STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1623

Xang Vang, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 30, 2009
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR03045459

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

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that his petition was timely and that he should have been granted an evidentiary hearing on his claim that his lack of fluency in English made his guilty plea invalid. Because we conclude that the postconviction court did not abuse its discretion by dismissing the petition on the merits without an evidentiary hearing, we affirm.

FACTS

In June 2003, appellant Xang Vang, who speaks both Hmong and English, shot and killed a member of a rival gang. Four days later, a police officer questioned Vang in English about the shooting. Vang did not request an interpreter for this interview and answered all of the officer's questions in English without hesitation. Vang was charged with two counts of first-degree murder and one count of being an after-the-fact accomplice for the June 2003 shooting. In July 2003, he was indicted by a Hennepin County grand jury on four counts of first-degree murder.

In November 2003, Vang's attorney told him that there was a plea offer for a 366-month sentence. Vang rejected this offer. Two days later, Vang's attorney met with the prosecutor, Vang's Hmong-speaking parents, and a Hmong interpreter regarding a plea agreement. After appellant met privately with his parents, he entered a guilty plea on the record to an amended count of second-degree murder (drive-by shooting) for the benefit of a gang, aiding and abetting another, in violation of Minn. Stat. §§ 609.05, .19, subd. 1(2), 609.229, subds. 2, 3(a) (2002). The other charges were dismissed, and the district

court, under the plea agreement, sentenced appellant to 306 months for the second-degree murder, with an added 60 months because the murder was committed for the benefit of a gang.

In July 2007, Vang filed a pro se petition for postconviction relief challenging the validity of his plea, the correctness of his sentence, and the adequacy of his representation.[1] Vang also requested an evidentiary hearing. The Office of the State Public Defender filed a supplemental petition in support of appellant's pro se petition. The state stipulated that 12 months, rather than 60 months, was the correct sentence modifier under the sentencing guidelines, but opposed Vang's petition to withdraw his plea and the request for an evidentiary hearing. The postconviction court modified Vang's sentence but, without an evidentiary hearing, denied his request to withdraw his plea. After addressing the merits of Vang's petition, the postconviction court held that, in the alternative, Vang's motion to withdraw his guilty plea was untimely. This appeal followed.

D E C I S I O N

We review decisions of a postconviction court for abuse of discretion. *Hale v. State*, 566 N.W.2d 923, 926 (Minn. 1997). The petitioner has the burden to establish facts alleged in the petition by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2008). We will sustain the postconviction court's findings if they are supported by sufficient evidence in the record. *Cuypers v. State*, 711 N.W.2d 100, 103 (Minn. 2006). Questions of law are reviewed de novo. *Id*.

[1] On appeal, Vang does not challenge the adequacy of his legal representation.

Under Minn. Stat. § 590.04, subd. 1 (2008), a court must grant an evidentiary hearing on a petition for postconviction relief unless the petition and the files and the record of the proceeding conclusively show that the petitioner is entitled to no relief. "A postconviction court is not required to hold an evidentiary hearing unless there are material facts in dispute which must be resolved in order to determine the postconviction claim on its merits." *Ford v. State*, 690 N.W.2d 706, 713 (Minn. 2005). In reviewing a postconviction court's denial of relief without an evidentiary hearing, "we resolve any doubts about whether an evidentiary hearing is required in favor of the petitioner." *Patterson v. State*, 670 N.W.2d 439, 441 (Minn. 2003).

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). After conviction and sentencing, a defendant may withdraw a guilty plea if withdrawal is "necessary to correct a manifest injustice" *and* the defendant makes a timely motion for withdrawal. Minn. R. Crim. P. 15.05, subd. 1; *Theis*, 742 N.W.2d at 646. Manifest injustice exists when a guilty plea is invalid; and a guilty plea is valid only if it is accurate, voluntary, and intelligent. *Theis*, 742 N.W.2d at 646. For a guilty plea to be intelligent, the defendant must be aware of the direct consequences of his plea, including the maximum sentence and any fine to be imposed. *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998). Here, appellant challenges the district court's determinations, made without holding a postconviction evidentiary hearing, that: (1) appellant understood the sentence he would be receiving as a direct consequence of his guilty plea and therefore his plea was intelligent and (2) his petition for postconviction relief was untimely.

