**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0305**

State of Minnesota,
Respondent,

vs.

Zachari Allen Kozar,
Appellant.

**Filed October 20, 2009**
**Reversed and remanded**
**Peterson, Judge**

St. Louis County District Court
File No. CR-05-0561

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

Melanie S. Ford, St. Louis County Attorney, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802-1298 (for respondent)

Frederick J. Goetz, Goetz & Eckland P.A., 43 Main Street Southeast, Suite 505, Minneapolis, MN 55414 (for appellant)

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

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

**PETERSON**, Judge

In this appeal from convictions of first-degree possession and possession with intent to sell methamphetamine and from the district court's denial of postconviction

relief following a hearing, appellant argues that (1) he was denied his Sixth Amendment right to effective assistance of counsel when his trial counsel failed to communicate a plea offer to him that would have resulted in substantially less time in prison, and (2) he was prejudiced by a discovery violation when law enforcement and the prosecutor failed to disclose the substance of oral statements made by the state's principal witness relating to the case and it would have been essential for the defense to know of such statements in forming a theory of defense. We reverse and remand.

## FACTS

*Facts underlying offense*

T.K. loaned his pickup truck to appellant Zachari Allen Kozar, B.B., and a third person for 48 hours in exchange for $200. When the truck had not been returned 72 hours later, T.K. reported it stolen.

Appellant and three passengers, S.V., J.J., and F.K., were riding in the truck when it became stuck in mud. S.V. and appellant contacted T.F., a friend who lived nearby, to come and help them get the truck out of the mud. T.F. and his father, J.F., agreed to help, in part because appellant owed J.F. money for a set of chrome wheels, and T.F. had been unsuccessful in recent efforts to contact appellant.

T.F. drove his car to the area where appellant was stuck, and J.F. followed in his truck. J.J. was waiting by the road, and he and T.F. began walking down the trail toward T.K.'s truck, where they were joined by appellant. J.F. followed them down the trail in his truck.

When the group reached T.K.'s truck, S.V. and F.K. walked up the road to wait in T.F.'s car. At some point, J.J. also started walking up the road. It took about 10-20 minutes for the others to get T.K.'s truck out of the mud. T.F. rode back to the road with appellant in T.K.'s truck because T.F. wanted to talk to appellant about reimbursement for the chrome wheels.

In the meantime, St. Louis County Sheriff's Deputy Jesse Richter saw T.F.'s car on the side of the road and stopped to investigate what appeared to be a stalled or suspicious vehicle. St. Louis County Sheriff's Deputy John Backman came to the scene to assist. The deputies spoke with F.K., S.V., and J.J. Because there were discrepancies in their stories, the deputies became increasingly suspicious. The deputies were also aware of the earlier report of a stolen truck and confirmed that the color of the stolen truck matched the color of the truck stuck in the mud.

The deputies began walking toward T.K.'s truck, which appellant was driving toward the road. Backman saw appellant look at him and then dive down out of sight, below the line of the dash or door window, while the truck continued moving. Appellant was out of Backman's sight for three to five seconds. Backman instructed appellant and T.F. to show their hands. T.F. immediately complied, but appellant "popped up briefly then went back down again."

For more than a minute, Backman continued ordering appellant to show his hands. Appellant ducked down between 24 and 30 times, reaching down to his right toward the center of the truck. Believing that appellant was reaching for a weapon, Backman threatened to shoot appellant if he leaned down again. Appellant stuck one hand out the

window, and Backman approached the truck. Backman grabbed appellant's hand and was able to gain control of him and handcuff him.

Backman spoke to T.F. briefly at the scene, but T.F. did not provide any material information at that time. St. Louis County Sheriff's Deputy Chad Larson, who had arrived at the scene, contacted T.K. and told him that his truck had been recovered. T.K. gave Larson permission to search the truck. Knowing that appellant had been reaching down toward the center of the vehicle out of Backman's sight, Larson searched the center console and underneath the center area of the seat. Larson looked under the dash but did not see anything; he did not feel under the dashboard. Larson released the truck to T.K.

