STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2209

Muriel Minnie Jackson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 10, 2009
Affirmed
Stoneburner, Judge

Dakota County District Court
File No. 19K505002763

Linda P. Aaker, University Student Legal Service, 160 West Bank Skyway, University of Minnesota, 219 19th Avenue South, Minneapolis, MN 55455 (for appellant)

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

James C. Backstrom, Dakota County Attorney, Tricia L. Loehr, Special Staff Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, 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 her 2008 motion to withdraw a 2006 *Alford* plea of guilty to gross misdemeanor theft entered pursuant to a plea agreement. Appellant argues that the district court abused its discretion by (1) concluding that there was a sufficient factual basis for the plea; (2) failing to consider diverse economic and cultural practices; and (3) concluding that appellant did not prove ineffective assistance of counsel. Because the record supports the district court's findings, the district court did not abuse its discretion in denying appellant's motion to withdraw her plea, and we affirm.

FACTS

In September 2005, appellant Muriel Minnie Jackson was charged with one count of felony theft of child-care benefits and one count of misdemeanor theft of food stamps. Specifically, Jackson was charged with wrongfully obtaining public assistance from July 23, 2004, through November 18, 2004 (child-care benefits) and August through November 2004 (food stamps) because she failed to report that K.W., the father of her child, was living with her in those months. Jackson denied that K.W. lived with her from July 23, 2004, through November 18, 2004, even though he was named on the lease and spent time at her residence. K.W. gave conflicting information about where he was living but told investigators that he only stayed with Jackson for nine or ten nights per month during the relevant time period.

In July 2006, Jackson, who was represented by privately retained counsel, entered an *Alford* plea of guilty,[1] under a plea agreement, to an amended charge of gross misdemeanor theft of child-care benefits and was sentenced to a stay of imposition with one year of probation with conditions, the offense to be deemed a misdemeanor after successful completion of probation. The misdemeanor charge for theft of food stamps was dismissed under the plea agreement.

At the plea hearing, the factual basis for the plea was established through Jackson's responses to leading questions from her attorney. Jackson agreed that she believed that, based on the state's evidence, there was a substantial likelihood that she could be found guilty of a felony charge of wrongfully obtaining child-care benefits, and was therefore choosing to accept the agreement to plead guilty to a lesser offense. She agreed that she had sufficient time to discuss the case with counsel and responded affirmatively when asked if she felt comfortable that her attorney had "presented [her] defenses in a fashion [constituting] zealous advoca[cy] on [her] behalf." The district court accepted Jackson's plea and sentenced her according to the agreement. Jackson successfully completed probation, and the conviction was deemed to be for a misdemeanor.

In August 2007, Jackson, who had experienced difficulty finding employment due to the conviction, moved for expungement of her criminal record, using forms from the

[1] An *Alford* plea permits a defendant to maintain her innocence but plead guilty because the record establishes, and the defendant reasonably believes, that the evidence is sufficient to result in a conviction. *North Carolina v. Alford*, 400 U. S. 25, 91 S. Ct. 160 (1970); *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (recognizing the validity of an *Alford* plea in Minnesota).

Minnesota Judicial Branch website. In response to a question on the form about why she qualified for expungement, Jackson checked the box that states: "I was convicted but I have rehabilitated myself." The motion was denied.

In August 2008, Jackson moved to withdraw her guilty plea. Jackson asserted that the plea was not voluntary due to ineffective assistance of counsel. Specifically, Jackson asserted that she was surprised to learn, in a conference with counsel prior to trial, that counsel appeared to be unfamiliar with her case. And, on the first day of trial, counsel for the first time advised her that she could not win and recommended that she accept a plea agreement. Jackson asserted that counsel assured her that a plea would not affect her eligibility for a housing subsidy and told her that she could later get the conviction expunged.