Under Minnesota law, the rights of a person who is disabled in communication cannot be fully protected unless the person is assisted in legal proceedings by a qualified interpreter. Minn. Stat. § 611.30 (2008). "'[P]erson disabled in communication' means a person who[,] . . . because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person, . . . or is incapable of presenting or assisting in the presentation of a defense." Minn. Stat. § 611.31 (2008). The trial court has discretion to decide whether an interpreter should be appointed. *State v. Perez*, 404 N.W.2d 834, 838 (Minn. App. 1987) (affirming the district court's determination that Perez was not disabled in communication and therefore did not need a simultaneous translator at trial, based on review of the transcript demonstrating Perez's sufficient command of English to answer all questions put to him at the omnibus hearing), *review denied* (Minn. May 20, 1987).

Vang argues that the postconviction court erred in denying an evidentiary hearing. Vang asserts that, despite the fact that in 2003 the district court was unaware of any problems with Vang's competency in English, his 2007 petition for postconviction relief and supporting affidavits put material facts concerning his ability to comprehend English, and therefore the validity of his plea, into question. The record, however, conclusively demonstrates that Vang was not disabled in communication at the time of his plea. There is no suggestion on the record by Vang, his attorney, or anyone who interacted with Vang that Vang was not competent in English. And transcripts reveal his ample ability to comprehend and speak English sufficiently to allow him to understand the proceedings, including the sentence involved in the plea agreement.

The transcript of the June 2003 interview conducted in English by a police officer four days after the shooting reflects that Vang readily understood and appropriately answered the officer's questions without hesitation. Vang's ability to ask for clarification of terminology that he did not understand is demonstrated in this interview. Vang amply demonstrated his competency in English including his use of idiomatic expression. For example, when asked by the police officer about the shooting, Vang responded that he heard about it on the news and stated that he "want[ed] to know the news . . . [to] stay in the loop."

Vang supported his petition with an affidavit from each of his parents and two of his own, describing conversations that preceded the entry of his guilty plea. Vang's parents assert that the interpreter told them that Vang was being offered a 122-month sentence and would face a 244-month sentence if he did not accept the plea offer and was convicted at trial. Based on this understanding, Vang's father advised Vang that the offer was for 122 months and to accept the offer. Vang asserts in one of his affidavits that after his parents told him the plea offer was for 122 months, he agreed to plead guilty, believing that he would be receiving a 122-month sentence, not a 366-month sentence.

The plea-hearing transcript reflects that on the morning of the plea hearing, Vang met with his parents to discuss the plea negotiation and that someone interpreted for the family. The transcript does not reflect what understanding Vang's parents had about the plea agreement or what they told Vang, but, at the plea hearing, Vang was plainly told by his attorney and by the district court that his sentence would be 366 months. He was given this information three times, and each time he indicated he understood his sentence.

Vang also acknowledged that by pleading guilty, he was avoiding a life sentence. Vang's attorney asked Vang if he understood that he would be sentenced to "366 months, just a little over 30 year[s]" and that with good behavior he would actually "serve just a little bit over 20 years." Vang responded, "[y]es." Vang's attorney then questioned Vang about the contents of his written petition to plead guilty. The attorney asked Vang whether the sentence, as written on the petition, of 306 months for second-degree murder plus 60 months due to the murder being committed for the benefit of a gang, was accurate. Vang responded, "[y]es." Finally, at the conclusion of the hearing, the district court explained Vang's sentence as being "based upon the guidelines sentence of 306 months that applies to second-degree murder [by] drive-by shooting and an additional 60 months, which is applicable because the crime was committed for the benefit of a gang."

At no point in the proceedings did Vang indicate that he did not understand the proceedings or that he was being sentenced to a more lengthy term than what he now claims his parents had discussed with him. During the plea colloquy, Vang answered each question appropriately and, as reflected by the transcript, without hesitation. Vang asked for clarification when it was necessary. For example, when his attorney asked Vang if he was going to waive the presentence investigation (PSI), Vang asked the attorney to "explain it more." After further explanation, Vang waived his right to the PSI. That Vang's parents may not have understood the plea agreement or accurately described their understanding of the plea agreement to Vang does not undermine Vang's clearly expressed understanding of his plea and sentence.

Vang's petition for postconviction relief was also supported with affidavits from two inmates who helped Vang with his petition. Each affidavit attests to the affiant's perception of Vang's poor English skills in his interaction with the affiant at the time the petition for postconviction relief was prepared. But these affidavits do not negate Vang's competency in English demonstrated in the 2003 transcripts and as reflected in lengthy, articulate letters to the district court and his attorney as late as March 11, 2008. Vang's petition did not raise a factual dispute about his language competency at the time of his plea, and the postconviction court did not abuse its discretion by denying appellant's petition for postconviction relief without an evidentiary hearing. Because we affirm dismissal of the petition on the merits, we do not reach the issue of whether the postconviction court erred in determining that the petition was untimely.

Affirmed.