STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1711

William Donald Buchan, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 9, 2009
Affirmed
Hudson, Judge

Le Sueur County District Court
File No. 40-CR-07-796

William Donald Buchan, OID No. 222342, MCF – Moose Lake, 1000 Lake Shore Drive, Moose Lake, Minnesota 55767 (pro se appellant)

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

Brent Christian, Le Sueur County Attorney, Jason L. Moran, Assistant County Attorney, 65 South Park Avenue, P.O. Box 156, Le Center, Minnesota 56057 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and Harten, Judge.*

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

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

HUDSON, Judge

In this pro se postconviction appeal, appellant argues that (1) the district court erred by not affording him the right of allocution and, therefore, he is entitled to withdraw his guilty plea; (2) the state engaged in sentencing entrapment, which justified a sentencing departure; (3) the district court abused its discretion when it imposed the guidelines sentence; and (4) he was denied effective assistance of counsel. We affirm.

FACTS

On August 15, 2007, appellant William Donald Buchan was charged with a first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 1(1) (2006). The charge stemmed from allegations that, over three separate days in July and August 2007, appellant sold more than 10 grams of methamphetamine to undercover police officers.

On July 31, 2007, a confidential police informant phoned appellant about purchasing methamphetamine with a friend (an undercover police officer). After the undercover officer and appellant met that night, it was agreed that the undercover officer would be back in contact with appellant to purchase methamphetamine at a later date. On August 2, 2007, appellant sold 0.5 grams of methamphetamine to the undercover officer. On August 5, 2007, appellant contacted the undercover officer and informed him that he had 10 grams of methamphetamine for sale. Appellant sold two clear plastic baggies to the undercover officer. Those baggies, respectively, were found to contain 0.85 grams and 11.95 grams an off-white crystalline substance. The former bag "field-tested"

positive for methamphetamine, while the latter (heavier) bag "field tested" negative for methamphetamine.[1] On August 9, 2007, a confidential police informant drove appellant to Minneapolis to purchase more methamphetamine. The amount of methamphetamine purchased (contained in three bags) had a "non-certified weight" of 4 grams.

On August 23, 2007, the complaint was amended to add a second count: second-degree sale of a controlled substance in violation of Minn. Stat. § 152.022, subd. 1(1) (2006). On October 17, 2007, appellant's counsel negotiated a plea agreement with the state whereby appellant would plead guilty to an amended count 1, and count 2 would be dismissed. At the plea hearing, appellant admitted that he had made the sales of methamphetamine. Pursuant to the plea agreement, appellant pleaded guilty to second-degree sale of a controlled substance (count I, amended from first-degree) in violation of Minn. Stat. § 152.022, subd. 1(1). Appellant was sentenced to 78 months at a Minnesota corrections facility.

On May 27, 2008, appellant filed a petition for postconviction relief. Appellant alleged due process violations, improper charging, abuse of the district court's discretion for not granting a downward departure to the negotiated sentence, and violation of his Fourth Amendment rights. Appellant subsequently filed an additional motion and a supplement to his additional motion. The district court denied appellant's postconviction

[1] The 11.95-gram bag later tested positive for methamphetamine, although this fact is not reflected in the complaint or complaint supplement. But the sentencing hearing transcript indicates that the bag eventually tested positive. There, appellant's counsel asked him if "there was one piece of evidence which initially field tested negative for methamphetamine and subsequently the BCA has tested it and it tested positive, correct?" Appellant answered, "Yes."

motions as "mere argumentative assertions without factual support." This pro se appeal follows.

D E C I S I O N

I

Appellant argues that he was denied his right to allocution and, therefore, he is entitled to withdraw his guilty plea. To withdraw a guilty plea after sentencing, a defendant must show that "withdrawal [of the plea] is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs when a guilty plea is not accurate, voluntary, and intelligent. *Allanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A reviewing court will reverse the district court's determination of whether to permit withdrawal of a guilty plea only if the district court abused its discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). The scope of review is limited to whether there is sufficient evidence to sustain the findings of the postconviction court. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Before the district court pronounces a defendant's sentence, it must allow the prosecutor and defense attorney an opportunity to make statements relevant to the sentence. Minn. R. Crim. P. 27.03, subd. 3. The district court must separately offer the defendant an opportunity for allocution: "[t]he court shall [ ] address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information before sentenc[ing] . . . ." *Id.*; *see State ex rel. Thunstrom v. Tahash*, 283 Minn. 239, 244, 167 N.W.2d 139, 144 (1969) (holding that a

defendant who interposes a plea of guilty must be provided with an opportunity to present mitigating facts, circumstances, and arguments to the sentencing court).

