STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0708

State of Minnesota,
Respondent,

vs.

Gerald Lee Thorstad, Jr.,
Appellant.

Filed August 18, 2009
Affirmed
Connolly, Judge

Stevens County District Court
File No. 75-CR-07-397

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

Charles C. Glasrud, Stevens County Attorney, 601-1/2 California Avenue, P.O. Box 593, Morris, MN 56267 (for respondent)

Eric L. Newmark, Birrell & Newmark, Ltd., 333 South Seventh Street, Suite 3020, Minneapolis, MN 55402 (for appellant)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant argues that the district court abused its discretion by denying his petition for postconviction relief without an evidentiary hearing. Because appellant was unable to allege facts which, even if proved, would have entitled him to relief, we affirm.

FACTS

In August 2007, appellant Gerald Lee Thorstad, Jr., was charged with four counts of first-degree criminal-sexual conduct. On November 15, appellant pleaded guilty to one count of first-degree criminal-sexual conduct. The plea agreement provided that the maximum sentence would be 144 months in prison, but that appellant would be entitled to seek a downward dispositional departure.

Appellant filed a motion for a downward dispositional departure, but the district court sentenced him to the presumptive sentence of 144 months in prison with a ten-year conditional-release term. Appellant filed a notice of appeal and then stayed that appeal in order to file a petition for postconviction relief in the district court. In his petition, he argued that he was never informed about the conditional-release term and that he received ineffective assistance of counsel. The district court denied appellant's petition for postconviction relief without an evidentiary hearing. This reinstated appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying his petition for postconviction relief without conducting an evidentiary hearing. The state asserts that because an evidentiary hearing was unnecessary, there was no abuse of discretion.

"[A]n evidentiary hearing is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995) (quotation omitted). A postconviction court may allow a defendant to withdraw a guilty plea *after* sentencing if the motion is timely and withdrawal is "necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. The district court concluded that appellant did not allege any facts that would entitle him to withdraw his guilty plea, and therefore, an evidentiary hearing was unnecessary. 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).

I. Conditional-Release Term

Appellant alleged in his postconviction petition for relief that he was not advised of the ten-year conditional-release term. The Minnesota Supreme Court has stated that if a defendant was not "made aware of the applicable mandatory 10-year conditional release term at the time he entered his plea of guilty or when he was sentenced" his plea was not knowingly and understandably made, and he is entitled to plea withdrawal. *James v. State*, 699 N.W.2d 723, 730 (Minn. 2005). But the district court concluded, based on *State v. Rhodes*, that although appellant was not made aware of the conditional-release term during the plea negotiation or at the plea hearing,[1] he was made aware of it in the presentencing investigation (PSI) recommendations and at sentencing, and therefore was not entitled to plea withdrawal. 675 N.W.2d 323, 325 (Minn. 2004).

[1] The issue of conditional release was tangentially touched upon in the plea agreement and at the plea hearing. The actual length of the release, however, was only addressed in the PSI and at the sentencing hearing.

In *Rhodes*, the defendant pleaded guilty to first-degree criminal-sexual conduct and subsequently brought a postconviction petition seeking to withdraw his plea because he had not been advised of the conditional-release term. *Id.* The supreme court affirmed the district court's denial of postconviction relief, in part, because the "postconviction court could infer from Rhodes' failure to object to the presentencing investigation's recommendation, the state's request at the sentencing hearing and the court's imposition of the sentence, that Rhodes understood from the beginning that the conditional release term would be a mandatory addition to his plea bargain." *Id.* at 327.

In *Rhodes*, the plea agreement did not reference the conditional-release period. *Id.* at 325. In this case, the plea petition put appellant on notice of a term of conditional release:

> 19. I have been told by my attorney and I understand:
>
> . . .
>
> c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will follow any executed prison sentence that is imposed. Violating the terms of this conditional release may increase the time I serve in prison.

However, the final sentence of 19(c) stated: "In this case, the period of release is __ years" with a line drawn horizontally above the blank spot. Therefore, it is possible that appellant believed there would be no conditional-release term.

In *Rhodes*, the release period was not discussed at the plea hearing. *Id.* In this case, it was referenced, briefly at the plea hearing, as an option:

> DISTRICT COURT: You understand that the presumption is if you're convicted of this you go to prison for 144 months which is 12 years.

> APPELLANT: Yes.
> DISTRICT COURT: Okay. And after that there's going to be some other things. You're going to have to give a DNA sample. If you get in any kind of trouble, they can extend your jail time. They can make you go to prison, those kinds of things.

Nonetheless, this was a somewhat cryptic reference to the conditional-release term, and the district court's conclusion that appellant was not fully informed of the conditional-release term until the PSI and the sentencing hearing is correct.