T.F. was brought to the St. Louis County Jail, where he gave a recorded statement to Backman. When Backman began asking about appellant's actions, T.F. said he did not want to speak on the record about that topic. Based on information provided by T.F., Backman contacted Larson and told Larson that there might be a bag of methamphetamine tucked up under the truck's dash. About one and one-half hours after turning the truck over to T.K., Larson searched the truck a second time and found a plastic baggie containing what appeared to be methamphetamine under the dash. Testing showed that the baggie contained 55.1 grams of a substance containing methamphetamine.

Appellant was charged with one count each of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 1(1) (2004) (possession of methamphetamine with intent to sell); first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 2(1) (2004) (possession of methamphetamine); and theft

of a motor vehicle in violation of Minn. Stat. § 609.52, subd. 2(17) (2004). The case was tried to a jury.

Backman testified at trial as to what T.F. told him at the St. Louis County Jail after the tape recorder had been turned off:

> Q. What did [T.F.] tell you . . . ?
> A. He told me that [appellant] flashed him a large chunk of meth or a large bag of meth.
> Q. Did he indicate to you where he had flashed that?
> A. He showed me his hand and said he had it and it was as big as a baseball.
> . . . .
> Q. What did he tell you with regard to [appellant's] actions inside the pickup truck?
> A. He said that he was attempting to hide it.

T.F. testified at trial that as he and appellant walked along the trail toward the stuck truck, appellant pulled an object out of his pocket and showed it to T.F. The object was a plastic baggie containing a golf-ball-size substance, which T.F. recognized as crystal methamphetamine. Appellant did not say anything and quickly put the baggie back in his pocket. J.J. did not see appellant take the baggie out of his pocket or see appellant in possession of any drugs, but J.J. did not recall where he had been walking in relation to appellant and T.F. T.F. also testified that when he and appellant were in T.K.'s truck, T.F. saw the baggie of methamphetamine in the center console.

Appellant moved for a mistrial, arguing that the state committed misconduct by failing to disclose T.F.'s statement to Backman regarding T.F. having seen appellant in possession of methamphetamine. The district court found that a discovery violation had

occurred but denied the mistrial motion. The jury found appellant guilty of the two counts of controlled-substance crime and not guilty of theft of a motor vehicle.

The district court sentenced appellant to an executed term of 163 months in prison on the possession-of-methamphetamine offense. Appellant filed a direct appeal, which was stayed pending the outcome of a postconviction proceeding. Appellant sought postconviction relief on the ground that he received ineffective assistance of counsel because his attorney failed to communicate to him a plea offer made by the state on the morning that trial began. The district court denied postconviction relief, finding that the offer had been communicated to appellant, and this court ordered this appeal reinstated.

*Facts underlying ineffective-assistance claim*

In addition to the charges in this case, appellant was charged in another case with assault and some misdemeanor offenses. In December 2005, the state proposed that appellant plead guilty to third-degree controlled-substance crime and motor-vehicle theft and offered to recommend a guidelines sentence and to dismiss the first-degree controlled-substance charges. The plea offer also required appellant to plead guilty to second-degree assault in the other case in exchange for the dismissal of the misdemeanor charges and the recommendation that appellant receive the guidelines sentence with sentences to run concurrently. The plea offer also stated that charges in a third file would be dismissed.

Defense counsel determined that the presumptive guidelines sentence for a third-degree controlled-substance offense based on appellant's criminal-history score would be 57 months and wrote a letter to appellant explaining the plea offer. The letter stated that

under the terms of the plea offer, appellant would be subject to a 57-month sentence for third-degree controlled-substance crime and concurrent sentences for the assault and theft-of-motor-vehicle charges. The letter further stated that appellant could be sentenced to 158 months if convicted of first-degree controlled-substance crime and faced potential consecutive sentences depending on the results of the other cases. Appellant, who denied committing the assault and did not want to plead guilty to that offense, turned down the plea offer. Defense counsel last recalled discussing a 57-month sentence with appellant in January 2006, although it could have been later.