To support her petition, Jackson submitted her affidavit, an affidavit from K.W., and an affidavit from her mother. K.W. asserts in his affidavit that he lived out of his car and not with Jackson during the period in question, but he used Jackson's address as his address on job applications. He states that he "was at [Jackson's] place quite a bit" to see his child. He states that his name was on Jackson's lease because it would have been a violation of the lease for a guest to receive mail and stay more than a certain number of nights in the apartment. K.W. states that he stayed overnight with Jackson nine or ten times per month. K.W. states that Jackson's attorney never contacted him. Jackson's mother, who lives in Illinois, states in her affidavit that, during the relevant time period, she visited Jackson "from time to time" and that K.W. was not living with Jackson or

keeping anything at her apartment while she was visiting. She also repeats what Jackson told her about concerns Jackson had regarding her attorney.

The district court denied Jackson's motion without a hearing. This appeal followed.

D E C I S I O N

On appeal, Jackson asserts that the district court abused its discretion by finding that a sufficient factual basis for the plea was established at the plea hearing and that Jackson "knowingly entered her plea of guilty understanding that she was not admitting to the facts but rather acknowledging that there was a substantial likelihood that she would be found guilty if the matter proceeded to trial."

We consider Jackson's motion as a petition for postconviction relief and review denial of the motion for abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005); *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review findings of fact to determine whether the evidence is sufficient to sustain the findings, and we review legal issues and mixed questions of fact and law, including claims of ineffective assistance of counsel, de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004); *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). Petitioner has the burden of establishing, by a fair preponderance of the evidence, facts that warrant postconviction relief. Minn. Stat. § 590.04, subd. 3 (2008); *State v. Warren*, 592 N.W.2d 440, 449 (Minn. 1999). The facts alleged must be more than bald assertions, conclusory allegations, or unsupported statements. *Berg v. State*, 403 N.W.2d 316, 318 (Minn. App. 1987), *review denied* (Minn. May 18, 1987).

"The [district] court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. It is the defendant's burden "to demonstrate that refusal to allow withdrawal amounts to a manifest injustice . . . [which] occurs if the plea is not accurate, voluntary, and intelligent." *State v. Christopherson*, 644 N.W.2d 507, 510 (Minn. App. 2002) (citation omitted), *review denied* (Minn. July 16, 2002). "The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he or she could be properly convicted of at trial." *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998).

An *Alford* plea is accurate "if the court, on the basis of its interrogation of the accused and its analysis of the factual basis offered in support of the plea, reasonably concludes that there is evidence which would support a jury verdict of guilty." *State v. Goulette*, 258 N.W.2d 758, 759 (Minn. 1977); *see also State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) (stating that an *Alford* plea is accurately made if it is supported by a factual basis). "[P]recedent . . . requires a strong factual basis for an *Alford* plea" and "the [district] court must be able to determine that the defendant, despite maintaining his innocence, agrees that evidence the State is likely to offer at trial is sufficient to convict." *State v. Theis*, 742 N.W.2d 643, 649 (Minn. 2007); *Williams v. State*, 760 N.W.2d 8, 12–13 (Minn. App. 2009). An *Alford* plea is valid if "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U. S. at 31, 91 S. Ct. at 164.

> Within the context of an *Alford* plea, where the defendant is maintaining his innocence, the defendant's acknowledgement that the State's evidence is sufficient to convict is critical to the court's ability to serve the protective purpose of the accuracy requirement. The best practice for ensuring this protection is to have the defendant specifically acknowledge on the record at the plea hearing that the evidence the State would likely offer against him is sufficient for a jury, applying a reasonable doubt standard, to find the defendant guilty of the offense to which he is pleading guilty . . . .

Theis, 742 N.W.2d at 649.

I. The district court's finding that the State's evidence was sufficient to convict, making Jackson's plea accurate, is supported by the record.

On appeal, Jackson relies primarily on *Shorter v. State*, 511 N.W.2d 743 (Minn. 1994), to argue that her plea was inaccurate and invalid because the factual basis, established through counsel's leading questions, was insufficient to support a guilty plea. In *Shorter*, the supreme court reversed the district court's denial of postconviction relief and held that, based on a number of unusual factors, to prevent manifest injustice, Shorter should be allowed to withdraw his *Alford* plea of guilty to criminal sexual conduct. *Id*. at 746–47.