Similar to *Rhodes*, appellant was informed of the conditional-release term, including its length, in the PSI and at the sentencing hearing.[2] Appellant argues that there is no evidence in the record to suggest that he read the PSI or understood the conditional-release term. Appellant does not cite any support for the proposition that such a showing is required. It was appellant's choice not to read the PSI or to object to its contents when it was made available to him.

Appellant further argues that although the court advised him "that he would be placed on conditional release for 120 months, [it] never explained that that could result in his return to prison for ten years." By making this argument, appellant acknowledges that he was informed of the conditional-release term at sentencing. Based on the supreme court's conclusion in *Rhodes*, this is sufficient for a district court to deny withdrawal of a plea. Appellant's assertion that he did not understand that he could be sent back to prison does not change the analysis. Appellant could have inquired into the meaning of "conditional release" at sentencing but he chose not to do so. His lack of understanding

[2] The PSI is not in the record, but there is no dispute that it contained information regarding the length of the conditional-release term.

does not change the fact that he was made aware of this condition of his sentence. Therefore, the district court did not abuse its discretion by denying appellant's petition for postconviction relief without an evidentiary hearing.

II. Ineffective Assistance of Counsel

Appellant asserts that there were three other bases that necessitated a hearing to determine whether a plea withdrawal was appropriate: (1) his lawyer threatened to withdraw from the case if he refused to enter a plea; (2) counsel advised appellant that he could not withdraw his plea under any circumstances; and (3) appellant was informed that his lawyer would only help to create a basis to withdraw the plea if he was retained to represent appellant in connection with such a motion. To obtain a plea withdrawal on the basis of ineffective assistance of counsel, a defendant must show "that her attorney's representation fell below an objective standard of reasonableness and that but for the substandard representation the result would have been different." *Anderson v. State*, 746 N.W.2d 901, 906 (Minn. App. 2008). Courts are to assume that counsel's performance fell within the wide range of reasonable professional assistance. *State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001).

First, aside from appellant's allegations, there is no evidence that appellant's counsel threatened to withdraw if he refused to take the plea. In fact, at the plea hearing appellant informed the court that nobody had made any threats or promises not contained in the plea petition. Appellant's assertion that his attorney threatened him and thereby forced him to accept the plea agreement is directly contradicted by his own testimony. Furthermore, even if we take the allegations contained in appellant's plea petition as true,

particularly that appellant's counsel informed him that "if he did not accept the agreement, he would no longer be able to represent [appellant] and that he would be a 'fool' to turn down the offer," these allegations are not sufficient to prove that appellant was threatened by his attorney. Quite simply, his attorney might have been correct that he would have indeed been a fool to turn down the offer.

Second, appellant alleges that his counsel informed him that he could not withdraw his plea under any circumstances. According to appellant's postconviction petition, this conversation took place before the plea hearing. It seems probable that appellant's counsel was attempting to inform appellant that if the plea was accepted, and intelligently, knowingly, and voluntarily made, he could not change his mind and withdraw his plea at a later date. In all likelihood, appellant's attorney wanted to confirm that his client was taking the decision to plead guilty seriously. Furthermore, counsel's statement is true because "[a] defendant generally does not have an absolute right to withdraw a plea of guilty." *State v. Rodriguez*, 590 N.W.2d 823, 824 (Minn. App. 1999), *review denied* (Minn. May 26, 1999). The plea agreement even stated:

> 23. My attorney has told me and I understand that if my plea of guilty is accepted by the judge I have the right to appeal, but that any appeal or other action I may take claiming error in the proceedings probably would be useless and a waste of my time and the court's.

Thus, assuming this statement was made, there is no indication that it was improper or would serve as a basis for a plea withdrawal.

Lastly, appellant asserts that his attorney informed him that he would only help to create a basis to withdraw the plea if he was retained to represent appellant in connection with such a motion. With regard to this argument, the district court stated:

> It seems obvious that [appellant's counsel] would no longer work on [appellant's] case if [appellant] hired new counsel; because in hiring new counsel, [appellant] is no longer his client. It is elementary that [appellant's counsel] would not do all that is necessary to create a basis for withdrawal for someone he no longer represents.

This reasoning is sound. Appellant, however, insists that "it is clear that at the time he made the statement, the lawyer was talking about what kind of record he would help develop while representing appellant, including his own testimony about the formation of the plea." This argument is mere speculation and is not supported by the record.

Appellant's petition for postconviction relief did not allege facts that necessitated an evidentiary hearing to explore his claim of ineffective assistance of counsel because, even if appellant's counsel did make these statements, they were not sufficient grounds for a plea withdrawal. Therefore, the district court did not abuse its discretion by summarily denying appellant's petition for postconviction relief.

Affirmed.