Trial began on July 10, 2007. That morning, the prosecutor communicated a new plea offer to defense counsel, offering to recommend a guidelines sentence with credit for jail time served on other offenses in exchange for a guilty plea to third-degree controlled-substance crime. That offer did not require appellant to plead guilty to any other offenses.

Defense counsel testified at the postconviction hearing that she did not recall a plea offer being made on the morning trial began. Defense counsel believed that she would have remembered such an offer and that she would have immediately communicated it to appellant. Defense counsel acknowledged that an attorney is obligated to communicate any plea offers to a client. Defense counsel testified that she would have advised appellant to accept the offer and believed appellant would have done so because it would have resulted in substantially less time for appellant to serve and appellant had inquired about credit for time served. Defense counsel was certain that she did not communicate a plea offer to appellant during the morning that trial began.

St. Louis County Sheriff's Deputy Gregory Landgren was working in court services during appellant's trial. His duties included escorting appellant to and from the courtroom. On the first morning of appellant's trial, Landgren asked appellant what he had going on that morning, and appellant replied that he had been offered 57 months. Landgren asked appellant what he was "lookin at," and appellant said about 12 years. Landgren said that sounded like a good deal, to which appellant replied, "We are not going to take – take the offer because we have a strong enough case, we are going to win the case."

In an October 25, 2007 order, the district court found that appellant was entitled to 669 days credit for jail time served on other matters. At the sentencing hearing, appellant was represented by a second attorney, who stated that the state had communicated an offer of "50 some" months to appellant's first attorney and that the offer was not communicated to appellant. Appellant stated:

> If anybody would have offered me 57 months, like he is saying they did, which it was and I never seen anything ever – the only offer I ever seen was 158 months [an offer made before the December 2005 offer] . . . . That's the only offer I ever seen. . . . I go to trial and then all of a sudden I hear about this plea bargain and it was 57 months. . . . Well, I never heard nothing like that, you know.

The district court sentenced appellant to 163 months in prison, the upper limit of the presumptive range.

At the postconviction hearing, appellant acknowledged that his attorney had communicated the December 2005 plea offer to him and that he had lied at the sentencing hearing.

## D E C I S I O N

### I.

Appellant argues that he received ineffective assistance of counsel because his attorney failed to inform him of the plea offer made on the morning trial began.

We will not disturb the decision of the postconviction court absent an abuse of discretion. *Zenanko v. State*, 688 N.W.2d 861, 864 (Minn. 2004). Our review for an abuse of discretion on issues of fact is limited to determining whether the evidence is sufficient to support the postconviction court's findings. *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). But we review the postconviction court's application of law de novo. *Id.*

A petition for postconviction relief is a collateral attack on a judgment that carries a presumption of regularity. *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). The petitioner bears the burden of establishing by a preponderance of the evidence that the petitioner is entitled to relief. Minn. Stat. § 590.04, subd. 3 (2006).

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the attorney's errors, the outcome 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, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). There is authority holding that failure to communicate a plea offer to a defendant is ineffective assistance. *See, e.g., Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *United states v. Blaylock*, 20 F.3d 1458, 1465-68 (9th Cir. 1994); *but see*

*State v. Powell*, 578 N.W.2d 727, 732 (Minn. 1998) (stating that failure to advise defendant of second plea offer was not ineffective assistance when defendant had rejected first plea offer, insisted that he was innocent, and believed witnesses would change their testimony).