Shorter first moved to withdraw his plea nine days after it was entered and before he was sentenced. *Id*. at 745. That motion was denied. *Id*. After Shorter was convicted, he continued to urge the investigation officers to contact witnesses and character references. *Id*. Shorter petitioned for postconviction relief after police officially reopened the investigation into the charges against Shorter and located and obtained statements from two witnesses who corroborated Shorter's version of events. *Id*. At the postconviction hearing, Shorter's trial attorney was prepared to present evidence from the

new police investigation. *Id*. A police investigator was available to testify about deficiencies in the original investigation, the reopening of the case and the new evidence. *Id*. An investigator for the defense was subpoenaed to testify about the investigation. *Id*. Shorter's postconviction attorney made an offer of proof as to the testimony of the two new witnesses. *Id*. The postconviction court limited the hearing to arguments of counsel and denied the motion. *Id*. at 746.

The only similarity between Jackson's plea and Shorter's plea is that both defendants are dissatisfied with the performance of trial counsel and both entered *Alford* pleas through counsel's leading questions. The investigation into Jackson's charge was not reopened, new evidence was not discovered, and Jackson's claims of ineffective assistance of counsel are based on her allegations that he "seemed" to be unprepared for trial and made representations about collateral consequences that were not true.

The supreme court, in *Shorter* and subsequent cases, has criticized the use of leading questions to determine a factual basis for a guilty plea, but it has not held that use of leading questions per se invalidates a plea. *Id*. at 747; *Ecker*, 524 N.W.2d at 717 (holding that Ecker's *Alford* plea was accurate, voluntary, and intelligent despite concerns regarding the plea, including the use of leading questions to establish the factual basis).

At the plea hearing, Jackson acknowledged that she was receiving public assistance during the time period at issue and that, to maintain eligibility for public assistance, she was required to report any changes in her residential circumstances within ten days. She acknowledged that she had read the complaint and the police reports and

had discussed the facts of the case with counsel. She acknowledged the evidence that (1) K.W answered her telephone when investigators called her apartment; (2) K.W. appeared on her lease as a tenant; (3) K.W. gave conflicting information about where he was living; and (4) the investigators did not believe her denial that K.W. was living in her apartment. Jackson agreed that she was accepting the plea agreement because she believed that if she went to trial, there was a substantial likelihood that she could be found guilty.

Jackson argues that the record does not contain adequate evidence regarding the intent element of her crime. But "*Alford* . . . and cases that have followed, allow [defendant] to plead guilty without expressing the requisite intent so long as [defendant] believed the state's evidence was sufficient to convict him." *Ecker*, 524 N.W.2d at 717. The record in this case shows that Jackson believed that she would be convicted based on the state's evidence and that she voluntarily and intelligently chose to plead guilty to a reduced charge.

On appeal, Jackson emphasizes evidence that she could have asserted to refute the charges against her, but none of that evidence negates the fact that Jackson, at the time of the plea, believed that a fact finder was substantially likely to find her guilty based on the state's evidence. Jackson sought to withdraw her plea only after she experienced unfavorable collateral consequences of the plea.

Jackson also argues that the district court abused its discretion by failing to consider K.W.'s diverse economic and cultural practices to determine that the factual basis for Jackson's plea was insufficient. Jackson contends that consideration of such

factors would have led the district court to conclude that the facts reflected circumstances having "nothing to do with welfare fraud" and would not support a verdict that Jackson was guilty of wrongfully obtaining public assistance. Jackson has not cited any sociological or legal authority to support this argument. An assignment of error which is based on "mere assertion" and is not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Because we conclude that the district court did not commit an obvious error in this case, Jackson has waived her argument on this issue, and the district court did not abuse its discretion by concluding that the factual basis for the plea was adequate.

II. The district court did not abuse its discretion by concluding that Jackson failed to demonstrate that her attorney's performance fell below an objective standard of reasonableness.

