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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2061

State of Minnesota,
Respondent,

vs.

Lathan Lamar Jamison,
Appellant.

Filed December 29, 2009
Affirmed
Ross, Judge

Stearns County District Court
File No. 73-CR-07-3035

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

Janelle P. Kendall, Stearns County Attorney, Chad T. May, Assistant County Attorney, Stearns County Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303-4701 (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Ross, Judge.

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

ROSS, Judge

In this appeal of his conviction of possession of a weapon by an ineligible person, Lathan Lamar Jamison argues that he was denied the effective assistance of counsel at sentencing because his attorney failed to argue for a downward departure even though Jamison had pleaded guilty while expressly indicating his intent to request a sentencing departure. Because Jamison has not established that his attorney's failure to argue for a departure prejudiced him, we affirm.

FACTS

The altercation underlying this case occurred in April 2007 soon after Jamison left a Waite Park trailer park. Two young men, R.J.S., 19, and R.A.H., 20, were riding their bicycles nearby. Jamison believed that one of them had recently broken into his home. So he stopped his car and approached the suspected burglar. Jamison recounted, "I was right in his face. I was probably a foot from his nose. . . . I had my hand gripped around the grip of his handle bars so that he couldn't go anywhere." He warned the suspect that if he confirmed his suspicion, he would "split [the suspect's] wig." According to R.J.S. and R.A.H., Jamison pointed a black handgun at them and said, "[Y]ou mentioned my name, you motherf--kers, you are in trouble now." The youths fled terrified.

Police arrested Jamison in Sauk Rapids and found a BB gun in the trunk of his car. The BB gun had been modified by blackening its orange safety markings so that it more convincingly resembled a .40 caliber semiautomatic handgun.

Jamison was ineligible to possess a firearm because of a 1998 delinquency adjudication for criminal sexual conduct in the third degree. The state charged Jamison with two counts of assault in the second degree and one count of possession of a firearm by an ineligible person. *See State v. Fleming*, 724 N.W.2d 537, 541 (Minn. App. 2006) (holding that the definition of a "firearm" for the purposes of the felon-in-possession statute includes BB guns).

In May 2008, Jamison appeared at a settlement conference in the district court. In addition to the charges stemming from the April 2007 incident, Jamison faced three counts of failure to register as a predatory offender. The state offered to dismiss four of the six counts in exchange for Jamison's agreement to plead guilty to the felon-in-possession count and to one count of failure to register as a predatory offender. Under the state's offer, Jamison would have been required to serve a 60-month mandatory minimum prison sentence for the felon-in-possession count. Jamison rejected the offer. Instead, he agreed to plead guilty to all counts "with the idea that at the time of sentencing he would be requesting of the Court a dispositional departure, and if not that, a durational departure." Jamison stated that he understood that the district court was not agreeing to depart from the presumptive sentence directed by the Sentencing Guidelines and that the court would require substantial and compelling reasons to depart.

Jamison then waived his jury-trial rights, offered factual bases of guilt, and pleaded guilty. Because Jamison did not admit to brandishing a gun at R.J.S. and R.A.H., however, the district court had no factual basis on which to accept his guilty plea to the two counts of assault with a dangerous weapon. Jamison therefore agreed to enter *Alford*

pleas to those two counts in exchange for the state's agreement to recommend that all sentences be imposed to run concurrently. The district court accepted Jamison's pleas and set the matter for sentencing.

When Jamison appeared for sentencing, the district court noted that he had filed no departure motion. The state recommended concurrent sentences for all six counts, including the mandatory minimum imprisonment term of 60 months for the felon-in-possession count. The state maintained that Jamison's "behavior with the firearm also aggravates the offenses." Jamison's attorney made the following statement at sentencing, which is the focus of Jamison's concern on appeal because the statement did not expressly include a request for a dispositional or durational departure:

> Your Honor, I would ask the Court to use its own judgment in terms of what the Court believes to be appropriate in these cases.
>
> Mr. Jamison, obviously, is a relatively young man. He's 25 years old, obviously has made some mistakes previously, and wants to sort of get beyond those and move on with his life and try and be a successful individual. And I think . . . a 60-month prison commit, particularly under these circumstances, is a significant commitment, and so I would ask the Court to use its own judgment in terms of whether it believes that to be an appropriate sanction in this case.