Appellant challenges the district court's finding that the plea offer made on the morning trial began was communicated to appellant. The district court explained its finding as follows:

> Deputy Landgren's conversation with [appellant] came to light shortly after the trial when he had indicated to [the prosecutor] that it had sounded like [appellant] had been offered a pretty good deal. The importance of this is the fact that at sentencing [appellant] indicated he had not heard of a deal wherein he would be sentenced to a guideline term of 57 months for a third degree controlled substance crime. It was at this time Deputy Landgren [who was present at the sentencing hearing] recalled that he had a conversation with [appellant] on the morning of trial about an offer that had been made to him regarding this issue. . . .
>
> Based upon the testimony of [appellant] at the sentencing hearing coupled with the totality of the evidence at the evidentiary hearing on the petition for post conviction relief, the Court finds that the offer was relayed to [appellant] on the morning of trial. He chose to exercise his right to jury trial and now that he is not happy with the result is attempting to circumvent the choices he made. This is clear based upon his inconsistent testimony between the sentencing hearing and his testimony at the evidentiary hearing. At sentencing, he made it clear that 57 months was an opportunity he would jump at and had never heard of that deal. Instead he claimed that only 158 months was offered. At the evidentiary hearing [on the postconviction petition] he indicated that he did hear of the 57 month deal but that it was the original offer entailed in the December 14, 2005 letter. Combined with Deputy Landgren's testimony it is clear that [appellant] was aware of

> his options and fully chose to opt for his ability to exercise his right to trial by jury.

The district court also noted that although defense counsel had indicated that she did not convey the plea offer to appellant on the morning trial began, she could not recall whether a plea offer had been made on the morning of trial or the details of what she discussed with appellant about a plea that morning.

The district court stated valid reasons for finding that appellant's testimony that the plea offer made on the morning of trial was not communicated to him was not credible. Because "the postconviction court is in a unique position to assess witness credibility," we "give the postconviction court considerable deference." *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006). Also, in response to a question about what appellant "had going on that morning," appellant told Landgren he had an offer of 57 months. The evidence supports the district court's finding that the plea offer made on the morning of trial was communicated to appellant; therefore, the district court did not abuse its discretion in denying appellant postconviction relief.

**II.**

Appellant argues that he was entitled to a mistrial based on the state's failure to disclose to appellant before trial T.F.'s off-the-record statement to Backman.

"The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court." *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). When exercising this discretion, a district court should consider (1) the reason why the disclosure was not made, (2) the extent of

prejudice to the opposing party, (3) the feasibility of rectifying that prejudice by a continuance, and (4) any other relevant factors. *Id.* "Generally, a new trial should be granted only if the defendant was prejudiced by the state's failure to comply with discovery rules." *State v. Ramos*, 492 N .W.2d 557, 560 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993). A new trial should be granted based on a discovery violation "if there is a reasonable probability that had the evidence been disclosed to the defense, the outcome of the trial might have been different." *Id.*

The state concedes that the failure to disclose the statement was a discovery violation. *See* Minn. R. Crim. P. 9.01, subd. 1(2) (requiring prosecutor to provide defense counsel "with the substance of any oral statements which relate to the case").

The district court explained its denial of appellant's mistrial motion as follows:

> [H]ad there been no mention in any reports about [T.F.] observing drugs or methamphetamine on [appellant's] person, I would have granted the mistrial. But . . . I find that in Page 9 of [T.F.'s] 13 page statement, he does talk about the fact that he and [appellant] and I believe [J.J.] did meet at the road and were walking back down the trail toward the vehicle, so there was notice given that they were together during that period of time. . . .
>
> During the interview of [T.F.] on Page 6, they do begin talking about drugs, and at that point in time – and possession of drugs – and at that point in time [T.F.] indicates he doesn't want to talk about it on the tape, and they go off-the-tape at some point and talk further . . . and then there's the reference in Larson's report . . . [t]hat Deputy Backman informed me that while interviewing [T.F.], he was advised that [appellant] had a bag of methamphetamine on his person prior to Deputy Richter and Deputy Backman stopping them.

> So notice was given that [T.F.] had made statements prior to the stop of the motor vehicle here, that he had observed methamphetamine on [appellant's] person.

The court found that a discovery violation had occurred but that it could be adequately addressed through cross-examination.