To support his argument, appellant cites to a selective quote from *State ex. rel. Napiwoski v. Tahash*, which states that "if the defendant is not afforded his right of allocution and his attorney fails to speak on his behalf at the time of sentencing, he is entitled to a vacation of his sentence." 278 Minn. 56, 58, 153 N.W.2d 138, 140 (1967). But appellant omits the language stating that the above rule only applies "in the absence of a presentence investigation, hearing, or interrogation." *Id.* Here, appellant was afforded a plea and sentencing hearing on October 17, 2007, and his attorney spoke on his behalf at that hearing. Moreover, the district court specifically asked appellant, "Mr. Buchan, is there anything more that you would like the Court to be aware of before I pronounce sentence?" Appellant replied, "No."

Because appellant was afforded a hearing, his attorney addressed the court on his behalf, and the district court separately addressed appellant and offered him an opportunity to comment on sentencing issues, appellant's right to allocution was not violated. Therefore, no manifest injustice occurred that would support a withdrawal of appellant's guilty plea.

II

Appellant next argues that the state engaged in sentencing entrapment or manipulation. Sentencing entrapment occurs when "outrageous official conduct . . . overcomes the will of an individual predisposed only to dealing in small quantities, for the purpose of increasing the amount of drugs . . . and the resulting sentence of the

entrapped defendant." *State v. Soto*, 562 N.W.2d 299, 305 (Minn. 1997) (quotation omitted). While "sentencing entrapment focuses on the predisposition of the defendant, the related concept of sentencing manipulation is concerned with the conduct and motives of government officials." *Id.* (citing *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993)). Under either doctrine, appellant bears the burden of demonstrating that he was predisposed only to sell smaller amounts of methamphetamine and that "he had neither the intent nor the resources for selling the larger amount he was entrapped into selling." *Soto*, 562 N.W.2d at 305.

Appellant contends that the state engaged in sentencing entrapment to gather sufficient evidence to charge him with a first-degree controlled substance offense and that the district court should have granted a downward durational departure from the presumptive sentence. We note, however, that in *Soto*, the supreme court declined to adopt the doctrine of sentencing entrapment in the absence of "egregious police conduct which goes beyond legitimate investigative purposes." *Id.* Here, appellant argues that "the officers received only [one-half] gram, so they continued to harass, persuade, and lure [appellant] without a warrant . . .," and "[appellant] was an abuse[r] of drug[s], [and] was merely employed as a mule, he was not a big time drug dealer." Appellant also cites to an unpublished case, *State v. LeMon*, No. C8-94-693, 1994 WL 468126, at *1 (Minn. App. Aug. 30, 1994), to support his argument that being a "mule" or minor player in a drug sale should be considered a mitigating factor. But appellant presented no evidence that he regularly dealt in small quantities of drugs; he acknowledged that he freely agreed to sell the drugs in this case, and the complaint indicates that the government agent took

no action beyond asking appellant for increased quantities of a controlled substance. On this record, we see no "egregious police conduct" and conclude that appellant did not meet his burden of demonstrating that he was predisposed only to sell smaller amounts of methamphetamine. Accordingly, we hold that appellant did not establish sentencing entrapment and, therefore, the district court did not abuse its discretion by imposing the presumptive sentence.

III

Appellant argues that the district court misapplied section II.A.02 of the Minnesota Sentencing Guidelines to the facts of his case. A district court has broad discretion in imposing a sentence. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). But a departure from the presumptive sentence must be supported by the presence of aggravating or mitigating factors. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). A downward departure requires a showing of "substantial and compelling circumstances." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The presence of a mitigating factor does not mandate a departure from the presumptive sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Therefore, we will reverse a district court's imposition of the presumptive sentence only in rare cases. *Kindem*, 313 N.W.2d at 7.

Appellant argues that based on (1) entrapment and (2) the erroneous aggregation of multiple sales within a 90-day period into one charge, he is entitled to a downward durational departure of his sentence to 13 months. But Minn. Stat. § 152.022, subd. 1(1) specifically allows for the aggregation of various sales and states that "[a] person is guilty

of controlled substance crime in the second degree if . . . on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of three grams or more containing cocaine, heroin, or methamphetamine . . . ." Appellant presents no mitigating factors other than that the offenses occurred on separate dates. Because the aggregation of these offenses is specifically allowed under the statute, and appellant's sales occurred within the 90-day time frame contemplated by the statute, the district court's imposition of the presumptive sentence was not an abuse of discretion.

