrawing his plea. By that time, Southerling's sentencing was drawing near, and he was having problems complying with the terms of his probation. We agree with the district court that the timing of Southerling's attempt to withdraw his plea is probative of his state of mind, and we therefore conclude that the district court did not err when it determined that Southerling's plea was voluntary. *See Sykes v. State*, 578 N.W.2d 807, 813 (Minn. App. 1998) (considering that the defendant attempted to withdraw his plea months after he entered it, when he realized his plea would impede his career, in determining that the plea was not coerced).

A district court may also allow a defendant to withdraw a plea of guilty if he is awaiting sentencing and if it is "fair and just" to do so, taking into account whether the withdrawal would prejudice the prosecution. Minn. R. Crim. P. 15.05, subd. 2. The defendant has the burden to show that the plea withdrawal is warranted, and the district court must give "due consideration to the reasons advanced by the defendant in support of the motion." *Id.*; *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989). Southerling argues that allowing him to withdraw his plea would be fair and just for the same reasons that he argues withdrawal of his plea would correct a manifest injustice: he was under the influence of alcohol at the time of his plea, induced by the promise of a lighter sentence, and pressured by his counsel and sister to enter the guilty plea. These arguments fail for the same reasons stated above. Southerling also argues that the district court erred in not considering the "fair and just" standard when it denied Southerling's request to withdraw his plea prior to sentencing and during postconviction proceedings. But the original sentencing and postconviction courts considered and properly rejected the arguments that Southerling made in favor of plea withdrawal.

In his pro se brief, Southerling argues that the district court erred because it refused to allow him to withdraw his guilty plea based on the letters he sent to the court. In the letters, Southerling described the events leading to the charged offense and alleged mistreatment of him by Forest Lake police officers. Southerling cites *State v. Kunshier* for the principle that the state may not "claim that an offered plea agreement can be withdrawn because of subsequent bad acts but, because of the claimed bad acts, determine the defendant forfeited his right to withdraw his qualified guilty plea." 410

N.W.2d 377, 380 n.2 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). But, here, the prosecution never argued that Southerling's plea agreement could be withdrawn based on his bad acts; thus, the principle for which Southerling cites *Kunshier* is inapplicable.

Southerling also argues that he should be allowed to withdraw his plea because he received ineffective assistance of counsel. A defendant may show ineffective assistance of counsel if he pleaded guilty and that "there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (quotation omitted). In order to prove ineffective assistance of counsel, "[t]he defendant 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)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Southerling argues that his counsel's assistance was ineffective because his counsel: (1) misled him about the sentence he would receive and whether he could withdraw his plea if he did not receive that sentence; (2) pressured him to enter the guilty

plea; and (3) allowed him to enter a plea even though he knew that Southerling was under the influence of alcohol. As previously discussed, the record does not support Southerling's arguments. He also argues that between the plea hearing and his original sentencing hearing, he tried to talk to his counsel about withdrawing his plea, but his attempts were "fruitless." Southerling complains that at the original sentencing hearing, he was forced to bring his own motion to withdraw his plea and that his attorney effectively argued against it. But the record shows that Southerling's counsel explained to the court Southerling's basis for requesting to withdraw his plea, basically that Southerling had changed his mind about his innocence. A change of mind is not a legitimate reason for withdrawal of a guilty plea. *See Kim*, 434 N.W.2d at 266 (stating a guilty plea cannot be withdrawn without good reason).

Even if Southerling's counsel was ineffective, Southerling must show that he was prejudiced by the ineffectiveness in order to prevail. *Gates*, 398 N.W.2d at 561. Southerling argues that he was prejudiced because he only pleaded guilty because of the alleged promise of a four-month sentence. A defendant may withdraw his plea if an unqualified promise is made as to an imposed sentence and that promise is unfulfilled. *Kunshier*, 410 N.W.2d at 379. In his pro-se brief, Southerling claims that before his plea hearing, his counsel approached him with a proposal from the prosecution that included a term of "four months to serve," and that his counsel testified at the postconviction evidentiary hearing that the prosecutor offered a four-month sentence as closure to the case. But the transcript of the evidentiary hearing does not support Southerling's claims. Southerling's counsel testified that he discussed with the judge and the prosecutor a

sentence of "up to a year, and up to a year in the workhouse" and up to ten years' probation, and he described this sentence as one that the district court was "willing to go [along] with," if Southerling met certain conditions, such as, remaining sober and law-abiding. And during Southerling's own testimony at the evidentiary hearing, he acknowledged that the plea petition contained no agreement about his sentence, and he described only the "very strong" likelihood of a dispositional departure as "the only thing that stuck out in my head that day, there it is, there is my four months right there." But, as previously discussed, the record does not show that any promises were made to Southerling regarding his sentence.