Despite Jamison's attorney's failure to expressly request a sentencing departure, the district court appeared to treat his oral statement as having included the request. The district court stated that it could find no basis for departing from the presumptive sentences and imposed concurrent sentences for all counts. This appeal follows.

D E C I S I O N

Jamison challenges his sentence, contending that he was denied the effective assistance of defense counsel because his appointed attorney failed to seek a downward departure at the sentencing hearing. He asks us to vacate his sentence and remand the case to the district court for a resentencing proceeding at which he can move for a downward departure.

An appellate court ordinarily "review[s] a postconviction court's findings to determine whether there is sufficient evidentiary support in the record" for an ineffective-assistance claim. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). But there are no postconviction findings here because Jamison appealed directly from his conviction. *See State v. Zernechel*, 304 N.W.2d 365, 367 (Minn. 1981) (observing that ineffective-assistance-of-counsel challenges are disfavored on direct appeal from conviction "because we do not have the benefit of all the facts concerning why defense counsel did or did not do certain things"). We therefore must evaluate the ineffective-assistance claim relying only on the existing record without the benefit of a postconviction hearing transcript. *See Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995).

The Sixth Amendment provides that in criminal trials "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Defense counsel may deprive a defendant of this right "simply by failing to render adequate legal assistance." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984) (quotation omitted). To prevail on an ineffective-assistance claim, the defendant must establish both

that his attorney's performance was deficient and that the deficiency actually prejudiced him. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Jamison argues that his attorney's failure to request a departure was a constructive denial of counsel that excuses him from proving actual prejudice. This is not so. Although an appellant generally must affirmatively prove prejudice, *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, prejudice is presumed when there has been a constructive denial of the assistance of counsel, *id.* at 692, 104 S. Ct. at 2067. A constructive denial of counsel occurs when a defense attorney "entirely fails to subject the prosecution's case to meaningful adversarial testing, . . . mak[ing] the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984).

The situations that implicate constructive denial of counsel are few. The denial of a jury trial because a defendant's attorney never informed the defendant of his right to one may constitute constructive denial of counsel. *McGurk v. Stenberg*, 163 F.3d 470, 474 (8th Cir. 1998). An attorney's sleeping during the prosecution's examination of adverse witnesses may also amount to constructive denial of counsel. *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001). And courts have held that a defense attorney acting as a "mere spectator" and making no comment at all at a resentencing hearing may constitute constructive denial of counsel. *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (finding constructive denial of counsel when convicted defendant's otherwise silent appointed attorney answered his client's question, "Do I have counsel here?" with, "Oh, I am just standing in for this one").

Jamison's counsel was more than a mere spectator. He effectively, though not precisely, sought a downward departure at sentencing. He explained that the court could depart from the presumptive sentence if it found a sufficient basis to do so. He corrected the pre-sentence investigation on Jamison's behalf. He confirmed that no motion for a downward departure had been filed. Jamison's counsel also demonstrated that he knew the facts. There is no ground to indicate a constructive denial of counsel, and Jamison must therefore prove prejudice to prevail. If Jamison fails to establish that his attorney's alleged deficiency prejudiced him at sentencing, our inquiry under *Strickland*'s two-prong test will end. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 (stating that a court need not address both prongs if the defendant's showing on one prong is insufficient).

We conclude that Jamison has failed to establish prejudice. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Jamison cannot make this showing.

There is no reasonable probability of prejudice when counsel fails to make a motion that the district court would have denied. *Johnson v. State*, 673 N.W.2d 144, 148–50 (Minn. 2004). Jamison has not presented evidence or arguments that raise a reasonable probability that the district court would have departed downward if his attorney had made a more clear or forceful motion for departure. The record supports the

opposite conclusion. The district court treated Jamison's counsel's statement as a request for departure, and it explained that it saw no basis for departing from the presumptive sentence:

> [A]ssuming I would have the authority to depart on the felon in possession, . . . where the five years applies to simple possession, and unfortunately . . . we are dealing with more than that, . . . I don't think I could in good faith make a finding that would allow me to depart from . . . what the legislature has required.

The district court's explanation shows us that there was no reasonable probability that it would have departed downward in sentencing Jamison even if Jamison's counsel had expressly argued for a departure. And Jamison presents no reasons demonstrating that a departure was appropriate. We conclude that Jamison was not prejudiced, and we therefore also hold that he was not denied effective assistance of counsel.

Affirmed.