IV

Appellant asserts that he received ineffective assistance of counsel for several reasons but primarily because his counsel failed to assert various defenses on his behalf. In determining whether to grant a defendant a new trial on the ground of 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.' 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

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, 2068 (1984)).

Appellant first argues that he received ineffective assistance of counsel when his attorney did not raise the defense of sentencing entrapment. But because we hold that the record does not support appellant's claim of sentencing entrapment, appellant's counsel was not ineffective for failing to raise that defense. *See State v. Roberts*, 279 Minn. 319,

323, 156 N.W.2d 760, 763 (1968) (holding that failure of defense counsel to introduce defenses which, on the record, would have been without merit does not constitute inadequate representation).

Appellant next argues that his counsel failed to argue a defense regarding the negative reading of one methamphetamine field test. During the portion of the hearing that appellant finds relevant, appellant's counsel questioned appellant.

> [Counsel]: This is talking about a series of drug sales that occurred in July and August of 2007. We have looked at those reports and [there are] very frankly some questions we had about those reports. Particularly there was one piece of evidence which initially field tested negative for methamphetamine and subsequently the BCA has tested it and it tested positive; correct?
>
> [Appellant]: Yes.

But it is not clear what defense appellant believes should have been raised in regard to the field testing and reports regarding the methamphetamine. Appellant's failure to develop his argument on that point waives the argument. *See State v. Butcher*, 563 N.W.2d 776, 780–81 (Minn. App. 1997) (refusing to address argument raised but not developed in brief), *review denied* (Minn. Aug. 5, 1997). Moreover, appellant's argument on this point fails because the substance sold by appellant eventually tested positive for methamphetamine.

Appellant further argues that a defense should have been raised regarding the chain of custody of the methamphetamine. During the portion of the hearing that appellant finds relevant, appellant's counsel questioned appellant as follows:

> [Counsel]: We have got some information, including the chain of custody sheets from the [Le Sueur] County Sheriff's Department. We are choosing not to argue that point to the Court as to whether or not the tested material is admissible or not; correct?
>
> [Appellant]: Yes.
>
> [Counsel]: Well that's your . . . .
>
> [Appellant]: Well, I just – I don't see why . . .
>
> [Counsel]: I understand you[ ] have problems with it, but you understand that in order to accept this deal you are going to have to put facts on the record that will substantiate that you sold more than 3 grams of methamphetamine; do you understand that?
>
> [Appellant]: Yes.
>
> [Counsel]: Okay, and you're willing to do that now; is that correct?
>
> [Appellant]: Yes.

Again, it is unclear what defense appellant believes his counsel should have raised. Appellant's August 13, 2008 postconviction supplement argues that his trial counsel "alter[ed] the evidence." Appellant highlights and appears to question the fact that his counsel questioned him in regard to "*three grams of methamphetamine*." But this was the proper amount for appellant to be questioned about because appellant was pleading guilty to the lesser, second-degree controlled substance offense. Furthermore, appellant's counsel appears to have been following a plea-bargaining strategy in choosing not to pursue an argument regarding a potential flaw in the chain of custody in exchange for a favorable plea agreement for his client. Trial strategy that "lie[s] within the discretion of

trial counsel [ ] will not be second-guessed by appellate courts." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Although appellant may have a colorable argument regarding the chain of custody of the evidence, appellant does not elaborate on this argument, and the "chain of custody sheets" to which he alludes were not included in the district court file, and are, therefore, unavailable for appellate review. *See Butcher*, 563 N.W.2d at 780–81 (refusing to address argument raised but not developed in brief).

Lastly, appellant argues that the evidence that the state bought drugs from him on three separate days is "prima facie evidence" and that after the first purchase, officers had an obligation to establish probable cause and to obtain a warrant for subsequent purchases. Appellant appears to argue that his counsel's failure to raise denial of due process as a defense requires a reversal. But appellant cites no caselaw or statutory authority requiring police officers to procure a warrant before making subsequent drug purchases.

Appellant did not meet his burden of proving that his counsel's representation fell below an objective standard of reasonableness.

Affirmed.