Jackson argues that the district court abused its discretion by concluding that Jackson failed to demonstrate that her attorney's performance fell below an objective standard of reasonableness. Jackson contends that her attorney's ineffective representation rendered her plea invalid. Specifically, Jackson argues that her attorney's "lack of even minimal preparation" in her case induced her to plead guilty involuntarily, and his misrepresentations to her regarding possible consequences of a conviction rendered her plea unintelligent.

A guilty plea may be rendered invalid by the ineffective assistance of counsel. *Ecker*, 524 N.W.2d at 718. A petitioner asserting a claim of ineffective assistance of counsel has the burden of proof on that claim, *State v. Jackson*, 726 N.W.2d 454, 463

(Minn. 2007), and "there is a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (quotation omitted). A party alleging ineffective assistance must show that (1) the representation "'fell below an objective standard of reasonableness'" and (2) "'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)). Both factors need not be analyzed if a defendant's claim fails under either one. *State v. Blom*, 682 N.W.2d 578, 624 (Minn. 2004).

The standard for attorney competence is "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quoting *White v. State*, 309 Minn. 476, 481, 248 N.W.2d 281, 285 (1976)). A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation omitted). Argumentative assertions for which a petitioner has offered no factual support are insufficient to establish a claim of ineffective assistance of counsel. *McKenzie v. State*, 754 N.W.2d 366, 370 (Minn. 2008); *Leake v. State*, 737 N.W.2d 531, 543 (Minn. 2007).

Jackson asserts that her attorney's lack of preparation induced her to plead guilty. By affidavit, Jackson asserted that counsel: (1) failed to contact witnesses for whom she had provided contact information; (2) seemed surprised by some of the information in his file when they met to prepare for trial; (3) did not seem interested in looking into her

explanations; and (4) appeared to her to be unprepared for trial. The supreme court has held that, in the context of asserting ineffective assistance of counsel by failing to contact alleged defense witnesses, a defendant has an affirmative duty to show that witnesses would have been found and that their testimony would have had an actual effect on the outcome of a proceeding. *Gates*, 398 N.W.2d at 563. In this case, welfare-fraud investigators interviewed K.W. and Jackson's neighbors. K.W. admitted being on the lease so that he could stay with Jackson, using Jackson's address, and staying there nine to ten nights per month. Jackson's neighbors stated that they did not know if K.W. was living with Jackson or not. On this record, Jackson has not shown that counsel's contact with her suggested witnesses would have affected her decision to accept the plea agreement.

Jackson complained of counsel's failure to subpoena Jackson's phone records or ask for a continuance but not did make any showing that a reasonably competent attorney would have subpoenaed the phone records or asked for a continuance under similar circumstances. And deciding what evidence to present is a matter of trial strategy which lies within the discretion of trial counsel and will generally not be reviewed later for competence. *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001).

Jackson alleges that her attorney misinformed her that her conviction could be expunged and would not affect eligibility for subsidized housing, making her plea unintelligent and therefore invalid. A criminal defendant must be informed of and understand the direct consequences of her guilty plea in order for the plea to be valid. *Alanis*, 583 N.W.2d at 578. "[D]irect consequences are those which flow definitely,

immediately, and automatically from the guilty plea, namely, the maximum sentence to be imposed and the amount of any fine." *Id*.

But the supreme court has held that *indirect* or collateral consequences—which are *not* a basis for allowing withdrawal of a guilty plea under *State v. Byron*, 683 N.W.2d 317, 322–23 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2009); *cf. Alanis*, 583 N.W.2d at 579—include restraints on *civil privileges* such as drivers licenses and firearms ownership. *See State v. Washburn*, 602 N.W.2d 244, 246 (Minn. App. 1999); *State v. Rodriguez*, 590 N.W.2d 823, 825–26 (Minn. App. 1999), *review denied* (Minn. May 26, 1999). The district court did not abuse its discretion by determining that denial of expungement and housing assistance are collateral, not direct consequences of Jackson's plea, ignorance of which would not support withdrawal of the plea. Jackson has failed to show that but for counsel's misinformation on these issues she would not have accepted the plea agreement, and the district court did not abuse its discretion in concluding that Jackson's *Alford* plea was valid.

Affirmed.