Appellant's theory of the case was that the evidence did not prove that appellant possessed the methamphetamine, which was found in a place to which several people other than appellant had access. During opening statement, defense counsel stated, "There's two different ways under the law to have possession. One is physical possession, pulling it out of your jacket pocket . . . . You are not going to hear any evidence that that's what happened in this case. None. Because that isn't what happened." T.F.'s trial testimony directly contradicted defense counsel's representation during opening statement, and T.F.'s credibility was bolstered by Backman's testimony about T.F.'s undisclosed off-the-record statement.

The portion of T.F.'s statement to Backman that indicated a willingness to make an off-the-record statement occurred about midway through the recorded interview. Backman did not turn off the recorder at that time and instead continued with the recorded interview. It is not evident from the recording that an off-the-record statement was in fact made. Consequently, the recording does not show that Backman and T.F. went off the record and talked further.

The state argues that Backman's and Larson's reports put defense counsel on notice of the off-the-record statement. Backman's report states, "[T.F.], when questioned by this deputy as to the nature of the movements [appellant] was making when at

gunpoint from the deputies, indicated that [appellant] was not attempting to retrieve a weapon but rather was trying to hide an item." Backman's report also states that following the interview with T.F., he contacted Larson and asked him to go through the truck again due to a concern that if there were no drugs in the vehicle, appellant may have placed the item on his person or ingested it. Larson's supplemental report states, "Deputy Backman informed me that while interviewing [T.F.], he was advised that [appellant] had a bag of meth on his person prior to Deputy Richter and Deputy Backman stopping them." Both reports could be interpreted as referring to methamphetamine that was in the truck with both appellant and T.F., and neither indicates that appellant had methamphetamine in his pocket before he reentered the truck; thus, the reports were consistent with appellant's defense theory that the methamphetamine was found in a place to which others besides appellant had access and did not put defense counsel on notice that T.F. had told police that appellant had pulled methamphetamine from his pocket before getting into the truck.

Furthermore, even if defense counsel could have learned about the off-the-record statement by carefully scrutinizing Backman's and Larson's reports and doing additional investigation, it was the state that committed a discovery violation by failing to clearly disclose T.F.'s off-the-record statement. Excusing the state's admitted discovery violation because an exacting effort by defense counsel could have uncovered the improperly withheld information would place a burden on appellant for failing to fully understand the substance of the reports rather than on the state for failing to fully disclose the evidence it possessed.

Cross-examination could have been adequate to address the state's discovery violation if the only issue was T.F.'s credibility. T.F. was in the truck where the methamphetamine was found, and cross-examination could test T.F.'s credibility about who possessed the methamphetamine. But an additional issue caused by the discovery violation was the effect that the violation had on the jury's perception of defense counsel. T.F.'s trial testimony and Backman's testimony about T.F.'s off-the-record statement directly contradicted defense counsel's opening statement that there would be no evidence of physical possession, specifically, no evidence that appellant pulled drugs out of his pocket. This undercut defense counsel's credibility throughout the proceeding. It is not apparent how counsel's credibility could have been rehabilitated without explaining to the jury that the prosecution improperly failed to disclose T.F.'s off-the-record statement, and this could not have been accomplished by cross-examining T.F. Also, explaining that the prosecution had improperly failed to disclose the statement would have undercut the prosecutor's credibility, which would have compounded the problem.

Because there was evidence that several people other than appellant had access to the truck where the methamphetamine was found, there was a basis for defense counsel to argue that the evidence did not prove that appellant possessed the methamphetamine. If T.F.'s off-the-record statement had been disclosed to defense counsel before trial, defense counsel could have pursued this defense strategy without saying during her opening statement that there was no evidence that appellant physically possessed the methamphetamine, and T.F.'s later testimony would not have suggested that defense

counsel had misrepresented the evidence. There is a reasonable probability that if this suggestion had been avoided, the outcome of appellant's trial might have been different. Consequently, we conclude that the district court abused its discretion in denying appellant's motion for a mistrial, and we reverse and remand for a new trial. *Cf. State v. Gouleed*, 720 N.W.2d 794, 801 (Minn. 2006) (upholding district court's grant of mistrial when "discovery violation went to the very heart of the state's case").

**Reversed and remanded.**