Southerling argues that the language in his plea petition allows him to withdraw his plea if he did not receive his desired sentence. But the plea petition merely states that he has the right to a trial if the court does not accept the petition. Here, the district court did accept the plea petition.

Southerling also argues that he was prejudiced by his counsel's failure to argue for a downward departure at his original sentencing hearing. But the district court agreed, vacated his sentence, and set a new sentencing hearing, at which Southerling was represented by new counsel. Therefore, Southerling fails to show prejudice as required under *Gates*.

For all of the reasons discussed, we reject Southerling's arguments that the original sentencing and postconviction courts erred in refusing to allow him to withdraw his guilty plea.

II

Southerling argues that the district court erred in sentencing him because it did not depart downward dispositionally. A defendant's particular amenability to treatment in a probationary setting can support a dispositional departure. *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981). The district court has broad discretion in determining whether to depart downward from the sentencing guidelines and may depart from the presumed sentence if mitigating factors exist. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). In considering a dispositional departure, the court may focus on the defendant as an individual and whether the presumptive sentence would be best for him and for society. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

This court has statutory authority to review or modify a sentence that is unreasonable or excessive, Minn. Stat. § 244.11, subd. 2(b) (2008), and discretionary authority to modify a sentence, Minn. R. Crim. P. 28.05, subd. 2. But it is a "rare case" that would warrant reversal of the refusal to depart. *Kindem*, 313 N.W.2d at 7.

Southerling argues that the district court erred in denying his motion for a dispositional departure because (1) "everyone considered this to be a good case for a dispositional departure" at the time of the plea hearing, (2) he remained employed between the plea hearing and his original sentencing hearing, and (3) he maintained the same address and telephone number and took regular drug tests which came back negative. At his re-sentencing hearing, Southerling argued that (1) he could deal with his chemical dependency and anger issues and was amenable to probation, (2) he had been in prison for a significant amount of time with no disciplinary issues, (3) he had good

reports about his job performance, (4) he had been attending Alcoholics Anonymous, and (5) he had the support of his mother. The re-sentencing court considered Southerling's arguments but concluded that he was not a good candidate for a downward departure because he continued to display "bullying" behavior, took little responsibility for his conduct, and minimized his conduct.

When the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). A written explanation is not required when the district court refuses to depart and instead imposes the presumptive sentence. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984). In this case, on re-sentencing, the district court considered the mitigating factors and was within its discretion in refusing to depart. *See State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) (the existence of mitigating factors does not require sentencing court to impose downward departure).

Southerling also argues that the re-sentencing court erred in failing to consider his request for a downward durational departure of a 50-month sentence, which he argues under the theory that 50 months was at the low end of the presumptive range at the time of resentencing. The re-sentencing transcript shows that the district court considered and denied Southerling's request for a durational departure when it stated that "what is preventing me from being able to give you the departure, whether it's dispositional or durational, is the fact that this same type of behavior," that Southerling exhibited on the day of the incident, "continues to reoccur." Southerling is therefore incorrect that the

district court failed to consider his request for a downward durational departure at his re-sentencing hearing.

In his pro se brief, Southerling argues that the district court improperly allowed its personal feelings toward him to determine his sentence. In particular, Southerling claims that the re-sentencing court improperly connected one of his letters to the district court "to a separate incident, (plea agreement) and overruled the plea settlement" without further evidence. We respond to Southerling's argument on the assumption that we actually understand it.

"[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008) (quotation omitted). As previously discussed, the re-sentencing court's refusal to depart downward was based on Southerling's behavior after his postconviction evidentiary hearing, which included sending threatening letters to the court and the prosecutor. Nothing in the record reflects that Southerling's re-sentence was the result of "deep-seated favoritism or antagonism" or personal bias on the part of the district court.

Southerling has failed to show that the district court abused its discretion in imposing on him the presumptive sentence on his conviction of first-degree arson.

Affirmed.